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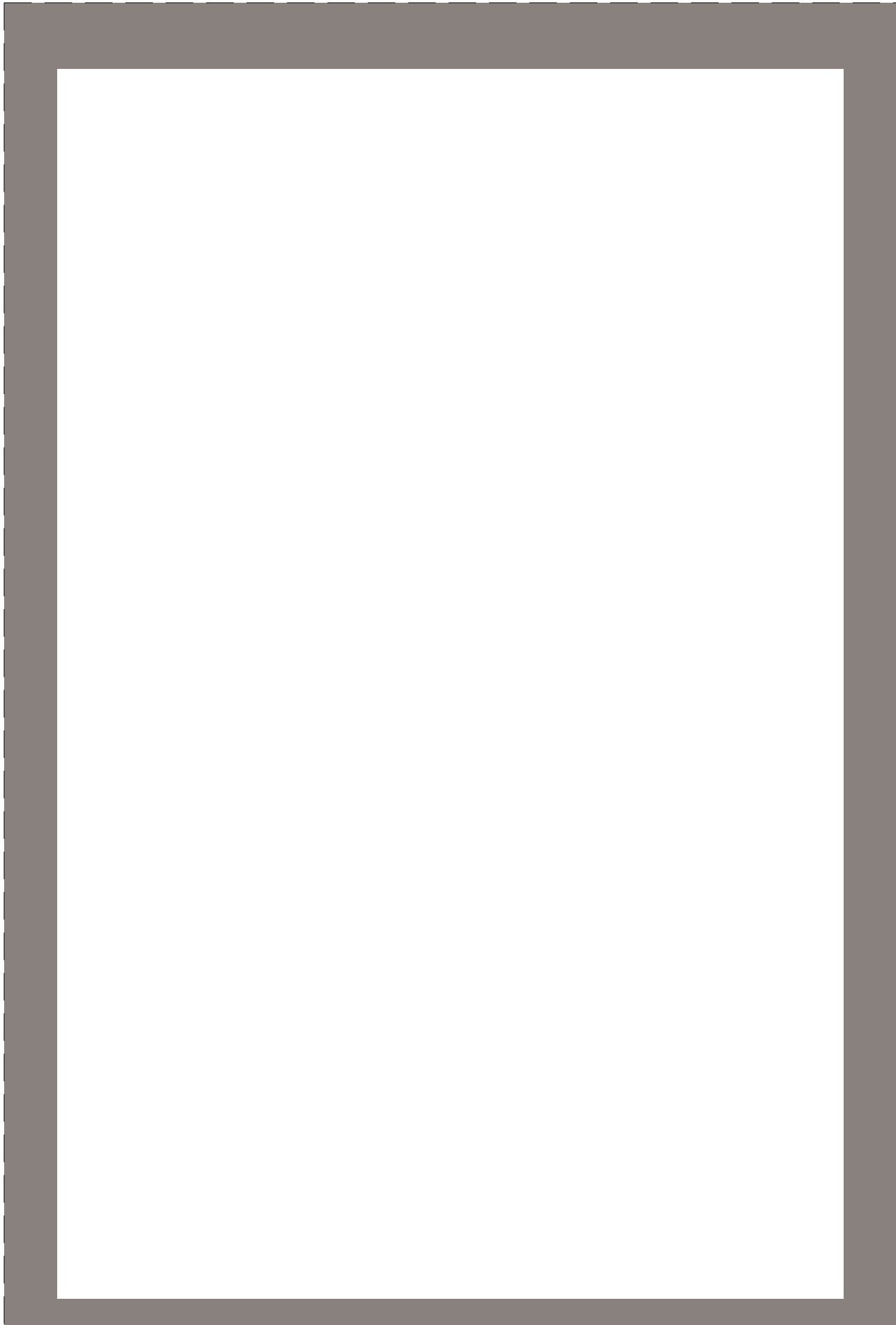
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**IS THE MIDDLE EAST MOVING TOWARD ISLAMISM
AFTER THE ARAB SPRING? THE CASE STUDY
OF THE EGYPTIAN COMMERCIAL AND
FINANCIAL LAWS**

RADWA S. ELSAMAN¹ and AHMED ELDAKAK²

ABSTRACT

The first parliamentary elections that followed the Egyptian Revolution witnessed an unprecedented success for Islamists as they secured an overwhelming majority of seats in parliament, suggesting that they may intend to amend many laws to bring parliament into compliance with Islamic Shari'a. This article addresses legal challenges that will face the new majority if they decide to Islamize laws and regulations related to business and finance. Particularly, the article discusses Islamic money theory, trade, banking systems, consumer protection, insurance, competition, and tax systems. The article analyzes Egyptian business and finance laws to examine whether they comply with Islamic law. It then proceeds to explain the alternative Islamic principles that may replace several current rules. The article concludes that while some changes are foreseeable, there can be no expectation of radical change in the near future. Although the authors come to this conclusion, they analyze the legal issues without judging, supporting, or opposing the imposition of Islamic law.

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INTRODUCTION

Although secularism stands as a solid wall against the imposition of religious principles in national laws and regulations, the situation is different when it comes to Islamic societies.³ This is because Islam as a religion regulates all aspects of life including spiritual, economic, political, social, and commercial activities.⁴ These divergent approaches may soon be displayed in Egypt; while its population is the largest in the region, with more than eighty million people, it also boasts the largest non-Muslim minority with about eight to twelve million Christians.⁵ Since Islamic law affects many aspects of its followers' lives, a question arises with respect to the *Shari'a* rules' impact on financial and commercial issues that affect all.⁶ This is especially important when it comes to huge financial and commercial practices such

³ Islam is the religion of Muslims with principles provided by their holy book, the *Qur'an*. God, *Allah*, dictated The *Qur'an* word for word to his Prophet *Muhammad*, the prophet of Islam. *Glossary of Islamic Legal Terms*, 1 J. ISLAMIC L. 89, 90, 99 (1996); MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 34 (2003). The word *Sharie'a* refers to the Islamic laws. *Id.* at 246. The sources of Islamic law include the *Qur'an* as the main source, which is not only considered as a spiritual book, but also a legal code. See generally Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 135, 138, 148-49 (2002) (defining the sources of the *Sharie'a* and its methods of interpretation). The *Sunna* is the second source of the *Sharie'a*, which refers to the Prophet *Muhammad's* oral statements, actions, or consensus in action by others. BADERIN, *supra* at 246. The *Sunna*, as a source of Islamic law, has to be in conformity with the *Qur'an* otherwise it cannot be considered as a source of the law. In cases where the *Qur'an* and the *Sunna* are silent regarding certain issues, the supplementary sources of the *Sharie'a* apply. These sources include *Ijma'* and *Qiyas*. *Ijma'* means the agreement on a particular issue that is not provided by the *Qur'an* or the *Sunna* or that requires further interpretation. *Qiyas* means analogical reasoning that aims to govern a new situation with an old rule as long as this new situation is similar to that governed by the old rule. See generally Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27 (2002) (defining *Shari'a* and discussing the methodologies of the Islamic jurisprudence); Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1 (1998) (introducing the definition of Islam and the various sources of its rules).

⁴ J. Michael Taylor, *Islamic Banking: The Feasibility of Establishing an Islamic Bank in the United States*, 40 AM. BUS. L.J. 385, 387 (2003) (quoting IMTIAZ PERVEZ, ISLAMIC BANKING AND FINANCE, reprinted in INFORMATION SOURCES ON ISLAMIC BANKING AND ECONOMICS 1980-1990 8-9 (S. Nazim Ali & Naseem N. Ali eds. 1994)).

⁵ Dwight Bashir, *Religious Freedom Under Assault in the Middle East: An Imperative for the U.S. and International Community to Hold Governments to Account*, 45 J. MARSHALL L. REV. xxiii (2011).

⁶ See Taylor, *supra* note 4, at 387.

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as banking systems, trade transactions, consumer protection, prohibition of monopoly, taxation mechanisms, governmental interference in private sector activities, and insurance, particularly for a country like Egypt, which is deemed the center of the Arab Middle East.

The January Revolution makes imposition of *Shari'a* as a source of legislation seem more likely than in the past, as Muslim groups advocate for a more integral role for Islamic law in Egypt's legal system. This possibility seems even more likely after the Islamists⁷ won an overwhelming majority of seats in a parliamentary election runoff, bringing them closer to dominating the first elected body after the Revolution.⁸

This Article addresses the legal challenges that may face the new Islamic government if they seek to impose *Shari'a*. The Article does not provide recommendations, but instead raises some unanswered questions that may arise if Muslim groups, wielding their new

⁷ The most common Muslim groups in Egypt are the Muslim Brotherhood (known as the "*Al-Ikhwan Al-Muslimeen*") and the *Salafi's* group. Currently, the Muslim Brotherhood is the most powerful political force in Egypt. It was established in 1928. The Brotherhood, a group that virtually invented the Islamist movement eight decades ago, is a middle-class missionary institution at its core, led not by religious scholars but by doctors, lawyers, and professionals. It has long sought to move Egypt toward a more orthodox Islamic society from the bottom up, one person and family at a time. Its vast following and disciplined organization, built during its decades in opposition, have given it preeminence among civilian groups since the Revolution that toppled former President Hosni Mubarak's regime in February 2011, even though the uprising was set off primarily by young people and liberal activists. The Muslim Brotherhood's Freedom and Justice Party was the clear winner in the first round of parliamentary voting held in late November, and appeared poised to create a dominant coalition with a more conservative Islamicist party. *Topics: Muslim Brotherhood (Egypt)*, N.Y. TIMES, Sept. 14, 2012, available at http://topics.nytimes.com/top/reference/timestopics/organizations/m/muslim_brotherhood_egypt/index.html?inline=nyt-org. In contrast, the *Salafis* are political newcomers, directed by religious leaders. Ten months after the uprising that overthrew President Mubarak, the *Salafis'* new brand of religious populism propelled Al Nour and its allies to claim more than a quarter of the vote in the first round of parliamentary elections, surprising even the most seasoned Egyptian analysts and Western diplomats. David D. Kirkpatrick, *In Egypt, a Conservative Appeal Transcends Religion*, N.Y. TIMES, Dec. 10, 2011, available at <http://www.nytimes.com/2011/12/11/world/middleeast/salafis-in-egypt-have-more-than-just-religious-appeal.html?pagewanted=all>. Recently, the Brotherhood's party denied that there was any "alleged alliance" to form "an Islamist government" with Al Nour, a party formed by ultraconservative Islamists known as *Salafis*. David D. Kirkpatrick, *Muslim Brotherhood Denies Islamist Alliance*, N.Y. TIMES, Dec. 2, 2011, at A10.

⁸ See Kirkpatrick, *In Egypt, a Conservative Appeal Transcends Religion*, *supra* note 7.

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authority, push for such a move. In particular, the Article explains legal difficulties that may arise in terms of financial and business laws.

Accordingly, Part I of this Article explains the effect of *Shari'a* on legislation in Muslim countries. Part II offers an overview of the Egyptian Revolution, particularly the political, economic, and social circumstances leading to the uprising. Part III provides a genealogy of debated issues that may arise when thinking about the imposition of rules based on *Shari'a* in commercial and financial laws and regulations. Finally, Part IV concludes that radical or fundamental changes in laws are unforeseeable, at least in the short run.

SHARI'A AS A SOURCE OF LEGISLATION

The degree of adopting *Shari'a* as a source of legislation is not the same in all Muslim countries. Arguably, Muslim countries, according to their reaction toward adopting *Shari'a* as a source of their legislation, are divided into three main categories.⁹ One category includes countries, such as Lebanon and Turkey, that do not provide for *Shari'a* as the main source of their national laws.¹⁰ Thus, the Turkish Constitution provides that "[t]he Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Ataturk, and based on the fundamental tenets set forth in the Preamble."¹¹

Some other countries, such as Algeria, Yemen, and Jordan, consider *Shari'a* to be a vital, but not exclusive, source of their national laws.¹² For instance, the Yemeni Constitution provides that Yemen is an Arab Muslim and independent country; that Islam is the religion of the country and Arabic is its official language; that *Shari'a* is the main source of legislation; and that inheritances must be granted in accordance with *Shari'a*.¹³

⁹ NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY 34-35 (2008) (Islamic Law Countries are countries where the majority of the population is Muslim, and where the state is one of fifty-seven member states in The Islamic Conference, an inter-governmental organization that represents the collective voice of the Muslim world.).

¹⁰ *Id.* at 35-36.

¹¹ TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1982 (Turk.); see also Republic of Turkey Ministry of Foreign Affairs, *Constitution of the Republic of Turkey*, http://www.constitution.org/cons/turkey/turk_cons.htm.

¹² See ABIAD, *supra* note 9, at 37.

¹³ TRANSLITERATED TITLE OF YEMENI CONSTITUTION OF THE REPUBLIC OF YEMEN [CONSTITUTION] May 16, 1991, as amended Sept. 29, 1994, Feb. 10, 2001, arts. 1-3, 23; see also *Constitution of Yemen* [Yemen], Feb. 10, 2001, available at <http://www.unhcr.org/refworld/docid/3fc4cie94.html>; Republic of Yemen Supreme Commission

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Finally, some countries, such as Iran, Bahrain, and Saudi Arabia recognize *Shari'a* as the main and exclusive source of their national laws.¹⁴ For example, the Bahraini Constitution provides that “[t]he Kingdom of Bahrain is a fully sovereign, independent Islamic Arab State whose population is part of the Arab nation and whose territory is part of the great Arab homeland.”¹⁵ In addition, the Basic Law of 1992 of Saudi Arabia states: “[t]he Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s Book and the Sunnah of His Prophet, God’s prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital.”¹⁶ Similarly, the Qatari Constitution provides that “Qatar is an independent sovereign Arab State. Its religion is Islam and *Shari'a* law shall be a main source of its legislations. Its political system is democratic. The Arabic Language shall be its official language. The people of Qatar are a part of the Arab nation.”¹⁷

It is claimed that Egypt falls under the second category explained above. Thus, the Egyptian Supreme Constitutional Court held:

The principles of Islamic *Shari'a* are the major source of legislation. This imposes a limitation curtailing both the legislative and executive power, through which they are obliged that whatever laws or decrees they enact, no provision contained in them may contradict the provisions of Islamic law which are definite in terms of their immutability and their meaning. . . whatever legislative enactment contravenes them must be declared null and void.¹⁸

Also, the Egyptian Constitution declares Islam as the religion of the State and the main source of the law.¹⁹ Written legislation, court deci-

for Elections and Referendum, *The Constitution of the Republic of Yemen*, available at <http://www.scer.org.ye/> (last visited Nov. 7, 2012).

¹⁴ See ABIAD, *supra* note 9, at 39.

¹⁵ BAHRAIN [Constitution] Feb. 14, 2002, no. 17, art. 1; see also Department of Legal Affairs, *Bahrain Kingdom Constitution*, http://www.servat.unibe.ch/icl/ba00000_.html (last visited Nov. 7, 2012).

¹⁶ SAUDI ARABIA [Constitution] Mar. 1992, art. 1; see also SAUDI ARABIA CONSTITUTION, http://www.servat.unibe.ch/icl/sa00000_.html (last visited Nov. 7, 2012).

¹⁷ ARTICLES OF THE DRAFT CONSTITUTION OF QATAR [Constitution], Apr. 29, 2003, art. 1; see also CONSTITUTION OF QATAR, http://www.servat.unibe.ch/icl/qa00000_.html (last visited Nov. 7, 2012).

¹⁸ Radwa S. Elsaman & Ahmed A. Elshorbagy, *Doing Business in Egypt After the January Revolution: Capital Market and Investment Laws*, 11 RICH. J. GLOBAL L. & BUS. 43, 48 (2011).

¹⁹ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Mar. 20, 2011, available at <http://www.egypt.gov.eg/english/laws/Constitution/default.aspx> (last visited Nov. 7,

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sions, and jurisprudential explanations all reflect that *Shari'a* is the main source of legislation in Egypt; however, in reality *Shari'a* does not serve this function except in a few areas such as family law.²⁰ The Egyptian legal system is more accurately described as a "combination of Islamic (*Shari'a*) law and the Napoleonic Code."²¹ In fact, Egypt was the first Arab Middle Eastern country that voluntarily adopted Western style codes in the late nineteenth century.²²

BACKGROUND ON THE JANUARY REVOLUTION

The Egyptian Revolution, beginning on January 25, 2011, called for democracy, justice, the protection of human dignity, the equal application of the rule of law to all citizens, and a change of the governing regime.²³ Many reasons have been cited to explain the eruption of this Revolution. Although Egypt has witnessed remarkable economic growth in the last decade, most Egyptians did not feel the effect of this growth. The corruption of public officials and businessmen, who were frequently motivated by politics, led to the concentration of most investment tools in the hands of the elite.²⁴ This elite monopoly led to an unfair distribution of wealth, contributing to the anger that caused the January Revolution.²⁵

Additionally, the denial of human rights and restrictions on public freedoms, such as freedom of speech and participation in public life, played a role in starting the January Revolution. For instance, abuse by police went unchecked for more than two and a half decades while the incumbent regime remained in power.²⁶ Police suppressed

2012) (repealed 2011 and replaced by the Temporary Constitutional Declaration of the Arab Republic of Egypt, *Al-Jarida Al-Rasmiyya*, Mar. 30, 2011 (Egypt)).

²⁰ See *The Origins of Islamic Law*, CONST. RIGHTS FOUNDATION, <http://www.crf-usa.org/america-responds-to-terrorism/the-origins-of-islamic-law.html> (last visited Nov. 7, 2012).

²¹ Mohamed S. E. Abdel Wahab, *Update: An Overview of the Egyptian Legal System and Legal Research*, GLOBALEX, Oct. 2012, <http://www.nyulawglobal.org/Globalex/Egypt1.htm>.

²² SAMIR SALEH, *COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI'A, SYRIA, LEBANON AND EGYPT* 335 (2d ed. 2006).

²³ See generally Ahmed Eldakak, *Approaching Rule of Law in Post-Revolution Egypt* (2012) (unpublished manuscript), available at http://works.bepress.com/ahmed_eldakak/1.

²⁴ See Matthew Partridge, *How the Economic Policies of a Corrupt Elite Caused the Arab Spring*, NEW STATESMAN, June 7, 2011, <http://www.newstatesman.com/blogs/the-staggers/2011/06/economic-arab-egypt-region>.

²⁵ Elsaman & Alshorbagy, *supra* note 18, at 43.

²⁶ See generally Heba Morayef, *Work on Him Until He Confesses: Impunity for Torture in Egypt*, HUM. RTS. WATCH, Jan. 30, 2011, <http://www.hrw.org/reports/2011/01/30/work-him-until-he-confesses-0>.

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social freedoms, practiced torture, constructed detention camps, committed security abuse, and destroyed institutions in a clear violation of the basic human rights of Egyptian nationals.²⁷

The fact that President Mubarak had been in power for thirty years also fueled the sentiments that led to the revolution. The Egyptian Constitution was amended in a way that gave him the power to monopolize the country and his son, Gamal Mubarak, was groomed to follow him.²⁸ It may be further noted that the scandalous rigging of all the elected councils during the past decade also encouraged the Revolution, particularly the rigging of the parliamentary elections, which was done in the most blatant and unsophisticated way, reflecting the arrogance of the ruling clique and its contempt of the people.²⁹

In the first parliamentary elections after the Revolution, Islamist candidates were overwhelmingly successful and dominated the new parliament.³⁰ This raises the question of whether or not the Egyp-

²⁷ See *Egypt: Pledge Serious Human Rights Reform*, HUM. RTS. WATCH, Feb. 16, 2010, <http://www.hrw.org/news/2010/02/16/egypt-pledge-serious-human-rights-reform>; *Egypt: Government Renews State of Emergency*, HUM. RTS. WATCH, May 11, 2010, <http://www.hrw.org/news/2010/05/11/egypt-government-renews-state-emergency>. These harms also emphasize the state of emergency Egypt had been in for 30 years. In fact, both Egyptian and international human rights organizations have reported that such abuses occurred in Egypt, not to mention similar reports by foreign governments and the United Nations. In fact, one of the occasions that led to the Revolution was the “accidental” murder of a young man, Khalid Sa’id, by the police on June 7, 2010. He was beaten to death by police forces in an internet café in Alexandria. This led some Egyptian youth to establish a Facebook group named “We are all Khalid Sa’id,” which soon gathered 100,000 members. They formed discussion groups and moved from demanding justice for their friend to protesting emergency law, repression, corruption, and unemployment. In short, they decided to take their destiny in their own hands and to go for real change. See Anver M. Emon et al., *We Are All Khaled Said*, 3 MIDDLE E. L. & GOVERNANCE, no. 1-2, 2011, reprinted in BOS. REV., http://www.bostonreview.net/BR36.6/khaled_said_facebook_egypt_revolution.php.

²⁸ See generally Jason Brownlee, *The Heir Apparency of Gamal Mubarak*, ARAB STUD. J. 36 (2008); Daniel Sobelman, *Gamal Mubarak, President of Egypt?*, 8 MIDDLE E. Q. 31 (2001), available at <http://www.meforum.org/27/gamal-mubarak-president-of-egypt>. The real challenge started when Nobel-prize winning Dr. Mohammad El-Barad’ei returned to Egypt and challenged Mubarak’s leadership of the country and asked to amend the constitutional articles that were drafted so as to give Mubarak the ability to monopolize the country. See Jeremy M. Sharp, *Egypt: The January 25 Revolution and Implications for U.S. Foreign Policy*, CONG. RESEARCH SERV. 4, 9, 18 (2011), available at <http://fpc.state.gov/documents/organization/157112.pdf>.

²⁹ See Sharp, *supra* note 28, at 2, 16.

³⁰ *Egypt’s Islamist Parties Win Elections to Parliament*, BBC NEWS, Jan. 21, 2012, <http://www.bbc.co.uk/news/world-middle-east-16665748>.

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tian Revolution was an Islamic revolution or at least called for an Islamic government. Regardless of the answer, one cannot deny that Islamic ideas were clear during the Revolution. Abou El Fadl cites examples that illustrate the effect of religion on the Revolution, such as the fact that protestors used to gather every Friday to perform prayers together before starting their political activity.³¹ They also used to label every Friday with a different inspiring name such as “the Friday of wrath,” “the Friday of departure,” and “the Friday of victory.”³²

Additionally, Friday sermons played a vital role in inspiring and motivating protestors to survive the Revolution.³³ Martyrs killed during the Revolution are called *Shohada*, from the word *Shihada*, an Islamic principle that refers to martyrs who are killed because of engaging in a battle against despotism, injustice, and corruption.³⁴ One can also see the effect of religion on slogans sung by protestors such as “*Allahu Akbar*” (God is greater), “*silmiyya, silmiyya*” (peacefully, peacefully), and “*alshahid habib Allah*” (martyrs are the closest or the most beloved to God).³⁵

The Egyptian Revolution, however, was not led or engineered by Islamists to bring about an Islamic state modeled after Iran or Saudi Arabia.³⁶ The reason behind the mixed nature of the Revolution that ties it strongly to Islam is the fact that Islam has a great influence on its followers’ everyday behavior.³⁷ Thus, “separation of church and state in many western societies has led to the view that religion is essentially a private matter, whereas the Islamic ethical system allows no such separation. As a result, Islam influences the decision making of its followers in every situation, including those that arise in business relationships.”³⁸

FINANCIAL AND COMMERCIAL LAW CHALLENGES

One of the greatest factors that contributed to the January Revolution was the country’s economic decline. Forty-four percent of all Egyptians used to be categorized as “extremely poor to near poor,”

³¹ Khaled Abou El Fadl, *The Language of the Age: Shari’a and Natural Justice in the Egyptian Revolution*, 52 HARV. INT’L L.J. 311, 312 (2011).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 313.

³⁵ *Id.*

³⁶ *Id.* at 312.

³⁷ See generally Gillian Rice, *Islamic Ethics and the Implications for Business*, 18 J. BUS. ETHICS 345, 346-47 (1999).

³⁸ Radwa S. Elsaman, *Corporate Social Responsibility in Islamic Law: Labor and Employment*, 2 YONSEI L.J. 64, 71 (2011); see also Gillian Rice, *Islamic Ethics and the Implications for Business*, *supra* note 37.

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more than 10 percent were unemployed — almost 90 percent of whom were between the ages of 15 and 24 — and inflation was almost 12 percent.³⁹ Since the Revolution took place, however, political instability further harmed the economy.⁴⁰ Foreign capital disappeared and more than 300 Egyptian businessmen remained on a government watch list, many of whom have fled the country.⁴¹ The GDP decreased four times and the reserves declined from \$36 billion at the beginning of 2011 to \$22 billion by October of the same year.⁴² Tourism revenue declined 35 percent, and the stock market declined more than 40 percent.⁴³ This suggests that the Egyptian transitional government failed to support the Egyptian economy during the transition period,⁴⁴ and that the new government will be facing a worst-case scenario of economic decline. This means the Egyptian economy's coming era requires careful attention, yet many challenges may arise depending on the direction Islamists adopt when imposing *Shari'a* rules. These potential roadblocks will be further explored below.

(A) *Monetary Theory*

The Islamic financial theory of moderation is somewhat of a midpoint between “Liberalism,” which adopts the concept of absolute possession and disposal of money, and “Totalitarianism,” which eliminates human beings' natural ability to possess and invest.⁴⁵ The core of the moderation theory is the idea of *Khilafa*.⁴⁶ This idea provides that a human being is a successor of Allah, and accordingly, his life is

³⁹ Ben W. Heineman, Jr., *Why Egypt's Economy Matters*, THE ATLANTIC, Dec. 12, 2011, <http://www.theatlantic.com/international/archive/2011/12/why-egypts-economy-matters/249718/>.

⁴⁰ The continuing unrest is due to contradictions among different demands: majority interests vs. minority rights; secular vs. religious; military vs. civilian; Christians vs. Muslims; Muslim Brotherhood vs. Salafists; poor and unemployed vs. elites; old vs. young. *See id.*

⁴¹ David Schenker, *Egypt and the Arab Fall*, L.A. TIMES, June 1, 2011, <http://articles.latimes.com/2011/jun/01/opinion/la-oe-schenker-egypt-20110601>.

⁴² Heineman, *supra* note 39.

⁴³ *Id.*

⁴⁴ IBRAHIM SAIF, CHALLENGES OF EGYPT'S ECONOMIC TRANSITION 2 (2011), available at http://carnegieendowment.org/files/egypt_econ_transition.pdf.

⁴⁵ Muhammad Mostafa Emarah, *Money Theory in Islam*, Oct. 13, 2008, available at <http://www.dr-emara.com/Articles/50.pdf> (author translation from Arabic to English).

⁴⁶ *Glossary of Islamic Legal Terms*, *supra* note 3, at 96 (*Khilafah* is an Arabic word meaning “succession”).

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“a test of the worth of men in the eyes of Allah.”⁴⁷ In other words, the ownership of money reverts first to Allah and people are appointed as successors/trustees to use this money through nominal ownership.⁴⁸ God attributed money to himself to underline its importance and assigned owners of money as successors/trustees who are responsible for maintaining, increasing, and spending money according to directions and instructions set by Allah.⁴⁹

So, where money is owned by Allah, all people are worshipers of Allah, and the life they live is dictated by Allah, money shall be generated to be used for and maintained by all people, and its benefits should be in the favor of all people.⁵⁰ Therefore, money is from and to the entire Islamic nation as one body.⁵¹ Thus, the welfare of society could be achieved if governments had a more enabling role, through the re-distribution of wealth, to create a more suitable climate for serving both private and social goals.⁵²

The legal challenge that may arise here is related to the degree of governmental interference, used as a tool of the people’s collective will, because the government’s role in the operation of monetary and investment activities must reflect the fair and just management of money owned by *Allah*.

(B) Prohibited trades

Shari’a has a unique concept of property and trade, called *mal*,⁵³ which affects trade in general. *Mal* refers to objects that can be owned and traded among people.⁵⁴ An object has economic value only if it is useful for people,⁵⁵ and the perspective of Islamic law informs

⁴⁷ See generally Geoffrey Williams & John Zinkin, *Islam and CSR: A Study of the Compatibility Between the Tenets of Islam and the UN Global Compact*, 91 J. Bus. ETHICS 519, 521, 523 (2009).

⁴⁸ See generally Emarah, *supra* note 45.

⁴⁹ The QUR’AN provides “Believe in Allah and His Messenger, and spend (in charity) out of the (substance) whereof He has made you heirs. For, those of you who believe and spend (in charity), for them is a great reward.” QUR’AN: THE HOLY QUR’AN ENGLISH TRANSLATION OF THE MEANINGS AND COMMENTARY 1688-89 (Presidency of Islamic Researchers et al. eds., 1994) (quoting the meaning of the *Qur’an* 57:7). It also provides: “[G]ive them something yourselves out of the means which Allah has given to you.” *Id.* at 24:33.

⁵⁰ See generally Emarah, *supra* note 45; “He who hath created for you all things that are on earth.” THE QUR’AN, *supra* note 49, at 2:29.

⁵¹ See generally Emarah, *supra* note 45.

⁵² M. UMER CHAPRA, ISLAM AND THE ECONOMIC CHALLENGE 348-49 (1992).

⁵³ *Glossary of Islamic Legal Terms*, *supra* note 3, at 97.

⁵⁴ FATHI AL-DURAINI, HAQQ, AL-IBTIKAR FI AL-FIQH AL-ISLAMI AL-MUQARAN [THE RIGHT TO PATENT IN THE COMPARATIVE ISLAMIC JURISPRUDENCE] 23-39 (1984).

⁵⁵ *Id.*

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this finding. Accordingly, some objects that otherwise can be subject to property rights and traded in comparative societies will be forbidden under Islamic law. This means that trade in Islamic law societies is not about achieving profits; rather, Islamic law societies aim to promote the social welfare of the whole society.⁵⁶

Accordingly, trade in certain types of items, such as tobacco and alcohol, is prohibited under *Shari'a* law.⁵⁷ This is because from the Islamic viewpoint alcoholic drinks are not useful to people, due to their intoxicating effect.⁵⁸ As a result, *Shari'a* law forbids drinking and trading in alcoholic drinks as they do not qualify as *mal*. However, it is imperative to note that the prohibition does not affect all such products; where items are traded for other purposes, such as alcohol used for scientific research, *Shari'a* is not so restrictive.⁵⁹ In short, the purpose and use of an item is just as important as its ingredients.

Moreover, although narcotic drugs are not explicitly mentioned in the Qur'an, trade in narcotic drugs is forbidden by virtue of analogy, which is another source of rules derived from Islamic law.⁶⁰ Like alcohol, narcotic drugs are not useful and do not qualify as *mal* except for scientific research or where used for medical purposes.⁶¹ One should therefore expect a fierce war against the illegal drug trade in Egypt, where the trade is absolutely outlawed but exists on a large scale due to the substantial failure of police to enforce the law, particularly in the period following the revolution.⁶²

Tobacco trading is another complicated issue. It does not qualify as *mal* in Islam because it negatively affects a person's health, and as a general rule, anything that negatively affects a person's health is forbidden.⁶³ Therefore, the tobacco industry and trade is prohibited under Islamic law. Yet, this conflicts with the situation in Egypt,

⁵⁶ See Williams & Zinkin, *supra* note 47, at 523; see also Taylor, *supra* note 4, at 388.

⁵⁷ Williams & Zinkin, *supra* note 47, at 523.

⁵⁸ Bassiouni & Badr, *supra* note 3, at 156.

⁵⁹ Letter from Hussein A. Gezairy, Reg'l Dir., World Health Org. (July 17, 2001), available at <http://www.mcb.org.uk/downloads/whoporcineadvice.pdf>.

⁶⁰ Bassiouni & Badr, *supra* note 3, at 155.

⁶¹ Letter from Gezairy, *supra* note 59.

⁶² Farida Helmy, *Drug Central*, BUS. TODAY EGYPT, Sept. 11, 2011, <http://business.todayegypt.com/news/display/article/artId:186/drug-central/secId:5>.

⁶³ The Islamic Jurisprudence derives evidence from the Qur'an and the Sunnah to that effect. The Qur'an provides: "Those who follow the Messenger, the unlettered prophet, whom they find written in what they have of the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them. So they who have believed in him, honored him, supported him and followed the light which was sent

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which is home to millions of smokers, and where the tobacco industry is quite successful.⁶⁴ As a result, it is not expected that tobacco will be banned since most smokers are addicted to the substance, but it is reasonable to expect restrictions on smoking, particularly in public places. This presents a question as to the effect of the prohibition of trade in these various goods and services on the Egyptian economy. It also raises a challenge to investment and trade ties between Egypt and the rest of the world, particularly those countries that do not prohibit these items. For instance, the application of Islamic law in Egypt may result in the prohibition of the alcohol industry – and businesses offering such products may be forced to look for an alternative. Nevertheless, according to some Islamic scholars, the prohibition of these businesses aims to protect life and health by avoiding its harmful effects on society.⁶⁵

(C) *Banking System*

Another challenge arises with respect to Egypt's banking system. In Islam, usury, called *riba*, is strictly prohibited. *Riba* literally means "increase" and refers to the principal and the premium the borrower pays the lender as a condition for the loan or for an extension in its maturity.⁶⁶ *Shari'a* law prohibits this because it creates profit without work and the lender and borrower do not equally share in the risk of the loan, which is not for the moral, social, and economic well-being of society.⁶⁷ In this context, the Qur'an provides:

That they took usury, though they were forbidden; and that they devoured men's wealth wrongfully; We have prepared for those among them who reject faith a grievous chastisement.⁶⁸

But Allah hath permitted trade and forbidden usury. Those who after receiving admonition from their Lord,

down with him - it is those who will be the successful." THE QURAN, *supra* note 49, at 7:157.

⁶⁴ HEBA NASSAR, THE ECONOMICS OF TOBACCO IN EGYPT: A NEW ANALYSIS OF DEMAND 17-18 (2003), available at <http://siteresources.worldbank.org/HEALTHNUTRITIONANDPOPULATION/Resources/281627-1095698140167/Nassar-TheEconomics-whole.pdf>.

⁶⁵ Williams & Zinkin, *supra* note 47, at 523; see also Taylor, *supra* note 4, at 388.

⁶⁶ Taylor, *supra* note 4, at 399. The Islamic alternative method to *Riba* is the *Qrde Hasan* (benevolent financing), which means that the lender provides the borrower the loan free of charge as if he is providing financial assistance. In return the borrower is committed to repay the loan, provide a collateral if required, and sometimes pay some small administrative charges. See *id.*

⁶⁷ See *id.* at 391.

⁶⁸ THE QURAN, *supra* note 49, at 4:161.

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desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (the offense) are Companions of the fire: they will abide therein (forever).⁶⁹

The prohibition of the *riba* led Islamic banking institutions to use supervisory boards that provide religious guidance for the banks' activities.⁷⁰ This allowed Islamic banks to develop new tools that are claimed to be in conformity with *Shari'a* rules: *Murabaha*, *Ba'i Bithaman Ajil*, *Istisna*, *Ijara*, *Musharaka*, *Mudaraba*, and *Qarde Hasan*.

The *Murabaha* is an installment sale agreement by which the bank works as an intermediary, buying goods and then selling them to the customer at the acquisition cost (in addition to some profits paid in installments).⁷¹ Hence, the bank owns the goods before the ownership is transferred to the customer.⁷² In *Ba'i Bithaman Ajil* ("deferred payment financing"), the bank, at the request of its customer, buys certain assets and then resells them to the customer on a deferred payment schedule.⁷³

Istisna is similar to the *Ba'i Bithaman Ajil*, except the bank pays a contractor to complete certain work for the customer's benefit.⁷⁴ Moreover, the *Ijara*, a tool that is often used for property, is a rent-to-own agreement encompassing a leasing arrangement whereby the bank buys the goods and then leases them to customers.⁷⁵ The *Musharaka* is a kind of partnership agreement that allows the bank to provide its customers with required capital on the condition that the bank shares the customers' profits and losses.⁷⁶ Customers also usually contribute small shares of capital, effort, and know-how. Although similar to the *Musharaka*, in *Mudaraba*, the bank provides the entire amount of capital while customers only provide know-how.⁷⁷ Finally, the *Qarde Hasan* allows banks to provide interest-free loans in return for an unconditional commitment to pay the bank back after providing collateral.⁷⁸

⁶⁹ *Id.* at 2:275.

⁷⁰ Taylor, *supra* note 4, at 394.

⁷¹ Roberta Mann, *Is Sharif's Castle Deductible?: Islam and the Tax Treatment of Mortgage Debt*, 17 WM. & MARY BILL RTS. J. 1139, 1148 (2009).

⁷² Taylor, *supra* note 4, at 395.

⁷³ *Id.* at 396.

⁷⁴ *See id.*

⁷⁵ Mann, *supra* note 71, at 1149.

⁷⁶ *See id.* at 1150.

⁷⁷ Taylor, *supra* note 4, at 398.

⁷⁸ *Id.* at 399.

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The question that arises here is related to the status of the treatment of the non-Islamic banks established in Egypt and the possibility of turning or establishing new Islamic banks that would deal under the banking rules imposed by *Shari'a* law. Another question addresses the effect of the establishment of this kind of bank on the cycle of economics and investment, and particularly foreign investment, in Egypt.

(D) Consumer Protection

Many principles of Islamic law discussed above, such as the prohibition against *riba*, aim at protecting consumers.⁷⁹ Similarly, Islamic insurance policies can be seen as protecting policyholders from wasting their money, which is transferred to the insurance companies that in turn achieve large profits.⁸⁰ Hence, protecting consumers is an ultimate goal of Islamic law.

In addition to the above-mentioned principles, in the Islamic contract of sale, the seller is required to reveal any defects he is aware of in the product; otherwise, the contract is void.⁸¹ Therefore, even if the seller put an exemption clause in the contract to avoid liability for any defect in the product sold, such clause is not applicable if the buyer proves that the seller was aware of the defect and did not disclose it at the time of contracting.⁸² Moreover, the buyer has the right to inspect the good to ensure its quality, a concept called *khiyar al-ayb*.⁸³ Additionally, the concept of *gharar* prohibits, as a general rule, those transactions whose subject matter is not available at the time of contracting in order to further protect consumers.⁸⁴

Similarly, a transaction that involves *significant* uncertainty and risk is not permitted.⁸⁵ For instance, gambling and other games of chance are prohibited.⁸⁶ This is because in Islam, one must acquire

⁷⁹ See *supra* pt. III(c).

⁸⁰ See *supra* pt. III(e).

⁸¹ Muhammad Akbar Khan, *Consumer Protection and the Islamic Law of Contract*, 2 ISLAMABAD L. REV., no. 2, 2011 at 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961912.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423, 441 (2008).

⁸⁶ The Qur'an provides: "They ask you about wine and gambling. Say, 'In them is great sin and [yet, some] benefit for people. But their sin is greater than their benefit.' And they ask you what they should spend. Say, 'The excess [beyond needs].' Thus Allah makes clear to you the verses [of revelation] that you might give thought." THE QURAN, *supra* note 49, at 2:219. Another verse of the Qur'an provides: "O you who have believed, indeed, intoxicants, gambling, [sacrificing on

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wealth by working and benefiting society.⁸⁷ Gambling does not qualify as work because it is a game of chance – a lucky person may acquire massive wealth, while an unlucky person may lose all his wealth. Accordingly, gambling redistributes wealth on the basis of pure chance, not work.

Gambling also involves social dangers since it can be addictive. A gambler who achieves a big profit on one occasion may be tempted to play repeatedly to earn money without expending much effort. Similarly, a gambler who loses money may feel compelled to do so again to recoup his losses. Regardless of the reason for doing so, the more gamblers play, the more they lose. The real winners are those lucky people in whose hands the wealth concentrates. Furthermore, for many people, incentives to gamble may exceed incentives to work and through work, benefit society.

With these concerns in mind, Egypt has long allowed gambling in casinos that limit access to foreigners.⁸⁸ Given the profits from these venues, the liberal regimes that formerly ruled Egypt thought that prohibiting gambling could negatively affect tourism. The rise of Islamists, however, casts doubts on the future of such foreigner-only casinos in Egypt.

In the same context, in the last few years Egypt has witnessed an increasing number of game shows that will likely be an issue under Islamic law. The game shows usually induce television spectators to send a text message or call a phone number to answer a question. The questions are usually very easy so that more people can know the answer and participate. Organizers of such shows will randomly choose one person who made the right answer to get a monetary reward. The source of this reward is the revenue from text messages and phone calls from other spectators. The remaining revenue becomes the profit of the show organizers. Therefore, such shows may be regarded under Islamic law as a prohibited game of chance.⁸⁹

stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful. Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?" *Id.* at 5:90-91.

⁸⁷ *Work and Wealth*, ISLAMRELIGION.COM, www.islamreligion.com/articles/295/ (last modified Nov. 1, 2009).

⁸⁸ Law No. 1 of 1973 (Hotels and Touristic Establishments), *Al-Jarida Al-Rasmiyya*, 1 Mar. 1973, art. 1 (Egypt).

⁸⁹ FRANZ ROSENTHAL, *GAMBLING IN ISLAM* 32 (1975) (illustrating that a lottery depends on two things: (1) haphazard drawing which designates the winner, and (2) participants who contribute to a share of the prize).

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(E) *Insurance*

Islamic law prohibits conventional insurance because it is conceptually similar to gambling and thus contradicts the concept of *gharar*.⁹⁰ This is because the insured pays a cash premium, while the insurer undertakes to pay a certain amount of money upon the occurrence of a given future contingency.⁹¹ If the future contingency does not occur, the insured gets nothing in exchange for the cash premiums paid as these are owned by the insurer. Thus, conventional insurance violates the *gharar* rule because it involves significant uncertainty as to whether or not the insured will get a return for the cash premium payments.⁹²

The Islamic version of insurance is "Takaful insurance."⁹³ Unlike conventional insurance, in this system an individual acts as an insurer and an insured at the same time.⁹⁴ To put it in another way, the policyholders are partners in the insurance company.⁹⁵ The company's administration operates the insurance process but is not the exclusive owner of the company.⁹⁶ In return, the administration gets compensation for operating the company depending on the business model employed.⁹⁷

The administration operates the company through a traditional agency contract, known as a *wakalah*.⁹⁸ Additionally, a profit-sharing arrangement can be organized through a *mudharabah* contract.⁹⁹ In such situations, one party, called *rab al-mal*, the owners of the insurance company, provides the capital while the other experienced party, the *mudarib*, the company's administrative team, oper-

⁹⁰ Hania Masud, *Takaful: An Innovative Approach to Insurance and Islamic Finance*, 32 U. PA. J. INT'L L. 1133, 1141 (2011).

⁹¹ See Oliver Agha, *Tabarru in Takaful: Helpful Innovation or Unnecessary Complication?*, 9 UCLA J. ISLAMIC & NEAR E. L. 101, 103 (2010).

⁹² See FRANK E. VOGEL & SAMUEL L. HAYES, III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN* 150 (1998).

⁹³ Ali Adnan Ibrahim, *The Rise of Customary Businesses in International Financial Markets: An Introduction to Islamic Finance and the Challenges of International Integration*, 23 AM. U. INT'L L. REV. 661, 715-16 (2008).

⁹⁴ Saleh bin-Abdullah bin-Humaid, *al-Ta'min al-t'awni al-islami* [The Islamic Takaful Insurance] 15, available at www.kantakji.com/fiqh/Files/Insurance/15202.doc; see also Masud, *supra* note 90, at 1143 ("the insurance company does not act like an insurer in the conventional sense").

⁹⁵ Bin-Humaid, *supra* note 92, at 17; see also Masud, *supra* note 90, at 1143 (noting that the insurance company manages the business aspect of insurance institutions).

⁹⁶ Bin-Humaid, *supra* note 92, at 17.

⁹⁷ Masud, *supra* note 90, at 1144.

⁹⁸ See *id.*

⁹⁹ *Id.*

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ates the capital.¹⁰⁰ The parties share the profit according to a pre-determined formula.¹⁰¹ However, they do not share liability as the *mudarib*'s liability is limited to losses resulting from negligence.¹⁰² Obviously, the administration shall invest the funds of the company in non-usurious projects.¹⁰³

The philosophy of Islamic insurance is based on brotherhood and solidarity among people.¹⁰⁴ Hence, one of its critical features is that a company should not aim to obtain profits for the operators of the insurance process.¹⁰⁵ Yet such profit may nevertheless occur as a secondary result when the cash premiums are invested through the agency or the profit sharing arrangements stated above.¹⁰⁶ Another important feature is that the ownership of the funds remains with the policyholders.¹⁰⁷ This feature in particular negates the suspicion of gambling. Accordingly, if the company is disassembled, each insured party gets a proportionate percentage to his or her original investment.¹⁰⁸

Additionally, life insurance is troublesome because it may be regarded as contradicting Islamic *Shari'a*. First, one cannot insure against death because "life and death are in the hands of God."¹⁰⁹ Second, life insurance violates the Islamic inheritance rules because the policyholder can nominate a beneficiary who might not otherwise inherit at all.¹¹⁰

The Egyptian insurance industry adopts the conventional version, rather than the Islamic version, of insurance.¹¹¹ The rise of Islamists after the Revolution suggests that this trend may change and

¹⁰⁰ Oliver Agha, *Islamic Finance: Principle Before Profit*, 2 BERKELEY J. MID. E. & ISLAMIC L. 125, 131 (2009) [hereinafter *Principle Before Profit*].

¹⁰¹ *Id.* at 132; see also NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW: RIBA, GHARAR AND ISLAMIC BANKING 103 (1986) ("The division of profits between the two parties must necessarily be on a proportional basis and cannot be a lump sum or a guaranteed return.").

¹⁰² *Principle Before Profit*, *supra* note 100.

¹⁰³ See Ibrahim, *supra* note 93, at 716.

¹⁰⁴ VOGEL & HAYES, *supra* note 92, at 151 (noting that Islamic insurance should be regarded "as a charitable collective enterprise by which Muslims pool resources to aid each other in the event of casualty or loss"); see also Masud, *supra* note 90 ("Islamic insurance is a cooperative model of insurance.").

¹⁰⁵ Masud, *supra* note 90, at 1143 ("the insurance pool is more akin to a charitable institution as opposed to a profit-earning institution").

¹⁰⁶ Bin-Humaid, *supra* note 94, at 16.

¹⁰⁷ *Id.* at 10.

¹⁰⁸ *Id.*

¹⁰⁹ Masud, *supra* note 90, at 1144; see SALEH, *supra* note 101, at 106.

¹¹⁰ See Masud, *supra* note 90, at 1144.

¹¹¹ Law No. 47 of 1972 (Civil Code), *Al-Jarida Al-Rasmiyya*, 29 July 1948, §§ 747-771 (Egypt).

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Egypt may follow the experiments of countries that adopt Takaful insurance, like Malaysia.¹¹² It is unclear how the transformation process will happen, and what will be the fate of the current insurance companies.

(F) Competition Laws

Islamic jurisprudence emphasizes that “the basic purpose of legislation in Islam is to secure the welfare of the people by promoting their benefit or by protecting them against harm.”¹¹³ Accordingly, the laws of Islam encourage fair trade.¹¹⁴ The harms of monopoly are obvious. Monopolies misallocate resources and redistribute income in favor of a few individuals.¹¹⁵ This causes a reduction in the society’s aggregate welfare, which contradicts the goals of Islam.¹¹⁶ Therefore, Islam forbids monopolies.¹¹⁷

Fighting monopolies, Islam forbids a merchant from hoarding products when supply does not satisfy demand.¹¹⁸ Hoarding means “withholding supplies of essential goods and services with a view to raising prices.”¹¹⁹ Under Islamic law, the state may force a merchant hoarding such a product to sell the hoarded product at the market

¹¹² Masud, *supra* note 90, at 1147 (noting that Takaful insurance was introduced in Malaysia after conventional insurance was declared to be contrary to Islamic *Shari’a*; at present, Malaysia has the largest Islamic insurance market.).

¹¹³ MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 268 (1991).

¹¹⁴ Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 *IDEA* 151, 175 (2003).

¹¹⁵ Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 *AM. ECON. REV.* 77, 77 (1954).

¹¹⁶ Michael Brewer, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 *BROOK. L. REV.* 1101, 1105 (2007).

¹¹⁷ Prophet Muhammad was reported to say “[t]hose who bring grain to a city to sell at a cheap rate are blessed, and they who keep it back in order to sell at a high rate are cursed” and “[w]hoever monopoliseth is a sinner.” THOMAS PATRICK HUGHES, *DICTIONARY OF ISLAM: BEING A CYCLOPEDIA OF THE DOCTRINES, RITES, CEREMONIES, AND CUSTOMS, TOGETHER WITH THE TECHNICAL AND THEOLOGICAL TERMS OF THE MUHAMMADAN RELIGION* 197 (1885).

¹¹⁸ Brewer, *supra* note 116; *see also* SAMÍRAH SAYYID SULAYMÁN BAYYŪMÍ, *AL-IHŪTIKĀR WA-ĀTHĀRUH FĪ AL-SHARĪ’AH AL-ISLĀMĪYAH [MONOPOLY AND ITS EFFECTS IN THE ISLAMIC SHARĪ’A]* 106 (1989) (noting that hoarding products is permissible as long as it does not harm the public; in other words, if the product is available in the market and the public has sufficient access to it, a merchant may hoard the amount he has with a view to selling it when prices go up because this will not harm the public).

¹¹⁹ Brewer, *supra* note 116.

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price.¹²⁰ Additionally, should such a merchant fail to comply, the state may expropriate and sell the product itself.¹²¹

Moreover, Islamic ethics constitute the foundation for unfair competition rules. Islam forbids any unjust or unscrupulous business practices.¹²² Dumping, for instance, is illegal under Islamic law.¹²³ A dumper uses predatory pricing in order to knock competitors out of competition.¹²⁴ By eliminating competition, dumping can constitute a first step toward establishing a monopoly.¹²⁵

Furthermore, free-riding through misappropriating trademarks is considered deceptive conduct and is not allowed under *Shari'a* law.¹²⁶ Besides the fact that misappropriation constitutes a fraudulent means to induce consumers to buy the product, it also hurts the competitor who owns the trademark.¹²⁷ Additionally, because trademarks constitute nontangible property, misappropriation shall be regarded as an attack on the private property of the trademark owner.¹²⁸

Egypt enacted the Law on the Protection of Competition and the Prevention of Monopolistic Practices in 2005.¹²⁹ The former regime did not seem serious about protecting competition, however, which was evident from suspicious monopolistic practices in the steel industry — led by a senior official of the then-ruling National Democratic

¹²⁰ BAYYŪMĪ, *supra* note 118, at 70-72.

¹²¹ *Id.* at 73-74. Under Islamic law, expropriation is permitted for two purposes: (1) executing a court decision against a debtor, or (2) for public interest. Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. INT'L & COMP. L. 307, 356 (1996).

¹²² See Ida Medieha Azmi et al., *Distinctive Signs and Early Markets: Europe, Africa and Islam*, in PERSPECTIVES ON INTELLECTUAL PROPERTY: THE PREHISTORY AND DEVELOPMENT OF INTELLECTUAL PROPERTY SYSTEMS 154 (Alison Firth ed., 1997).

¹²³ HUSSIEN HUSSIEN SHEHATA, NAZRAT AL-IQTISAD AL-ISLAMI ILA MUSHKILAT AL-IGHRAQ [DUMPING FROM THE PRESPECTIVE OF ISLAMIC ECONOMY] 9, available at <http://www.darelmashora.com/download.ashx?docid=981> (last visited Mar. 27, 2012).

¹²⁴ *Id.* at 2-3.

¹²⁵ *Id.*

¹²⁶ See Azmi et al., *supra* note 122.

¹²⁷ See *id.*

¹²⁸ The Qur'an provides: "Devour not the properties of one another unlawfully, but let there be lawful trade by mutual consent." THE QURAN, *supra* note 49, at 4:29. Another verse states: "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property." *Id.* at 2:188.

¹²⁹ Law No. 3 of 2005 (Protection of Competition and the Prohibition of Monopolistic Practices Law), *Al-Jarida Al-Rasmiyya*, 15 Feb. 2005 (Egypt).

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Party.¹³⁰ Nonetheless, as one scholar notes, the main purpose of enacting that law was compliance with Egypt's obligations toward its trade agreement with European countries.¹³¹

While Islamic principles regulating competition are very basic and general, Egyptian competition laws provide additional details on these issues in light of these general principles.¹³² Accordingly, no apparent conflict between Islamic competition law and Egyptian law exists. Hence, the challenge to the new parliament should be to promote competition laws and to provide efficient enforcement mechanisms. Unlike the former regime, the Islamists appear to have a sincere desire to fight monopolies to comply with Islamic teachings.¹³³ The former regime denied the legal enforcement of many rules that were not applied on the ground. For example, misappropriation of trademarks is illegal but its enforcement is very relaxed.¹³⁴ The rise of Islamists may have a direct impact on eliminating misappropriation of trademarks. Therefore, the promotion of antitrust and unfair competition laws is expected, and enforcing intellectual property rights should be promoted.

(G) Tax

Islam has a very special obligatory charity system called *zakah* which, to a certain extent, is similar to the modern tax system.¹³⁵ *Zakah* is a wealth tax focused on compulsory charitable giving for specially designated groups in society.¹³⁶ The idea of *zakah* illustrates how Islam distributes income and wealth in society to guarantee security for members and to maintain business activity along just and ethical lines.¹³⁷ Williams and Zinkin argue that the system of *zakah* applies to both Muslims and non-Muslims who are in need, as Islam allows the latter to share in the wealth of Muslims.¹³⁸ In their argu-

¹³⁰ See MAHER M. DABBAH, COMPETITION LAW AND POLICY IN THE MIDDLE EAST 252-54 (2007); *Egyptian Steel Magnate Ahmed Ezz Convicted*, BBC NEWS, Oct. 4, 2012, <http://www.bbc.co.uk/news/world-middle-east-19830922>.

¹³¹ See DABBAH, *supra* note 130.

¹³² See Law No. 3 of 2005 (Protection of Competition and the Prohibition of Monopolistic Practices Law), *Al-Jarida Al-Rasmiyya*, 15 Feb. 2005 (Egypt).

¹³³ See DABBAH, *supra* note 130, at 255.

¹³⁴ See Khoury, *supra* note 114, at 195-96.

¹³⁵ *Glossary of Islamic Legal Terms*, *supra* note 3, at 103 (*Zakah* is an Arabic word that refers to the obligatory charity based upon a percentage of annual surplus wealth); see also Williams & Zinkin, *supra* note 47, at 526.

¹³⁶ See generally Emarah, *supra* note 45.

¹³⁷ Williams & Zinkin, *supra* note 47, at 526.

¹³⁸ *Id.*

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ment Williams and Zinkin refer to the Prophet saying: "The Head of State is the Guardian of him who has nobody to support him."¹³⁹

A question arises as to whether the newly elected parliament intends to replace the current Egyptian tax law with the system of *zakah*. If they do not, there is the further issue of whether they are going to impose a *zakah* system in addition to the tax imposed by law so that Egyptians pay double the standard tax, or whether the payment of *zakah* will be optional. Another challenge is related to the administration of the *zakah* funds, which may sometimes be unfairly distributed because of the corrupt authorities responsible for the distribution and management of the money collected under *zakah*.¹⁴⁰

CONCLUSION

The rise of Islamists in the Egyptian parliament suggests that Egypt may incorporate more rules based on the Islamic *Shari'a* in its legal system. This article followed a purely analytical methodology to spot potential issues and transformations in the Egyptian business and finance laws and regulations, which may affect the ways of doing business in Egypt after the Revolution. The article does not aim to judge, support, or oppose the application of Islamic law in Egypt after the Revolution. It is imperative to note that Islamic law is man-made law, based on divine rules in the Qur'an and the Sunnah, which forms *Shari'ah* law.

Generally, radical or fundamental changes in laws are unforeseeable, at least in the short run. Thus, one cannot expect the closure of usury banks and conventional insurance companies because this would contradict the public interest, a source of rules for Islamic law.¹⁴¹ However, non-Islamic businesses should expect fierce competition from newly emerging businesses that follow Islamic teachings. In the field of insurance, for instance, consumers are likely to prefer Islamic insurance companies' model because it better serves consumer interests because consumers own the cash premium they pay under that model. This may not be the case for the Islamic banks because the usury banks may be more profitable.

Some industries, like alcohol and tobacco, may be banned or restricted in light of the application of *Shari'a* rules, but this restriction would be challenging to apply in the short run since it would affect

¹³⁹ *Id.*

¹⁴⁰ Some scholars argue that sometimes the collected *Zakah* is not properly distributed to the poor, giving examples from Malaysia and Sudan where no more than between 11 and 15 percent of the collected money for *Zakah* is distributed to people in need. HANS VISSER, *ISLAMIC FINANCE PRINCIPLES AND PRACTICE* 30 (Edward Elgar Publishing Ltd., 2009).

¹⁴¹ Bassiouni & Badr, *supra* note 3, at 147.

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the cycle of trade. In the short run, the focus is thus expected to be on fighting monopolies in different areas of trade to promote competition and the welfare of society. This is in line with the overwhelming trend of protecting consumers, which is among the most important issues that the parliament is expected to address in order to satisfy a public that displaced the former regime largely for economic reasons. Finally, Islam recognizes the taxation system but it is unclear whether a change is likely in the tax law.



IOSCO: THE WORLD STANDARD SETTER FOR GLOBALIZED FINANCIAL MARKETS

Antonio Marcacci

ABSTRACT:

As the current endless crisis clearly proves, world financial markets are closely interconnected. In order to provide a legal backdrop, a soft-law body, named the International Organisation of Securities Commissions (IOSCO), was established and tasked with encouraging an efficient flow of capital. Funded as a Pan-American, and subsequently world-wide, forum more than thirty years ago, IOSCO is a multilateral regulatory network whose members are the public regulators of more than ninety percent of the world's securities and futures markets. It is devoted to promoting common and efficient regulations, setting the floor for the exchange of information between its members, improving the effective surveillance of international securities transactions, and increasing the mutual assistance necessary for the integrity of global financial markets, valued at over \$800 trillion. IOSCO is now the primary institution through which international standards, memoranda, and guidelines concerning the securities markets are promulgated. This paper examines the way this relatively hidden organisation works by trying to figure out its regulatory role in the international financial arena.

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1) THE BIRTH OF IOSCO: FROM A PAN-AMERICAN TO A GLOBAL ORGANISATION

Born in 1974 as a pan-American forum, IOSCO was originally named the “Inter-American Conference of Securities Commissions.”¹ Its first conference was held in Caracas, Venezuela.² The idea of creating a permanent forum of American regulators of securities markets was initially sponsored and funded by the International Finance Corporation (IFC), the lending arm for the private sector of the World Bank Group.³ The first authorities to join the Conference came from Argentina, Brazil, Quebec, Ontario, Chile, the United States, Mexico, Panama and Venezuela, but even non-American regulators attended as observers, like the French *Commission des Opérations en Bourse*.⁴ IOSCO operated in a very informal fashion in its first decade, making it difficult to find documents dated before 1987.⁵

IOSCO did not stay informal for very long. At the 1983 Conference held in Quito, Ecuador, an Inter-American regional group became the global “International Organisation of Securities Commissions” with France, Indonesia, Korea, and the United Kingdom becoming official members in 1984.⁶ Three years later, IOSCO established a secretariat in Montreal, Québec, Canada.⁷ In 1994, IOSCO had seventy ordinary members, nine associate members, and thirty-five affiliate members, covering eighty-five percent of the world’s securities markets.⁸ IOSCO currently has one hundred and fifteen ordinary members (usually public financial market authorities), twelve associate members (such as regulators not dealing with regulated capital markets), and seventy-six affiliate members (usually stock and futures exchanges or brokers/dealers associations) coming from all around the

¹ It has also been referred to as the “Inter-American Association of Securities Commissions.” *E.g.*, A.A. Sommer, Jr., *IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities*, 17 NW. J. INT’L L. & BUS. 15, 15 (1996).

² IOSCO, *Annual Report 2010*, at 49 (2011).

³ Régis Bismuth, *La Coopération Internationale des Autorités de Régulation du Secteur Financier et le Droit International Public* 207 (Mar. 23, 2009) (unpublished Ph.D. dissertation, Université Paris-Sorbonne) (on file with author).

⁴ *Id.* at 207-08.

⁵ *See* Sommer, *supra* note 1, at 16.

⁶ IOSCO, POLISH FIN. SUPERVISORY AUTH., http://www.knf.gov.pl/en/About_us/International_Cooperation/internationals/iosco.html (last visited Oct. 10, 2012).

⁷ JOEL P. TRACHTMAN, *THE INTERNATIONAL ECONOMIC LAW REVOLUTION AND THE RIGHT TO REGULATE* 327, n.18 (Cameron May 2006).

⁸ David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L. J. 281, 292 (1998).

world.⁹ To date, IOSCO covers more than ninety-five percent of the world's securities and futures markets,¹⁰ and it is the primary global institution tasked with setting international standards for finance.¹¹

a. The Organisation's legal nature

The Organisation's legal nature is quite intricate and fascinating. Despite the label "Organisation," IOSCO is not a "proper" public international organisation because it lacks a founding treaty.¹² A better term would be "multilateral regulatory network of supervisors" because IOSCO is a private organisation made up of mostly public authorities.¹³ Moreover, it did not have any formal recognition for the first five years of its existence and was only formally recognized as a non-profit corporation by Quebec law in 1987.¹⁴

Interestingly, the 1987 Quebec statute¹⁵ recognizing IOSCO states: "*It is appropriate to recognize the Organization as a not-for-profit legal entity,*" while article 7 specifies: "*The Organization shall have a legal personality and have such capacity to contract, to acquire, and to dispose of property and to sue.*" Significantly, the Quebec Law did not mention anything concerning IOSCO's functioning and governance, but left everything to IOSCO's internal rules. "*Subject to this Act, the Statutes of the International Organization of Securities Commissions, effective November 30, 1987, shall continue to govern the Organization until they have been modified, replaced, or repealed.*"¹⁶

⁹ See *Ordinary Members of IOSCO*, OICU-IOSCO, https://www.iosco.org/lists/display_members.cfm?memID=1&orderBy=none (last visited Sept. 28, 2012); *Associate Members of IOSCO*, OICU-IOSCO, https://www.iosco.org/lists/display_members.cfm?memID=2&orderBy=jurSortName (last visited Sept. 28, 2012); *Affiliate Members of IOSCO*, OICU-IOSCO, https://www.iosco.org/lists/display_members.cfm?memID=3&orderBy=jurSortName (last visited Sept. 28, 2012).

¹⁰ See *IOSCO Historical Background*, OICU-IOSCO, <https://www.iosco.org/about/index.cfm?section=background> (last visited Sept. 28, 2012).

¹¹ Chris Brummer, *Post-American Securities Regulation*, 98 CALIF. L. REV. 327, 338 (2010).

¹² See David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L. J. 281, 284 (1998).

¹³ See *Membership Categories and Criteria*, IOSCO, <http://iosco.org/about/index.cfm?section=membership> (last visited Oct. 12, 2012).

¹⁴ Quebec was the jurisdiction hosting the General Secretariat at that time. Sommer, *supra* note 1, at 15.

¹⁵ *Loi concernant l'Organisation Internationale des Commissions de Valeurs*, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re} session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456.

¹⁶ *Article 8 de la Loi concernant l'Organisation Internationale des Commissions de Valeurs*, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re}

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In 1999, Madrid became the host city of the IOSCO General Secretariat's headquarters.¹⁷ IOSCO was incorporated under Spanish law with a 1999 Act concerning administrative order.¹⁸ This piece of Spanish legislation defined IOSCO as a public utility association, which confirmed the quite controversial nature of IOSCO as a non-profit organisation.¹⁹

Both the Spanish and the Quebec laws leave wide leeway to the Organisation's self-imposed internal rules, the so-called By-Laws. These by-laws can be thought of as, *mutatis mutandis*, the "Constitution" of IOSCO. The document distinguishes the differing nature and roles of the members (full, associate, and affiliate), describes the governance of the organisation, and establishes annual meetings and a system of sanctions that can be inflicted on members in cases of "repeated failure to pay contributions."²⁰ Significantly, not even the by-laws give a proper definition of IOSCO's legal nature; instead, they simply state that securities regulators decide to "assemble together in the International Organisation of Securities Commissions, governed by the present By-Laws" in order to achieve specific aims, such as cooperation and information sharing.²¹

session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456. (The centrality of IOSCO internal rules was acknowledged by the Quebec Act in other articles: "*Sont membres de l'Organisation, les commissions de valeurs et organismes similaires qui le 30 novembre 1987 sont membres de l'Organisation internationale des commissions de valeurs et tout autre organisme qui le deviendra par la suite conformément aux statuts de l'Organisation*" (Art. 3); "*Les dirigeants et membres de comités de l'Organisation internationale des commissions de valeurs en fonction le 30 novembre 1987, le demeurent jusqu'à ce qu'ils aient été remplacés conformément aux statuts de l'Organisation*" (Art. 5); "*Le secrétaire général est désigné conformément aux statuts de l'Organisation. Il dirige le secrétariat général et prend les décisions nécessaires à son administration*" (Art. 6).

¹⁷ IOSCO, *A Resolution on the Relocation of the IOSCO General Secretariat to Madrid* (May 1999).

¹⁸ Law 55/1999, of Dec. 29, on Tax, Administrative, and Social Order tit. 5, ch. 13, amend. 3 (B.O.E. 1999, 312) (Spain).

¹⁹ See *id.* See generally Law 191/1964, of Dec. 24, art. 4, § 1 (B.O.E. 1964, 311) (clarifying that a non-profit organizations represent "*de cooperación para el desarrollo*" (cooperation for the development) and seek "*de fomento de la economía social*" (to develop social economy).

²⁰ IOSCO, *Resolution of the President's Committee on Amendment to IOSCO's By-Laws to Reflect Change in Structure*, IOSCO, at 20 (2010) (referencing all of part three and section 77 of part 12 of the IOSCO by-laws), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf> [hereinafter *Structural Change Amendment*].

²¹ *Id.*

b. The Organisation's Official Aims

The official aims of IOSCO were originally created by the Quebec Act that incorporated the Organisation, which states: “*The Organization aims to enable its members to better fulfill their mission, including the exchange of information in order to develop the securities markets and improve their operations, coordinate the activities of its members and adopt or propose the adoption of common standards.*”²² Thus, IOSCO’s “eternal” goals seem to have been the exchange of information in order to better develop financial markets, operational coordination, and the adoption of common rules. The Spanish Act, however, does not mention the Organisation’s aims in detail, but simply refers to IOSCO as a public utility association.

IOSCO members officially declare to be working together to fulfill four major objectives:

- Promotion of high standards of regulation in order to maintain just, efficient and sound markets;
- Exchange of information on members’ respective experiences in order to promote the development of domestic markets;
- Establishment of standards and an effective surveillance of international securities transactions; and
- Provision of mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.²³

It is thus clear that the core activity of IOSCO is to harmonize domestic legislation concerning national securities markets and to create a proactive international environment where information can be easily and safely passed from one domestic regulator to another to enforce home securities regulations based on common standards. It is worth mentioning the so-called operational priorities, a set of temporary objectives established “to help focus common efforts and coordinate actions.”²⁴ These “operational priorities” can be viewed as the

²² Art. 2, *Loi concernant l’Organisation Internationale des Commissions de Valeurs*, 1er Décembre 1987, Assemblée Nationale du Québec, 33e législature, 1re session, 1987, chapitre 143, Loi no 243, Bulletin de l’Assemblée Nationale du Québec, 1987, 2453-2456.

²³ POLISH FIN. SUPERVISORY AUTH., *supra* note note 6; See also *Objectives and Principles of Securities Regulation*, IFCI RISK INST., <http://riskinstitute.ch/144460.htm> (last visited Oct. 11, 2012); Press Release, Financial Services Board, South Africa to Host Global Securities Conference (Oct. 9, 2008), available at <ftp://ftp.fsb.co.za/public/media/09102008.pdf>.

²⁴ IOSCO, Presidents Committee, *Resolution on IOSCO’s Mission, Goals and Priorities*, at 2 (July 2010).

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organisation's mid-term policy goals, characterized by the fact that they are much more detailed, more flexible, and less formal than the statutory goals mentioned above.

An example of these "mid-term policy goals" can be found in the Final Update of the 36th Annual Conference where a new "strategic direction" was devised.²⁵ This document draws up a new set of operational priorities for the period spanning from 2010 to 2015. According to the Final Update, during these five years, IOSCO must be particularly focused on the following:

- Maintaining and improving the international regulatory framework for securities markets by setting international standards;
- Identifying and addressing systemic risks;
- Advancing implementation of the IOSCO Objectives and Principles of Securities Regulation; and
- Pursuing full implementation of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.²⁶

2) THE GOVERNANCE OF IOSCO

A key aspect of IOSCO's governance is that the Organisation operates through a network of committees, which are usually composed of the Organisation's full members, although associate and affiliate members also play an active role.²⁷

Formally speaking, the most important organ is the Presidents' Committee, which consists of the presidents of all of IOSCO's public authorities members.²⁸ This Committee meets once a year at the annual conference and makes key formal decisions.²⁹ Each ordinary member has one vote at the annual meeting³⁰ and the associate members have the right to attend and speak.³¹ The Presidents' Committee plays a formal leading role for the organisation by and large and "has all the powers necessary or convenient to achieve the objectives of the

²⁵ Press Release, Final Update 36th Annual Conference of the International Organization of Securities Commissions, IOSCO/MS/04/2011 1 (Apr. 20, 2011), available at <http://www.iosco.org/news/pdf/IOSCONEW207.pdf>.

²⁶ *Id.*

²⁷ Sommer, *supra* note 1, at 18.

²⁸ *See id.*; *Annual Report 2010*, *supra* note 2, at 47.

²⁹ In order to operate, the quorum that the Presidents' Committee must achieve is the majority of the ordinary members attending the Annual Meeting. *See Structural Change Amendment*, *supra* note 20, at 7, 18.

³⁰ *Id.* at 9.

³¹ *Id.*

Organisation.”³² The Presidents’ Committee is responsible for adopting the resolutions that reformulate IOSCO’s mission and goals, setting up the Organisation’s operational priorities, amending the by-laws, admitting new members, recognizing the regional committees, determining the annual contribution for the members, and imposing sanctions upon members.³³

The Executive Committee is, formally speaking, the second key body of IOSCO. It acts as the executive arm of the organisation and, like any other committee of IOSCO, its members are elected every two years at the biennial meeting.³⁴ It is composed of nineteen members: the Chairman of the Technical Committee, the Chairman of the Emerging Markets Committee, the four Chairmen of the four Regional Committees, one ordinary member elected by each Regional Committee from among the ordinary members of that region, and nine ordinary members elected by the Presidents’ Committee.³⁵ If the Presidents’ Committee is the formal decision-making organ that officially makes the most important decisions,³⁶ then the Executive Committee is the body that actually implements those decisions and lays the groundwork necessary to achieve IOSCO’s objectives.³⁷ This is why the Executive Committee meets periodically during the year,³⁸ unlike the Presidents’ Committee, which only meets once a year.³⁹

After a formal examination, one could identify the Executive Committee as IOSCO’s “principal governing body.”⁴⁰ It is the organ concerned with the active management of the Organisation rather than the mere formulation of policy.⁴¹

The Executive Committee has established two specialised working committees, the Technical Committee and the Emerging Markets Committee, which “carry out the policy development of IOSCO” and are responsible before the Executive Committee.⁴² The Technical Committee was established in 1987 by the Executive Committee in order “to study critical issues affecting countries with developed securi-

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 11; *Annual Report 2010*, *supra* note 2, at 47.

³⁵ *Annual Report 2010*, *supra* note 2, at 47. The current members of the Executive Committee come from Australia, Belgium, Brazil, China, France, Germany, India, Japan, Morocco, Nigeria, Portugal, Spain, South Africa, Turkey, United Kingdom, the United States of America, and Uruguay. *Id.*

³⁶ *Id.* at 23.

³⁷ *Id.* at 47.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Sommer, *supra* note 1, at 18.

⁴¹ *Id.*

⁴² *Annual Report 2010*, *supra* note 2, at 26, 47.

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ties markets.”⁴³ It is, indeed, made up of eighteen agencies that regulate some of the world’s larger, developed, and international markets including China, Switzerland, and India.⁴⁴ Its reason for existence is to “review major regulatory issues related to international securities and futures transactions, and to coordinate practical responses to these concerns.”⁴⁵

The work of the Technical Committee is performed by six standing committees covering six major topics.⁴⁶ The members of standing committees meet regularly and work “on the mandates they receive from the Technical Committee.”⁴⁷ The Multinational Disclosure and Accounting Committee mainly focuses on the quality of financial information that investors must receive from listed institutions, and the accounting standards which constitute the basis of this information.⁴⁸ The Committee on the Regulation of Secondary Markets focuses on the infrastructure of global capital markets and exchanges while keeping an eye on on-going changes and their impact on the effectiveness of markets.⁴⁹ The Committee on the Regulation of Market Intermediaries analyzes how the intermediaries meet their responsibilities, manage their conflicts of interest, and ensure the protection of clients’ interests.⁵⁰ The Committee on the Enforcement and the Exchange of Information monitors the implementation of guidelines and procedures regarding the exchange of information.⁵¹ The Committee on Investment Management is tasked with studying the development of this sector.⁵² Finally, the Committee on Credit Rating Agencies works toward easing potential conflicts between CRA supervisors.⁵³

⁴³ Cynthia C. Lichtenstein, *Introduction to Bank for International Settlements: Committee on Banking Regulations and Supervisory Practices’ Consultative Paper on International Convergence of Capital Measurement and Capital Standards*, 30 INT’L LEGAL MATERIALS 967, 971 (1991).

⁴⁴ See *Members of the Technical Committee*, IOSCO, http://www.iosco.org/lists/display_committees.cfm?cmtid=3 (last visited Oct. 12, 2012).

⁴⁵ *Annual Report 2010*, *supra* note 2, at 47.

⁴⁶ *IOSCO Working Committees*, IOSCO, <http://www.iosco.org/about/index.cfm?section=workingcmts> (last visited Sept. 21, 2012).

⁴⁷ See *IOSCO Working Committees*, *supra* note 46.

⁴⁸ See *Annual Report 2010*, *supra* note 2, at 26. The Standing Committee on Multinational Disclosure and Accounting works on behalf of the Technical Committee in giving views on the work carried out by the international accounting standard setting bodies. *Id.* It participates as an observer in the IFRS Interpretations Committee (IFRIC), the IFRS Advisory Council, and other IFRS Advisory Groups. *Id.*

⁴⁹ *Id.* at 27.

⁵⁰ *Id.* at 29.

⁵¹ *Id.*

⁵² See *id.* at 30.

⁵³ *Id.* at 32.

The Technical Committee is the key body that enables IOSCO's entire structure to work because it elaborates or drafts most of IOSCO's documents like the *Objectives and Principles of Securities Regulation* and the several Memoranda of Understanding. Moreover, it can be defined as a "self-constituting" committee since it determines the countries that can join its membership.⁵⁴ One recent example is the invitations the Committee sent to India, China, and Brazil to join the committee.⁵⁵ In the same vein, the Technical Committee also establishes its own procedures and agenda.⁵⁶ Hans Hoogervorst, Chairman of the Autoriteit Financiële Markten (AFM), or the Netherlands Authority for the Financial Markets, was appointed as the Technical Committee Chair in 2012.⁵⁷

The Emerging Markets Committee is the other specialised committee, whose task is to focus on the development and improvement of emerging financial markets.⁵⁸ This Committee carries out its mission by setting up principles and minimum standards, preparing training programs, and "facilitating the exchange of information and transfer of technology and expertise."⁵⁹ Its work is carried out by five working groups (analogous to the Technical Committee's standing committees) covering the following topics: Disclosure and Accounting; Regulation of Secondary Markets; Regulation of Market Intermediaries; Enforcement and Exchange of Information; and Investment Management. Importantly, the Emerging Markets Committee has established several task forces tasked with studying, analysing, and assessing different, relevant issues.

⁵⁴ Sommer, *supra* note 1, at 19.

⁵⁵ See Press Release, OICU-IOSCO, Committee Invites Brazil, China and India to Join its Membership (Feb. 19, 2009), available at <http://www.iosco.org/news/pdf/IOSCONEWS136.pdf>. The Brazilian Comissao de Valores Mobiliarios (CVM) has concluded many bilateral agreements with the US SEC. Probably the most important is the one establishing a fullest mutual assistance which is provided in order "to facilitate the performance of securities market oversight functions, inspection or examination of investment businesses, and the conduct of investigations, litigation or prosecution in cases where information located within the jurisdiction of the requested Authority is needed to determine whether, or prove that, the laws or regulations of the requesting Authority may have been violated." Memorandum of Understanding between the United States Securities and Exchange Commission and Comissao de Valores

Mobiliarios (Brazil) (July 1, 1988), available at <http://www.cvm.gov.br/reinter/mou/ussec-in.asp>.

⁵⁶ Sommer, *supra* note 1, at 19.

⁵⁷ See Press Release, OICU-IOSCO, Hans Hoogervorst Appointed Chairman of IOSCO's Technical Committee, IOSCO/MR/06/2010 (June 08, 2010).

⁵⁸ See *id.*

⁵⁹ *Id.*

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The Emerging Markets Committee and the Technical Committee are the organs that together run IOSCO. The latter can be described as a group of “elite regulators” who come from developed countries and are charged with the main regulatory powers.⁶⁰ The former is made up of less developed countries that play a different role: by participating in this Committee they are necessary for the Organisation to issue institution-wide standards.⁶¹

In addition to the Technical Committee and the Emerging Markets Committee, IOSCO has four Regional Committees, which meet to discuss problems specific to their respective geographical areas: the Africa/Middle-East Regional Committee, the Asia-Pacific Regional Committee, the European Regional Committee, and the Inter-American Regional Committee.⁶² Each regional committee acts as a forum for its members to discuss topics of special interest and provides recommendations and reports to IOSCO on regional issues.⁶³

Self-Regulatory Organisations (SROs) play an important role within the IOSCO structure because they are members of the SRO Consultative Committee (SROCC). The SROCC was established in 1989 and currently has sixty-nine members representing securities and derivatives markets.⁶⁴ Some of the most important stock exchanges in the world are members of the SROCC, including the London Stock Exchange, Tokyo Stock Exchange, and the National Stock Exchange of India.⁶⁵ Their participation at IOSCO is aimed at making “a constructive input in the work of IOSCO.”⁶⁶ SROCC members work with the Technical Committee “to provide substantive input on their regulatory initiatives,”⁶⁷ while working with one another to enforce securities laws and regulations.⁶⁸

Finally, the General Secretariat in Madrid carries out all the necessary administrative and organisational tasks. These duties include keeping IOSCO’s records, updating by-laws and resolutions,

⁶⁰ Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 339 (2010).

⁶¹ *Id.*

⁶² See *Annual Report 2010*, *supra* note 2, at 47.

⁶³ See *id.* at 40-43.

⁶⁴ The committee members are 17 regulatory membership organisations, 43 exchanges (including the World Federation of exchanges), 4 clearing and settlement agencies, and 5 investor protection funds. See *Annual Report 2010*, *supra* note 2, at 18.

⁶⁵ *SROCC Member Organization Links*, IOSCO, <http://www.iosco.org/committees/srocc/index.cfm?srocc=links> (last visited Oct. 12, 2012).

⁶⁶ IOSCO, *Annual Report 2008*, at 25 (2009).

⁶⁷ *Id.*

⁶⁸ See *SRO Consultative Committee (SROCC)*, IOSCO, <http://www.iosco.org/committees/srocc/index> (last updated 2012).

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monitoring members' compliance, examining membership applications, representing the Organisation in meetings with, or presentations to, other groups and bodies, and preparing the Annual Report of the Organisation.⁶⁹

This graph shows an overview of IOSCO's current governance:

I O S C O S T R U C T U R E



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New amendments to IOSCO's by-laws in 2012 caused a deep change in IOSCO's structure that year.⁷¹ A new body, the IOSCO Board, replaced the Executive and the Technical Committees and the Advisory Board of the Emerging Markets Committee.⁷² This transformation has just taken place and it will be interesting to see the way IOSCO works once this reform is implemented.

⁶⁹ *Structural Change Amendment*, *supra* note 20, at 14, § 51(a)-(h).

⁷⁰ *Annual Report 2008*, *supra* note 66, at 25.

⁷¹ See *Structural Change Amendment*, *supra* note 20, at Ann.1. The Presidents' Committee conferred upon the Executive Committee the authority to do all it is deemed necessary for the amendments to take effect before the 2012 Annual Meeting. See *id.* It also indicated a bridge period, running from the 2012 Annual Meeting to the 2014 Annual Meeting, during which a transitional IOSCO Board will be constituted and will carry out all the functions and wield all the powers conferred upon the formal IOSCO board. See *IOSCO, Resolution of the Presidents Committee on Transitional Arrangements for the IOSCO Board*, at Ann. 2 (2011).

⁷² *Annual Report 2010*, *supra* note 2, at 4. See generally *Members of the IOSCO Board*, OICU-IOSCO, http://www.iosco.org/lists/display_committees.cfm?cmtid=11 (detailing the organisational structure of the IOSCO Board) (last visited Oct. 12, 2012).

34 *RICHMOND JOURNAL OF GLOBAL LAW & BUSINESS* [Vol. 12:1*a. IOSCO's funding system*

A regular annual fee of 15,000 Euros used to be applied equally to all members, regardless of whether they were ordinary, associate, or affiliate members. As of 2012, a new funding system has been introduced based on a mild progressive scheme that differentiates countries through two variables: Low, Middle and High income economies, and Low, Middle and High GDP. The following table explains this new scheme:

Annual financial contribution structure in Euros from 2012:

GDP	National Per Capita Income		
	1. Low Income	2. Middle Income	3. High Income
A. Low GDP	€ 12,500	€ 15,000	€ 16,000
B. Medium GDP	€ 15,000	€ 16,000	€ 21,000
C. High GDP	€ 16,000	€ 21,000	€ 30,000

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Annex 1 to the Resolution of the Presidents' Committee on Funding the New Strategic Direction specifies that the GDP categories are the following:

- Low GDP is any amount less than US \$100,000 million;
- Middle GDP is any amount from US \$100,000 million to US \$500,000 million; and
- High GDP is any amount above US \$500,000 million.⁷⁴

Standards regarding the Gross National Income per Capita indicator are the following:

- Low income economies is less than US \$1,025;
- Middle income is from US \$1,026 to US \$12,475; and
- High income is above US \$12,476.⁷⁵

IOSCO should now receive more funds from its members, just as it hoped for in the 2010 Annual Report, which held that changes

⁷³ OICU-IOSCO, *Resolution of the Presidents Committee on Funding the New Strategic Direction*, at Ann. 1, p. 1 (2010).

⁷⁴ *Id.* at Ann. 1, p. 2.

⁷⁵ WORLD BANK, HOW WE CLASSIFY COUNTRIES, <http://data.worldbank.org/about/country-classifications> (last visited Nov. 26, 2012).

were needed to create more resources.⁷⁶ This increase in revenue is perfectly coherent with the broadening role that IOSCO is now supposed to play in the global arena.

b. IOSCO's sanctions system

According to the IOSCO By-Laws, the term “sanction” concretizes three different kinds of suspensions representing a scale of seriousness of breaches. These sanctions are the suspension a member's voting rights for a certain period; the suspension of a member from membership in the Organisation for a certain period; and the exclusion of a member from membership.⁷⁷

The Presidents' Committee holds the power to impose a sanction and to determine its length and severity when it is alerted by the Executive Committee.⁷⁸ Before sending any recommendation, however, the Executive Committee must give the member under scrutiny reasonable notice of its intention to send a sanction recommendation to the Presidents' Committee and give that member the opportunity to make representations concerning the intended recommendation.⁷⁹

Sanctions are not frequently imposed, and the IOSCO website library only reports one case taking place in 2002.⁸⁰ In that circumstance the Presidents' Committee passed a resolution by which it suspended the voting rights of the Superintendency of Securities of Colombia and of the National Commission of Securities of Paraguay, and also suspended the affiliate membership of the Open Electronic Market of Argentina until such time as each of their outstanding annual financial contributions to the Organisation were paid.⁸¹ Whereas the Superintendency of Securities of Colombia is still an ordinary member of IOSCO, both the National Commission of Securities of Paraguay and the Open Electronic Market of Argentina are no longer ordinary and affiliate members, respectively.⁸²

⁷⁶ *Annual Report 2010*, *supra* note 2, at 4.

⁷⁷ *Structural Change Amendment*, *supra* note 20, at 20.

⁷⁸ See, e.g., IOSCO, *A Resolution on Delinquents of the Presidents' Committee* (May 2002).

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² The Argentinean stock market is now represented by the *Bolsa de Comercio de Buenos Aires* which is an IOSCO affiliate member. See *Affiliate Members of IOSCO*, OICU-IOSCO, http://www.iosco.org/lists/display_members.cfm?memID=3&orderBy=jurSortName (last visited on Sept. 27, 2012).

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3) THE “NORMATIVE” PRODUCTION OF IOSCO

IOSCO’s Objectives and Principles of Securities Regulation and the Multilateral Memorandum of Understanding are the core “*normative*” production of IOSCO. I write *normative* in italics and between quotation marks because IOSCO’s standards and principles are not binding because they are “soft-law” rules.⁸³ Moreover, even if they are *norms* adopted by a private legal organisation, they also have a public law effect given by the quasi-immediate incorporation carried out by IOSCO’s members.⁸⁴ Finally, they are deliberately broad because they aim to ease the assimilation of specific content, rather than focus on detailed rules. While IOSCO recognises that there is “no single prescription or roadmap to good regulation in the field of securities,”⁸⁵ these broad goals must necessarily lead to a predefined objective.

a. *Objectives and Principles of Securities Regulation*

In September 1998, IOSCO enacted the *Objectives and Principles of Securities Regulation*, the so-called IOSCO Principles.⁸⁶ The document was revised in 2010 when eight principles were added to adapt the IOSCO Principles to the post-financial crisis environment.⁸⁷ The list now contains 38 principles of securities regulation, which are inevitably general so as to apply to many different jurisdictions and “to accommodate the differences in the laws, regulatory framework, and market structures among its [m]ember jurisdictions.”⁸⁸ Despite this generality, these principles represent an attempt to ground the fundamental elements of an “effective regulatory system.”⁸⁹ IOSCO has officially stated that in drafting the Principles it wanted to “avoid being

⁸³ See Antonio Cassatella, *La Regolazione Globale del Mercato dei Valori Mobiliari: la International Organization of Securities Commissions (IOSCO)*, in LA REGOLAZIONE GLOBALE DEI MERCATI FINANZIARI 77,127 (Stefano Battini ed. 2007).

⁸⁴ See generally *id.* at 101 (discussing the hybrid nature of IOSCO standards).

⁸⁵ Brummer, *supra* note 60, at 340.

⁸⁶ See generally IOSCO, *Objectives and Principles of Securities Regulation* (Sept. 1998), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf>.

⁸⁷ The recently added principles deal with issues such as hedge funds, credit rating agencies, auditor oversight, mitigating systemic risk, and disclosure of conflicts of interest. IOSCO, *Objectives and Principles of Securities Regulation* (2010), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

⁸⁸ IOSCO, *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation*, at 3 (2008), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD266.pdf> [hereinafter *Methodology for Assessing Implementation*].

⁸⁹ Jeffrey Lucy, Deputy Chairman, Austl. Sec. and Inv. Comm’n, *The Single Market for Financial Services in the EU and Its Impact on Globalisation*, Speech Before the European Australian Business Council (Nov. 3, 2003) (transcript available at http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/EABC_speech_

overly prescriptive in its requirements while, at the same time, providing sufficient guidance as to the core elements of an essential regulatory framework for securities.”⁹⁰

The IOSCO Principals are important for three main reasons: “they establish higher standards of regulation across jurisdictions; improve the depth of cooperation between different regulators; and provide a chance to regulate foreign jurisdictions in domestic regulatory arrangements.”⁹¹ Additionally, the IOSCO Principals follow three main goals:

- Protecting investors [mainly through information disclosure];⁹²
- Ensuring that markets are fair, efficient and transparent; and
- Reducing systemic risk [through efficiency].⁹³

The document clarifies that the 38 principles must be incorporated into domestic legislation in order to achieve the goals described above.⁹⁴ These 38 principles are then further grouped into nine clusters: a) Principles Relating to the Regulator; b) Principles for Self-Regulation; c) Principles for the Enforcement of Securities Regulation; d) Principles for Cooperation in Regulation; e) Principles for Issuers; f) Principles for Auditors, Credit Rating Agencies, and other information providers; g) Principles for Collective Investment Schemes; h) Principles for Market Intermediaries; and i) Principles for the Secondary Market.⁹⁵

The IOSCO Principles look like the *nec plus ultra* of the Efficient Markets Hypothesis transposed into a transnational “*normative*” document. This economic theory is, indeed, based on the following three main arguments:

1. Investors are generally rational in valuating securities.
2. Investors who are irrational act randomly and their trades cancel each other.

031103.pdf/\$file/EABC_speech_031103.pdf) (hover over “Publications” tab, then click on “Speeches”, click on “2003”, click on the first link under 2003).

⁹⁰ *Methodology for Assessing Implementation*, *supra* note 93, at 3.

⁹¹ Lucy, *supra* note 89.

⁹² The Document specifies in its second footnote that “the term investor is intended to include customers or other consumers of financial services.” IOSCO, *Objectives and Principals of Securities Regulation*, at 3, n.2 (2010), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

⁹⁵ *Id.* at Table of Contents.

3. Rational arbitrageurs eliminate the influence of irrational investors on prices.⁹⁶

Setting aside the most technical aspects regarding the arbitrage coordination, we can nevertheless highlight the rationale behind the theory: given the publicly available information, investors are able to give each security the most adequate price. The availability of information is the essential condition for financial markets to efficiently develop.

Reading the IOSCO Principals, one can easily see that this document is actually based on the idea that full disclosure of material information can enable investors to make good investment decisions. Disclosure is the most important means to ensure investor protection. Through enough information and transparency, both professional and retail investors can assess the potential risks and rewards of their investments and thus protect their own interests. Moreover, through efficient and transparent transactions it is possible to reduce the systemic risk inherent in financial markets. Importantly, Part E, which deals with Principles for Issuers, directly mentions both investor protection and accounting and auditing standards, which are held to be key components of disclosure requirements and “should be of a high and internationally acceptable quality,” as assessed through the lens of IOSCO’s normative production.⁹⁷

b. The Multilateral Memorandum of Understanding

The memoranda of understanding are probably the oldest instruments used by IOSCO members. A MOU is a cooperative tool used by the contracting parties to facilitate their functional needs in specific areas. At the beginning of the 1980’s, the existing classical international law tools were thought to be “inadequate because they were too general and inflexible for highly technical and rapidly evolving” financial markets, where deep supervision is needed to fight illegal activities.⁹⁸ Given the difficulty of carrying out extraterritorial investigations or wielding administrative power, MOUs were conceived of as a tool to avoid these obstacles and to introduce a flexible alternative.⁹⁹

⁹⁶ ANDREI SHLEIFER, *INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE 2* (Oxford University Press, 2000).

⁹⁷ IOSCO, *Objectives and Principals of Securities Regulation*, at 8 (2010), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

⁹⁸ *Id.*

⁹⁹ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 30 (2002).

The IOSCO MOUs were originally bilateral and the first Multilateral Memorandum of Understanding (MMoU) is still relatively recent, having been developed after the events of September 11, 2001, and adopted in May 2002.¹⁰⁰ This MMoU concerning Consultation and Cooperation and the Exchange of Information was seen as the perfect tool for regulators to “exchange information across borders in order to fulfil their domestic enforcement mandates.”¹⁰¹ The rules of conduct set up by this document were meant to become a worldwide “recognised international benchmark for cross-border co-operation aimed at combating violations of securities laws and regulations.”¹⁰²

It took about a decade for most IOSCO members to become signatory parties of the MMoU. Indeed, in the first years, the implementation process was so slow that the Presidents’ Committee pushed to speed it up. At IOSCO’s Annual Conference in Sri Lanka in 2005, the Presidents’ Committee made the decision to compel all full and associate members with primary responsibility for financial regulation in their home countries either to apply for and be accepted as signatories under Appendix A of the MMoU, or to express, via Appendix B, a commitment to seek legal authority to enable them to become signatories before January 1, 2010.¹⁰³ As of October 2012, eighty-six members are signatories to the IOSCO MMoU.¹⁰⁴

Paragraph 4 of the MMoU is the core element of the document because it sets up the kind of information requests covered by the Memorandum:

- Insider dealing, market manipulation, misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives, including solicitation practices, handling of investor funds and customer orders;
- The registration, issuance, offer, or sale of securities and derivatives, and reporting requirements related thereto;

¹⁰⁰ IOSCO, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, at 2 (May 2002), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf> [hereinafter *Memorandum of Understanding*].

¹⁰¹ *Annual Report 2010*, *supra* note 2, at 7.

¹⁰² *Id.* at 5.

¹⁰³ *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)*, IOSCO, http://www.iosco.org/library/index.cfm?section=mou_main (last visited on Sept. 19, 2012).

¹⁰⁴ *IOSCO MOU: Current Signatories and Responses to Questionnaire*, IOSCO, http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Oct. 12, 2012).

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- Market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents; and
- Markets, exchanges, and clearing and settlement entities.¹⁰⁵

Paragraph 7 clarifies the scope of assistance provided by the MMoU:

- (a) The Authorities will, within the framework of this Memorandum of Understanding, provide each other with the fullest assistance permissible to secure compliance with the respective Laws and Regulations of the Authorities.
- (b) The assistance available under this Memorandum of Understanding includes, without limitation
 - a. Providing information and documents held in the files of the Requested Authority regarding the matters set forth in the request for assistance;
 - b. Obtaining information and documents regarding the matters set forth in the request for assistance [. . .]; and
 - c. In accordance with Paragraph 9(d), taking or compelling a Person's statement, or, where permissible, testimony under oath, regarding the matters set forth in the request for assistance.
- (c) Assistance will not be denied based on the fact that the type of conduct under investigation would not be a violation of the Laws and Regulations of the Requested Authority.¹⁰⁶

By reading the fundamental parts of the IOSCO MMoU it becomes clear that the driving regulatory ideas governing financial markets are meant to be the free movement of capital and financial stability. To maintain both of them, a constant and continuous exchange of information must be kept between domestic authorities. In a global liberalised and deregulated financial market, reciprocal assistance and the exchange of information among regulators become the tools to tame markets. Unfortunately, the IOSCO MMoU does not touch upon important issues such as investor protection, but it is still important to keep in mind because it clearly depicts the leitmotif of current financial regulation.

¹⁰⁵ *Memorandum of Understanding*, *supra* note 103, at 2.

¹⁰⁶ *Id.* at 4-5.

4) CONCLUDING REMARKS

After reading this paper, the answer to the question, “Is a greater role for IOSCO looming?” cannot be anything but affirmative. Indeed, IOSCO has grown exponentially over the last two decades and has become more and more defined, structured, and organised. Its original goals have become much broader and its normative production has increasingly penetrated domestic legislation. The adoption of two important documents like the Multilateral Memorandum of Understanding or the “*Objectives and Principles of Securities Regulation*” confirms this trend.

But all that glitters is not gold. Controversially, IOSCO is a private, law-based organisation, but is made up of public authorities.¹⁰⁷ It adopts soft-law documents in the form of private law-based regulations, but these instruments have a quasi-immediate public law effect being incorporated into domestic legislation soon after.¹⁰⁸ Finally, the regulatory powers are in the hands of an elite committee made up of regulators coming from developed and important countries.¹⁰⁹ All of this raises the classic problem of legitimacy.

What seems to matter most, however, is the regulatory philosophy that is conveyed by IOSCO. Through the “enough disclosure” and “exchange of information” paradigm, IOSCO “regulations” aim at establishing an efficient transnational market by eliminating the externalities generated out of information asymmetries that are likely to distort financial transactions. Ultimately, the goal should be to meet the market’s expectations by achieving general financial stability. On this very point, however, another crucial question arises: is this regulatory model, pushed by a handful of developed regulators, economically efficient in the long run?

¹⁰⁷ See *Membership Categories and Criteria*, *supra* note 13.

¹⁰⁸ See Cassatella, *supra* note 83, at 101.

¹⁰⁹ *The Monitoring Group*, IOSCO, https://www.iosco.org/monitoring_group/ (last visited on Sept. 28, 2012).

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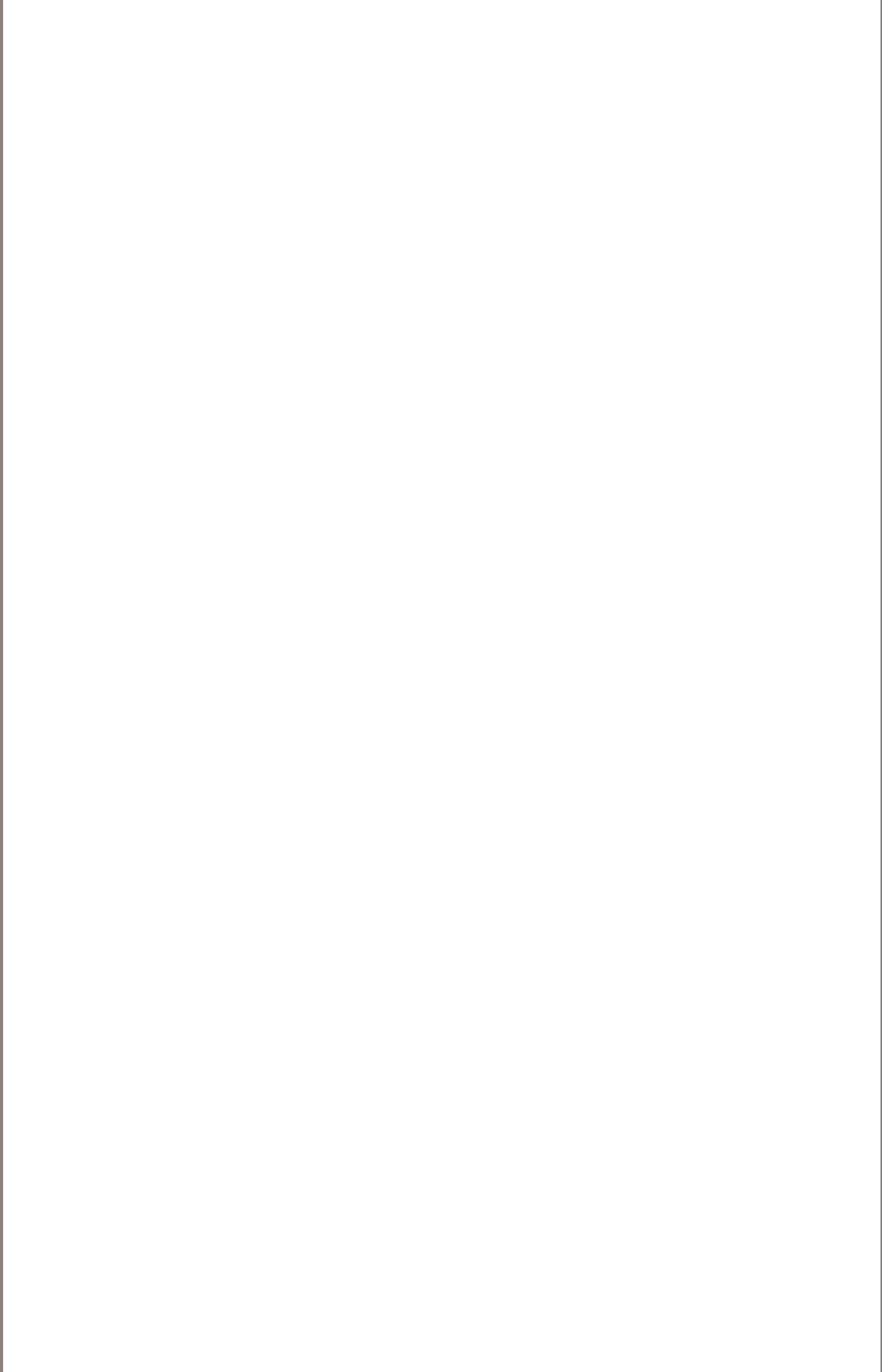
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CHINESE BORDER DISPUTES REVISITED: TOWARD A BETTER INTERDISCIPLINARY SYNTHESIS

*Roda Mushkat**

ABSTRACT

China has long been embroiled in a wide array of territorial disputes and has occasionally flexed its military muscle in the process. Its conduct in such situations has been of great theoretical and practical relevance and has attracted considerable attention from scholars across the socio-legal spectrum. Researchers in the field of international law have carefully surveyed official and semi-official Chinese pronouncements and practices, while their social science counterparts have rigorously dissected key behavioral patterns. This is an inherently complex subject that this two-pronged approach has not yet been able to comprehensively address, however, because scholars engaged in the enterprise have only completed a partial exploration of a multifaceted phenomenon and insufficient interdisciplinary alignment. A potentially richer investigative platform, and more effective conceptual bridge building, may help narrow the gaps in the explanatory architecture.

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I. INTRODUCTION

As is amply documented, China's relations with its neighbors have been characterized by great complexity and have given rise to

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serious practical challenges.¹ This conceptually intricate and strategically vital subject has attracted much attention from students of Chinese history who are fascinated by the notion of an East Asian system of tributary linkages revolving around China—commonly equated with the “Chinese world order.”² The construct possesses Sino-centric underpinnings in that it rests on the premise that China has traditionally sought to establish its centrality and superiority in the regional context. Its proponents have argued that Chinese relations with surrounding states have generally been hierarchical and ironically unequal, two salient features of the country’s domestic structure.³

This seemingly deeply entrenched model of international organization is believed to owe its coherence to the universal pre-eminence of the Son of Heaven.⁴ Rather than entailing the division of territories among sovereign authorities of equal status, it is thought to involve the subordination of all local political units to the central and formidable power of the emperor.⁵ An unambiguous acknowledgement of the inviolability of the principles underlying this configuration and strict adherence to the regional hierarchy embodying them have been absolute requirements for entering into and sustaining meaningful relations with China.⁶

Embracing additional perspectives, which, if incorporated into a multi-dimensional theoretical scheme, may either narrow the formulation’s scope or broaden it, may rework the tributary system formulation. A shrinkage occurs when the focus is confined to the distinct bureaucratic practices relied upon by the foreign policy establishment

¹ See generally Robert A. Scalapino, *China’s Relations with Its Neighbors*, 38 PROC. ACAD. POL. SCI. 63-74 (1991); Ross H. Munro, *China’s Relations with Its Neighbors: Some Observations Regarding Its Strategy and Tactics*, 61 INT’L J. 320-28 (2006); Zheng Fang, *Rethinking the “Tribute System”: Broadening the Conceptual Horizon of Historical East Asian Politics*, 2 CHINESE J. INT’L POL. 545-74 (2009); CHIEN-PENG CHUNG, CHINA’S MULTILATERAL COOPERATION IN ASIA AND THE PACIFIC: INSTITUTIONALIZING BEIJING’S “GOOD NEIGHBOR POLICY” (2010).

² See generally John K. Fairbank & S.Y. Teng, *On the Ch’ing’s Tributary System*, 6 HARV. J. ASIATIC STUD. 135-246 (1941); John K. Fairbank, *Tributary Trade and China’s Relations with the West*, 1 FAR E. Q. 129-49 (1942) [hereinafter *Tributary Trade*]; JOHN K. FAIRBANK, TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS, 1842-1854 (1953) [hereinafter TRADE AND DIPLOMACY]; THE CHINESE WORLD ORDER: TRADITIONAL CHINA’S FOREIGN RELATIONS (John K. Fairbank ed., 1968) [hereinafter CHINESE WORLD ORDER].

³ See generally Fairbank & Teng, *supra* note 2; *Tributary Trade*, *supra* note 2; TRADE AND DIPLOMACY, *supra* note 2; CHINESE WORLD ORDER, *supra* note 2.

⁴ See generally Fairbank & Teng, *supra* note 2

⁵ See generally *id.*

⁶ See generally *id.*; *Tributary Trade*, *supra* note 2; TRADE AND DIPLOMACY, *supra* note 2; CHINESE WORLD ORDER, *supra* note 2.

in its pursuit of an essentially Sino-centric strategy.⁷ An expansion takes place when the hierarchical and uneven tributary structure is turned into an elaborate “institution” that reflects both the philosophical assumptions and organizational rituals pervading the Chinese world order. This in turn shapes relations and ensures cooperation between China and other participants in *Pax Sinica*.⁸ The potential for movement in both directions may enhance the construct’s analytical versatility.

The geographical ambit of the tributary system model has also been redefined in a more limited fashion, rendering it less ambiguous than before. It has been asserted that China’s claim of being ‘ruler of the *tianxia*’ has not signaled a desire to dominate the known world.⁹ Rather, it has been restricted to the areas adjacent to the Chinese empire, roughly corresponding to those currently referred to as Northeast Asia and Southeast Asia.¹⁰ China has not aspired to control States lying outside this sphere of influence and has often treated them as equal.¹¹ Moreover, even East Asian States have not been targeted in a uniform manner, with some deemed to be more crucial than others.¹² This highlights the need to consistently maintain focus on China’s relations with its neighbors and to not be exclusively concerned with superpower ties, currently primarily the United States, but previously the Soviet Union as well.

By the same token, it is historically inappropriate to ascribe static qualities to the tributary structural configuration, whatever its manifestations and scope. There is evidence to suggest that the configuration’s robustness has varied over time, depending on real or apparent Chinese capabilities.¹³ During periods characterized by relative strength vis-à-vis surrounding states, China has tended to embrace the paradigm more vigorously than during phases marked by compar-

⁷ See generally A. DOAK BARNETT, *THE MAKING OF FOREIGN POLICY IN CHINA: STRUCTURE AND PROCESS* (1985).

⁸ *Pax Sinica* means “Chinese Peace” and refers to periods in the country’s history when China maintained the dominant civilization in the region due to its political, economic, military, and cultural power. It is believed that a renewed *Pax Sinica* in central Asia may maintain stability in the region. See generally Yongjin Zhang, *System, Empire, and State in Chinese International Relations*, in *EMPIRES, SYSTEMS, AND STATES: GREAT TRANSFORMATION IN INTERNATIONAL POLITICS* 43-63 (Michael Cox, Tim Dunne & Ken Booth eds., 2002).

⁹ See Zheng, *supra* note 1, at 554-55.

¹⁰ See *id.*

¹¹ See *id.*

¹² An analysis of which East Asian states are more crucial centers on core versus periphery, inner vassal domain versus outer vassal domain, and so forth. See *id.*

¹³ See *id.* at 555-57.

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ative weakness.¹⁴ The corollary is that, other things being equal, relations with neighbors should presently loom large on the scholarly agenda because of Chinese economic dynamism and military resurgence.

Even the strength/weakness dichotomy ought to be employed cautiously, however, as merely one of several potentially relevant influences. Rapid output expansion, coupled with a rising standard of living and the ability to prevail in armed conflict, has not always predisposed China's leaders to act in accordance with the tributary system formulation.¹⁵ Additional variables have entered into their decision calculus including the behavior of other States.¹⁶ The augmented model should arguably extend beyond the socio-cultural realm, which features prominently in the tributary structure paradigm,¹⁷ propelling the study of China's relations with its neighbors in a genuinely multifaceted direction.

The appeal of such an approach has become apparent during the post-1978 reform era, a period of relative strength, but one that has witnessed a discernible, if not wholesale, shift from staunch advocacy of sovereign rights, non-interference, and bilateral ties with hegemonic powers,¹⁸ to a willingness to embrace cooperative multilateralism in the East Asian region and surrounding areas.¹⁹

¹⁴ See *id.*

¹⁵ See Zheng, *supra* note 1, at 556-57.

¹⁶ One of the limitations of the original construct is that it is one-sided, overlooking inputs from non-Chinese sources and two-way interaction. See *id.* at 557.

¹⁷ See *id.* at 557-58.

¹⁸ See generally DAVID SCOTT, CHINA STANDS UP: THE PRC AND THE MODERN INTERNATIONAL SYSTEM (2007); DAVID SCOTT, CHINA AND THE INTERNATIONAL SYSTEM, 1840-1940: POWER, PRESENCE, AND PERCEPTIONS IN A CENTURY OF HUMILIATION (2008); DAVID SCOTT, THE CHINESE CENTURY? THE CHALLENGE TO GLOBAL ORDER (2008); JULIA LOVELL, THE OPIUM WARS: DRUGS, DREAMS, AND THE MAKING OF CHINA (2011).

¹⁹ See generally CHUNG, *supra* note 1; NICHOLAS R. LARDY, CHINA IN THE WORLD ECONOMY (1994); NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY (2002); KENNETH G. LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION TO REFORM (2d ed. 2004); JINGLIAN WU, UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM (2005); BARRY NAUGHTON, THE CHINESE ECONOMY: TRANSITIONS AND GROWTH (2007); LOREN BRANDT & THOMAS G. RAWSKI, CHINA'S GREAT ECONOMIC TRANSFORMATION (2008); CHINA AND THE NEW INTERNATIONAL ORDER (Wang Gungwu & Zheng Yongnian eds., 2008) [hereinafter NEW INTERNATIONAL ORDER]; CHINA TURNS TO MULTILATERALISM: FOREIGN POLICY AND REGIONAL SECURITY (Guoguang Wu & Helen Landowne eds., 2008) [hereinafter CHINA TURNS TO MULTILATERALISM]; TONY SAICH, GOVERNANCE AND POLITICS OF CHINA (3d ed. 2011); GREGORY C. CHOW, CHINA AS A LEADER OF THE WORLD ECONOMY (2012); NICHOLAS R. LARDY, SUSTAINING CHINA'S ECONOMIC GROWTH AFTER THE GLOBAL FINANCIAL CRISIS (2012).

This has culminated in the “Good Neighbor Policy,” which has been pursued actively, rather than merely passively, on several fronts, albeit by no means single-mindedly and unreservedly.²⁰

Chinese interactions with adjacent States are consequently no longer portrayed as a pure zero-sum game and are increasingly presented as an amalgam containing positive-sum elements.²¹ Nor is it just a matter of collaboration or lack thereof. The exploration of China’s relations with its neighbors has inevitably evolved in the process of intellectual expansion into a more complex enterprise, incorporating diverse theoretical perspectives and drawing on an array of fields of academic inquiry, encompassing law and key branches of the social sciences – notably business, economics, politics, and sociology – and at times crossing established disciplinary lines.²²

This reconfiguration is not adequately reflected in surveys of Chinese approaches to border issues, particularly those marked by disagreement and friction. From the middle phase of the reform era to the present, only a handful of in-depth empirical investigations have addressed the subject.²³ They have displayed positive-sum attributes²⁴ and analytical rigor,²⁵ but the output generated does not amount to a critical mass and considerable gaps remain. Some of the research conducted, although conceptually solid, has not been significantly extended beyond conventional legal boundaries.²⁶ Further, social science efforts have largely been directed toward examining specific propositions, some derived from a two-level model of international bargaining.²⁷

²⁰ See generally CHUNG, *supra* note 1.

²¹ See generally *id.*; NEW INTERNATIONAL ORDER, *supra* note 19; CHINA TURNS TO MULTILATERALISM, *supra* note 19.

²² See generally NEW INTERNATIONAL ORDER, *supra* note 19; CHINA TURNS TO MULTILATERALISM, *supra* note 19; CHUNG, *supra* note 1.

²³ See generally BYRON N. TZOU, CHINA AND INTERNATIONAL LAW: THE BOUNDARY DISPUTES (1990); RAMES AMER, THE CHALLENGE OF MANAGING THE BORDER DISPUTES BETWEEN CHINA AND VIETNAM (1998); CHIEN-PENG CHUNG, DOMESTIC POLITICS, INTERNATIONAL BARGAINING, AND CHINA’S TERRITORIAL DISPUTES (2004) [hereinafter CHINA’S TERRITORIAL DISPUTES]; M. TAYLOR FRAVEL, STRONG BORDERS, SECURE NATION: COOPERATION AND CONFLICT IN CHINA’S TERRITORIAL DISPUTES (2008); JUNGWU PAN, TOWARDS A NEW FRAMEWORK FOR PEACEFUL SETTLEMENT OF CHINA’S TERRITORIAL AND BOUNDARY DISPUTES (2009).

²⁴ See generally TZOU, *supra* note 23; PAN, *supra* note 23.

²⁵ See generally CHINA’S TERRITORIAL DISPUTES, *supra* note 23; FRAVEL, *supra* note 23.

²⁶ See generally TZOU, *supra* note 23; PAN, *supra* note 23. *But cf.* FRAVEL, *supra* note 23.

²⁷ See generally CHINA’S TERRITORIAL DISPUTES, *supra* note 23; Chien-peng Chung, *Resolving China’s Island Disputes: A Two-Level Game Analysis*, 12 J. CHINESE POLI. SCI. 49-71 (2007) [hereinafter *Resolving China’s Island Disputes*].

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The corollary is that there is ample scope for delving further into the topic and producing additional insights. This is the aim of the present paper. A descriptive literature review is first performed, in two stages, with a view to outlining the principal strategies followed by scholars in this policy domain and their core findings. An evaluation of the same body of writings is then undertaken in order to provide, in a forward-looking section, potentially new observations and ones that may have not been fully developed by the original authors. The exploration is selective, rather than comprehensive, as this is an ongoing project.

The survey is in the form of a free-flowing narrative rather than a systematically structured one, meaning it is not conducted in accordance with predetermined criteria. The work reviewed consists of all notable, published materials on the topic, but it is modest in volume. Quality should not be equated with quantity, however, as collectively, the studies dissected exhibit such breadth and depth that they may legitimately be portrayed as exhaustive in nature. Moreover, although no attempt is made to provide a comprehensive account, their essence is conveyed here in considerable detail and key dimensions of the picture painted are subjected to close scrutiny. Additional lines of inquiry will doubtless be pursued in the future, but as matters stand there is a sufficiently solid foundation to assess to what extent international law specialists and social researchers fruitfully cross paths in addressing issues of mutual interest.

II. DESCRIPTIVE SURVEY: LEGAL DIMENSION

The dissection of China's border disputes over the past two decades began within a framework bearing the hallmarks of tributary system formulations and ones closely wedded to the notion of a structurally-ingrained defensive Chinese posture. Substantial emphasis was placed on the People's Republic of China's ("PRC") early distinction between bourgeois and socialist international law.²⁸ The former was supposed to primarily govern relations among bourgeois, or capitalist, States and the latter was to govern relations among members of the socialist fraternity.²⁹ The bourgeois variant was perceived as an instrument geared toward serving entrenched capitalist interests.³⁰

In this fundamentally adversarial context, great importance was attached to the virtually unfettered exercise of national sovereignty.³¹ This coincided with the view that the bourgeois states aspired to perpetuate their dominant status by creating one layer of fully

²⁸ See Tzou, *supra* note 23, at 7-9.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.* at 11-13.

sovereign states, and another layer of partially sovereign states.³² The post-Second World War doctrine of limited sovereignty was thus categorically discarded.³³ While the doctrine of absolute sovereignty was not unambiguously embraced, the principle of mutual respect for national sovereignty was vigorously promoted.³⁴

Bourgeois theories pertaining to territorial acquisition were also rejected because they were seen as legitimizing actions underpinned by an asymmetrical distribution of power.³⁵ Adjustments to the status quo, however, were deemed acceptable on certain grounds, notably if they were conducive to the self-determination of colonial peoples and the restoration of historical rights.³⁶ In this and other respects, state equality was regarded as a basic tenet of the international legal order and one expected to guide Chinese foreign policy on all fronts.³⁷ International law today should thus consistently and decisively be employed to that end.³⁸

The applicability of such a doctrinal edifice was put to an empirical test in the Soviet Union, Burma, and India shortly after the Communist Party gained power in 1949.³⁹ The pattern that emerged was not clear-cut; rather, it reflected a mixture of strategic assertiveness and pragmatic accommodation.⁴⁰ For example, while recovery of territories to which historical claims could be established loomed large on the policy agenda, and force was resorted to for this purpose,⁴¹ there was an unmistakable desire to achieve a modicum of regional stability, which was given expression in the good neighbor strategy and the five principles of peaceful coexistence.⁴² Additionally, remarkable flexibility was displayed at times. For example, China did not insist on the prompt return of "lost territory" by Southwestern neighbors and even accepted arrangements such as conceding sovereignty over the Namwan Assigned Tract to Burma in exchange for three small villages.⁴³

Such adaptations in the face of conflicting policy pressures did not prompt pioneering international legal researchers to relegate the

³² See *id.* at 11.

³³ Interestingly, this doctrine was selectively practiced by the Soviet Union. See *id.* at 11-12.

³⁴ See Tzou, *supra* note 23, at 12.

³⁵ See *id.* at 13.

³⁶ See *id.*

³⁷ See *id.* at 13-14.

³⁸ See *id.* at 14-16.

³⁹ See *id.* at 23-44.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* at 29-35.

⁴³ See *id.* at 32.

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vastly important issue of unequal border treaties to the analytical periphery. The question of ceded or leased territories – potentially including, according to some counts, Annam (Vietnam), the Amur and Ussuri river basins, areas north of Ili, Bhutan, Borneo, Burma, Ceylon, Java, Kholand, Nepal, Penhu Archipelago (the Pescadores), Ryukyu (Okinawa), Sulu Archipelago, Taiwan, and Thailand – continued to loom large on the scholarly agenda.⁴⁴ Key unequal treaties – notably, the Outer Mongolian-Soviet, Sino-Burmese, and Sino-Russian Accords – failed to satisfy criteria of “mutual benefit and equality,” and were thus subjected to close scrutiny.⁴⁵

Efforts to abrogate or revise such treaties, prior to and following the 1949 regime change, were carefully documented.⁴⁶ It can be said that, on the whole, they yielded distinctly modest results and, as indicated earlier, occasionally even culminated in possibly unfavorable agreements with scarcely formidable neighbors.⁴⁷ It is reasonable to argue, however, that traditional international law research did not produce, at least initially, an entirely clear and conceptually grounded picture in this respect. Essential facts were presented, but not necessarily in a truly coherent fashion, and theoretical construction was confined to elementary observations.

A less ambiguous and more structurally solid account was provided of the Chinese approach to the procedural and technical dimensions of international treaty formation involving border-related issues. Legal researchers operate comfortably within this intellectual and professional domain, and matters regarding definition, classification, procedure, interpretation and abrogation, third parties, state succession, change of government, estoppel, and acquiescence have been addressed in a detailed and insightful, albeit largely descriptive and non-explanatory, fashion.⁴⁸

A review of the mechanics of border determination, underlying assumptions, and dispute settlement methods was conducted in an equally sound factual manner. Factors impinging on decisions pertaining to boundary demarcation and delimitation – such as former treaties, customary borders, national defense considerations, geographical elements, natural features, cultural influences, and geometrical patterns – were painstakingly highlighted.⁴⁹ Similar care was exercised in identifying the steps relied upon in the process – typically including the signing of a preliminary agreement, setting up a joint committee

⁴⁴ See *id.* at 77.

⁴⁵ See *id.* at 79-83.

⁴⁶ See *id.* at 83-86.

⁴⁷ See *id.*

⁴⁸ See *id.* at 91-112.

⁴⁹ See *id.* at 113-20.

for investigations and survey, erecting permanent boundary markers, concluding a formal treaty, and exchanging a final protocol.⁵⁰

Dispute settlement methods were divided into peaceful methods and those requiring the use of force.⁵¹ The principal techniques placed in the former category were negotiation, inquiry and conciliation, mediation, adjudication, and arbitration.⁵² These institutional channels for pursuing orderly accommodation attracted the bulk of scholarly attention, but recourse to violence, whether proactive or reactive, was not altogether overlooked because it was not an uncommon phenomenon during the 1949-78 revolutionary era, particularly on the Indian and Soviet fronts, where China faced determined and formidable adversaries.⁵³

Certain features of this first, elaborate survey of the internationally relevant Chinese approaches to border management, as seen through a law-centered lens, stood out from an analytical perspective. While China had territorial disputes with virtually all of its numerous neighbors, it was inclined to avoid confrontation, notably of a military nature, and generally preferred to pursue its goals in an orderly fashion, readily engaging in give-and-take via formal and informal channels, provided it did not entail submission to third-party judgment. Nor did it persistently signal its opposition to well-established international legal principles, but instead often acted in accordance with them.⁵⁴

By the same token, an insistence on recovery of lost territories, which regularly surfaced during international interactions, was rather muted. Indeed, there was a frequent willingness to accept prevailing realities, including circumstances where there was discomfort about the historical origins of the status quo. It appears that Chinese policy makers were more concerned about fairness in the process than with fairness in the outcome.⁵⁵ Alternatively, other strategic objectives, such as an overwhelming desire to achieve regional stability, may have overshadowed what proved to be a lesser consideration.

Treaties perceived as blatantly unequal posed considerable difficulties. In the case of the Sino-Russian boundary accords, China demanded that they be acknowledged as unequal and nullified, a step the Soviets, who went no further than offering minor adjustments to the existing configuration, refused to take.⁵⁶ It is noteworthy, how-

⁵⁰ *See id.* at 120-21.

⁵¹ *See id.* at 125-33.

⁵² *See id.* at 125-32.

⁵³ *See id.* at 132-33.

⁵⁴ *See id.* at 71-72.

⁵⁵ *See id.*

⁵⁶ *See id.* at 86.

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ever, that accommodation was reached with Burma without any similar preconditions emerging as a stumbling block.⁵⁷ The overall pattern may consequently defy clear explanation, at least one that possesses a simple structure and leaves no room for 'random' fluctuations.

Notwithstanding evidence supporting arguments emphasizing Chinese pragmatism, there was no lack of manifestations of a reluctance to compromise or abandon certain fundamental positions. As observed earlier, engaging in armed conflict was deemed an acceptable option, although apparently not an attractive one. Additionally, the stance adopted regarding some pivotal issues either deviated from accepted norms or displayed a degree of formalism exceeding that shown by the other parties to the dispute. An example of the former was the claim that international organizations cannot conclude treaties,⁵⁸ coupled with the assertion that only fully sovereign states, as distinct from dependent political entities such as Tibet, enjoy this power.⁵⁹

A significant measure of formalism was exhibited in relation to a broad array of questions. For instance, China contended that to qualify as definitive and complete, an agreement must be mutual,⁶⁰ contain specific provisions regarding border location,⁶¹ and satisfy a wide range of conditions.⁶² By the same token, the agreement ought to be the product of proper negotiations rather than merely consultations,⁶³ signed not initialed,⁶⁴ leave sufficient scope for reservation and abrogation,⁶⁵ and be reinforced by clear signs that it was put into effect.⁶⁶

That said, the distinction between formalism and strategic flexibility motivated by a desire to maximize room for maneuver became blurred on occasion. The posture with respect to reservation and abrogation may thus be viewed as an indication of the latter rather than the former. The proposition that state succession and change of government may readily provide grounds for treaty nullification is another case in point. For example, it was invoked in relation to the McMahon Line drawn when India was under British rule and the Sino-Soviet boundary portrayed as the result of "Tsarist imperialist aggression."⁶⁷ The position that prolonged Chinese "silence" should not be

⁵⁷ See *id.* at 86.

⁵⁸ See *id.* at 93.

⁵⁹ See *id.* at 93-95.

⁶⁰ A unilateral proposal does not amount to a mutual agreement. See *id.* at 93.

⁶¹ See *id.* at 95-97.

⁶² See *id.* at 97-98.

⁶³ See *id.* at 98-99.

⁶⁴ See *id.* at 99-100.

⁶⁵ See *id.* at 101-03.

⁶⁶ See *id.* at 100.

⁶⁷ See *id.* at 104-05.

seen as a reflection of acceptance of the territorial status quo may be looked at from a similar perspective.⁶⁸

The unwillingness to submit to arbitration and adjudication may also be viewed as a manifestation of the quest for strategic flexibility or the pursuit of a high degree of policy autonomy. This is a complicated issue, however, and one with a salient cultural dimension influenced by positioning in the international system. The point is that the Confucian code of ethics prevailing in China has traditionally discouraged people from seeking redress of grievances through legal channels, even when legitimate.⁶⁹ Moreover, Chinese isolation during the revolutionary era and slow integration into the global community subsequently, as well as the sense of mistrust and vulnerability engendered by the Century of Humiliation, led to an ambivalent and cautious attitude toward institutional mechanisms for conflict resolution, such as arbitration and adjudication, because of reliance on third-party judgment and potentially problematic curtailment of strategic discretion, which in the final analysis is no different from loss of flexibility.⁷⁰

The picture painted by legal scholars in the early 1990s was subjected to further scrutiny by students of international law two decades later. Despite the positive note struck in the earlier study, it was observed, without fundamentally challenging the overall validity of the previous assessment, that China still did not resolve all the border disputes with its neighbors. It may have settled the ones with Afghanistan, Burma, Kazakhstan, Kyrgyzstan, Mongolia, Pakistan, Russia, and (partly) Vietnam, but those with India, Japan, and Spratly Islands claimants (Brunei, Malaysia, the Philippines, and Vietnam) remained unresolved, notwithstanding the importance accorded to regional stability and a penchant for pragmatism.⁷¹

The more recent work on the topic has some illuminating technical features. The exclusion of maritime border disputes, commonly seen elsewhere, was scrupulously avoided because it was deemed to be arbitrary and unproductive, given their prevalence and the policy significance of land-sea linkages.⁷² A useful distinction was also drawn between territorial disputes, which entail modes of acquiring title such as discovery, occupation, cessation, and so forth, and boundary disputes, which give rise to issues such as delimitation, demarcation, enforcement, and so forth, although the two categories are so closely

⁶⁸ See *id.* at 105-07.

⁶⁹ See *id.* at 132.

⁷⁰ See generally *id.*

⁷¹ See Pan, *supra* note 23, at 1.

⁷² *Id.* at 2.

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intertwined that seeking rigid separation may not be a fruitful exercise.⁷³

Interestingly, the Chinese approach to international legal matters, including those involving border disputes, as viewed by students of international law toward the end of the first decade of the 21st century, was not entirely devoid of traditional elements which gradually receded into the periphery in earlier writings on the subject. The difference between *Li* (Confucianism) and *Fa* (Legalism) was thus considered to be relevant for the 'new' China, a country fully, or almost fully, integrated into the global community and economy. *Li* refers to the use of moral precepts to regulate human behavior in conformity with natural law.⁷⁴ *Fa* was employed as an instrument to control criminal conduct and was regarded as a mechanism for establishing order rather than a vehicle for the protection of natural rights.⁷⁵

The persistent superiority of *Li* over *Fa*, both in the domestic arena and in international society, was reaffirmed and its hierarchical, tributary-like character re-emphasized. The historic Sino-centric world order was accordingly portrayed as one underpinned by moral virtue and, at the same time, as non-egalitarian, or legitimately dominated by China.⁷⁶ The *Fa* component eroded further over the years, and remains simply a supplement to *Li*.⁷⁷

Traces of traditional influences are seen elsewhere in the present Chinese handling of international legal issues, including boundary conflicts. The preference for informal over formal modes of dispute resolution is assumed to be an enduring phenomenon, attributable to *Li* and its promotion of free dialogue rather than mechanistic adjudication.⁷⁸ Indeed, the Confucian conception of minimum social order envisions the disappearance of both litigation and recourse to judicial intervention, favoring a quest for virtue through processes consistent with the natural order of social life.⁷⁹

On balance, however, greater significance appears to have been accorded to the pragmatic proclivities of the new China. In fact, they are not viewed as entirely 'new' because their manifestations can be witnessed at previous historical junctures, such as in the form of the Qing government's responses to attempts in the mid-19th century by William A.P. Martin, an American missionary and Sinologist, to intro-

⁷³ See generally *id.* at 19-68.

⁷⁴ *Id.* at 71-72.

⁷⁵ *Id.* at 72.

⁷⁶ Pan, *supra* note 23, at 73-74.

⁷⁷ *Id.* at 73.

⁷⁸ *Id.* at 75-76.

⁷⁹ *Id.*

duce international law and its potential merits to the country.⁸⁰ Whatever the origins of the attitude, it is perhaps best reflected in the posture that “all should start from actuality,”⁸¹ which could be construed as providing justification for virtually any policy stance, including on the international legal front.⁸²

Paradoxically, pragmatism was not posited to be always conducive to strict adherence to international law. The latter cannot be wholly situation-dependent (a pattern ultimately associated with pragmatic adaptation) as international legal norms and their application, although not static, do not vary substantially with circumstances.⁸³ If invoked liberally, unalloyed pragmatism may turn international law into a mere extension of foreign policy or international relations, a complex dynamic apparently not absent from traditional and contemporary Chinese international legal discourse and practice.⁸⁴

The inherent tension between a culturally shaped worldview, reinforced by adverse historical experiences, and pragmatic impulses tainted by a tinge of *realpolitik*, was poignantly highlighted by illustrating the subtle interplay between these two factors in China’s ongoing responses to challenges impinging on its sovereignty, a concept intimately wedded to that of territory and at the heart of the Chinese international legal edifice.⁸⁵ On the one hand, attention was drawn to a wide array of official and semi-official documents and statements clearly indicating that China regards sovereignty as “absolute, indivisible, and perpetual”⁸⁶ (which implies a firm commitment to: “(1) sovereign equality; (2) political independence; (3) territorial integrity; (4) exclusive jurisdiction over a territory and the permanent population therein; (5) freedom from external intervention and the corresponding duty of non-intervention in areas of exclusive domestic jurisdiction of other States; (6) freedom to choose political, economic, social, and cultural systems; and (7) dependence of obligations arising from international law and treaties on the consent of States”).⁸⁷ On the other hand, it was emphatically noted that, in practice, the Chinese government has never scrupulously pursued this lofty doctrine.⁸⁸

Evidence offered to support the flexibility displayed in concrete situations included the willingness to negotiate border accords in a va-

⁸⁰ *Id.* at 76-77.

⁸¹ *Id.* at 77.

⁸² *Id.*

⁸³ See Pan, *supra* note 23, at 77-79.

⁸⁴ *Id.*

⁸⁵ See *id.* at 79-80.

⁸⁶ *Id.* at 81.

⁸⁷ *Id.* at 80.

⁸⁸ Pan, *supra* note 23, at 81.

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riety of circumstances on the basis of unequal treaties declared null and void because they entailed a violation of China's sovereignty.⁸⁹ This Chinese duality—juxtaposing rhetorical aspirations with inescapable realities—was attributed to a desire to harmonize conflicting strategic agendas.⁹⁰ It led China in a direction whereby the country endeavored to creatively but problematically reconcile the imperatives of absolute and relative sovereignty or, to express it differently, “to hold up its wieldy shield of ‘absolute sovereignty’ for its political purposes, although the shield has already been perforated.”⁹¹

In this context, clinging to the notion of absolute sovereignty, even if it is characterized by a degree of inconsistency and selectivity, may have negative implications for the settlement of border disputes. The reason is that, by embracing this principle, States inevitably substitute policy for international law.⁹² The resulting configuration is bound to diverge from the ideal of “creating a world ruled by law” rather than one “ruled by power,”⁹³ because attaining this ideal requires States to accept “the reality of relative sovereignty” and comprehensively incorporate international legal norms into their existing dispute resolution framework.⁹⁴

Ambiguity, again the product of divergent cultural-historical forces and strategic orientations, was believed to pervade China's position regarding the sources of international law. Specifically, it was deemed to be significant that the customary element continued to be relegated to the intellectual periphery because it largely developed in the Western world without meaningful contribution from States not closely integrated into the hierarchically and unevenly structured international political system.⁹⁵ To make matters worse, many of the tenets to which it has given rise, such as *uti possidetis*, could legitimately be considered discriminatory and unfair to China and other marginalized countries.⁹⁶

At the same time, when policy expediency dictated otherwise, the Chinese attitude could be more constructive in this respect. Indeed, even during the revolutionary pre-1978 era, it was not uncommon for China to invoke custom-derived international legal principles to further its interests.⁹⁷ Subsequent adjustments on that front have been mostly inspired by shifts in the country's position in the interna-

⁸⁹ *Id.*

⁹⁰ *Id.* at 83.

⁹¹ *Id.* at 82.

⁹² *Id.* at 83.

⁹³ *Id.*

⁹⁴ Pan, *supra* note 23, at 84.

⁹⁵ *See id.* at 85-86.

⁹⁶ *Id.*

⁹⁷ *Id.* at 86.

tional community and corresponding strategic assessments.⁹⁸ This manifested itself in key policy domains, such as the stance toward international courts and tribunals, notably the International Court of Justice (ICJ), versus the post-1971 United Nations General Assembly resolutions.⁹⁹

That said, the transition from revolution to reform was accompanied by a change in the balance between the traditional and pragmatic elements of the strategic equation, as well as a tendency to engage with international law in a distinctly selective or fundamentally broad-based fashion.¹⁰⁰ To the extent that the international legal architecture invariably possesses deep ideological underpinnings, such rebalancing was inevitable due to the marked ideological transformation that took place following the death of Mao Zedong in 1976 and the consolidation of power in the hands of liberally-minded leaders like Deng Xiaoping.¹⁰¹ *Fa* started playing a more prominent role in foreign policy decision-making in subsequent years, albeit without completely overshadowing *Li*.¹⁰²

In the new reformist climate, settling boundary disputes, preferably through peaceful means, became an economic imperative for China, but also increasingly so for the other parties involved given their growing propensity to embrace liberalization and to engage in globalization.¹⁰³ Challenging the territorial status quo and pursuing revisionist goals proved to be a potentially costly proposition not merely in terms of the disruption caused, but also in terms of foregone opportunities related to their inability to enter into cooperative cross-border ventures, notably in the form of joint development projects.¹⁰⁴ This evolving pattern has reinforced the trend toward greater reliance on established international legal mechanisms, including customary practices, in addressing boundary disputes.¹⁰⁵

The most prominent manifestation of the shift was a less adverse posture toward the ICJ, although not so much that China accepted its compulsory jurisdiction.¹⁰⁶ Concrete steps were taken in the late-1980s and mid-1990s to give expression to this selectively more constructive stance.¹⁰⁷ Symbolically, the Chinese government sent a powerful accommodative signal in 1994 when the ICJ elected Shi

⁹⁸ *Id.*

⁹⁹ *See id.* at 86-88.

¹⁰⁰ *See Pan, supra* note 23, at 91-94.

¹⁰¹ *Id.*

¹⁰² *See id.* at 94-98.

¹⁰³ *See id.* at 98-104.

¹⁰⁴ *See id.* at 104-07.

¹⁰⁵ *Id.*

¹⁰⁶ *Pan, supra* note 23, at 119.

¹⁰⁷ *Id.*

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Jiuyong, a leading international law authority, as a judge.¹⁰⁸ In the following years, China's legal experts began to consistently display an appreciation for the functions performed by the ICJ and to recognize the role it could play in facilitating the resolution of international disputes.¹⁰⁹

Another significant development was the Chinese readiness to embrace the 1982 United Nations Convention on the Law of the Sea, which China ratified in 1996.¹¹⁰ This instrument prescribes mandatory jurisdiction for conflicts stemming from the interpretation and application of its terms. Indeed, the 1982 UNCLOS features one of the strongest commitments to compulsory arbitration and adjudication in the realm of international law.¹¹¹ In keeping with the notion that any disputes between parties to the Convention should be settled by any peaceful means of their choice, it provides that no exceptions or reservations may be made to this principle unless expressly permitted by the Convention's other articles.¹¹² Stubborn Sino-Japanese territorial conflicts prompted China to seek ways to qualify its willingness to submit itself to dispute settlement procedures within this restrictive framework, but merely in a limited fashion, apparently suggesting yet again that *Fa* was gradually gaining the upper hand in its 'struggle' with *Li*.¹¹³

III. DESCRIPTIVE SURVEY: SOCIAL SCIENCE DIMENSION

International legal literature constitutes the richest source of information regarding Chinese border disputes as, by virtue of its nature, the subject is often addressed by scholars in the field, in one form or another, in as comprehensive a manner as conventional methods allow. This is a topic, however, whose understanding may be enhanced by insights obtained by means typically employed by researchers associated with other academic disciplines, notably the social sciences, because students of international law tend to confine themselves to the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 120.

¹¹⁰ *Id.* at 122; see also United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹¹¹ See UNCLOS, *supra* note 110.

¹¹² *Id.* part XV, art. 279 and part XV, art. 282.

¹¹³ See Pan, *supra* note 23, at 123. See generally Suzanne Ogden, *Sovereignty and International Law: The Perspective of the People's Republic of China*, 7 N.Y.U. J. INT'L L. & POL. 1-32 (1974); Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267-75 (2000); KEYUAN ZOU, CHINESE LEGAL REFORM: TOWARD THE RULE OF LAW (2006); Wang Zonglai & Hu Bin, *China's Reform and Opening-up and International Law*, 9 CHINESE J. INT'L L. 193-203 (2010); XUE HAQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE, AND INTERNATIONAL LAW (2012).

formal side of the picture. When they venture further, their explorations generally lack sufficient analytical complexity and are rather selective.

Two social scientists have examined China's border disputes in substantial detail and in a conceptually rigorous fashion,¹¹⁴ one across a wider historical spectrum and within a broader theoretical framework than the other,¹¹⁵ but both productively so. The more multifaceted study provides a painstaking dissection of twenty-three post-1949 Chinese boundary conflicts, both at land and at sea.¹¹⁶ Surprisingly, extensive empirical evidence was presented to convincingly show that in seventeen of these episodes, China sought compromise and did not refrain from offering concessions.¹¹⁷ The flexibility displayed was quite remarkable, as the territory gained in the final settlement normally amounted to less than half of that which was contested.¹¹⁸

The far-reaching compromises struck with often recalcitrant neighbors resulted in border accords in which China relinquished claims to more than 3.4 million square kilometers of land that were fully controlled by the Qing Empire at its height in the early nineteenth century, for all intents and purposes a staggering volte-face for a once-great power proudly re-emerging following a decades-long decline and international marginalization.¹¹⁹ Again the facts are difficult to reconcile with beliefs commonly held in this respect for, "In total, the People's Republic of China. . .contested roughly 238,000 square kilometers or just seven percent of the territory once part of the Qing."¹²⁰

Nevertheless, it cannot be overlooked that the Chinese engaged in armed confrontation in six of the border disputes explored.¹²¹ Some of these conflicts, notably the ones with India and Vietnam, were intensely violent.¹²² Others, such as those over Taiwan in the 1950s and with the Soviet Union in the late 1960s, occurred at the height of the Cold War and involved threats of recourse to nuclear weapons.¹²³ That said, the belligerent rhetoric and military maneuvers yielded scanty

¹¹⁴ See generally FRAVEL, *supra* note 23.

¹¹⁵ See generally CHINA'S TERRITORIAL DISPUTES, *supra* note 23; *Resolving China's Island Disputes*, *supra* note 27.

¹¹⁶ FRAVEL, *supra* note 23, at 321–34 (providing an overview of China's territorial disputes).

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.*

¹¹⁹ See *id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See FRAVEL, *supra* note 23, at 173–219.

¹²³ See *id.*

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benefits for China.¹²⁴ Despite its exertions and the inevitable costs incurred, China gained little land that it did not control before the outbreak of hostilities.¹²⁵

These variations in Chinese behavior went largely unnoticed in the international legal community, which typically does not delve deeply into the dynamics of State conduct and inter-State interactions. Social scientists, on the other hand, found this pattern theoretically intriguing.¹²⁶ Leading schools of thought in the field of international relations, such as realism and neo-realism, would not effectively account for most of the initiatives and responses observed in the 23-case sample.¹²⁷ After all, one could legitimately “expect a [S]tate with China’s characteristics to be uncompromising and prone to using force in international disputes, not conciliatory,”¹²⁸ yet this regional power “rarely exploited its military superiority to bargain hard for the territory it claims or to seize it by force.”¹²⁹

Nor did the growth of Chinese strategic capabilities post-1949, and even more so post-1978, lead to greater assertiveness vis-à-vis neighboring countries, implying that the accumulation of relative power may not always have a corresponding impact on State behavior.¹³⁰ Analytical propositions employing key nationalistic and institutional frameworks proved equally problematic. The fact is that the Chinese were “quite willing to offer territorial concessions despite historical legacies of external victimization and territorial dismemberment under the Qing.”¹³¹ By the same token, China “escalated only a minority of its territorial conflicts even with a highly centralized, authoritarian political system that places few internal constraints on the use of force.”¹³²

Chinese state conduct in this specific domain may of course be viewed simply as a conceptual outlier, not consistent with overall historical trends and thus requiring no further theoretical elaboration. However, this is too large a sample, extending over too long a period, and involving too many imponderables, to be relegated to the analytical periphery.¹³³ There is also some variation within the set, with seventeen seemingly baffling cases versus six less puzzling ones.¹³⁴ The

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ FRAVEL, *supra* note 23, at 2.

¹²⁹ *Id.* at 2.

¹³⁰ *See id.*

¹³¹ *Id.* at 2.

¹³² *Id.* at 2.

¹³³ *See* FRAVEL, *supra* note 23, at 2–4.

¹³⁴ *See id.*

corollary is that this is a configuration worth examining from a methodical, albeit perhaps not mainstream, social science perspective.¹³⁵

Indeed, the systematic, predominantly quantitative dissection of border disputes is a well-established undertaking that has generated substantial insights.¹³⁶ It has been noted that alliance partners and democracies embroiled in territorial conflicts are more inclined to compromise and resolve their disputes peacefully than non-aligned and non-democratic States.¹³⁷ Additionally, all actors in such circumstances are more likely to resort to violence if the contested territory is of significant strategic value for economic, national security, political, social, or symbolic reasons.¹³⁸ Finally, it has been shown that capabilities matter, or that relatively strong military states tend to resort to coercion more readily than relatively weak ones.¹³⁹

The explanatory potential of these seemingly compelling observations was deemed modest in the quest for an understanding of China's behavior regarding border disputes.¹⁴⁰ It was concluded that this was due to an overly heavy emphasis on factors contributing to conflict escalation and stabilization, or the features of the conflict itself, rather than those factors impinging on State decisions or the incentives driving the parties to the dispute in one direction or another.¹⁴¹ As amply reflected in Chinese conduct toward Taiwan, the latter may inspire opposing players to delay tactics, cooperation, or confrontation if a rationalist and state-centric conceptual framework is embraced, and assuming that the State is a unitary actor.¹⁴²

No elaborate account of delaying tactics was provided, as this was not the principal objective of the study, although some light was shed on how they were crafted and deployed during the revolutionary and reform eras.¹⁴³ A four-dimensional scheme was proposed, on the other hand, to explain what might tilt parties embroiled in territorial conflicts toward either cooperation or escalation.¹⁴⁴ The dimensions singled out were the value of contested land, claim strength in dispute,

¹³⁵ *See id.*

¹³⁶ *See id.* at 10.

¹³⁷ *See id.* at 10–11.

¹³⁸ *See id.* at 11.

¹³⁹ *See id.* *See generally* GARY GOERTZ & PAUL F. DIEHL, TERRITORIAL CHANGES AND INTERNATIONAL CONFLICT (1992) (describing the relationship between states' military strength and territorial disputes).

¹⁴⁰ *Id.*

¹⁴¹ *See* FRAVEL, *supra* note 23, at 11.

¹⁴² *See id.* at 12–13.

¹⁴³ *See, e.g., id.* at 134–35, 222, 252.

¹⁴⁴ *See id.* at 38–39.

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the security environment, and scope conditions.¹⁴⁵ The first three variables are viewed as pivotal and explored in substantial detail, both generally and in this specific geographic and historical context.¹⁴⁶

Cooperation may thus materialize when land is regarded as less valuable; a state's relative position in a dispute is stable, strong, or strengthening; when it faces neither internal nor external threats to its security; and when an opponent is able to provide military, economic, or diplomatic support.¹⁴⁷ On the contrary, conflict may escalate when land is seen as more valuable; when a state's position in a dispute is declining or, alternatively, when it suddenly and temporarily improves; when it faces internal or external threats to its security; and when it is able to execute a limited-aims operation without suffering destruction of its entire armed forces.¹⁴⁸

The distinction between the dimensions relied upon here to account for variations in China's handling of its border conflicts and those identified in previous empirical work, such as the value of contested land, was perhaps not always made sufficiently clear. But, unlike elsewhere, these dimensions were explicitly incorporated into a decision-oriented model acknowledging the State's potential to engage in discretionary action grounded in cost-benefit calculus. Importantly, the author was also able to demonstrate, even if for the most part qualitatively, that the four-dimensional construct may adequately explain a Chinese propensity to employ, or refrain from employing, coercion in territorial disputes.¹⁴⁹

Nevertheless, despite the lengths to which the author goes to counter possible methodological criticisms, the extensive and rigorous survey has a number of problematic facets. Notably, the parties to the dispute are rather loosely connected. For all intents and purposes, each party formulates its strategies independently of the other. The picture that emerges thus sheds greater light on foreign policy decision-making than international relations. By the same token, in accordance with the unitary actor hypothesis, domestic forces in China and

¹⁴⁵ See *id.* at 37–39.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 38.

¹⁴⁸ See *id.*

¹⁴⁹ See generally *id.* at 70–299; M. Taylor Fravel, *Securing Borders: China's Doctrine and Force Structure for Frontier Defense*, 30 J. STRATEGIC STUD. 705 (2007); M. Taylor Fravel, *Explaining Stability in the Senkaku (Diaoyu) Dispute*, in GETTING THE TRIANGLE STRAIGHT: MANAGING CHINA-JAPAN-US RELATIONS 144 (Gerald Curtis, Ryosei Kokubun & Wang Jisi eds., 2010); M. Taylor Fravel, *China's Rise: Assessing China's Potential for Territorial Expansion*, 12 INT'L STUD. REV. 505 (2010); Alstair I. Johnston, *China's Militarized Interstate Dispute Behavior, 1948–1992: A First Cut at the Data*, 153 CHINA Q. 1 (1998).

in neighboring countries are accorded scant attention and are effectively ruled out as a significant element in conflict dynamics.

These deficiencies, or deliberate omissions, were addressed in another social science research project, albeit one less comprehensive in scope.¹⁵⁰ The explicit aim of the project was to pinpoint the interplay between influences emanating from external and internal arenas in the process of dispute settlement, peaceful or otherwise, involving opposing territorial claims.¹⁵¹ The guiding assumption was that

the critical theoretical task confronting scholars in the field of international politics is to develop generalizing propositions about state behavior based on the premise that foreign policy leaders are attentive to the incentives and constraints generated by both their domestic and international environment. . . [and that] powerful explanations of international conflict behavior cannot be derived from theoretical models that fail to consider the simultaneous impact of both domestic and international-level variables.¹⁵²

The specific analytical vehicle employed for this purpose was developed and tested by a leading American political scientist¹⁵³ and explored further, both conceptually and empirically, by other social scientists and socio-legal researchers,¹⁵⁴ some of whom focused on the Chinese context.¹⁵⁵ It is commonly referred to as the “two-level game”

¹⁵⁰ See generally CHINA'S TERRITORIAL DISPUTES, *supra* note 23; *Resolving China's Island Disputes*, *supra* note 27.

¹⁵¹ *Id.*

¹⁵² PAUL K. HUTH, *STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT* 7 (1996).

¹⁵³ See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

¹⁵⁴ See generally DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993); Howard P. Lehman & Jennifer L. McCoy, *The Dynamics of the Two-Level Bargaining Game: The 1988 Brazilian Debt Negotiations*, 44 WORLD POL. 600 (1992); Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127 (2010).

¹⁵⁵ See generally Krishna P. Jayakar, *The United States-China Copyright Dispute: A Two-Level Games Analysis*, 2 COMM. L. & POL'Y 527 (1997); HONGYING WANG & MATTHIAS KAELBERER, *THE TWO-LEVEL GAME OF CHINA'S EXCHANGE RATE POLICY* (2006); Albert S. Yee, *Domestic Support Ratios in Two-Level Bargaining: The US-China WTO Negotiations*, 4 CHINA REV. 129 (2004); Albert S. Yee, *Semantic Ambiguity and Joint Deflections in the Hainan Negotiations*, 2 CHINA: INT'L J. 53 (2004).

model.¹⁵⁶ It falls squarely into the rationalist tradition, which does not lack followers in the field of international law.¹⁵⁷ One key feature, however, is that it relaxes the theoretical requirement that States be treated as unitary actors, or discards the notion that they may realistically be portrayed as such, by introducing domestic groups into the foreign policy decision-making dynamics in general and also in examining China's initiatives and responses in various international settings.¹⁵⁸

Bargaining between states that are embroiled in border disputes or other conflicts is assumed to unfold in both international (Level I) and domestic (Level II) arenas.¹⁵⁹ Agents of the state and negotiators on both sides are engaged in a complex process, endeavoring to reconcile, within an often tight "bargaining space" or "area of compromise," divergent national interests and demands of domestic constituencies.¹⁶⁰ It is posited that any Level I agreement must ultimately be endorsed by Level II groups.¹⁶¹ This unique feature provides the vital theoretical link, often missing elsewhere, between the external and internal drivers that impinge on international bargaining outcomes.

The concept of the win-set is at the heart of the construct. It is the cluster of all potential Level I accords capable of attracting sufficient support, or "winning," at Level II.¹⁶² The fundamental hypothesis put forward is that the larger the win-set of a negotiator, the greater the room for maneuver he or she enjoys and the more substantial the concessions that may be extracted from him or her by the other side.¹⁶³ By contrast, and perhaps paradoxically, a small win-set may

¹⁵⁶ See generally CHINA'S TERRITORIAL DISPUTES, *supra* note 23; *Resolving China's Island Disputes*, *supra* note 27.

¹⁵⁷ See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008).

¹⁵⁸ See generally BRUCE B. DE MESQUITA, DAVID NEWMAN & ALVIN RABUSHKA, *FORECASTING POLITICAL EVENTS: THE FUTURE OF HONG KONG* (1985); BRUCE B. DE MESQUITA, DAVID NEWMAN & ALVIN RABUSHKA, *RED FLAG OVER HONG KONG* (1996); Miron Mushkat & Roda Mushkat, *The Political Economy of International Legal Compliance: Pre-1997 Predictions and Post-1997 Realities in Hong Kong*, 10 U.C. DAVIS. J. INT'L L. & POL'Y 229 (2004); Miron Mushkat & Roda Mushkat, *International Law and Game Theory: A Marriage of Convenience or Strange Bedfellows?*, 2 N.Z. Y.B. INT'L L. 101 (2005).

¹⁵⁹ See, e.g., CHINA'S TERRITORIAL DISPUTES, *supra* note 23, at 16.

¹⁶⁰ See *id.* at 16-18.

¹⁶¹ See *id.* at 16.

¹⁶² See *id.*

¹⁶³ See *id.*

prove to be advantageous in such circumstances because it effectively ties a negotiator's hands and implies that he or she is in no position to compromise.¹⁶⁴ Of course, a virtually non-existent win-set is a recipe for failure since domestic endorsement is, by definition, impossible to secure.¹⁶⁵

Three additional key propositions underpin the model. First, the size of the win-set depends on Level II societal preferences and informal coalitions:¹⁶⁶ the more heterogeneous the preferences, the more difficult it is to satisfy them.¹⁶⁷ By the same token, the less stable the domestic coalition structure, due for example to the presence of a strong "isolationist" camp, the less smooth the bridge-building effort.¹⁶⁸ Second, the size of the win-set depends on the nature of domestic political institutions.¹⁶⁹ For example, the Japanese propensity to seek as broad a consensus as possible prior to policy action militates against strategic flexibility.¹⁷⁰ Third, the size of the win-set depends on the strategies of Level I negotiators:¹⁷¹ a negotiator who enjoys high standing at home is more likely to obtain support for his or her foreign policy initiatives.¹⁷² Negotiators also have reason to seek ways to boost the popularity of their counterparts since this increases the size of the other side's win-set and, consequently, their own bargaining power.¹⁷³ This in turn makes "reverberation," or the ability of negotiators and leaders to affect the preferences of their adversaries through positive and negative incentives, a crucial factor in the two-level game.¹⁷⁴

The effectiveness of this elaborate construct was examined by scrutinizing its fit with the facts observed in three protracted and stubborn Chinese territorial conflicts: the Diaoyutai/Tiaoyutai/Senkaku Islands dispute, the Zhenbao/Chenpao/Damansky Islands dispute, and the McMahon Line/Aksai Chin dispute.¹⁷⁵ This is a rather modest sample, compared with the 23-case analysis undertaken in the other wide-ranging social science survey of China's handling of its territorial conflicts. As indicated, however, all the disputes dissected were protracted and stubborn in nature. By extension, each

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See CHINA'S TERRITORIAL DISPUTES, supra note 23, at 20-22.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* at 22.

¹⁷⁰ *See id.*

¹⁷¹ *See CHINA'S TERRITORIAL DISPUTES, supra note 23, at 23.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See id.; Resolving China's Island Disputes, supra note 27.*

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could be regarded as a series of interrelated cases, featuring considerable dynamics and variation over time.

Overall, it can be said that the model performed satisfactorily across the sample. Some gaps were inevitably highlighted. The active role of leadership in international negotiations may have thus been underestimated.¹⁷⁶ By the same token, insufficient emphasis may have been placed on the disruptive capacity of highly organized domestic forces determined to forestall progress toward a viable compromise.¹⁷⁷ These limitations notwithstanding, external-internal linkages in the dispute settlement process were traced with a degree of precision, fruitfully complementing analytical endeavors strictly focused on the external side of the picture.

IV. EVALUATION

Rather surprisingly, Chinese territorial conflicts, which are without a doubt of substantial academic and policy interest, have not attracted great scholarly attention. The number of in-depth studies produced on the subject is relatively modest. Fortunately, those studies that do exist are broad in scope and meticulously executed. Moreover, the insights generated emanate from two distinct, yet, in many respects, complementary disciplinary sources: law and social sciences. The conceptual pattern that emerges upon distilling their essence and reviewing them sequentially thus appears to convey a certain sense of completeness and wholeness.

Legal research is typically inductive and aims at theory-building.¹⁷⁸ It evolves from an observation to a configuration to a tentative hypothesis to a theory.¹⁷⁹ Social science inquiry tends, at least in the case of the "harder" disciplines, to be deductive or to be concerned with theory-testing.¹⁸⁰ It proceeds from a theory to a hypothesis to an observation to a confirmation.¹⁸¹ International law and international re-

¹⁷⁶ See *id.* at 161.

¹⁷⁷ See *id.*

¹⁷⁸ See DAVID DE VAUS, RESEARCH DESIGN IN SOCIAL RESEARCH 223 (2001); ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 38-39 (4th ed. 2009); EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 56-58 (12th ed. 2010); EARL BABBIE, THE BASICS OF SOCIAL RESEARCH 56-58 (5th ed. 2011).

¹⁷⁹ See DE VAUS, *supra* note 178, at 263-66; YIN, *supra* note 178; BABBIE, THE PRACTICE OF SOCIAL RESEARCH, *supra* note 178; BABBIE, THE BASICS OF SOCIAL RESEARCH, *supra* note 178.

¹⁸⁰ See DE VAUS, *supra* note 178, at 253-62; YIN, *supra* note 178, at 35-38; BABBIE, THE PRACTICE OF SOCIAL RESEARCH, *supra* note 178, at 53-56; BABBIE, THE BASICS OF SOCIAL RESEARCH, *supra* note 178, at 54-56.

¹⁸¹ See YIN, *supra* note 178, at 35-38; BABBIE, THE PRACTICE OF SOCIAL RESEARCH, *supra* note 178; BABBIE, THE BASICS OF SOCIAL RESEARCH, *supra* note 178.

lations students who have methodically explored China's border disputes have followed these divergent paths.

Theory-building and theory-testing are undertakings that vary considerably in their degree of contribution to knowledge. The former encompasses an attempt to replicate previously demonstrated effects, an examination of effects that have been the subject of previous theorizing, the introduction of a new mediator or moderator to an existing relationship or process, an examination of a previously unexplored relationship or process, and the introduction of a new construct or a significant re-conceptualization of an existing one.¹⁸² The latter involves blending predictions with logical speculation, references to past findings, existing conceptual arguments, existing models, diagrams, or figures, and existing theory.¹⁸³ Researchers engaged in such activities may consequently be classified as reporters, qualifiers, builders, testers, and expanders.¹⁸⁴ It is fair to portray the legal scholars whose work has been surveyed here as mostly reporters, qualifiers, and tentative builders and their social science counterparts as determined testers, although this is merely one dimension of an intricate picture.

Reporting, qualification, and tentative building are by no means trivial pursuits. In this particular instance, it can be said that substantial information was produced regarding the norms relating to Chinese practices with respect to border disputes, their origins, and evolution. This is a significant contribution, given that norms are accorded such scant attention in the contemporary academic literature on public policy making,¹⁸⁵ including that pertaining to foreign affairs,¹⁸⁶ with international law remaining an exception to the rule.¹⁸⁷ There is considerable evidence to suggest that norms do play a non-

¹⁸² See Jason A. Colquitt & Cindy P. Zapata-Phelan, *Trends in Theory Building and Theory Testing: A Five-Decade Study of the Academy of Management Journal*, 50 *ACAD. MGMT. J.* 1281, 1282-85 (2007).

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See, e.g., MICHAEL HOWLETT ET AL., *STUDYING PUBLIC POLICY: POLICY CYCLES AND POLICY SUBSYSTEMS* (3d ed. 2009).

¹⁸⁶ See, e.g., ALEX MINTZ & KARL R. DEROUEN, *UNDERSTANDING FOREIGN POLICY DECISION MAKING* (2010).

¹⁸⁷ See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); OONNA A. HATHAWAY & HAROLD H. KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* (2005).

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negligible role in the evolution of territorial conflicts,¹⁸⁸ the corollary being that their omission from factual accounts and explanatory schemes may be a methodologically problematic step.

The work of legal scholars on China's border disputes, while undertaken at different junctures, has another fundamentally attractive feature in that it is characterized by a fairly high degree of consistency. Clearly, official and semi-official ideas seldom stand still, notably in a dynamic institutional environment such as that witnessed in modern Chinese society.¹⁸⁹ Some divergences are thus bound to manifest themselves in writings spanning two decades and no two authors are likely to follow precisely the same path in dissecting such a complex subject. Still, those authors whose research has been reviewed here paint a coherent picture devoid of substantial variations. In technical parlance, it may be marked by a significant measure of descriptive validity.¹⁹⁰

Moreover, the norms identified as relevant in this context were not portrayed as cast in stone, let alone inviolable. Rather, a certain sense of ambiguity and fluidity was conveyed. This analytical posture is worth highlighting because it accords with the recent trend in the academic literature to acknowledge—indeed, strongly emphasize—the elastic nature of international legal norms and the behavioral consequences of that pattern.¹⁹¹ Such a conceptual re-adjustment has shifted attention toward interpretation and the manner in which it impinges on international realities, as “[i]nterpretation is pervasively determinative of what happens to legal rules when they are out in the world.”¹⁹²

That said, as indicated earlier, the largely international law-inspired perspective on China's management of its border disputes is inherently restrictive due to its unavoidably limited scope and its heavy focus on principles, as distinct from action. The forces shaping norms are thus selectively outlined, rather than comprehensively explored. Perhaps too much is assumed as cultural, historical, and political fact or taken for granted instead of being exposed to critical scrutiny. By the same token, the relationship between norms and actual State conduct remains somewhat vague despite the extensive re-

¹⁸⁸ See, e.g., GOERTZ & DIEHL, *supra* note 139, at 69-78; GARY GOERTZ, INTERNATIONAL NORMS AND DECISION MAKING: A PUNCTUATED EQUILIBRIUM MODEL (2003) [hereinafter INTERNATIONAL NORMS AND DECISION MAKING].

¹⁸⁹ See generally LIEBERTHAL, *supra* note 19; SAICH, *supra* note 19.

¹⁹⁰ See Joseph A. Maxwell, *Understanding and Validity in Qualitative Research*, 62 HARV. EDUC. REV. 279, 287-300 (1992).

¹⁹¹ See Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y REV. 127, 127-36 (2010).

¹⁹² *Id.* at 135.

search undertaken. These are gaps that behaviorally inclined social scientists may be able to narrow.

Fortunately, Chinese border disputes constitute a fertile field of inquiry that has not been overlooked by behaviorally oriented scholars. Two book-long studies and a number of solid articles, surveyed in the previous section, have been published on the topic from a distinct social science standpoint. They rest on a robust empirical foundation that consists of a detailed examination of virtually every territorial conflict in which China has been involved. The qualitative nature of the investigative endeavor does not detract from its merit, even if research in this area increasingly relies on quantitative tools,¹⁹³ because of the meticulous matching of theoretical propositions and historical data across a wide array of cases.

Nor should this work be viewed as decoupled from the theoretical mainstream. For instance, the power structure, or States' relative strength, is a variable that features prominently in almost all writings on border disputes, whether they possess qualitative or quantitative underpinnings.¹⁹⁴ The value of contested land is just as broadly embraced in behavioral inquiry centered on territorial conflicts, although it is often couched in slightly different terms, such as resource scarcity.¹⁹⁵ Even the more esoteric two-level game model can be said to loom quite large on the research agenda of economists, political scientists, and sociologists concerned with the dynamics of inter-State bargaining and negotiations, as evidenced by the substantial volume of publications on the subject, including from an international legal angle.¹⁹⁶

Nevertheless, the social science analytical facade is not without chinks, both methodological and theoretical, which cannot be entirely eliminated by integrating it with its legal counterpart. Perhaps most problematic is the treatment of each case dissected as a discrete episode. Some of the cases stretch over a long period of time, but this does not obviate the need for adopting a research strategy, or a design, that systematically incorporates a temporal dimension. This is common practice in methodologically driven case studies,¹⁹⁷ and an approach that is often resorted to, and formally so, by social scientists who focus on the evolution of territorial conflicts.¹⁹⁸

¹⁹³ See, e.g., GOERTZ & DIEHL, *supra* note 139; RONGXING GUO, CROSS-BORDER RESOURCE MANAGEMENT: THEORY AND PRACTICE (2005).

¹⁹⁴ See, e.g., GOERTZ & DIEHL, *supra* note 139, at 89, 92-93, 96-97, 99, 119-20, 123-24, 128-30.

¹⁹⁵ See, e.g., GUO, *supra* note 193, at 107-30.

¹⁹⁶ See, e.g., Trachtman, *supra* 154.

¹⁹⁷ See, e.g., DE VAUS, *supra* note 178, at 260-63; JOHN GERRING, CASE STUDY RESEARCH: PRINCIPLES AND PRACTICES 152-64 (2007).

¹⁹⁸ See, e.g., GOERTZ AND DIEHL, *supra* note 139, at 93.

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The absence of clear linkages between cases, or a proper longitudinal perspective, gives rise to possible theoretical difficulties. The corollary inevitably is that Chinese foreign policy is wholly dependent on case-specific situational factors and lacks strong continuity, let alone powerful inertia. Another implication is that it does not periodically change in a manner that may be explained within a broad, coherent, and time-sensitive analytical framework. This is inconsistent with the thrust of mainstream theoretical writings on China's external adaptation, which generally place considerable emphasis on path dependence coupled with occasional fundamental readjustments.¹⁹⁹ To the extent that social science investigations centered on Chinese border disputes significantly diverge from this trend, they are characterized by insufficient convergent validity.²⁰⁰

¹⁹⁹ See, e.g., CHIH-YU SHIH, *THE SPIRIT OF CHINESE FOREIGN POLICY: A PSYCHOCULTURAL VIEW* (1990); CHINESE FOREIGN POLICY: THEORY AND PRACTICE (Thomas W. Robinson & David Shambaugh eds., 1994); ALASTAIR I. JOHNSTON, *CULTURAL REALISM: STRATEGIC CULTURE AND GRAND STRATEGY IN CHINESE HISTORY* (1995); QUANSHENG ZHAO, *INTERPRETING CHINESE FOREIGN POLICY: THE MACRO-MICRO LINKAGE APPROACH* (1996); CHINA AND THE WORLD: CHINESE FOREIGN POLICY FACES NEW MILLENNIUM CHALLENGES (Samuel S. Kim ed., 4th ed. 1998); GERALD CHAN, *CHINESE PERSPECTIVES ON INTERNATIONAL RELATIONS: A FRAMEWORK FOR ANALYSIS* (1999); LU NING, *THE DYNAMICS OF FOREIGN-POLICY DECISION MAKING IN CHINA* (2d ed. 2000); CHINA'S INTERNATIONAL RELATIONS IN THE 21ST CENTURY: DYNAMICS OF PARADIGM SHIFTS (Weixing Hu et al. eds., 2000); THE MAKING OF CHINESE FOREIGN AND SECURITY POLICY IN THE ERA OF REFORM, 1978-2000 (David M. Lampton ed., 2001); CHINESE FOREIGN POLICY IN TRANSITION (Guoli Liu ed., 2004); CHINESE FOREIGN POLICY: PRAGMATISM AND STRATEGIC BEHAVIOR (Suisheng Zhao ed., 2004); CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY (Yong Deng & Fei-Ling Wang eds., 2005); AVERY GOLDSTEIN, *RISING TO THE CHALLENGE: CHINA'S GRAND STRATEGY AND INTERNATIONAL SECURITY* (2005); YUFAN HAO & LIN SU, *CHINA'S FOREIGN POLICY MAKING: SOCIETAL FORCE AND CHINESE AMERICAN POLICY* (2005); NEW DIRECTIONS IN THE STUDY OF CHINA'S FOREIGN POLICY (Alastair I. Johnston & Robert S. Ross eds., 2006); NEW DIMENSIONS OF CHINESE FOREIGN POLICY (Guo Sujian & Shiping Hua eds., 2007); CHINA'S NEW DIPLOMACY: TACTICAL OR FUNDAMENTAL CHANGE? (Pauline Kerr et al. eds., 2008); CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS (Robert S. Ross & Zhe Feng eds., 2008); NEW INTERNATIONAL ORDER, *supra* note 19; MARC LANTEIGNE, *CHINA'S FOREIGN POLICY: AN INTRODUCTION* (2009); LAI HONGYI, *THE DOMESTIC SOURCES OF CHINA'S FOREIGN POLICY: REGIMES, LEADERSHIP, PRIORITIES, AND PROCESSES* (2010); ROBERT G. SUTTER, *CHINESE FOREIGN RELATIONS: POWER AND POLICY SINCE THE COLD WAR* (2d ed. 2010); ZHIQUN ZHU, *CHINA'S NEW DIPLOMACY: RATIONALE, STRATEGIES, AND SIGNIFICANCE* (2010).

²⁰⁰ See BABBIE, *THE PRACTICE OF SOCIAL RESEARCH*, *supra* note 178, at 154; BABBIE, *THE BASICS OF SOCIAL RESEARCH*, *supra* note 178, at 161; Donald T. Campbell & Donald W. Fiske, *Convergent and Discriminant Validation by the Multitrait-Multimethod Matrix*, 56 *PSYCHOL. BULL.* 81, 81-105 (1959); ALAN BRYMAN, *SOCIAL RESEARCH METHODS* 151-52 (3d ed. 2008).

Nor is it just a matter of divergence from mainstream conceptual paradigms. The latter seem to provide modest inspiration for social scientists who explore China's territorial conflicts and who apparently prefer to tread their own paths. Several variables that are typically included in all-embracing explanatory schemes are omitted, known as a "deficiency error,"²⁰¹ and highly parsimonious models are chosen that do not overlap closely with the former, a content validity problem.²⁰² By the same token, certain influences that are largely ignored by mainstream students of Chinese foreign policy and international relations are deemed relevant in this specific context, a "contamination error."²⁰³ Even more intriguing is the fact that some variables are given a distinctly non-mainstream interpretation. For instance, domestic heterogeneity is believed to have had a moderating impact on China's international behavior,²⁰⁴ but is assumed to render bargaining and negotiations an inherently challenging proposition in two-level games.

The two-level game construct is particularly difficult to accommodate within the theoretical mainstream. It does not correspond well to analytical structures employed to examine the interplay between external and internal forces on the Chinese foreign policy front.²⁰⁵ Moreover, it does not effectively capture the intricacies pinpointed by scholars who endeavor to shed light on the dynamics of border dispute containment and escalation in such settings from a wider conceptual standpoint.²⁰⁶ In the China context, the sample of cases is also rather small and there are potentially unresolved methodological issues stemming from the somewhat arbitrary and unsystematic case selection in the two-level game model.²⁰⁷

Such reservations do not detract from the theoretical and heuristic value of the social science studies reviewed here. Hypothesis testing can be said to have provided partial support for the ideas put forward and to have generated ample analytical insights, no mean

²⁰¹ See LUIS R. GOMEZ-MEJIA ET AL., *MANAGING HUMAN RESOURCES* 270 (7th ed. 2010).

²⁰² See BABBIE, *THE PRACTICE OF SOCIAL RESEARCH*, *supra* note 178, at 155; BABBIE, *THE BASICS OF SOCIAL RESEARCH*, *supra* note 178, at 161.

²⁰³ See GOMEZ-MEJIA ET AL., *supra* note 201.

²⁰⁴ See David M. Lampton, *China's Foreign and National Security Policy-Making Process: Is It Changing and Does It Matter?*, in *THE MAKING OF CHINESE FOREIGN AND SECURITY POLICY IN THE ERA OF REFORM, 1978-2000* 12-24 (2001).

²⁰⁵ See ZHAO, *supra* note 199.

²⁰⁶ See Ming Gyo Koo, *Island Disputes and Maritime Regime Building in East Asia: Between a Rock and a Hard Place* (2009).

²⁰⁷ See DE VAUS, *supra* note 178, at 238-42; GERRING, *supra* note 197, at 86-150; David Silverman, *Doing Qualitative Research: A Practical Handbook* 137-51 (3d ed. 2010).

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achievement in such complex circumstances. Moreover, a solid conceptual and empirical foundation has been established that is capable of sustaining a broad-based research agenda. Still, it is important to note that the complementary efforts of international law researchers and social scientists, even if considered in their entirety, have not progressed to a point whereby closure has been attained and the scope for further inquiry is limited. Quite the contrary, this remains, in certain respects, an open field not short of incompletely answered questions.

V. WAY FORWARD

As emphasized throughout this paper, the pattern of cross-border interactions in East Asia and Southeast Asia, including Russia and South Asia, revolving around the rapidly re-emerging Chinese regional and global power, is a vital component of the delicate but vibrant Asia-Pacific and world economic-political-security order. Territorial conflicts and their management are a crucial element of that dynamic equation and, in the China context, have spawned a rich, if not voluminous, community of academic literature on the subject. The breadth and depth of the work undertaken notwithstanding, it has been shown to contain some gaps that should ideally be narrowed further over time. Offered here is a tentative roadmap in an attempt to initiate and facilitate the process.

Ample “raw material” is available for additional research in this area. Both legal scholars and social scientists, particularly the latter, have provided a detailed account of virtually every Chinese border dispute since the founding of the PRC. The database that has been constructed can be ‘mined’ in search of new theoretical propositions (“theory building”), or serve as an empirical vehicle for assessing those and existing alternative theories (“theory testing”). Pursuit of this idea could occur in a more or less structured way, but the scope for quantitative exploration via techniques such as meta-analysis²⁰⁸ is rather limited because this form of secondary data manipulation generally requires the original, primary data to be quantitatively organized.²⁰⁹

The two qualitative methods typically relied upon in such circumstances are the narrative and systematic literature review. The former surveys a body of academic work, such as the writings on China’s border disputes, to uncover new or alternative patterns absent guidance by pre-determined criteria.²¹⁰ On the other hand, such criteria are the driving force constrained a priori.²¹¹ It is possible to call

²⁰⁸ See generally BRYMAN, *supra* note 200, at 106.

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

narrative literature review “unstructured,” whereas its systematic counterpart qualifies as “structured.” This paper is part of a larger research project that involves the examination of specific hypotheses on the basis of a systematic review of the studies surveyed in the previous sections. The furnished roadmap, however, does not have such an empirical foundation because the primary objective is to demonstrate how extending the analytical range, by incorporating mainstream conceptual insights, may place the work on Chinese territorial conflicts on a firmer analytical footing, for example by increasing convergent and content validity.

Norms, or principles, of international law, and their underlying values, are the logical starting point because they precede action in most models of the policy process²¹² and do not vary greatly in the short or medium-term. Although social scientists increasingly bypass them in their writings, there is no reason to assume that norms are irrelevant, even if the linkage between them and State behavior is at times not obvious. The legal literature on China’s border disputes effectively highlights the visibility of norms across the foreign policy spectrum and in this specific domain in particular. Painted in other studies, notably those focused on the role of international law norms in Chinese adaptation in the global arena, is a similar picture.²¹³

It is often implied that norms coalesce into a harmonious set, and the studies reviewed here are no exception to the rule. Some scholars in the field of international relations have compellingly conveyed the inevitable heterogeneity of norms, the tension among them, the resolution or management of the tension, and the prioritization of the norms.²¹⁴ These scholars draw the distinction between norm structures that are coherent, and even robust, and those that are conflicting.²¹⁵ It is suggested that the conceptual and practical intricacies to which heterogeneity, tension, and conflict give rise may be mitigated by invoking the fuzzy logic method.²¹⁶ In the present context, it suffices to acknowledge this phenomenon and to endeavor to place relevant international law norms within a framework consisting of conflicting, or at least competing, values and strategic impulses, which do not necessarily remain constant.

²¹² See, e.g., SHIH, *supra* note 199, at 38-94.

²¹³ See, e.g., Ann Kent, *China’s Changing Attitude to the Norms of International Law and Its Global Impact*, in CHINA’S “NEW” DIPLOMACY: TACTICAL OR FUNDAMENTAL CHANGE? 57-76 (Pauline Kerr, Stuart Harris & Qin Yaqing eds., 2008).

²¹⁴ See, e.g., INTERNATIONAL NORMS AND DECISION MAKING, *supra* note 188, at 103-17.

²¹⁵ *Id.* at 103-23.

²¹⁶ *Id.* at 110-17.

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A well-documented position commonly held by social scientists, and vividly epitomized by Mao Zedong's famous dictum that "political power grows out of the barrel of a gun,"²¹⁷ is that power is the dominant value pervading all layers of the social fabric in China – "the cornerstone of [its] politics."²¹⁸ Consistent with this stance are arguments that "Chinese politicians and diplomats are . . . recognized as masters of power politics, having inherited a well-spring of experience of power play over the millenniums."²¹⁹ Moreover, "[e]ven ordinary [people in China] realize the importance of power and exercise it in their daily lives."²²⁰ Power is equated in such circumstances with "who gets what, when, and how."²²¹

Traditionally, the Chinese conception of power was confined to the military realm, with "gunboat diplomacy" as its most prominent manifestation and the essence of *qiangquan zhengzhi* (big-power politics).²²² That conception has expanded subsequently to encompass dimensions such as economic strength and external influence, eventually morphing into the notion of *zonghe guoli* or comprehensive national power (CNP).²²³ A common assertion is that this is China's paramount strategic goal and that it is pursuing it with great determination.²²⁴ However, to complicate matters, CNP appears to have an ethical component, although its practical significance is shrouded in uncertainty, and its application entails balancing force and morality.²²⁵

The quest for CNP, at home and abroad, is not a futile enterprise. Rather, it is thought to dovetail with power transition theory (PTT), which posits that a dominant State (i.e., the United States) is sooner or later overtaken by a challenger (i.e., China), peacefully (e.g., the Anglo-American transition at the end of the nineteenth century), or violently (e.g., the Anglo-German transition a decade or so later).²²⁶

²¹⁷ CHAN, *supra* note 199, at 29.

²¹⁸ *Id.* at 28.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 29.

²²³ CHAN, *supra* note 199, at 29-33.

²²⁴ *Id.*

²²⁵ *Id.* at 30.

²²⁶ See generally STEVE CHAN, CHINA, THE US, AND THE POWER-TRANSITION THEORY: A CRITIQUE (2008); Jack S. Levy, *Power Transition Theory and the Rise of China*, in CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 11-33 (Robert S. Ross & Zhu Feng eds., 2008); Steve Chan, *Is There a Power Transition Between the U.S. and China? The Different Faces of National Power*, 45 ASIAN SURV. 687-701 (2005); Renee Jeffrey, *Evaluating the "China Threat": Power Transition Theory, the Successor State Image, and the Dangers of*

Indeed, once the economic, demographic, military, political, and social conditions are in place, such a shift is a foregone conclusion, a deterministic instead of a probabilistic outcome, whose inevitability cannot be altered by cataclysmic events like war and similar eruptions.²²⁷

Such distinct realist or neo-realist interpretations have been fine-tuned to reflect changing strategic realities. Specifically, it is claimed that the Chinese foreign policy posture has been transformed from one of offensive realism under Mao Zedong to that of defensive realism under Deng Xiaoping and his successors.²²⁸ Offered to account for this metamorphosis is an elaborate, learning-centered analytical framework, grounded in social evolutionary (as distinct from non-evolutionary and semi-evolutionary) thinking.²²⁹ It differs from the punctuated equilibrium model often employed for this purpose,²³⁰ but has considerable theoretical appeal. The crucial point to note is that a defensive realist State is less likely to flout prevailing international legal norms and more likely to seek a peaceful resolution to border disputes than an offensive realist one, even when there are forces, such as its relative strength, value of contested land, and so forth, propelling it in the opposite direction.

A number of criteria have been suggested for distinguishing between defensive realist States and offensive realist ones. Some authors emphasize ideology, attitude toward domestic minorities, stance regarding arms control, and policy vis-à-vis neighboring countries, particularly weaker ones.²³¹ Others highlight a recognition of the benefits of international cooperation and a willingness both to exercise self-restraint and to be constrained by other States.²³² These operational norms have inevitable implications for China's approach to the settlement of border disputes if today's China does indeed acknowledge the merits of collaborative international and regional arrangements, as ev-

Historical Analogies, 63 AUSTL. J. INT'L AFF. 309-24 (2009); Douglas Lemke, *Power Transition Theory and the Rise of China*, 29 INT'L INTERACTIONS 269-71 (2003); Ronald L. Tammen & Jacek Kugler, *Power Transition and China US Conflicts*, 1 CHINESE J. INT'L POL. 35-55 (2006), available at <http://cjip.oxfordjournals.org/content/1/1/35.full.pdf+html>.

²²⁷ See Levy, *supra* note 226, at 11-16.

²²⁸ Tan Shiping, *From Offensive to Defensive Realism: A Social Evolutionary Interpretation of China's Security Strategy*, in CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 141-62 (Robert S. Ross & Zhu Feng eds., 2008).

²²⁹ *Id.* at 146-48.

²³⁰ See generally INTERNATIONAL NORMS AND DECISION MAKING, *supra* note 188.

²³¹ See generally Andrew Kydd, *Sheep in Sheep's Clothing: Why Security Seekers Do Not Fight Each Other*, 7 SECURITY STUD. 114-55 (1997).

²³² See, e.g., Shiping, *supra* note 228, at 152.

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idenced, *inter alia*, by its strategy of multilateralism,²³³ does not as a rule exploit the relative weakness of its neighbors, and does act in a constrained fashion in the global arena and segments thereof (i.e., in effect, practices limited sovereignty).²³⁴

Assuming that a sense of altruism or other-directedness drives defensive realist states is not necessarily the norm. Chinese international behavior is open to both realist and liberal interpretations. It is a moot point whether China is “racing to integrate, or cooperating to compete.”²³⁵ If it is the latter, its conduct would not be inconsistent with realist or at least neo-realist (or, alternatively, institutionalist)²³⁶ readings, and the quest for power might remain a key element of the equation. However, it would constitute a different, more constructive and multifaceted quest than might be the case if a narrower, less accommodative and elastic set of premises provided the inspiration for the analytical structure.

In augmented realist and non-realist accounts, values other than power enter into the Chinese foreign policy calculus. In some social science research, an even greater emphasis is thus placed on China’s “struggle for status,”²³⁷ and not necessarily along realist lines (“[i]ronically, when the term is used in [international relations], it is often by realists, who equate the status struggle with a state’s jockeying for a higher position in the pecking order of power. . . [m]y application here is based on a rejection of key assumptions in the mainstream realist paradigm”).²³⁸ The significance accorded to this value stems

²³³ See generally NEW INTERNATIONAL ORDER, *supra* note 19; CHINA TURNS TO MULTILATERALISM: FOREIGN POLICY AND REGIONAL SECURITY (Guoguang Wu & Helen Lansdowne eds., 2008); Jenny Clegg, CHINA’S GLOBAL STRATEGY: TOWARD A MULTIPOLAR WORLD (2009).

²³⁴ See generally Allen Carlson, *More Than Just Saying No: China’s Evolving Approach to Sovereignty and Intervention Since Tiananmen*, in NEW DIRECTIONS IN THE STUDY OF CHINA’S FOREIGN POLICY 217-41 (Alastair I. Johnston & Robert S. Ross eds., 2006); Shan Wenhua, *Redefining the Chinese Concept of Sovereignty*, in CHINA AND THE NEW INTERNATIONAL ORDER 53-80 (Wang Gungwu & Zheng Yongnian eds., 2008).

²³⁵ See generally Thomas G. Moore, *Racing To Integrate or Cooperating To Compete? Liberal and Realist Interpretations of China’s New Multilateralism*, in CHINA AND THE NEW INTERNATIONAL ORDER 35-50 (Wang Gungwu & Zheng Yongnian eds., 2008).

²³⁶ See generally INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD ECONOMY* (1984).

²³⁷ See generally Yong Deng, *Better Than Power: “International Status” in China’s Foreign Policy*, in CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY 51-72 (Yong Deng & Fei-Ling Wang eds., 2005); YONG DENG, *CHINA’S STRUGGLE FOR STATUS: THE REALIGNMENT OF INTERNATIONAL RELATIONS* (2008).

²³⁸ *Id.* at 1-2.

from the fact that “the Chinese are intensely sensitive to their nation’s ‘international status,’ treating it as if it were the overriding foreign policy objective.”²³⁹

Paradoxically, the belief is that the acquisition of power does not diminish the thirst for status: “Although history matters, contemporary China’s status consciousness would not be so acute if it were not for its ongoing phenomenal ascendancy in comprehensive power.”²⁴⁰ This is because “[g]rowing wealth generates an expectation of greater respect.”²⁴¹ Given the disparity between its power and status, when “[f]aced with the established—albeit still evolving—world order, the PRC naturally feels that its great-power rise is yet to be duly recognized.”²⁴² Accordingly, overlooking this point when seeking explanations for Chinese responses in situations involving border disputes would be a mistake if this diagnosis was correct.

International law scholars have not yet fully explored the relevant cultural norms, and the norms are, in reality, paid no heed by social scientists. Yet, the inherent tension between the two strands and their divergent impact on China’s foreign policy is examined extensively in other contexts.²⁴³ One is the *realpolitik* view of the world, which “holds that conflicts are perennial and zero-sum”²⁴⁴ and “regards the use of force as the only effective means [of] ensuring security, stability, and peace.”²⁴⁵ The other is the Confucian-Mencian worldview, which conceives international society as “harmonious, orderly, and hierarchically structured.”²⁴⁶ Consistent with this image, “[c]onflicts are regarded as largely deviant phenomena rather than the nature of things and should and can be managed through means other than the use of brute force.”²⁴⁷

Scholars believe that the Confucian-Mencian outlook displays an aversion to the use of force and a willingness to countenance its prospect only as a last resort, a strategic device employed for no purposes other than the fulfillment of public interest and self-defense.²⁴⁸ It also apparently exhibits a clear preference for defense over of-

²³⁹ *Id.* at 8.

²⁴⁰ *Id.* at 9.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See, e.g., Chan, *supra* note 199, at 55-63; Qingxin Wang, *Cultural Norms and the Conduct of Chinese Foreign Policy*, in CHINA’S INTERNATIONAL RELATIONS IN THE 21ST CENTURY: DYNAMICS OF PARADIGM SHIFTS 143-69 (Weixing Hu, Gerald Chan & Daojing Zha eds., 2000).

²⁴⁴ Chan, *supra* note 199, at 59.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ See Wang, *supra* note 243, at 147-50.

fense.²⁴⁹ Additionally, it seems that a strong pragmatic streak, embodied in the notion of *chung-yun*, which emphasizes the need for smooth equilibrium in human affairs, characterizes this outlook.²⁵⁰ Interestingly, it has been shown that these norms impinged, to a degree, on Chinese foreign policy even during the revolutionary era.²⁵¹ This may partly explain why the recourse to force, including over disputed territory, may have been less frequent and less overwhelming than might have been expected on conventional theoretical grounds.

The constructivist concept of national or State identity, although in need of a realist and utilitarian enhancement to render it a reasonably precise tool in dissecting foreign policy decision making,²⁵² may also play a meaningful role in grappling with the forces shaping China's handling of boundary conflicts. This is a dimension which is completely lacking in the academic literature surveyed here, but which has received ample attention elsewhere.²⁵³ Where national identity is acknowledged as an influence that, while not readily amenable to operational definition and quantification, may shed some light, in conjunction with other pertinent variables, on State action, there may be some scope for materially broadening the framework within which the quest for understanding the dynamics of foreign policy making is pursued.²⁵⁴

Five components of national identity have been outlined in the present context. The first portrays the Chinese State as a socialist entity with distinct features, which is pursuing material progress in a manner properly reflecting its unique socio-economic conditions, and displaying commendable realism in the process (epitomized by the motto that "practice is the sole criterion of truth").²⁵⁵ The second mirrors China's assent to global power status, and the heavy responsibilities that emanate from this position.²⁵⁶ Paradoxically, the third component is not in accord with the second one. It is sustained by the gap between Chinese living standards and those enjoyed by people in

²⁴⁹ See *id.* at 150-52.

²⁵⁰ See *id.* at 146-47. See generally ANDREW SCOBELL, CHINA'S USE OF MILITARY FORCE: BEYOND THE GREAT WALL AND THE LONG MARCH (2003); QUANSHENG ZHAO, *supra* note 197.

²⁵¹ See Wang, *supra* note 243, at 152-62.

²⁵² See generally J. Samuel Barkin, *Realist Constructivism*, 5 INT'L STUD. REV. 325 (2003); J. SAMUEL BARKIN, REALIST CONSTRUCTIVISM: RETHINKING INTERNATIONAL RELATIONS THEORY (2010).

²⁵³ See generally, e.g., Johnston, *supra* note 199; Tiejun Zhang, *Self-Identity Construction of the Present China*, 23 COMP. STRATEGY 281 (2004).

²⁵⁴ See generally Barkin, *Realist Constructivism*, *supra* note 252; BARKIN, REALIST CONSTRUCTIVISM: RETHINKING INTERNATIONAL RELATIONS THEORY, *supra* note 252.

²⁵⁵ See Zhang, *supra* note 253, at 289.

²⁵⁶ See *id.* at 282-83.

high-income countries. China is consequently perceived as an economic laggard whose loyalties lie with the South rather than the North.²⁵⁷ This results in a dual-identity syndrome, whereby great power aspirations and commitments run counter to the images and obligations stemming from lower-middle income status.²⁵⁸

The fourth component is also at variance with the second one. It focuses on the informal and modestly institutionalized Chinese social fabric, compared with the relatively elaborate and transparent organizational edifice in high-income countries.²⁵⁹ Its manifestations may be observed on the external front as well as the internal one. For example, in the early 1990s, the close relationship with Thailand was depicted as a form of kinship.²⁶⁰ The fifth component, amply emphasized in legal writings, was encountered earlier. It centers on the persistent, even if diminished, preoccupation with sovereignty and the reluctance, again less intense than in the past, to contemplate its dilution.²⁶¹

The second, third, and fourth components may have a bearing on the issue at hand. A China that sees itself as a global power with corresponding responsibilities is more likely to display restraint in addressing border disputes. Interestingly, a self-image that keeps it on the international periphery need not have the opposite effect. The point is that a country which identifies itself as a member of the Third World—indeed, its champion and leader—may be unwilling to resort to coercion against neighbors, most of whom belong to this “disadvantaged” and “marginalized” group.

Norms and identities do not properly explain the ramifications of the external-internal linkages highlighted by the two-way game model. A number of Chinese case studies, including those pertaining to border disputes, lend tentative support to this analytical construct. However, as indicated, they give rise to a host of methodological issues and probably constitute a better test of the model, albeit not a robust one, than a robust account of the mechanisms consistently transmitting impulses from the domestic to the international arena, and vice versa, in this particular context. Other exploratory paths, notably at home in China, may yield greater insights regarding the management of territorial conflicts.

²⁵⁷ See *id.* at 292-93.

²⁵⁸ See Yong Deng, *Escaping the Periphery: China's National Identity in World Politics*, in CHINA'S INTERNATIONAL RELATIONS IN THE 21ST CENTURY 41, 51 (Weixing Hu et al. eds., 2000); Zhang, *supra* note 253.

²⁵⁹ See Deng, *supra* note 258, at 51-54.

²⁶⁰ See *id.* at 53.

²⁶¹ See *id.* at 53.

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A broad scheme for examining the external-internal linkages in Chinese foreign policy making was in fact suggested well before the two-way game model came into vogue.²⁶² The initial formulation focused on the conversion of general inputs (international constraints plus domestic determinants) into general outputs (foreign policy).²⁶³ The input side was then expanded by differentiating between the macro-level and its micro-level counterpart, where decision makers abroad and at home operate, and by specifying the macro-level international constraints and domestic determinants that affect output.²⁶⁴

The applicability of the scheme was demonstrated by pinpointing the impact of changes in such inputs on China's foreign policy over time.²⁶⁵ Particularly close attention was paid to the domestic dynamics where shifts in the symbolic macrostructure from revolution to modernization, institutional macrostructure from vertical to horizontal authoritarianism, power and regime macrostructure from rigidity toward flexibility, and a wide range of micro processes employing similar categories, were carefully dissected, the latter in greater detail than the macro ones because of the diversity typically encountered at that level.²⁶⁶

As indicated, the micro processes were classified in a corresponding fashion, but possibly not as unambiguously and thus less meaningfully from an empirical perspective, into symbolic ("change in the interpretation of the internal and external environments; learning and adaptation; [and] changing priorities of foreign policy"), institutional ("increased scope and degree of participation in foreign policy making; [and] changes of norms, rules, and mechanisms in the policy making process"), and power/regime-related processes ("dynamics of individual leaders' power and authority; regime legitimacy; decision makers preference and choices; [and] foreign policy strategies and tactics").²⁶⁷

Besides offering a broad theoretical framework, such a scheme may also serve the purpose of bringing into focus continuities and periodic shifts in Chinese foreign policy. For instance, in a recent survey, the following, currently relevant, enduring features have been highlighted: (1) the pursuit of cooperation and partnerships with all countries in Asia and key governments in other parts of the world; (2) the exercise of self-restraint as part of a strategy to promote a benign image of China as a country that is a source of opportunities rather than

²⁶² See generally QUANSHENG ZHAO, *supra* note 199.

²⁶³ See *id.* at 19-21.

²⁶⁴ See *id.* at 22-25.

²⁶⁵ See *id.* at 25-28.

²⁶⁶ *Id.* at 25, Table 2.4.

²⁶⁷ *Id.*

threats to members of the international community; (3) a willingness to lower rhetoric directed at American hegemonic practices as long as the United States does not challenge fundamental Chinese interests; (4) an increasingly deeper integration into the global economy; and (5) a progressively firmer commitment to multilateralism.²⁶⁸

Strategic continuity, even if punctuated by periodic paradigm transformations, paves the way for the consideration of regimes, or stable patterns of action, rather than case-specific responses, in analyzing China's border disputes. This is the emerging trend in social science research addressing the subject, productively followed in the Asian space, with selective references to the Chinese situation.²⁶⁹ It does not obviate the need for scrutinizing individual cases, but ideally in clusters, rather than in isolation, employing methods designed to deal with multiple and interconnected historical episodes instead of relying on those geared toward handling single and self-contained cases.

The distinction drawn in this paper has primarily been between the revolutionary and reform eras' policy regimes, which may have been marked by reasonably well-defined behavioral propensities in relation to border disputes. Elsewhere, additional phases displaying regime-like properties have been identified. For instance, one social scientist divides the 1949-78 period into a cycle of moderation (until shortly before the 1958 Great Leap Forward) and of radicalization, and has divided the period of liberalization that followed into a cycle of incremental restructuring (up to 1993) and a comprehensive overhaul of the socialist system thereafter.²⁷⁰ Another social scientist euphemistically portrays the entire revolutionary era as a "catching up" regime, which gave way in 1978 to one characterized by "GDPism," with the latter apparently discarded in the wake of the mismanagement of the 2003 severe acute respiratory syndrome (SARS) episode in favor of "people-centered development" (i.e., a simultaneous pursuit of economic betterment, environmental preservation, and social equality).²⁷¹

Whatever analytical scheme one adopts, the external-internal linkages outlined above may exhibit different patterns during different policy regimes. Notably, both at the macro- and micro-level, but perhaps particularly the latter, the post-1978 domestic landscape

²⁶⁸ See SUTTER, *supra* note 199, at 5-6.

²⁶⁹ See generally KOO, *supra* note 206.

²⁷⁰ See JINGLIAN WU, UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM 31-89 (2005).

²⁷¹ See Kinglun Ngok, *Redefining Development in China: Toward a New Policy Paradigm for a New Century?*, in CHANGING GOVERNANCE AND PUBLIC POLICY IN EAST ASIA 49 (Ka Ho Mok & Ray Forrest eds., 2009).

sharply diverges from the preceding configuration.²⁷² For instance, the pre-1978 foreign policy process/structure was remarkably fluid, with key decisions often made by strategically placed individuals such as Chairman Mao Zedong and Premier Zhou Enlai.²⁷³ It is now a far more complex and less flexible setting, occupied by multiple actors who are institutionally much more constrained by previous standards.²⁷⁴ One authoritative account of the evolution of the foreign policy-national security establishment lays considerable emphasis on trends such as professionalization, corporate pluralization, decentralization, and globalization, and shows that they have had a tangible impact on strategic decisions and tactical maneuvers.²⁷⁵

The impulses running from the international level to the domestic one have been extensively explored, albeit largely within a unitary actor framework, by social scientists, including those with a quantitative orientation.²⁷⁶ The impulses traveling in the opposite direction have been accorded less attention. Recently, there has been a rebalancing of research priorities and the internal side has come to the fore.²⁷⁷ The effects of domestic factors such as the role of top leaders, cohesion-promoting stimuli emanating from the desire of all key prominent players to preserve the prevailing politico-economic order, crucial events like the SARS debacle, deeply entrenched organizational patterns, and firmly rooted institutional routines on China's foreign policy decisions are thus beginning to be systematically examined.²⁷⁸

Attempts have been made to apply this perspective in a methodical fashion to Chinese militarized conflicts, including those involving disputed territory, but selectively so.²⁷⁹ This clearly is an analytical domain where there is substantial scope for further inquiry. An interesting issue is the relationship between increasing domestic heterogeneity, a salient feature of the present policy regime, and the ten-

²⁷² See generally Wang Gungwu, *China and the International Order: Some Historical Perspectives*, in CHINA AND THE NEW INTERNATIONAL ORDER, *supra* note 19, at 21.

²⁷³ See David Bachman, *Structure and Process in the Making of Chinese Foreign Policy*, in CHINA AND THE WORLD: CHINESE FOREIGN POLICY FACES NEW MILLENNIUM CHALLENGES *supra* note 199, at 34, 37.

²⁷⁴ See generally NING, *supra* note 199.

²⁷⁵ See David M. Lampton, *supra* note 204, at 1, 4-31.

²⁷⁶ See generally Alastair I. Johnston, *International Structure and Chinese Foreign Policy*, in CHINA AND THE WORLD: CHINESE FOREIGN POLICY FACES NEW MILLENNIUM CHALLENGES, *supra* note 199, at 55.

²⁷⁷ See generally LAI, *supra* note 199.

²⁷⁸ See generally *id.*

²⁷⁹ See Johnston, *supra* note 149; Thomas J. Christensen, *Windows and War: Trend Analysis and Beijing's Use of Force*, in NEW DIRECTIONS IN THE STUDY OF CHINA'S FOREIGN POLICY 50 (Alastair I. Johnston & Robert S. Ross eds. 2006).

dency to either rely on peaceful means of conflict resolution or to resort to coercion. Proponents of the two-level game model provide insights in this regard that may be overly mechanistic and may possess insufficient explanatory power.

Two theoretical constructs may prove relevant in providing a foundation for fruitfully delving into that question. One portrays China's evolving policy regime as a loose network rather than a rigid hierarchy.²⁸⁰ It draws on a psycho-cultural paradigm that places the social network (*guanxi*) at the heart of Chinese political order, demonstrating its pervasiveness and resilience in varying circumstances,²⁸¹ and posits that consensus, bargaining, networking, and face-saving²⁸² are the most steadfast characteristics of the policy process in the country.²⁸³ It is argued that this social configuration has morphed into a mode of governance consisting of "webs and spiders."²⁸⁴ The former are "the institutional attributes"²⁸⁵ and the latter are "the actors."²⁸⁶

The second possibly useful formulation is the fragmented authoritarianism model that depicts China's one-party political system as a negotiated State composed of a wide array of vertical lines (*tiao*) and horizontal pieces (*kuai*).²⁸⁷ Despite perceptions to the contrary, this is a highly complex institutional edifice that is assumed to often require a massive effort to attain a modicum of organizational cohesion and to shift the politico-administrative machinery forward.²⁸⁸ Such structural intricacy, whether attributed to network-like properties or institutional fragmentation, may render recourse to force to settle border disputes an organizationally challenging proposition. It may also lead to an erosion of State capacity,²⁸⁹ with conceivably similar policy consequences.

²⁸⁰ See generally JOHN B. STARR, UNDERSTANDING CHINA: A GUIDE TO CHINA'S ECONOMY, HISTORY, AND POLITICAL STRUCTURE (3d ed. 2001); MING XIA, THE PEOPLE'S CONGRESSES AND GOVERNANCE IN CHINA: TOWARD A NETWORK MODE OF GOVERNANCE (2008).

²⁸¹ See generally LUCIAN W. PYE WITH MARY W. PYE, ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY (1985).

²⁸² STARR, *supra* note 280.

²⁸³ See *id.*

²⁸⁴ XIA, *supra* note 280, at 16.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See LIEBERTHAL, *supra* note 19, at 186-87.

²⁸⁸ See *id.* at 186-88.

²⁸⁹ See generally Jonathan Schwartz, *The Impact of State Capacity on Enforcement of Environmental Policies: The Case of China*, 12 J. ENV'T & DEV. 50 (2003); Paul Collins & Hon S. Chan, *State Capacity Building in China: An Introduction*, 29 PUB. ADMIN. DEV. 1 (2009).

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Given this backdrop, it may not be productive to study Chinese decisions to resort to force over disputed territory as the sole product of deliberations by rational, forward-looking, expected utility-maximizing leaders whose strategy selection is a function of "the values they attach to alternative outcomes and the beliefs they hold regarding how their adversary will respond to their strategic decisions."²⁹⁰ The notion that they clinically assess the costs and benefits associated with each alternative to obtain the largest net gain at an acceptable level of risk²⁹¹ is, strictly speaking, difficult to reconcile with the complex realities outlined above.

Greater insights may, in all likelihood, be generated by endeavoring to identify recurring regime-specific organizational patterns. In the intricate context of elaborate external-internal linkages, persistent behavioral trends may still be observed, but probably more consistent with a configuration akin to that outlined by the cybernetic satisficing model of decision-making whose proponents highlight the multiple constraints under which political leaders operate while searching for an acceptable outcome to an inter-State conflict over contested territory.²⁹² One way or another, the enormous complexity of China's strategic environment, at home and abroad, needs to be acknowledged.

VI. CONCLUSION

Chinese border disputes are manifold and have deep historical roots. Some, but not all, have been resolved, yet not necessarily in a manner that might have been anticipated. Given the international prominence of the parties involved, notably China, the ramifications of actions taken and refrained from, the not-easy-to-read policy signals, and the elaborate strategic maneuvers, this is a subject that merits careful scholarly attention. Students of international law have responded to the challenge by exploring it broadly and consistently. The largely traditional orientation of those involved in the enterprise has left some inevitable gaps and social scientists have stepped into the breach.

²⁹⁰ Bruce B. de Mesquita & David Lalman, *Domestic Opposition and Foreign War*, 84 AM. POL. SCI. REV. 747, 750 (1990).

²⁹¹ See BRUCE BUENO DE MESQUITA, *THE WAR TRAP* (1981); Bruce B. de Mesquita, *The War Trap Revisited: A Revised Expected Utility Model*, 79 AM. POL. SCI. REV. 156 (1985).

²⁹² See generally Charles W. Ostrom, Jr. & Brian L. Job, *The President and the Political Use of Force*, 80 AM. POL. SCI. REV. 541 (1986). For additional insights, see also Alastair I. Johnston, *China and International Environmental Institutions: A Decision Rule Analysis*, in *ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 555 (Michael B. McElroy et al. eds., 1998).

However, the latter have followed a rather narrow path, without explicitly aiming at achieving a high degree of cross-field convergence. A set of well-defined hypotheses has been put to an empirical test, with partial success, but the gaps have not been significantly narrowed. Several potentially fruitful avenues of socio-legal investigation have been identified in this paper. To pursue them productively may require a more effective interdisciplinary collaboration and synthesis than witnessed thus far. Rather than operate in parallel, researchers in the international law field and social scientists may have to circumvent existing academic barriers and seek closer conceptual integration. The general lesson to be drawn here is that this is a theoretically challenging topic that should ideally be addressed within a comprehensive analytical framework instead of in a segmented fashion.

The juxtaposition of international legal approaches with social science strategies of empirical inquiry, in this particular context, leads to additional, more specific observations. First, despite the failure to achieve a meaningful convergence, the considerable and selectively overlapping insights generated independently by a small number of scholars belonging to two distinct academic disciplines serve as a poignant reminder of the methodological and theoretical promise of systematic case studies focused on clearly delineated policy issues, rather than overarching ones. Attempts to analytically enrich the field of international law by incorporating concepts from the social sciences into the prevailing body of thought have largely been confined to the far macro end of the macro-micro continuum, or to the question of what consistently drives States when they face legal constraints in the global arena. This may have resulted in the proliferation of narrow-based paradigms that are overly abstract and difficult to reconcile.

Such intellectual constructs are inevitably limited in scope because of the level at which they are formulated. To generalize about the behavior of States in a manner that is independent of space and time, researchers need to freely discard relevant information and build models that consist of insufficient variables and oversimplified relationships. These problems may be circumvented by endeavoring to develop and test middle-range theories, rather than grand ones, which often are the product of meta-theoretical exploration, or theorizing about theories, through studies that concentrate on concrete policy issues such as the management of territorial conflicts by different States in varying circumstances. The knowledge generated in the process may then be consolidated in a bottom-up fashion with a view to drawing broad inferences, without materially sacrificing fine detail and structural complexity. The strengths and weaknesses of the work surveyed here suggest that this is a desirable and realistic undertaking.

The ultimate goal of such an ongoing scientific project must be a full integration of legal and social science perspectives, which is a

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formidable challenge, but one that does not imply that proceeding in a stepwise manner is an unproductive strategy. Knowledge creation is a cumulative endeavor, often entailing the construction of two-level theories that have a structure consisting of a basic level (the core of the model) and a secondary level (a set of variables that are less closely related to the fundamental proposition).²⁹³ This type of a framework may prove to be an effective analytical vehicle for scholars comprehensively versed in international law, yet not thoroughly familiar with social science reasoning, and vice versa.

Better interdisciplinary synthesis is both a conceptual and practical imperative. Proper understanding and sound management of international legal issues cannot be attained unless a genuinely multidimensional approach is adopted. A painstaking examination by the International Crisis Group (ICG) of the dynamics of recent maritime boundary disputes in the South China Sea, currently the subject of much media attention, lends support to this argument.²⁹⁴ Competing claims by Northeast and Southeast Asian protagonists, and even outside powers (but with an Asia-Pacific identity), are involved in a dispute over islands located in an area suffused with historic symbolism, strategically valuable, and to all appearances richly endowed with vital resources.

China is at the heart of the unfolding conflict. The ISG employs an informal variant of the two-way theoretical scheme. Its implicit model revolves around economic, political, and social forces that shape Chinese behavior at the basic level. These include an array of organizations in both the public and private sector, factional groupings within such entities, the media, interest groups, and the grassroots community. Domestic pressures emanating from other countries engaged in the disputes are dissected in a similar fashion and the interaction among the protagonists, in terms of the tactics relied upon, is incorporated into the picture by also resorting to tools of behavioral inquiry. The practical side, focused on institutional coordination mechanisms, is principally viewed through a social science lens as well.

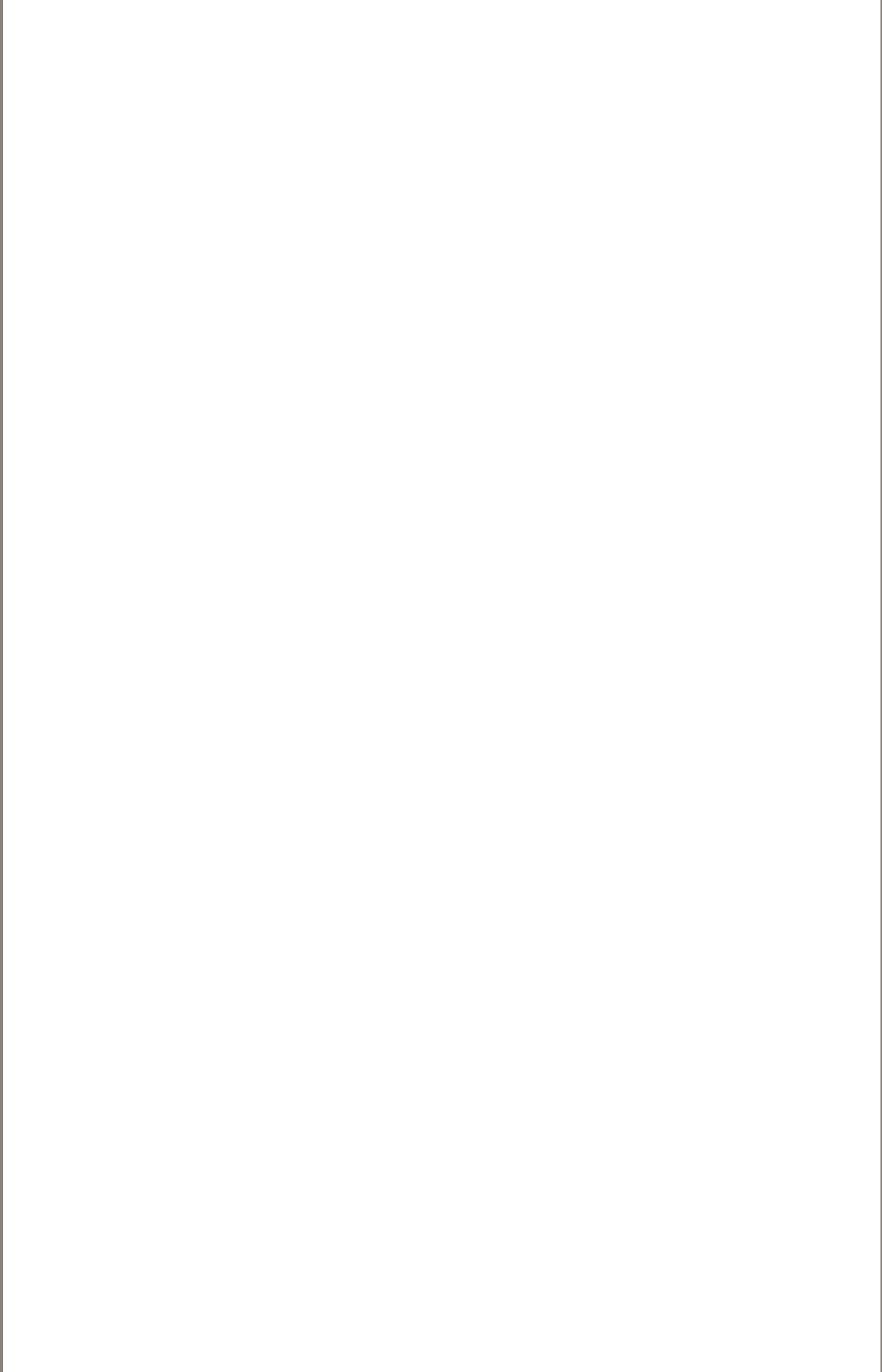
The international law element is not overlooked. Claims advanced by the countries involved—their forms, origins, and validity—are carefully scrutinized. This observation equally applies to the pursuit, actual and potential, of those claims via legal channels. This en-

²⁹³ See GARY GOERTZ, *SOCIAL SCIENCE CONCEPTS: A USER'S GUIDE* 240-41 (2006).

²⁹⁴ See INTERNATIONAL CRISIS GROUP, *STIRRING UP THE SOUTH CHINA SEA (I)* (Apr. 23, 2012), <http://www.crisisgroup.org/en/regions/asia/north-east-asia/china/223-stirring-up-the-south-china-sea-i.aspx>; INTERNATIONAL CRISIS GROUP, *STIRRING UP THE SOUTH CHINA SEA (II): REGIONAL RESPONSES* (July 24, 2012), www.crisisgroup.org/en/regions/asia/north-east-asia/china/229-stirring-up-the-south-china-sea-ii-regional-responses.aspx.

tire dimension of the analytical framework, however, is accorded less space and weight and may thus be deemed as a less crucial, albeit still relevant, ingredient of the conceptual structure. The corollary is that, as a vehicle for exploring and controlling conflict and cooperation among States, international law cannot perform its essential function without seeking inspiration from the social sciences. This is not a one-sided relationship as it is also apparent that behaviorally-oriented scholarship cannot single-handedly fulfill that role either.





BEYOND LABOR RIGHTS: WHICH CORE HUMAN RIGHTS MUST REGIONAL TRADE AGREEMENTS PROTECT?

Stephen Joseph Powell and Trisha Low¹

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I. ABSTRACT

As World Trade Organization (“WTO”) Members relentlessly pursue new regional trade agreements to achieve even faster economic growth than the extraordinary numbers posted by global trade rules, the smaller number of parties and their greater cultural affinity have led negotiators to address the intersection of trade and human rights to an extent unparalleled in the culturally disparate and near-unmanageable, 150-plus member WTO itself. These new provisions have used trade’s huge power to improve worker rights, secure environmental protections, and make initial inroads toward defending indigenous populations from trade’s adverse effects. Employing the perspectives both of trade negotiators and students of this halting progress toward the integration of trade and human rights, we have concluded that the single greatest barrier to engaging in regional trade agreements (“RTAs”) openly and unequivocally to reduce global poverty through human rights implementation is the near-impenetrable complexity of human rights norms.

Captured within dozens of United Nations human rights treaties and a growing *corpus* of customary international norms, human rights law embraces literally hundreds of specific entitlements, each by U.N. guarantee designated as indivisible, interdependent, and interrelated. This foreboding array of obligations, each ostensibly of equal rank, whose legal intricacies are sometimes beyond the experience and training of trade ministries, explains the reluctance of trade negotiators to undertake the responsibility for further integration of trade rules with human rights, and does so more credibly than the oft-cited reason that trade rules succeed only when they single-mindedly pursue economic growth.

The breakthrough in worker rights may be attributed directly to the International Labor Organization’s (“ILO’s”) endorsement, at WTO urging, of four core human rights standards inarguably tied to international trade. The ILO’s Work Declaration chooses those core standards for workers that are inarguably and inextricably linked to trade without downplaying the importance of the hundreds of worker protections identified in dozens of other ILO conventions. This choice has freed trade negotiators to concentrate on incorporating these core worker rights in regional trade agreements, a manageable task that has met with great success.

Encouraged by the ILO precedent, we identify those core standards in each of six categories of human rights that are so closely linked to trade and so fundamental in importance that their exclusion from RTAs cannot reasonably be argued. We justify in some detail our selection of those core aspects of the human rights of women, indigenous cultures, health, the environment, and democratic governance that stand at the same level of importance to trade as do the four core

labor standards identified by the ILO. With respect to the core labor standards, we explain in greater detail the specific obligations placed on states for implementation of worker rights in RTAs.

By identifying a limited and manageable body of fundamental human rights standards in those human rights fields most closely affected by trade, we believe that trade negotiators may more successfully use RTAs to accomplish the symbiosis of trade and human rights that is inherent in their basic objectives. This symbiosis can accomplish the goal of increased economic growth together with increased standards of well-being of civil society.

We begin our study with the most difficult case to make: that there are core standards in the emerging right to democracy that must be included in RTAs regardless of the form of governance of the parties. We next take up the human rights of women most often implicated by trade liberalization and proceed, in turn, to treat the core human rights of health, of indigenous populations, and of workers. We conclude by identifying core standards of the emerging human right to a healthy environment.

II. INTRODUCTION

A. *Role of Regional Trade Agreements*

The relentless process of trade liberalization, that is, the expansion of markets for the export of goods and services, forcefully pursues the reduction of government-imposed border barriers to lessen the costs of transnational commerce.² WTO Members have achieved such reductions in no small part by using RTAs.³ The use of RTAs is widely debated, including whether their proliferation marks a turning point for the WTO's utility,⁴ but their explosive numbers— Members

² BERTA HERNÁNDEZ-TRUYOL & STEPHEN JOSEPH POWELL, *JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS* 30 (2009)[hereinafter *JUST TRADE*].

³ Antoni Estevadeordal & Kati Suominen, *Bridging Regional Trade Agreements in the Americas* viii, *Special Report on Integration and Trade* (Inter-Amer. Dev. Bank 2009), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2252290>.

⁴ Stephen Joseph Powell & Trisha Low, *Is the WTO Quietly Fading Away? The New Regionalism and Global Trade Rules*, 9 *GEO. J. L. & PUB. POL'Y* 261, 282 (2011). Because of RTAs, over half of the world's goods cross borders without the discipline of the GATT's venerable pillar against discrimination, the Most-favored Nation Clause. Antoni Estevadeordal & Kati Suominen, *supra* note 3. As dolefully put in the Sutherland Report on the occasion of the WTO's 10th anniversary, "nearly five decades after the founding of the GATT, MFN is no longer the rule; it is almost an exception." *THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* (WTO 2004), http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm.

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have reported over 500 to the WTO as of January 2012—⁵evidence the belief of Members that RTAs can increase economic growth beyond the limits achievable through global trade rules alone.

RTAs can be tools both in achieving multilateral economic growth and in reducing global poverty. Because each country faces specific barriers and challenges, trade liberalization affects each country differently. With fewer negotiating partners and usually close cultural connections, RTAs often are able to address issues that are beyond the reach of a larger international organization, such as the WTO, with its 150+ Members of starkly differing economic, political, and religious propensities.

In recognition of this greater meeting of cultural minds, RTAs have begun to address the intersection of trade with human rights, particularly in the area of worker rights and environmental protection, with the occasional foray into protecting indigenous populations from trade's adverse effects. In negotiating these agreements, policy makers must understand the linkages between trade and human rights with respect to gender, health, indigenous rights, workers, the environment, and democratic governance. Mastering the effects of these intersections has been a daunting task, given the study required to master international human rights law. As stated in the foundation work on these intersections:

The consensus documents that make up this blueprint [for human rights in the 21st century) address issues ranging from environment to education; from universality of rights to respect for cultural traditions; from population growth to economic growth and sustainable development; from gender equity and equality to the empowerment of women; from the role of the family to the role of government; from health to migration; from equity among generations to the placing of people at the center of development; from the recognition that social development is both a national and international concern to the recognition of the need to integrate economic, cultural, and social policies to achieve desired ends; and from employment to affordable housing so that the health, education, and welfare goals of individuals, families, governments, and the global community can be met.⁶

It is often stated that trade officials shun integration of the human rights regime because trade liberalization requires unremit-

⁵ *Regional Trade Agreements Gateway*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Jan. 22, 2013).

⁶ JUST TRADE, *supra* note 2, at 50.

ting pursuit of wealth maximization through the benefits of comparative advantage.⁷ Our conclusion, after considerable study,⁸ is that international human rights law to date has failed to present trade officials with a workable body of rights that fit the singular confines of the trade regime.

With a smaller body of human rights with which to work, and in the knowledge that each of these rights has a close and undeniable linkage to trade, trade negotiators may more easily identify areas where trade liberalization can advance broader domestic goals and where RTAs potentially undermine other public policy priorities. Our present study aims to stimulate this understanding.

B. *The ILO Model*

Many trade agreements touch upon human rights issues. In almost all cases, however, the language is aspirational and does not set out specific mechanisms for implementing compliance with these rights, including penalties for non-compliance. Although the examples discussed in this paper demonstrate a global concern for human rights issues with respect to trade, they also demonstrate the difficulty in transforming deontological human rights concepts into concrete, RTA-friendly, solutions. Based on our experience, a major hindrance to this transformation has been the plethora of specific human rights protected by U.N. treaties.

As but one example, the right to health encompasses access to essential medications, availability of medical care, safe drinking water, adequate sanitation, and assurances of rest and leisure from work. It protects health-related education and information, adequate nutrition and housing, safe food, healthy working conditions, and wholesome environmental conditions. The right to health also ensures freedom from non-consensual medical treatments, special consideration for child and reproductive health, participation in health-related decision-making at the national and community level, and gender

⁷ See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1198 (4th ed. 2011).

⁸ See Stephen J. Powell & Paola A. Chavarro, *Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations*, 20 FLA. J. INT'L L. 93 (2008), Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Trade Agreements*, 17 FLA. J. INT'L L. 59, 61-2 (2005)[hereinafter Powell, *Regional Economic Arrangements*], and Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT'L L. 219, 224 (2004).

equality.⁹ Faced with this bewildering arsenal of health rights, none of which is singled out as more important than any other, trade negotiators may be forgiven their hesitation to attempt to contribute through RTAs to a healthier civil society.

Following the Ministerial Conference in Singapore in 1996, the WTO issued a declaration recognizing that, while trade liberalization has created more and better paying jobs in many countries and has created opportunities for growth and development, not all of the effects on civil society have been positive.¹⁰ Liberalized trade's challenges include balancing the problems trade creates for realization of human rights against the acknowledged economic benefits of trade.

The Singapore Declaration went on to affirm the WTO's commitment to core labor standards, which it found fell under the U.N.'s International Labor Organization (ILO) jurisdiction. Taking up the challenge, two years later, the ILO adopted the Declaration of Rights and Principles at Work by consensus,¹¹ setting out the four core standards that have the most insistent linkage to international trade. As the ILO notes, the Declaration "recognizes that economic growth alone is not enough to ensure equity, social progress and to eradicate poverty."¹²

C. *The Present Study*

We propose to identify in this study the core standards in each of six categories of human rights that are so closely linked to trade and so fundamental in importance that their exclusion from RTAs cannot reasonably be argued. In the sections that follow, we identify and justify our selection in some detail of those core aspects of the human rights of women, indigenous cultures, health, the environment, and democratic governance that stand at the same level of importance to trade as do the four core labor standards identified by the ILO. With respect to the ILO Work Declaration's core labor standards, which have generally been accepted as necessary for inclusion in RTAs,¹³ we

⁹ World Health Organization [WHO], *The Right to Health*, at 2-3, Fact Sheet No. 31 (June 2008), available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

¹⁰ World Trade Organization [WTO], Ministerial Declaration of 13 Dec. 1996, WT/MIN(96)/DEC (1996), available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm [hereinafter Singapore Declaration].

¹¹ International Labor Organization [ILO], Declaration on Fundamental Principles and Rights at Work, 86th Sess., 37 I.L.M. 1233, 1235 (1998), available at <http://www.ilo.org/declaration/thedeclaration/lang-en/index.htm> [hereinafter ILO Work Declaration].

¹² *Id.*

¹³ See, e.g., Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, art. 17.2, available at <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset->

explain in greater detail the specific obligations placed on states for implementation of the worker rights in RTAs.

III. TRADE AND DEMOCRATIC GOVERNANCE

A. Introduction

Trade permits countries to interact economically regardless of their form of governance. For example, the communist People's Republic of China and the democratic European Union are two of the biggest trading partners in the world,¹⁴ despite destabilizing differences in their views on political participation in governance by civil society and adherence to other human rights.¹⁵ Nearly 160 states participate harmoniously as Members of the WTO without regard to their authoritarian, commonwealth, communist, democratic, monarchic, or republican forms of governance.¹⁶

Debate continues as to whether democracy is the form of government best suited to promote liberalized trade. Whatever the evidence ultimately demonstrates in this respect, a close linkage between democratic governance and economic rights is widely accepted.¹⁷ As the great Indian economist Amartya Sen famously observed, no country with freedom of the press and open elections has ever been afflicted with famine.¹⁸ Given this close connection, and in light of the emerging human right to democratic governance, the core standards of democratic governance that we identify here must be included in RTAs, regardless of the form of government of the contracting parties. In this

upload-file73-9496.pdf; Dominican Republic-Central America Free Trade Agreement, Aug. 5, 2004, art. 16.1, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf; Comunidad Andina (Andean Pact or CAN), Dec. 545, Andean Labor Migration Instrument, ch. 5, Jun. 25, 2003, *available at* <http://www.comunidadandina.org/ingles/normativa/D545e.htm>; and Declaración Socio-laboral del Mercosur, Dec. 19, 1998, arts. 1-10, *available at* http://www.mercosur.int/msweb/Documentos/Publicados/Declaraciones%20Conjuntas/003671668_CMC_10-12-1998_DECL-DPR_S-N_IN_SocioLaboral.pdf.

¹⁴ *China*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/china/> (last visited Jan. 2, 2013).

¹⁵ Duncan Freeman & Gustaaf Geeraerts, *Europe, China, and Expectations for Human Rights*, 4 CHINESE J. INT'L POLITICS 179, 181 (2011), *available at* <http://cjpj.oxfordjournals.org/content/4/2/179.full.pdfhtml>.

¹⁶ *Members and Observers, Understanding the WTO: The Organization*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 2, 2013); *The World Factbook – Appendix B*, U.S. CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2128.html> (last visited Jan. 2, 2013).

¹⁷ JUST TRADE, *supra* note 2, at 250.

¹⁸ Amartya Sen, *Freedom and Needs: An Argument for the Primacy of Political Rights*, THE NEW REPUBLIC, Jan. 10, 1994, at 34-35.

paper, we make the boldest proposal of the entire paper, that the core democratic standards we identify here must be included in RTAs regardless of the form of governance of the parties.

B. *Emerging Human Right to Democratic Governance*

Traditional international law was indifferent to a sovereign state's form of governance. As recently as 1986, the International Court of Justice, in rejecting the U.S. argument for a right of intervention, observed that adherence by Nicaragua to a "particular ideology or political system," even, as suggested by the U.S. Congress, a totalitarian communist dictatorship, "does not constitute a violation of customary international law."¹⁹ However, legal scholars have argued that these principles are not absolute.

In fact, since the fall of the Soviet Union and other communist states from 1989 to 1991, one may observe that international law's indifference to a state's internal form of government has swung toward a concept of popular sovereignty based on the will of civil society.²⁰ The demise of these anti-democratic forces found in 1991 some 110 nations professing adherence to open and universal elections with multiple parties and secret ballots.²¹ One of the leading American international law scholars, former N.Y.U. Law Professor Thomas M. Franck,²² observed in an influential 1992 article that "democratic entitlement . . . [is being transformed] from moral prescription to international legal obligation."

This newly emerging "law"—which requires democracy to validate governance—is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations.²³

¹⁹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.) (Merits) (June 27, 1986), ICJ Reports 14, at 108, 133, available at www.icj-cij.org/docket/files/70/9505.pdf.

²⁰ Gregory H. Fox, *The Right to Political Participation in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 49 (2000).

²¹ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AMER. J. INT'L L. 46, 47 (1992). Even China, by far the largest non-democratic WTO Member, has signed the ICCPR and recently announced progress toward ratification of the treaty, albeit without emphasis on the right of citizens to decide their government. See Frank Ching, *China Government Announces Plans to Ratify 1998 ICCPR Treaty*, THE CHINA POST ONLINE, Jul. 20, 2011, <http://www.chinapost.com.tw/commentary/the-china-post/frank-ching/2011/07/20/310434/China-govt.htm>.

²² Dennis Hevesi, *Thomas Franck, Who Advised Countries on Law, Dies at 77*, N. Y. TIMES, May 29, 2009, at A12 (quoting Professor David Kennedy).

²³ Franck, *supra* note 21, at 47.

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The crumbling of non-democratic governments in North Africa in 2011's "Arab Spring" has accelerated the establishment of the emerging human right to democracy.²⁴

C. *Democratic Governance in International Conventions*

The foundation for our claim that democracy is an emerging human right is laid by a number of human rights documents. Article 21 of the Universal Declaration guarantees everyone the right to participate in the government of his country and the right to equal access to public service. Consistent with emerging international law in this respect, it ratifies the will of the people as the basis of a government's authority to govern.²⁵ Article 25 of the Civil Covenant grants every person the right to participate in her own governance, either personally or through representatives that she freely chooses.²⁶ General Comment 25 to the Civil & Political Covenant, adopted in 1996 by the Human Rights Committee formed under that Covenant, greatly strengthens the push for democratic governance by rejecting any condition of eligibility to vote or stand for office and by demanding that voters be free to support or oppose the government without undue influence.²⁷

As noted by the U.N.'s Office of the High Commissioner for Human Rights, "democracy is one of the universal core values and principles of the United Nations."²⁸ The Charter of the OAS is so

²⁴ Michèle Olivier, *Impact of the Arab Spring: Is Democracy Emerging as a Human Right in Africa?*, CONSULTANCY AFRICA INTELLIGENCE (Oct.3, 2011), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=866:impact-of-the-arab-spring-is-democracy-emerging-as-a-human-right-in-africa&catid=91:rights-in-focus&Itemid=296.

²⁵ Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration].

²⁶ International Covenant on Civil and Political Rights, New York, Dec. 16, 1966, 999 U.N.T.S. 171. As of Mar. 28, 2012, 176 parties have acceded to the ICCPR. See *Databases*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en&clang=en.

²⁷ General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), CCPR/C/21/Rev.1/Add.7 (July 12, 1996); Same Varayudej, *A Right to Democracy in International Law: Its Implications for Asia*, 12 ANN. SURV. INT'L & COMP. L. 1, 8-9 (2006).

²⁸ *Rule of Law—Democracy and Human Rights*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/issues/rule_of_law/democracy.htm. The High Commissioner for Human Rights is the principal human rights official of the United Nations. See *Who We Are*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/AboutUs/Faces/WhoWeAre.aspx> (last visited Jan. 22, 2013).

strongly committed to democracy that a democratically constituted government is a condition of continued membership.²⁹

D. *Linkage Between Trade and Democratic Governance*

We noted earlier Amartya Sen's observed connection between the elements of democracy and freedom from famine, a strong economic underpinning of the emerging right to democratic governance.³⁰ Harold Koh, Yale law school professor and former dean, and former U.S. assistant secretary of state believes that "democracy and genuine respect for human rights remain the best paths for sustainable economic growth."³¹ Koh explains

"In genuine democracies, rights to a fair trial and to personal security are enhanced. Elected leaders gain legitimacy through the democratic process, allowing them to build popular support, even for economic and political reforms that may entail temporary hardships for their people."³²

Two recent studies by Princeton political scientist Helen Milner, one co-authored with World Bank senior economist, Keiko Kubota, the second with Penn State political scientist, Bumba Mukherjee, offer compelling evidence that democratic governance promotes liberalized trade. These political scientists conclude that the wave of trade liberalization³³ over the past 20 years³⁴ is best explained by changes toward democratic governance, as opposed to other explanations such as economic crises or outside influences.

Earlier studies had suggested that the type of government bore little relation to trade liberalization tendencies. Boston University's Strom Thacker presents the more traditional point of view:

²⁹ New Article 9, Protocol of Amendments to the Charter of the OAS, *done* Dec. 14, 1992, *entered into force*, Sept. 25, 1997, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF). Common Articles 1 of the ICCPR and the ICESCR guarantee the right of self-determination, which underlies the concept of a government representative of its people and, at least in the West, the concept of democracy. Jure Vidmar, *The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?*, 10 HUM. RTS. L. REV. 239, 240-41 (2010).

³⁰ Amartya Sen, *Freedom and Needs: An Argument for the Primacy of Political Rights*, THE NEW REPUBLIC, Jan. 10, 1994, at 34-35.

³¹ Harold H. Koh, *The Right to Democracy*, U.S. Dept. of State, WASHINGTON FILE, EPF112, May 15, 2000, *available at* <http://usinfo.org/wf-archive/2000/000515/epf112.htm> (last visited Mar. 7, 2012).

³² *Id.*

³³ The term, "emerging market countries" is preferred over the more common "developing countries" because it is both more accurate and less debasing.

³⁴ Helen V. Milner & Keiko Kubota, *Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries*, 59 INT'L ORG. 107, 110-11 (2005).

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“The nature of more fundamental political institutions, such as party systems, the bureaucracy, and organizations of interest group representation, along with external factors, may be more important in determining economic policy than regime type per se.”³⁵

The 2005 Milner and Kubota study, on the other hand, found empirically that democratization has played a critical role in fostering trade liberalization relative to other explanations, which suggests that it was the spread of liberal trade ideas among government officials in emerging market countries that led to a decline in trade barriers.³⁶

These studies theorized that the results are consistent with the changes in the electorate achieved by democratic governance. As the size of the electorate grows under democracy’s principles of allowing the people to choose their governments, the country’s leaders must adopt trade policies that better promote the welfare of the consumers at large, or “selectorate.”³⁷ This implies more liberal trade policies for the country.

Expansion of the ruling class, in this argument, from a small group of powerful military, industrial, and religious officials also broadens the range of imports and exports that brings economic benefit to the selectorate. Protectionist trade measures will no longer provide a sufficiently broad base of political support.

These results have been repeated in numerous studies,³⁸ including a more detailed follow-up analysis by Milner and Mukherjee published in 2007. The later paper expands on the original research by focusing on the way democracy-related trade liberalization affects different segments of the population. The study corroborates the earlier paper’s conclusion that democratization produces “substantially positive” trade liberalizing effects, but notes that these effects will be con-

³⁵ Strom Thacker, *Does Democracy Promote Economic Openness?*, Boston Univ. Dept. of Int’l Rels. 4 (unpublished manuscript 2007).

³⁶ Milner & Kubota, *supra* note 34, at 115.

³⁷ The term was coined by N.Y.U. political scientist Bruce Bueno de Mesquita and his co-authors to describe those members of the total citizenry responsible for choosing the leadership. Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 *AMER. POLIT. SCI. REV.* 791, 793 (1999). See also Bruce Bueno de Mesquita et al., *Testing the Selectorate: Explanation of the Democratic Peace*, available at http://www.nyu.edu/gsas/dept/politics/faculty/bdm/dem_peace_bdm.pdf. In a democracy, one expects the selectorate to include essentially all voting age members of the population; in more autocratic regimes, only landowners, military commanders, business magnates, and other wealthy members of civil society have significant influence on the choice of leaders.

³⁸ Helen V. Milner & Bumba Mukherjee, *Democratization and Economic Globalization*, 12 *ANN. REV. POLIT. SCI.* 163, 166-67 (2009) [hereinafter *Democratization and Economic Globalization*].

centrated in skill-intensive segments of the economy. Tariffs on low skilled goods will actually tend to increase. They theorize that this is because trade liberalization brings greater benefits to skilled workers, with the result that poorer low-skilled or unskilled workers will hold more protectionist views.³⁹ These studies isolate the wave of democratization over the past two decades as a distinct causal factor in promoting liberalized trade.⁴⁰

It is important to note that this explanation emphasizes the loss of the incentive to use protectionism strategically rather than the notion that liberalization itself is used strategically. In that sense, democracy-related trade liberalization is compatible with continued disparities in the concentrations of the benefits of trade, and the articles do not necessarily indicate that trade liberalization will actually tend to support further democratization. In fact, the 2009 Milner and Mukherjee analysis posits, primarily from a review of the literature, a cautionary tale that, because trade liberalization will bring greater benefits to higher skilled workers, the income inequality engendered by trade may actually work against further democratization.⁴¹ In our view, these results suggest trade agreements that reduce this income inequality will more likely promote democratic governance. That is, trade agreements which seek to strengthen democratic practices will need to take care that the policies selected also are compatible with the strengthening of non-ruling classes in society.

E. Core Rights of Democracy

We are firm in our belief in the existence of a human right to democracy, and of the positive impact of democracy on economic growth. We acknowledge, however, that not all nations involved in trade have yet reached a democratic stage of governance and, even more critically, that not all of civil society has benefited equally from

³⁹ Helen V. Milner & Bumba Mukherjee, *Democratization and Trade Liberalization*, Sept. 25, 2007, at 5, available at http://www.princeton.edu/~pcglobal/conferences/globdem/papers/milner_mukherjee.pdf.

⁴⁰ It is less clear that liberalized trade promotes democracy in the first instance. One scholar concludes that trade promotes the formation of a sizeable and educated middle class that takes an interest in public affairs and is greatly less willing to enable an authoritarian regime. Daniel Griswold, *Trade, Democracy, and Peace: The Virtuous Cycle*, available at <http://www.cato.org/publications/speeches/trade-democracy-peace-virtuous-cycle> (last visited Apr. 16, 2012). While we find this argument convincing, we do not believe proving that trade promotes democracy is necessary, given the existence of the emerging right to democracy and the evidence that democracy promotes liberalized trade, toward demonstrating the need to include democratic principles in RTAs.

⁴¹ *Democratization and Economic Globalization*, *supra* note 38, at 163, 170.

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the economic welfare engendered by trade.⁴² In these circumstances, what aspects of democratic governance must be included in RTAs regardless of the form of government of the contracting states?

We find that two aspects of the human right to democracy, the right to participate in the political process and the rule of law, are so fundamental, so universally accepted, and so closely linked to trade that, like the core labor standards adopted by the ILO in 1998, credible argument cannot be mounted against their inclusion in trade agreements.

1. *Full Participation in the Political Process*

As John Rawls pronounced in *A Theory of Justice*, “all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply.”⁴³

We should state at the outset that we do not delimit the core right to participate in the political process by the mere holding of elections, even “free” and “open” ones. A right to vote, taken alone, bears little relation to democratic governance, as confirmed by elections ranging from the non-democratic regimes “freely and fairly” elected in wartime Nazi Germany to those in modern Venezuela and Iran.⁴⁴ Article 21(3) of the Universal Declaration provides that “the will of the people . . . shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁴⁵ However, there is no agreed definition of which elections are “genuine,” and the putative freedom of elections is more often honored in the breach than in the observance.⁴⁶

⁴² See *JUST TRADE*, *supra* note 2, at 257-58.

⁴³ JOHN RAWLS, *A THEORY OF JUSTICE* 194 (1999); see Joshua Cohen, *Is there a Human Right to Democracy*, *THE EGALITARIAN CONSCIENCE: ESSAYS IN HONOUR OF G. A. COHEN* 226, 228 (2006). In the interest of full disclosure, neither Rawls nor Cohen accepts for reasons not relevant here that democratic governance is properly labeled a “human right.”

⁴⁴ *JUST TRADE*, *supra* note 2, at 255.

⁴⁵ Universal Declaration, *supra* note 25, art. 21(3). Article 25(b) of the ICCPR is to similar effect. See 999 U.N.T.S. 171.

⁴⁶ *Freedom in the World*, Freedom House’s widely-used report, for example, counts 117 electoral democracies in 2011 (countries that at least *de jure* conduct open elections), but only 87 countries that are considered “free” in the sense of a wider range of democratic governance factors such as ability to stand as candidates, access to information about elections, strength of opposition parties, and breadth of the suffrage right. *Freedom in the World 2012*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/freedom-world-2012> (last visited Jan. 11, 2013).

Therefore, political participation must go beyond the holding of popular elections. Our core democratic rights aim to make elections “a proxy for the ability of persons to empower themselves by creating or having a voice in the environment in which they live so they can fulfill their personhood.”⁴⁷

a) Unrestrained Right to Vote and Stand for Office

As a critical starting point, cultural, ethnic, religious, and other minority groups should have full rights to participate in the electoral process, both as part of the “selectorate” and as candidates for office.⁴⁸

While freedom from discrimination on the basis of race, color, creed, religion, or origin is an elemental human right,⁴⁹ our emphasis here relates to the groups whose livelihoods have been marginalized the most from the economy by trade. The rabid increase in income inequality between rich and poor brought about through trade’s economic favoritism⁵⁰ justifies including steps in RTAs to level the playing field for those members of civil society who are at the greatest disadvantage in having an effect on the political process.

b) Freedom from Outside Influences and Corruption

From a trade standpoint, it is equally important whether the “people’s political choices [are] free from domination by the military, foreign powers, totalitarian parties, religious hierarchies, economic oligarchies, or any other powerful group” and, concomitantly, whether the government is “free from pervasive corruption.”⁵¹ Either type of undue influence on elections and other selection processes undercuts the power of a citizen’s individual vote, and thus, the level of democratic governance in the country. Because democratic governance promotes trade, RTAs sensibly should ensure that all members of civil

⁴⁷ JUST TRADE, *supra* note 2, at 255.

⁴⁸ Freedom House, *supra* note 46.

⁴⁹ Common Article 2 of the ICCPR and the ICESCR. International Covenant on Civil and Political Rights, New York, Dec. 16, 1966, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967); International Covenant on Economic, Social and Cultural Rights, New York, Dec. 16, 1966, 993 UNTS 3/ [1976] ATS 5/ 6 ILM 360 (1967).

⁵⁰ Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 920 (2007). Dau-Schmidt explains that international trade increases the wealth of the high-skilled workers whose production is the principal currency of trade while decreasing demand, and thus payments, to lower-skilled—and usually already poor—workers whose production is not favored by trade. *Id.* at 920-21.

⁵¹ Freedom House, *supra* note 46.

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society have meaningful powers in sustaining the governmental process.

2. *Rule of Law*

Promotion of the rule of law through trade agreements has long underpinned the expansion of export markets, for the simple reason that rules-based governance creates “business-friendly environments . . . that will best ensure the success” of transnational economic endeavors.⁵² The particular elements of the rule of law that we find to be most closely linked to trade in promoting democratic governance are government transparency and accountability and an independent judiciary.

a) *Government Transparency*

Rights to participate in the political governance of a nation have little meaning in the absence of an informed electorate. RTAs must confirm and strengthen existing processes that safeguard open and transparent governments, which successfully educate civil society about their activities, policies, and decisions.⁵³ We have written elsewhere that government transparency and accountability contribute strongly to bringing the economic benefits of trade to civil society as a whole, as well as to creating stable and predictable markets most favored by trade.⁵⁴

Transparent governments are those that publish, that is, provide open notice of, laws and regulations and the reasons under consideration for their promulgation or revision.⁵⁵ Publication also requires notice of government actions in an official, regularly-issued, and widely-available journal, such as Brazil’s *Diário Oficial da União*.

b) *Government Accountability*

Having taken account of participation in the political process by civil society and having made the public aware of its action through publication, government accountability ensures against the undermining of these laws and actions through the “corralling of discretion.”⁵⁶ Two means are paramount toward this end.

First, governments must maintain records of their actions. Under the transparency provisions, this documentation of the premises for government decisions would be made available to the electorate as protection against hidden deals that belie the government’s

⁵² Powell, *Regional Economic Arrangements*, *supra* note 8, at 59, 65-66.

⁵³ Freedom House, *supra* note 46.

⁵⁴ Powell, *Regional Economic Arrangements*, *supra* note 8, at 73, 76.

⁵⁵ *Id.* at 76.

⁵⁶ *Id.* at 81-82.

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official justification for its actions. These records also would be available in the event of a challenge by a member of civil society to the legality or reasonableness of a government decision.⁵⁷

Second, government decisions must be reviewable under reasonable terms and conditions through a mechanism for oversight of administrative actions. Such a review holds government officials at least to a minimum of accountability and, secondarily, deters corruption.⁵⁸

c) *Independent Judiciary*

Joseph Raz, Columbia University law professor and philosopher, wrote the foundational work on the elements of the rule of law. In delineating the eight principles that characterize a society that is applying the rule of law, he emphasized, in addition to the transparency and accountability guidelines discussed above, that the independence of the judiciary must be guaranteed.⁵⁹

The ability of the government to pervert the political participation of civil society by misapplication of laws governing voting, candidacy for office, and information dissemination requires that the people have access to a judicial review system that is not beholden to the government whose allegedly anti-democratic action is at issue. An independent judiciary is an absolute necessity of democratic governance.

The connection with international trade is equally plain. Unless transnational business actors have access to an independent review process, the democratically enacted laws governing business are continually in jeopardy. Just as RTAs have been responsible for creation of dispute settlement systems whose administration is independent of the contracting parties to the agreement,⁶⁰ so also must RTAs that seek to promote democratic governance address the independence of the review system for the political participation laws of the Parties.

F. *Concerns of Sovereignty*

As we have noted, "RTAs cannot of course directly inject rules-based governance into a country. Only national governments can ensure the success of the rule of law in their countries."⁶¹ If trade agreement language is intended to guarantee core democratic rights, it

⁵⁷ *Id.* at 85.

⁵⁸ *Id.* at 82.

⁵⁹ Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 216-17 (1979).

⁶⁰ Stephen J. Powell, *Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?*, 16 *L. & BUS. REV. AMERS.* 217, 219 (2010).

⁶¹ Powell, *Regional Economic Arrangements*, *supra* note 8, at 70.

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must be crafted to foster the development of democratic capacity that already is underway. As noted by the Council for a Community of Democracies, “democracy is about people developing popular self-government for themselves.”⁶²

Therefore, we have chosen these core rights of democratic governance based not only on their importance to the maintenance of democracy in the territory of the Parties, but also because they infringe the least on the sovereignty of state parties that have not achieved full democratic governance. Nevertheless, we believe that democratic governance is an emerging human right and must be respected in every country.

G. Conclusion

Trade policy, governance structures, and political freedoms are in some respects complementary and in other respects in tension. RTAs must emphasize and ensure political freedoms because prosperous, open markets and democratic societies are strongly correlated. There is a growing consensus that a human right to democratic governance is emerging. The weight of the evidence supports the view that the incidents of democratic governance promote economic growth through trade. Thus, even for those countries that do not benefit fully from democratic governance, RTAs properly include protections of the core rights to democratic governance.

It is essential to confront the possible tensions that can emerge when trade obligations are used to confirm and secure democratic rights, but these tensions do not represent insurmountable challenges. The core democratic rights of full participation in the political process and the rule of law find support in the constitutions and other domestic laws of most nations substantially involved in trade.⁶³

We would be remiss in failing to return to the “cautionary tale” mentioned earlier,⁶⁴ regarding recent studies supporting a strong correlation between democratic governance and trade liberalization. Because the income inequality between rich and poor worsened by trade may actually work against further democratization,⁶⁵ policies selected to confirm and strengthen the core rights to democratic governance

⁶² A DIPLOMAT’S HANDBOOK FOR DEMOCRACY DEVELOPMENT SUPPORT 11 (Council for a Community of Democracies 2010), available at <http://www.diplomatshandbook.org/>.

⁶³ Franck, *supra* note 21, at 47.; see Juan Carlos Botero, Joel Martinez, Alejandro Ponce & Christine S. Pratt, *The Rule of Law Index 2011, Pt. II: The Rule of Law Around the World 19 & passim* (The World Justice Project 2011), available at <http://www.worldjusticeproject.org/rule-of-law-index/index-2011>.

⁶⁴ See Democratization and Economic Globalization, *supra* note 38, at 163, 170.

⁶⁵ *Id.*

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through RTAs must also advance the economic positions of the low-earning members of civil society so that the inculcated democratic principles will have the effect of promoting further trade liberalization.

IV. TRADE AND WOMEN'S RIGHTS

A. *Introduction*

Trade officials claim that trade rules are gender neutral because they do not use masculine and feminine pronouns. In fact, trade liberalization affects men and women differently⁶⁶ because women have unequal access to ownership and control of productive resources and an unequal influence on decision-making. Women are also more likely to suffer the negative impacts of trade liberalization⁶⁷ because they are more vulnerable to adversity based in discrimination and inequality in employment, wages, and access to capital.⁶⁸ Gender inequalities prevent women from enjoying the benefits created by the expansion of trade.⁶⁹

Common Article 2 of the Universal Declaration⁷⁰ and both of the Civil and Economic Covenants prohibit discrimination based on gender. A special U.N. Convention adopted in 1979 is expressly dedicated to eliminating such discrimination. Discrimination is defined broadly in the Convention on the Elimination of All Forms of Discrimination against Women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, [or] civil . . . field.”⁷¹

By addressing gender-related barriers to the economic activities of a country's work force, policies promoting gender equity can cre-

⁶⁶ Heather Gibb, *Gender, Trade and the WTO, Speaking Notes for the WTO Public Symposium*, THE NORTH SOUTH INSTITUTE CANADA 1 (June 16, 2003), <http://www.cid.harvard.edu/cidtrade/Papers/gibb.pdf> [hereinafter Gibb, *Gender and Trade*].

⁶⁷ Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti, *Trade and Gender Opportunities and Challenges for Developing Countries* x, UNCTAD (2004), http://www.unctad.org/en/docs/edm20042_en.pdf (last visited Jan. 23, 2013).

⁶⁸ Gibb, *Gender and Trade*, *supra* note 66, at 1.

⁶⁹ See generally, *Because I am a Girl: The State of the World's Girls 2010 - Digital and Urban Frontiers*, PLAN, <http://plan-international.org/girls/resources/digital-and-urban-frontiers-2010.php> (last visited Jan. 23, 2013).

⁷⁰ Universal Declaration, *supra* note 25, at art. 2.

⁷¹ Convention on the Elimination of All Forms of Discrimination Against Women, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Jan. 13, 2013) [hereinafter CEDAW].

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ate gains in productivity. Such policies can increase female productive capital and the total level of productive capital in society.⁷²

Gender equality is critical to the well-being of global civil society. In its statement on the occasion of International Women's Day 2012, the UN estimated that agricultural yields would rise by 20 percent to 30 percent if rural women had access to productive resources, lifting 150 million people out of hunger.⁷³ This powerful evidence demonstrates the importance of gender equity in the quest for sustainable development.

B. *The Link Between Gender and Trade*

A number of factors demonstrate that gender is closely related to international trade. Women receive 10 percent of the world's income even though they perform two-thirds of the world's work.⁷⁴ In addition, women own only 1 percent of the means of production such as farms, factories, and machines.⁷⁵ Further studies show that about 70 percent of the world's poor are women,⁷⁶ and women make up 70 percent of the informal economies of most countries, constituting 40 percent of the world's total economically active population.⁷⁷ Because of the prominent role of women in the economy, without protections, gender inequalities cause great harm to the global economy.

Investing in women is critical because women can benefit through greater empowerment and autonomy, improving their social and economic status, thereby shifting the power in their relationships with men, and improving their well-being, negotiating power, and their status in general.⁷⁸ Eliminating discrimination against women

⁷² *Integrating Gender into the World Bank's Work: A Strategy for Action*, World Bank 5 (Jan. 2002), <http://siteresources.worldbank.org/INTGENDER/Resources/strategypaper.pdf> [hereinafter *Integrating Gender Report*].

⁷³ U.N. International Women's Day, *Empower Rural Women, End Hunger and Poverty*, UNITED NATIONS (Mar. 8, 2012), <http://www.un.org/en/events/womensday/>.

⁷⁴ U.N. Dev. Fund for Women (UNIFEM), *World Poverty Day 2007: Investing in Women-Solving the Poverty Puzzle, Facts & Figures*, UNITED NATIONS, available at http://www.womenfightpoverty.org/docs/WorldPovertyDay2007_FactsAndFigures.pdf (referencing the informal slogan of the Decade of Women) (last visited Jan. 23, 2012) [hereinafter UNIFEM].

⁷⁵ *Id.*

⁷⁶ *Gender, Climate Change and Human Security: Lessons from Bangladesh, Ghana and Senegal* at 1 (May 2008), available at http://www.gdnonline.org/resources/WEDO_Gender_CC_Human_Security (last visited Jan. 23, 2012).

⁷⁷ Megan Berry, *A Woman's Worth: Accounting For Women In The Global Market*, 37 DEN. J. INT'L L. & POL'Y 465, 470 (2009).

⁷⁸ Zo Randriamaro, *Gender and Trade: Overview Report*, BRIDGE 16 (2005), available at <http://www.bridge.ids.ac.uk/reports/CEP-Trade-OR.pdf>.

will result in women reinvesting their income into their families.⁷⁹ As family income grows, women are able to allocate resources toward putting food on the family's table, of course, but also into the education of both their girl and boy children, thereby creating the potential for more and better prepared women in the workforce.⁸⁰ In short, empowering women contributes strongly to a nation's economic growth.

Practically speaking, trade affects individuals through fluctuations in prices, which affect the availability of goods, and through changes in output, which affect what people produce, how, and under what conditions.⁸¹ Throughout the world, women continue to exist in relationships and roles that make them subordinate to men, thus limiting their capacity to benefit from the greater opportunities presented by trade.⁸²

Although trade liberalization has increased the availability of opportunities for women, they are generally in low-skilled and low-paying jobs or sectors.⁸³ Trade liberalization usually results in an increase in labor-intensive exports from emerging market countries, such as textiles or assembly of manufactured goods. As shown by employment in Mexico's maquiladoras, employers prefer women for these jobs because of their greater reliability and attention to detail.⁸⁴ For example, in 2000, approximately 35 percent of the manufacturing work force in Latin America consisted of women and 41 percent in Asia, where 80 percent of the workforce in the export industries of Southeast-Asia were women.⁸⁵ Trade liberalization can extend products and increase production opportunities, create new activities to employ a labor surplus, and increase productivity and wage levels.⁸⁶ Women can capitalize on these opportunities, with some help from the international community.

We often hear about trade's "creative destruction," and that inefficient and outdated industries give way to newer, more efficient businesses. Buried telephone cables have given way to cellular towers for mobile phones, and tea and coffee industries are feeling competi-

⁷⁹ Jennifer Powers & Barbara Magnoni, *A Business to Call Her Own: Identifying, Analyzing and Overcoming Constraints to Women's Small Businesses in Latin America and the Caribbean* at 3 (Apr. 2010), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35327678>.

⁸⁰ Randriamaro, *supra* note 78, at 8.

⁸¹ *Id.*

⁸² *Id.* at 9.

⁸³ Tran-Nguyen & Zampetti, *supra* note 67, at 3.

⁸⁴ Gurushri Swamy, *The Impact of International Trade on Gender Equality*, 86 PREM NOTES (May 2004), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11271/302000premnote86.pdf?sequence=1>.

⁸⁵ Randriamaro, *supra* note 78, at 16.

⁸⁶ Tran-Nguyen & Zampetti, *supra* note 67, at 17.

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tion from vitamin and flavored water producers. Because women own very few of the productive resources and are usually the least educated in a country, they have fewer opportunities to take advantage of these changes.

These disturbing facts do not, of course, prove that trade *causes* the gender inequities that exist in the first place. Indeed, domestic cultures are the reason for the subservient, disadvantaged positions in the workplace and otherwise in the economic life of the society in which women find themselves. These cultural stereotypes are reflected in legal restrictions, religious traditions, and customs or beliefs of the society, such as the marianista/machismo roles women and men still play in parts of many Latin American nations.

However, even assuming that domestic cultural stereotypes primarily underpin the inequities that position women to suffer more severely from trade liberalization, unless trade takes account of these stereotypes, its effects will be outsized. We are told that trade's economic tide raises all ships; this is not, however, the case with respect to the disadvantaged members of society who live on the margins.⁸⁷

Gender discrimination causes a severe distortion of economic growth patterns. For example, unless redirected to production rewarded by trade, even micro-credit programs can result in women performing "pink collar" jobs, basically extensions of their household and reproductive duties.⁸⁸ For these reasons, trade must share the blame in perpetuating these inequities and play a role in ameliorating them.

The most potent antidote to the cultural stereotypes we describe is education. Women in particular need greater access to the educational skills that will help eliminate wage and job inequalities by making women less dependent on male family members and more qualified for male-dominated work. RTAs, while ill-equipped to directly oppose cultural stereotypes, certainly may properly address work-related training and educational opportunities on a gendered basis as a model for closing the gender gap associated with trade.

C. The Role of Regional Trade Agreements in Promoting Women's Rights

The United Nations Conference on Trade and Development (UNCTAD) observed that trade, as the most important form of globalization, can have significant implications for gender equality.⁸⁹ At the individual level, RTAs affect prices, employment, and production

⁸⁷ JUST TRADE, *supra* note 2, at 3.

⁸⁸ Tracy Bachrach Ehlers, *Women and the False Promise of Microenterprise*, 12 *GENDER & SOCIETY* 424, 426 (1998).

⁸⁹ United Nations Conference on Trade & Development (UNCTAD), Sao Paulo, Brazil, June 13-18, 2004, *Report of UNCTAD on its Eleventh Session*, UN Doc. TD/

strategies,⁹⁰ which differently affect the various societal groups within a country.

Individuals are more likely to gain if they have access to export markets, credit, transportation, land, technology, and other infrastructure, and are more likely to lose if they are dependent on uncompetitive sectors or cannot access new markets or sectors.⁹¹ Because of the intersection between trade and gender inequality, some multilateral trade promotion organizations have attempted to integrate these issues into their trade agreements.

At the Fourth World Conference on Women in Beijing in 1995, members of the UN identified specific problems in the context of women's rights and trade, and proposed action plans to assist in solving them.⁹² For example, the Cotonou Agreement, a partnership agreement between the European Union and members of the African, Caribbean, and Pacific Group of States, explicitly states that ". . .account shall be taken of the situation of women and gender issues in all areas - political, economic and social." Numerous other conventions also seek to eliminate discrimination against women.⁹³ These examples demonstrate a global concern for gender inequalities; however, the language is aspirational at best. This paper seeks to enumerate three core principles with respect to women's rights as they pertain to trade and to provide examples of how these principles apply to trade on a practical level.

D. Core Principles With Respect to Women and Trade

Consistently with these links between women's rights and trade, we have identified – from among the dozens of human rights of women - three core women's rights that should be included in all trade agreements. They are the elimination of discrimination against women in the workplace, equality in investments in physical capital, and

412, ¶ 73 (Aug. 20, 2004), available at http://www.unctad.org/en/docs/td412_en.pdf.

⁹⁰ Heather Gibb, *Gender and Regional Trade Agreements* at 8, 13th Meeting of the APEC Women Leaders Network, May 12-14, 2008), available at <http://archive.unctad.org/Templates/StartPage.asp?intItemID=2068> [hereinafter Gibb, *Regional Trade*].

⁹¹ *Id.*

⁹² United Nations Conference on Women, Beijing, 1995, *Report of the U.N. Fourth World Conference on Women*, available at <http://www.un.org/womenwatch/daw/beijing/pdf/Beijingpercent20fullpercent20reportpercent20E.pdf>.

⁹³ In 1986, the Organization of African Unity adopted the African Charter on Human and People's Rights (Banjul Charter), which required the State to eliminate discrimination against women. See African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981), 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

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the right to participate in the markets and institutions that set policies.⁹⁴

1. *Elimination of Discrimination Against Women in the Workplace*

ILO Convention No. 111 addresses discrimination in the workplace and defines “discrimination against women” as any distinction, preference, or exclusion based upon sex, which nullifies or impairs the equality of opportunity or treatment in occupation or employment.⁹⁵ In order to promote equality at work, discrimination against women needs to be eliminated by dismantling the barriers between men and women.⁹⁶ This first core right has three components. The wage gap between men’s and women’s work must be eliminated, their educational opportunities must be increased, and they must be given more job opportunities.

a) *Elimination of the Gender Wage Gap*

According to the Universal Declaration, everyone has the right to equal pay for equal work without discrimination.⁹⁷ A 2001 World Bank study found that if wage and employment differences between men and women were eliminated, world GDP would experience a 6 percent increase.⁹⁸ This shows the enormity of the inequality in pay

⁹⁴ Integrating Gender Report, *supra* note 72, at 5.

⁹⁵ International Labor Organization [ILO], Convention Concerning Discrimination in Respect of Employment and Occupation, art. 1 (June 15, 1960), available at <http://www.ilo.org/declaration/principles/eliminationofdiscrimination/lang—en/in dex.htm> [hereinafter Convention No. 111].

⁹⁶ See generally *id.*

⁹⁷ Universal Declaration, *supra* note 25, art. 23. See also International Covenant on Economic, Social, and Cultural Rights [ICESCR], which guarantees the right to “[f]air wages and equal remuneration for work of equal value, without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.” Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), art. 7 (Dec. 16, 1966); see also Convention on the Elimination of all forms of Domestic Violence Against Women [CEDAW], which provides for the right “to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.” Office of the High Commissioner of Human Rights, Convention on the Elimination of all forms of Domestic Violence Against Women, art. 11(d) (1979), available at <http://www.un.org/women watch/daw/cedaw/text/econvention.htm#article11>.

⁹⁸ Elizabeth M. King & Andrew D. Mason, *Engendering Development Through Gender Equality in Rights, Resources and Voice, a World Bank Policy Report 2001*, available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=477960&piPK=64165421&menuPK=64166093&entityID=000094946_01020805393496 (last visited Apr. 13, 2012).

and types of work. ILO Convention No. 100 provides that the principle of equal remuneration should be applied to men and women for work of equal value.⁹⁹ The 2001 World Bank study found that even at comparable skill levels, women still earn significantly less than men worldwide.¹⁰⁰ Women's earnings represented 73 percent of men's earnings in emerging market countries and only 20 percent of the earnings gap could be explained by differences in work experience and educational attainment.¹⁰¹ Even in highly skilled occupations, presumably where the education and training of men and women are comparable, the average wage a woman earns is only 88 percent of a man's wage.¹⁰²

Participation in labor unions can also influence the gender wage gap. As we might expect, the gender wage gap is only 6 percent among unionized employees. A female unionized worker earns about 80 percent of what a male unionized worker earns; by comparison, a non-unionized female worker earns approximately 74 percent of what an equivalent non-unionized male worker earns.¹⁰³ Another influential factor appears to be age, as the wage gap increasingly favors men as the years go by.¹⁰⁴

b) Elimination of the Educational Gap

Reducing the earnings gap between men and women is intricately connected with increasing a woman's skill level.¹⁰⁵

Women should be accorded equal access to opportunities to develop their skills, knowledge, and competencies relevant to the activities in which they choose to participate.¹⁰⁶ Recognizing women's reproductive role, training centers could be set up in neighborhoods or travel from neighborhood to neighborhood.

⁹⁹ International Labor Organization [ILO], *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, art. 2 (1951), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100> [hereinafter Convention No. 100].

¹⁰⁰ Melanie Ramjoue, *Can Trade Policies Promote Gender Equalities? Exploring the Trade-Growth-Gender Nexus*, U.N. ESCAP (Nov. 2010), available at <http://www.unescap.org/tid/artnet/pub/alert7.pdf>.

¹⁰¹ *Id.*

¹⁰² Tran-Nguyen & Zampetti, *supra* note 67, at 6.

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.* at 13.

¹⁰⁵ Ramjoue, *supra* note 100, at 4; The gender wage gap is closing in some countries, likely because of increased training and education among the female population. Gibb, *Gender and Trade*, *supra* note 66, at 3.

¹⁰⁶ *Elimination of Discrimination in Respect of Employment and Occupation*, INTERNATIONAL LABOR ORGANIZATION [ILO], <http://www.ilo.org/declaration/principles/eliminationofdiscrimination/lang-en/index.htm> (last visited Jan. 23, 2013).

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In the rural areas of Guatemala and Bolivia, large gender gaps in literacy and educational attainment remain; however, even in countries where there is a smaller gender gap in educational attainment, women are less likely to have participated in on-the-job training. Better training will qualify women for service sectors such as automobile and electronics repair, rather than the consumer-oriented sectors such as personal services and small commerce to which they often are relegated because they lack the needed skill sets.

Increasing a woman's training and education is critical for developing a country's productive capacity, including the rate of return on investment, which of course will attract more investors. More educated women are better able to profit from new forms of technology and the opportunities they create.¹⁰⁷ Evidence from Mexico and Singapore indicates that as production becomes more capital- and machine-intensive, higher skilled male workers replaced lesser skilled women workers.¹⁰⁸ Studies have also found a need for business training such as money management and financial education, costing and accounting skills, bookkeeping, and technical and vocational training.¹⁰⁹ Because of the link between women's productivity and the potential gains to the country, it is important for RTAs to include provisions that require secondary and vocational training for women.

c) Access to Equal Work Opportunities

Another barrier to reducing the wage gap is a lack of access to certain types of work as a result of social conventions and family responsibilities. Throughout the world, many people believe that work can be classified as "women's work" or "men's work." "Women's work" relies on the abilities and social characteristics learned by women (such as administrative and domestic services), while "men's work" generally encompasses cash crops (instead of food and subsistence crops), physical labor, and managerial roles.¹¹⁰ According to the Statistical Yearbook for Asia and the Pacific, women are overrepresented in poorly paid positions and sectors of the economy and under-

¹⁰⁷ Integrating Gender Report, *supra* note 72, at 5; A 2009 U.N. study spanning a 40-year period indicated that gaps in women's education and training significantly affected economic growth through the reduction of the average ability of the workforce. See Ramjoue, *supra* note 100, at 2.

¹⁰⁸ Ramjoue, *supra* note 100, at 4; In the textile and clothing sector, certain countries such as Madagascar, Bangladesh, Vietnam, and South Africa exclude women from training activities, making them less likely to be promoted into higher positions, thereby limiting them to lower function jobs. See Tran-Nguyen & Zampetti, *supra* note 67, at 21.

¹⁰⁹ Powers & Magnoni, *supra* note 79, at 2.

¹¹⁰ Gibb, Regional Trade, *supra* note 90, at 9.

represented in better-paid industrial and service sectors.¹¹¹ In 2008, data showed that 47 percent of women in the region were engaged in agriculture.¹¹²

Social conventions in Latin America have somewhat evolved so that the thinking is no longer that the woman's place is solely in the home. Still, these conventions tend to dictate the roles and responsibilities of men and women. A woman's familial responsibility can play a role in the type of business in which she can engage. Women are still largely considered the primary caregivers of the children, their husbands, and older relatives, thereby placing constraints on the hours and jobs a woman can work.

This leads to many women opening small businesses. In Guatemala, Mexico, and Peru, women largely enter into consumer-oriented sectors such as personal services where the profit margins tend to be much lower than in male-dominated businesses such as business services and manufacturing.¹¹³ Studies revealed that profits in business services are much higher than in the personal services sector. Through retraining and investment, women could move into more profitable work.

E. Equality of Investments in Physical Capital

It is difficult to address the issue of discrimination in the workplace without considering the discrimination that exists outside the more traditional notions of the workplace. This leads to the second core women's right, equality of investments in physical capital. Two areas in which this disparity is especially notable are in equality of access to financing and technology.

Women often own small or medium sized enterprises and face different types of barriers which constrain their potential growth.¹¹⁴ Even without these barriers, women's entrepreneurial endeavors have been notable. In low- and middle-income countries, women entrepreneurs make an important contribution to economic development, especially in Latin America and the Caribbean.¹¹⁵ Latin America has the highest rate of entrepreneurial activity in the world with 21 percent,

¹¹¹ *Statistical Yearbook for Asia and the Pacific*, U.N. ESCAP (2011), <http://www.unescap.org/stat/data/syb2011/I-People/Women-empowerment.asp> [hereinafter Yearbook for Asia].

¹¹² *Id.*

¹¹³ Powers & Magnoni, *supra* note 79, at 13.

¹¹⁴ Gibb, Gender and Trade, *supra* note 66, at 1.

¹¹⁵ I. Elaine Allen & Nan Langowitz et al., 2007 *Report on Women and Entrepreneurship*, *Global Entrepreneurship Monitor*, The Centre for Women's Leadership, Babson College and Baruch College, available at <http://www.gemconsortium.org/docs/download/282>.

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as compared with 12.2 percent in other low- and middle-income countries in Europe and Asia. Even in high-income countries, the rate is only 7.9 percent.

Women's entrepreneurial activity in Latin America is a great contributor to countries' economies. Because the number of women entrepreneurs can account for up to a 19 percent change in GDP in Latin America, it is important to take steps to increase this number.¹¹⁶ Women's entrepreneurship allows countries to exponentially capitalize on new venture creation, because there is evidence that returns on investment in women is higher than investments in men because women are more likely to share their gains in health, education, and resources with their families and their communities.

However, women entrepreneurs face a myriad of barriers, including constraints in accessing financing and gender based bias in legal structures and financial institutions. As with the gender gap, other key barriers include family responsibilities, social conventions, and lack of access to education and technology.¹¹⁷ Research conducted on entrepreneurial activity shows a gender gap in ownership activity and venture creation. In general, women are underrepresented as business owners and their businesses are smaller and slower growing than men's in terms of the number of employees and the level of sales.¹¹⁸

1. *Equality in Access to Financing*

Access to markets and enterprise development are considered fundamental in enabling emerging market countries to engage in international trade.¹¹⁹ However, trade liberalization has generally not caused a significant increase in women's access to credit and has not provided more opportunities to use domestic savings for entrepreneurial activities.¹²⁰ Women face the discriminatory attitudes of financial institutions,¹²¹ thereby limiting their access to bank loans. Additionally, their access to other forms of property is very low.¹²² Frequently, collateral requirements are higher for women, who in any event often lack collateral because of gender inequalities in property

¹¹⁶ Powers & Magnoni, *supra* note 79, at 5.

¹¹⁷ *Id.* at 1.

¹¹⁸ *Id.*; The exceptions to the under-representation of women business owners are Peru, Thailand, Japan, and Brazil. *See* Allen & Langowitz et al., *supra* note 115, at 2.

¹¹⁹ Randriamaro, *supra* note 78, at 18.

¹²⁰ *Id.* at 18.

¹²¹ Powers & Magnoni, *supra* note 79, at 12.

¹²² In Afghanistan and Papua New Guinea, women lack access to property other than land. *Id.* at 12.

ownership and rights.¹²³ Women's businesses also tend to have fewer fixed assets, all of which translates into less collateral that women can post¹²⁴ to secure loans from traditional banks.

Access to capital presents a significant constraint for women entrepreneurs.¹²⁵ Women have been empowered through the experience of microcredit programs in South Asia and other low-income countries.¹²⁶ Women micro-entrepreneurs in Latin America have benefited from the growth of the microfinance industry because it has provided them more equitable access to financing for their businesses. Women have proven themselves to be reliable borrowers and have higher rates of repayment than men, thus, raising their profile with lending institutions. Women are being given access to short-term loans, which can help meet their working capital needs. However, banks have not been successful at developing products that meet women's investment capital needs, which could potentially support the long-term growth and development of their businesses.¹²⁷

Savings is a useful source of capital for women to expand their business through the purchase of additional market space or to diversify into other businesses. However, women generally have lower savings because their businesses have lower profits.¹²⁸ Very often, women lack seed money for their business because they have not previously held wage-earning jobs. Moreover, even if they held such jobs, cultural conventions may dictate that women must turn their wages over to their husbands or other male family members.

2. Access to Technology

Women around the world play a significant role in farming and post-harvesting activities.¹²⁹ In Sub-Saharan Africa, the agricultural sector has become predominantly women-based with women contributing between 60 percent and 80 percent of the labor for food production.¹³⁰ Studies on productivity indicate that women farmers have lower rates of productivity because they lack resources; however, there is no evidence that this discrepancy is attributable to efficiency in per-

¹²³ Randriamaro, *supra* note 78, at 18.

¹²⁴ Powers & Magnoni, *supra* note 79, at 12.

¹²⁵ Examples include Guatemala, Nicaragua, Peru, and Colombia. *Id.* at 1.

¹²⁶ *Integrating Gender Report*, *supra* note 72, at 8.

¹²⁷ Powers & Magnoni, *supra* note 79, at 1.

¹²⁸ Examples include Mexico, Peru, Nicaragua, and Bolivia. *Id.* at 1.

¹²⁹ *Women Farmers' Productivity in Sub-Saharan Africa*, UNEP, http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Human_Societies/Agriculture/Supplemental/Women-Farmers_Productivity_in_Sub-Saharan_Africa.pdf (last visited Jan. 24, 2013) [hereinafter *Women Farmer's Productivity*].

¹³⁰ For example, In Kenya, approximately 86 percent of farmers are women. *Id.*

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forming their tasks.¹³¹ There is some indication that if women and men had equal access to resources, total agricultural output could increase between 6 percent and 20 percent.¹³²

Women also are less likely to utilize technology in their businesses.¹³³ It is critical for women to be educated to utilize newer technologies to increase their productivity because evidence indicates that with training and education, women are more likely than men to utilize their knowledge and new technologies. The lower productivity of women can be explained by a number of reasons. In the agricultural sector, women farmers have less access to technology, land, information, inputs, and credits.¹³⁴ They are severely disadvantaged because they farm smaller plots with uncertain tenure. Women's access to land is limited by institutional and legal factors which prevent ownership and inheritance of land.¹³⁵ Because women are unable to secure title to land, they are excluded from participating in cooperatives and other organizations, making it more difficult for their voices to be heard in policies developed by these groups.

Women also lack access to reliable accounting systems and have limited access to channels through which they can market their products. This saturation limits their ability to compete for large orders, much less deliver them.¹³⁶

F. *Right of Participation*

The third core principle with respect to women's rights is the ability to participate in decision-making, which can increase the likelihood that their interests are considered.¹³⁷ Men seek to preserve their authority, naturally leading them to exclude women from their decision-making circles.¹³⁸ Policy-makers and managers are predominantly male, especially in the agricultural sector, and rarely understand the challenges and needs of women, which leads to wo-

¹³¹ *Id.*

¹³² *Id.*

¹³³ Powers & Magnoni, *supra* note 79, at 1.

¹³⁴ *Women Farmers' Productivity*, *supra* note 129.

¹³⁵ For example, in Sudan, any land owned by women is registered in the name of the male. *Id.* For example, in Afghanistan, Bangladesh, Fiji, India, the Islamic Republic of Iran, Mongolia, Papua New Guinea, and Sri Lanka, women's access to land is very limited. See *Statistical Yearbook for Asia and the Pacific 2011*, U.N. ESCAP, <http://www.unescap.org/stat/data/syb2011/I-People/Women-empowerment.asp> (last visited Jan. 12, 2013).

¹³⁶ Powers & Magnoni, *supra* note 79, at 13.

¹³⁷ UN ESCAP *Statistical Yearbook for Asia and the Pacific, 2011*, available at <http://www.unescap.org/stat/data/syb2011/I-People/Women-empowerment.asp> (last visited Jan. 12, 2012).

¹³⁸ Tran-Nguyen & Zampetti, *supra* note 67, at 2.

men's interests being underrepresented and potentially harmed by the policies and rules that are put in place. Many cultures consider women inferior members of society, causing women to lack any semblance of power in the workplace.¹³⁹

Even with advancements in education, women still are greatly underrepresented in top government posts and senior managerial positions.¹⁴⁰ Women thus lack experience in organizing lobbying groups or entering into negotiations to address critical work issues.¹⁴¹ The ongoing gender gaps in income and business leadership limit achievement of development objectives and threaten long-term sustainable development. Women's participation in business leadership is highly correlated to growth in GDP,¹⁴² and although education alone does not guarantee power or rights, it is a critical step in empowering women and increasing their participation in the political system.¹⁴³

Good governance is necessary to sustainable development and evidence suggests that gender equality in resources and rights is associated with better governance and less corruption. Attitudinal studies from 43 countries show that women view corruption more negatively than men, giving further support to the proposition that gender equality promotes economic growth through better governance.¹⁴⁴

G. Conclusion

Throughout the world, men and women have unequal access to resources, rights, and a voice in decision-making. In order to ensure equality in the workplace, effective structures must be put in place to deal with the issues explored in this paper. To facilitate gender equality, countries need to consider "engendering" their trade agreements.

V. TRADE AND HEALTH

A. Introduction

The pursuit of economic growth often has disastrous consequences for human health, particularly in the areas of food safety and access to lifesaving medicines.¹⁴⁵ These aspects of the human right to health form the basis for our two core rights to health in a RTA. The International Covenant on Economic, Social, and Cultural Rights

¹³⁹ *Id.*

¹⁴⁰ Powers & Magnoni, *supra* note 79, at 5.

¹⁴¹ Tran-Nguyen & Zampetti, *supra* note 67, at 3.

¹⁴² Powers & Magnoni, *supra* note 79, at 5.

¹⁴³ *Integrating Gender Report*, *supra* note 72, at 6.

¹⁴⁴ *Integrating Gender Report*, *supra* note 72, at 8.

¹⁴⁵ M. Gregg Bloche & Elizabeth R. Jungman, *Health Policy and the WTO*, 31 J. LEG. MED. & ETHICS 529 (2003).

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(ICESCR) ensures the right to “the enjoyment of the highest attainable standard of physical and mental health,” as well as the right to enjoy the fruits of scientific development.¹⁴⁶ As explained in the Universal Declaration, every person “has the right to a standard of living adequate for the health and well-being of himself and of his family.”¹⁴⁷

B. *Relationship Between Trade and Health*

However, we must consider the competing societal interests that may be found at the intersection of trade and health. On the one hand, a healthy population is necessary to create a productive and prosperous economy and thus is fundamental to trade and sustainable development. On the other hand, the human right to health must be balanced against the human rights to property and self-determination as represented in intellectual property rights (IPR) protections. For this reason, it is important that RTAs not only take care to ensure that trade policies avoid adverse impacts on public health—and even that they take reasonable steps to promote health—but also that IPRs be preserved.

It is imperative that governments learn the consequences of globalization on issues such as food safety and access to medicine, in order to determine policies to best deal with them.¹⁴⁸ These issues affect not only individuals, but also states and the global economy. We find that two core rights to human health, the right to essential medicines and the right to food safety, have such close linkages to trade that RTAs must explicitly account for them.

C. *Right to Essential Medicines*

The *sine qua non* of a healthy population is its access to essential medications, which will prevent or control epidemics and plagues. Article 4 of the Doha Declaration on TRIPS and Public Health,¹⁴⁹ later memorialized as an amendment to the TRIPS Agreement,¹⁵⁰ recognizes a state’s right to protect public health and to promote access to medications for all of its citizens despite the IPRs protected by the Agreement. The World Health Organization (WHO) defines essential

¹⁴⁶ ICESCR, *supra* note 97, arts. 12 & 15(1).

¹⁴⁷ Universal Declaration, *supra* note 25, art. 25(1).

¹⁴⁸ *The Effects of Globalization on Working Conditions in Developing Countries: An Analysis Framework and Country Study Results*, EMPLOYMENT POLICY PRIMER No. 9 (2008), available at http://siteresources.worldbank.org/INTLM/214578-1103128720951/21692675/EPPNoteNo9_Eng.pdf [hereinafter *Globalization on Working Conditions*].

¹⁴⁹ World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, ¶ 4 (Nov. 20, 2001) [hereinafter *Doha Declaration*].

¹⁵⁰ Amendment of the TRIPS Agreement, Decision of Dec. 8, 2005, WT/L/641.

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medicines as medications that “satisfy the priority health care needs of the population.”¹⁵¹ This broad recognition of the link between trade and essential medicines confirms its place in RTAs as a core right to human health.

Evidence indicates a strong correlation between poverty and high levels of disease. The WHO projects that there will be over 40 million deaths this year from lack of life-saving medications,¹⁵² and estimates that two million people die from tuberculosis, one million from malaria, and three million from HIV/AIDS in developing countries annually.¹⁵³ Incredibly, as much as one-third of the world’s population lacks access to essential medications, rising to over 50 percent in the poorest parts of Asia and Africa.¹⁵⁴ Moreover, diarrheal diseases account for 4 percent of the burden of disease, with 88 percent of this type of illness caused by unsafe water supplies, hygiene, and sanitation.¹⁵⁵

Although effective drug treatments exist for these life-threatening diseases,¹⁵⁶ extreme disparities in access to pharmaceuticals globally still abound. For some serious diseases discussed above, the treatments are either unaffordable or unavailable, and the situation only gets bleaker for rural areas.¹⁵⁷ These areas often lack access to the most basic of drugs for treating common illnesses, much less drugs for more complicated diseases such as HIV/AIDS. Does this mean that individuals who can afford these drugs deserve to live and are worth

¹⁵¹ WHO *Policy Perspectives on Medicines: The Selection of Essential Medicines 1*, WORLD HEALTH ORGANIZATION (June 2002), <http://archives.who.int/tbs/sel/s2296e.pdf> [hereinafter WHO Essential Medicines].

¹⁵² WHO: *Medicines, A Summary of Essential Medicines and Pharmaceutical Policies*, WORLD HEALTH ORGANIZATION (2012), http://www.who.int/medicines/services/essmedicines_def/en/[hereinafter WHO Essential Medicines Summary].

¹⁵³ *Public Health, Innovation and Intellectual Property Rights: Report of The Commission on Intellectual Property Rights, Innovation and Public Health 2-3*, WORLD HEALTH ORGANIZATION (2006), <http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf> [hereinafter Public Health].

¹⁵⁴ WTO Agreements and Public Health: A Joint Study by the WHO and the WTO Secretariat 103, 87, WORLD TRADE ORGANIZATION (2002), http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf [hereinafter Joint Study].

¹⁵⁵ Evidence also suggests that by 2030 in sub-Saharan Africa, burning wood for fuel could cause the premature deaths of 2 million women and 8 million children through respiratory illnesses. Public Health, *supra* note 153, at 6.

¹⁵⁶ Because the communicability of a disease does not delimit its requirement for essential medication, this paper uses the term, disease, to refer both to communicable and non-communicable diseases. Joint Study, *supra* note 154, at 87.

¹⁵⁷ Zita Lazzarini, *Making Access to Pharmaceuticals a Reality: Legal Options Under TRIPS and the Case of Brazil*, 6 YALE HUM. RTS. & DEV. L.J. 103, 105 (2003).

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more than those who cannot? This question cuts straight to the core of the issue.

Which pharmaceuticals must be considered “essential” for our purposes? The WHO has a Model List of Essential Drugs whose availability will satisfy the needs of a majority of the population. These drugs should be affordable and represent a balance of safety, quality, efficacy, and cost for a given health setting.¹⁵⁸ While the WHO’s Model list is purely a guide, it has led to global acceptance of the concept of essential medications and their ability to promote a healthy and sustainable population.¹⁵⁹ Each state must determine and periodically update its own essential medication list. The emergence of new epidemics such as HIV/AIDS and of anti-microbial resistance has brought the notion of essential medicines to the forefront.¹⁶⁰ The list of essential medicines should not take into account whether the medicines are patented.

Essential medications are not accessible if they are cost prohibitive. One example of the importance of affordable drugs is highlighted in the Philippines. If Filipinos were required to purchase the patented version of the beta blocker, atenolol, an additional 22 percent of the population would live below the poverty line, compared to the 7 percent affected if they bought the generic equivalent instead.¹⁶¹ Insulin is much more inaccessible and is definitively less affordable. In the Islamic Republic of Iran, a 10 ml vial of insulin costs about \$1.50, as compared to more than \$47 in the Congo and Namibia. This represents an incredible price difference and highlights the problem of access to essential medicines.¹⁶²

With respect to low-income countries, the cost of pharmaceuticals needs to be brought down to a level that is more affordable for the majority of people. While medical expenses can represent a significant portion of the household expenditure, they often are lower in priority than food and shelter. While the cost of a drug is largely determined by the price tag the manufacturer ascribes to it, the Joint Study proposes a number of things that governments and RTAs can do to reduce the

¹⁵⁸ Joint Study, *supra* note 154, at 87.

¹⁵⁹ The WHO also posits that essential medications should be chosen on the basis of the prevalence in the state of the diseases they counteract. WHO Essential Medicines Summary, *supra* note 152.

¹⁶⁰ WHO Essential Medicines, *supra* note 151, at 1.

¹⁶¹ The poverty line in the Philippines is \$1.25 per day. Dele Abegunde, *Essential Medicines for Non-Communicable Diseases (NCDs)*, Background Paper 4 (2010) [hereinafter Abegunde Essential Medicines].

¹⁶² In the case of diabetes mellitus, over 220 million people live with the disease; however, the cost of the oral drugs as compared to an individual’s income makes the drugs inaccessible. Even the generic brand would cost over two days’ wages in some countries and a shocking eight days’ pay in Ghana. *Id.* at 12.

cost. States can reduce import duties and other taxes on pharmaceuticals and they can rely on the use of safety measures built into the TRIPS Agreement, such as compulsory licensing,¹⁶³ parallel imports,¹⁶⁴ and exceptions which permit early testing and approval of generics.¹⁶⁵

Another reason that medicines are expensive, in addition to the cost imposed by IPR protections, is that some countries try to derive tariff revenue from the import of medications. As RTAs to reduce tariffs have come into effect, import duties for medical supplies, vaccines, and other drugs have also begun to decrease, with average tariff rates in developing countries being low to moderate.¹⁶⁶ A number of emerging market countries allow duty free entry of a limited number of essential drugs, while others impose tariffs.¹⁶⁷ For example, in Sub-Saharan Africa, import tariffs on mosquito insecticides and netting in-

¹⁶³ The TRIPS Agreement does not specifically use the term “compulsory licensing.” Joint Study, *supra* note 154, at 60. However, Article 31, which provides for such licensing as “other use without authorization of the right holder.” Marrakesh Agreement Establishing World Trade Organization Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights art. 31, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter TRIPS Agreement].

¹⁶⁴ Parallel importation involves the importation of trademarked or patented products from a country where the product is marketed either by the right holder or the right holder’s consent. Joint Study, *supra* note 154, at 60. This concept is regulated by the concept of exhaustion of IPRs under the TRIPS Agreement. Essentially, parallel exports allow a country to take advantage of products the right holder has released in a different country at a lower price. TRIPS Agreement, art. 6.

¹⁶⁵ Joint Study, *supra* note 154, at 44. Art. 30 of the TRIPS Agreement provides limited exceptions for usage, such as the ability of researchers to use the patented products to understand them more fully. Art. 30 of the TRIPS Agreement permits countries to allow manufacturers of generic drugs to use the patented drugs, *sans* permission from the rights holder and prior to the expiration of the patent in order to obtain marketing approval from public health authorities. This puts generic producers in a position to market their versions immediately after the patent expires.

¹⁶⁶ Two exceptions to this are Tunisia and India, where the tariff rates are 20.6 percent and 30 percent, respectively. Joint Study, *supra* note 154, at 88.

¹⁶⁷ Countries such as Pakistan, Tanzania, India, Tunisia, Kenya, and Burkino Faso have tariff rates in the range of 20 to 30 percent for active ingredients that go into the manufacturing of pharmaceuticals, such as insulin or penicillin. See generally Müge Olcay & Richard Laing, *Pharmaceutical Tariffs: What is their Effect on Prices, Protection of Local Industry and Revenue Generation?*, WORLD HEALTH ORGANIZATION (2005), <http://www.who.int/intellectualproperty/studies/TariffsOnEssentialMedicines.pdf>.

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creased their cost by 20 percent to 40 percent.¹⁶⁸ Reducing the cost of mosquito nets can increase utilization and decrease rates of malaria.

The main barrier to essential medications arises out of IPR concerns because current standards intended to protect patent-holders often compromise public health. It is generally agreed that IPRs must be tempered with considerations of health issues, which has led the trade regime to attempt to balance the need for affordable medications with the need for the regulation of patent rights.¹⁶⁹ Infringing on the rights of patent holders would deter innovation; however, this policy needs to take into account the interests of public health. In 1994 members of the WTO adopted the TRIPS Agreement to create a global consensus on the protection of patent rights. The TRIPS Agreement acknowledges the intersection between public health and IPRs by addressing the needs of emerging markets countries with respect to pharmaceutical patents.¹⁷⁰ The TRIPS Agreement grants patent protection to suitable products and processes for twenty years, with limited exceptions for public health, among others.¹⁷¹

The Agreement also contains mechanisms designed to increase access to pharmaceuticals for public health concerns and to include compulsory licensing, parallel importing, exceptions from patentability, and generic substitution.¹⁷² The balance of interests under the TRIPS Agreement involves the interplay between Articles 30 and 31. Article 31 of the TRIPS Agreement provides for government mandated manufacturing of generic pharmaceuticals if good-faith negotiations fail with the patent-holder. However, this Article has burdensome requirements that a state must meet before utilizing Article 31. For example, Article 31(f) provides that in the case of this compulsory licensing, the pharmaceuticals must be only for domestic use,¹⁷³ which clearly fails to provide a solution for states that lack the manufactur-

¹⁶⁸ Prices for malaria nets vary throughout Africa with prices being as high as \$45 in Swaziland and \$30 in Sudan. In contrast, Tanzania reduced its taxes and tariff duties on mosquito nets to 5 percent, making mosquito nets on average \$3.50. Joint Study, *supra* note 154, at 88.

¹⁶⁹ See TRIPS Agreement, *supra* note 163, art. 8 (noting right of Member states to protect and promote public health).

¹⁷⁰ *Id.* art. 8. Article 8 lets states “adopt measures necessary to promote public health” so long as these measures do not conflict with other provisions of the TRIPS Agreement. Article 30 also allows Member states to make limited exceptions to patent rights if they “do not unreasonably prejudice the legitimate interests of the patent holder.”

¹⁷¹ See generally TRIPS Agreement, *supra* note 163.

¹⁷² *Id.*

¹⁷³ TRIPS Agreement, *supra* note 163, art. 31.

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ing capability for drugs.¹⁷⁴ Also, Article 31(h) provides that the user must provide adequate compensation, taking into account the economic value of the compulsory licensing.¹⁷⁵ However, Article 31 must be read in conjunction with Article 30 which allows the exceptions under Article 31 provided that they do not conflict with the normal exploitation of the patent and do not prejudice the interests of the patent holder.¹⁷⁶

The hyper-epidemic of HIV/AIDS highlights the problem with the disparity in access to pharmaceuticals. In the developed world, HIV/AIDS is largely considered a chronic but treatable illness. However, in emerging and underdeveloped countries, HIV/AIDS is considered a plague and a death sentence.¹⁷⁷ Statistics show that sub-Saharan Africa continues to bear the brunt of the global HIV burden. While the percentage of the population living with HIV/AIDS has started to decrease, the absolute numbers continue upward. In 2009, these countries represented 22.5 million of the 33 million people still living with HIV, which is 68 percent of the global total. More women than men have the disease in this region.¹⁷⁸

In the Americas, Brazil is considered the epicenter of the HIV/AIDS epidemic and accounts for 57 percent of all of the cases in the Caribbean and Latin America.¹⁷⁹ The price tag for the triple-cocktail drug therapy used to treat HIV/AIDS is between \$10,000 and \$15,000 per person per year, despite the fact that it costs the manufacturer a fraction of this amount to produce.¹⁸⁰ Access to anti-retroviral medications makes the difference between life and death.

¹⁷⁴ *Id.* art. 31(f). In the Doha Declaration on TRIPS and Public Health, the WTO reached an agreement allowing a waiver to art. 31(f) of the TRIPS Agreement for nations that need to import generic drugs. This Declaration was formally incorporated into the Agreement as art. 31b in a 2008 amendment. Amendment of the TRIPS Agreement, Dec. 8, 2005, WT/L/641. This new policy allows a Member with manufacturing capacity to export the pharmaceuticals made under the compulsory license subject to burdensome, but viable, requirements. *See also* Press Release, World Trade Organization, Decision Removes Final Patent Obstacle to Cheap Drug Imports (Aug. 30, 2003), *available at* http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

¹⁷⁵ Trips Agreement, *supra* note 163, art. 31(h).

¹⁷⁶ *Id.* art. 30.

¹⁷⁷ Zita Lazzarini, *Making Access to Pharmaceuticals a Reality: Legal Options Under TRIPS and the Case of Brazil*, 6 YALE HUM. RTS. & DEV. L.J. 103, 106 (2003).

¹⁷⁸ *Global Report 2010* at 25, U.N. AIDS, http://www.unaids.org/globalreport/Global_report.htm [hereinafter AIDS Report].

¹⁷⁹ Approximately 640,000 Brazilians live with HIV/AIDS. JUST TRADE, *supra* note 2, at 115.

¹⁸⁰ *Id.* at 116.

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In an attempt to quantify the economic impact of the losses, studies estimate that the loss of national income from stroke, diabetes, and heart diseases in 2005 was \$11 billion in the Russian Federation, \$18 billion in China, \$9 billion in India, and a startling \$43 billion in Brazil.¹⁸¹ A lack of access to essential pharmaceuticals impacts the affected person, and that person's family productivity and well-being. Estimates indicate that between 2005 and 2015, China will have lost \$558 billion in national income due to stroke, diabetes, and heart diseases.¹⁸²

It seems clear that meaningful observance of human rights to health in this area requires the prioritization of direct protection of those rights. This can be accomplished through treatment with existing medicines over protection of business incentives to innovate new medicines and treatments, which has only an attenuated benefit to human health rights. Recognizing the need for access to essential medicines as a fundamental aspect of the right to health would ensure medicines with regard to the prevalence of a disease. The concept of essential medicines means those pharmaceuticals that satisfy the priority health care needs of the population,¹⁸³ those that address diseases reaching epidemic proportions or that present a threat to public health.¹⁸⁴

D. Food Safety

Another topic that deserves emphasis, and denominates our second core human right to health, is the connection between liberalized trade and food safety, including the quality of foods available in transitioning food markets, especially because of the probability that these products contribute to a new generation of public health risks. As explained by the Institute of Medicine of the National Academies,

The increasing cross-border and cross-continental movements of people, commodities, vectors, food, capital, and decision-making power that characterize globalization, together with global demographic trends, have enormous potential to affect the emergence and spread of infectious diseases.¹⁸⁵

¹⁸¹ Essential Medicines, *supra* note 151, at 4.

¹⁸² *Id.*

¹⁸³ See generally WHO Essential Medicines Summary, *supra* note 152.

¹⁸⁴ Melissa McClellan, "Tools for Success": *The TRIPS Agreement and the Human Right to Essential Medicine*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 153, 161 (2005).

¹⁸⁵ THE IMPACT OF GLOBALIZATION ON INFECTIOUS DISEASE EMERGENCE AND CONTROL: EXPLORING THE CONSEQUENCES AND OPPORTUNITIES, Workshop Summary,

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These new risks include the possibility that dangerous infectious diseases such as swine flu are connected to intensive meat production. The Food and Agricultural Organization warned in a 2007 report that an excessive concentration of industrial animals has greatly exacerbated the risk of spreading swine and bird flu, hoof and mouth disease, and other pathogens from animals to humans in the quest to meet the burgeoning demand for beef, chicken, turkey, and pork:

The risk of disease transmission from animals to humans will increase in the future due to human and livestock population growth, dynamic changes in livestock production, the emergence of worldwide agro-food networks and a significant increase in the mobility of people and goods.¹⁸⁶

Food-borne illness¹⁸⁷ is no longer a problem localized to a particular nation or region. Trade liberalization has led to rapid and widespread marketing of food products internationally, making food-borne illness a concern of global scope. As of 2009, the value of the world food trade was roughly \$1.2 trillion and it is steadily increasing as a result of the liberalization of agricultural trade and a more prosperous and growing middle class that is demanding greater meat consumption.¹⁸⁸ The risk that food-borne illnesses can spread worldwide has led to the notion of “farm to fork” regulation, meaning that food controls and oversight must take place along the entire food chain.¹⁸⁹

Forum on Microbial Threats, Inst. of Med. of the Nat'l Acads. 21 (2006), available at http://www.nap.edu/openbook.php?record_id=11588&page=R1.

¹⁸⁶ *Dramatic Changes in Global Meat Production could Increase Risk of Diseases*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (Sept. 17, 2007), <http://www.fao.org/newsroom/en/news/2007/1000660/index.html> [hereinafter *Dramatic Changes*].

¹⁸⁷ Food-borne illness is defined by the WHO as diseases that are either toxic or infectious in nature, and are caused by agents that enter the body through the ingestion of food. *Food Safety and Foodborne Illness*, Fact Sheet No. 37 (2007), WORLD HEALTH ORGANIZATION, <http://www.who.int/mediacentre/factsheets/fs237/en/>.

¹⁸⁸ *International Trade Statistics 2010*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/res_e/statis_e/its2010_e/its10_merch_trade_product_e.htm; See *Dramatic Changes*, *supra* note 186.

¹⁸⁹ *Veterinary Public Health and Food and Feed Safety Programme: the Safety of Animal Products from Farm to Fork*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (2002), <http://www.fao.org/docrep/MEETING/004/AB500E.htm>.

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Recent highly publicized food contamination problems in the United States after a 46-state salmonella poisoning from peanuts,¹⁹⁰ in Canada with 22 deaths from listeria poisoning from deli meat,¹⁹¹ and in China with melamine-contaminated infant formula,¹⁹² have underlined both the importance of food safety and its linkage to trade.¹⁹³ Nations need effective food control systems in place to protect the health and safety of their people and to prevent epidemics of foodborne illnesses. Complications arise from the fact that many countries are themselves involved in the actual food production and distribution process, and each country has its own food control systems or lack thereof. The presence of pathogens in food is extremely complicated precisely because of the numerous vectors from which the food became contaminated. Mechanisms of control are critical to nations in ensuring the safety and quality of the foods that enter international trade, while ensuring that the foods they import also meet these requirements. Because of globalization, the burden is on both the importing

¹⁹⁰ In 2008, outbreaks of *Salmonella* Typhimurium in forty-six States and Canada caused 691 illnesses and at least nine deaths. The culprit turned out to be peanut butter produced by a Georgia processing plant. Producers recalled all peanut products from that plant. See *2008-2009 Salmonella Typhimurium Outbreak Response*, CENTER FOR DISEASE CONTROL AND PREVENTION (May 18, 2009), <http://www.cdc.gov/salmonella/typhimurium/SalmonellaTyphimuriumAAR.pdf>.

¹⁹¹ In the summer of 2008, Canada experienced a widespread outbreak of *Listeria Monocytogenes* found to be caused by deli meat from a Maple Leaf Foods plant in Toronto. Even though Maple Leaf voluntarily recalled all of its products, the contamination resulted in 22 deaths. See *Listeriosis Outbreak Timeline*, CBCNEWS, Sep. 11, 2009, <http://www.cbc.ca/news/health/story/2008/08/26/f-meat-recall-time-line.html>.

¹⁹² In November 2008, 50,000 infants were hospitalized from a variety of kidney ailments. In total, 294,000 infants fell ill and six died. This outbreak was related to the consumption of melamine-contaminated infant formula and related dairy products. Contamination traces were also detected in liquid milk and powdered milk products originating from the Sanlu Group in China. Many countries banned Chinese dairy food and the WHO defined this crisis as one of the largest food safety events that it had dealt with in recent years. See Report of a WHO Expert Meeting in Collaboration with FAO, *Toxicological and Health Aspects of Melamine and Cyanuric Acid* (Dec. 1-4, 2008), http://whqlibdoc.who.int/publications/2009/9789241597951_eng.pdf.

¹⁹³ The term food safety is often used interchangeably with food quality. Food safety refers to hazards, whether acute or chronic, that make food injurious to the health of the end-user, while food quality refers to other attributes that influence a product's cost, and includes things such as contamination and spoilage. Food quality seems to be an additional requirement after already having achieved the minimum standards of food safety. For the purposes of this paper, we will treat the terms interchangeably.

and exporting countries to implement and enforce food control systems, while establishing risk criteria for their imports and exports.

The purpose of control systems is to enforce national laws already in place for the protection of the consumer. However, recognition that contamination can occur at all stages of the food chain—from farm to fork¹⁹⁴—has inspired the creation of international instruments to extend this regulation to agricultural products transnationally. The WTO has recognized the importance of food safety and standards in two agreements: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)¹⁹⁵ and the Agreement on Technical Barriers to Trade (TBT Agreement).¹⁹⁶ Both the SPS and TBT Agreements provide Members with blueprints to protect human, animal, and plant life or health, as well as the environment, from disease and pest infestation.¹⁹⁷

The SPS Agreement applies to trade-related measures taken to protect human health from various risks arising from toxins, contaminants, additives, drug and pesticide residues, and organisms that carry or cause disease in foods or beverages.¹⁹⁸ While the Agreement provides Members with the ability to take measures to protect its interests, and allows them to discriminate between like products if one of the products presents a health risk, it requires that such discrimination may only be in pursuit of the concerns of the SPS measure, not for arbitrary or unjustifiable purposes or otherwise as a disguised trade restriction.¹⁹⁹

The SPS Agreement attempts to create an international consensus on food safety standards, using other international instruments such as the joint FAO/WHO Codex Alimentarius Commission.²⁰⁰ Members can take measures that result in higher

¹⁹⁴ *The Importance of Food Quality and Safety for Developing Countries*, FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS AND THE WORLD HEALTH ORGANIZATIONS, http://www.fao.org/trade/docs/LDC-foodqual_en.htm (last visited Jan. 28, 2013)[hereinafter Food Safety].

¹⁹⁵ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade, Annex 1A, 33 I.L.M. 1125, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement].

¹⁹⁶ See Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A art. 2 [hereinafter TBT Agreement].

¹⁹⁷ See generally SPS Agreement, *supra* note 195; TBT Agreement *supra* note 196.

¹⁹⁸ See Joint Study, *supra* note 154, at 103.

¹⁹⁹ See generally SPS Agreement, *supra* note 195.

²⁰⁰ The Codex Alimentarius Commission is an intergovernmental body whose purpose is to create international standards for food quality and safety requirements. Codex has formulated international standards for a range of food products and has developed specific requirements with respect to veterinary drugs, pesticide resi-

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levels of sanitary or phytosanitary protection for its citizens than these agreed international standards if they have scientific justification or if the Member meets the Agreement's version of the precautionary principle.

The Agreement imposes on Members the requirement to prepare scientific risk assessments justifying sanitary and phytosanitary measures that seek higher levels of protection than agreed international standards. The assessment must take into account the nature of the risks to human, animal, or plant life or health presented by the import, as well as the effectiveness of the Member's chosen border measure in preventing that risk.²⁰¹

The main difference between the SPS Agreement and the TBT Agreement is that the SPS Agreement covers health protection measures as discussed above, while the TBT Agreement covers technical requirements, voluntary standards, and conformity assessment standards, excluding issues that are covered by the SPS Agreement.²⁰² With respect to food safety issues, the TBT Agreement has a much broader focus and covers things such as the non-deceptive labeling of the composition or quality of drugs, food and beverages, or products; quality requirements for fresh food; and packaging requirements.²⁰³ For example, the TBT Agreement covers labeling issues dealing with nutritional claims, and quality and packaging regulations, which fall outside of the scope of the SPS Agreement.²⁰⁴ Because the coverage of the SPS Agreement is relatively narrow, this leaves the TBT Agreement with a wide variety of risks to cover.²⁰⁵ With food safety primarily the domain of the SPS Agreement, the TBT Agreement focuses on food quality and seeks harmonization of these characteristics so that producers may easily trade in all WTO markets.

Food-borne illnesses not only create health problems for the population, but also have severe economic effects for the state. Quantifying these effects is difficult,²⁰⁶ so we will illustrate with representa-

duces, food additives, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practices, among many other standards. Food Safety, *supra* note 194, para. 32.

²⁰¹ SPS Agreement, *supra* note 195, art. 5.1.

²⁰² TBT Agreement, *supra* note 196, art. 1.5.

²⁰³ The TBT Agreement covers most aspects of human disease control, with the exception of food safety or diseases carried by animals or plants. *SPS Agreement Training Module, Chapter 1, Introduction to the SPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c1s4p1_e.htm (last visited Jan. 28, 2012).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Studies rely on numerous methods in determining costs from food-borne illnesses. For example, these studies can use measurements of the monetary costs of

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tive examples.²⁰⁷ For example, approximately 70 percent of the 1.5 billion instances of diarrhea that occur in the world annually are attributed to chemical or biological contamination of foods. Even though the disease by itself may not be fatal, it can lead to physical disabilities and mental retardation.²⁰⁸

A study conducted by the Centers for Disease Control and Prevention (CDC) in 2011 estimated that roughly 48 million new cases of food-borne illnesses occur in the United States every year, resulting in 128,000 hospitalizations and 3,000 deaths.²⁰⁹ This study specifically focused on health related costs and estimated the cost of food-borne illnesses in the United States to be \$152 billion,²¹⁰ with approximately \$39 billion being attributed to produce.²¹¹ This study estimated the health related cost as the sum of medical costs²¹² together with quality-of-life losses.²¹³ These costs include the cost to others in society²¹⁴ together with costs incurred by the affected person. Differences in wages, access to medications, and exposure to pathogens all affect the costs of illness in each nation. Obviously, these effects translate into production decreases and health care costs.

The complexity in quantifying the economic consequences of contaminated food is derived from a number of factors including: a) the value of the animal products and crops that are spoiled or have to be destroyed as a result of contamination; b) the value of the rejections or detentions of these products in the export trade, such as losses from product bans, loss of reputation, and other breach of contract costs; c) the cost of healthcare; and d) the loss of productive output or earnings that result from premature death, morbidity, or disability.²¹⁵

the illness to society, the “willingness-to-pay” principle to avoid illness, as well as hybrid approaches. Robert L. Scharff, *Health-Related Costs from Foodborne Illness in the United States* 1 (2010), available at <http://www.producesafetyproject.org/media?id=0009> [hereinafter Health Cost Study].

²⁰⁷ *Id.* Studies that attempt to quantify the losses are often based on limited inputs. For example, only some studies take into account the long-term health consequences of acute food-borne illnesses.

²⁰⁸ Food Safety, *supra* note 194, para. 18.

²⁰⁹ *2011 Estimates of Foodborne Illness*, CENTER FOR DISEASE CONTROL AND PREVENTION (Apr. 3, 2012), <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html>.

²¹⁰ Food Safety, *supra* note 194, at 1.

²¹¹ *Id.* at 14.

²¹² *Id.* at 2. Medical costs include pharmaceuticals, physician and hospital services.

²¹³ *Id.* Examples of the cost of quality of life losses include pain, suffering, death, and disability.

²¹⁴ *Id.* For example, costs to society include costs to the insurance companies that pay the medical expenses.

²¹⁵ Food Safety, *supra* note 194, para. 20.

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The greatest health impact on the economy is the loss of output and earnings caused by contaminated food. The disability or death of the wage earner affects the country's economy as well as the individual's family.²¹⁶ The affected nation can lose a global comparative advantage when it loses the productive capacity of many of its citizens.

As an example of these many vectors, in 1996 an outbreak of an intestinal parasite in the United States and Canada sickened 1,500 people.²¹⁷ California strawberries were erroneously implicated as the culprit by Ontario's chief medical examiner. Though the chief medical examiner proclaimed that Ontario strawberries were safe to eat, some consumers stopped eating them entirely and supermarkets removed them from their shelves. Shortly thereafter, the CDC determined that Guatemalan raspberries were actually to blame. Because of the confusion, the California Strawberry Commission estimated a loss of \$20 million to \$40 million. A spokesperson for the Commission was quoted as saying that "[Y]ou can take consumer confidence away in a day, but it takes forever to restore."²¹⁸

A subsequent outbreak occurred in 1997 from Guatemalan raspberries and a temporary suspension on the export of raspberries was instituted.²¹⁹ This suspension affected over 250 producers and 5,000 workers and resulted in a \$10 million loss of income.²²⁰ The United States even issued an import ban on these raspberries.²²¹ Even though the ban on Guatemalan raspberries has since been lifted, the demand is only one-third of what it once was,²²² giving other exporters an opportunity to corner the market. A study completed in 2000 found that only six Guatemalan raspberry farms remained, down from eighty-five farms in 1996.²²³

In 2006, the FDA informed the public of an outbreak of a specific strain of *E. coli* which had been linked to bagged spinach.²²⁴ Be-

²¹⁶ *Id.*

²¹⁷ Dr. Douglas Powell, *Risk-Based Regulatory Responses in Global Trade: Guatemalan Raspberry Imports in the U.S. and Canada, 1996-1998*, at 7, available at http://www.foodsafety.ksu.edu/articles/443/guatemalan_rasp_imports.pdf [hereinafter *Raspberry Case*].

²¹⁸ *Id.* at 8.

²¹⁹ *Raspberry Case*, *supra* note 217, at 10.

²²⁰ *Id.*

²²¹ *Id.* at 11.

²²² Judy C. Buzby, *Effects of Food-Safety Perceptions on Food Demand and Global Trade* 59 (May 2001), available at <http://www.ers.usda.gov/publications/wrs011/wrs011i.pdf>.

²²³ *Id.*

²²⁴ Robert M. Yoke, Note, *Let Us Eat Lettuce (and Spinach): Is The Bioterrorism Preparedness Act Enough or Is An Independent Food Safety Agency Required?*, 96 *Ky. L.J.* 731, 731 (2007-08).

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cause the source of the contamination was unknown at that time, the FDA warned consumers to stay away from all bagged spinach.²²⁵ Even though the FDA was subsequently able to determine possible causes of the E. coli outbreak, it was not able to identify a single source. As of 2006, this was considered one of the deadliest outbreaks in the country,²²⁶ and one of the costliest to date because of lost profits. The spinach industry was shut down by the FDA's warning for 5 days, causing grocery stores to pull the bagged spinach from their shelves and restaurants to remove it from their menu. One year after the outbreak, the California spinach market lagged \$60 million from before the outbreak. The spinach industry in general lost as much as \$350 million in profits.²²⁷

As discussed, unsafe food can have far-reaching consequences on individuals, nations, and the global economy. For these reasons, we consider food safety a fundamental aspect of the human right to health and a necessary right in achieving sustainable development in a growing economy.

E. Conclusion

This paper seeks to highlight the two core human rights we find most fundamental to the intersection of trade and health. If the moral consequences highlighted in this paper are not enough to push nations towards creating programs to protect these rights, the numbers and what they mean for the global economy should be enough. Without access to essential life-saving medications and food safety the population as a whole will suffer. The loss of millions of people decreases the demand for products as well as efficient production of such products. A healthy population is the foundation to achieving a prosperous and sustainable economy.

VI. TRADE AND INDIGENOUS RIGHTS

A. Introduction

As previously discussed, while trade liberalization can create benefits, it can also have unintended consequences such as human rights abuses.²²⁸ Critics of trade liberalization and RTAs claim that

²²⁵ The outbreak resulted in 204 cases of illness across 26 states and Canada. Sara M. Benson, *Guidance for Improving the Federal Response to Foodborne Illness Outbreaks Associated with Fresh Produce*, 65 FOOD & DRUG L.J. 503, 508 (2010).

²²⁶ See generally *id.*

²²⁷ *Id.* at 509.

²²⁸ *Trade and Development - an Introduction, A Global Focus Key Issues Paper*, GLOBAL FOCUS (2010), <http://www.globalfocus.org.nz/uploaded/documents/Trade%20and%20development.pdf>.

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this system and these agreements only benefit a few multinational corporations and local elites, while harming large parts of civil society,²²⁹ particularly indigenous peoples. Indigenous peoples are inarguably entitled to share in the benefits of trade liberalization, including the opportunities and economic growth it creates.

Economic policies often ignore the non-economic effects of these policies, including increases in low-quality, unstable, low-paying employment and increased inequity and poverty, especially for women, children, the elderly, and indigenous peoples.²³⁰ Additionally, participants in international trade often do not abide by land rights and international labor standards.²³¹ Local government human rights organizations insist that the continuing discrimination and exclusion of indigenous peoples has significant negative consequences.²³²

The term “indigenous peoples” refers to a population that shares a common culture, language, race, historical condition, or territorial connection, which are all objective elements. There is also a subjective element in which the group self-identifies as a distinctive ethnic or cultural group.²³³ For the purposes of this paper, the term “indigenous peoples” will be defined as communities that pre-date colonization periods, are still characterized by a distinctive culture, and still inhabit ancestral lands.²³⁴ These indigenous populations represent a minority group within their resident territories and generally live under conditions of severe economic deprivation in comparison to the majority group around them.²³⁵

As of 2011, there were approximately 300 million indigenous peoples worldwide, a majority of whom face marginalization from the dominant society and live under conditions of severe disadvantage, poverty, discrimination, and exclusion, all while struggling to preserve their original way of life and their culture.²³⁶ Even though indigenous peoples comprise roughly 5 percent of the world’s population, they ac-

²²⁹ Roberto R. Coll, *Wielding Human Rights and Constitutional Procedure to Temper the Harms of Globalization: Costa Rica’s Battle Over the Central America Free Trade Agreement*, 33 U. PA. J. INT’L L. 461, 464 (2011).

²³⁰ *Trade and Development*, *supra* note 228.

²³¹ *Id.*

²³² *World Directory of Minorities and Indigenous Peoples—Nicaragua: Overview*, REFWORLD (June 3, 2008), <http://www.unhcr.org/refworld/docid/4954ce1bc.html> [hereinafter *World Directory Nicaragua*].

²³³ Patrick Wieland, *Why the Amicus Curia Institution is Ill-suited to Address Indigenous Peoples’ Before Investor State Arbitration Tribunals: Glamis Gold and the Right of Intervention*, 3 TRADE, LAW AND DEVELOPMENT 335, 345-46 (Fall 2011).

²³⁴ *Id.* at 346.

²³⁵ JUST TRADE, *supra* note 2, at 207.

²³⁶ Wieland, *supra* note 233, at 345.

count for about 15 percent of the world's poor.²³⁷ A 2004 World Bank study indicated that indigenous peoples in Latin America have made little social and economic progress in the last decade and suffer from lower education, poverty, and a greater incidence of discrimination and disease than most other groups.²³⁸

For example, the majority of Nicaragua's minorities live in the Atlantic lowlands, which comprise approximately 56 percent of the national territory.²³⁹ Nicaragua, for example, is comprised of 15 districts and two Autonomous Regions, with significant inequalities existing between the districts and the Autonomous Regions.²⁴⁰ This area contains some of the nation's richest reserves of natural resources and the second largest tropical jungle in the Americas,²⁴¹ providing a prime opportunity for investors and the government. The Autonomous Regions are primarily inhabited by indigenous peoples who have very low rates of formal employment and generally work in the subsistence fishing, mining and farming sectors, with the rate of unemployment in these regions being 90 percent as opposed to approximately 7 percent in the country as a whole. In addition, a majority of Nicaragua's indigenous population suffers from a lack of access to health care. Even while the rate of poverty in Nicaragua has decreased by about 14 percent during the past 5 years, it has increased by 11 percent among minority and indigenous Caribbean coast populations of Nicaragua.²⁴² These are troubling statistics that need to be addressed in order for these countries to both become more economically productive and to enjoy higher standards of living for all of civil society.

A majority of indigenous peoples have been separated from lands they consider sacred, deprived of their natural environments, and economically, culturally, politically, and religiously dispossessed.²⁴³ They have borne the brunt of the international trade policies as evidenced by significant increases in unemployment, underemployment, and other social indicators indicative of Third World populations. Resource extraction can cause the forceful removal of people from their lands and the destruction of their natural environ-

²³⁷ *Statistics and Key Facts about Indigenous People*, Rural Poverty Portal (Apr. 27, 2012, 9:48 AM), <http://www.ruralpovertyportal.org/web/guest/topic/statistics/tags/indigenous%20peoples>.

²³⁸ Gillian Moon, *Fair in Form, But Discriminatory in Operation — WTO Law's Discriminatory Effects on Human Rights in Developing Countries*, 14 J. INT'L ECON. L. 553, 570 (2011).

²³⁹ *World Directory Nicaragua*, *supra* note 232.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Wieland, *supra* note 233, at 345.

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ments.²⁴⁴ This presents a significant issue when they face the loss of biodiversity, land, water, culture, livelihoods, and traditional knowledge.²⁴⁵ Investor's rights under investment treaties disproportionately affect indigenous peoples when "the boundaries of their sovereignty remain disputed."²⁴⁶ Because of this, investors may not recognize indigenous peoples' rights to natural resources and land.

Additionally, indigenous peoples have a weakened bargaining position vis-à-vis their employers because of high levels of unemployment and the increased mobility of capital. They are particularly vulnerable when their integration into the global economy occurs without their free prior knowledge and consent because they are inadequately able to protect their livelihoods, culture, and rights,²⁴⁷ making it difficult, if not impossible, to enjoy the opportunities and growth that come with trade liberalization.

B. Link Between Trade and Indigenous Rights

The global economy operates under rules and legal frameworks, which can be adverse to indigenous peoples' rights and can lead to the destruction of their cultures and ways of life.²⁴⁸ Indigenous peoples and their livelihoods need to be able to co-exist with other systems²⁴⁹ in order for them to flourish in the economy. They need to be supported in the push for them to be integrated into the global market economy.²⁵⁰ Investment in the indigenous potential of poorer regions can increase the competitiveness of regional economies. Indigenous communities are the keepers of unique skills, knowledge, and production systems, which can be an asset not only to the indigenous populations that discovered it, but also to the economy and global welfare.²⁵¹ It is important to take steps to protect, promote, and recognize the traditional industries, occupations, and economies of indigenous peoples.²⁵² Doing so can have far-reaching effects on the economy, both nationally and globally through the increased productivity of more of the population.

²⁴⁴ Trade and Development, *supra* note 228.

²⁴⁵ *Id.*

²⁴⁶ Wieland, *supra* note 233, at 348.

²⁴⁷ *A Fair Globalization: Creating Opportunities for All*, WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION 46 (2004), <http://www.ilo.org/public/english/wcsdg/docs/report.pdf> [hereinafter Fair Globalization].

²⁴⁸ *Id.* at 70.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Rural Development through Decent Work, Rural Policy Brief*, INTERNATIONAL LABOR ORGANIZATION, available at http://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/publication/wcms_165311.pdf (last visited Jul. 1, 2012).

²⁵² *Id.*

Indigenous peoples are no strangers to entrepreneurship, innovation, and enterprise.²⁵³ They are the world's first peoples and they are responsible for the creation and development of early forms of trade and barter, which now provide the base for modern commerce.²⁵⁴ Indigenous innovation was based upon their extensive knowledge of their traditional lands and skills in designing artifacts and tools that were adaptable to their environment.²⁵⁵ Indigenous peoples are critical to the development of the economy and their economic success can help maintain the survival of indigenous communities. Indigenous peoples are struggling to improve their socio-economic status and many of them believe that economic development is the way to achieve wealthier and healthier communities.²⁵⁶ It also allows them to participate in the global economy through entrepreneurship and business development.²⁵⁷

C. *The Role of RTAs in Indigenous Rights*

While international and non-governmental organizations have attempted to address human rights applicable to indigenous peoples, there are limited mechanisms in place to accomplish the goal of protecting indigenous rights. Indigenous peoples' rights were not even covered by the UN until the adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples (the "Indigenous Declaration") on September 13, 2007.²⁵⁸ Even though it is an aspirational, non-binding document, the Indigenous Declaration has created a new awareness of indigenous peoples' concerns and human rights, recognized the invaluable contributions of indigenous peoples to the culture and heritage of the world, and created an awareness of the need to address the issues of indigenous peoples through regulations and budgets. The Indigenous Declaration can prove to be extremely useful

²⁵³ Danielle M. Conway, *Promoting Indigenous Innovation, Enterprise and Entrepreneurship Through the Licensing of Article 31 Indigenous Assets and Resources*, 64 SMU L. Rev. 1095, 1098 (2011)[hereinafter *Promoting Innovation*].

²⁵⁴ *Id.* at 1099.

²⁵⁵ *Id.*

²⁵⁶ Bob Kayseas et al., *Fostering Indigenous Entrepreneurship: A Case Study of the Membertou First Nation, Nova Scotia, Canada 2* (2006) (unpublished manuscript), available at <http://ciede.mgt.unm.edu/pdf/papers/BobKayseas.pdf> (last visited July).

²⁵⁷ *Id.*

²⁵⁸ See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at 1, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [hereinafter *Indigenous Declaration*].

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if states, civil society, indigenous peoples, and the UN make use of it to provide guidance on indigenous rights.²⁵⁹

RTAs can manage trade between economic rivals and neighbors and can regulate competition in politically sensitive sectors of the economy.²⁶⁰ Structural change provided by RTAs has brought uncertainty and insecurity to workers because of the lack of social and economic provisions for adjustment. Indigenous peoples are among the most vulnerable because they lack economic assets and trade-significant skills.²⁶¹ Today, a myriad of actors play an important role in shaping trade policy. These global networks can help bring together diverse groups of people to try to affect change²⁶² and can help address common problems such as gender equality, the environment, and the rights of indigenous peoples.²⁶³

Despite the aspirational language, these RTAs do not set out specific mechanisms for ensuring these rights. They are merely aspirational discussions in the social dimensions of the agreements or are often separate from the main text of the agreements. Although these examples demonstrate a global concern for indigenous inequalities, it is difficult to integrate this concept at a practical level. Enabling language such as that discussed above is not enough. This paper seeks to enumerate four core principles with respect to indigenous rights as they pertain to trade, and will provide examples of how these principles apply to trade on a practical level.

D. Core Principles for Indigenous Peoples

We have identified four core indigenous rights that are so closely linked to trade and so critical to indigenous peoples that they must be included in RTAs. These are the right to own land and resources, the protection of traditional knowledge, access to education, and the right to participate in the institutions that set policies affecting them.

1. Right to Own Land and Resources

One of the objectives of the indigenous rights movement has been articulated by Article 26(2) of the Indigenous Declaration which

²⁵⁹ UNFPII, State of the World's Indigenous Peoples, available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf (last visited Feb. 6, 2012) [hereinafter UNFPII].

²⁶⁰ Roberto R. Coll, *Wielding Human Rights and Constitutional Procedure to Temper the Harms of Globalization: Costa Rica's Battle Over the Central America Free Trade Agreement*, 33 U. PA. J. INT'L L. 461, 463 (2011).

²⁶¹ Fair Globalization, *supra* note 247, at 4.

²⁶² *Id.* at 9.

²⁶³ *Id.* at 10.

states that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”²⁶⁴ This objective often stands in opposition to trade’s alluring potential for economic growth and development, which creates pressure for governments to use indigenous land in a way that maximizes financial rewards and increases the country’s standing in the global market.

The right to control resources and land is crucial to the survival of indigenous populations as distinct peoples.²⁶⁵ Indigenous peoples’ rights over land and resources need to be recognized because these lands and resources have been looked after by the indigenous for time immemorial.²⁶⁶ Indigenous populations continue to lose their lands, leading to the loss of their culture and livelihoods,²⁶⁷ together with their traditional knowledge as discussed below. The development of indigenous peoples depends on control of their land because land provides a base to rebuild indigenous communities by establishing an economic footing in modern society.²⁶⁸

Trade greatly affects the resources that are necessary to the survival of indigenous peoples and has caused the destruction of these resources. In cases of investments in extractive industries, plantations, and mega-hydroelectric dams, indigenous peoples have been subjected to disruption of livelihoods, massive dislocations, and the ecological degradation of their lands.²⁶⁹ For example, oil development interests have affected five of Ecuador’s indigenous tribes in the Amazon rain forest because the oil development by Texaco and its successor caused an oil spillage, which detrimentally affected the Amazon rain forest.²⁷⁰

One flagrant example of a massive dislocation of indigenous peoples from their land is the Mapuche people. In South America, the

²⁶⁴ Lillian Aponte Miranda, *The Hybrid State- Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 137 (2007); Indigenous Declaration, *supra* note 258, at art. 26(2).

²⁶⁵ Wieland, *supra* note 233, at 349.

²⁶⁶ Fair Globalization, *supra* note 247, at 70.

²⁶⁷ Rural Development through Decent Work, Rural Policy Brief, INTERNATIONAL LABOR ORGANIZATION [ILO], available at http://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/publication/wcms_165311.pdf (last visited Feb. 16, 2012).

²⁶⁸ Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples’ Rights, Identity and Resources*, 15 TEX. WESLEYAN L. REV. 207, 212 (2009).

²⁶⁹ Fair Globalization, *supra* note 247, at 46.

²⁷⁰ JUST TRADE, *supra* note 2, at 225.

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Mapuche people are the third largest indigenous group²⁷¹ and comprise 8 percent of the population of Chile.²⁷² The Pehuenche tribe is part of the Mapuche and is actively seeking recognition of its rights to the resources and lands to which it is culturally, spiritually, and materially connected.²⁷³ In 1989, the government of Chile approved a hydroelectric development plan for the upper Bío Bío River,²⁷⁴ which traditionally was Mapuche-Pehuenche land.²⁷⁵ The project, once completed, was intended to supply 10 percent of Chile's energy,²⁷⁶ which would spur economic growth and development.

The Pehuenches claimed that the project would require the displacement of their people because their lands would be flooded.²⁷⁷ After a series of legal battles, the Pehuenches filed a claim before the Inter American Commission for Human Rights (IACHR).²⁷⁸ Although this case settled out of court, it demonstrates how economic development trumps indigenous rights that, unlike most land property claims, involve an intimate attachment to the lands which they originally settled.

Saramaka People v. Suriname addressed the loss of indigenous resources, when the Saramaka filed various land and resource claims stemming from concessions Suriname granted to transnational companies for the exploration and extraction of natural resources. The IACHR found that Suriname violated the Saramaka people's rights to judicial protection and property through the granting of mining and logging concessions. The IACHR found that these concessions adversely affected resources necessary to subsistence and trade by the Saramaka and ordered Suriname to grant title over the Saramaka people's territory before authorizing new plans for development or investment of natural resources that could affect their territory.

²⁷¹ Lila Barrera-Hernández, *Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water*, 11 ANN. SURV. INT'L & COMP. L. 1 (2005).

²⁷² *Id.* at 1, 12.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1.

²⁷⁵ José Alwyn, *The Ralco Dam and the Pehuenche People in Chile: Lessons From an Etho-Environmental Conflict*, Paper Presented at the Conference at the Centre for the Study of Global Issues, University of British Columbia, Sept. 25-27, 2002, at 5-6, 9-10, 12, available at [http://www.historiaecologica.cl/Ralco%20\(Alwin\).pdf](http://www.historiaecologica.cl/Ralco%20(Alwin).pdf).

²⁷⁶ Barrera-Hernández, *supra* note 271, at 13.

²⁷⁷ *Id.* at 14.

²⁷⁸ *Id.* at 17.

According to the facts of the Yanomami case,²⁷⁹ the Brazilian Constitution guaranteed the rights of the Indians to own their territory and it gave them exclusive use of the natural resources in that territory. Nonetheless, the Yanomami Indian inhabitants were displaced from their lands because of the building of a highway. Not only did the construction of the highway cause a considerable number of deaths from epidemics of influenza, tuberculosis, measles, and venereal diseases, it was later discovered that the area contained ores of tin and other metals, which technically belonged to the Yanomami. The displacement of the Yanomami from their lands deprived them of the benefit of these natural resources, making them unable to engage in trade that had brought such great benefit to Brazil's majority populations. This led to many of the Yanomami becoming beggars and prostitutes unable to contribute to the economic development of Brazil.

Indigenous peoples should be afforded equal access to assets and resources. Policies need to be enacted to take into account indigenous peoples' needs where they work and live. It is important to foster local communities by strengthening local cultural identities, economic capabilities, and the need to respect the rights of indigenous peoples.²⁸⁰ Indigenous peoples' rights over land and natural resources need to be recognized, and mechanisms need to be put in place to ensure this happens. Their lands and natural resources need to be conserved and protected in order to preserve the various indigenous groups, as well as their traditional knowledge.

Since 2005, the ILO has worked with the indigenous peoples' organizations and the Government of Cambodia to empower the indigenous communities by protecting their collective rights to land within the framework of a DANIDA funded project. The ILO supports the implementation of the Forestry Law and the Land Law through the provision of assistance and capacity building to indigenous communities and public officials throughout the steps involved in the process leading to land-titling. These steps include community identification, legal registration, and application for collective land title under the Land Law of 2001 and other related regulations. As of the time of the report, thirty-six communities were identified, and twenty had been registered as legal entities and are now working towards collective land titling.²⁸¹

²⁷⁹ Resolution No. 12/85, Case No. 7615 (Brazil), Mar. 5, 1985, printed in Annual Report of the IACHR 1984-85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, Oct. 1, 1985, available at <http://www.cidh.org/annualrep/84.85eng/brazil7615.htm>.

²⁸⁰ Fair Globalization, *supra* note 247, at 46.

²⁸¹ *Rural Development through Decent Work*, Rural Policy Brief, INTERNATIONAL LABOR ORGANIZATION, http://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/publication/wcms_165311.pdf (last visited Feb. 16, 2012).

In Australia, the Native Title Legislation has increased the negotiating powers of indigenous peoples by obliging mining companies to consult with the communities. This has led to improvements in the proportion of indigenous peoples employed in the mining sector within the indigenous communities.²⁸² Licensing can facilitate the control and exercise over indigenous resources and assets, and can provide the foundation for indigenous entrepreneurship.²⁸³ Through licensing, indigenous entrepreneurs can cement in commerce the indigenous resources and assets to commercial market participants.²⁸⁴

2. *Protection of Traditional Knowledge*

The second core right we consider fundamental is the protection of indigenous knowledge. The Indigenous Declaration provides a guarantee that also contains the definition of traditional knowledge. Article 31 of the Indigenous Declaration states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.²⁸⁵

Traditional knowledge generally refers to intangible features of assets and resources that arise from indigenous existence.²⁸⁶ It also refers to the innovations,²⁸⁷ knowledge,²⁸⁸ assets,²⁸⁹ resources, and

²⁸² State of the World's Indigenous Peoples, at 17, UNFPII, *available at* <http://www.un.org/esa/socdev/unfpii/en/sowip.html> (last visited Feb. 6, 2012).

²⁸³ Promoting Innovation, *supra* note 253, at 1116-1117.

²⁸⁴ *Id.* at 1117.

²⁸⁵ Indigenous Declaration, *supra* note 258, art. 31.

²⁸⁶ Promoting Innovation, *supra* note 253, at 1115.

²⁸⁷ See Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 *MICH. J. INT'L L.* 919, 924 (1996). In recent years companies have sought to make their clothing using environmentally-friendly materials. *Id.* In 1990, scientist Sally Fox sought and received a U.S. patent for colored cotton, based on seeds she received from a United States Department of Agriculture collection from Latin America. *Id.* This patented colored cotton resulted from centuries of cultivation and breeding by indigenous groups in Latin America. *Id.* While these indigenous groups are the true inventors of colored cotton, Sally Fox receives all of the proceeds of the pat-

practices²⁹⁰ of local and indigenous populations around the world that have been developed over time and passed from generation to generation.²⁹¹ It is generally practical in nature, especially in fields such as fisheries, agriculture, forestry, horticulture, and health,²⁹² and can also include manufacturing and handicrafts.²⁹³

Indigenous assets and resources are referred to as indigenous intellectual property (“indigenous IP”).²⁹⁴ The use of indigenous knowledge is recognized as a rich source of scientific information,²⁹⁵ which can contribute to the global well-being. However, indigenous

ents. *Id.* Even today thousands of farmers still grow colored cotton and thousands of indigenous women still spin and weave it. *Id.*

²⁸⁸ Andean indigenous cultures have long used quinine, which comes from the bark of the Peruvian cinchona tree. *Id.* at 921-22. They learned to use quinine to cure fever after seeing feverish jaguars eating it. However, its most-well known use is as a cure for malaria. *Id.*

²⁸⁹ See Jonathan Vuotto, *One Year After Breakthrough Court Order, Nicaragua Government Still Ignores Awas Tingni Rights*, CULTURAL SURVIVAL, May 5, 2010, <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/nicaragua/one-year-after-breakthrough-court-order-nicaragua>. The Awas Tingni is part of the larger Mayagna indigenous group in Nicaragua, which has inhabited the Atlantic coastal region for centuries. *Id.* The group holds their land communally and each family maintains several plots of land, which they cultivate using the slash-and-burn system. *Id.* This method, which has been passed down for centuries, mimics the natural forest system. *Id.* Not only is this method ecologically sustainable, but is also economically productive. *Id.* It involves a rotating period of regeneration where the community does not use a specific plot of land. *Id.* It takes approximately 15 years of disuse for the land to regain its productive capacity. *Id.*

²⁹⁰ See Roht-Arriaza, *supra* note 287, at 923-24. For centuries, indigenous African peoples have been using katempfe and the serendipity berry to sweeten their food and drink. *Id.* at 923. Thaumutin is the active ingredient in katempfe, is roughly 2,000 times sweeter as sugar, and is calorie free. *Id.* Lucky Biotech, a Japanese corporation, and the University of California, were granted patents over the proteins derived from the two plants, making no arrangements to compensate the African communities from which the knowledge of the plant originated. *Id.* at 923-24.

²⁹¹ *Traditional Knowledge Information Portal: Background Material*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/tk/material.shtml> (last visited Feb. 6, 2012) [hereinafter *Traditional Knowledge Information Panel*].

²⁹² *Id.*

²⁹³ INTERNATIONAL LABOR ORG., UNLOCKING INDIGENOUS PEOPLES’ POTENTIAL FOR SUBSTANTIAL RURAL DEVELOPMENT 2 (2011) [hereinafter UNLOCKING INDIGENOUS PEOPLES’ POTENTIAL], available at http://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/publication/wcms_165311.pdf.

²⁹⁴ *Promoting Innovation*, *supra* note 253, at 1115.

²⁹⁵ Geoffrey Scott, *A Protocol for Evaluating Changing Global Attitudes Toward Innovation and Intellectual Property Regimes*, 32 U. PA. J. INT’L L. 1165, 1170 n.9 (2011).

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peoples are not afforded the protection for their traditional knowledge as creators of new ideas in the West are. Western IP laws support the appropriation of indigenous property without any obligation to allow the originators of the knowledge a share in the proceeds.²⁹⁶

Western IP law is useful in protecting indigenous IP,²⁹⁷ but it is currently inadequate to protect the non-commercial attributes of intangible assets and indigenous resources.²⁹⁸ Indigenous IPRs are violated because international rules open the door to privatization of indigenous knowledge.²⁹⁹ The TRIPS Agreement provides patent protection only to inventions that are new, involve an inventive step, and are capable of industrial application.³⁰⁰

Today, people are starting to recognize and appreciate the correlation between culture and biodiversity. The practices and knowledge that the indigenous and local populations have passed on through generations is closely linked to the sustainable use and conservation of biodiversity.³⁰¹ Today, industrialized agriculture favors uniformity, which means large areas are planted with a single, high-yielding variety through the use of pesticides, fertilizers, and irrigation to maximize the yield.³⁰² This can have disastrous effects on the ecosystem and other crops.³⁰³ Genetic uniformity is dangerous because it is susceptible to attacks from pests.³⁰⁴ However, crop genetic diversity is crucial to food security.³⁰⁵ In developing countries, farmers who still practice traditional farming techniques cultivate local varieties of

²⁹⁶ JOHN MUGABE, *INTELLECTUAL PROPERTY PROTECTION AND TRADITIONAL KNOWLEDGE: AN EXPLORATION IN INTERNATIONAL POLICY DISCOURSE* (1999), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/mugabe.pdf> (quoting Thomas Greaves, *Tribal Rights*, in *VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHT* 25, 26 (Stephen B. Brush & Doreen Stabinsky eds., 1996)).

²⁹⁷ See Conway, *supra* note 268, at 209.

²⁹⁸ *Id.* at 238.

²⁹⁹ Fair Globalization, *supra* note 247, at 22.

³⁰⁰ Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 319, 14331, art. 27(1) (1995).

³⁰¹ *Traditional Knowledge Information Panel*, *supra* note 291.

³⁰² U.N. Food and Agriculture Organization Director-General, *Harvesting Nature's Diversity: Biodiversity to Nurture People*, <http://www.fao.org/DOCREP/004/V1430E/V1430E04.htm> (last visited Apr. 25, 2012).

³⁰³ See *id.*

³⁰⁴ See *id.* During the 1970s, a virus devastated rice field from India to Indonesia, endangering a critical food crop. *Id.* After years of research, scientists found a gene in one variety of rice that was resistant to the virus, leading to a virus resistant variety of rice being grown today. *Id.*

³⁰⁵ See *id.*

crops called “land races.”³⁰⁶ These land races are the result of generations of farming.³⁰⁷ There are also closely related varieties that survive in the wild, which are known as “wild relatives” of the crops.³⁰⁸ These two species form the “richest repositories of crop genetic diversity.”³⁰⁹ In various parts of the world, women play an important role in preserving and maintaining diversity because of their role in seed selection, vegetative propagation, and livestock management.³¹⁰

Knowledge, including indigenous knowledge, produces information, which in turn produces an intangible asset.³¹¹ This asset production can create opportunities and wealth in the indigenous communities, as well as other communities.³¹² This increase in opportunity and wealth creation assists in building infrastructure, which allows the indigenous communities to participate in the global economy.³¹³ For example, in India, an effort was made to stop transnational bio-prospectors from acquiring IPRs over traditional knowledge.³¹⁴ A searchable database of traditional medicine was created to serve as evidence of prior art for patent examiners in examining patent applications so that the pirated use would be shown not to be novel.³¹⁵ This followed a case in which the U.S. Patent and Trademark office granted, but later revoked, a patent for the use of turmeric to treat wounds.³¹⁶

Traditional knowledge is valuable not only to those who depend on it for their daily lives, but also to agriculture and modern industry.³¹⁷ Products such as plant-based cosmetics and medicines³¹⁸

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Roht-Arriaza, *supra* note 287, at 932.

³¹¹ See Conway, *supra* note 268, at 209.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See *Traditional Knowledge and Intellectual Property*, WORLD INTELL. PROP. ORG. NEWS & EVENTS, available at http://www.wipo.int/pressroom/en/briefs/tk_ip.html (last visited Feb. 9, 2013).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Traditional Knowledge Information Portal*, *supra* note 291.

³¹⁸ See Shayana Kadidal, *Plants, Poverty, and Pharmaceutical Patents*, 103 YALE L.J. 223, 223-24 (1993). One of the most notable examples is the discovery of the rosy periwinkle plant, which is unique to Madagascar. *Id.* at 223. Scientists discovered that it had cancer-treating properties. *Id.* From that, the drugs vinblastine and vincristine were developed. *Id.* at 224. These drugs have resulted in annual sales of \$100 million for Eli Lilly, without so much as a dollar going to Madagascar. *Id.*

are derived from traditional knowledge.³¹⁹ Additionally, it is well known that indigenous peoples have the ability to identify the exact uses of local herbs to cure specific illnesses.³²⁰ Because of their long-standing observations, indigenous peoples are able to find the exact means of preparation, the specific dosages, and the required conditions which can yield the best results.³²¹ This information is critical to the development of drugs, because without this knowledge, investigators would have to test all of the approximately one quarter of a million species of plants in existence.³²² This indigenous knowledge is crucial to the survival of people around the globe because it helps create cures for diseases, allowing people to live longer and participate in the global economy.

Recognizing and fostering the abilities of indigenous peoples can contribute to their individual growth as well as the growth of the national economy. Creating new and improved processes and technology, especially with respect to indigenous peoples' new adaptations of existing knowledge or processes, is considered the cornerstone of innovation.³²³ Indigenous peoples are in a unique position to instigate indigenous economic development by adapting and harnessing indigenous resources and assets to build and sustain enterprises.³²⁴

3. *Access to Education*

Indigenous peoples face extreme disadvantages and barriers in the labor market because their skills and knowledge are not valued and they lack access to educational and vocational training.³²⁵ Because of this they are often unemployed or underemployed and may even have to resort to exploitative sectors such as trafficking, bonded labor, hazardous work, discrimination at work and child labor.³²⁶ Indigenous peoples need access to educational and vocational training in order to increase their job opportunities and improve their standing in the economy.

The Indigenous Declaration addresses the right of education for indigenous peoples by stating that "[i]ndigenous peoples have the right, without discrimination, to the improvement of their economic

³¹⁹ UNLOCKING INDIGENOUS PEOPLES' POTENTIAL, *supra* note 293.

³²⁰ Mohammad Hossein Erfanmanesh, *Traditional Medicines and the Requirement of Patentability: Do They Have a Technical Character? The European Approach*, 17 INT'L PROC. ECON. DEV. & RES. 305, 306 (2011).

³²¹ *Id.*

³²² Michael J. Huft, *Indigenous Peoples and Drug Discovery Research: A Question of Intellectual Property Rights*, 89 NW. U.L. REV. 1678, 1723 (1995).

³²³ *Promoting Innovation*, *supra* note 253, at 1116.

³²⁴ *Id.*

³²⁵ UNLOCKING INDIGENOUS PEOPLES' POTENTIAL, *supra* note 293, at 1.

³²⁶ *Id.*

and social conditions, including, inter alia, in the areas of education. . . .³²⁷ Access to education for indigenous peoples is also discussed in a number of international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women.³²⁸

Despite these international instruments, the right to education has not been afforded to indigenous peoples on a large-scale basis. A critical educational gap exists between the general population and indigenous peoples.³²⁹ In a majority of countries, indigenous children have low school enrollment, poor performance in school, high dropout rates, low literacy rates, and generally lag behind other groups in terms of academic achievements.³³⁰ Illiteracy is generally caused by educational exclusion in the form of poor access, inadequate funding, and ill-equipped instructors.³³¹ A 2009 study found that indigenous peoples are deprived access to quality education, which leads to their social marginalization, increased poverty, and the dispossession of indigenous peoples.³³²

In general, indigenous girls are more disadvantaged than indigenous boys, but both groups suffer from inadequate education.³³³ The Hmong in Vietnam are among the most marginalized of the country's indigenous groups and approximately 97 percent of the women and 83 percent of the men are illiterate.³³⁴ In Ecuador, the indigenous illiteracy rate in 2001 was 28 percent as compared to the national average of 13 percent. In Venezuela, the non-indigenous illiteracy rate is approximately 6.4 percent while the indigenous illiteracy rate is 32 percent.³³⁵ Additionally, in Nicaragua, out of the 5400 primary schools in the country, only 200 are in the Autonomous Regions, and the rate

³²⁷ Indigenous Declaration, *supra* note 258, art. 21.

³²⁸ U.N. OFFICE OF THE SPECIAL ADVISER ON GENDER ISSUES AND ADVANCEMENT OF WOMEN AND THE SECRETARIAT OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, GENDER AND INDIGENOUS PEOPLES' EDUCATION, BRIEFING NOTE NO. 3 at 1 (2010) [hereinafter BRIEFING NOTE NO. 3], available at http://www.un.org/esa/socdev/unpfii/documents/BriefingNote3_GREY.pdf.

³²⁹ *Id.*

³³⁰ UNFPPII, *supra* note 259, at 132.

³³¹ *Id.*

³³² BRIEFING NOTE NO. 3, *supra* note 328, at 13.

³³³ *Id.* at 13-14.

³³⁴ UNFPPII, *supra* note 259, at 132.

³³⁵ *Id.*

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of illiteracy in these Regions is 40 percent as opposed to 23 percent for the rest of the country.³³⁶

Educating indigenous peoples is a critical step toward achieving economic development and improving their situation. With an education, indigenous peoples can increase their entrepreneurial and employment opportunities, and their access to higher levels of education.³³⁷ An education can empower them, leading to increased standards of living. Education also allows indigenous peoples to better develop skills crucial to managing the development of their communities and to actively participating in all levels of the decision-making process.³³⁸

4. *Participation in Decision-Making*

We believe that the fourth core right for indigenous people is the right to participate in decision-making because everyone should have input into policies that affect them. Indigenous peoples face discrimination and exclusion from the political and economic process.³³⁹ The World Commission on the Social Dimension of Globalization sought to analyze globalization from a wide range of perspectives. This included dialogues with groups across and within countries, including indigenous peoples.³⁴⁰ One issue was the conflict between the indigenous peoples and the mining corporations because of the liberalization of mining efforts.³⁴¹ For example, the 1997 Mining Law in Guatemala failed to consider the rights of indigenous peoples such as the right to prior consultation about major development investment in their communities. The Mining Law also made no provision for closing the mine and did not include any obligations to repair the environmental impact caused by the mining.³⁴²

One very recent example of the need for prior consultation is the plight of the Ngöbe Buglé people, who demanded the right to participate in discussions to decide whether to allow large-scale development projects. Approximately one year after the Panamanian government agreed to ban hydroelectric dam projects and mining in the Ngöbe Buglé territory, the president of Panama reversed the agreement in late 2011, leading to a bloody protest that could have

³³⁶ World Directory of Nicaragua, *supra* note 232.

³³⁷ BRIEFING NOTE NO. 3, *supra* note 328, at 3.

³³⁸ *Id.*

³³⁹ UNFPPII, *supra* note 259.

³⁴⁰ Fair Globalization, *supra* note 247, at 12.

³⁴¹ *Id.* at 17.

³⁴² Raquel Aldana, *Transforming Students, Transforming Self: The Power of Teaching Social Justice Struggles in Context*, 24 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 53, 59 (2011).

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been avoided by more involvement of the Ngöbe people in the new decision.³⁴³

In conclusion, mechanisms need to be put into place to ensure participation of indigenous peoples in political decision-making and in institutions.³⁴⁴ Indigenous peoples need to be ensured full and effective participation on administrative measures, legislative measures, and programs that affect them directly.³⁴⁵

The Latin American rural indigenous communities developed a network called the Redturs in 2000, which promotes tourism-led development based upon the inclusion and sovereignty of these communities in decision-making. This program ensures that indigenous peoples are involved in decisions regarding the extent, nature, and speed of touristic endeavors. The Redturs now have programs in about 14 Latin American countries.³⁴⁶ The programs connect the indigenous communities to advanced technology, modern economic trends, and market opportunities.

E. Conclusion

It is critical that national and local authorities ensure the rights of indigenous peoples. Authorities need to enact policies to prevent discrimination and ensure that indigenous peoples are a protected group.³⁴⁷ Indigenous peoples have begun making their voices heard by building partnerships with the UN system and beyond.³⁴⁸ Although advances have been made in protecting and recognizing the rights of indigenous peoples, more still needs to be done. Implementation in future RTAs of the four core indigenous rights is necessary because of their high importance and their close connection to trade.

VII. TRADE AND WORKER RIGHTS

A. Introduction

Human rights and labor lawyers argue that some labor laws are fundamental to human dignity.³⁴⁹ In response, the WTO renewed its commitment to “the observance of internationally recognized core

³⁴³ *CIEL Stands with Ngöbe Buglé People of Panama: Repression Cannot Replace Consent*, CTR. FOR INT’L ENVTL. L. (Feb. 28, 2012), available at http://www.ciel.org/Law_Communities/Panama_27Feb2012.html.

³⁴⁴ UNLOCKING INDIGENOUS PEOPLES’ POTENTIAL, *supra* note 293.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 3.

³⁴⁷ Fair Globalization, *supra* note 247, at 70.

³⁴⁸ UNFPPII, *supra* note 259, at 1.

³⁴⁹ Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457, 471 (2004).

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labour standards.³⁵⁰ Even so, ministers declared the task of identifying these core standards should rest with the ILO, not with the trade body.³⁵¹

Worker rights encompass both procedural and substantive rights. The substantive rights include the rights to minimum wages, maximum working hours, and health and safety protections, while the procedural rights include the rights to collective bargaining and union formation.³⁵² Workers face many impediments to achieving labor rights and better workplace standards because they lack bargaining power in contractual relationships and are unable to push for the implementation of labor rights and better working conditions.³⁵³ The creation and implementation of labor laws can decrease bargaining disparities and substandard labor conditions by mandating labor conditions and regulating the bargaining process.³⁵⁴

The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted in Geneva in 1998 in direct response to the WTO Singapore Ministerial Declaration, identified the core labor standards of international labor law.³⁵⁵ The four core labor standards consisted of the following: 1) freedom of association and the effective recognition of the right to collective bargaining; 2) elimination of all forms of compulsory or forced labor; 3) effective abolition of child labor; and 4) elimination of discrimination in respect of employment and occupation.³⁵⁶ These four rights were chosen from among the hundreds agreed to in the sixty-five conventions adopted by the ILO as the most closely linked to international trade.

Their adoption has made the subject of worker rights in post-1998 RTAs a hopeful exception to the general rule that human rights provisions in trade agreements are simply aspirational. However, critics of these provisions claim that they are vague and ambiguous. They argue that the ILO Work Declaration promotes undefined and open-ended principles, which inherently undermine ILO rights, and encourage the proliferation of ephemeral, divergent, and inadequate labor standards.³⁵⁷ The rights under the ILO Work Declaration are meant to establish procedures for workers to achieve substantive rights as opposed to outcome-oriented rights such as minimum wage

³⁵⁰ Singapore Declaration, *supra* note 10.

³⁵¹ *See id.*

³⁵² *See* Brian Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 *EUR. J. INT'L L.* 409, 428-29 (2005).

³⁵³ *Id.* at 428.

³⁵⁴ *See id.*

³⁵⁵ ILO Work Declaration, *supra* note 11.

³⁵⁶ *See id.*

³⁵⁷ *See* Philip Alston, *Facing up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 *EUR. J. INT'L L.* 467, 476-77 (2005).

and occupational health and safety standards. Its focus is to ensure that workers can participate in setting substantive standards.³⁵⁸ Conversely, proponents of the ILO Work Declaration argue that these rights are not concerned with setting detailed substantive standards, and, therefore, the ILO Work Declaration's ambiguity was intentional.³⁵⁹

In addition to the core principles enumerated under the ILO Work Declaration, this paper proposes that other labor rights should be considered core rights. It will also discuss the ambiguities involved in some of the current core principles under the ILO Work Declaration.

B. *Link Between Trade and Labor*

Trade and labor are linked in a variety of ways. The two main arguments behind the linkage are a human rights-based approach and a competition-based approach.³⁶⁰ Supporters of the competition-based argument claim that it is based on unfair competition and a race to the bottom. Countries with lower labor standards will necessarily have lower production costs, hence giving them a competitive advantage.³⁶¹ This could potentially cause other countries to lower their labor standards in order to maintain a competitive edge and attract foreign direct investment. What the WTO and ILO had recognized in the Work Declaration was that unfair labor practices can distort free trade, which is contrary to the goal of trade liberalization. This link between trade and labor continues to be undeniable. Free trade maximizes the wealth of all nations because it encourages each one to produce those services and goods in which it has a "comparative advantage," such that it can produce those services and goods most efficiently.³⁶² A "comparative advantage" can be because of climate or natural resources, or it can be the result of accumulated expertise and investment.³⁶³

The human rights argument views violations of the core labor standards as violations of fundamental human rights.³⁶⁴ It is important to consider both arguments because they help explain the importance of fundamental rights and their impact on international trade.

³⁵⁸ Michael A. Cabin, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, 109 COLUM. L. REV. 1047, 1079 (2009).

³⁵⁹ *Id.*

³⁶⁰ Junlin Ho, *The International Labour Organization's Role in Nationalizing the International Movement To Abolish Child Labor*, 7 CHI. J. INT'L L. 337, 343 (2006).

³⁶¹ *Id.*

³⁶² David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labour*, 16 HOFSTRA LAB. & EMP. L.J. 383, 387 (1999).

³⁶³ *Id.*

³⁶⁴ See Ho, *supra* note 360, at 343.

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Additionally, the global interest in improving workers' bargaining positions was meant to benefit their social welfare, thereby improving the economy by increasing their purchasing power.³⁶⁵ This global concern led to the ILO Work Declaration.

C. *Core Labor Principles under the ILO*

The ILO Work Declaration was considered a breakthrough because of its identification of core labor rights that are universally applicable and universally endorsed whether or not a particular state has ratified the corresponding ILO conventions.³⁶⁶ Delegates to the 86th International Labour Conference reaffirmed the commitment of the international community to uphold fundamental rights in the workplace.³⁶⁷ By an overwhelming vote, the ILO Work Declaration committed the Organization's 174 member States to respecting the principles inherent in the core labor standards and to promoting their universal application.³⁶⁸ The vote was 273 for, and 0 against, with 43 abstentions.³⁶⁹ In the view of the authors of this article, such identification, responding to the challenge thrown down by the WTO in 1996, carries with it the recognition that these basic rights are inseparable from trade and should be included in all trade agreements.

1. *Freedom of Association and Collective Bargaining*

Serving as an example of the need for efforts with respect to freedom of association, until 1990, Colombian workers were among the most organized in Latin America, and their trade unions were among the strongest, winning significant economic benefits for the workers.³⁷⁰ The unions attempted to create a democratic worker's voice; however, they were subjected to unrelenting violence.³⁷¹ Since the mid-1980s, approximately 4,000 labor union members have been killed

³⁶⁵ Cabin, *supra* note 358, at 1051-52.

³⁶⁶ ILO Work Declaration, *supra* note 11, para. 2 ("[A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize. . . the principles concerning the fundamental rights which are the subject of th[e] [core] Conventions. . .").

³⁶⁷ *Fundamental Rights Declaration Clears Final Hurdle ILO Conference Seeks End to Child Labour Abuses*, ILO NEWS, June 18, 1998, available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_007990/lang-en/index.htm.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ AM. CTR. FOR INT'L LABOR SOLIDARITY, JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN COLOMBIA 11 (2006), available at <http://www.solidaritycenter.org/files/ColombiaFinal.pdf>.

³⁷¹ *Id.*

in Colombia, with more than half of those killings occurring since 1991.³⁷² Bleak statistics show that more trade unionists are killed each year in Colombia than in the rest of the world combined.³⁷³ Perhaps in response, the percentage of workers covered by collective bargaining in South and Central America has dropped to less than 15 percent.³⁷⁴ This demonstrates that RTAs have an important role to play in protecting the rights of freedom of association and collective bargaining.

As a fundamental ILO principle, freedom of association and the recognition of the right to collective bargaining involves the right of workers to create and participate in organizations that protect and promote their interests.³⁷⁵ Collective bargaining is a way of attaining productive solutions to potentially conflicting relations between workers and employers.³⁷⁶ These rights were defined under ILO Conventions 87 and 98.³⁷⁷ These Conventions also established necessary accompaniments to the core right of freedom of association.³⁷⁸ We believe that these important additions to the right of association explicate its meaning in the context of trade and should join the core right in trade agreements. The right of association, which is an important right in and of itself, is also a prerequisite of collective bargaining.³⁷⁹ It should grant workers and employers the right to establish independent organizations representing their benefits in the social dialogue.³⁸⁰ Reinvigorating organizational efforts to enforce freedom of association is a central issue in international labor law.³⁸¹

The rights articulated under Convention No. 87 are considered extremely fundamental to freedom of association as a whole. The pre-

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ ILO, GLOBAL WAGE REPORT 2008/2009 at 38 (2008), available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_100786.pdf.

³⁷⁵ ILO, FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED ix (2008) [hereinafter FREEDOM OF ASSOCIATION REPORT], available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_096122.pdf.

³⁷⁶ *Id.* at 5.

³⁷⁷ ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948, No. C87, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087> [hereinafter Convention No. C87]; ILO, Right to Organise and Collective Bargaining Convention, 1949, No. C98, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098> [hereinafter Convention No. C98].

³⁷⁸ *Id.*

³⁷⁹ Faina Milman-Sivan, *Freedom of Association as a Core Labor Right and the ILO: Toward a Normative Framework*, 3 LAW & ETHICS HUM. RTS. 109, 111 (2009).

³⁸⁰ FREEDOM OF ASSOCIATION REPORT, *supra* note 375, at 5.

³⁸¹ Milman-Sivan, *supra* note 379, at 110.

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amble expressly recognizes the right to freedom of association as a means of improving labor conditions and establishing peace between the parties.³⁸² Convention No. 87 provides workers the rights to establish and join any organization of their choosing without prior authorization, organize their own activities, formulate their own programs, elect their own representatives, and draft their own rules and constitutions.³⁸³ It also includes union rights to join and affiliate with other organizations.³⁸⁴

Convention No. 98 ensures that workers enjoy adequate protection against acts of anti-union discrimination³⁸⁵ including conditioning employment on the prerequisite that a worker refrain from joining a union or relinquish existing membership.³⁸⁶ It also precludes dismissal of a worker because of union membership or participation. Convention No. 98 further recognizes the need for trade unions to be independent of company interference³⁸⁷ to prevent company influence and to protect anonymity.

Recognizing and promoting strong and independent workers' and employers' organizations are key elements for the right of collective bargaining.³⁸⁸ Freedom of association includes the right to information necessary for collective bargaining, including access to the economic status of the company.³⁸⁹ The rights to freedom of association and collective bargaining are fundamental principles because they allow workers to gain some power vis-à-vis their employer, which increases the chances that their rights will be protected and allows them to push for more outcome-oriented rights.

2. *Elimination of All Forms of Compulsory or Forced Labor*

According to the ILO, over 12 million people are victims of forced labor each year, including over one million in Latin America and the Caribbean.³⁹⁰ An important problem in this area is the definition and minimum standards of "forced labor."³⁹¹ Each country's trade

³⁸² Convention No. C87, *supra* note 377.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Convention No. C98, *supra* note 377.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ See Owen E. Herrnsstadt, *Voluntary Corporate Codes of Conduct: What's Missing?*, 16 *LAB. LAW.* 349, 353 (2001).

³⁸⁹ *Id.* at 353-54.

³⁹⁰ ILO, *A GLOBAL ALLIANCE AGAINST FORCED LABOUR 12-13* (2005) [hereinafter *FORCED LABOUR REPORT*], available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

³⁹¹ See *id.* at 5.

agreement may have its own definition of “forced labor.”³⁹² However, the definition should be consistent with the ILO’s minimum standard, which has been recognized by a number of countries around the globe. ILO Convention No. 105 on the Abolition of Forced Labor³⁹³ covers a variety of cases of forced labor including: (a) as a means of political coercion or education or as punishment for holding or expressing opposing political views; (b) as a method of organizing labor to use for economic development; (c) as a means of labor discipline; (d) as a punishment for participating in strikes; and (e) as a means of social, racial, religious, or national discrimination.³⁹⁴

The ILO defines compulsory or forced labor as any work or service compelled from any person under the threat of a penalty and for which the person has not volunteered himself.³⁹⁵ Human trafficking is a form of forced labor, which the ILO estimates claims nearly two and one-half million victims each year, including 250,000 in Latin America and the Caribbean.³⁹⁶

While forced labor inarguably is linked to international trade, trafficking across national borders is international trade. Provisions to eliminate or reduce both inarguably belong in RTAs.

3. *Abolition of Child Labor*

Peru is the largest producer of gold in Latin America, mining some fifteen tons per year with a value of \$120 million. The sad fact is that as many as 50,000 children, some as young as six, work in these mines under labor-intensive, dangerous, and risky conditions.³⁹⁷ A CBS documentary exposed the use of child labor in soccer ball manufacturing in Pakistan, primarily for Nike and Adidas.³⁹⁸ The documentary showed images of children stitching soccer balls in substandard conditions, with the ILO estimating that 15,000 children were involved in the industry. In both of these examples and hundreds of others, not only are the children being exploited—and in many case trafficked—because their small bodies can enter spaces adults cannot

³⁹² *See id.*

³⁹³ International Labor Organization [ILO], Abolition of Forced Labour Convention, 1957, No. C105, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105>.

³⁹⁴ *Id.*

³⁹⁵ International Labor Organization [ILO], Forced Labour Convention, 1930, No. C29, art. 2, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>.

³⁹⁶ FORCED LABOUR REPORT, *supra* note 390, at 14.

³⁹⁷ International Labor Organization [ILO], *Peru: Child Labor in Gold Mines* (June 23, 2005), http://www.ilo.org/global/about-the-ilo/press-and-media-centre/videos/video-news-releases/WCMS_067872/lang-en/index.htm.

³⁹⁸ Farzad R. Khan & Kamal A. Munir, *How the West Was Won: The De-institutionalization of Child-Labor in Pakistan’s Soccer Ball Industry* (Working Paper 4, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882395.

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reach or their tiny fingers can make stitches too small for adults to manage, in any event they are also not receiving the education that would make at least possible a future escape from poverty and abuse.

The ILO's 1973 Minimum Age Convention sets the general minimum age for admission to employment or work at 15 years (13 for light work) and the minimum age for hazardous work at 18, or 16 under certain strict conditions. In countries where the economy and educational facilities are "insufficiently developed," it allows the initial minimum age to be 14, or 12 for light work.³⁹⁹ The ILO's 1999 Convention on the Worst Forms of Child Labor defines a "child" for its purposes as a person under 18 years, and requires states to eliminate all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; child prostitution and pornography; using children for illicit activities, in particular for the production and trafficking of drugs; and work which is likely to harm the health, safety, or morals of children.⁴⁰⁰ The fact that each of us has likely encountered at least one of these worst forms of child labor is witness to the need for trade's power to assist in implementation to ensure that children acquire through school the human capital needed to ensure that every child has the opportunity to develop physically and mentally to his or her full potential.

These, too, are the kinds of crimes, legislated or not, that trade agreements are eminently prepared to prohibit and to enforce with meaningful financial penalties on companies that engage in them.

4. *Elimination of Employment and Occupational Discrimination*

ILO Conventions 100 and 111 aim at eliminating discrimination in employment. ILO Convention 100 on Equal Remuneration is based on the principle of "equal remuneration for men and women workers for work of equal value."⁴⁰¹ Remuneration is broadly defined as "the ordinary, basic, or minimum wage or salary and any additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment."⁴⁰²

³⁹⁹ International Labor Organization [ILO], Minimum Age Convention, 1973, No. C138, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

⁴⁰⁰ International Labor Organization [ILO], Worst Forms of Child Labour Convention, 1999, No. C182, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

⁴⁰¹ Convention No. 100, *supra* note 99.

⁴⁰² *Id.*

Convention 111 on Discrimination defines discrimination as any exclusion, distinction, or preference made on the basis of sex, color, race, political opinion, religion, social origin, or national extraction.⁴⁰³ This broad definition of discrimination allows room for flexibility.⁴⁰⁴ Direct discrimination includes regulations that explicitly disadvantage or exclude workers based on characteristics such as age, sex, or disability.⁴⁰⁵ Examples include job advertisements with age requirements or requiring women to submit to pregnancy tests to obtain or keep a job.⁴⁰⁶

Indirect discrimination refers to laws that on the surface appear to be gender neutral, but that negatively affect a disproportionate number of members within a particular group of workers.⁴⁰⁷ It includes situations where particular categories of workers receive different treatment compared to other workers without justification.⁴⁰⁸ One example is offering training courses outside of working hours which excludes workers who cannot attend because they have family or other responsibilities.⁴⁰⁹ This limits the career prospects of that group within the company.⁴¹⁰ Another example is requiring applicants to be a certain height, thereby disproportionately excluding women and members of some ethnic groups. Unless the specified height is absolutely necessary to perform the particular job, this evidences discrimination.

Each nation needs to ensure equality regarding labor issues such as access to training, education, and practices related to hiring, assignment of tasks, working conditions, pay, benefits, promotions, lay-offs, and termination of employment. Convention No. 111 leaves too much room for interpretation and does not take into account other forms of discrimination. With respect to the fourth core human right, elimination of discrimination, we believe that more effort needs to be applied to eliminating discrimination based on age, disabilities, and HIV/AIDS infection. The definition of discrimination is ambiguous with respect to those categories, although they clearly qualify, in our view, as workplace discrimination.⁴¹¹ Some countries have used this

⁴⁰³ Convention No. 111, *supra* note 95.

⁴⁰⁴ *Id.*

⁴⁰⁵ Matteo Borzaga, *Accommodating Differences: Discrimination and Equality at Work in International Labor Law*, 30 VT. L. REV. 749, 764 (2006).

⁴⁰⁶ ILO DIRECTOR-GENERAL, *EQUALITY AT WORK: TACKLING THE CHALLENGES 9* (2007) [hereinafter ILO Report], *available at* http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/equality_07.pdf.

⁴⁰⁷ Borzaga, *supra* note 405.

⁴⁰⁸ *Id.*

⁴⁰⁹ ILO Report, *supra* note 406.

⁴¹⁰ *Id.*

⁴¹¹ *See id.*

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as an opportunity to expand the number of grounds on which discrimination is prohibited, beyond those in Convention No. 111. For example, sub-Saharan Africa protected workers with HIV/AIDS from discrimination at work, and many jurisdictions prohibit sexual harassment and discrimination based on family status.⁴¹²

Discrimination at work is a violation of human rights because it demeans personhood, emasculates the right to self-determination, and wastes human talent. It also has detrimental effects on a country's economic growth and productivity.⁴¹³

D. Additional Labor Rights

The fact that the core rights discussed above are exclusively procedural has led to the diminishment in progress toward outcome-oriented worker rights of a more substantive nature. In addition, there are an increasing number of infringements of labor rights other than the fundamental labor rights discussed above. For example, sweatshops operate under substandard working conditions where low wages, unsanitary work environments, 15-hour workdays, rape, coerced labor, and even death are regular occurrences.⁴¹⁴ The substantive rights implicated in these incidents include minimum wages, maximum working hours, and health and safety protections; however, the ILO Work Declaration does not address these important issues. For this reason we contend that other labor rights should be considered core rights.

With approximately 1.2 million workers, Foxconn Technology (Foxconn) is China's largest exporter and employer.⁴¹⁵ The Foxconn suicide incidents, which took place in China in 2010 and resulted in the death of 14 employees, resulted from sweatshop conditions that would not have violated any of the core ILO standards.⁴¹⁶ Research indicates that there were excessively long working hours, low wages, high production quotas, poor living conditions,⁴¹⁷ and a lack of work-

⁴¹² *See id.*

⁴¹³ *Id.* at 7.

⁴¹⁴ Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 *WASH. U. GLOBAL STUD. L. REV.* 205, 206 (2007).

⁴¹⁵ Charles Duhigg & David Barboza, *In China, Human Costs Are Built into an iPad*, *N.Y. TIMES*, Jan. 25, 2012, <http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?pagewanted=all>.

⁴¹⁶ NICHOLAS "NICK" HIU FUNG CHAN, *NEW CONSIDERATIONS FOR COMPANIES ENTERING THE CHINESE MARKET* 1 (2011).

⁴¹⁷ Duhigg & Barboza, *supra* note 415.

ing relationships.⁴¹⁸ These incidents serve to remind the global community that these issues need to be addressed.

This case shows that a number of problems regarding wages, working hours, and safety and health have become grave problems in practice. Routine inclusion of the core standards of the ILO Work Declaration in RTAs has not ameliorated this dire situation. In our view, experience since ILO adoption of the Work Declaration some 16 years ago argues strongly for expansion of the four core labor standards to include minimum wages and acceptable working conditions.

1. *Right to Minimum Wages*

Globalization has increased the volume of trade among countries due to a reduction in trade interests.⁴¹⁹ This has a strong effect on workers' rights. For example, foreign direct investment (FDI) that produces exports can increase demand for workers, thereby providing incentives for employers to improve working conditions to retain and attract workers.⁴²⁰ However, FDI that produces for the domestic market can increase competition, causing employers to lower their costs to remain competitive at the expense of proper working conditions.⁴²¹ The right to a minimum wage has been neglected because emerging market countries believe that low wages are their comparative advantage, which has spurred the so called "race to the bottom."⁴²² The right was first addressed in the Universal Declaration in 1948 and defined as "just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity."⁴²³ Additionally, the Economic Covenant included the right to a minimum wage in the context of the right to "just and favourable conditions of work."⁴²⁴

However, the right to a minimum wage is critical, especially to disadvantaged workers who otherwise would receive a significantly low wage. This can lead to their continued poverty, so a minimum wage is needed to ensure that the employee and his family can enjoy a

⁴¹⁸ *Foxconn Called to Account for Another Employee Suicide*, WANTCHINATIMES.COM, Nov. 26, 2011, <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20111126000001&cid=1103>.

⁴¹⁹ RUWAN JAYASURIYA, *THE EFFECTS OF GLOBALIZATION ON WORKING CONDITIONS IN DEVELOPING COUNTRIES: AN ANALYSIS FRAMEWORK AND COUNTRY STUDY RESULTS 1* (2008), available at http://siteresources.worldbank.org/INTLM/214578-1103128720951/21692675/EPPNoteNo9_Eng.pdf.

⁴²⁰ *See id.* at 4.

⁴²¹ *Id.*

⁴²² Hani Ofek Ghendler, *Globalization and Social Justice: The Right to Minimum Wage*, 3 LAW & ETHICS HUM. RTS. 266, 267-68 (2009).

⁴²³ Universal Declaration, *supra* note 25, art. 23.

⁴²⁴ G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316, at art.7 (Dec. 16, 1966).

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basic means of existence. The right to a minimum wage has been an agreed worker right in ILO treaties for at least 90 years. Minimum wage policies can ensure the purchasing power of vulnerable workers and reduce instances of low pay, and therefore should be considered a core labor right for trade agreements.

But what does “minimum wage” mean? When the ILO Work Declaration defined its four core labor standards, the right to a minimum wage was conspicuously absent.⁴²⁵ Three ILO Conventions discussed the right to a minimum wage, one being general in nature,⁴²⁶ the second focusing on minimum wages in the agricultural sector,⁴²⁷ and the third focusing on minimum wages in emerging market nations.⁴²⁸ Some developing countries such as Brazil, China, and South Africa have been increasing their minimum wages to provide social protection to vulnerable workers.⁴²⁹ This demonstrates that countries are beginning to take the issue of minimum wages seriously.

In 1992, the Committee of Experts of the ILO revised Convention No. 131’s requirements by identifying four criteria for determining minimum wages: 1) the worker’s needs for subsistence in light of the cost of living in the local economy; 2) the capacity of the employer to pay, with an eye to wages in the nation’s economy as a whole; 3) a comparison among various social groups of their standard of living, including the pay for unionized workers in similar trades; and 4) the requirements of economic development including the effect of wages on the total number of jobs.⁴³⁰

To achieve a minimum wage system, that system needs to provide general coverage through a national minimum wage or through minimum wages within occupational or comprehensive sectors.⁴³¹ A national minimum wage can facilitate coordination with other economic development policies, simplify the application of the system,

⁴²⁵ Ghendler, *supra* note 422, at 282.

⁴²⁶ International Labor Organization [ILO], Minimum Wage-Fixing Machinery Convention, 1928, No. 26, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312171:NO.

⁴²⁷ International Labor Organization [ILO], Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, No. C99, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312244.

⁴²⁸ International Labor Organization [ILO], Minimum Wage Fixing Conventions, 1970, No. C131, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

⁴²⁹ GLOBAL WAGE REPORT 2008/2009, *supra* note 374, at 35.

⁴³⁰ International Labor Organization [ILO], General Survey: Minimum Wages, ¶ 274 (1992), available at <http://www.ilo.org/ilolex/english/surveyq.htm>.

⁴³¹ Andrés Marinakis, THE ROLE OF ILO IN THE DEVELOPMENT OF MINIMUM WAGES 17 (2008).

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and improve equity through raising wages of the lowest paid workers.⁴³²

It is critical that the minimum wage-fixing machinery be set up and operated in consultation with organisations of employers, workers,⁴³³ and social partners.⁴³⁴ For example, the United Kingdom increased its minimum wages by 25 percent between 2000 and 2007. This increase did not have any demonstrable adverse effects on employment.⁴³⁵ The United Kingdom Low Pay Commission provides recommendations to the government on minimum wage adjustments and involves social partners and academics in the same consultative forum.⁴³⁶

A minimum wage policy is only useful if minimum wages are actually paid. The effectiveness of the enforcement mechanism depends upon such factors as just compensation for workers whose rights have been breached, penalties for the violators, and adequate funding of the enforcement authority.⁴³⁷

2. *Right to Acceptable Working Conditions*

Acceptable working conditions should be considered a fundamental right. Two aspects of acceptable working conditions that have been identified as closely linked to trade are the right to maximum working hours and the right to occupational health and safety standards.⁴³⁸

a) *Right to Maximum Working Time*

Setting maximum working hours protects workers from becoming overworked to the point of exhaustion or sickness. An example can be found in the scandal from the recent suicide incidents at Foxconn. One of the most significant labor violations identified was excessively long working hours. In peak periods, substantial numbers of the

⁴³² *Id.*

⁴³³ See ILO, General Survey: Minimum Wages, *supra* note 430, ¶ 186.

⁴³⁴ *Id.* ¶ 230.

⁴³⁵ ALAN MANNING, MINIMUM WAGE: MAXIMUM IMPACT 1 (2012).

⁴³⁶ INT'L LABOUR OFFICE, UPDATE ON MINIMUM WAGE DEVELOPMENTS 8 (2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_101713.pdf.

⁴³⁷ *Id.* at 9.

⁴³⁸ Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386, 403 (2006).

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workforce were engaged in continuous production activities without rest breaks for 70 or more hours per week.⁴³⁹

ILO Convention No. 1 provides a standard of 48 regular hours of work per week, with a maximum of eight hours per day.⁴⁴⁰ ILO Convention No. 14 provides for a rest period of at least 24 consecutive hours every seven days.⁴⁴¹ Other lesser-known ILO Conventions cover paid annual holidays,⁴⁴² protections for night workers,⁴⁴³ and protections for part-time workers in access to employment, working conditions, and social security.⁴⁴⁴

The Conventions only require that the contracting parties set the work week at the 48-hour standard because it is the essential part and the basic right under “hours of work.”⁴⁴⁵ As countries may face different economic and social conditions, it is not practical to set the same maximum working hours standards for night work, holidays, and rest periods. In a majority of countries, working hours are governed by regulations and are sometimes supplemented by collective agreements.

b) Right to Occupational Health and Safety Standards

One of the principles of the ILO Constitution is that “workers should be protected from sickness, disease, and injury arising out of their employment.”⁴⁴⁶ However, this principle is in stark contrast to

⁴³⁹ *Independent Investigation of Apple Supplier, Foxconn Report Highlights*, FAIR LABOR ASSOC., Mar. 2012, at 8, available at http://www.fairlabor.org/sites/default/files/documents/reports/foxconn_investigation_report.pdf.

⁴⁴⁰ International Labor Organization [ILO], Hours of Work (Industry) Convention, 1919, (No. 1) No. C001, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:2103630277745507:::P12000_INSTRUMENT_SORT:4 [hereinafter Hours of Work Convention].

⁴⁴¹ International Labor Organization [ILO], Weekly Rest (Industry) Convention, 1921, No. C14, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312159:NO.

⁴⁴² International Labor Organization [ILO], Holidays with Pay Convention (Revised), 1970, No. C132, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312277:NO.

⁴⁴³ International Labor Organization [ILO], Night Work Convention, 1990, No. C171, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312316:NO.

⁴⁴⁴ International Labor Organization [ILO], Part-Time Work Convention, 1994, No. C175, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312320:NO.

⁴⁴⁵ See Hours of Work Convention, *supra* note 441.

⁴⁴⁶ International Labor Organization [ILO], *Occupational Safety and Health* (Apr. 9, 2012), available at <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang-en/index.htm> [hereinafter ILO Summary].

reality. Studies have shown that people spend approximately one-third of their time at work each day.⁴⁴⁷ It is clearly evident that working conditions directly affect the health of the approximately 210 million workers in Latin America and the Caribbean.⁴⁴⁸ These health effects include accidents, deaths, and work-generated illnesses.⁴⁴⁹ These health and safety conditions are referenced as occupational safety and health conditions for the remainder of this article.

Numbers indicate poor working conditions are thriving throughout the world while worker safety is not at the forefront of human rights issues. ILO data reveal that approximately two million people die every year from work-related accidents and diseases, amounting to an average of 6,000 people a day.⁴⁵⁰ Indeed, this record of workplace danger is evidence of poor implementation of the Universal Declaration's assurance that each of us should have the chance to work under just and favorable conditions.⁴⁵¹ Occupational safety and health issues have not been readily addressed in Latin America and the Caribbean because of a lack of institutions⁴⁵² responsible for promoting work safety standards, and a lack of knowledge and awareness on the part of the workers.⁴⁵³ These same challenges generally exist throughout the world.

Another aspect of the Foxconn incident involved multiple explosions at the Apple manufacturing plant. About 2 years ago, 137 workers were injured after they were forced to use a poisonous chemical to clean iPhone screens.⁴⁵⁴ In addition and more recently, two explosions killed 4 workers and injured 77.⁴⁵⁵

Employers face costly early retirements, loss of skilled staff, absenteeism, and high insurance premiums from work-related accidents and diseases. A nation's economy cannot prosper with a crippled

⁴⁴⁷ ROBERTO FONTES IUNES, OCCUPATIONAL HEALTH AND SAFETY IN LATIN AMERICA AND THE CARIBBEAN: OVERVIEWS, ISSUES AND POLICY RECOMMENDATIONS 2 (2001), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=354332>.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ International Labor Organization [ILO], *Facts on Safety at Work*, available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067574.pdf.

⁴⁵¹ Universal Declaration, *supra* note 25, at art. 23.

⁴⁵² See *Deliberate Indifference: El Salvador's Failure to Protect Workers' Rights*, Hum. Rts. Watch Vol.15, No. 5(B), Dec. 4, 2003, available at <http://www.hrw.org/sites/default/files/reports/elsalvador1203.pdf>. In 2003 in El Salvador, there were only 37 labor inspectors covering a workforce of 2.6 million. *Id.*

⁴⁵³ IUNES, *supra* note 447, at 2.

⁴⁵⁴ Duhigg & Barboza, *supra* note 415.

⁴⁵⁵ *Id.*

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or poisoned workforce.⁴⁵⁶ Yet many of these tragedies are preventable through the implementation of prevention, reporting, and inspection practices. The ILO has adopted more than 40 standards specifically dealing with occupational safety and health, as well as over 40 Codes of Practice.⁴⁵⁷

The right to occupational health and safety standards is one of the most important issues in the area of labor rights. Article 4 of the ILO Convention No. 155 Concerning Occupational Safety and Health and the Working Environment contains a general and comprehensive statement on occupational safety and health with the aim of preventing accidents and injuries to health “arising out of, linked with or occurring in the course of work” through the minimization of hazards inherent in the workplace.⁴⁵⁸

To prevent occupational accidents and diseases, and to continuously improve the working environment, Article 5 of another ILO Convention lists five main spheres where action must be taken. These criteria include: 1) controlling the material elements of work; 2) creating a working environment conducive to the workers’ physical and mental capacities; 3) training workers; 4) communicating and cooperating at all levels of the working group; and 5) protecting workers and their representatives from disciplinary measures.⁴⁵⁹

The Occupational Health Services Convention (No. 161) provides for the establishment of occupational health services which are responsible for advising the employer, workers, and their representatives on maintaining a safe and healthy working environment.⁴⁶⁰ The Promotional Framework for Occupational Safety and Health Convention (No. 187) aims at promoting a preventive safety and health cul-

⁴⁵⁶ See Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 *LAW & ETHICS HUM. RTS.* 153, 163 (2009).

⁴⁵⁷ See International Labor Organization [ILO], *List of Instruments by Subject and Status*, NORMLEX, available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:12030:0::NO:::> ; ILO, *Codes of Practice*, available at <http://www.ilo.org/safework/info/standards-and-instruments/codes/lang—fr/index.htm>.

⁴⁵⁸ See International Labor Organization [ILO], Occupational Safety and Health Convention, 1981, No. C155, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C155> (convention concerning occupational safety and health and the working environment).

⁴⁵⁹ See *id.*

⁴⁶⁰ International Labor Organization [ILO], Occupational Health Services Convention, 1985, No. C161, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312306:NO.

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ture and progressively achieving a safe and healthy working environment.⁴⁶¹

This goal requires the development of a national policy on occupational safety and health to provide the infrastructure for implementing national policy and programs, such as regulations, authorities, compliance mechanisms, and arrangements.

Although the intersection between trade and working conditions may seem to be tenuous, they are, in fact, intimately intertwined. In economic terms, the ILO has estimated that 4 percent of the world's annual GDP is lost as a consequence of occupational diseases and accidents.⁴⁶² A study found that in the United States alone the direct consequence of occupational injuries was upwards of \$40 billion and indirect costs were estimated at over \$200 billion per year.⁴⁶³ If the moral consequences do not provide enough impetus to push nations towards stricter working conditions, the numbers and what they mean for businesses is staggering. These numbers represent lost profits for the company instead of increased productivity.⁴⁶⁴

Countries have a responsibility to maintain conditions that foster a healthy and safe working environment.⁴⁶⁵ The relationship between safe working conditions and trade is self-evident and definitional. Working hazards refers to different risks arising from the job, including physical and biological/chemical risks.⁴⁶⁶

3. *Physical Risks*

Physical risks include ergonomically poor working conditions and heavy physical labor, all of which can lead to musculoskeletal diseases and injuries.⁴⁶⁷ It was estimated that between 50 percent and 70 percent of the workforce of emerging market countries has been exposed to these risks, with the most exposed types of workers being farmers, miners, fisherman, construction workers, and lumberjacks.⁴⁶⁸ Other major physical hazards include vibration, noise, heat,

⁴⁶¹ See International Labor Organization [ILO], Promotional Framework for Occupational Safety and Health Convention, 2006, No. 187, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C187>.

⁴⁶² ILO Summary, *supra* note 460.

⁴⁶³ Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1079-80 (2005).

⁴⁶⁴ See *id.* at 1080.

⁴⁶⁵ See World Health Org., *The Right to Health: WHO Fact Sheet No. 323* (Aug. 2007), available at <http://www.who.int/mediacentre/factsheets/fs323/en/index.html>.

⁴⁶⁶ IUNES, *supra* note 447, at 3.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

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radiation, and other microclimatic conditions.⁴⁶⁹ In 2004, more people died at work than from wars. In the United States alone, over a dozen workers were killed each day due to workplace accidents and over a hundred from work-related diseases.⁴⁷⁰

An example of physical hazards directly related to trade is the 1993 fire at the Kadar Industrial Toy plant near Bangkok.⁴⁷¹ Kadar employed 3,000 workers producing Bart Simpson dolls, Sesame Street dolls, and Muppets.⁴⁷² The fire exits were all blocked, forcing the workers to jump from the upper stories as their hair and clothes caught fire.⁴⁷³ Approximately 188 workers died and 469 were seriously injured.⁴⁷⁴

4. *Chemical and Biological Risks*

Chemical and biological risks⁴⁷⁵ pose a significant threat to workers' health and include exposure to pesticides, solvents, and metal dusts.⁴⁷⁶ Exposure can result in skin and respiratory diseases, cancer, and infertility.⁴⁷⁷ One WHO study estimated that pesticides cause more than 1 million poisonings and 10,000 deaths of agricultural workers every year in Latin America and the Caribbean.⁴⁷⁸ For example, pesticides used in banana plantations have caused higher than average rates of cancer in Costa Rica.⁴⁷⁹ The ILO estimated that the annual costs from occupational deaths and injuries in Latin America and the Caribbean amount to \$76 billion.⁴⁸⁰

In the electronics industries, electronic components contain both toxic and valuable metals. Previously, the industry recycled electronics to retrieve the precious metals contained inside them.⁴⁸¹ To reduce costs, manufacturers reduced the quantities of precious metals, making it less economically efficient to retrieve the precious metals

⁴⁶⁹ *Id.*

⁴⁷⁰ Lobel, *supra* note 463, at 1079.

⁴⁷¹ Jonathan P. Hiatt & Deborah Greenfield, *The Importance of Core Labor Rights in World Development*, 26 *MICH. J. INT'L L.* 39, 39 (2004).

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ In this paper, chemical and biological hazards will be considered as one in the same.

⁴⁷⁶ IUNES, *supra* note 447, at 3.

⁴⁷⁷ *Id.* (noting respiratory diseases can be caused by inhalation of dusts such as silica, coal dust, asbestos, molds, and fungi).

⁴⁷⁸ *Id.* at 2.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ Eric V. Hull, *Poisoning the Poor for Profit: The Injustice of Exporting Electronic Waste to Developing Countries*, 21 *DUKE ENVTL. L. & POL'Y F.* 1, 30-31 (2010).

without the most expensive equipment.⁴⁸² In order to extract the minimal precious metal components, informal recycling plants arose in developing countries.⁴⁸³ The workers use extremely primitive retrieval techniques including open air burning, breaking components apart, and dissolving component parts in strong acids, all of which expose the workers to chemicals through inhalation and skin contact.⁴⁸⁴

A study conducted by the ILO in 2001 found that the cost of accidents in the manufacturing sector in the United States amounted to \$190 billion each year, while the cost of work related accidents and diseases amounted to \$25.4 billion per year in Germany and \$4.4 billion in Norway.⁴⁸⁵

Diseases, accidents, and deaths arising from work can be prevented through management systems that control the risks and hazards in the workplace. These systems can be made actionable in RTAs. In light of trade's significant contribution to the reduction in standards of living for the injured workers and the decrease in GDP for the countries in which work-related accidents occur, such management systems must become a requirement of RTAs. For these reasons, we identify a safe workplace as one of the core worker rights that must be accounted for in RTAs.

Poor working conditions not only affect individuals, but the economy as well. Occupational injuries and illnesses are undesirable by-products caused by the production process.⁴⁸⁶ These economic costs place a large burden on both the employee and the worker.⁴⁸⁷ The costs employers face consist of damage to the plant and equipment, and profit losses due to interruptions in the production process⁴⁸⁸ because of lost days of work.⁴⁸⁹ Costs to employers also include a loss of the competitiveness of the business,⁴⁹⁰ unemployment compensation payments,⁴⁹¹ and the incursion of fixed labor costs, such as the costs

⁴⁸² *Id.*

⁴⁸³ These dumps were originally concentrated in China but are emerging in Nigeria, Ghana, Pakistan, and India. *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ BENJAMIN O. ALLI, FUNDAMENTAL PRINCIPLES OF OCCUPATIONAL HEALTH AND SAFETY 7 (2001), available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093550.pdf.

⁴⁸⁶ Terry Thomason & Silvana Pozzebon, *Determinants of Firm Workplace Health and Safety and Claims Management Practices*, 55 INDUS. & LAB. REL. REV. 286, 287 (2002).

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ ALLI, *supra* note 485.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

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associated with recruiting and training replacement workers.⁴⁹² The costs to workers include loss of wages and future wage earning capacity, rehabilitative and medical expenses, and non-pecuniary losses such as pain and suffering, etc.⁴⁹³

Although the right to a safe workplace should be considered a fundamental right, employers also have a monetary incentive to provide a safe working environment. We believe that respect for human rights and safe working conditions contribute to social and economic growth. Happy and healthy workers produce higher quality items. Although some may argue that increasing labor standards necessarily raises costs, thereby decreasing the amount of jobs available, access to fair work is critical in accomplishing social and economic stability. As discussed in other parts of this paper, more money in the hands of workers increases economic and sustainable development.

E. Conclusion

Trade and labor rights are intricately linked because trade can only be accomplished through the provision of goods and services by people. Therefore, labor can be considered one of the most important factors in advancing trade liberalization. Without a healthy workforce, trade liberalization could be significantly stunted. A healthy workforce requires labor standards because without appropriate standards, trade could be at risk due to a reduction in the workforce from sub-standard labor conditions, as demonstrated in this paper.

Because of the prominent role of labor in promoting trade liberalization, it is an issue that cannot afford to go unaddressed. Trade negotiators need to be armed with this information to create and enforce labor standards in RTAs. While the idea of “competitive advantage” is useful to some degree, it is a short-sighted approach that can create a race to the bottom with respect to labor rights. It is short-sighted because it fails to take into account the effect of the long term health and safety of the workforce on global wealth.

We believe that additional steps through trade agreements need to be taken to create the infrastructure for implementing national policy and programs promoting occupational safety and health. While some argue that the ILO Work Declaration is vague and ambiguous, it provides a step in the right direction by enumerating four core principles with respect to labor. The ILO Work Declaration demonstrates the importance of labor conditions, and makes it a global issue. The authors of this paper believe that further attention should be paid to conventions regarding health and safety in particular branches of economic activity such as construction, mining, and agricultural

⁴⁹² Thomason & Pozzebon, *supra* note 486.

⁴⁹³ *Id.*

safety, as well as to protection against specific risks such as radiation and chemicals. In conclusion, we believe that the four core ILO principles, although vague, provide a framework for trade negotiators. However, we argue that there are additional core principles with respect to labor that must also be taken into account because of their importance to workers and their close connection to trade.

VIII. TRADE AND A HEALTHY ENVIRONMENT

A. Introduction

Our next subject has been addressed in trade agreements since the first global rules of the GATT in 1947. Unlike the situation with labor rights, however, as we have noted, no effort has been undertaken to identify core environmental rights so closely linked to trade and so important that they should be included in trade agreements. The result has been that trade agreements have not been as useful to environmental protection as trade has been harmful to the environment. Trade liberalization has unintentionally led to abuses in the spheres of environmental protection and human rights. Generally, when experts analyze the intersection between trade and the environment, they do not consider a healthy environment a human right.⁴⁹⁴ These experts tend to address environmental protection as a separate issue from human rights, although some concede that it has links to human rights.⁴⁹⁵ The intersection of environmental protection with trade and with human rights reflects the collision of competing forces and raises the question of how we may bring these forces into equilibrium.⁴⁹⁶

Human rights and a healthy environment are closely linked because an unhealthy environment threatens the existence of human life on earth. For example, drinking contaminated water and inhaling toxic fumes cause illness, and pregnant women can even pass the contaminants on to their unborn babies. The right to life can be rendered useless if the environment is so degraded that people are deprived of this right.

Like democratic governance, the right to a healthy environment is an emerging human right. Some environmental scholars believe a healthy environment is part of other, more established, human rights, such as the rights to life and health.⁴⁹⁷ In our view, clean air,

⁴⁹⁴ JUST TRADE, *supra* note 2, at 86.

⁴⁹⁵ *Id.*

⁴⁹⁶ David Barnhizer, *The Trade, Environment and Human Rights: The Paradigm Case of Industrial Aquaculture and the Exploitation of Traditional Communities*, MANGROVE ACTION PROJECT, available at <http://mangroveactionproject.org/issues/shrimp-farming/the-trade-environment-and-human-rights/> (last visited Feb. 16, 2012).

⁴⁹⁷ See Jeffrey Atik, *Commentary*, HUM. RTS. DIALOGUE 26 (2004).

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clean water, and an adequate supply of safe food, the necessities that are guaranteed by a healthy environment, qualify it as a separate human right. Other environmental scholars see a healthy environment as a right belonging to the environment itself.⁴⁹⁸ With respect to this view, a healthy environment is only a human right in so much as a human is needed to enforce the right.⁴⁹⁹ This paper will focus on a healthy environment as a separate human right. As international Court of Justice Judge Weeramantry observed, “The protection of the environment is a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.”⁵⁰⁰

The San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights⁵⁰¹ recognizes that every person has the right to “live in a healthy environment.”⁵⁰² Additionally, Article 24 of the African Charter on Human and People’s Rights recognizes that “all peoples shall have the right to a general satisfactory environment favorable to their development.”⁵⁰³ In a case involving a complaint by Nigeria’s Ogoni peoples of human rights violations caused by oil development, this Article was interpreted by the African Commission on Human Rights as a right to a healthy environment.⁵⁰⁴

Further proof that a healthy environment is an emerging human right is found in a number of national constitutions in the Americas that provide for some version of a right to live in a healthy environment independent of other rights.⁵⁰⁵ The European Union has proposed an amendment to its Human Rights Charter that would add the human right to a healthy environment:

⁴⁹⁸ *See id.*

⁴⁹⁹ *Id.*

⁵⁰⁰ JUST TRADE, *supra* note 2, at 87.

⁵⁰¹ Org. of Am. States [OAS], *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* “Protocol of San Salvador”, art. 11, O.A.S.T.S. No. 69 (1988), available at <http://www.oas.org/juridico/english/treaties/a-52.html>.

⁵⁰² *Id.* art. 11(1).

⁵⁰³ African [Banjul] Charter on Human and Peoples’ Rights, June 27, 1981, available at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf.

⁵⁰⁴ African Commission on Human Rights, Comm. No. 155/96, Social & Econ. Rts. Action Center & Center for Econ. & Social Rts. Nigeria, ACHPR/COMM/A044/1, para. 55-56 (May 27, 2002).

⁵⁰⁵ Environmental Rights Report, EARTHJUSTICE (2005), available at http://earthjustice.org/sites/default/files/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTrev.pdf.

The Parliamentary Assembly notes the close relationship that exists between human rights and quality of the environment and observes that enjoyment of these rights is often jeopardised by degradation of the environment. This interconnection between the environment and human rights clearly highlights their interdependence and indivisibility and so requires us to recognise that people have a right to a healthy environment. The Assembly points out that . . . the European Court of Human Rights has itself indirectly upheld the right to a healthy environment through its case law.⁵⁰⁶

B. *International Conventions Addressing a Healthy Environment*

According to Article 3 of the Universal Declaration, everyone has the right to life⁵⁰⁷ and “the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care. . . .”⁵⁰⁸ This right to life can only be accomplished through the provision of clean water, clean air, and adequate shelter and food, which are directly linked to a healthy environment.

The Organization of American States and the African Union have adopted it as a separate human right and the EU is in the process of adopting a similar amendment to its Human Rights Charter, following precedent from the EU Human Rights Court, which has upheld the human right to a healthy environment. According to Article 11 of the OAS Declaration of the Rights and Duties of Man, “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”⁵⁰⁹

The relationship between human rights and a healthy environment has been on the global agenda since the 1972 Stockholm Conference where Principle 1 of the Declaration of the United Nations Conference on the Human Environment stated that man has the fundamental right to “adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a

⁵⁰⁶ Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment, EUR. PARL. DOC. (COM 12003) 1 (2009), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC12003.pdf>.

⁵⁰⁷ Universal Declaration *supra* note 25.

⁵⁰⁸ *Id.* art. 25.

⁵⁰⁹ OAS, *Declaration of the Rights and Duties of Man*, art. XI, OEA/Ser.L.V/II.82, doc. 6, rev.1, at 17 (1948), available at http://www.hrcr.org/docs/OAS_Declaration/oasrights3.html.

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solemn responsibility to protect and improve the environment for present and future generations.”⁵¹⁰ The proclamation section noted that man has to continue advancing in order to achieve economic development.⁵¹¹

However, when these advancements are improperly implemented, it can cause “dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.”⁵¹² Despite these strong statements, the link between human rights and the environment have not been followed up in subsequent environmental conventions such as the 1992 Rio Declaration.⁵¹³ These declarations linked human well-being to the state of the environment with no reference to human rights.⁵¹⁴

In 2009, the UNEP and the OHCHR organized a high level meeting on the topic.⁵¹⁵ A series of resolutions drew attention to the relationship between a healthy and safe environment and the enjoyment of human rights.⁵¹⁶ Although these resolutions have drawn attention to how fundamental the environment is to the enjoyment of human rights, all of this language has proven to be merely aspirational at best.

The most recent development in furthering the linkage between a healthy environment and human rights was the Rio+20 U.N. Conference on Sustainable Development (Rio+20) which took place in June 2012. Rio+20 focused on two major themes with respect to sustainable development: a green economy and an institutional framework.⁵¹⁷ The objective of Rio+20 directly concerned environmental and

⁵¹⁰ U.N. Environment Programme, Declaration of the United Nations Conference on the Human Environment, Principle 1 (June 5-16, 1972), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

⁵¹¹ *Id.* at Proclamation 3.

⁵¹² *Id.*

⁵¹³ Christopher Holmes, *The New Future of Human Rights and Environment: Moving the Global Agenda Forward – High Level Experts Meeting*, LINKAGES (Mar. 4, 2010), <http://www.iisd.ca/mea-l/guestarticle87.html>.

⁵¹⁴ *Id.*

⁵¹⁵ U.N. Environment Programme, High Level Experts Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward (Nov. 30 – Dec. 1, 2009), <http://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/language/en-US/Default.aspx>.

⁵¹⁶ *Id.*

⁵¹⁷ United Nations Conference on Sustainable Development, Rio de Janeiro, Braz., June 20-22, 2012, *Report of the United Nations Conference on Sustainable Development*, p. 3, U.N. Doc. A/CONF.216/XX (2012).

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human rights issues.⁵¹⁸ With respect to the theme of a green economy, Achim Steiner, the Executive Director of the U.N. Environment Programme, stated before the conference that it was to involve elaborating on the “growing recognition of a fundamental link between ecosystem services and human rights.”⁵¹⁹

Establishing an institutional framework for sustainable development presents the opportunity to define the linkages between governance and the procedural rights necessary to attain progress in the area. The link between human rights and the environment requires effective compliance with environmental laws, together with the need for institutional mechanisms designed to hold public authorities accountable for their decisions. This establishes the important linkage among the environment, human rights, and governance. Rio+20 reinforced this powerful and profound link between the environment and human rights.⁵²⁰

The Rio+20 outcome document needs specifically to recognize the right to a healthy and sustainable environment⁵²¹ and the responsibility of every nation to ensure such an environment, while emphasizing the importance of accountability mechanisms and institutional frameworks to enhance sustainable development outcomes.⁵²² Additionally, Rio+20 reinforced the need for future trade agreements to address issues such as “access rights,” including the right to information, with respect to environmental governance.⁵²³

C. *Link Between Trade and a Healthy Environment*

We need not dwell on proving the link between international trade and the environment. There is a direct relationship between human rights, a healthy environment, and economic development.⁵²⁴ They are so intertwined that problems with the environment can give rise to human rights abuses, while economic development can, and often does, cause environmental problems.⁵²⁵ As we all know, trade often results in the use of limited natural resources at a rate that cannot be sustained, and pollution of our air and water at levels that can-

⁵¹⁸ *Id.*, at 2,7.

⁵¹⁹ CTR. FOR INT’L ENVTL. LAW, HUMAN RIGHTS & ENVIRONMENT IN THE RIO+20 CONFERENCE ON SUSTAINABLE DEVELOPMENT (2012), available at http://ciel.org/Publications/Rio+20_IssueBrief_Feb2012.pdf.

⁵²⁰ *Id.*

⁵²¹ *Id.* at 2.

⁵²² *Id.* at 15.

⁵²³ *Id.*

⁵²⁴ Sumudu Atapattu, *The Right to a Healthy Life or the Right To Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 70 (2002).

⁵²⁵ *Id.* at 70-71.

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not be corrected. Trade in certain products often leads to environmental destruction through abuses in logging, mining, and drilling.

On the other hand, trade liberalization can increase economic development, leading to higher national incomes and potentially giving rise to better environmental and human rights protections. Additionally, trade liberalization can have the unintended consequence of the dissemination of good environmental practices through the transfer of cleaner technology from countries with high environmental standards.

The key to economic productivity and development is a healthy population. People are needed at every stage in the institution of trade: from production to distribution to sales and beyond. Thus, it is important to balance trade with a healthy economy to ensure both global economic growth and the well-being of global civil society.

Additionally, the rules of international trade are based on the fundamental principle that countries may not discriminate in their trading patterns. For example, steel oil field pipes from Brazil must be regulated by an importing country in the same manner as the country regulates steel oil field pipes from China.

The problem with this principle is that most environmental treaties and national environmental laws rely for their enforcement on discriminating against products that are produced in a manner that is environmentally unfriendly. For example, a country trying to prevent air pollution might want to import steel pipe from countries that make steel with low carbon and sulfur emissions, and not trade with countries whose steel was manufactured in a high-polluting factory. That discrimination is very difficult under trade rules, which makes environmental protection more complicated.

How can we alleviate these two aspects of the link between trade and the environment?

D. Core Rights with Respect to a Healthy Environment

We propose five fundamental rights to a healthy environment so intertwined with trade that agreements to liberalize trade must address their implementation: 1) the right to safe food and water; 2) the right to participate in decision-making; 3) the right to sustainable development; 4) the right to the application of the polluter pays principle; and 5) the right to the application of the precautionary principle.

1. Right to Safe Food and Water

While even the healthiest environments contain some harm, setting thresholds will allow for the identification of violations of

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human rights.⁵²⁶ As noted, a healthy environment consists of the right to clean water and air, and more generally, the right to a safe environment.⁵²⁷ Quite often, development projects provide an example where states fail to respect the right to water, especially if the projects render the water undrinkable through pollution or deprive the population of its water resources.⁵²⁸ It is inconsistent with human rights law to deprive people of access to water that they have enjoyed, without finding alternatives or compensating them.⁵²⁹ Because water is an essential ingredient of human life, RTAs must help prevent economic activities that render water undrinkable or that deprive the population of its water resources.⁵³⁰

The right to a healthy environment is inconsistent with degradation of natural resources as demonstrated by the *Ecuador* case. The Inter-American Commission on Human Rights conducted a comprehensive study in Ecuador after receiving complaints in 2002 of extensive pollution caused by oil exploration.⁵³¹ The inhabitants claimed the exploration was polluting the air, soil, and water, which put individuals in the region at greater risk of becoming seriously ill.⁵³² The inhabitants and the government agreed that the oil was polluting the environment and exposing the people to toxic byproducts of oil exploitation.⁵³³ These toxins were absorbed into the soil, the air, and their water supplies.⁵³⁴ Many claimed that water pollution contaminated fish and drove away wildlife, thereby threatening their food supplies.⁵³⁵

The Commission found serious human rights violations in this disastrous situation, holding that the rights to life, physical integrity, and security are closely related to one's physical environment.⁵³⁶

⁵²⁶ Atik, *supra* note 497, at 26.

⁵²⁷ *Id.*

⁵²⁸ *Water Sanitation and Health: State Obligations Regarding the Human Right to Water*, World Health Org., available at http://www.who.int/water_sanitation_health/humanrights/en/index3.html (last visited Feb. 21, 2012).

⁵²⁹ *Id.*

⁵³⁰ *See id.*

⁵³¹ DINAH SHELTON, HUMAN RIGHTS, HEALTH & ENVIRONMENTAL PROTECTION: LINKAGES IN LAW AND PRACTICE – A BACKGROUND PAPER FOR THE WORLD HEALTH ORGANIZATION 17 (2002), available at http://www.who.int/hhr/information/en/Series_1%20%20Human_Rights_Health_Environmental%20Protection_Shelton.pdf [hereinafter LINKAGES IN LAW AND PRACTICE].

⁵³² *Id.* (The inhabitants claimed the byproducts of oil exploitation caused them to have rashes, gastrointestinal problems, skin diseases, and chronic infections.)

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ *Id.*

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When environmental degradation poses a persistent threat to life and health, those rights are implicated.⁵³⁷ Oil, the main revenue earner of the country, plays an extremely valuable role in Ecuador's economic development as its economy is largely dependent on foreign exchange earnings from oil.⁵³⁸ Therefore, trying to eradicate all of the effects of the oil facilities would stunt the nation's economic development. This situation is by no means uncommon because oil exploration, copper and diamond mining, and other investment activities are vital to the economic development of many countries. The lesson is that RTAs, which encourage and facilitate these economic activities that have adverse effects on a healthy environment, must take responsibility for these human rights violations⁵³⁹ by requiring transnational companies and the host government to put into effect systems that will prevent these long-term threats to clean water, clean air, and a safe food supply. We believe that the emerging right to a healthy environment and trade are so closely linked, and that safe food and water are so important, that RTAs must balance a healthy environment with economic development.⁵⁴⁰

2. *Right to Participate in Decision-Making*

One feature of the interrelationship between trade and a healthy environment that necessitates special attention is the procedural right of participation and consultation.⁵⁴¹ Procedural environmental rights need to be guaranteed through participation in environmental decision-making, provision of access to environmental information, and remedies for environmental harm.⁵⁴² Underpinning these rights is the notion that a healthy environment cannot be achieved by governments alone; instead, it requires an open society which allows citizens access to decision-making institutions and processes.⁵⁴³ Citizens need to be able to both influence decisions affecting the environment and to correct, and obtain redress for, environmental harm.⁵⁴⁴

For example, in 2007, the U.N.'s Sustainable Development Foundation, the ILO, and the WHO, launched a project aimed at

⁵³⁷ LINKAGES IN LAW AND PRACTICE, *supra* note 531, at 17.

⁵³⁸ INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ECUADOR, para. 5 (2000), available at <http://www.cidh.org/annualrep/99eng/Chapter4a.htm>.

⁵³⁹ See LINKAGES IN LAW AND PRACTICE, *supra* note 531.

⁵⁴⁰ *Water Sanitation and Health*, *supra* note 528.

⁵⁴¹ David Kinley & Junko Tadaki, *From Walk to Talk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 985 (2004).

⁵⁴² *Id.*

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

strengthening participation in international environmental processes.⁵⁴⁵ The goal was to improve the engagement of trade unions and workers in developing and implementing environmental policy.⁵⁴⁶ In Latin America and the Caribbean, Project “Sustainlabour” works with trade unions to promote a search for sustainable development options that ensure decent living conditions for all.⁵⁴⁷

Access to information is a crucial prerequisite to meaningful decision-making in the environmental sector by the community.⁵⁴⁸ As we mentioned with respect to democratic governance, governmental organizations have an obligation to disclose all records they hold that will be used to make the decision.⁵⁴⁹ The right also needs to reasonably guarantee access to information by all bodies with public responsibilities for the environment.⁵⁵⁰ Environmental issues need to be addressed by all concerned citizens to ensure that all views are presented.

The case of *Maya Indigenous Communities v. Belize* is instructive in this regard. There, the IAHCR found that Belize violated the rights of the Maya Indigenous Communities by “granting logging and oil concessions to third parties to utilize the property and resources that could fall within [lands traditionally used and occupied by the Maya people]. . . in the absence of effective consultations with and the informed consent of the Maya people.”⁵⁵¹ The loss of their land would have devastating effects on the community.

We believe it is clear that participation in civil society in environmental decisions is a core right to a healthy environment that is both basic and closely linked to international trade.

3. *Right to Sustainable Development*

A healthy environment and sustainable development are symbiotically related and should be pursued in tandem. The concept of sustainable development reconciles the right to a healthy environment with economic development, including for future generations.⁵⁵²

⁵⁴⁵ SUSTAINLABOUR PROJECT, http://www.unep.org/labour_environment/features/trade-unions-project.asp (last visited July 15, 2012).

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ Kinley & Tadaki, *supra* note 541.

⁵⁴⁹ INT’L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 40 (2002), available at http://www.ichrp.org/files/reports/7/107_report_en.pdf.

⁵⁵⁰ Kinley & Tadaki, *supra* note 541.

⁵⁵¹ *Maya Indigenous Communities of the Toledo District v. Belize*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 40, ¶ 153 (Oct. 12, 2004), available at <http://www1.umn.edu/humanrts/cases/40-04.html>.

⁵⁵² See Atapattu, *supra* note 524, at 70.

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The term “sustainable development” is not easily defined. It encompasses a variety of concepts, such as promotion of socially and environmentally sustainable economic growth, respect for human rights, and protection of the natural environment.⁵⁵³ While dozens of competing definitions have been offered, that proposed by a Commission created by the UN General Assembly, headed by Norwegian Prime Minister Gro Brundtland, has been the most influential. The Report craftily defines sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁵⁵⁴ Two key concepts are incorporated in this definition. First, economic development cannot stop as long as people live in poverty.⁵⁵⁵ Second, such development cannot outpace the ability of our ecosystem, aided by our technology, to sustain itself.⁵⁵⁶

We know that trade can accomplish the first part, by increasing economic development through the use of its natural resources. We also know, however, that such use promotes pollution and introduces the danger of over-exploitation of natural resources. For this reason, we identify sustainable development as a core environmental right so closely linked to trade that RTAs must address its implementation.

For some countries, shrimp aquaculture is extremely lucrative. However, large-scale shrimping destroys fragile coastlines and ecosystems because they were not designed to sustain such heavy burdens. In many places, including Thailand, the shrimp ponds are placed side-to-side and end-to-end in ways that alter the coastlines and prevent local communities from accessing coastal resources.⁵⁵⁷ Before shrimp aquaculture, the coasts used to be filled with mangrove forests, upon which the local communities depended.⁵⁵⁸ Because the ponds have changed, they pollute the water, deplete the ecosystem, introduce salt into freshwater supplies, destroy the mangrove forests together with their productive capacity, reduce the quality of fishing, and generally harm local agriculture.⁵⁵⁹

However, while many of these ocean fisheries are already fully exploited or over-exploited, aquaculture is still increasing rapidly to

⁵⁵³ CTR. FOR INT’L ENVTL. LAW, ONE SPECIES, ONE PLANET: ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 2 (2002), available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (last visited Feb. 20, 2012).

⁵⁵⁴ World Commission on Environment and Development, *Our Common Future*, Chapter 2: *Towards Sustainable Development*, ¶ 1, U.N. Doc., A/42/427 (1987), available at <http://www.un-documents.net/ocf-02.htm#I>.

⁵⁵⁵ See *id.*

⁵⁵⁶ See *id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ Barnhizer, *supra* note 496.

keep up with the demand.⁵⁶⁰ Future use will have to consider the competing demands for limited resources, the protection of these water resources, and the management of the destruction of the environment.⁵⁶¹ RTAs must play their part, even if it is small and difficult, to accomplish sustainable development.

Trade agreements can help in this respect by ensuring oversight of resource use facilitated by the agreement by agencies operating under the sustainable development principle. For this reason, we identify sustainable development as a core environmental right so closely linked to trade that RTAs must address its implementation.

4. *Right to Application of Polluter Pays Principle*

We all know that pollution is an unavoidable byproduct of both production and consumption.⁵⁶² It is also obvious that controlling pollution requires restraints on polluting activities.⁵⁶³ The question is how best to apportion the responsibility for minimizing and remediating this pollution. The most widely-accepted, though politically difficult, economic principle for this purpose is the “polluter pays principle” (PPP). It is an economic rule of cost allocation or internalization that requires the polluter to take responsibility for the external costs, or costs to society in general, of its polluting activity.⁵⁶⁴ By shifting the economic burden of, for example, a stream poisoned by chemical runoff, or the Gulf of Mexico imperiled by a huge oil spill, to the company that caused the problem, the company is given a strong economic incentive to prevent the polluting activity in the first place.⁵⁶⁵ The premise for the PPP is that the production of goods and services produces not only a monetary value, but also inflicts social and environmental costs on society.⁵⁶⁶ The liability placed by the PPP includes the costs of preventing future damage that the polluter’s actions may cause.⁵⁶⁷

⁵⁶⁰ U.N. DEP’T OF ECON. & SOC. AFFAIRS, GLOBAL CHALLENGE, GLOBAL OPPORTUNITY: TRENDS IN SUSTAINABLE DEVELOPMENT 11 (2002), available at http://www.un.org/esa/sustdev/publications/critical_trends_report_2002.pdf.

⁵⁶¹ *Id.*

⁵⁶² Kurt A. Strasser, *Pollution Control in an Era of Economic Redevelopment: An Overview*, 8 CONN. J. INT’L L. 425, 427 (1993).

⁵⁶³ *Id.*

⁵⁶⁴ Margaret Rosso Grossman, *Agriculture and the Polluter Pays Principle: An Introduction*, 59 OKLA. L. REV. 1, 3 (2006).

⁵⁶⁵ Michael R. Parker, *Two Sides of the Same Coin: Considering Human Rights When Designing Environmental Policy*, 25 J. LAND USE & ENVTL. L. 109, 126 (2009).

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

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The PPP appears in several international agreements,⁵⁶⁸ the 1992 Rio Declaration on Environment and Development,⁵⁶⁹ and the Council of Europe's 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.⁵⁷⁰ The Rio Declaration introduces two important warnings or conditions – first, that due regard must be taken of the public interest.⁵⁷¹ For example, BP Oil Company has paid many billions of dollars to clean up and to compensate fisherman and others from economic losses caused by the Gulf Oil Spill.

However, many billions more have been spent by governments in safety net and research activities where it is not considered to be in the public interest to charge the company. This condition also implicates the political difficulty previously mentioned. At some point, it becomes politically impossible to place all of the social and future environmental costs onto one company.

The second condition is that trade and investment must not be “distorted” by the cost internalization. This is similar to the first condition in that it introduces a limit to charging producers for their pollution.⁵⁷²

The PPP also operates to prevent transnational companies from seeking pollution havens – countries that are willing to allow the company to cause pollution without controlling their pollution.⁵⁷³ Under the PPP, any pollution the company causes will be factored into the costs no matter where it operates.⁵⁷⁴

The PPP is closely tied to trade and is critically important to environmental protection. Additionally, preventing pollution havens likely will require international agreements such as RTAs that encourage companies to enforce environmental laws if they want access to larger export markets. For these reasons, we believe that RTAs must hold transnational companies responsible for internalizing pollution costs consistently with the PPP.

⁵⁶⁸ See Jonathan Remy Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the “Polluter Pays” Principle*, 24 *HARV. ENVTL. L. REV.* 465, 469 n.8 (2000).

⁵⁶⁹ 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/Rev. 1 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

⁵⁷⁰ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 *I.L.M.* 1228 (1993).

⁵⁷¹ *Rio Declaration*, *supra* note 569, at 879.

⁵⁷² *Id.*

⁵⁷³ Parker, *supra* note 565, at 127.

⁵⁷⁴ *Id.*

5. *Right to Application of Precautionary Principle*

According to Principle 15 of the Rio Declaration “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁵⁷⁵ This is known as the precautionary principle and involves assessing the risk and determining how to manage it.⁵⁷⁶ At the core of the precautionary principle is the notion that the lack of scientific certainty as to potential damage should not be invoked in the decision-making process because avoiding risk is the main concern.⁵⁷⁷

However, this principle is extremely controversial not only because it requires a country to act first and ask questions later to prevent serious environmental harm,⁵⁷⁸ but also because no one really knows what the terms of the definition mean.⁵⁷⁹ Global climate change is a good example, where the scientific community in general has one view and political leaders have quite another.

Although treaties such as the WTO and others are intended to promote trade liberalization, it is improper to assume that such trade is to be at the expense of fundamental human rights. Many of these conventions contain exceptions for the protection of the environment, health, and human life, including Article XX(b) of the GATT⁵⁸⁰ and Article 30 of the Treaty Establishing the European Community (“EC Treaty”),⁵⁸¹ while attempting to prevent the application of the principle in an arbitrary way. Article XX of the GATT provides standards of determination of the exceptions with components such as ‘necessary’ or ‘related to.’⁵⁸²

In addition, the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) enumerates a series of requirements that must be satisfied to utilize an exception and to qualify as WTO-

⁵⁷⁵ *Rio Declaration*, *supra* note 569, at 879.

⁵⁷⁶ Global Compact Principle U.N. GLOBAL COMPACT, 7 (Feb. 12, 2009), available at <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle7.html>.

⁵⁷⁷ Miguel A. Recuerda, *Dangerous Interpretations of the Precautionary Principle and the Foundational Values of European Union Food Law: Risk Versus Risk*, 4 J. FOOD L. & POL’Y 1, 3 (2008).

⁵⁷⁸ *Id.* at 42.

⁵⁷⁹ *Id.* at 41-42.

⁵⁸⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX(b), available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT].

⁵⁸¹ Hans-Joachim Priess & Christian Pitschas, *Protection of Public Health and the Role of the Precautionary Principle Under WTO Law: A Trojan Horse Before Geneva’s Walls?*, 24 FORDHAM INT’L L.J. 519, 519 (2000).

⁵⁸² GATT, *supra* note 580, art. XX.

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compatible.⁵⁸³ Technological advancements have provided important benefits by providing Member States access to information they would not have had access to otherwise.⁵⁸⁴ The SPS Agreement allows Member states to provisionally adopt phytosanitary or sanitary measures on the basis of available pertinent information, where relevant scientific evidence is insufficient. This includes information from international organizations as well as from measures applied by other Member states. In those circumstances, the Member states still have a responsibility to try to obtain relevant information for a more objective assessment of risk and to review the measures taken within a reasonable period of time.⁵⁸⁵

One example of a case in which Article XX(b) of the GATT was at issue is what has become known as the *Brazil-Tyres* case. In 2005, the European Communities filed a complaint against Brazil because of its import restrictions on refurbished tires.⁵⁸⁶ The EC also challenged several of Brazil's measures related to retreaded tires including: 1) prohibiting issuing import licenses for used tires, which sometimes applied against imports of retreaded tires, even though they were not used tires; 2) imposing fines on the importation, marketing, transportation, storage, keeping, or keeping in deposit or warehouses of imported, but not of domestic retreaded tires; and 3) exempting retreaded tires from other MERCOSUR countries, in response to the ruling of a MERCOSUR panel established at the request of Uruguay.⁵⁸⁷ The Panel issued its opinion in June 2007, and in September 2007, the European Communities filed an appeal.⁵⁸⁸

⁵⁸³ *Agreement on the Application of Sanitary and Phytosanitary Measures*, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf [hereinafter SPS Agreement].

⁵⁸⁴ See WORLD HEALTH ORGANIZATION, *THE PRECAUTIONARY PRINCIPLE: PROTECTING PUBLIC HEALTH, THE ENVIRONMENT AND THE FUTURE OF OUR CHILDREN* 1 (2004), available at http://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf.

⁵⁸⁵ SPS Agreement, *supra* note 582, at art. 5(7).

⁵⁸⁶ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007), DS332 (Sept. 25, 2009) (adopted Dec. 17, 2007), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm; see also MARCEL VAILLANT, *HOW TO ENCOURAGE THE NETWORK TRADE RULES INTERCONNECTIONS? AN APPLICATION TO THE CASE OF NON TARIFF BARRIERS 5* (2011), available at <http://ictsd.org/downloads/2012/02/marcel-vaillant-how-to-encourage-the-network-trade-rules-interconnections-an-application-to-the-case-of-non-tariff-barriers.pdf> (last visited July 23, 2012).

⁵⁸⁷ *Brazil – Measures Affecting Imports of Retreaded Tyres*, *supra* note 586, at 2.

⁵⁸⁸ *Id.* at 3.

Brazil claimed the tires polluted the environment because they were highly combustible and the toxic gases released from tire incineration contaminated its air, soil, and water.⁵⁸⁹ The accumulation of the tires also resulted in the propagation of mosquitoes, resulting in the transmission of yellow fever, dengue fever, and malaria.⁵⁹⁰ The EC claimed violations under the GATT and Brazil counterclaimed that Article XX of the GATT justified measures otherwise inconsistent with GATT principles to protect health and the environment. When determining whether or not a GATT-inconsistent provision can be saved under the Art. XX(b) exception, panels must determine whether the measure is “necessary” to fulfill the objectives of protecting human, animal, or plant life or health.⁵⁹¹

The Appellate Body had to determine whether Brazil could achieve the same level of health and environmental protection by using other reasonably available measures that could be less restrictive to trade.⁵⁹² The Appellate Body determined that the import ban consisted of a comprehensive strategy to deal with waste tires and likely would achieve Brazil’s objective of reducing exposure to risks from waste tires.⁵⁹³ The Appellate Body also had to determine whether the measure was “necessary” within the meaning of Art. XX(b) and found that prevention of the accumulation of waste tires would be more apt to achieve Brazil’s objective of reducing the “exposure to the risks to human, animal, or plant life or health arising from the accumulation of waste tyres” to the maximum extent possible.⁵⁹⁴

After determining that the import ban was provisionally justified under Art XX(b) of the GATT, the Appellate Body examined whether the provisionally justified measure met the requirements of the chapeau of Art. XX.⁵⁹⁵ The requirements are two-fold: 1) a measure provisionally justified under Article XX must not be applied in a manner that would constitute “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail; and 2) the measure must not be applied in a manner that would constitute “a disguised restriction on international trade.”⁵⁹⁶ These exceptions must be exercised in good faith to protect legitimate interests under Article

⁵⁸⁹ CTR. FOR INT’L ENVTL. LAW, THE BRAZIL-RETREADED TIRES CASE: BACKGROUND PAPER 1 (2006), available at http://www.ciel.org/Publications/Brazil_Tires_3Apr06.pdf.

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.* at 4.

⁵⁹² *Id.*

⁵⁹³ See Brazil – Measures Affecting Imports of Retreaded Tyres, *supra* note 586, para. 210.

⁵⁹⁴ *Id.* ¶ 136.

⁵⁹⁵ *Id.* ¶ 213.

⁵⁹⁶ *Id.* ¶ 215.

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XX, and not as a means to circumvent one Member's obligations toward other WTO Members.⁵⁹⁷ Thus, the Appellate Body had to determine whether the MERCOSUR exemption fell within the chapeau.

Brazil's justification for the MERCOSUR exemption was that it was following the ruling of the MERCOSUR tribunal, and therefore, it provided a rationale for the exemption. The Appellate Body found that the MERCOSUR exemption constituted an abuse and was applied in a manner that constituted arbitrary or unjustifiable discrimination.⁵⁹⁸ Even though the Court noted that Brazil's decision to comply with the MERCOSUR tribunal ruling was rational, it noted that a rational decision could still be arbitrary or unjustifiable if the rationale bears no relationship to the objective of a measure provisionally justified under Article XX, or if it goes against that objective.⁵⁹⁹ The Appellate Body determined that the MERCOSUR exemption resulted in the import ban being applied in a manner that constituted arbitrary or unjustifiable discrimination.⁶⁰⁰ It also found that the exemption resulted in a disguised restriction on international trade.⁶⁰¹

The Appellate Body then examined the issue of whether imports of used tires through court injunctions fell within the chapeau of Art. XX. It found that this resulted in the import ban being applied in a manner that constituted unjustifiable or arbitrary discrimination, and was applied in a manner that constituted a disguised restriction on international trade only to the extent that these imports took place in such quantities that they significantly undermined the objective of the import ban. Because of these findings, the Appellate Body determined that the import ban was not justified under Art. XX of the GATT.⁶⁰²

Nonetheless, we believe that a version of the Precautionary Principle should become an essential element of RTAs. The version we would adopt is that of the WTO's Food Safety or SPS Agreement. Article 5.7 of that Agreement permits action in the absence of the full scientific justification normally required by the Agreement, but with important safeguards.⁶⁰³ The measures taken can only be temporary. The country must continue to search for full scientific justification within a reasonable period of time. We believe that, with these limitations, the most controversial aspects of the Precautionary Principle are

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.* ¶ 228.

⁵⁹⁹ *Id.* ¶ 232.

⁶⁰⁰ *Id.* ¶ 233.

⁶⁰¹ *Id.* ¶ 239.

⁶⁰² *Id.* ¶ 228.

⁶⁰³ See SPS Agreement, *supra* note 583, art. 5(7).

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eliminated, while the important requirement to act quickly to prevent serious environmental harm is preserved.

E. Conclusion

The intersection between trade and the emerging human right to a healthy environment presents one of the most dynamic conflicts in international law. Managing these potential conflicts, and exploiting their potential synergies, will pose a continuing challenge in the international community.

RTAs need to be drafted in such a way that they do not conflict with human rights. Moreover, nations must recognize their obligation to regulate international trade in a way that promotes the human right to a healthy environment.⁶⁰⁴ RTAs can accomplish this task in part by following the lead of NAFTA article 104, which contains a hierarchy of norms clause that puts environmental treaties signed by the Parties above the trade rules contained in NAFTA.⁶⁰⁵ Because the protection of water, air, and other natural resources is necessary to the realization of human rights, environmental rights and obligations should also receive hierarchical priority.⁶⁰⁶ The status of human rights norms can be acknowledged by including in the RTA a hierarchy specifying that human rights norms will prevail in the event of a conflict between human rights and trade norms.⁶⁰⁷

In addition, we maintain that an exceptionally strong case can be made for including in RTAs the five core environmental rights that we have identified. Their link to trade is undeniable and their reliance on the power of trade's enforceable rules is patently clear.

IX. OVERALL CONCLUSION

The field of international human rights law contains challenging complexities. It often must operate without positive enforcement mechanisms, even though its tenets describe the very standards of right and wrong conduct for human society. Human rights advocates increasingly recognize the power of international trade instruments both to counter human rights implementation through its adverse effects and to advance human rights implementation through its positive enforcement mechanisms.

⁶⁰⁴ Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT'L L. 723, 776 (2011).

⁶⁰⁵ *Id.* at 779.

⁶⁰⁶ See JUST TRADE, *supra* note 2, at 86-87.

⁶⁰⁷ See Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 627-28 (2007).



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We have proceeded in this paper from the assumption, gained through years as trade negotiators and students of the intersections of trade and human rights, that reducing the complexity of human rights law for trade negotiators will yield greater integration of these two great social policies. In identifying a limited and manageable body of fundamental human rights standards in those human rights fields most closely affected by trade, we believe that trade negotiators may more successfully use RTAs to accomplish the symbiosis of trade and human rights that is inherent in their basic objectives.

We trust that this study will assist trade negotiators in accomplishing the goal of increased economic growth while at the same time increasing the standard of well-being of civil society.