RICHARD LILLICH MEMORIAL LECTURE: NURTURING A TRANSNATIONAL SYSTEM OF INNOVATION

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I. INTRODUCTION

At a College of Europe Workshop[1] in 2007, I was asked to elaborate on the idea that what really emerged from the World Trade Orangization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property law ("TRIPS Agreement")[2] in 1994 was "an incipient transnational system of innovation." [3] This idea was initially put forward in an article that Keith Maskus and I published in our book about the growing tendency of multilateral intellectual property negotiations to disrupt the capacity of nation states to maintain the supply of such critical public goods as education, public health, environmental safety, and scientific re-

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1. College of Europe, Workshop on Issues of Public Policy and Trade in Intellectual Property Law, Bruges, Belgium, Oct. 5, 2005.

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15 1994, 33 I.L.M. 1154 [hereinafter TRIPS Agreement].

3. Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods, in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3, 33-41 (Keith E. Maskus & Jerome H. Reichman eds., 2005). [hereinafter INTERNATIONAL PUBLIC GOODS AND IP].

search.[4] In the present article, I will summarize some of the main themes from our previous work and focus attention on the difficulties of nurturing a transnational system of innovation that could properly balance the needs of states at different levels of economic development.

Part I identifies some of the paradoxes that have emerged from overzealous efforts to re-regulate the global economy, in order to make it safe for investors in the production of knowledge goods, despite the long-standing drive of trade policy to deregulate that same economy in the name of free competition. Part II discusses the governance deficiencies that currently frustrate the need to balance public and private interests at the multilateral level.

Part III focuses on specific problems of maintaining the supply of knowledge as a global public good[5] in the face of the high-protectionist ethos driving current trade policy and of the governance problems identified in Part II. Part IV concludes with a warning about the risks of succumbing to a dogmatic intellectual property ideology precisely at a moment when history beckons state actors to engage in open-minded experimentation with promising new technologies and with new legal tools to promote their development and widespread diffusion.

II. REGULATORY PARADOXES OF THE NEW GLOBAL ECONOMY

Let me first point out that, in an effort to promote trade in knowledge goods, we have paradoxically and energetically been re-regulating the global economy in ways that contradict the sixty-year historical mission of the General Agreement on Tariffs and Trade (GATT).[6] That mission was precisely to deregulate the global economy in the interest of free competition.[7]

I find it disconcerting that "free traders" acquiesce so readily in this process of re-regulation, without critically examining the premise that ever-expanding intellectual property rights must enhance global economic welfare. One high-level governmental study, and many reputable intellectual property scholars, have ques-

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4. *See generally* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3.

5. *See, e.g.,* J.E. Stiglitz, *Knowledge as a Public Good, in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (I. Kaul et al., eds., 1999).

6. Multilateral Agreements on Trade in Goods, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1154 [hereinafter GATT 1994].

7. *See, e.g.*, John H. Jackson, *GATT and the Future of International Trade Institutions,* 28 BROOK J. INT'L. L. 11 (1992).

tioned the wisdom behind this high-protectionist agenda.[8] Professor Thomas Dreier's thoughtful comments on this and related topics also reflect growing concerns about ever-expanding intellectual property rights, at least with regard to the border with competition law.[9] Nevertheless, the notion that more intellectual property protection necessarily translates into more innovation has been so successfully promoted in recent years that few trade economists even bother to ask whether multiplying legal monopolies may not hamstring innovation and competitive enterprise in the end.

When the GATT was adopted, the prevailing norm at the international level was that intellectual property rights represented islands of protection in a sea of free competition. Those islands were largely left to the domestic laws, which, however, were subject to norms of reasonableness and necessity under Article XX(d) of the GATT 1947.[10] This provision expressly ordained that domestic intellectual property laws should not become disguised barriers to trade.[11]

In contrast, when one reviews the massive amounts of intellectual property legislation that characterize the post-TRIPS model at every level, it seems more accurate to speak of islands of competition in a sea of legal monopolies. It is at best unclear who represents the larger public interest[12] in negotiating forums dominated by powerful multinational firms that behave increasingly like a

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8. *See, e.g.*, Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property Rights and Development Policy* 8, 21-27 (2000) [hereinafter CIPR]; Carlos M. Correa, *Internationalization of the Patent System and New Technologies*, 20 WIS. INT'L. L.J. 523, 544-50 (2002); John. H. Barton, *The Economics of TRIPS: International Trade in Information Intensive Product*s, 33 GEO. WASH. INT'L L. REV. 473 (2001); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement,* 17 EMORY INT'L L. REV. 819 (2003); James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property,* DUKE L. & TECH. REV. 9 (2004). For an insightful review and analysis of this literature, *see* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006).

9. *See* Thomas Dreier, *Shaping a Fair International IPR-Regime in a Globalized World—Some Parameters for Public Policy*, *in* INTELLECTUAL PROPERTY, PUBLIC POLICY, AND INTERNATIONAL TRADE 43-75 (Inge Govaere & Hanns Ullrich eds., 2007).

10. *See* GATT 1994, *supra* note 6, at art. XX(d), carrying forward original article XX(d) in GATT 1947.

11. *See* GATT 1994, *supra* note 6, at art. XX, *chapeau* clause, disallowing measures that constitute "a disguised restriction on international trade" (carrying forward same language from GATT 1947).

12. For a discussion of the ambiguities inherent in the term "public interest," *see* Dreier, *supra* note 9, who correctly observes that IPRs are given birth as an expression of the public interest in creativity and innovation. Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3, did not equate the larger public interest with consumer access to knowledge or knowledge goods as such, although it is one component of a broader equation. Nor do we equate the broader public interest with "the sum total of private interests." That, indeed, is why we chose to focus on the "privatization of global public goods."

"knowledge cartel."[13] This process has been dramatically evidenced in the recent Free Trade Negotiations, where the United States Trade Representative (USTR) directly espouses the interests of the pharmaceutical and entertainment industries, among others, in securing provisions that sometimes exceed what is permitted by congressionally enacted U.S. laws.[14]

Yet, there is reason to fear that the members of this "knowledge cartel" are more interested in "lock[ing] in temporary competitive advantages" from existing innovation than in formulating measures that would advance "the global public interest in [future] innovation, competition, or the provision of complementary public goods."[15] This one-sided drive to re-regulate the global economy thus produces distortions to trade that can impede worldwide economic growth in the long term.

For example, re-regulation can disrupt the transfer of technology under market conditions by allowing dominant firms to refuse to deal with would-be competitors in developing countries or to demand such increased rent extraction for up-to-date technology (based on immunities from reverse-engineering under TRIPS) that the welfare gains from technology installation are lost. Moreover, the same intellectual property standards that impede reverse-engineering also hinder local manufacturers' efforts to add value and improvements to the existing technological base.[16]

"Without a legitimizing governance process that adequately represents all stakeholders," Maskus and I fear that a re-regulated global market will "reflect dubious practices in developed markets for knowledge goods that may actually hamper both innovation and competition in the long run."[17] There is a "further risk that an over-regulated market for knowledge goods could compromise the

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13. *Id.* at 19. *See also* John. Barton, *Integrating IPR Policies in Development Strategies, in* TRADING IN KNOWLEDGE (C. Bellman et al., eds., 2003) (stressing difficulties of entry into markets "dominated by multinational oligopolies" that are "compounded by the international IP system").

14. *See* Frederick M. Abbott, *Intellectual Property Rights in a Global Trade Framework: Trends in Developing Countries*, 98 AM. SOC'Y OF INT'L L. Proceedings 95, 97 (2004); Graham Dutfield*, North/South: An Assymetric Global Market?*, paper presented at the Annual Meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Parma, Italy, 9-11 September 2006.

15. Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 19.

16. *See, e.g.,* Carlos M. Correa*, Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 227-56; Lee G. Branstetter, *Do Stronger Patents Induce More Local Innovation?, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 309-20.

17. Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 20.

ability of nation states to supply other public goods that only they can provide in a decentralized world economy."[18]

Beyond the potential negative effects on innovation, the drive for ever stronger international IP standards is also disrupting the provision of other key public goods that are essential components of global public welfare, such as education, public health, environmental protection, food, security, scientific research, and competition.[19] Increasingly, the knowledge inputs needed to promote these public goods are subject to exclusive property rights, and they are made available at high prices or on terms and conditions that render it difficult for ministries to provide essential public goods at the national level. Yet, these ministries were usually not represented at the negotiating forums where international intellectual property standards were set; and in these forums, there has been little regard to the impacts of intellectual property rights on the provisions of global public goods generally.

III. BALANCING PUBLIC AND PRIVATE INTERESTS IN AN INCIPIENT TRANSNATIONAL SYSTEM OF INNOVATION

Maskus and I concede that an "incipient transnational system of innovation" could enable successful innovators in all countries[20]—developed or developing—to reach an integrated world market.[21] If one believes that carefully calibrated intellectual property rights provide needed incentives to invest in risky forms of innovation, the public benefits likely to accrue from scientific and technological progress under such a worldwide

18. *Id.* at 20. *See generally* PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (I. Kaul et al., eds., 2003); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (Cambridge University Press 2003).

19. *See,* e.g. Paul A. David, *Koyaanisqatsi in Cyberspace: The Economics of an 'Out-of-Balance' Regime of Private Property Rights in Data and Information, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 81-120; Ruth Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 142-87; Frederick M. Abbott, *Managing the Hydra: The Herculean Task of Ensuring Access to Essential Medicines in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 393-424; Hans Ullrich, *Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 726-57.

20. Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 33-35 (stressing that "[a]ll countries could benefit from a functionally efficient transnational system of innovation if low barriers to entry enabled entrepreneurs anywhere to invest in the production and distribution of knowledge goods.").

21. *See, e.g.*, Asish Arora, Andrea Fosfuri & Alfonso Gambardella, *Markets for Technology, Intellectual Property Rights and Development, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 321-336; *see also* Michael Blakeney, *Stimulating Agricultural Innovation,* in INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 367-390; Keith E. Maskus, Kamal Saggi & Thitima Puttitanum, *Patent Rights and International Technology Transfer Through Direct Investment and Licensing, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 265-80.

logical progress under such a worldwide system are potentially incalculable.[22]

There are serious obstacles to achieving such progress, however. In practice, the different national and regional capabilities and endowments of WTO Members limit their absorptive capacities and reduce the potential benefits of open markets for knowledge goods. This "technological divide" is widened by the high rents that must now be paid to technology exporters and by the absence of provisions conferring differential and more favorable treatment on developing countries under the TRIPS Agreement,[23] even though that principle had been enshrined in the GATT (1947) at the end of the Tokyo Round in 1979.[24] The only differential treatment under TRIPS is now reserved for Least-Developed Countries (LDCs), the poorest of the poor, whose general compliance obligations have just been extended to 2013 (in addition to further exemptions for the patenting of pharmaceutical producst until 2016).[25]

Disregarding the LDCs, all other developing countries—whether they fall in the high, medium, or low income brackets—must accordingly compete in markets for knowledge goods on roughly the same normative terms and conditions that govern advanced industrialized countries. A growing number of these developing countries have demonstrated considerable capacity in some technological fields, and some are beginning to challenge the technological supremacy of the OECD countries.[26] Nevertheless, all of

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22. *See, e.g.,* M. P. Ryan, *Useful Knowledge and the Development Agenda Debate at WIPO*, paper presented at the Annual Meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Parma, Italy, 9-11 September 2006. However, some commentators believe that many developing countries should focus on comparative advantages in agriculture and other local endowments, rather than technological innovation. *See, e.g.,* Dreier, *supra* note 9.

23. *See* TRIPS Agreement, *supra* note 2, art. 65 (Transitional Arrangements).

24. *See* GATT (1947), *supra* note 6, Part IV, "Results of the Uruguay Round — Legal Texts" 533-37 (1994).

25. *See* TRIPS Agreement, *supra* note 2, arts. 65-66; World Trade Organization, Ministerial, Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/MIN(01)/DEC/W/2, 14 November 2001 [hereinafter Doha Declaration on Public Health], A7; Decision by the Council for TRIPS of 27 June 2002, Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with respect to Pharmaceutical Products Council for Trade-Related Aspect of Intellectual Property Rights, WTO Doc. IP/C/25, (July 1, 2002) [hereinafter Decision on the 2016 Extension]. LDCs may postpone implementation of other TRIPS obligations, including the duty to provide patent protection for products other than pharmaceuticals, until 2013. *See* Decision by the Council for TRIPS of 29 November 2005, Extension of the Transition Period under Article 66.1 for Least-Developed Country Members, WTO Doc. IP/C/40 (Nov. 30, 2005) [hereinafter Decision on the 2013 Extension]. During these transition periods, LDCs must continue to respect national treatment and most-favored-nation (MFN) obligations under arts. 3-4 of the TRIPS Agreement, *supra* note 2.

26. *See, e.g.,* J. Straus, *The Impact of GATT and TRIPS on Economic Development*,

them are struggling to cope with the enormous challenges and burdens, including financial burdens, thrust upon them by a universal set of relatively high intellectual property standards.[27]

These burdens and challenges affect even those developing countries that are not actively engaged in the production of knowledge goods. Such countries must nonetheless organize and maintain the defense of foreign intellectual property owners, with serious repercussions for their internal ability to meet, say, public education and public health goals at prices their general populations can afford.[28]

In other words, even developing countries that opt out of the world's innovation "tournaments" must engage in burdensome efforts to cope with the social costs of world intellectual property norms, including the distributional inequities that poverty greatly magnifies. They must cope, with varying degrees of success, with the so-called "flexibilities" built into the TRIPS Agreement itself, which could, if mastered, potentially lower those same social costs.[29] Increasingly, developing countries must also deal with official and unofficial pressures and threats to provide higher TRIPS-plus levels of intellectual property protection, which may become embodied in bilateral or regional Free Trade Agreements.[30]

When, instead, developing countries opt into the production of knowledge goods for local consumption or export purposes, they face an even more complex and burdensome "balancing act." On the one hand, they must internalize universal IP norms in ways that stimulate relevant industrial sectors having innovative poten-

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paper presented to the Annual Meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Parma, Italy, 9-11 September 2006 (stressing successes of China and India). *See also* Dutfield, *supra* note 14 (predicting shift in terms of knowledge goods trade to detriment of current technology exporters).

27. *See generally* CIPR, *supra* note 8. *See also* Chon, *supra* note 8 at 2839-58 (criticizing intergovernmental efforts and scholarly analysis of IP problems as insufficiently grounded in development theory and practice).

28. *See, e.g.,* Okediji, *supra* note 19; Abbott, *supra* note 19. *See also* Timothy Swanson & Timo Goeschl, *Diffusion and Distribution: The Impacts on Poor Countries of Technological Enforcement Within the Biotechnological Sector, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 669-94.

29. For detailed discussion of these flexibilities, *see generally*, U.N. CONFERENCE ON TRADE & DEV. (UNCTAD) AND INTERNATIONAL CENTER FOR TRADE AND SUSTAINABLE DEVELOPMENT (ICTSD), RESOURCE BOOK ON TRIPS AND DEVELOPMENT (2005). *See also* Jerome H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 NYU J. INT'L. L. & POL. 11 (1997); Carolos M. Correa, *Formulating Effective Pro-Development National Intellectual property Policies, in* TRADING IN KNOWLEDGE, *supra* note 13 at 209 *et seq.* For discussion of distributional effects, *see, e.g.,* Peter M. Gerhart, *Distributive Values and Institutional Design in the Provision of Global Public Goods, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 69-77.

30. *Supra* note 14.

tial without, however, legally discriminating against foreign competitors. The national treatment principle of the TRIPS Agreement[31]—which the WTO Appellate Body has deemed a cardinal premise of the worldwide intellectual property system[32] —thus reinforces the lack of "differential and more favorable treatment" in that same Agreement.

This formidable challenge is then made considerably more difficult by the countervailing welfare goals these countries must also meet, for political reasons, among others, with respect to, say, public health and public education. Here, in short, even economically dynamic developing countries must resolve tensions between calibrating TRIPS-compliant domestic IP norms to stimulate innovation and adjusting the same set of norms to provide access to knowledge and medicines on affordable terms and conditions.[33] These efforts are reflected, for example, in India's new patent law, where efforts to stimulate the research-based pharmaceutical sector increasingly conflict with efforts to preserve the well-developed capacity of local producers to supply low-cost generic drugs to both domestic and foreign consumers.[34]

More generally, the TRIPS Agreement has thus obliged developing countries to engage in a delicate balancing act between stimulating the production of private knowledge goods, when feasible, and maintaining the supply of essential public goods.[35] Public international law, however, affords them little guidance in choosing normative and practical tools for achieving this balance. Rather, the relentless drive to privatize knowledge goods, which has picked up even more steam in bilateral and regional FTAs since TRIPS (despite implicit promises to the contrary during the Uruguay Round), has been accompanied by no comparable collective action at the intergovernmental level to preserve and coordinate the supply of global public goods. This governance gap persists despite a growing clamor for such initiatives by NGOs en-

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31. TRIPS Agreement, *supra* note 2, arts. 3 & 4.

32. United States-Section 211 Omnibus Appropriations Act of 1998 (*Havana Club*), January 2, 2002, DSR 2002: II 589, WTO Doc. WT/DS176/AB/R.

33. See Frederick M. Abbott & Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INT'L ECON. L. 921 (2007).

34. *See, e.g.,* J. M. Mueller, *The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation* (draft version, August, 2006), University of Pittsburg School of Law Working Paper Series, Working Paper no. 43 at http://law.bepress.com/pittlwps/papers/art 43; Janis M. Mueller, *Taking TRIPS to India—Novartis, Patent Law, and Access to Medicines*, 356 NEW ENGLAND J. MEDICINE 54 (Feb. 8, 2007).

35. For deep conceptual issues, *see* Peter Drahos, *The Regulation of Public Goods*, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3, at 46-64.

gaged in "regime shifting" tactics[36] and by the so-called "Friends of Development," who have sought to prod the World Intellectual Property Organization (WIPO) in new, more development-friendly directions.[37]

Indeed, we have no trusted governance mechanism for balancing public and private interests in this emerging transnational system of innovation at all.[38] We lack clear theoretical premises or empirical evidence to determine which intellectual property standards would best promote diverse goals over time.[39] We have generated few ideas, and little discussion about how to maintain the supply of other global public goods — including knowledge itself — under a supra-national intellectual property regime.[40] And we have not even begun to acknowledge the need to deal with adverse distributional impacts, especially on the poor, that even the most carefully balanced intellectual property regime may produce.[41]

IV. MAINTAINING THE SUPPLY OF KNOWLEDGE AS A GLOBAL PUBLIC GOOD

In the rest of this article, I focus primary attention on the topic of innovation itself, and particularly its dependence on the continued upstream availability of knowledge as both a domestic and a global public good. Joseph Stiglitz, the Nobel Prize winner, has written brilliantly on this general concept.[42] Moreover, recent efforts to focus attention on both human rights and human welfare in the context of overall development goals has added new and welcome dimensions to the debate about international IPRs.[43]

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36. *See generally* L. R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004).

37. *See infra* note 52; for details, *see* Chon, *supra* note 8 at 2844-49 (citing authorities).

38. Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 18-20.

39. *See generally* Jerome H. Reichman & R. Cooper Dreyfuss, *Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85 (2007).

40. *See, e.g.,* Jane C. Ginsberg, *Toward Supranational Copyright Law?, The WTO Panel Decision and the "Three Step Test" for Copyright Exceptions*, 187 REVUE INTERNATIONALE DU DROIT D'AUTEUR 3, January 2001 *available at* SSRN: http://ssrn.com/abstract=253867; Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 27-33, 41-45; *see generally* P. Drahos, *supra* note 35 at 46-68.

41. *See, e.g.*, Gerhart, *supra* note 29; Chon *supra* note 8.

42. *See generally* Stiglitz, *supra* note 5.

43. *See, e.g.,* Chon, *supra* note 8 at 2859-909 (stressing access to knowledge as key to capacity building); Helfer, *supra* note 33. *See also* Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, Mich. St. Univ. C. of L., Legal Studies Research Paper Series, Paper No. 04-01, 2006, *available at* http://ssrn.com/abstract=927335.

Nevertheless, these approaches should not deflect attention from more specific needs to devise an economically stable innovation system potentially of benefit to all countries, even if they raise searching questions about distributive justice and larger developmental goals that cannot be ignored.

For present purposes, I wish to underscore the extent to which today's high protectionist agenda progressively tends to compromise the availability of knowledge inputs needed for future innovation by expanding the protection of contemporary outputs as if there were no tomorrow.[44] This short-sighted approach threatens to disrupt the delicate "ecology of information" that James Boyle has eloquently portrayed.[45]

A fundamental problem is that international trade negotiations have not self-consciously postulated the need to seek intellectual property norms and incentives that would best advance the incipient worldwide system of innovation as such.[46] On the contrary, special interest lobbyists claiming to know what best serves that system have promoted normative solutions that maximize rents from existing innovation. These self-serving IP proposals are then exchanged for trade concessions in other areas that may or may not advance the long-term interests of the technology importing countries.[47]

This linkage methodology first evolved in the 1980s, when a Cold War political stalemate had blocked the progressive harmonization of rudimentary international IP standards at WIPO, and countries at very different levels of development were unwilling to exchange purely IP concessions as such. Once a more robust transnational IP system had been installed on the shoulders of the

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44. *See, e.g.,* Michael A. Heller & Rebecca. S. Eisenberg, *Can Patents Deter Innovation? The Anti-commons in Biomedical Research*, 280 SCIENCE 690 (1998); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003); Arto K. Rai, *Fostering Cumulative Innovation in the Biopharmaceutical Industry: The Role of Patents and Antitrust*, 16 BERKELEY TECH. L.J. 813 (2001); Paul A. David, *A Tragedy of the Public Knowledge "Commons? Global Science, Intellectual Property and the Digital Technology Boomerang*, SIEPR Discussion Paper No. 00-02, Stanford Inst. for Economic Pol'y Research (2000), *available at* http://siepr.stanford.edu/papers/pdf/00-02.html (last visited Jan. 8 2004).

45. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net,* 47 DUKE L.J. 87 (1997).

46. *See, e.g.,* JAYASHEE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES (2001); Susan K. Sell, *Trade Issues & HIV/AIDS*, 17 EMORY INT'L L. R. 591 (2003); Peter K. Yu, *TRIPS and Its Discontents,* 10 MARQ. INTELL. PROP. L. REV. 369 (2006). *See generally* G. H. Evans, *The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights,* 18 WORLD COMPETITION 137-180 (1994).

47. *See, e.g.,* Suzanne Scotchmer, *The Political Economy of Intellectual Property Treaties,* 20 J. L. ECON. & ORG. 415 (2004) (showing that these agreements seek to capture positive externalities and spillovers from existing innovation).

TRIPS Agreement, however, continued reliance on this linkage methodology has undermined the stability of that very system by blinding negotiators to the cumulative social costs of unbalanced, over-protectionist IP regimes even in the most advanced economies.

Respectable economic inquiry has never been more perplexed and uncertain about the potential hazards of our ever-expanding, ever more protectionist intellectual property regimes.[48] Nor have serious efforts been made to reconcile the private and public interests of countries at different levels of development, with a view to optimizing global welfare in a healthy competitive environment.[49] Indeed, in some countries, especially the United States, even the word "competition" has become suspect under an antitrust law that increasingly views monopoly as a socially desirable tool to promote research and development.[50] Yet, those who cling to this pessimistic Schumpetarean outlook largely ignore, or at least under-appreciate, the extent to which so much of today's basic research is performed at government expense in universities and other government-funded entities. The very success of this growing public-private partnership in technological innovation[51] could instead justify a greater degree of competition in downstream applications and improvements than was previously thought economically desirable.

While a group of developing countries has recently called for sustained economic analysis of these questions at the international level,[52] the most powerful countries' trade negotiators relentlessly

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48. *See, e.g.,* ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS AND WHAT TO DO ABOUT IT (Princeton University Press 2004); David, *supra* notes 19 & 44; Keith E. Maskus, *Lessons from Studying the International Economics of Intellectual Property Rights*, 52 VAND. L. REV. 2219 (2000); Yochai Benkler*, An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000).

49. CIPR, *supra* note 8; Branstetter, *supra* note 16; *see also* Ullrich, *supra* note 19 at 726-57.

50.*See, e.g.,* J. Drexl, *Intellectual Property Rights as Constituent Elements of the Market Order*, paper presented to the Annual Meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Parma, Italy, September 9-11 2006; Eleanor M. Fox, *Can Antitrust Policy Protect the Global Commons from the Excesses of IPRs?, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 758-69; *see also* S. Ghosh, *Comment: Competitive Baselines for Intellectual Property in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 793-814.

51. *See, e.g.,* DAVID MOWERY ET AL., IVORY TOWER AND INDUSTRIAL INNOVATION: UNIVERSITY-INDUSTRY TECHNOLOGY BEFORE AND AFTER THE BAYH-DOLE ACT (Stanford University Press 2004).

52. *See* WIPO General Assembly, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WIPO Doc. WO/GA/31/11, 27 August 2004; Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11, WIPO Doc IIM/1/4, 6 April 2005; Proposal by Morocco on Behalf of

seek to export their increasingly dysfunctional intellectual property systems to the rest of the world at the very time when those systems are in danger of breaking down at home.[53] If these trends continue unabated, the poorly designed intellectual property mechanisms forged in bilateral and multilateral forums could stifle rather than accelerate the pace of innovation in the emerging transnational system.

We ignore, for example, the extent to which low eligibility standards and dubious conceptual formulations have flooded technology markets with weak patents that generate thickets of rights and other blocking effects, which in turn shift funds away from R&D into wasteful litigation and other counter-measures.[54] We ignore the spreading tentacles of copyright law, which have made truly creative expression ever more difficult by narrowing user and public-interest safeguards,[55] and which have surrounded computer programs and other functional works with impenetrable legal and technological fences.[56] We risk elevating the costs of R&D across entire economies through database protection laws so poorly designed[57] that they have embarrassed both the highest court called

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the African Group Entitled *The African Proposal for the Establishment of a Development Agenda for WIPO*, WIPO Doc IIM/3/2, 18 July 2005. *See also* S. Musungu & G. Dutfield, Multilateral Agreements and a TRIPS-Plus World: The World Intellectual Property Organization (WIPO), (QUNO/QIAP), TRIPS Issues Paper 3, 2003; C. L. Deere, *What Next for the Development Agenda at WIPO? Priorities for 2006*, BRIDGES, ICTSD, February 2006.

53. *See, e.g.,* Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 20-23 (citing authorities); Reichman & Dreyfuss, *Patent Law Harmonization*, *supra* note 39.

54. *See supra* note 39; Jaffe & Lerner, *supra* note 48; B. Verbeure et al., *Patent Pools and Diagnostic Testing*, 24 TRENDS IN BIOTECHNOLOGY 115 (2006); Geertrui Van Overwalle et al., *Models for Facilitating Access to Patents on Genetic Inventions*, 7 NATURE REVIEW GENETICS 143 (2006); J. Warloin, The Tsunami of Biotech Patents, paper presented to the International Workshop on Gene Patents and Clearing Models: From Concepts to Cases, Catholic University, Leuven, Belgium, 8-10 June 2006.

55. *See, e.g.,* Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECHNOLOGY L.J. 98 (2007). *See also* R. Cooper Dreyfuss, *TRIPS — Round II: Should Users Strike Back*, 71 U. CHI. L. REV. 21 (2004). Ruth L. Okedigi, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3, 142-87.

56. *See, e.g.*, Dreier, *supra* note 9; Pamela Samuelson, Ramdall Davis, Mitchell.D. Kapr & Jerome H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2203 (1994); Jerome H. Reichman & Johnathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875 (1999); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003).

57. *See* Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, O.J. (1996) L 77/20; Jerome H. Reichman and Pamela Samuelson, *Intellectual Property Rights in Data?,* 50 VAND. L. REV. 51 (1997); Jerome H. Reichman, *Database Protection in a Global Economy,* REVUE INTERNATIONALE DE DROIT ÉCONOMIQUE*,* 455 (2002).

to enforce them[58] and even the legislative entity that spawned them.[59] And we continue to roll out competition laws and policies that claim to advance innovation — as if that were not sufficiently the province of IPRs — rather than to reign in anticompetitive arrangements that limit both the diffusion of innovation and the pace of improvements.[60]

Professor Dreier rightly reminds us that the advent of new technologies requires some adjustments of pre-existing IP paradigms and that allowing users and consumers to free-ride on investments in such technologies would also constitute a short-sighted policy resulting in market failure.[61] But few, if any, reputable scholars endorse such policies. The scarecrow of free-riding has become a political gambit to steer legislators away from softer modalities of protection that could overcome market failure with lower social costs and without unnecessarily impeding future innovation.[62]

A. Rationalizing the Protection of Cumulative and Sequential Innovation

Professor Dreier has called attention to special problems posed by information technologies and biotechnology, in which each new advance seems to depend upon a mix of preceding innovative contributions. This phenomenon is, indeed, the problem of "cumulative and sequential innovation," which I have addressed in a number of monographs and articles.[63]

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58. *See, e.g.,* Case C-203/02, British Horse-racing Board Ltd v. William Hill Organization, Ltd., 2004 E.C.R. I-10415; Case C-46/02, Fixtures Marketing Ltd. v. Oy Veikkaus AB, 2004 E.C.R. I-10365.

59. Commission of the European Communities, First Evaluation of Directive 96/9/EC on the Legal Protection of Databases, DG Internal Market and Services working paper, Brussels, Dec. 12, 2005, http://europa.eu.int/comm/interval/market/copyright/docs/databases/evaluationreporten.pdf. *But see* Estelle Derclaye, *IPRs on Information and Market Power: Comparing the European and American Protections of Databases*, paper presented to the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Parma, Italy, September 9-11, 2006 (advocating European approach with certain modifications).

60. *See* Drexl, supra note 50; Fox, *supra* note 50; Ullrich, *supra* note 19; *see also* M.D. Janis, *"Minimal" Standards for Patent-Related Antitrust Law Under TRIPS, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 774-792.

61. Dreier, *supra* note 9. *See also* James Boyle, *Enclosing the Genome: What Squabbles Over Genetic Patents Could Teach Us, in* PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT 97-118 (F. Scott Kieft ed., Elsevier Academic Press 2003).

62. Jerome H. Reichman, *Saving the Patent Law from Itself, in* PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT, *supra* note 61 at 289-301.

63. *See* Dreier, *supra* note 9; Jerome H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation* 53 VAND. L. REV. 1743 (2002); Jerome H.

Traditional patent law presupposes clear boundaries between non-obvious inventions, and it proceeds on the assumption that the initial inventor is best-equipped to develop the new product or process and bring it to market in an efficient manner. The powerful exclusive rights of the patent paradigm rest upon both these premises and make it possible for innovators to exchange their creations for value in the absence of market failure.[64]

In reality, the conditions of present-day technological innovation increasingly contradict and confound these premises.[65] When patents are freely granted for merely incremental additions to the knowledge stock, as routinely occurs under today's low eligibility requirements, innovations clustering around common technical trajectories overlap, with no clear proprietarial lines of demarcation.[66] These proliferating patents then give rise to thickets of rights that produce blocking effects on both follow-on innovation and upstream basic research.[67] Scarce resources needed for R&D are progressively diverted to litigation seeking judicial clarification of boundary lines that are inherently blurred by definition.[68]

Meanwhile, the pace of innovation is further slowed because exclusive property rights in "slivers of innovation" act as a barrier to entry to those who must use existing inventions to produce value-adding improvements.[69] Experience with small-scale innovation in different fields suggests that the market often discerns the course of improvements faster than the initial innovator, and that would-be competitors would move quickly to invest in value-adding improvements but for the potential blocking effects of the first-comer's exclusive rights. Exchange often fails to occur because the second comers fear to disclose small-scale applications of know-

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Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2342 (1994).

64. *See, e.g.,* Edmund Kitch, *The Nature and Function of the Patent System* 20 J. L. & ECON. 265 (1997); Edmund Kitch *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1737 (2000); Robert P. Merges, *One Hundred Years of Solitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2225-27 (2000).

65. *See, e.g.,* James Bessen & Michelle Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1 (2006); Rai, *supra* note 44; Heller & Eisenberg, *supra* note 44; Dan L. Burk & Mark A. Lemley, *Biotechnology's Uncertainty Principle, in* PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT, *supra* note 61 at 325-53.

66. *See* Bessen & Meurer, *supra* note 65; *see also supra* note 54.

67. *See, e.g.,* Burk & Lemley, *supra* note 65 at 339-353; Rebecca S. Eisenberg, *Reaching Through the Genome, in* PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT, *supra* note 61 at.209-30; Heller & Eisenberg, *supra* note 41.

68. Cf., e.g. W. Kingston, *An Agenda for Radical Intellectual Property Reform, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 653-61.

69. *See* Reichman, *Saving the Patent Law from Itself*, *supra* note 62.

how to the initial innovator and cannot proceed to deliver value-adding improvements without incurring the risk of actions for infringement.[70] The domestic patent laws, and their *sui generis* counterparts, thus clumsily impede the pace of innovation because of a well-intentioned aim to immunize the first-comers from free-riding appropriations of their initial investments in R&D.

From a broader perspective, the forgoing analysis shows the dominant Cosean model, in which rational actors contract around strong and clearly defined exclusive property rights,[71] to be at war with two pre-existing subsystems on which competitive economies traditionally depended. One such subsystem was the set of liability rules that governed trade secrets in the past, especially when patents were hard to obtain because of high eligibility standards, and routine engineers could freely provide value-adding improvements by reverse-engineering the technical know-how embodied in sub-patentable innovation.[72] The second major subsystem undermined by a mindless expansion of exclusive property rights was the Mertonian model of open access and sharing of scientific research results, which provided a continuous flow of upstream knowledge inputs often funded by government science agencies.[73] It also complicates the evolution of promising new innovation models based on voluntary forms of coordinated collective action.[74]

From a theoretical perspective, I have elsewhere argued that policymakers should be exploring and experimenting with novel intellectual property regimes that could defend cumulative and sequential innovation against free-riding appropriators without unduly blocking value-adding improvements and without depriving first-comers of a fair share of the revenues from such improvements. To this end, a set of "take and pay" liability rules, known as a "compensatory liability regime," can be fashioned to regulate the pace of improvements while impeding wholesale duplication of pro-

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70. *See* Reichman, *Green Tulips*, *supra* note 63 (discussing Arrow's Information Paradox).

71. *See* Rober P. Merges, *Of Property Rules, Coase, and Intellectual Property,* 94 COLUM. L. REV. 2655 (1994).

72. *See* Reichman, *Legal Hybrids*, *supra* note 63.

73. *See, e.g.*, Arti Kaur Rai, *Evolving Scientific Norms and Intellectual Property Rights: A Reply to Kieff*, 95 NW. U. L. REV. 707 (2001); Jerome H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 L. & CONTEMP. PROBS. 317 (2003); Graeme B. Dinwoodie & R. Cooper Dreyfuss, *Patenting Science: Protecting the Domain of Accessible Knowledge, in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 191-221 (Lucie Guibault & P. Bernt Husgenholtz eds., Kluwer Law International 2006) [hereinafter *Patenting Science*].

74. *See, e.g.,* Yochai Benkler, *Coase's Penguin or Linnux and the Nature of the Firm,* 102 YALE L. J. 369 (2002); *see also* GLYN MOODY, REBEL CODE: LINUX AND THE OPEN SOURCE REVOLUTION (Perseus Books Group 2002).

tected small-scale innovation.[75] This alternative form of protection would provide *ex ante* entitlements to promote value-adding uses of cumulative and sequential innovation with low transaction costs and fewer barriers to entry, and it would also avoid many of the coordination problems that frustrate the collective action needed for complex innovative undertakings.[76]

This is not the place to explore such proposals in detail. I mention them here because they attempt to address the problems that an increasingly dysfunctional intellectual property system has elicited. Many other ambitious proposals are on the table, such as open-source initiatives, patent pools, science commons and other clearing house models,[77] which merit investigation and study. Yet, all these worthwhile responses to the pressing problems of the day could be compromised if the knowledge cartel that has captured the international IP law-making process continues to ratchet up ever-more protectionist standards in the name of so-called "harmonization."

B. A Moratorium on Stronger International Intellectual Property Standard-Setting Exercises

The forgoing discussion suggests that the last thing that an incipient transnational system of innovation needs at the moment are additional rounds of international IP law-making exercises. On the contrary, the developing countries need a breathing space in which to accommodate the social costs of the TRIPS Agreement (and posterior TRIPS-plus agreements, if any). They must particularly master the nuances of existing international standards of protection, including both built-in and subsequently added flexibilities, with a view to adapting this legal infrastructure to their own assets, needs and capabilities.[78] At the same time, policymakers in

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75. Reichman, *Green Tulips*, *supra* note 63; *see also* Jerome H. Reichman & Tracy Lewis, *Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge, in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 337-66.

76. *See,* Tom Dedeurwaerdere, A Philosopher's View, paper presented to the International Workshop on Gene Patents and Clearing Models: From Concepts to Cases, Catholic University, Leuven, Belgium, 8-10 June 2006.

77. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); JANET HOPE, OPEN SOURCE BIOTECHNOLOGY (forthcoming 2008); *see generally* papers presented to the International Workshop on Gene Patents and Clearing Models: From Concepts to Cases, Catholic University, Leuven, Belgium, 8-10 June 2006.

78. *See, e.g.,* Dutfield, *supra* note 14; *see generally* Mueller *supra* note 34 (for an in-depth survey of India's struggle to reconcile international patent standards with its own development goals); *see also* Abbott & Reichman, *supra* note 33 (discussing potential impact of amended TRIPS provision 31*bis*).

developed countries need to step back and take stock of their growing intellectual property predicaments, without worsening existing problems by further succumbing to the "more is always better" propaganda of a powerful knowledge cartel.

For all these reasons, Keith Maskus and I have called for a moratorium on intellectual property standard-setting exercises for the immediate future. In our view, "further harmonization is not an improper goal, but rather a premature exercise under the new and uncertain conditions that attend the development of cutting-edge technologies generally and information-based technologies in particular."[79]

Professor Dreier correctly understands our proposal to be directed at developed and developing countries alike.[80] Our hope is that, as states at different levels of development "accommodate[d] existing international [IP] standards to their own nascent or evolving systems of innovation," a body of fresh empirical data would emerge with which to compare and test different development strategies.[81] In the long run, such data might make it more feasible for states to trade further intellectual property concessions once again, "on a win-win basis, without coercion and with fewer risks that powerful interest groups had rigged the rules to lock in fleeting competitive advantages."[82]

If developing countries (whose interests vary greatly according to per capita GDP and industrial capacities) rallied around the call for such a moratorium, it could help them collectively resist bilateral pressures in FTA negotiations that have so far succeeded on a "divide and conquer" strategy. These countries should, however, remain willing to consider minimalist, good faith responses to new or rampant free-riding practices that might unexpectedly emerge during the moratorium period.[83]

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79. Maskus & Reichman in INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3, at 36. *See also*, Reichman & Cooper Dreyfuss, *supra* note 39.(For efforts to bolster the recognition of foreign judgments obtained under IP laws already conforming to TRIPS standards, *see*, Jane C. Ginsberg, & R. Cooper Dreyfuss, *Draft Convention on Jurisdiction and Recognition of Judgments, in* INTELLECTUAL PROPERTY MATTERS, 77 CHI.-KENT L. R. 1065 (2002); Yoav Ostreicher, *The Rise and Fall of the "Mixed" and "Double" Convention Models Regarding Recognition and Enforcement of Foreign Judgments*, 6 WASH. U. GLOBAL STUD. L. REV. 338 (2007).

80. *See* Dreier, *supra* note 9.

81. Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 37; *see also* Reichman & Cooper Dreyfuss, *supra* note 39.

82. Maskus & Reichman, *in* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 37.

83. For example, certain rampant forms of free-riding on digital sound recordings might require a positive response, in the spirit of TRIPS, even if not clearly covered by treaty obligations. By the same token, had developing countries been willing to consider

C. New Institutional Initiatives

While both the European Commission and the European Patent Office[84] have recently demonstrated greater awareness of the dangers of extending IP protection in the absence of solid economic justification, there is no sign that either USTR or the administration will reduce pressures currently being exerted to stiffen intellectual property standards in multilateral, regional, and bilateral forums.[85] Accordingly, if a healthy worldwide system of innovation is to emerge in the post-TRIPS environment, the need for a proper balance of public and private interests within that system is factually dependent on the developing countries' ability to resist the drive to re-regulate the world economy. Important in this regard was the WIPO Development Agenda,[86] and other parallel initiatives, such as the Access to Essential Medicines[87] and Access to Knowledge[88] campaigns, whose mission it is to document developing country complaints about how they may be ill-served by TRIPS and TRIPS-plus standards of IP protection.

At the same time, we need more reliable information about how IPRs may be helping the developing countries, especially in certain fields and at certain levels of per capita GDP.[89] In so doing, it is important to take account of the different conditions affecting different industrial sectors in these countries. For example, while a stronger patent regime has certainly caused problems for Brazil's public health program,[90] that country has become a major innova-

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early U.S. proposals for compensatory fees for access to clinical trial data, they might have avoided the imposition of tough exclusive rights regimes in recent FTAs. *See, e.g.,* Jerome Reichman, *The International Legal Status of Undisclosed Clinical Trial Data: From Private to Public Goods*?, *in* NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES, EarthScan, (Pedro Roffe et al. eds., 2006) [hereinafter Negotiating Health].

84. *See Interviews for the Future*, European Patent Office, 2006.

85. *See, e.g.,* Abbott, *supra* note 14.

86. *See*, *supra* note 52.

87. *See, e.g., Access to Essential Medicines Campaign*, Doctors Without Borders, http://www.accessmed-msf.org; Karin Timmermans, *Ensuring Access to Medicines in 2004 and Beyond,* in NEGOTIATING HEALTH, *supra* note 83 at 41-54; Frederick M. Abbott, *Managing the Hydra: The Herculean Task of Ensuring Access to Essential Medicines* in INTERNATIONAL PUBLIC GOODS AND IP 393-424, *supra* note 3.

88. *See, e.g., CPTech, Draft Treaty on Access to Knowledge*, 9 May 2005, available at http://www.cptech.org.

89. *See, e.g.,* Mueller, *supra* note 34 (case of Indian pharmaceutical industry); Straus, *supra* note 26; Michael P. Ryan, *Brazil's Quiet Bio-Medical Innovation Revolution: Drugs, Patents, and the '10/90 Health Research Gap,'* Creative and Innovative Economy Center Research Paper (2006), *available at* http://www.law.gwu.edu/Academics/CIEC/Research+Papers.htm; *see also* Ryan, *supra* note 22.

90. *See, e.g.*, Mirta Levis, *Role, Perspectives and Challenges of the Generic Pharmaceutical Industry in Latin America, in* NEGOTIATING HEALTH, 55-63, *supra* note 83; *see also* Barbara Rosenberg, *Market Concentration of the Transnational Pharmaceutical Industry and the Generic Industries: Trends on Mergers, Acquisitions and Other Transactions, in*

tor and exporter in the aircraft industry and, allegedly, in the biomedical sector as well.[91] IPRs may have played a positive role in both cases.

Similarly, some Indian and Chinese pharmaceutical companies are reportedly well-positioned to benefit from universal patent norms, even if many smaller Indian firms may be denied prior opportunities to reverse-engineer cheap generic drugs.[92] Ideally, our quest for reliable empirical studies of what actually transpires in developing countries should enable scholars and policymakers better to differentiate the situations in low and middle-income countries from those at a more advanced state of industrialization.[93]

Because today's most scientifically and commercially valuable knowledge goods are likely to be products of cumulative and sequential innovation, all countries — not just developing countries — need norms that reinforce the natural sharing ethos of public science and that expand the semi-commons of nonpatentable or subpatentable ideas and know-how accessible to routine engineers.[94] To this end, the developing countries in particular need to embrace a pro-competitive ethos by strengthening their capacities and technologies of reverse-engineering.[95] They need to experiment with new intellectual property models, including those based on open-source solutions and on the strategic use of liability rules, which can cure market failures without impeding follow-on innovation and without creating barriers to entry.

Above all, developing countries need to formulate suitable competition law rules and policies (hopefully coordinated) to ensure that foreign technologies and know-how flow to local markets at prices local entrepreneurs can afford. In so doing, they should also make use of competition law exceptions in the TRIPS-Agreement

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NEGOTIATING HEALTH, 65 & 73-75, *supra* note 83.

91. *See supra* note 89.

92. *See, e.g.*, Mueller, *supra* note 34; Timmermans, *supra* note 87 at 50-53. *See also* Joan Rovira, *Creating and Promoting Domestic Drug Manufacturing Capabilities: A Solution for Developing Countries?, in* NEGOTIATING HEALTH, 227-40, *supra* note 83.

93. *See generally* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (Institute for International Economics 2000); Phillip McCalman, *Reaping What You Sow: An Empirical Analysis of International Patent Harmonization*, 55 *J INT'L ECON.* 161 (2001); Maskus, *Lessons, supra* note 48, at 2224-39.

94. *See supra* text accompanying notes 63-76; *see also* R. Cooper Dreyfuss & G. Dinwoodie, *WTO Dispute Resolution and the Preservation of the Public Domain of Science Under International Law* in INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3 at 861-883 (providing innovative proposals); Marianne Levin & Annette Kur, *Towards More Balanced, User Friendly Paradigms in IP Law: A Project to Reform TRIPS*, Special Session: the *IP in Transition Research Programme* presented to the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) conference in Parma, Italy, (Sep. 5, 2006) (providing innovative proposals).

95. *See supra* note 29.

to obtain bulk access to educational and scientific texts at prices the local educational community can afford.[96]

Ideally, all developing countries should experimentally be testing different approaches to stimulating and disseminating innovation in their national and regional systems of innovation and to defining the relevant supporting legal standards that could prove effective for different players at different levels of development, all of whom are necessarily operating within the incipient transnational system of innovation. Valid experiments of this kind should eventually lead to bottom up proposals for future intellectual property standards that are demonstrably consistent with development goals and that suitably reconcile public and private interests at national, regional and, ultimately, global levels.[97]

Another overarching goal for developing countries is to experiment with new techniques, strategies and institutions for maintaining the supply of knowledge as a public good. While this dimension was painfully ignored during the multilateral trade negotiations that gave birth to the TRIPS Agreement, governments in the most technologically advanced countries clearly understand the importance of funding basic research and the need to provide critical upstream inputs for groundbreaking scientific research, which the private sector cannot sustain. [98] Yet, one of the biggest defects of multilateral and bilateral standard-setting exercises, without public interest negotiators seated at the table, is precisely the emergence of a one dimensional normative infrastructure that can make the provision of the public good side of innovation ever harder and more costly.[99]

In this regard, we must particularly ensure that developing countries are connected to the worldwide flow of scientific and technical information, in what UNESCO calls the drive for "knowledge societies,"[100] a goal that will require restraints on electronic fencing of disembodied information.[101] We will need better research exemptions to all intellectual property regimes. We must

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96. *See, e.g.*, Drexl, *supra* note 50; Correa, *supra* note 29; Ullrich, *supra* note 19; Okediji, *supra* note 19.

97. *See, e.g.*, Dreyfuss & Dinwoodie, *supra* note 94; Levin & Kur, *supra* note 94.

98. *See, e.g.*, Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 66 L. & CONTEMP. PROBS. 289 (2003).

99. *See e.g.*, *Patenting Science*, *supra* note 73; Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. & CONTEMP. PROBS. 147 (2003).

100. *See Towards Knowledge Societies,* UNESCO WORLD REPORT (UNESCO Publishing 2005).

101. *See* Jerome H. Reichman, Paul F. Uhlir, & Heather Ritch, *Access to Scientific and Technological Knowledge: UNESCO's Past, Present and Future Roles, in UNESCO,* SIXTY YEARS OF STANDARD-SETTING IN EDUCATION, SCIENCE AND CULTURE (2007).

ensure that both government-funded and government-generated scientific research results are widely disseminated at affordable costs.[102] And we need to encourage developing countries to invest wisely in forms of public-private cooperation that focus on capacity building in universities and on the transfer of both innovative capacity and technology from the public to the private sectors.

In so doing, we must also take pains to distinguish problems of distributive injustice from problems directly dependent on IPRs. While these issues are often interrelated, Peter Gerhart's recent work shows that we have not thought enough about how developed countries cope with distributional aspects "behind the scenes," and why this absence of secondary coping mechanisms magnifies the social costs of IPRs in developing countries.[103]

Finally, looking beyond innovation as such, we must find ways to ensure that progress in stimulating the production of knowledge goods leads to the support of other public goods, such as public health, agriculture, the environment, education and scientific research generally. In other words, we must reverse the trend that makes the globalization of private knowledge goods increasingly at odds with the provision of global public goods, and instead take steps to ensure that the emerging transnational system of innovation adequately fosters and supports the supply of both, in an environment that remains responsive to basic human needs and fundamental human rights.[104]

V. CONCLUDING REMARKS

The TRIPS Agreement of 1994 is usually characterized as a technical harmonization exercise that consecrates basic standards of intellectual property protection established in developed countries. From that perspective, there has been a sustained emphasis on compliance by other countries that must conform their laws and practices to these international standards, and on the need for still higher levels of protection that technology exporting countries demand in the name of efficiency and wealth maximization.[105]

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102. *See, e.g.*, JOHN WILLINSKY, THE ACCESS PRINCIPLE: THE CASE FOR OPEN ACCESS TO RESEARCH AND SCHOLARSHIP 55-69 & 111-126 (MIT Press 2006); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000).

103. *See* Gerhart, *supra* note 29; *see also* Chon, *supra* note 8.

104. *See* Chon, *supra* note 8; Yu, *supra* note 43.

105. *See, e.g.*, Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000); Yu, *supra* note 40; Jerome H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441 (2000).

In contrast, Maskus and I contend that, perhaps as an unintended consequence, the TRIPS Agreement has spawned an incipient transnational system of innovation, which could provide worldwide incentive effects with positive gains for both innovation and welfare. A number of developing countries, including Brazil, Chile, China, India, Malaysia and Thailand have taken steps to profit from these opportunities, and critics of globalization ignore these growing successes at their peril.[106]

Higher intellectual property standards have nonetheless engendered new problems for all countries, and they have particularly complicated the already arduous task of formulating and implementing economic development strategies in poor countries.[107] In his early work, Maskus emphasized that IP regimes were but one component of a healthy, development-oriented economy and that, without a broader, well-coordinated infrastructure that included corporate law, bankruptcy law, and a solid educational system, among other variables, IP protection might add little to economic growth in its own right.[108] In a perceptive recent article, Margaret Chon argues that the interrelation between IPRs and overall development policies may be far more complex than was previously understood, and that differential and more favorable treatment — which Professor Chon calls "substantive equality" — will become essential if developing countries are to succeed in the post-TRIPS environment.[109]

Other recent studies have focused on the interplay of private and public goods in a healthy, pro-competitive global economy.[110] One key phenomenon here is the extent to which expanding international IP legislation to support the "globalization of private knowledge goods" has increasingly burdened and complicated developing country efforts to achieve broader development goals that

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106. *See, e.g.*, Straus, *supra* note 26; Ryan, *supra* note 22.

107. *See, e.g.*, Dutfield, *supra* note 14 (documenting the role of low intellectual property standards in the history of developed countries' technological evolution); Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 Minn. L. Rev 249 (2003). *See also* Ketih Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11 (1998).

108. *See* Maskus, *supra* note 93; *see also* Jerome H. Reichman, *Taking the Medicine with Angst: An Economist's View of the TRIPS Agreement*, 4 J. INT'L ECON. L. 795, 802 (2001) (reviewing Keith E. Maskus, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000)).

109. *See generally* Chon, *supra* note 8. Whether articles 7 and 8 of the TRIPS Agreement, *supra* note 3, provide some legal foundation for preferential treatment for poor countries remains an open question. *See, e.g.*, Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 J. WORLD INTELL. PROP. 493, 502 (2000).

110. *See generally* INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3.

provide both measurable economic growth and equitable access to the fruits of growth for poor and disadvantaged citizens.[111] While history demonstrates that the enforcement of intellectual property rights and the pursuit of overall economic welfare are not antithetical in relatively free-market economies, as some human rights declarations expressly recognize, the one-sided emphasis on private rights in the WTO and WIPO law-making processes has made it far more difficult than in the past for most developing countries to bridge the technology divide[112] and to maintain the supply of such basic public goods as health, education, food security, environmental protection and even a pro-competitive economic environment.

In this regard, they have so far received little comfort from the WTO Dispute Settlement apparatus, which has tended to ignore adverse distributional effects of the TRIPS standards, despite certain enabling provisions in that agreement.[113] While recent legislative concessions regarding public health adopted by the WTO[114] may be seen as a partial response to demands for less "formal equality"[115] and more "substantive equality,"[116] the developing countries have largely been left on their own to sort out the developmental difficulties that TRIPS and post-TRIPS pressures have engendered.[117]

From a broader perspective, the incipient transnational system of innovation that the TRIPS Agreement brought to life in 1994 needs time and a stable competitive environment in which to grow and flourish through the efforts of entrepreneurs in both developed and developing countries, without further top-down regulatory interference from misguided protectionist legislation. WTO Members

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111. *See generally* Maskus & Reichman in INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3.

112. *See, e.g.*, *Towards Knowledge Societies*, UNESCO WORLD REPORT, *supra* note 100; PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (New Press 2002); *see also* Heald, *supra* note 107; Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L. J. 1 (2002).

113. *See* Howse, *supra* note 109: Gerhart, *supra* note 29; *but see* Jerome H. Reichman, *Securing Compliance with the TRIPS Agreement After US v. India*, 1 J. INT'L ECON. L. 585, 586 & 594-97 (1998)(finding that WTO Appellate Body may defer to local law under art. 1.1 of TRIPS when good-faith effort to comply is otherwise demonstrated).

114. *See supra* note 25; Abbott & Reichman, *supra* note 33.

115. *See, e.g.*, Graeme B. Dinwoodie, & R. Cooper Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT'L L. 95, 95-96 (2004).

116. *See* Chon, *supra* note 8.

117. Post-TRIPS Pressures under so-called Free Trade Agreements have significantly cut back upon even the public health concessions made under the Doha Ministerial Declaration, *supra* note 25; *see, e.g.*, Abbott & Reichman, *supra* note 33. See also Thomas Cottier, *The Doha Waiver and Its Effects on the Nature of the TRIPS System and on Competition Law—The Impact of Human Rights*, *in* INTELLECTUAL PROPERTY, PUBLIC POLICY, AND INTERNATIONAL TRADE, *supra* note 9 at 173-99.

must be allowed broad latitude to ensure that this system remains pro-competitive, with affordable access to knowledge inputs and outputs for both creators and users of knowledge goods. By the same token, WTO Members must retain sufficient autonomy and power to preserve the supply of global public goods that are indispensable to both growth and welfare in a properly functioning worldwide intellectual property regime.[118]

With specific regard to the promotion of innovation as such, concerned governments must make strenuous efforts to resist claims that the technology exporting industries know what is best for the rest of the world. In reality, legal scholars and economists have never been less certain about the levels of IP protection likely to preserve these industries' long-term competitive advantages even in their home countries.[119] We do not stand at the end of intellectual property history, as the high-protectionist lobby wants us to believe. Nor will ever-stronger IPRs and ever higher levels of harmonization redound to the benefit of even the most developed countries, let alone the rest of the world.

On the contrary, we have crossed a new historical threshold where an emerging transnational system of innovation in an integrated global market place with an interconnected research community breeds unprecedented opportunities and uncharted means of realizing them. Far from locking in the sixteenth and twentieth century intellectual property models of the past, we need new models, and we need time and space to experiment with them, and with new legal approaches to finding the best balance of private and public interests for this global economy. It is precisely a time for experimentation,[120] comparable to the period in the 1880s, when the Paris and Berne Conventions were first negotiated. It is not a time to codify obsolete approaches and standards that are likely to boomerang against the long-term interests of developed countries as well as to undermine economic growth and human welfare in the developing countries.

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118. *See* Maskus & Reichman in INTERNATIONAL PUBLIC GOODS AND IP, *supra* note 3, at 27-33 (suggesting legal modalities to secure this objective by discussing "impact of intellectual property standards on the reserved welfare powers of WTO members").

119. *See, e.g.*, Reichman & Cooper Dreyfuss, *supra* note 39; Dutfield, *supra* note 14 (predicting shift in terms of IP trade favoring China and India).

120. John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L. J. 685, 709-25 (2002).

THE FRENCH HEADSCARF LAW BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

KATHRYN BOUSTEAD

I. INTRODUCTION

In October 2006, hundreds of young people marched through Paris to commemorate the deaths of Zyed Benna and Bouna Traore, two young boys from Clichy-sous-Bois, a largely immigrant- populated Parisian suburb.[1] One year before, Benna and Traore were electrocuted when they jumped into an electrical substation, allegedly attempting to hide from the police.[2] This incident sparked nearly three weeks of violent rioting throughout

1. *As Anniversary of Riots Nears, Suburban Youths March on Paris*, N.Y. TIMES, Oct.. 26, 2006, at A5.
2. *Id.*

France, during which time, about 9000 cars were burned and almost 3000 people were arrested.[3]

The unrest was widely attributed to Islamic extremism, but many rioters were incensed by the desperate conditions in minority Parisian suburbs, resulting from high unemployment and discrimination.[4] Over one year later, little has changed. According to the Deputy Mayor of Clichy-sous-Bois, "[t]he explosion came as the result of both a spark and a powder keg. The pow[d]er keg is still here, and a new spark could trigger another blast."[5]

The riots of October 2005 are merely one skirmish in the ongoing struggle to find a place for the growing Muslim population in French society. In March 2004, President Jacques Chirac ignited another battle by approving a ban on "the wearing of symbols or clothing by which students conspicuously [*ostensiblement*] manifest a religious appearance" in public schools.[6] The prohibition on conspicuous religious dress, hereafter referred to as the Headscarf Law, was enthusiastically approved with votes of 494 to thirty-six in the French National Assembly and 276 to twenty in the French Senate.[7] The ban received support across the political spectrum, placing the far-right National Front in unlikely company with the Socialist Party and prominent feminists.[8] The Headscarf Law's widespread approval may be attributable to the government's declared motion for the law—the protection of the French brand of secularism, or *laïcité*.[9]

"*Laïcité*, the French term for balancing religious freedom and public order . . . is a principle of religious neutrality that is intended to create the conditions for religious freedom."[10] As a brand of secularism that removes religion from the public sphere, *laïcité* has become an elemental part of the French national iden-

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3. Henri Astier, *Tense Anniversary in French Suburbs*, BBC NEWS, Oct. 26, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/6083790.stm.

4. *As Anniversary of Riots Nears, Suburban Youths March on Paris, supra* note 1, at A5.

5. Astier, *supra* note 3.

6. Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 581 (2004).

7. *Id.*

8. Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 13 (2005).

9. President Jacques Chirac, Speech on Respecting the Principle of Secularism in the Republic (Dec. 17, 2003), *available at* http://www.elysee.fr/elysee/root/bank/print/2675.htm.

10. Justin Vaïse, *Veiled Meaning: The French Law Banning Religious Symbols in Public Schools,* U.S.-FRANCE ANALYSIS SERIES (The Brookings Institute, Washington, D.C.), Mar. 2004, at 2, *available at* www.brookings.edu/fp/cusf/analysis/vaisse20040229.htm.

tity, representing core values of neutrality, equality, and freedom of conscience.[11]

However, for those who do not subscribe to the French national identity, the protection of *laïcité* may not justify infringing on religious expression. Certainly, the forty-eight students who were expelled for refusing to remove their conspicuous religious symbols may dispute the legitimacy of the Headscarf Law.[12]

Under French law, any attempt to invalidate the Headscarf Law as a violation of religious freedom would have to be addressed by the *Conseil Constitutionnel* (Constitutional Council) before the law is actually enacted.[13] However, the *Conseil Constitutionnel* only reviews draft laws by referral from sixty members of either houses of Parliament, or by other political authority such as the Prime Minister or the President of the Republic.[14] Because the Headscarf Law did not have sixty objectors in either chamber of Parliament, and it is no longer a draft, but a law in force, the *Conseil Constitutionnel* offers no remedy.

In addition, it seems unlikely that French voters would encourage the revocation of the Headscarf Law anytime in the near future, as they have just elected an advocate of cultural integration as their president.[15] Fearing a violent reaction to Sarkozy's election, the French government deployed 3000 police into Paris and its multi-ethnic suburbs to quell any signs of unrest.[16] Interior Minister Nicolas Sarkozy, who proposed deporting all immigrant participants in the riots[17], won the presidential election on May 6, 2007.[18] When Sarkozy accepted his party's nomination in January of this year, he said it is "unacceptable to 'want to live in France without respecting and loving France and learning the French language. . . . 'If you live in France then you respect the laws and the

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11. T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 466 (2004).

12. *French Schools Expel 48 Over Headscarf Ban*, EXPATICA, Jan. 20, 2005, http://www.expatica.com/source/site_article.asp?subchannel_id=58&story_id=15996&name=French+schools+expel+48+over+headscarf+ban. Expatica is a web site that prints articles from the Agence France-Presse in English.

13. Beller, *supra* note 6, at 620.

14. For an explanation of the procedures of the Conseil Constitutionnel, see http://www.conseil-constitutionnel.fr/langues/anglais/ang4.htm.

15. *Sarkozy Takes French Presidency*, BBC NEWS, May 6, 2007, *available at* http://news.bbc.co.uk/2/hi/europe/6630797.stm.

16. *Id.*

17. Mark Landler, *France to Deport Foreigners in Riots,* INT'L. HERALD TRIB., Nov. 10, 2005, *available at* http://www.iht.com/articles/2005/11/09/news/france.php.

18. *Sarkozy Takes French Presidency*, *supra* note 15.

values of the Republic'"—the same Republic he also referred to as "the heirs of 2000 years of Christianity."[19]

Because there are substantial legal, political, and social obstacles to contesting the Headscarf Law within France, any challenge to the ban as a violation of the freedom of religious expression should be brought in an alternate forum. The following article addresses this hypothetical scenario: If an expelled student were to bring the Headscarf Law before the European Court of Human Rights as a violation of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, how would the Court decide?

To deduce the Court's probable conclusion, Section II describes the European Court of Human Rights and the procedure of enforcing the European Convention for the Protection of Human Rights and Fundamental Freedoms. Section III analyzes the Court's precedents to determine how religious expression is protected by Article 9 and under what circumstances a state can justifiably limit religious freedom. Section IV focuses on *Sahin v. Turkey*, a recent decision of the European Court of Human Rights which upheld a Turkish headscarf prohibition at the university level. Lastly, Section V describes the Headscarf Affair in France as the facts of this hypothetical case, and attempts to predict the likely outcome if the Headscarf Law were adjudicated by the European Court of Human Rights.

II. THE EUROPEAN COURT OF HUMAN RIGHTS

The atrocities of World War II brought human rights standards to the forefront of policy-making in Europe. The Holocaust served as tragic evidence that individual states may not be the best guardians of human rights, even with regard to their own citizens.[20] Moreover, Europe acutely perceived a growing threat from the Communist Eastern Bloc countries, encouraging it to solidify a multilateral position on democracy and human rights.[21] Contemporary political thought emphasized that suppression of human rights was directly linked with totalitarianism and international

19. Elaine Sciolino, *French Governing Party Endorses Sarkozy for President*, INT'L HERALD TRIB., Jan. 14, 2007, *available at* http://www.iht.com/articles/2007/01/14/news/france.php.

20. Peter G. Danchin & Lisa Forman, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities*, *in* PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 192, 194 (Peter G. Danchin and Elizabeth A. Cole eds., 2002).

21. Robert Blackburn, *The Institutions and Processes of the Convention*, *in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000 3, 4 (Robert Blackburn & Jorg Polakiewicz eds., 2001).

conflict.[22] Wishing to prevent future war, the European states considered a supranational approach.

In May of 1948, the Congress of Europe assembled at The Hague and adopted a resolution that envisioned a European human rights charter enforced by a unified court of justice.[23] Within a year, ten European countries formed the Council of Europe and assumed the task of drafting a multilateral human rights treaty.[24] Their work produced the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, Convention), which entered into force on September 3, 1953.[25] Undertaking enforcement of the Convention, the European Court of Human Rights (hereinafter, ECHR) heard its first case in February of 1959.[26]

Today, the Council of Europe has forty-six members, and accession to the Convention is a condition of membership.[27] Each contracting member state "undertakes that its domestic law and administrative practices conform to the Convention's articles and, where any violation of human rights is held to exist by the Strasbourg organs [ECHR], that it will take positive action to remedy the breach, if necessary by introducing corrective legislation in its national Parliament."[28] The Convention also encourages resolution of human rights claims at the domestic level: "The States must provide effective remedies before a national authority and guarantee the rights and freedoms of their individual citizens without discrimination on any ground."[29]

As the enforcement body, the ECHR has jurisdiction over "all matters concerning the interpretation and application of the Convention and the protocols thereto. . . ."[30] Individuals, as well as groups of individuals and non-governmental organizations have standing to bring complaints before the Court if they have been

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22. *Id.*

23. *Id.* at 3-4.

24. The Statute of the Council of Europe was signed on May 5, 1949 by Belgium, Denmark, Sweden, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, and the United Kingdom. *Id.* at 4.

25. *Id.* at 6.

26. *Id.* The first enforcement body for the Convention was the European Commission, established in 1954, which reviewed petitions before transferring admissible claims to a limited Court of Human Rights. The Commission was later dissolved by Protocol 11, which allows petitioners to apply to the ECHR directly.

27. THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE'S MEMBER STATES, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp. *See also* Danchin & Forman, *supra* note 20, at 194.

28. Blackburn, *supra* note 21, at 11.

29. Keturah A. Dunne, Comment, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms,* 30 CAL. W. INT'L L.J. 117, 129 (1999).

30. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 32, para. 1, *opened for signature* Nov. 11, 1950, E.T.S. No. 005 [hereinafter Convention].

injured by a member state's action.[31] Originally, individual complaints were directed to the European Commission on Human Rights, which acted as a filter for the Court.[32] The Commission would investigate the claims, submit a report to the state in question, and request either written or oral responses to the complaint.[33] The Commission would also provide conciliation services to promote friendly settlement between the parties.[34]

By 1994, many Eastern European countries had joined the Council of Europe, creating a dramatic surge in applications to the Commission.[35] In an effort to address new logistical difficulties and onerous workloads, the Council approved Protocol 11, which collapsed the Commission and the Court into a single enforcement body.[36] As a result of Protocol 11, individual petitions are submitted directly to the ECHR, which is responsible for deciding both the admissibility of a particular case and its merits.[37]

The current Court is comprised of forty-six judges, each nominated by a member state and appointed by the Parliamentary Assembly of the Council of Europe.[38] The judges are expected to be neutral and not to act as representatives of their nominating state.[39] The Court will not consider a petition unless all domestic remedies have been exhausted and the petition is filed within six months of the final domestic judgment.[40] The preliminary review of admissibility is conducted by a committee of three judges, who can dismiss the complaint by unanimous vote for procedural problems or because the application is manifestly unfounded.[41] If the committee approves the petition, the entire case will be heard before a Chamber of seven judges.[42]

If the parties are dissatisfied with the Chamber's judgment, they can appeal to the Grand Chamber within three months from the Chamber's final decision.[43] A panel of five judges has the dis-

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31. *Id.* at art. 34.
32. Blackburn, *supra* note 21, at 15.
33. *Id.*
34. *Id.*
35. *Id.* at 14.
36. *Id.* Previously, the Court was considered a limited court because admissibility issues were considered by the Commission.
37. *Id.*
38. *See* THE COUNCIL OF EUROPE, *supra* note 27. *See also* Convention, *supra* note 30, at art. 20.
39. Convention, *supra* note 30, at art. 21. Judges sit ex officio when a case involves their nominating state. Javier Martínez-Torrón, *The European Court of Human Rights and Religion*, *in* CURRENT LEGAL ISSUES 2001: LAW AND RELIGION 185, 188 (Richard O'Dair & Andrew Lewis eds., 2001).
40. Convention, *supra* note 30, at art. 35.
41. *Id.* at art. 28. *See also* Martínez-Torrón, *supra* note 39, at 187-88.
42. Convention, *supra* note 30, at arts. 27 & 29.
43. *Id.* at art. 43.

cretion to accept the appeal if it raises a serious issue of interpretation or has the potential to overturn case precedent.[44] Likewise, the Chamber of seven judges may voluntarily relinquish jurisdiction to the Grand Chamber of seventeen judges before making their final judgment.[45]

With regard to legal method, the ECHR has been described as a common law system because it allows case law to elaborate on the Convention and considers itself bound by its prior decisions (stare decisis*).*[46] However, the Convention clearly states that judgments are only binding on the parties to the dispute.[47] The relationship between ECHR precedent and the Convention can be characterized in the following light: "It may indeed be argued that the interpretation of a provision which the Strasbourg Court has developed in a series of individual applications, and which transcends the particular facts of these cases, becomes an integral part of that provision and thereby acquires its binding force."[48]

In other words, a state will not per se violate the Convention under the principle of res judicata by acting in contradiction of precedent. However, there is a high probability that the interpretation of a given provision will evolve to include consistent case law patterns.

Unfortunately for petitioners, the ECHR is a court of limited remedy. Because jurisdiction is restricted to interpreting and applying the Convention, the Court can only decide whether the member state is in violation or not.[49] Thus the ECHR "operate[s] as a supranational system of review of the human rights practices of member states", rather than as a typical form of judicial review.[50] While the Court can award compensatory damages to the petitioner, it cannot force the member state to amend or repeal any violating national law.[51] This limitation of remedy reflects the subsidiary nature of the ECHR system, which must maintain a

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44. *Id.*
45. *Id.* at art. 30.
46. Blackburn, *supra* note 21, at 25.
47. Convention, *supra* note 30, at art. 46, para. 1.
48. Jörg Polakiewicz, *The Execution of Judgments of the European Court of Human Rights*, *in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000 55, 73 (Robert Blackburn & Jörg Polakiewicz eds., 2001).
49. Danchin & Forman, *supra* note 20, at 194-95.
50. *Id.*
51. Joshua Briones, *Religious Minorities in Russia*, 8 U.C. DAVIS J. INT'L L. & POL'Y 325, 330 (2002). *See generally* European Court of Human Rights, How the Execution of Judgment Works, http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgments+works/

delicate balance between state sovereignty and supranational enforcement.[52]

III. ARTICLE 9 PROTECTION OF RELIGIOUS EXPRESSION AND ITS JURISPRUDENCE

In Article 9(1), the Convention provides for freedom of thought, conscience, and religion: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."[53] Article 9(2) describes justifiable limitations on the freedom of religious expression:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[54]

As a preliminary observation, it is important to note that only religious expression, not religious belief, can be justifiably limited by state action. Breaking Article 9 into its elements, the petitioner must show that the state has interfered with his right to manifest his religious beliefs.[55] To justify the interference, the state must demonstrate that the interference was (1) prescribed by law, (2) directed at a legitimate aim, and (3) necessary in a democratic society.[56] Subsequent case law further elucidates the standards of Article 9.

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52. Blackburn, *supra* note 21, at 25.

53. Convention, *supra* note 30, at art. 9, para. 1.

54. *Id.* at art. 9, para. 2. Although many articles of the Convention touch on religious freedom (*see Article 10 Freedom of Expression, Article 11 Freedom of Assembly and Association, Article 14 Prohibition Against Discrimination)*, I have chosen to focus on Article 9 for two reasons. First, Article 9 most directly addresses the issues of religious expression raised by the French Headscarf Law. Second, the ECHR previously addressed the headscarf issue as an Article 9 violation in *Sahin v. Turkey*, which will be used as a point of comparison in this piece.

55. *Id.*

56. *Id.*

A. Interference with the Freedom of Religious Expression

In order for interference to be recognized, the petitioner must satisfy the Court that the offended belief has reached a "certain level of cogency, seriousness, cohesion and importance."[57] All conventional religions, as well as some less mainstream religious beliefs have achieved this standard (i.e. Jehovah's Witness, Church of Scientology), but the Court refused to acknowledge Wicca as a religion capable of suffering interference.[58]

Once the belief system is recognized, the Court will consider whether interference actually occurred.[59] With regard to this inquiry, the Court has been reluctant to find interference where the offending rule is generally applied in a neutral manner.[60] For example, in *Efstratiou v. Greece* and *Valsamis v. Greece*, two secondary school students refused to participate in a parade to commemorate the outbreak of war between Greece and Italy in 1940 because of their Jehovah's Witness beliefs.[61] The Court ruled that the students had no right to be exempted from the parade, because participation was universally required and neutral with regard to religion.[62]

The Court has been criticized for declaring "neutral" laws of general applicability incapable of interference, because in doing so, it arguably ignores the subjective experience of the petitioner.

> [T]he Court in effect substituted its own judgment on a matter of conscience for that of the persons concerned. The Court was . . . presuming to define what [is] "reasonable" for the applicants to believe with regard to their participation in a national commemorative ceremony. . . . But this does not mean that a secular court is competent to elucidate when a person's beliefs are sufficiently consistent from an "objective" point of view. This is a slippery slope.[63]

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57. Danchin & Forman, *supra* note 20, at 197 (citing Campbell & Consens v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) at para. 36 (1982)).

58. Danchin & Forman, *supra* note 20, at 197 (citing X v. United Kingdom, No. 7291/75, 11 D.R. 55 (Dec. 1977)).

59. Danchin & Forman, *supra* note 20, at 197-99.

60. Martínez-Torrón, *supra* note 39, at 202.

61. Efstratiou v. Greece, 1996-VI Eur. Ct. H.R., para. 9; Valsamis v. Greece, 1996-VI Eur. Ct. H.R., paras. 8-9.

62. Efstratiou, 1996-VI Eur. Ct. H.R. at para. 37; Valsamis, 1996-VI Eur. Ct. H.R. at para. 36-38.

63. Martínez-Torrón, *supra* note 39, at 201.

Moreover, by declaring neutral laws incapable of causing interference, the Court indirectly protects mainstream religions over minorities. Even if the language of the law is technically neutral, in practice "'[n]eutral' laws will rarely conflict with the morals of the major churches, but they will sometimes lead to conflict with minority religious groups that are socially atypical."[64] As a result, the laws reflecting mainstream religious concepts are excluded from Article 9 review. "The fact that the Court has fashioned an approach whereby 'neutral' laws will automatically prevail . . . constitutes a significant risk for the rights of minorities."[65]

In spite of the challenges to its position, the Court generally denies that interference has occurred where a law is universally applied and considered neutral with regard to religion.[66] On the other hand, where a law is directed at expression of a recognized religion, the Court has treated the interference requirement as being rather self-evidently satisfied.[67]

B. "Prescribed by Law"

To justify interference with religious expression, the state must demonstrate that its action was "prescribed by law" as a form of due process notice requirement.[68] "[T]he law in question must be both adequately accessible to the individual and formulated with sufficient precision to enable him to regulate his conduct."[69] If a law is unduly vague, the Convention will not protect state action in accordance with that law.[70] However, the Court has given the state some leeway by recognizing that vagueness may be necessary to "keep pace with changing circumstances."[71] Moreover, the Court imputes knowledge of the state's case law as a supplement to the language of the law itself.[72] Therefore, if the petitioner had sufficient notice of the proscribed action from either the language

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64. *Id.* at 202.

65. Danchin & Forman, *supra* note 20, at 212 (citing Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom in the System of the European Convention on Human Rights*, Paper presented to the Oslo Conference on Freedom of Religion and Belief, Aug. 11-15, 1998, at 14).

66. Martínez-Torrón, *supra* note 39, at 200.

67. *See* Manoussakis and Others v. Greece, 1996-IV Eur. Ct. H.R., at para. 36, where the existence of a law requiring discretionary approval from the Ministry of Education and Religious Affairs in order to build a place of worship was summarily determined to be interference without further discussion.

68. Larissis and Others v. Greece, 1998-I Eur. Ct. H.R. para. 40.

69. *Id.*

70. *See id.*

71. Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) para. 40 (1993).

72. *Id.*

of the law or its subsequent jurisprudence, the state action is considered "prescribed by law."

C. "Legitimate Aim"

The language of Article 9(2) indicates that states may legitimately interfere with religious freedom in the interests of health and safety, public order, morals, or the protection of rights and freedoms of others. Arguably, the state does not bear a heavy burden in this area because most legislation is at least ostensibly enacted to serve the public good. However, the Court has assisted the states' positions by accepting the government's benevolent objectives and ignoring any less legitimate aim in the legislative intent.

For example, in *Kokkinakis v. Greece*, a Jehovah's Witness couple challenged a Greek anti-proselytism law. Mr. and Mrs. Kokkinakis visited the wife of a local cantor of the Greek Orthodox Church to discuss their religious beliefs.[73] When the cantor heard of the visit, he alerted the local police, who arrested Mr. and Mrs. Kokkinakis.[74] Greek law criminalizes proselytism, which is defined as:

> [A]ny direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion . . . with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.[75]

The local criminal court convicted Mr. and Mrs. Kokkinakis and sentenced them to four months in prison.[76] On appeal, Mrs. Kokkinakis' conviction was overturned and Mr. Kokkinakis' sentence was reduced and converted to a pecuniary fine.[77] In spite of his reduced sentence, Mr. Kokkinakis applied to the Commission

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73. *Id.* at para. 7.
74. *Id.*
75. *Id.* at para. 16.
76. *Id.* at para. 9.
77. *Id.* at para. 10.

under Article 9 because the Greek courts refused to declare the anti-proselytism law unconstitutional.[78]

With regard to its legitimate aim, the Greek government contended that the purpose of the law was to protect the religious rights and freedoms of those who would fall victim to "influence . . . by immoral and deceitful means. . . ."[79] The Court accepted the government's proposition in full, despite its acknowledgment that the anti-proselytism law commonly had been used against minority believers in an overwhelmingly Greek Orthodox country.[80] The Court itself makes a distinction between "bearing Christian witness . . . [which] corresponds to true evangelism" and improper proselytism, which in the opinion of the Court is justifiably criminalized.[81] Overall, the Court addressed the question of a legitimate aim with broad strokes, not considering whether the law was more particularly designed as a mechanism for suppressing minority religions.

The Court took a similarly superficial approach to identifying a legitimate aim in *Manoussakis and Others v. Greece*.[82] A group of Jehovah's Witnesses rented a room "for all kinds of meetings [and] weddings,"[83] without obtaining the government's authorization to establish a place of worship as prescribed by Greek law.[84] The group submitted a request for authorization, but the government withheld issuance of a permit for over a year, alleging that it had not received all the necessary information from other departments involved.[85] Meanwhile, the group was arrested for operating an illegal place of worship and sentenced to four months in prison convertible to a fine of 400 drachmas per day.[86] Mr. Manoussakis and the group made application to the Commission, arguing that the permit requirement and the ensuing interminable process constituted interference with religious expression in violation of Article 9.[87]

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78. *Id.* at para. 29.
79. *Id.* at para. 42.
80. T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 305, 325 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).
81. Kokkinakis, 260-A Eur. Ct. H.R. (ser. A) at para. 48.
82. 1996-IV Eur. Ct. H.R.
83. *Id.* at para. 7.
84. *Id.* at para. 16.
85. *Id.* at para. 11.
86. *Id.* at para. 15.
87. *Id.* at para. 16.

Speaking to the law's legitimate aim, the Court cast a significant vote in favor of mainstream religion by equating protection of Greek Orthodoxy with the maintenance of public order in Greece.[88] The Court reasoned: "In Greece virtually the entire population was of the Christian Orthodox faith, which was closely associated with important moments in the history of the Greek nation. The Orthodox Church had kept alive the national conscience and Greek patriotism during the periods of foreign occupation."[89] Under this standard, any state that ascribes part of its identity to a majority religion could arguably establish a legitimate aim for legislation restricting minority beliefs in the name of public order. In addition, the Court again referred to "various sects . . . [who] manifest their ideas and doctrines using all sorts of 'unlawful and dishonest' means."[90] Protecting individuals from such manipulation was also classified in the interest of public order.[91]

If the discriminatory purpose was obvious in the anti-proselytism law, it is blatant in *Manoussakis*. The Court acknowledged that the authorization requirement had disproportionately been used "to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses."[92] While the Court may have considered the discriminatory effects of the law with regard to its necessity in a democratic society (*see infra* Subsection (4)), the clear existence of a secondary illegitimate purpose for the law is effectively ignored.

Together, *Kokkinakis* and *Manoussakis* clarify the Court's approach to finding a legitimate aim under Article 9(2). First, "the Court effectively holds that a government satisfies its burden by offering *any* justification that can be tied, however remotely, to the 'protection of the rights and freedoms of others.' "[93] By finding legitimate aims amidst substantial evidence of illegitimate purposes, the Court "suggests that the requirement . . . is in fact meaningless. . . ."[94] Secondly, by defining legitimate aims to include the protection and fostering of mainstream religions, the Court reveals a reoccurring bias against minority beliefs.[95] This tendency will

88. *Id.* at para. 39.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at para. 48.
93. Gunn, *supra* note 80, at 324.
94. *Id.*
95. *Id.* at 325. While Mr. Kokkinakis and Mr. Manoussakis technically won because the Court found violations of Article 9, neither was fully vindicated. *Kokkinakis* was decided on the facts, holding that Mr. Kokkinakis' form of proselytism was not improper in this case. The Court did not, however, rule that criminalizing proselytism is a violation of

weigh more heavily when the Court addresses the necessity of the interfering law in a democratic society.

D. "Necessary in a Democratic Society"

On several occasions, the Court affirmed that freedom of religious expression is a fundamental feature of a democratic society, and governments have a duty to ensure religious pluralism.[96] To that end, Article 9(2) creates a balancing test that places the legitimate aims of the government against the need for preserving religious freedom in a democratic society. While restrictions may be necessary to allow various religious groups to coexist,[97] the Court must "determine whether the measures taken at [the] national level [are] justified in principle and proportionate" to the government's concern.[98]

A central element to the balancing test is the doctrine of margin of appreciation. Although the ECHR acts as a supranational authority, accession to the Convention is not a general relinquishment of sovereignty. Because of the subsidiary nature of the Convention, primary responsibility for enforcing the Convention lies with the states, which have relative autonomy when incorporating the provisions into their national law.[99] "The margin of appreciation encompasses the discretion afforded by the Court to member states to employ varying standards of conventional protections."[100] In application, the margin of appreciation lessens the burden on the state, because the Court expects some variation when the Convention's language is implemented into domestic law.

However, because Article 9 enshrines a freedom fundamental to a democratic society, the Court should closely monitor national approaches to protecting religious expression. In *Manoussakis,* the Court held:

> In delimiting the extent of the margin of appreciation . . . the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society. . . . The restrictions imposed on the

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Article 9 per se. Likewise, the Court's holding in *Manoussakis* did not include a condemnation of the registration requirement for non-Orthodox places of worship.

96. Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) at para. 31; Manoussakis, 1996-IV Eur. Ct. H.R. at para. 44.

97. Kokkinakis, 260-A Eur. Ct. H.R. at para. 33.

98. *Id.* at para. 47.

99. Blackburn, *supra* note 21, at 25.

100. Danchin & Forman, *supra* note 20, at 195.

> freedom to manifest religion [in this case] call for very strict scrutiny by the Court.[101]

In *Manoussakis*, the Court ultimately found that Greece had strayed too far from the objectives of Article 9 by criminalizing the failure to obtain authorization for a place of worship, while at the same time allowing the public officials too much discretion in granting the permit.[102] However, the Court did not categorically rule that requiring authorization interfered with religious expression under Article 9.

Likewise, in *Kokkinakis*, the Court did not issue a comprehensive ruling demonstrating strict scrutiny review under Article 9. Instead, the Court based the violation on a lack of factual evidence that Mr. Kokkinakis' acts constituted improper proselytism.[103] Without proof of the proscribed act, the Court naturally reasoned that the punishment was disproportionate to the crime. To the extent that the Greek law criminalized "improper proselytism," which the Court did not clearly define, it did not find the law objectionable.[104]

In *Kokkinakis* and *Manoussakis*, the Court-determined margin of appreciation preserved laws that had admittedly been used to discriminate against religious minorities. As a result of these two decisions, critics have begun to question whether "strict scrutiny" is merely a stated policy of the Court with regard to Article 9, or whether it has the practical effect of limiting the margin of appreciation.[105] They suggest that the Court's tendency to favor mainstream religions can account for the gap between the enunciated standard and its application.[106]

When a government's law favors one religion, that religion is necessarily protected and privileged before the Court to the extent of the margin of appreciation. Based on case law precedent, the Court grants a wide margin of appreciation when considering laws that implicate the delicate balance between church and state, acknowledging that various reasonable relationships could exist in a legitimate democracy.[107] "To grant [a] margin of appreciation to majority-dominated national institutions . . . is to stultify the goals

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101. Manoussakis, 1996-IV Eur. Ct. H.R. at para. 44.

102. *Id.* at para. 45.

103. Kokkinakis, 260-A Eur. Ct. H.R. at para. 49.

104. *Id.* at paras. 16, 48.

105. *See generally* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002).

106. *See generally* YUTAKA ARAI-TAKAHASHI, *supra* note103*;* Gunn, *supra* note 78; Dunne, *supra* note 29; Danchin & Forman, *supra* note 20.

107. *See* Cha'are Shalom Ve Tsedek v. France, 2000-VII Eur. Ct. H.R. 259.

of the international system and abandon the duty to protect the democratically challenged minorities."[108] Thus, the current precedents regarding the margin of appreciation do not demonstrate a fervent protection of minority religions.

Overall, Article 9 case law reveals broad patterns of interpretation. In general, the Court will recognize interference with religious freedom unless the offending law is deemed neutral. The "prescribed by law" element represents a basic notice requirement that is easily fulfilled. Despite the presence of ulterior motives, the Court seems willing to find a legitimate aim if the government presents any rational argument that it is motivated by the public good. In balancing the legitimate aim against the democratic demand of religious pluralism, the Court professes to be protecting an interest of the highest order with strict scrutiny review. However, the Court's hesitant restriction of the margin of appreciation and its position on neutral laws leave significant opportunity for governments to discriminate against minority religions without violating Article 9.

IV. THE TURKISH HEADSCARF CASE: SAHIN V. TURKEY

A. The Facts of the Case

If the French headscarf law were ever to come before the European Court of Human Rights, *Sahin v. Turkey* would be the most relevant precedent. In this case, the Court considered a University of Istanbul policy prohibiting students from wearing head coverings and beards in class lectures or exams.[109] Leyla Sahin was a student in the Faculty of Medicine who considered it her religious duty to wear a headscarf.[110] After the Vice-Chancellor of the University issued the no-headscarf policy in February of 1998, Sahin was excluded from several exams and lectures, and was prevented from registering for other classes.[111]

Sahin filed a complaint in the Turkish Administrative Court, arguing first that the Vice-Chancellor had no authority to make such a policy, and second, that in doing so, he violated her rights

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108. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U J. INT'L L. & POL. 843, 850 (1999).

109. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R., para. 16 (2005) (Grand Chamber), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=sahin%20%7C%20v.%20%7C%20turkey&sessionid=11508006&skin=hudoc-en.

110. *Id.* at para. 14-15.

111. *Id.* at para. 17.

under the Convention.[112] The Turkish Administrative Court held that the Higher Education Act authorized the Vice-Chancellor to regulate student dress to maintain order, in accordance with the Constitution and supplementary case law.[113] In its original form, the Higher Education Act allowed students to wear veils and headscarves, but the Turkish Constitutional Court immediately declared the policy contrary to the principles of secularism and sexual equality, as enshrined in the Turkish Constitution.[114]

In their judgment, the Constitutional Court judges explained, firstly, that secularism had acquired Constitutional status by reason of the historical experience of the country and the particularities of Islam compared to other religions; secularism was an essential condition for democracy and acted as a guarantor of freedom of religion and of equality before the law.[115]

The Constitutional Court emphasized Turkey's unique position, as a secular state with a majority Muslim population, facing serious threats from fundamentalist Islam.[116] In their opinion, the state had to limit religious expression in schools to prevent discrimination against non-practicing Muslims and create a "calm, tolerant and mutually supportive atmosphere" for learning.[117] Accordingly, the Higher Education Act was amended to reflect "the laws in force" prohibiting veils and headscarves.[118]

Thereafter, Sahin was subject to several disciplinary measures for continuing to wear her headscarf and for participating in an unauthorized assembly to protest the policy.[119] She petitioned the ECHR, arguing that the University policy violated her rights under Article 9 of the Convention.[120] Sahin's case was heard before the Chamber and successfully appealed to the Grand Chamber, but in both instances, the Court found no violation of Article 9. In coming to this conclusion, the Court provides further elucidation on the requirements of Article 9, specifically in relation to the headscarf as a form of religious expression in schools.

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112. *Id.* at para. 18.
113. *Id.* at para. 19.
114. *Id.* at para. 39.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at para. 40.
119. *Id.* at *paras.* 21-28.
120. *Id.* at para. 3.

B. Interference with the Freedom of Religious Expression

As demonstrated by prior case-law, the ECHR seems rather willing to recognize that interference with religious expression has occurred as long as the offending law or regulation is not religion-neutral or subject to general applicability. *Sahin v. Turkey* follows this pattern: the headscarf policy negatively impacts certain religious groups, and therefore is not neutral or generally applied. Accordingly, the Court is readily satisfied that Sahin suffered interference with her religious freedom, despite the government's argument that the policy in question complies with the Convention as interpreted.

C. "*Prescribed by Law"*

The "prescribed by law" requirement was the subject of much debate in *Sahin v. Turkey*. Sahin argued that the prohibition on wearing headscarves was not in written law until the Vice-Chancellor issued his circular in 1998, some four years after Sahin began her studies.[121] Moreover, Sahin asserted that when the policy was issued, there was no basis for the Vice-Chancellor's authority within the laws in force (making reference to the language of the Higher Education Act).[122] To address this issue, the Court clarified the "prescribed by law" standard:

> [T]he Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures . . . and unwritten law. . . . In sum, the "law" is the provision in force as the competent courts have interpreted it.[123]

Applying this standard, the Court said that "laws in force" included the binding decision of the Constitutional Court, which clearly prohibited wearing veils and headscarves in places of higher education in defense of secularism.[124] By declaring that law should be understood in a "substantive sense," the Court in-

121. *Id.* at para. 79.
122. *Id.* at para. 86.
123. *Id.* at para. 88 (emphasis added).
124. *Id.* at paras. 92-93.

cludes all laws, statutes, case law, and possibly judicial commentary as sources providing foreseeability.[125]

D. "Legitimate Aim"

In line with previous treatment, the Court wastes little time addressing the issue of the government's legitimate aim:

> Having regard to the circumstances of the case and the terms of the domestic courts' decisions, the Court is able to accept that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, a point which is not in issue between the parties.[126]

Because the Court pays significant attention to the history and importance of secularism in Turkey, it can be reasonably assumed that "the circumstances of the case and the terms of the domestic courts' decisions" refer to the public interest of maintaining secularism in Turkey.[127] The Court does not even reflect on other possible motivations, such as suppression of traditional Muslim practices, which coincides with prior Article 9 jurisprudence.

E. "Necessary in a Democratic Society"

As described above, Article 9 requires that the offending law be necessary in a democratic society to place a limitation on the legitimate aims asserted by the government. In essence, the government is granted a margin of appreciation to apply the Convention according to its own customs and history, subject to the duty to maintain religious pluralism that is fundamental to a democratic society.

In *Sahin v. Turkey,* Turkey argued for a wide margin of appreciation. As the only Muslim country to have adopted a liberal democracy, the Turkish government argued that it required the capacity to strictly enforce secularism as a means of self-preservation.[128] In response, Sahin questioned the necessity of the headscarf ban as a means of preserving secularism. She argued

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125. *Id.* at para. 88.
126. *Id.* at para. 99.
127. *Id.*
128. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. para. 91 (2004) (Fourth Section), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=44774/98&sessionid=10411350&skin=hudoc-en.

that the headscarves presented no threat to the educational atmosphere in universities because reasonable adults are less likely to participate in or overreact to religious discrimination.[129] Finally, Sahin reiterated that "no European State prohibited students from wearing the Islamic headscarf at university and . . . there had been no sign of tension in institutions of higher education that would have justified such a radical measure."[130]
Citing the broad margin of appreciation in affairs of church and state, the Court forthrightly declared that secularism is necessary to a democratic society:

> The Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle . . . will not enjoy the protection of Article 9 of the Convention.[131]

Here, the Court presents a significant step in Article 9 case law. With this decision, the Court endorses the view that religious pluralism can legitimately be achieved through strict secularism,[132] an approach to religious expression common to both France and Turkey.

Taking this principle to the French headscarf case, two important questions arise. First, is secularism a justifiable means of preserving democracy in Turkey's case alone, or would the same fervent defense of secularism be necessary in a more established democracy like France? The Court makes several references to secularism promoting sexual equality and avoiding confrontations between practicing and non-practicing Muslims:

> As has already been noted, the issues at stake include the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of

129. Sahin v. Turkey, Eur. Ct. H.R. at para. 101 (Grand Chamber).
130. *Id.* at para. 100.
131. *Id.* at para. 114 (emphasis added).
132. *Id.*

> women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated . . ., this religious symbol has taken on political significance in Turkey in recent years.[133]

In addition, the Court cites "extremist political movements" in Turkey as further justification for imposing a strict notion of secularism, "based on its historical experience."[134] Overall, the opinion offers a sense of sympathy for Turkey as a state struggling to maintain its democracy. It is unclear to what extent the margin of appreciation was expanded in *Sahin v. Turkey* to accommodate Turkey's compromised position. Likewise, it is debatable whether France would receive the same specialized treatment if its headscarf law were to come before the Court.

Sahin v. Turkey generates a second significant question: Does the Court's approval of secularist policies end the pattern of favoring mainstream religions? As illustrated above, the Court has applied a broad margin of appreciation, resulting in weak protection of minority religious expression. However, with a complete separation of church and state, there should be no state-favored religion for the margin of appreciation to protect. On the other hand, if strict secularism is treated as the government's enforced policy on religion, it may likewise benefit from a broad margin of appreciation, to the detriment of minority religions. If the Court were applying *Sahin v. Turkey* to the French Headscarf Law, the position of secularism as a state-sponsored "religion" and the threat of religious fundamentalism would largely determine whether such a law is necessary in a democratic society.

V. FRENCH HEADSCARF LAW BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

A. The Headscarf Affair: The Facts of the Case

The first confrontation over the Headscarf Law took place in the Parisian suburb of Creil in October 1989.[135] The principal of a majority-Muslim middle school suspended three girls for refusing

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133. *Id.* at para. 115 (citing Sahin, Eur. Ct. H.R. at para. 108 (Fourth Section)) (emphasis added).

134. *Id.*

135. Beller, *supra* note 6, at 582.

to remove headscarves in the classroom.[136] Within a week of the incident, headscarves dominated the national press while public response revealed a deep divide in French society.[137] Politicians seized on the hot topic, making the wearing of headscarves an ever more controversial issue.[138] After announcing his support for the Muslim students, Education Minister Lionel Jospin requested that the Conseil d'Etat, France's highest administrative court, address the propriety of the principal's actions.[139]

In November 1989, the Conseil d'Etat ruled that wearing religious garb in schools was permissible, as long it was not so "'ostentatious' [*ostentatoire*] as to 'constitute an act of intimidation, provocation, proselytizing, or propaganda. . . .'"[140] In addition, no religious symbols that disrupt the academic environment or threaten the dignity and freedom of other students should be allowed.[141]

By declaring that *laïcité* requires schools to protect religious expression, the Conseil d'Etat showed some support for the Muslim students.[142] Yet at the same time, the Court diverted its authority by instructing principals to interpret and implement the pronounced standards on a case-by-case basis.[143] Prime Minister Jospin and the subsequent Minister of Education, Francois Bayrou, issued circulars attempting to clarify the Conseil d'Etat's decision, but the controversy persisted because students were often subject to disparate treatment according to their principal's personal opinions.[144] Moreover:

> The *affaire des voiles*, or affair of the scarves, as it has become known, crystallized many of the conflicts in French society surrounding immigration and national . . . identity[,] . . . [including] the role of secularism in the public school system; women's rights; "the spectre of a fundamentalist, aggressive Islam proselytising France"; and the integration of North Africans and other non-European immigrants.[145]

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136. *Id.* at 582-83.
137. *Id.* at 583.
138. *Id.*
139. *Id.* at 584.
140. *Id.*
141. *Id.*
142. *Id.* at 617.
143. *Id.* at 584.
144. *Id.*
145. *Id.* at 585 (citing MIRIAM FELDBLUM, RECONSTRUCTING CITIZENSHIP: THE POLITICS OF NATIONALITY REFORM AND IMMIGRATION IN CONTEMPORARY FRANCE 136 (1999)).

Many were unhappy with the Conseil d' Etat's decision,[146] and the Headscarf Affair simmered in French society for a few years without firm resolution until, rather spontaneously, it re-emerged in the spring of 2003.[147] At that time, Prime Minister Jean-Pierre Raffarin made several statements on the radio and before the National Assembly proposing a ban on wearing headscarves in public schools in defense of *laïcité*.[148] On May 17, former Prime Minister and Socialist deputy Laurent Fabius advocated the adoption of such a law, which led to the establishment of a parliamentary Inquiry Commission on the "Question of Wearing Religious Signs at School."[149] Thereafter, President Chirac commissioned a similar inquiry on *laïcité* in modern France, led by French Ombudsman, Bernard Stasi.[150]

The Stasi Commission made a central finding in favor of banning religious or political expression in public schools.[151] President Chirac praised their report and declared his government's intentions in a December 17 speech to the French people:[152]

> In all conscience, I consider that the wearing of clothes or signs which conspicuously denote a religious affiliation must be prohibited at school. Discreet signs, for example a Cross, a Star of David or Hand of Fatima will of course remain allowed. On the other hand, . . . the Islamic veil, . . . the Kippa or a Cross of a clearly excessive size, have no place in State schools. State schools will remain secular.[153]

Within the first semester after the Headscarf Law's enactment, forty-eight students were expelled for refusing to remove conspicuous religious symbols at school.[154]

B. Interference with the Freedom of Religious Expression: "Prescribed By Law"

If an expelled student were to bring the Headscarf Law before the Court, *Sahin v. Turkey* and the other precedents discussed

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146. Gunn, *supra* note 11, at 455-56.
147. *Id.* at 459.
148. *Id.*
149. *Id.* at 461.
150. *Id.* at 462.
151. *Id.* (citing Rapport AU PRESIDENT DE LA REPUBLIQUE, at 68 (2003), http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf)).
152. *Id.*
153. President Jacques Chirac, *supra* note 9.
154. *French Schools Expel 48 Over Headscarf Ban*, *supra* note 12.

above would have direct bearing on the outcome of the case. Several fairly reliable patterns have emerged from Article 9 case law, making their hypothetical application to the Headscarf Law rather straightforward.

First, the Court's opinions demonstrate a willingness to recognize that a law has interfered with religious expression, unless that law is religion-neutral and generally applied to a range of believers and non-believers alike (*supra* Sections III(1) & IV(2)). In its defense, the French government could argue that the Headscarf Law prohibits conspicuous Christian crosses and Jewish head coverings, as well as Muslim headscarves, making it generally applicable to all public school students. However, unlike requiring participation in a commemorative parade (*see Efstratiou* and *Valsamis*, *supra* Section III(1)), preventing students from exhibiting their religious beliefs in school can hardly be classified as religion-neutral. Accordingly, the Court is likely to recognize that the Headscarf Law constitutes interference with religious expression under Article 9(1) of the Convention.

Likewise, precedent presents a rather certain interpretation of the "prescribed by law" requirement of Article 9(2) of the Convention. As discussed above (*supra* Sections III(2) & IV(3)), the Court will consider a government's action "prescribed by law" if justification for that action is present in published laws, statutes, or case law. The Headscarf Law was published in *Le Journal Officiel*, the official reporter of the French Republic, on March 17, 2004.[155] Furthermore, if the Court continues to read this requirement broadly, it may even consider that extensive coverage of the Headscarf Law in the international press as a source of basic due process notification. Thus, the decision to expel public school students who refused to remove their headscarves was prescribed by law in accordance with Article 9(2) of the Convention.

C. "Legitimate Aim"

As explored previously, the language of Article 9(2) indicates that public order, public health and safety, and the protection of the rights of others qualify as legitimate aims that may justify limiting religious expression.[156] In application, the Court has approved governments' stated purposes that are tangentially related to the aims proposed by the Convention, making this portion of Article 9's conditions relatively easy to fulfill (*supra* Sections III(3) &

155. The record of Headscarf Law in *Le Journal Officiel* can be found in French at http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L.

156. Convention, *supra* note 30, at art. 9 ¶2.

IV(4)). Moreover, the Court tends to dismiss evidence of illegitimate aims, such as the suppression of minority religions (*see Kokkinakis* and *Manoussakis, supra* Section III(3)).
As if defending itself before the Court, the Stasi Commission justified its recommended ban on religious garb with two public order arguments:

> (1) to respond to the coercion suffered by Muslim girls whose families and communities force them to wear headscarves against their will (. . . [which] exacerbates sexual discrimination and religious polarization within France); and (2) to respond to administrative difficulties suffered by school officials who are forced to implement confusing directives in situations of intense pressure.[157]

These justifications are reminiscent of the accepted legitimate aims proposed by the Turkish government in *Sahin v. Turkey* (*supra* Section IV(4)). In all likelihood, the arguments presented by the Stasi Commission would be approved as legitimate aims under the current jurisprudential standard of the Court. As identified in previous cases, the French government may have multiple motivations for enacting the Headscarf Law, exhibited by the effects of the law in French society. The Stasi Commission made reference to religious polarization as a rising concern in the absence of the proposed ban.[158] This statement intimates a broader apprehension about the Muslim community's failure to integrate, according to the French standard.

The French conception of "citizen" requires an immigrant to "actively take on [the French] culture, including the all-important French language, and participate in [the French] political life."[159] "[I]mmigrants become part of the French nation as individuals, not as groups having a common ethnicity or religion."[160] Thus, when the Muslim community began to demand a supply of *halal* meat, Islamic schools and cultural centers, and permission to wear religious dress in schools, the French people sensed a threat of inva-

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157. Gunn, *supra* note 11, at 467 (citing Rapport au President de la Republique, at 31 (2003), http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf)).

158. *Id.*

159. Beller, *supra* note 6, at 586 (citing ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 35-49 (1992)).

160. JOEL S. FETZER & J. CHRISTOPHER SOPER, MUSLIMS AND THE STATE IN BRITAIN, FRANCE, AND GERMANY 95 (2005).

sion.[161] The government has attempted to encourage integration by establishing specialized agencies to enforce anti-discrimination laws and increasing funding to problem schools in Muslim suburbs.[162] Nevertheless, the Muslims in France are still widely regarded as "fundamentally 'unassimilable.'"[163]

In response to the growing national identity crisis, the government turned to "[t]he instrument par excellence for entrenching the Republican Idea,"[164] the unified public school system. By removing religious dress from school, the French government forced a significant move towards integration, at least on a superficial level. This "fortunate side-effect" of the Headscarf Law suggests that encouraging assimilation may have been one of the government's original motivations. However, the ECHR has already demonstrated that a government's surreptitious goal of suppressing minority religions can be overlooked if a legitimate aim, such as public order, is proposed. Therefore, the French government would likely be successful in justifying the Headscarf Law as pursuing the legitimate aim of maintaining public order.

D. "Necessary in a Democratic Society"

Because Article 9 represents a fundamental freedom, the Court has a stated policy of applying a stricter standard of review to determine whether state action is necessary in a democratic society. However, in practice, the Court has not confirmed this position by placing a clear limit on the margin of appreciation to respect Article 9 as a fundamental freedom.[165] As evidenced by *Kokkinakis* and *Manoussakis,* state-favored or majority religions often receive privileged treatment without condemnation from the Court by hiding within the state's margin of appreciation (*supra* Section III(4)).

The strict secularism demanded by the Headscarf Law represents the official state position on religion, and, as seen in *Sahin v. Turkey*, it may likewise benefit from a broad margin of appreciation as if it were a state religion.

> [S]tates frequently adopt an aggressive secularism and endeavor to remove any actual reference to reli-

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161. Neil MacMaster, *Islamaphobia in France and the "Algerian Problem", in* THE NEW CRUSADES 288, 297-98 (Emran Qureshi & Michael A. Sells eds., 2003).

162. FETZER & SOPER, *supra* note 160, at 68.

163. *Id.* at 67.

164. President Jacques Chirac, *supra* note 9.

165. As two of the few violations of Article 9 recognized by the Courts, *Kokkinakis* and *Manoussakis* were not decided based on a limitation of the margin of appreciation, but instead on factual nuances that did not address the problem of the offending laws in general.

> gious beliefs and practice from public life. Secularism then becomes a sort of official 'religion'. Religious intolerance transforms a religious dogma into the law of the State. Secular intolerance transforms the law of the State into a religious dogma. Neither of these seems to be an adequate solution to the question of freedom of religion and belief.[166]

French secularism, or *laïcité*, demands a separation between church and state, which began with political opposition to the Catholic Church in the 1700's.[167] During the French Revolution, "church property was confiscated, the Christian calendar was replaced by a revolutionary one, and Christianity itself was replaced by a 'religion of reason.' "[168]

The secularist ideal was first institutionalized in public schools in 1882, when the Ferry Law "effectively laïcized public education" by removing religious influence.[169] The Ferry Law revoked the clergy's right to monitor school curriculum and fire non-conforming teachers.[170] Then in 1905, France rebuked the Catholic church with the Separation Law, which declared that the French government would no longer "recognize [or] pay salaries or other expenses for any form of worship [*culte*]."[171]

Laïcité remains a vigorously protected ideal in modern day France. In the speech confirming the decision to enact the Headscarf Law, President Chirac describe *laïcité* as a "'pillar' of the French Constitution: Its values are at the core of our uniqueness as a Nation. These values spread our voice far and wide in the world. These are the values that create France."[172]

In addition, *laïcité* is still considered an essential component of French public schools. Speaking about his decision to expel several Muslim girls for refusing to remove their headscarves, a principal in Creil said: "It is *laïcité* that has allowed the public school to be the melting pot in which, through the alchemy of education, differences vanish so [a] nation can emerge."[173]

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166. Martínez-Torrón, *supra* note 39, at 203 (emphasis added).

167. William Safran, *Religion and Laïcité in a Jacobin Republic: The Case of France*, *in* THE SECULAR AND THE SACRED 54, 54 (William Safran ed., 2003).

168. *Id.*

169. *See* FETZER & SOPER, *supra* note 158, at 70 (the Ferry Law "effectively *laïcitized* public education.").

170. *Id.*

171. *Id.*

172. Gunn, *supra* note 11, at 428 (citing President Jacques Chirac, Speech on Respecting the Principle of Secularism in the Republic).

173. FETZER & SOPER, *supra* note 160, at 62.

As a founding principle of the French Republic, *laïcité* has fervent believers within the French government and its public servants. Not unlike Orthodoxy in Greece, *laïcité* is recognized by the government as a conviction common to the majority of French citizens which is integrated into the national identity. The Headscarf Law is a modern manifestation of France's historical approach to religion in the public sphere, and as such it represents a zealously-protected national policy. Considering the Court's record of applying a broad margin of appreciation to the delicate relations between church and state (*supra* Section IV(5)), the Headscarf Law would likely be protected from condemnation by the Court as if it were a state-favored religion.

In *Sahin v. Turkey*, the Court added another nuance to determining whether state action limiting religious expression is necessary in a democratic society.

> In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students . . . may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion . . . with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others.[174]

Thus, the Court acknowledged that the need to control dangerous fundamentalist movements and protect public order could justify prohibiting headscarves in public universities. Would the Court apply this holding to the French Headscarf Law? By sheer numbers, Turkey and France face different situations.

> While Turkish secularist law extends from a minority (the government and the military) over the majority, French secularist law extends from the majority over a minority. But both countries have agreed that when the principle of secularism is not voluntarily adopted by their respective Muslim popula-

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174. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R., para. 99 (2004) (Fourth Section), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=44774/98&sessionid=10411350&skin=hudoc-en (emphasis added).

> tions, it must be imposed by force for the sake of national integrity.[175]

Could France argue that the Court has already declared its support for the Headscarf Law? The proposed aims of preventing religious coercion and establishing a religion-free school zone are common to the headscarf prohibitions in both Turkey and France. However, the Court would likely need to see that Muslim fundamentalism in France poses a significant threat to the French Republic as it does to the secularist Turkish state.

Unfortunately, the true status of fundamentalism in France is somewhat obscured by the fear and distrust pervading French society. During the first sixty years of Muslim immigration, the practice of Islam was not very visible to the average French citizen.[176] However, as immigrant families reunited in the 1960s and 1970s, the Muslim community emerged as a separate entity, which was regarded as an aggressive religious assertion amounting to an invasion of French society.[177] During the 1980s, anti-immigrant rhetoric fueled the growth of the LePen's *Front National*, which made a successful electoral breakthrough in 1983.[178]

Thereafter, France supported a military junta in Algeria, intending to suppress the swell of fundamentalism.[179] Concurrently, the Minister of the Interior initiated a large-scale police operation in France to arrest supporters of the popular party in Algeria, the Islamic Salvation Army (FIS).[180] These arrests and the ensuing media frenzy encouraged the perception that fundamentalist Islam had a significant presence in France, and that it was likely to spread throughout the Muslim community.[181] In 1995, many fears and suspicions were confirmed when Khaled Kelkal led members of the Armed Islamic Group in blowing up the Paris RER train.[182] Subsequent rising crime rates have largely been attributed to delinquent Muslim youths.[183]

It is impossible to detect the actual breadth of Islamic fundamentalism in France today. However, the French government and much of French society certainly perceive a grave threat. Appre-

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175. Maximilien Turner, *The Price of the Scarf: The Economics of Strict Secularism*, 26 U. PA. J. INT'L. ECON. L. 321, 331 (2005).

176. MacMaster, *supra* note 161, at 297. Prayer rooms and meeting houses were improvised and did not have "the external architectural symbolism of the traditional mosque."

177. *Id.* at 297-98.

178. *Id.* at 298.

179. *Id.* at 302.

180. *Id.*

181. *Id.* at 304

182. FETZER & SOPER, *supra* note160, at 66.

183. *Id.* at 66-67.

hensions rooted in the Muslim community's failure to assimilate have grown into a profound sense that France has an enemy within. With Islamic fundamentalism identified as a probable cause of the recent rioting, France may have a stronger argument than ever that certain limitations on religious freedom, such as the Headscarf Law, are necessary to remedy the failure of Muslim integration and preserve public order.

VI. CONCLUSION

The French Headscarf Law is not likely to be condemned as a violation of Article 9 by the ECHR. The Court may readily recognize the prohibition on religious dress as interference under Article 9(1) because it is not neutral with regard to religion. However, the French government can successfully justify its actions as pursuing the legitimate aim of maintaining public order and protecting the rights of others. Even if France is executing forced integration through the Headscarf Law, the proposed objectives coincide with the aims of the Convention, and the Court has a tendency to disregard the state's less acceptable motivations. With a broad margin of appreciation protecting *laïcité* and violent unrest in minority suburbs in recent memory, the ECHR would almost certainly conclude that the Headscarf Law is a justifiable interference on the religious freedoms enshrined in Article 9 of the Convention.

HUMAN RIGHTS FOR TRANSNATIONAL CORPORATIONS

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I. INTRODUCTION

Transnational corporations and human rights law have come into increasing contact with one another in recent years.[1] The pri-

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1. For purposes of this article, a "transnational corporation" or "corporation" is defined as "an economic entity operating in two or more countries - whatever their legal form, whether in their home country or country of activity, . . . and whether taken individually or collectively." U.N. Sub-Commission on the Promotion and Protection of Human Rights, U.N. ESCOR, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights,¶ 20, R.21.7.3 U.N. Doc. E/CN.4/Sub.2/2003/L.12/Rev.211 (Aug. 13, 2003) [hereinafter Human Rights Norms].

mary issue arising from this contact is whether transnational corporations are subject to human rights obligations previously thought to be exclusively applicable to states. This issue has been raised in many different venues. In the international arena, the duties of transnational corporations have been recognized through specific language within the body of human rights instruments.[2] A wide range of international guidelines have attempted to define basic human rights obligations applicable to transnational corporations.[3] The most recent effort, the United Nations' Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, identifies six primary duties of all transnational corporations.[4]

The issue of applicability of human rights law to the activities of transnational corporations has also been raised in national legal systems as well as the private sector. Perhaps the most notable recognition in national legal systems has been the substantial body

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2. *See, e.g.,* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 5 (1), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966) (providing that the Covenant shall not be interpreted as to imply "for any . . . group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 5(1), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (Dec. 16, 1966) (providing that the Covenant shall not be interpreted as to imply "for any. . . group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, pmbl., art. 30, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (providing "every . . . organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance" and prohibiting interpretations of the Declaration that imply for "any . . . group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein").

3. *See, e.g.,* UNITED NATIONS GLOBAL COMPACT ORG., WHAT IS THE GLOBAL COMPACT? (2000), *available at* http://www.unglobalcompact.org/content/AboutTheGC/Overview__About.htm (creating a voluntary corporate citizenship initiative based upon ten principles relating to human rights, labor and environmental protection); ORG. FOR ECON. COOPERATION & DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000) (consisting of recommendations by national governments to transnational corporations regarding employment practices, industrial relations, human rights, environmental protection, competitive practices and taxation).

4. The Human Rights Principles impose five primary duties on transnational corporations. These duties are: equal opportunity and treatment in the workplace; respect for the security of persons by refraining from engaging in war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking and other violations of humanitarian law; protection of workers' rights through prohibitions upon slavery and forced, compulsory and child labor, maintenance of a safe working environment, payment of fair and reasonable remuneration and recognition of freedom of association and collective bargaining; respect for the sovereignty of states, local communities and indigenous populations; consumer protection; and environmental protection. Human Rights Norms, *supra* note 1, ¶¶ 2-14.

of U.S. case law created by attempts to apply the Alien Tort Statute to corporate activities.[5] National legal systems have also recognized corporate human rights obligations through reporting requirements[6] and divestment initiatives targeting alleged human rights violators.[7]

Recognition of the applicability of human rights obligations to transnational corporations in the private sector has taken two primary forms. On an organizational level, there has been wholesale adoption of codes of conduct, guiding principles, credos and similar statements by members of the international business community.[8] Within such organizations, there is a smaller and

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5. The Alien Tort Statute provides "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350 (2000). A detailed discussion of the attempts to apply the Alien Tort Statute to the activities of transnational corporations is beyond the scope of this article. However, there were more than twenty U.S. federal court opinions addressing these attempts and relating to the activities of dozens of transnational corporations in sixteen states at the time of preparation of this article. It further bears to note that the vast majority of these opinions have rejected the application of the Alien Tort Statute to the activities of transnational corporations. For a discussion of recent developments relating to litigation initiated against transnational corporations pursuant the Alien Tort Statute, *see* Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y (forthcoming 2007).

6. *See, e.g.,* Law No. 2001-420 of May 15, 2001, Journal Officiel de la République Francaise [J.O.] [Official Gazette of France], May 16, 2001, art. 116, p. 7776 (requiring all French corporations listed on the premier marché to annually report on the social and environmental impact of their activities commencing with their 2003 annual reports). For an analysis and critique of Law Number 2001-420, *see* Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques,* 21 ARIZ. J. INT'L & COMP. L. 441 (2004).

7. Recent efforts by state governments within the United States concerning their investments in companies doing business in Sudan or in other states designated as sponsors of terrorism are a primary example of recent divestment initiatives. For discussion of such initiatives, *see, e.g.*, Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations,* 43 AM. BUS. L.J. 245 (2006); Lucien J. Dhooge, *Darfur, State Divestment Initiatives and the Commerce Clause*, 32 N.C. J. INT'L L. & COM. REG. (forthcoming 2007). For an example of recent litigation challenging the constitutionality of state divestment initiatives with respect to Sudan, *see* Nat'l Foreign Trade Council v. Topinka, No. 06C-4251 (N.D. Ill. filed Aug. 7, 2006) (challenging the Illinois Act to End Atrocities and Terrorism in the Sudan as an unconstitutional state interference with the federal government's authority with respect to foreign affairs and a violation of the Foreign Commerce and Supremacy Clauses and the National Bank Act).

8. For a discussion of codes of conduct, guiding principles, credos and other statements, *see, e.g.,* Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct,* 33 COLUM. J. TRANSNAT'L L. 663, 674-83 (1995); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level,* 43 COLUM. J. TRANSNAT'L L. 389 (2005). The number of such codes, principles, credos and other statements is voluminous and beyond the scope of this article. However, for an example of a code of conduct created through the collaborative efforts of national governments, industry, labor and nongovernmental organizations, see BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2001). The Voluntary Principles establish a code of conduct for U.S. and British companies engaged in the energy and extractive industries. The Principles were the result of consultations between U.S. and British-based oil, gas and mining companies (in-

somewhat less successful campaign to recognize human rights obligations through the adoption of shareholder resolutions.[9] The social responsibility movement has empowered institutions and individuals to determine the circumstances under which their monies are invested.[10]

Largely unaddressed is the issue of whether transnational corporations enjoy rights in a manner similar to human beings. The resolution of this issue turns, at least in part, on the recognition of legal personality for transnational corporations. This article posits that transnational corporations possess legal personality sufficient to be granted rights in a manner similar to those granted to human beings in modern human rights law. In recognizing such status, the article contends that transnational corporations are rights-carrying persons in addition to being duty-bearing entities. The paper initially describes difficulties associated with granting human rights to transnational corporations and the importance of addressing these difficulties. The paper then advances the case for recognition of corporate rights through discussion of the status of corporations in international human rights instruments and the recognition of corporate personhood in national legal systems. The paper does not equate transnational corporations with human beings but rather concludes that the unique status of corporations requires different treatment in the human rights arena. This different treatment is elaborated upon in a two-part test devised for

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cluding British Petroleum, Chevron, Conoco, Freeport McMoRan, Rio Tinto and Texaco), non-governmental organizations (including Amnesty International, Human Rights Watch and the Lawyers' Committee for Human Rights), corporate responsibility groups (including Business for Social Responsibility, the Council on Economic Priorities and the Prince of Wales Business Leaders' Forum), the International Federation of Chemical, Energy, Mine Workers and the General Workers' Unions, the U.S. State Department and the United Kingdom Foreign Office. *Id.*

9. The Social Investment Forum reported that shareholder resolutions on social responsibility, corporate governance and crossover proposals implicating both areas increased from 299 proposals in 2003 to 350 in 2004 and 348 proposals in 2005. SOCIAL INVESTMENT FORUM, 2005 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 16 (2006) *available at* http://www.socialinvest.org/areas/research/trends/sri_trends_report_2005.pdf. The majority of these resolutions addressed environmental protection, occupational health and safety, equal employment opportunity, labor standards, defense contracting, political contributions, sustainability, tobacco and animal welfare. *Id.* at 17. The average percentage of votes cast in favor of these types of resolutions peaked at 11.9% in 2003 and dropped to 11.4% in 2004 and 10.3% in 2005. *Id* at 16.

10. Socially responsible investing has been defined as the integration of "social and environmental values into the investment decision-making process . . . . link[ing] financial and social goals [and] striving to deploy investment capital in a manner that is consistent with the needs of society and the limits of ecosystems." ETHICAL FUNDS, INTRODUCTION TO SOCIALLY RESPONSIBLE INVESTING 1 (2002). According to the Social Investment Forum, there was $179 billion invested in 201 socially screened mutual funds and $1.5 trillion invested in screened separate accounts managed for institutions and individuals at the end of 2005. SOCIAL INVESTMENT FORUM, 2005 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES, *supra* note 9, at 7, 11.

the purpose of determining what specific rights should be extended to transnational corporations.

II. PROBLEMS ASSOCIATED WITH TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

The question of whether transnational corporations are beneficiaries of modern human rights instruments is fraught with uncertainties. An initial difficulty arises from the relative newness of general incorporation. At the dawn of the Industrial Age, corporate recognition relied on a specific grant of status from the government.[11] Corporations were thus relatively rare creatures.[12] Given the lateness of its recognition, freely incorporable entities were not accounted for at the time of the creation of the legal systems they came to inhabit. For example, the term "corporation" does not appear in either the U.S. Constitution or the Bill of Rights. The conferral of legal status on freely incorporable entities thus raised the issue of whether they were properly includable in foundational documents referring to a "person," "people" or "citizens," none of which were defined in the Constitution.[13]

To the extent that the intent of the Framers can be ascertained, it may be concluded that the Constitution was designed, in part, to shield individuals from overreaching by the national government.[14] Individuals meant human beings rather than artificial

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11. A specific legislative act was required in order to form a corporation in the United States with few exceptions until the mid nineteenth century. *See* PHILIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW 22 (1993). Similar rules were applicable in the United Kingdom, which required a charter from the Crown or an act of Parliament. *Id. See also* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 84 (1999).

12. There were only 317 corporations in the United States at the beginning of the nineteenth century. General incorporation, introduced during the Jacksonian era, did not fully take root until after the Civil War. BLUMBERG, *supra* note 11, at 22, 31. *See also* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987) (discussing the preference for sole proprietorships and partnerships in the United States in the late eighteenth and early nineteenth centuries).

13. BLUMBERG, *supra* note 11, at 25, 31. *See also* Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 298 (1990) (noting the absence of definitions of these terms in the Constitution as well as any description of their characteristics or whether the terms were intended to extend beyond their commonly accepted meanings).

14. *See, e.g.*, MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS 85-87 (1986); Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech is not Free,* 83 IOWA L. REV. 995, 1013 (1998) (describing the American legal system as embodying "an ancient tradition of seeing the world as composed of private individuals and governmental entities"); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 64, 100 (2005) (contending that the Constitution established an "individualistic framework" wherein "[m]ost of the protections . . . were designed as barriers between the government and individual citizens").

entities.[15] Utilizing an approach that focuses on this perceived original intent, corporations are not entitled to the guarantees and protections enumerated in the Constitution.[16] Neither do corporate rights arise automatically from a flexible interpretation focusing on the needs of modern society as such an approach has traditionally focused on the expansion of individual liberties, which does not necessarily include corporations.[17]

Legislation has not resolved this uncertainty. Legislation adopted prior to widespread acceptance of general incorporation suffers from the same construction problem as foundational documents.[18] While understandable with respect to legislation adopted prior to the ascension of the corporate model, this uncertainty continues to plague modern legislation as well. For example, the Model Business Corporation Act, the fountainhead of modern U.S. corporate law, creates two separate classes of persons. "Individuals" consist exclusively of "natural" people.[19] However, natural people are also defined as "persons," which includes domestic and foreign business corporations.[20] The result is that human beings and corporations may or may not be equals depending on the circumstances.

Case law addressing the status of corporations has occasionally added to this uncertainty. The U.S. Supreme Court has simultaneously denied and granted corporations status as "citizens."[21] This inconsistency continued into the latter half of the nineteenth cen-

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15. *See, e.g.,* Mark, *supra* note 12, at 1472 (concluding "the irreducible unit" of the common law existing at the time of the drafting of the Constitution was the individual human being); David Graver, *Comment, Personal Bodies: A Corporeal Theory of Corporate Personhood,* 6 U. CHI. L. SCH. ROUNDTABLE 235, 243 (1999) (concluding that "[t]he Framers thought they were bestowing rights on human beings" based upon the application of original construction).

16. *See* Krannich, *supra* note 14, at 95 n.225 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (Antonin Scalia & Amy Gutmann, eds., 1997) wherein Justice Scalia wrote that "[i]f the courts are free to write the Constitution anew, they will . . . write it the way the majority wants . . . . [which] is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority").

17. *See* Krannich, *supra* note 14, at 95 nn .226-27 (citing Lawrence H. Tribe, *Comment, in* Scalia & Gutmann, *supra* note 16, at 85-86).

18. BLUMBERG, *supra* note 11, at 25.

19. MODEL BUS. CORP. ACT ch. 1, § 13 (1969) (amended 2002).

20. *Id.* ch. 1, § 16.

21. *See, e.g.,* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868) (refusing to apply the Privileges and Immunities Clause to state regulation through the Fourteenth Amendment); Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844) (holding corporations to be citizens of the states in which they are incorporated for purposes of diversity jurisdiction); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586 (1839) (holding that corporations were not citizens pursuant to the Privileges and Immunities Clause); Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 88, 91 (1809) (concluding that corporations are not citizens for purposes of diversity jurisdiction).

tury with respect to the issue of whether corporations were "persons." The Court pronounced in *Santa Clara County v. Southern Pacific Railroad* that it did not wish to entertain argument with respect to applicability of the Equal Protection Clause of the Fourteenth Amendment to corporations as such applicability was settled law.[22] Subsequent opinions affirmed this holding with respect to the Fourteenth Amendment.[23] However, the Court has reached different conclusions with respect to application of the freedoms and protections set forth in the Bill of Rights.[24]

III. THE IMPORTANCE OF GRANTING RIGHTS TO TRANSNATIONAL CORPORATIONS

The previously noted problems are due, in part, to the incongruence between the modern corporation and the concept of personhood. As has been noted by commentators, this form of social organization does not fit neatly into the legal traditions of many states, whose founding documents focus on the regulation of the relationship between individuals and their governments.[25] However, if corporations are truly nothing more than the collective effort of individual human beings, then do not these individuals retain rights, constitutionally granted or otherwise, upon the formal organization of their cooperative efforts in the corporate form? To hold otherwise would imply a waiver of the promoters' individual rights upon their filing of articles of incorporation and receipt of a state charter.

Legal personality is "a condition sine qua non for the possibility of acting within a given legal situation" without which an entity

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22. 118 U.S. 394 (1886). The Court stated that it "[did] not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are all of [the] opinion that it does." *Id.* at 396 (citing to the preopinion statement of chief Justice Walte).

23. *See, e.g.*, S. Ry. Co. v. Greene, 216 U.S. 400, 412-13 (1910); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896); Pembina Consol. Silver Mining and Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888).

24. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) (speech); Fed. Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 257-59 (1986) (speech); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-92 (1978) (holding corporations enjoy First Amendment protection for speech); United States v. Martin Linen Supply Co., 430 U.S. 564, 569-76 (1977) (attaching double jeopardy to a judgment of acquittal for corporate defendant's speech); United States v. White, 322 U.S. 694, 698 (1944) (cited with approval in Bellis v. United States, 417 U.S. 85, 89-90 (1974) (holding protection against self-incrimination limited to natural persons)) *accord* Wilson v. United States, 221 U.S. 361, 379-86 (1911); Hale v. Henkel, 201 U.S. 43, 70-71 (1906) (search and seizure and self-incrimination).

25. *E.g.*, Krannich, *supra* note 14, at 61.

does not exist.[26] The recognition of personhood not only confers life upon the entity but also imbues it with a sense of legitimacy by counting it for purposes of law.[27] Personhood also implies recognition of the individuals comprising the group as well as the cause for which they have united.[28] The conferral of these benefits and their importance are determined by national legal systems given the absence of an international regime with respect to personhood in general and corporate personality in particular.[29]

Personality is also essential to corporations for a wide variety of practical reasons. Personality is the basis for ownership of assets separate and apart from individual shareholders. This recognition of separate ownership serves as the basis for contracts wherein corporations undertake duties and receive rights without the necessity of direct participation of their shareholders. Separate existence also permits corporations to avoid the uncertainties regarding individual members that plague other business associations, such as death, entry and exit of members and personal bankruptcy. All of these benefits serve to reduce transaction costs and improve efficiency, the benefits of which may be passed down to consumers. Similarly, these benefits, when combined with the pooling of assets and the shield of limited liability, reduce risk, which no single participant would be willing or able to assume on an individual basis. Finally, personhood may shield individual shareholders from undue intrusion into their business affairs by diverting government attention to their collective activities through the corporate form.

Corporate personality is also vital to the interests of the international community. Obligations and rights accrue only to those

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26. Jan Klabbers, *Legal Personality: The Concept of Legal Personality*, 11 IUS GENTIUM 35, 37 (2005). For general discussion of the importance of legal personality to corporations, see generally Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999). *But see* Klabbers, *supra*, at 49, 55 (condemning the "obvious circularity" of the reasoning that one needs to be a person to have rights yet having rights implies that one is a person, questioning the necessity of legal personality to the exercise of rights and enforcement of duties and characterizing the status as merely declaratory); *see also* August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37, 72 (Philip Alston ed., 2005).

27. Klabbers, *supra* note 26, at 61-63 (characterizing the purpose of corporate personhood as certification that "the human group is worthy of recognition (in the broadest sense of the word) in itself" and is essential in order for corporations to be considered "legitimate participants in struggles over scarce resources").

28. *Id.* at 62. Klabbers contends that non-recognition of a group by denial of personhood implies non-recognition of the individual members. *Id.*

29. Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259, 262 (Michael K. Addo ed., 1999) (discussing the primary role of national governments with respect to corporate personality).

who are recognized subjects of international law.[30] Entities lacking legal personality pursuant to national law may not be subjects of international law. The absence of international recognition excuses such entities from international obligations. Behavior deemed to be a violation of international norms by entities possessing legal personality may not be a violation if engaged in by unrecognized entities. Consequently, such behavior creates no right to redress for injured parties. The obligations imposed upon or voluntarily undertaken by transnational corporations referenced in the introduction are thus meaningless without internationally recognized corporate personality. To the extent individuals may benefit from these compulsory obligations and voluntary undertakings, society at large has a stake in the recognition of corporate personality.

Additionally, if modern human rights law imposes new duties and extends existing ones to transnational corporations, then a discussion of freedoms and protections is necessary to enhance the credibility of human rights in corporate boardrooms. Enforcement measures alone are not adequate in this regard. Instead of building credibility for human rights, enforcement measures without accompanying rights may breed contempt and foster an atmosphere of evasion rather than acknowledgment of corporate responsibility. Existing measures, such as litigation, the imposition of monetary penalties, public condemnation and damage to business reputation, may prove inadequate if the financial rewards associated with the behavior in question outweigh the actual or perceived harm to corporate interests.

Concurrent recognition of freedoms and guarantees imbues human rights law with enhanced standing. Such recognition is essential in convincing corporations to appreciate human rights and their responsibilities. Acknowledging transnational corporations as stakeholders in the human rights regime rather than solely as responsible parties encourages them to act to protect rights that they share on an equal basis with others.[31] Transnational corporations could not credibly claim the benefits of human rights protections while simultaneously denying their accompanying duties and responsibilities.[32] Transnational corporations are thus faced with a choice — either receive the benefits flowing from status as rights, carrying entities while simultaneously acknowledging that they are also duty-bearing entities or deny the legitimacy of the applica-

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30. Reinisch, *supra* note 26, at 70.

31. Addo, *supra* note 29, at 93 (noting that such recognition gives transnational corporations a stake in the outcome "upon which one can build a relationship of cooperation in the effective protection of human rights").

32. *Id* at 25.

tion of human rights principles to their operations and suffer the consequences as efforts to impose increased responsibilities upon them continue without abatement. Corporate self-interest mandates selection of the first option.

Such recognition does not come at the expense of sovereign governments or human beings. It has been aptly noted that "international law is not a zero-sum system" in which recognition of the rights of some detracts from the protection of the established rights of others.[33] Recognition of corporate rights does not detract from the ability and obligation of national governments to exercise their sovereign power if and when necessary. National governments retain their sovereignty and remain the primary focus of public international law.[34]

Human beings also do not suffer harm as a result of such recognition. Human rights become no less "human" because some of their protections are extended to transnational corporations. Human beings remain the primary beneficiaries of human rights law, do not suffer a diminution of their rights and retain attributes which set them apart from corporations. The result is the continued exercise of sovereign powers by national governments and recognition and protection of the rights of human beings accompanied by the creation and "growth of a complementary system of law that fills the penumbra of existing State-centered international law and facilitates, as well as regulates, activity undertaken by, through, and with sovereign States and their citizens."[35] The uncertainty in the public international legal system in which transnational corporations currently operate is dissipated in favor of the development of new legal regime with readily identifiable and enforceable rights and duties.

By contrast, non-recognition of corporate personhood or its revocation where otherwise established would do far more harm than good.[36] Abrogation of corporate personhood would not remedy

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33. Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law: An Introduction*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 1, 6 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

34. *Id.*

35. *Id.*

36. *See, e.g.*, Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 824 (2004). *But see* THOM HARTMANN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS 252 (2002). Hartmann contends that human beings are ruled by corporations, which are the creatures of their own social construct. The remedy for this situation is inversion of the hierarchy wherein corporations are made legally subordinate to the people and governments who created them. *Id.* According to Hartmann, this inversion may be accomplished, in part, through "a grassroots movement in communities all across America and the world to undo corporate personhood, leading to change in the definition of the word 'person.'" *Id.* Litowitz dismisses Hartmann's call for the abolition of personhood as ineffective in remedying corporate abuses and having a disparate impact on

real or perceived abuses by corporate malefactors. The abolition of personhood would free corporations from national and international constraints imposed upon persons. The net effect would be to cast the corporation, including its transnational iteration, as an outlaw "exempt from the operation of some parts of the law and imbued with a power to impose law on its members."[37]

Such a result is clearly undesirable given the preeminence of the corporate form of business as the dominant economic actor in the national and global marketplaces.[38] Such preeminence has generated enormous resources, which have in turn provided corporations with the ability to assert themselves far more vigorously than their human brethren without consideration of impacted communities.[39] These resources and consequent power may even rival those of the states in which they operate and to which they owe their existence.[40] Trust should not be blindly placed in the hands of corporations to always exercise this economic and political power wisely and legally. Given these realities, corporations must be brought within the legal system and subject to similar duties and restraints as other persons. This necessity supports the imposition of human rights obligations on transnational corporations. This necessity also supports the delineation and careful circumscription of human rights protections for such corporations.

IV. THE LEGAL BASES FOR GRANTING HUMAN RIGHTS TO TRANSNATIONAL CORPORATIONS

A. Introduction

Given the absence of reference to corporations in foundational documents, the undefined or inconsistent usage of terms such as "persons" and "citizens" and the diversity of judicial opinions, it is tempting to conclude that the attributes of corporations, including legal personality, are whatever the law determines them to be or

small and medium sized businesses by penalizing them for the sins of larger transnational corporations. Litowitz, *supra* at 824.

37. Liam Seamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 206 (2006).

38. For discussion of the economic preeminence of transnational corporations, see Krannich, *supra* note 14, at 65.

39. HARTMANN, *supra* note 36, at 6, 105, 252.

40. *See, e.g.*, Blumberg, *supra* note 13, at 298 (describing transnational corporations as operating as "multi-tiered multinational groups" with concentrated power exceeding that of individual nations); Krannich, *supra* note 14, at 65, 70 (characterizing transnational corporations as "once the derivative tool of the state . . . [and now] its rival" and possessing "greater influence in the country and upon the legislation of the country than the states to which they owed their corporate existence") (internal citations omitted); O'Melinn, *supra* note 37, at 206 (describing a corporation as "an extraordinary kind of person with legal privileges to rival those of the state").

perhaps what best accommodates corporate needs.[41] The many shared attributes of corporations and human beings lend further support to their equation within the law.[42] However, the granting of human rights protections to transnational corporations on the basis that the law may grant any right it deems prudent is inadequate.

This section of the article contends that transnational corporations are beneficiaries of international human rights instruments. This conclusion is based upon the recognition of personhood in the express language of human rights instruments and in the vast majority of national legal systems.

B. International Human Rights Instruments

International human rights law provides a basis for corporate legal personality. The significance of the impact of transnational corporations on human rights has been recognized in international instruments dating back to the founding of modern human rights law. The preamble of the Universal Declaration of Human Rights provides that "every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . . ."[43] The responsibility of these "individual[s] and organ[s] of society" is reiterated in the Universal Declaration's

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41. *See, e.g.*, John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926) (stating that the corporate form of business is "whatever the law makes it [to] mean"); Iwai, *supra* note 26, at 604 (contending that the "concept of the corporation is essentially indeterminate" and "can signify essentially whatever law makes it signify"); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1754 (2001) (concluding that "courts have adjusted definitions of personhood to accommodate the modern corporation's need for [Bill of Rights'] protections").

42. *See* MODEL BUS. CORP. ACT, *supra* note 19, ch. 3, § 3.02(1-15). Section 3.02 enumerates fifteen separate rights possessed equally by corporations and human beings by providing that a corporation has "the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including":

> (1) to sue and be sued;.
> (4) to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;
> (5) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;
> (7) to make contracts and guarantees, incur liabilities [and] borrow money;
> (8) to lend money . . . [and]
> (14) to transact any lawful business. . . .

Id. § 3.02 (1), (4-5), (7-8) (14).

43. Universal Declaration of Human Rights, *supra* note 2, pmbl.

concluding section, which prohibits interpretations "implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[44]

The "individuals," "organs of society," groups and persons to whom these duties are applicable are not defined. Nevertheless, they include transnational corporations to the extent such entities may be characterized as individuals or persons using real entity theory.[45] Individuals and persons may also include corporations applying aggregate theory to the extent they are viewed as groups formed as a result of contractual relations.[46] Applying concession

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44. *Id.* art. 30.

45. *See* Louis Henkin, *The Universal Declaration at Fifty and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999) (interpreting the Universal Declaration of Human Rights to mean that "[e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace"). *See also* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 96 (2002) (contending that "[t]o the extent that individuals have rights and duties under customary international law and international humanitarian law, [multinational corporations] as legal persons have the same set of rights and duties"). Real entity theory provides that corporations possess personality due to their nature as full-fledged legal entities possessing free will. Iwai, *supra* note 26, at 600. This existence and free will are separate and apart from that of the ever-changing roster of individuals constituting the organization. *See, e.g.*, BLUMBERG, *supra* note 11, at 28; OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 67-73 (Frederic W. Maitland trans., 1900); FREDERICK HALLIS, CORPORATE PERSONALITY: A STUDY IN JURISPRUDENCE 138-65 (1978); GEORGE W. PATON, A TEXTBOOK OF JURISPRUDENCE 268-69 (1946); Klabbers, *supra* note 26, at 44; Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1459-63 (1992); Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction,* 61 TUL. L. REV. 563, 566-69 (1987). The lack of identification of the corporate entity with its owners requires recognition of the corporation as an autonomous entity. Krannich, *supra* note 14, at 82. *See also* Mark, *supra* note 12, at 1473. The importance of state action, the hallmark of concession theory, is minimized. Although a state charter is still required, its issuance does not confer status upon the corporation. Rather, the issuance of state charters is "merely confirming the preexisting 'reality' of the organizational existence." BLUMBERG, *supra* note 11, at 28. *See also* Graver, *supra* note 15, at 238.

46. Aggregate theory provides that corporations are a simple "nexus of contracts" or aggregation of individuals connected by contractual relations between themselves and management. *See, e.g.,* BLUMBERG, *supra* note 11, at 27-28; ROMAN TOMASIC, STEPHEN BOTTOMLEY & ROB MCQUEEN, CORPORATIONS LAW IN AUSTRALIA 58 (2d ed. 2002) (describing corporations as "nothing more than a shorthand expression for a multiplicity of private, consensual, contract-based relations between economic actors, each seeking to maximize his or her own benefits"); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 423-27 (1989); Daniel P. Sullivan & Donald E. Conlon, *Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware*, 31 LAW & SOC'Y REV. 713, 719-20 (1997). Aggregate theory in the United States has been traced back to the early nineteenth century at which time it was deemed "necessary to enhance the powers of individually powerless citizens by allowing them to unite in order to amass power." Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression,* 66 GEO. WASH. L. REV. 235, 252 (1998); *see also* RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784-1855 256 (1982) (characterizing aggregate theory as "the economic aspect of the policital [sic] and social forces that democratized the United States during the 'Age of

theory, corporations are organs of society to the extent they are creatures of the law bearing rights and duties as memorialized in state-issued charters.[47] Regardless of the theory utilized, it is clear that the intent of the Universal Declaration was to reach beyond traditional state actors and create private duties with respect to human rights.[48]

Similar responsibilities are imposed by other international human rights instruments. For example, the other two components of the International Bill of Rights, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, impose duties on individuals as well as prohibit interpretations that permit the disregard or limitation of rights contained therein by "any State, group or person."[49] Similar language ap-

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Jackson'"). Corporations are disconnected from their state moorings and viewed as private arrangements that should be free from state interference. *See, e.g.*, BLUMBERG, *supra* note 11, at 28; ROBERT HESSEN, IN DEFENSE OF THE CORPORATION 22 (1979); RALPH K. WINTER, GOVERNMENT AND THE CORPORATION 69-73 (1978). *But see* Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1648 (1982) (concluding that corporations are subject to no greater or less scrutiny and exercise of government authority than human beings). The "explanatory framework" for the corporation utilizing aggregate theory is thus the provisions of the underlying contracts themselves rather than state action resulting in the creation of an independent institution. Iwai, *supra* note 26, at 600.

47. *See* Human Rights Norms, *supra* note 1, pmbl. (defining transnational corporations and other business enterprises as organs of society). *See also* Henkin, *supra* note 45, at 25. Concession theory may be traced back to Pope Innocent IV in the thirteenth century. *See* Iwai, *supra* note 26, at 584. Concession theory as recognized in the United States was a descendant of the British legal tradition dating back to the writings of Blackstone and Coke in the seventeenth and eighteenth centuries. *See, e.g.,* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 475-76 (1765); EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 250 (1628). Concession theory has also been referred to as artificial or fictional person theory or grant doctrine. BLUMBERG, *supra* note 11, at 26. Concession theory was perhaps best summarized in Trustees of Dartmouth College v. Woodward wherein Chief Justice Marshall described a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law . . . . [and thus] possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." 17 U.S. (4 Wheat.) 518, 636 (1819). The corporation is merely a concession memorialized in a state charter, which grants the participants the right to utilize the corporate vehicle as a means by which to conduct business. *See* Janet Dine, *Human Rights and Company Law*, HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 209, 227. *See also* TOMASIC, BOTTOMLEY & MCQUEEN, *supra* note 46, at 53. The state maintains an active role only to the extent of ensuring compliance with corporate governance structures. Dine, *supra* at 227. The rights and duties possessed by corporations as "constructed entities" are separate and apart from those enjoyed by the natural persons constituting the organization. *Id. See also* BLUMBERG, *supra* note 11, at 26. This separation, as well as the maintenance of state sovereignty with respect to corporate operations, simultaneously preserves the sanctity of natural individuals while permitting them a limited degree of freedom in the methods by which they elect to conduct commercial transactions. TOMASIC, BOTTOMLEY & MCQUEEN, *supra* note 46, at 53-54.

48. *See, e.g.,* Reinisch, *supra* note 26, at 71 (stating that "the core of human rights obligations are binding on all parts of society including the non-state actors"); Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights,* 21 HUM. RTS. Q. 56, 64-68 (1999); Jordan J. Paust, *The Other Side of Right: Private Duties under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 53-54 (1992).

49. International Covenant on Civil and Political Rights, *supra* note 2, pmbl., art. 5(1) (providing that "the individual, having duties to other individuals and to the community to

pears in regional human rights instruments.[50] Other international human rights instruments are expressly directed at transnational corporations and impose specific obligations upon them.[51]

However, international legal personality entails not only duties, but also an accompanying set of rights.[52] Many existing international human rights instruments recognize the interconnectedness of duties and rights with respect to transnational corporations by either expressly granting specific rights or being capable of interpretation as to include such rights. For example, the Universal Declaration of Human Rights not only creates duties for every individual and organ of society but also grants rights to such individuals and organs. The Universal Declaration's repeated use of the term "everyone" without limitation to human beings serves to

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which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant" and prohibiting interpretations that imply "for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant"). *See also* International Covenant on Economic, Social and Cultural Rights, *supra* note 2, pmbl., art. 5(1) (providing that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant" and prohibiting interpretations that imply "for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant").

50. *See, e.g.*, African Charter on Human and Peoples' Rights arts. 27-29, June 27, 1981, 21 I.L.M. 58 ("Every individual shall have duties towad his family and society, the State and other legally recognized communities and the international community"); American Convention on Human Rights, art. 28(3)(a), July 18, 1978, OAS Treaty Series No. 36, at 1, OAS Off. Rec. OEA/Ser4v/II 23 ("No provision of this Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein"); American Declaration of the Rights and Duties of Man, pmbl., Apr. 1948, O.A.S. Res. Res. XXX, OEA/Ser.L.V/II.82, at 17 (stating that "juridical and political institutions . . . have as their principal aim the protection of the essential rights of man").

51. *See supra* notes 3-4 and accompanying text. *But see* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (discussing the refusal of the U.N. Diplomatic Conference on the Establishment of an International Criminal Court to adopt a French proposal to grant the Court jurisdiction over transnational corporation pursuant to Article 23 of the Rome Statute).

52. Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259, 262 (Michael K. Addo ed., 1999). *See also* Ramasastry, *supra* note 45, at 96. The interconnectedness of rights and duties in international human rights law is perhaps no better expressed than in the American Declaration of the Rights and Duties of Man, which provides, in part, "[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty." American Declaration of the Rights and Duties of Man, *supra* note 50, pmbl.

grant numerous rights to human beings as well as transnational corporations.[53]

Several provisions of the Universal Declaration are too broad to be limited to human beings. For example, the right to receive and impart information and ideas through the media and protect moral and material interests arising from scientific, literary or artistic productions applies to "everyone".[54] The Universal Declaration does not distinguish between human beings and corporations in the recognition of these rights. Exclusion of corporations from these rights would be an unduly restrictive interpretation to the extent that much of the information imparted to the general public has a corporate source. Similarly, it could not have been the intent of the drafters to exclude recognition and protection of corporate interests in scientific, literary and artistic productions.

The Universal Declaration also grants everyone the right to own property.[55] However, unlike the rights to freedom of expression and protection of ideas, Article 17 recognizes property rights arising from sole ownership as well as "in association with others."[56] This language clearly includes transnational corporations to the extent they are viewed as associations of people utilizing aggregate theory. Corporations are also considered persons to the extent they are designated as such by applicable national legal systems.[57]

The other two components of the International Bill of Rights similarly grant human rights to transnational corporations. The International Covenant on Civil and Political Rights grants a wide variety of freedoms and protections to "individuals,"[58] "persons"[59]

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53. *See* Universal Declaration of Human Rights, *supra* note 2, arts. 2, 6, 10, 11, 12, 18 (stating that everyone is entitled to the rights and freedoms set forth in the Declaration without distinctions of any kind and that everyone has the rights to recognition as a person, a "fair and public hearing by an independent and impartial tribunal" and the presumption of innocence in criminal matters and freedom of thought and conscience and the rights to be free from *ex post facto* laws and "arbitrary interference" with privacy).

54. *Id.* arts. 19, 27(2) ("Everyone with the right to freedom of opinion and expression . . . to seek, receive and impart information and ideas through any media and regardless of frontiers" and the right to "the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.").

55. *Id.* art. 17(1-2) ("Everyone has the right to own property alone as well as in association with others . . . . [and] [n]o one shall be arbitrarily deprived of his property.").

56. *Id.* art. 17(1).

57. *Id.* art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by the law.").

58. International Covenant on Civil and Political Rights, *supra* note 2, art. 2 (stating that individuals are entitled to the rights and freedoms set forth in the Covenant without distinctions of any kind).

59. *Id.* arts. 2(3)(a-b), 14(1), 26 (stating that persons have a right to an effective remedy for violations of the rights set forth in the Covenant to be determined by "competent judicial, administrative or legislative authorities," the right to be equal before the courts,

and "everyone"[60] and further provides that "no one"[61] shall be subjected to certain actions without distinguishing between human beings and transnational corporations. In a manner similar to the Universal Declaration, the International Covenant on Civil and Political Rights is broader than necessary to be solely applicable to human beings. For example, the right to receive and impart information and ideas through the media applies to all persons without a basis for distinguishing between human beings and corporations.[62] The same conclusion applies to the right to benefit from the protection of "moral and material interests resulting from any scientific, literary or artistic production" set forth in the International Covenant on Economic, Social and Cultural Rights.[63] The Covenant provides that this right is applicable to "everyone" without distinction between human beings and juridical persons, and there is no rational basis upon which to grant human beings such protections while denying the same to transnational corporations.[64]

Similar interpretations exist with respect to regional human rights instruments. For example, the American Declaration of the Rights and Duties of Man specifically refers to "human beings"[65] but then proceeds to grant numerous rights to "every person".[66] These rights include freedom of expression and dissemination of ideas through any medium, which applies to all persons regardless of their nature.[67] The American Declaration also includes transna-

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the right to "a fair and public hearing by a competent, independent and impartial tribunal established by law" with respect to criminal matters and the right to equal protection of the law).

60. *Id.* arts. 14(2-3, 5), 16, 17(2) (providing everyone with the presumption of innocence in criminal matters, minimum guarantees in such proceedings, appeal of convictions and sentences, the right to recognition as a person and the right to protection against arbitrary or unlawful interference with privacy).

61. *Id.* arts. 14(7), 15, 17(1) (providing no one shall be subjected to double jeopardy, the operation of *ex post facto* laws or "arbitrary or unlawful interference with his privacy").

62. *Id.* art. 19(2) (granting "[e]veryone . . . the right to freedom of expression . . . includ[ing] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice").

63. International Covenant on Economic, Social and Cultural Rights, *supra* note 2, art. 15(1)(c) (recognizing the right of "everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production").

64. *Id.* art. 15(1).

65. American Declaration of the Rights and Duties of Man, *supra* note 50, art. 1 ("Every human being has the right to life, liberty and the security of his person.").

66. *Id.* arts. 2, 5, 10, 17-18, 23, 26 (granting "all persons" equality before the law, the right to protection from attacks upon his privacy, the inviolability of correspondence, the right to be recognized as a person, resort to the courts for the purpose of protecting his legal rights, the right to own private property and the presumption of innocence, the right to a "an impartial and public hearing" and freedom from "cruel, infamous or unusual punishment" in criminal matters).

67. *Id.* art. 4 ("Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.").

tional corporations to the extent they are viewed as associations of people pursuant to aggregate theory.[68]

The implementation of the American Declaration through the American Convention on Human Rights does not alter this conclusion. Although the American Convention specifically defines persons as human beings,[69] it simultaneously grants rights to "everyone"[70] and "anyone"[71] and prohibits certain conduct to which "no one" shall be subjected.[72] This specific reference to human beings is furthered qualified by limitations imposed "by the rights of others and by the security of all."[73] These other persons and the "all" whose security is to be preserved are unidentified and thus may include not just other human beings but transnational corporations. The American Convention also includes freedom of expression and dissemination of ideas through any medium in which no distinction is made between human beings and corporations.[74] The American Convention also includes transnational corporations through its recognition of associations of persons.[75]

The European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes a wide variety of rights enjoyed by "everyone"[76] while simultaneously prohibiting certain conduct to which "no one" shall be subjected.[77] For example, the European Convention recognizes freedom of expression and dissemination of ideas through any medium without distinction be-

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68. *Id.* art. 22 ("Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a . . . economic . . . nature.").

69. American Convention on Human Rights, *supra* note 50, art. 1(2).

70. *Id.* arts. 11(1-3), 21(1), 25(1) (granting "everyone" the right to privacy, the right to use and enjoyment of property and recourse to a "competent court or tribunal" in the event of a violation).

71. *Id.* art. 14(1) (granting "anyone" the right to reply or make corrections to erroneous information disseminated by communications outlets).

72. *Id.* arts. 9, 21(2) (providing that "no one" shall be convicted of a crime on the basis of an ex post facto application of the law or shall be deprived of property "except upon payment of just compensation, for reasons of public utility or social interest").

73. *Id.* art. 32(2).

74. *Id.* art. 13(1) ("Everyone has the right to freedom of thought and expression . . . includ[ing] freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.").

75. *Id.* art. 16(1) ("Everyone has the right to associate freely for . . . economic . . . purposes.").

76. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6(1-3), 8(1), Sept. 3, 1953, 213 U.N.T.S. 222 (stating that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" with respect to the determination of civil rights and criminal charges, the presumption of innocence and minimum procedural protections in criminal matters, the right to privacy and the right to an "effective remedy" for violations of the Convention).

77. *Id.* art. 7(1) (providing that "[n]o one" shall be convicted of a crime on the basis of an ex post facto application of the law).

tween human beings and corporations.[78] States are required to undertake measures to "secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention";[79] Any doubt as to the applicability of these protections to transnational corporations is eliminated by Article 34, which grants standing to file a complaint to "any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention".[80] The European Court of Human Rights has characterized corporations as non-governmental organizations and has accepted complaints from such entities alleging a variety of violations.[81]

In a manner similar to the American Convention, the African Charter on Human and Peoples' Rights makes a distinction between human beings and other persons.[82] However, it then proceeds to grant numerous rights to "individuals" without distinction between human beings and other types of persons.[83] The African Charter also includes transnational corporations to the extent they possess rights to disseminate opinions[84] and are viewed as associations of persons.[85]

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78. *Id.* art. 10(1) ("Everyone has the right to freedom of expression . . . includ[ing] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers,").

79. *Id.* art. 1.

80. *Id.* art. 34.

81. *See, e.g.*, Pressos Compania Naveira S.A. v. Belgium, 21 E.H.R.R. 301 (1996) (Article 6 right to fair trial); Dombo Beheer v. Netherlands, 18 E.H.R.R. 213 (1994) (Article 6 right to fair trial); Sunday Times v. United Kingdom No. 2, 14 E.H.R.R. 229 (1992) (Article 10 freedom of expression); Observer & The Guardian v. United Kingdom, 14 E.H.R.R. 153 (1992) (Article 10 freedom of expression); Pine Valley Develops. Ltd. v. Ireland, 14 E.H.R.R. 319 (1991) (Article 6 right to fair trial); Autronic AG v. Switzerland, 12 E.H.R.R. 485 (1990) (interpreting "everyone" to include natural and legal persons for purposes of Article 10 freedom of expression); Groppera Radio AG v. Switzerland, 12 E.H.R.R. 321 (1990) (Article 10 freedom of expression); Mrkt. Int'l Verlag GmBH v. Germany, 12 E.H.R.R. 161 (1989) (Article 10 freedom of expression); Sunday Times v. United Kingdom No. 1, 2 E.H.R.R. 245 (1979) (Article 10 freedom of expression); Naviflora Sweden v. Sweden, Application No. 14369/88, (1993) 15 E.H.R.R. 6 (in which the European Commission on Human Rights upheld a complaint that a search of business premises constituted intrusion into the private affairs and correspondence of a corporation in violation of Article 8). *See also* Addo, *supra* note 29, at 194-95 (discussing the application of the human rights protections contained within the European Convention to transnational corporations).

82. African Charter on Human and Peoples' Rights, *supra* note 50, art. 4 (stating that "[h]uman beings are inviolable . . . [and] shall be entitled to respect for [their lives] and . . . integrity").

83. *Id.* arts. 2, 3(2), 7(1-2) (granting "individuals" entitlement to the rights set forth therein "without distinctions of any kind", equal protection of the law, the right to have one's cause heard, the presumption of innocence and "the right to be tried within a reasonable time by an impartial court or tribunal" in criminal cases and the right to be free from *ex post facto* laws).

84. *Id.* art. 9(1-2) (granting "[e]very individual" the right to receive information and disseminate opinions).

85. *Id.* art. 10(1) (granting "[e]very individual" the right to free association).

C. National Legal Systems

1. The U.S. Legal System

Despite the previously-noted uncertainty in U.S. constitutional and statutory law, there has been a steady trend in judicial recognition of corporate legal personality dating back to the nineteenth century. The U.S. Supreme Court's initial foray into this field concerned the issue of whether corporations were citizens.[86] The Court addressed the issue of whether corporations were persons in the latter half of the nineteenth century. The Court pronounced in *Santa Clara County v. Southern Pacific Railroad* that it did not wish to entertain argument with respect to applicability of the Equal Protection Clause of the Fourteenth Amendment to corporations as such applicability was settled law.[87] Although the exact legal basis for this pronouncement remains unclear, this conclusion may have had its genesis four years earlier in the *Railroad Tax Cases* in which a federal circuit court applied the Equal Pro-

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86. *See, e.g.*, Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 88 (1809) (concluding a corporation was not a citizen within the meaning of the Constitution for purposes of federal diversity jurisdiction but rather was a "mere creature of the law, invisible, intangible, and incorporeal"). The specific constitutional clause at issue in *Deveaux* was the grant of jurisdiction to federal courts to hear cases or controversies between citizens of different states. U.S. CONST. art. III, § 2, cl. 1. According to Chief Justice Marshall, "citizens" described only "the real persons who come into court, in this case, under their corporate name." *Deveaux,* 9 U.S. (5 Cranch), at 91. The twin prongs of Justice Marshall's opinion were recognition of the corporation as an entity dating back to Coke and Blackstone combined with an associational view relative to shareholders to the extent necessary to sustain corporate rights to sue and be sued in federal courts utilizing diversity jurisdiction. *See* BLUMBERG, *supra* note 11, at 32-33. *But see* Bank of Augusta v. Earle, 38 U.S. 519 (1839) (reaffirming the conclusion that a corporation was a "mere creature" of the law without a "legal existence out of the boundaries of the sovereignty by which it was created" but refusing to endorse the associational theory advanced by Justice Marshall, perhaps lest equation of corporations with their shareholders threaten the concept of limited liability). *Id.* at 554, 574. *See* BLUMBERG, *supra* note 11, at 34. Blumberg bases his conclusion upon the relative newness of the concept of limited liability at the time of the Court's opinion in *Earle* and language in Chief Justice Taney's opinion stating:

> [if] members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner . . . [and] be liable to the whole extent of [their] property for the debts of the corporation.

Earle, 38 U.S. at 586.

The specific constitutional clause at issue in *Earle* was the Privileges and Immunities Clause, which states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. *See also* Louisville, Cincinnati & Charleston Railroad Co. v. Letson, 43 U.S. 497 (1844) (deeming corporations to be citizens of the states in which they were incorporated for purposes of diversity jurisdiction). *But see* Paul v. Virginia, 75 U.S. 168 (1868) (refusing to apply the Privileges and Immunities Clause to state regulation through the Fourteenth Amendment).

87. 118 U.S. 394, 396 (1886).

tection Clause to corporations based upon a constitutional status similar to human beings.[88] Twenty-two years later, in *Southern Railway Co. v. Greene,* the Court affirmed *Pembina,* but its recitation of the holding in that case omitted the language characterizing corporations as "merely associations of individuals."[89] Rather, corporations could stand alone as constitutionally empowered persons utilizing real entity theory.

The Court also has a long history regarding corporate entitlement to the protections and guarantees set forth in the Bill of Rights. In *Hale v. Henkel,* the Court held that corporations were persons subject to the Fourth Amendment protection against unreasonable search and seizure.[90] The persons comprising such entities did not surrender their right to be free from such intrusions merely by electing to conduct their business relations utilizing the

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88. 13 F. 722, 744 (C.C.D. 1882), *appeal dismissed as moot*, San Mateo County v. S. Pac. R.R. Co., 116 U.S. 138 (1885). The majority opinion held that "[t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value." *Id.* at 747. Some commentators have focused on this statement as an endorsement of an associational view of corporations rather than a grant of corporate personhood. *See, e.g.,* Krannich, *supra* note 14, at 77; Morton J. Horowitz, *Santa Clara Revisited, The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 183 (1985) (equating corporate interests for constitutional purposes with shareholder interests). Further support for this interpretation may be found in the Court's holding two years later in *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania* in which the Court not only affirmed its previous conclusion in *Santa Clara County* but also determined that corporations were entitled to the Fourteenth Amendment's due process protections as "merely associations of individuals." 125 U.S. 181, 189 (1888). *But see* Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 592 (1896) (concluding that it was "settled" that corporations were persons within the meaning of the Equal Protection and Due Process Clauses of the U.S. Constitution).

89. 216 U.S. 400, 412 (1910). This omission has been characterized as a rejection of the associational theory of constitutional personhood. *See* BLUMBERG, *supra* note 16, at 37.

90. 201 U.S. 43, 71 (1906). The search and seizure clause of the Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizure, shall not be violated." U.S. CONST. amend. IV. However, the Court refused to hold that corporations were "persons" for purposes of the Fifth Amendment's self-incrimination clause. *Hale,* 201 U.S. at 70. The self-incrimination clause of the Fifth Amendment provides "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Such a result would be, in the Court's view, a "strange anomaly" contrary to the state's exercise of sovereignty to inquire through requests for production of documents how entities created pursuant to its own laws had been employed or abused. *Hale*, 201 U.S. at 74. Subsequent decisions have affirmed this conclusion. *See, e.g.,* Bellis v. United States, 417 U.S. 852, 889-90 (1974); United States v. White, 322 U.S. 694, 698 (1944) (stating that the privilege to be free from self-incrimination is "essentially a personal one, applying only to natural individuals"); Wilson v. United States, 221 U.S. 361, 379-86 (1911). The result is different in other common law states. For example, corporations possess the right to be free from self-incrimination in the United Kingdom, Canada and New Zealand. *See, e.g.,* Triplex Safety Glass Co. v. Lancegaye Safety Glass, Ltd., (1939) 2 K.B. 395 (U.K.); Reg. v. Bank of Montreal, (1962) 36 D.L.R.2d 45 (Can.); New Zealand Apple & Pear Mktg. Co. v. Master & Sons, Ltd., [1986] 1 N.Z.L.R. 191 (N.Z.).

corporate form.[91] Although the Court, indeed a single Justice, reached two different results regarding the same "person" with respect to two different amendments, this apparent conflict may be reconciled on the basis that protection from unreasonable search and seizure pursuant to the Fourth Amendment is justified by associational theory. Shareholders should not be deemed to have surrendered their Fourth Amendment rights on the basis of their choice of business entity. By contrast, the Court's refusal to extend the self-incrimination privilege to corporations did not conflict with the personal interests of shareholders to be protected by such privilege.[92] The search and seizure portion of the Court's opinion has been upheld in subsequent decisions.[93]

The Court's opinion in *Marshall v. Barlow's, Inc.* is particularly instructive with respect to two aspects of corporate legal personality. First, the opinion traces the right of businesses to be free from warrantless searches back to the colonial period immediately preceding the American Revolution.[94] Thus, the inclusion of businesses within the meaning of "people" protected by the Fourth Amendment's warrant requirement is not a late twentieth century interpretation but rather the intent of the Founding Fathers.

Second, the opinion recognizes that businesses possess rights with respect to their commercial premises identical to those of human beings with respect to their residences, specifically, to conduct their affairs "free from unreasonable official entries."[95] Warrantless searches of business premises jeopardize this right to the

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91. *Hale,* 201 U.S. at 76. ("A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."). .

92. *See* BLUMBERG, *supra* note 11, at 41.

93. *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986) ("Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe."); Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) (holding that the warrant requirement of the Fourth Amendment is applicable to commercial buildings as well as private residences); See v. Seattle, 387 U.S. 541, 543 (1967) (holding that the right of a businessperson to be free from "unreasonable official entries upon his private commercial property" is violated to the extent regulatory authorities can enter such property "without official authority evidenced by a warrant"); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967) (concluding that the general prohibition upon warrantless searches is applicable to commercial premises).

94. *Marshall*, 436 U.S. at 311-12. The Court found that the "particular offensiveness" of the general warrant during the colonial era was "acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary measures that most irritated the colonists," including the Stamp Act of 1765, the Townshend Revenue Act of 1767 and the Tea Act of 1773. *Id.* at 311, 311 n.7. According to the Court, the warrant requirement "grew in large measure" from the experiences of merchants with these measures. *Id.* at 311. As a result, it was "untenable" to conclude that the prohibition upon warrantless searches was not intended to protect businesses as well as private residences. *Id.* at 312.

95. *Id.* at 312.

same degree as such searches jeopardize the rights of human beings to the security of their residences.[96] The Court also equated businesses with "individuals" and "persons" in its conclusion that the purpose of the Fourth Amendment's warrant requirement is "to safeguard the privacy and security of individuals against arbitrary invasions of their property by governmental officials" and that the privacy interests of "persons" suffer as a result of searches conducted without the benefit of a warrant.[97] Corporations are thus the legal equivalent of human beings with respect to the Fourth Amendment's prohibition upon unreasonable search and seizure.

The Court has also addressed corporate personhood in the context of the prohibition upon double jeopardy contained in the Fifth Amendment.[98] The prohibition upon double jeopardy utilizes the term "person" in the same manner as the Self-Incrimination Clause, which it immediately follows in the Constitution. The Double Jeopardy Clause also utilizes the term "jeopardy of life or limb," neither of which is possessed by corporations, thus leaving the impression that such rights are personal in a manner similar to the Self-Incrimination Clause. Given these similarities and the Court's holding in *Hale*, it would be fair to assume that corporations are not persons for purposes of the Double Jeopardy Clause. Nevertheless, the Court has concluded on more than one occasion that the clause does in fact protect corporations from double jeopardy.[99]

Corporations have also been recognized as possessing speech rights pursuant to the First Amendment.[100] Corporate speech rights had their judicial origin in numerous cases extending First Amendment protection to commercial speech, which the Court defined as "expression related solely to the economic interests of the

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96. *Id.*

97. *Id* at 312.

98. The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

99. *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (noting that the prohibition upon double jeopardy applies to corporations in order to shield them from " 'embarrassment, expense and ordeal' ") (citation omitted); Am. Tobacco Co. v. United States, 328 U.S. 781 (1946). According to critics, the Court has never adequately explained the theoretical basis for these decisions and their difference from the holding in *Hale*. *See, e.g.*, Krannich, *supra* note 14, at 97-98. Particularly unpersuasive to critics is the Court's conclusion that policies justifying the prohibition with respect to natural persons--specifically, protection from "embarrassment, expense and ordeal"--were equally applicable to corporations. *Id.* at 97 n.242.

100. The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

speaker and its audience."[101] These decisions served as the foundation for subsequent opinions granting speech rights to corporations. For example, the majority opinion in *First National Bank of Boston v. Bellotti* found resolution of the corporate personality debate unnecessary in order to strike down a Massachusetts statute restricting the use of corporate monies to influence state initiatives.[102] According to Justice Powell, the question of what the First Amendment speech clause was intended to protect was far more important than the identity of the speaker.[103] Society's interest in the preservation of the "right of public discussion" guaranteed by the First Amendment prevented Massachusetts from barring certain participants from this discussion.[104] This conclusion abrogated any need for addressing corporate personality in the context of the First Amendment.[105] Subsequent opinions have utilized this approach.[106]

Later opinions have recognized that the unequal power possessed by corporations may skew Justice Powell's marketplace of

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101. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (overturning a regulation issued by the New York Public Service Commission prohibiting advertising by electric utilities) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (striking down a Virginia statute defining unprofessional conduct of state licensed pharmacists to include advertising the price of drugs available only by prescription)); *see also* Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977) (overturning a disciplinary rule prohibiting advertising by attorneys of prices for "routine legal services"). *But see* Friedman v. Rogers, 440 U.S. 1, 11 (1979) (upholding a provision of the Texas Optometry Act prohibiting the practice of optometry utilizing a trade name on the basis that the Act furthered the state's interest in protecting the public from the deceptive use of trade names); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (rejecting a claim by an attorney that the solicitation of clients was protected speech not subject to the disciplinary provisions of Ohio's Code of Professional Responsibility).

102. 435 U.S. 765 (1978).

103. *Id.* at 776 (stating that the proper issue for resolution was not "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons [but rather] . . . whether [the Massachusetts legislation] abridges expression that the First Amendment was meant to protect").

104. *Id.* at 792.

105. Justice Powell did note that the dissenting opinions of Chief Justice Rehnquist and Justice White (with whom Justices Brennan and Marshall concurred) upholding the Massachusetts statute on the basis of the artificial entity theory and thereby entitling corporations to only those rights granted by the state was "extreme." *Id.* at 778 n.14, 792. Justice Powell subsequently retracted this characterization nine years later. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

106. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (holding that the identity of the speaker was not relevant to the determination of whether speech was protected, and corporations as well as their human counterparts contributed to the " 'discussion, debate and the dissemination of information and ideas' that the First Amendment seeks to foster") (citation omitted); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 544 (1980) (striking down a prohibition upon discussion of political issues contained in billing envelopes on the basis that the prohibition abridged protected speech and improperly limited public access to information and ideas).

ideas at the expense of other less powerful participants.[107] The Court's post-*Bellotti* holdings have been described as a careful balancing act designed to provide equal access to the public forum while maintaining some semblance of balance between the speakers.[108] Nevertheless, it is incontestable that corporations have a right to participate in the marketplace of ideas created by the First Amendment regardless of whether or how their legal personalities are described.

There are several conclusions to be reached as a result of this survey of corporate personhood in the United States. First, the U.S. Supreme Court has recognized that corporations are separate from their founders, shareholders, managers, and directors. This recognition of separate personality is accompanied by a concurrent grant of associated rights. The Court's conclusions are not without critics.[109] However, corporate personhood has been largely assumed for the past 120 years. The current debate, to the extent it

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107. *See, e.g.*, Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990) (noting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" in upholding a law prohibiting spending in connection with state elections by nonprofit corporations comprised of for-profit corporations); Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 257-59 (1986) (opining that a federal law prohibiting all corporate spending in connection with federal elections may have been constitutional if it only applied to for-profit corporations due to the "corrosive influence of concentrated corporate wealth").

108. Krannich, *supra* note 14, at 99.

109. *See, e.g.*, BLUMBERG, *supra* note 11, at 44-45 (contending that the Constitution is largely irrelevant to the U.S. Supreme Court's conclusions with the exception of search and seizure law pursuant to the Fourth Amendment as the Court has expanded the meaning of the term "person" beyond the framers' intent or the text of the document). This alleged lack of basis in either the text of the document or the framers' intent has been criticized as "a foundational problem in corporate constitutional law, for the Court has granted corporations constitutional rights without engaging in the preliminary inquiry of whether a corporation is entitled to them." Krannich, *supra* note 14, at 62. Krannich has also criticized the granting of rights to corporations on the basis that U.S. constitutional law is individualistically oriented. As legal actors, corporations are entitled to recognition and protection. However, the U.S. legal system is ill-suited to make this determination due to its traditional focus on individual rights. *Id.* at 66; *see also* Douglas Litowitz, *The Corporation as God*, 30 IOWA J. CORP. L. 501, 503 (2005) (criticizing the many judicial incarnations of corporations as " 'a set of contractual obligations,' " a " 'fictional person,' " and " 'an incorporeal, artificial creature of the law' "); Mark, *supra* note 12, at 1472 (concluding that "[t]he irreducible unit of the common law" existing at the time of the drafting of the Constitution was the individual human being); Rivard, *supra* note 45, at 1465-66 (criticizing U.S. Supreme Court jurisprudence with respect to the issue of constitutional personhood for corporations as utilizing only "pragmatic concerns," following "a result-oriented approach," and addressing corporate personhood as "a conclusion, not a question"); Graver, *supra* note 15, at 243 (concluding that "[t]he Framers thought they were bestowing rights on human beings" based upon the application of original construction); Note, *supra* note 41, at 1747, 1751-52, 1754, 1759 (criticizing judicial opinions addressing corporate personality as lacking "philosophical support," "confused," "haphazard," "result oriented," and reflecting "fundamental disorganization").

exists, "relate[s] only to the details of the superstructure erected on a universally accepted foundation."[110]

2. Other National Legal Systems

Corporate legal personality is well-established in national legal systems outside of the United States. For example, corporate personality is accepted throughout common law systems. Corporate personality dates back to the late nineteenth century in the United Kingdom. In *Salomon v. Salomon & Company*, the House of Lords established the principle that a company was a separate legal person from its creator and controlling shareholder and was not merely such person's agent.[111] This principle has been followed in subsequent cases despite attempts to evade the holding in *Salomon* to reach a "more just" resolution.[112] More recently, the Companies Act of 1985 permitted the creation of entities with legal personalities separate from its members.[113] These entities possess numerous rights separate and apart from their creators, including the acquisition, utilization, and transfer of property, and protection of their rights through the initiation.[114]

Other common law jurisdictions have followed the holding in *Salomon* in their legislation and judicial precedents. Canadian courts have established separate corporate personality except in the instance where the company is "a mere 'agent' or 'puppet' of its controlling shareholder."[115] This recognition entitles corporations

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110. BLUMBERG, *supra* note 11, at 47.

111. [1897] A.C. 22, 42 (H.L.) (appeal taken from Eng.) (U.K.); *see also* Rainham Chem. Works, Ltd. v. Belvedere Fish Guano Co., [1921] 2 A.C. 465, 475-76, 501 (H.L.) (appeal taken from Eng.) (U.K.); Janson v. Driefontein Consol. Mines, Ltd., [1902] A.C. 484, 497-98, 501 (H.L.) (appeal taken from Eng.) (U.K.).

112. *See, e.g.*, *In re* A Company, (1985) 1 B.C.C. 99421, 99425 (C.A.) (U.K.) (concluding that "the court will use its powers to pierce the corporate veil if it is necessary to achieve justice"); Macaura v. N. Assurance Co., [1925] A.C. 619 (P.C.) (appeal taken from N. Ir.) (U.K.) (denying recovery for damage to company property as the result of a fire pursuant to insurance policies issued in the name of the owner of the company). *But see* Adams v. Cape Indus. plc, [1990] B.C.C. 786, 822 (C.A.) (U.K.) (rejecting the contention that the holding in *Salomon* could be disregarded on the basis that it may lead to an unjust result and permitting disregard of a company's separate legal personality only when the company serves as " 'a mere façade concealing the true facts' ") (citation omitted); Woolfson v. Strathclyde Reg. Council, (1979) 38 P. & C.R. 521 (H.L.) (U.K.) (permitting disregard of the separate legal personality of a company only when it is a "facade").

113. Companies Act, 1985, c. 1, § 1(2)(a) (U.K.).

114. For a summary of the rights granted to companies as a result of the Companies Act of 1985, see Ben Pettet, *Public Company Law in the United Kingdom*, *in* CORPORATIONS AND PARTNERSHIPS 75 (Kluwer L. Int'l ed., 1995).

115. Kosmopoulos v. Constitution Ins. Co., [1987] S.C.R. 1, 10 (Can.); *see also* Wandlyn Motels, Ltd. v. Commerce Gen. Ins. Co., [1970] S.C.R. 992 (Can.); Meadow Farm Ltd. v. Imperial Bank of Can., [1922] 66 D.L.R. 743 (Alta. C.A.); Associated Growers of B.C. Ltd. v. Edmunds, [1926] 1 W.W.R. 535 (B.C.C.A.); Fidelity Devs., Inc. v. Chief of Res., [1979]

to numerous rights traditionally extended to human beings pursuant to the Canadian Charter.[116] The House of Lords' opinion in *Salomon* is also a hallmark of Australian company law, which provides that, upon completion of incorporation, a corporation is a legal entity separate and independent from its creators, investors, directors, and managers.[117] This separate and independent entity possesses the same legal capacity as human beings.[118] Applicable Australian precedent continues this equation in likening the corporate body to the human body.[119] The same result holds true in New Zealand pursuant to the Companies Act of 1993 and applicable case law.[120] In South Africa, corporations acquire separate rights and duties upon registration of the memorandum establishing the company.[121] South African corporations are also entitled to the fundamental rights set forth in the Constitution "to the extent required by the nature of the company and the nature of the rights concerned."[122] Similarly, Botswana law relies upon *Salomon* in

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W.W.R. 151 (N.W.T.); White v. Bank of Toronto, [1953] O.R. 479 (O.C.A.); Carter v. Fournier, [1937] 75 Que. S.C. 530 (C.S. Qué.); R. v. Meilicke, [1938] 3 D.L.R. 33 (Sask. C.A.).

116. *See, e.g.*, Thomson Newspapers Ltd. v. Canada, [1990] 1 S.C.R. 425 (Can.) (discussing Sections 11 and 13 fair trial); Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 971 (Can.) (discussing Section 2(b) freedom of speech); Ford v. Quebec, [1988] 2 S.C.R. 712, 766-67 (Can.) (discussing Section 2(b) freedom of speech); Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (Can.) (discussing Section 8 privacy).

117. Corporations Act, 2001, Cth., § 119 (Austl.).

118. *Id.* § 124(1).

119. H.L. Bolton (Eng'g) Co. v. T.J. Graham & Sons. (1957) 1 Q.B. 159 (U.K.) in which Lord Denning stated:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does.

Id. at 172. However, Australian jurisprudence has refused to extend every right accorded to human beings to corporations. *See, e.g.*, Envtl. Prot. Auth. v. Caltex Refining Co. (1994) 12 A.C.S.R. 452, 504 (wherein the Australian High Court refused to extend the privilege against self-incrimination to corporations); *see also* TOMASIC, BOTTOMLEY & MCQUEEN, *supra* note 46, at 59.

120. *See, e.g.*, Companies Act 1993, §§ 15, 16(1), 1993 S.N.Z. No. 105 (recognizing registered companies as separate persons from their creators, shareholders, officers, and managers and granting such companies full capacity to undertake any business, engage in any activity, or enter into any transaction); Meridian Global Funds Mgmt. Asia Ltd. v. Sec. Comm'n, [1995] 3 N.Z.L.R. 7 (P.C.); N.Z. Apple & Pear Mktg. Bd. v. Master & Sons, [1986] 1 N.Z.L.R. 191 (C.A.); Lee v. Lee's Air Farming, Ltd., [1961] N.Z.L.R. 325 (P.C.); Gordon Williams, *Public Company Law in New Zealand*, *in* CORPORATIONS AND PARTNERSHIPS 93 (Kluwer L. Int'l ed., 2005) (discussing the ability of companies registered in New Zealand to enter into contracts and commit crimes and torts, including those requiring human attributes such as intent and knowledge).

121. *See* Michele Havenga, *Public Company Law in South Africa*, *in* CORPORATIONS AND PARTNERSHIPS, *supra* note 114, at 19.

122. *Id.*; *see also* S. AFR. CONST. 1996, ch. 2, § 739 (listing twenty-seven separate rights possessed by South African citizens, including several relevant to businesses, such as equal

concluding that public companies are separate entities possessing legal personality, which permits them to acquire, hold, and transfer property, enter into contracts, and sue and be sued in their own names.[123]

Recognition of separate corporate personality is not restricted to the common law tradition. European law also recognizes separate corporate personality. For example, Article 58 of the Treaty of Rome states that "[c]ompanies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall . . . be treated in the same way as natural persons who are nationals of Member States."[124] Similar language is found in the national laws of the member states as well as those states aspiring to future membership in the European Union.[125]

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protection of the law, privacy, expression, association, citizenship, property, access to information and courts, and just administration of the laws).

123. *See* John Kiggundu, *Public Company Law in Botswana*, *in* CORPORATIONS AND PARTNERSHIPS 93 (Kluwer L. Int'l ed., 2000).

124. Treaty of Rome Establishing the European Economic Community art. 58(1), Mar. 25, 1957, 2 B.D.I.E.L. 45. "Companies or firms" are defined broadly to include all entities "constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking." *Id.* art. 58(2). For additional discussion of corporate personality in the European Union, see STEPHAN RAMMELOO, CORPORATIONS IN PRIVATE INTERNATIONAL LAW 27-29 (P.B. Carter ed., 2001).

125. For discussion of corporate personality in member states of the European Union, *see, e.g.*, Ioanna G. Anastassopoulou, *Public Company Law in Greece*, *in* CORPORATIONS AND PARTNERSHIPS 27, 46 (Kluwer L. Int'l ed., 1992) (discussing the separate personality and rights of the public company limited by shares (anonymi etairia); Józef Frackowiak, *Public Company Law in Poland*, *in* CORPORATIONS AND PARTNERSHIPS 29 (Kluwer L. Int'l ed., 1996) (discussing the separate personality and rights of the share company (spóbka akcyjna) and the limited liability company (spóbka z ograniczona odpowiedzialnościa)); Koen Geens, *Public Company Law in Belgium*, *in* CORPORATIONS AND PARTNERSHIPS 59 (Kluwer L. Int'l ed., 1997) (discussing the separate personality and rights of the public company limited by shares (naamloze vennootschap or sociéte anonyme)); Carl Henström, *Public Company Law in Sweden*, *in* CORPORATIONS AND PARTNERSHIPS 34 (Kluwer L. Int'l ed., 1995) (discussing the separate personality and rights of the public company limited by shares (aktiebolaget)); Timo Rapakko, *Public Company Law in Finland*, *in* CORPORATIONS AND PARTNERSHIPS 40 (Kluwer L. Int'l ed., 1997) (discussing the separate personality and rights of the corporation (osakeyhtiö or oy)); Dragos-Alexandru Sitaru, *Public Company Law in Romania*, *in* CORPORATIONS AND PARTNERSHIPS 54 (Kluwer L. Int'l ed., 1992) (discussing the separate personality and rights of commercial companies (including general and limited partnerships and partnerships limited by shares)). For a discussion of corporate legal personality in states aspiring to membership in the European Union, see, for example, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1988, No. 7, Item 785, art. 2(2-3), which provides that a limited responsibility society formed pursuant to Russian law is a juridical person from the moment of its government registration and possesses civil rights "necessary for the effectuation of any types of activity not prohibited by Federal laws if this is not contrary to the subject and purposes of activity specifically limited by the charter of the society," including the right to "acquire and effectuate property and personal non property rights, bear duties, and be a plaintiff and defendant in a court"). *See also* Ünal Tekinalp, *Public Company Law in Turkey*, *in* CORPORATIONS AND PARTNERSHIPS 40 (Kluwer L. Int'l ed., 1994) (discussing the separate personality and rights of commercial associations, including companies limited by shares, partnerships with limited liability, general and limited partnerships, and partnerships limited by shares).

Separate personality is also a principal feature of Asian legal systems. Corporations have separate legal personality and resultant rights in the People's Republic of China and the Republic of China.[126] A similar characterization of corporations exists in the Japanese Commercial Code, which defines companies as juridical persons whose legal capacity must be considered pursuant to the Civil Code, which in turn grants rights and imposes duties upon such persons.[127] Korean law closely tracks applicable Japanese law in its grant of personhood to all corporate forms. This recognition of personhood grants businesses specific rights, including the power to own property, enter into contracts, and sue or be sued.[128] Thai law as elaborated upon in the Public Liability Company Act and an earlier judicial opinion grants registered companies legal personality separate from that of their shareholders and directors and numerous resultant rights.[129] A similarly detailed list of rights accruing to corporations is contained in the Corporations Law of the Philippines.[130]

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126. *See* Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective Jan. 1, 2006), art. 3, *translated in* CHINA LAWS FOR FOREIGN BUSINESSES—BUSINESS REGULATION ¶13-518 (2005) (P.R.C.) (providing that a company organized pursuant to Chinese law is "an enterprise legal person which owns independent legal person property and enjoys legal person property rights"); Company Law, art. 1, Faigui Huibian (2001) (R.O.C.) (defining a company as "a corporate juristic person organized and incorporated in accordance with this law for the purpose of profit making"). However, it bears to note that no provision of Taiwanese company law specifically equates companies with human beings. *See* Neil Andrews & Angus Francis, *Company Law in Taiwan*, *in* COMPANY LAW IN EAST ASIA 219, 237 (Roman Tomasic ed., 1999).

127. *See* Shōhō [Commercial Code], Law No. 48 of 1899 as amended, art. 54 (Japan); Minpō [Civil Code], Law No. 89 of 1896 as amended, art. 43 (Japan). *See also* Stephen Bottomley, *Company Law in Japan*, *in* COMPANY LAW IN EAST ASIA, *supra* note 126, at 39, 45.

128. COMMERCIAL CODE [COMM. C.] Law No. 1000, arts. 170, 171, Jan. 20, 1962 (S. Korea) (granting legal personhood and associated rights to the partnership company (hapmyong-hoesa), the limited partnership (hapcha-hoesa), the limited company (yuhan-hoesa), and the stock company (chusik-hoesa)). Personhood is limited to the objects set forth in the organizational documents, and actions taken outside the scope of such documents are null and void. *See* Kon-Sik Kim & Choong-Kee Lee, *Public Company Law in South Korea*, *in* CORPORATIONS AND PARTNERSHIPS 42 (Kluwer L. Int'l ed., 1999). However, as Professors Kim and Lee note, the *ultra vires* doctrine has been subject to much criticism within Korea, and its effects "have been practically evaded by flexible interpretation of the objects clauses [of organizational documents] by the courts." *Id.*

129. Public Liability Company Act, B.E. § 42 (1992) (Thail.) (enumerating corporate rights to include the right to sue and be sued; obtain, utilize, mortgage, benefit from, or transfer property; borrow money; issue and trade in negotiable instruments; acquire, hold interests in, and manage other companies; and "engage in any other operation which a natural person may be able to do"); *see also* Case No. 734 [Sarn Dika] [Supreme Court] (1958) (Thail.) (recognizing the separate legal personhood of public liability companies); Saowanee Asawaroj & Eugene Clark, *Thai Company Law*, *in* COMPANY LAW IN EAST ASIA, *supra* note 126, at 343, 350-51.

130. CORPORATION CODE, B.P. Blg 68, §§ 36-44 (1980) (Phil.) (granting corporations the right to sue and be sued, engage in trade, sell or dispose of assets, invest funds, enter into contracts, and exercise powers that "may be essential or necessary to carry out its purpose or purposes as stated in the articles of incorporation"); *see also* Geoffrey Nicoll, *The Corporations Law of the Philippines*, *in* COMPANY LAW IN EAST ASIA, *supra* note 126, at 507,

Latin and South American legal systems also recognize corporate personality. For example, the Mexican *sociedad anónima* bears many similarities to corporations in the United States, including a legal existence separate from its shareholders, directors, and managers and the rights to own real estate, transact business and sue or be sued in its own name.[131] Similarly, Argentina's *sociedad anónima* possesses full and separate legal personality upon completion of the formation process.[132] Venezuelan law provides that the *compañia anonima* is regarded as an artificial person with a separate existence from its shareholders, directors, and officers and the capacity to exercise rights in the same manner as natural persons from the moment of its addition to the National Commercial Registry.[133] By contrast, Uruguay does not specifically address legal personality in its Commercial Code, but nevertheless corporations have been granted separate status from that of their members in practice.[134]

There are several conclusions to be reached as a result of this survey of corporate personhood in national legal systems outside of the United States. First, there is significant international support for recognition of corporate personality separate and apart from founders, shareholders, managers, and directors. Second, this recognition is accompanied by a concurrent grant of rights. Although some jurisdictions may not recognize corporate rights to the same degree as the United States, there is significant international authority declaring corporations to be the near equivalent of human beings. This authority, when combined with U.S. law, supports the conclusion that corporate legal personality is an established inter-

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515-16. Other Asian legal systems do not explicitly recognize corporations as persons or have not addressed the issue in substantive detail. *See, e.g.*, COMPANY LAW art. 7, ¶ 6 (1995) (Indon.) (granting limited liability companies status as legal entities but not explicitly characterizing them as separate persons). However, commentators have noted that, in practice, Indonesian limited liability companies maintain a separate existence from their members and managers and are regarded as possessing some of the same rights as human beings, including the right to own property and act independently. *See* Peter Little & Bahrin Kamarul, *Company Law in Indonesia*, *in* COMPANY LAW IN EAST ASIA, *supra* note 126, at 475, 482. By contrast, the issue appears to have received little consideration in Vietnam's Law on Private Enterprise adopted in 1990 or subsequent jurisprudence. Rather, natural and legal persons are deemed to derive their respective capacities through the state. *See* John Gillespie, *Corporations in Vietnam*, *in* COMPANY LAW IN EAST ASIA, *supra* note 126, at 297, 309. Nevertheless, this approach does distinguish between natural and legal persons for purposes of assessing liability and determining property ownership. *Id.*

131. *See* Ley General de Sociedades Mercantiles [Business Organizations Law], arts. 84-89, *as amended*, Diario Oficial de la Federación [D.O.], 6 de Juno de 1992 (Mex.); *see also* WILLIAM E. MOOZ, JR., AN INTRODUCTION TO DOING BUSINESS IN MEXICO 65 (1995).

132. *See* Paul Van Nieuwenhove, *Company Law in Argentina*, *in* CORPORATIONS AND PARTNERSHIPS 25 (Kluwer L. Int'l ed., 1993).

133. *See* Araque Reyna De Jesús Sosa Viso & Pittier, *Doing Business in Venezuela*, *in* BUSINESS ORGANIZATIONS 7-5 to 7-6 (Juris Publ'g. ed., 1999).

134. *See* Ricardo Olivera García & Alberto J. Foderé, *Company Law in Uruguay*, *in* CORPORATIONS AND PARTNERSHIPS 21 (Kluwer L. Int'l ed., 1997).

national tradition that supports its recognition in human rights instruments.

V. A PROPOSED STANDARD FOR RECOGNIZING CORPORATE HUMAN RIGHTS

A. Introduction

Although recognized as separate persons by corporate theory, international human rights instruments ,and national legal systems, corporations should not be equated to their human counterparts. This section of the article proposes a standard for the determination of whether specific freedoms and protections set forth in human rights instruments should be extended to transnational corporations. This standard initially poses the question of whether the recognition of a specific human right as applicable to transnational corporations benefits human beings. The second part of this standard requires equivalence of the reasons for granting a specific right to human beings and its extension to transnational corporations.

B. The Non-Equivalence of Transnational Corporations and Human Beings

It is tempting to equate transnational corporations with human beings. Identification of corporations as persons "gives rise to an association between the attributes of a person and those of the corporation." [135] Granting personhood to soulless entities[136] may be viewed as "cheapen[ing] the social meaning of humans' legal personality."[137] But the law does not require a soul in order to be deemed a human being let alone a legal person. Neither does it re-

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135. BLUMBERG, *supra* note 11, at 47.

136. *See, e.g.*, Case of Sutton's Hosp., (1612) 77 Eng. Rep. 960, 973 (K.B.) (in which Sir Edward Coke proclaimed corporations "cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls").

137. Note, *supra* note 41, at 1764. The potential for cheapening human existence by granting constitutional rights to corporations was described by Justice Hugo Black as follows:

> [The Fourteenth] Amendment sought to prevent discrimination by the states against classes or races. . . . Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent[] invoked it in protection of the negro race, and more than fifty per cent[] asked that its benefits be extended to corporations.

Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 89-90 (1938) (Black, J., dissenting) (footnotes omitted).

quire a body.[138] Even assuming such a requirement, corporations may be deemed to have a body[139] or at least possess attributes similar to the human body.[140] However, although they are legal persons, corporations are not human beings but rather mimics.[141] As such, corporations are entitled to a lesser degree of protection than their human counterparts.

There are two primary reasons for declining to equate human beings and corporations. First, transnational corporations lack the "complete constitutional reality" of human beings.[142] One method of defining this reality is through differences in the sources of legal personhood. The rights of natural persons are inherent, arising from the status of human being.[143] By contrast, the rights of corporations are derivative. Corporate rights do not arise from the company's status but rather only from its charter and state sanction.[144] The law retains the right to "define and limit the scope of

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138. *See, e.g.*, ALAN HYDE, BODIES OF LAW 260 (1997) (noting that "[l]aw is rich in constructions of the body that emphasize its thingness, its distance from us [human beings], that treat the body as object, property, machine"); Graver, *supra* note 15, at 244 (commenting on the reluctance of law to acknowledge the connection between the human body and human existence).

139. *See* Graver, *supra* note 15, at 246-47. Graver contends bodies possess three attributes: interiority, exteriority, and autonomy. *Id.* at 246. According to Graver, corporations possess each of these attributes and thus have bodies. Corporations demonstrate interiority--the volitional mechanisms and motivating forces that lead to observable behavior--through the mandates of the corporate charter and fiduciary duties as well as the duty to maximize profit that compel management to act in a particular manner. *Id.*. Corporations demonstrate exteriority through their separate legal existence from their incorporators, their ability to bind themselves contractually with other businesses and individuals, their management of media image through self-publicity, the means by which they disseminate their goods and services, and their effect on people within and outside of their organizations. *Id.* Autonomy is demonstrated through the constant interaction and communication between corporations and the environments they inhabit. *Id.*

140. *See supra* note 119 and accompanying text.

141. Graver, *supra* note 20, at 249. *But see* CHARLES E. LINDBLOM, POLITICS AND MARKETS 172 (1977). Lindblom describes corporations as "a kind of public official." As a result, corporations do not share the same position as individual citizens in relation to their national governments. *Id*; *see also* Iwai, *supra* note 26, at 585-87, 593-98. Iwai contends that corporations have a dual role as persons and things. *Id.* at 585, 593. Corporations are not persons to the extent they are subject to ownership by human beings, the result of which would return national legal systems to "the slave economy of the ancient past." *Id.* at 587. However, corporations are persons to the extent they have been endowed with certain human attributes by legislatures and courts. *Id.* at 593, 597. As a result, a corporation is "neither fully a person nor merely a thing." *Id.* at 594. According to Iwai, a corporation's ability to be owned by others makes it less of a person than a human being, but its right to own other property imbues it with a status not shared by mere things. *Id.*

142. Graver, *supra* note 15, at 239.

143. *See, e.g.*, Iwai, *supra* note 26, at 603 (stating that "[a] natural person can become a person not because she or he is a creature of Nature but because she or he can be recognized as a person naturally").

144. *Id.*; *see also* Addo, *supra* note 29, at 190; BLUMBERG, *supra* note 11, at 26; Klabbers, *supra* note 26, at 42 (noting that "[t]he legal person has no will, no mind, and no ability to act, except to the extent that the law imputes such will and ability to the legal person in question"). This distinction was described by Chief Justice Rehnquist, who noted that corporations are creatures of the state and not the product of the higher powers of nature

the rights of corporations [as] a predictable consequence of the fact that corporations are a legal creation while human beings are not."[145]

Second, such an equation obscures the inherent personhood of human beings. Human behavior is impelled by several different motivations such as benevolence, charity, guilt, humanity, love, and shame.[146] These motivations inspire acts of generosity as well as restrain immoral, reckless, and selfish behavior. Human beings sift through their emotions in a life-long quest for self-knowledge. Based upon these emotions and the self-knowledge gained through experience, human behavior and world views may change over time.[147]

By contrast, transnational corporations are constrained by their sole devotion to profit maximization within the bounds of the law. Corporations cannot change this motivation lest they violate their most fundamental duty to investors. Corporate decisions must necessarily lack emotional influence. As a result, a corporation can "divide itself into pieces, avoid taxes by moving its mailing address offshore, leave its hometown and lay off employees without shedding a tear."[148]

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responsible for human beings. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 828 (1978) (Rehnquist, J., dissenting).

145. Addo, s*upra* note 29, at 190.

146. *See, e.g.*, WILLIAM G. BISHOP & WILLIAM H. ATTREE, REPORT OF THE DEBATES AND PROCEEDINGS OF THE NEW YORK COMMISSION FOR CONSTITUTIONAL REFORM 222 (1846), in which the authors stated:

> An incorporation . . . is impelled on to action by the same motives of gain which impel private citizens, but it is not restrained by the same motive of benevolence and of humanity, and of fellow feeling, which exists in the mind of every individual person, and which restrains his selfish propensities in the acquisition of gain. Nor were they restrained by those prudential considerations which prevent individuals from embarking their capital rashly, in the desperate hope of gain, reckless of loss.

Id.; *see also* Litowitz, *supra* note 36, at 818-19.

147. *See, e.g.*, Graver, *supra* note 15, at 247 (noting that freedom permits human beings to make changes in how they view the world and their behavior).

148. Litowitz, *supra* note 36, at 819; *see also* Robert C. Hinkley, Neither Enron Nor Deregulation (May 19, 2002), http://www.commondreams.org/views02/0519-07.htm:

> [C]orporations are institutions not people. They have no conscience, morals nor sense of right and wrong. They have no sense of living in community. They have none of the human traits and characteristics that restrain people in ways that laws cannot and make living in community possible. Although corporations act only through people, these people are forced to play roles that in some ways make them more like machines than human beings. . . . Protecting the public interest is not part of their job description.

Id.

The difference noted by Hinkley between human beings acting in their individual and corporate capacities was aptly summarized in Morton Mintz's description of managers at A.H. Robins with respect to its marketing of the Dalkon Shield. Mintz described Robins' management as consisting of "human being[s] who would not harm you on an individual, face-to-face basis, who [are] charitable, civic-minded, loving, and devout, [but] will wound or kill

This devotion to profit maximization also means that corporations are not engaged in the process of self-discovery. Rather, corporations are imbued with self knowledge from the moment of chartering.[149] A corporation "is the ultimate self-concerned 'person' who exists to benefit its own bottom line and disregards others."[150] Unlike human beings, there are few negative consequences attached to this excessive self-devotion. Other than suffering a decline in profits, corporations cannot be harmed in the same manner and extent as human beings. Corporations are thus truly different and are not entitled to the identical degree of protection afforded to natural persons by human rights instruments. Different degrees of protection for human beings and transnational corporations recognize "that the concept of legal personality is not a static, uniform concept" but rather is flexible and can be conferred in various gradations.[151] Unlike human beings, the manner in which corporations are regarded differs depending upon the training and point of view of the observer and the "effectiveness of the tasks which the law recognizes corporations as capable of undertaking."[152]

C. A Proposed Standard for Recognizing Corporate Human Rights

One method of capturing these differences is through utilization of a two-part test in order to determine the human rights protections that should be extended to corporations. The first element of the test focuses on the degree to which according transnational corporations a particular right would benefit human beings. This test recognizes that, although they are artificial in nature, corporations are organized and operated by, and for the benefit of, groups

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you from behind the corporate veil." MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD xiv-xv (1985).

149. Graver, *supra* note 15, at 247. Graver notes that, to the extent corporations engage in self-discovery, they have a distinct advantage over their human counterparts given their perpetual life. *Id.*

150. Litowiz, *supra* note 36, at 828.

151. *See, e.g.*, Addo, s*upra* note 29, at 190-91 (noting that "where corporations are acknowledged to have rights, the scope of the law is often determined by the same regime of analysis used for human beings, although where necessary, this may be modified to suit the corporate context"); Jägers, *supra* note 52, at 262; Klabbers, *supra* note 26, at 47.

152. Dewey, *supra* note 41, at 655; *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 136-37 (3d ed. 1991) (stating that "international personality . . . will always involve a test of judgment and perception of the situation at hand and the overall context of the current nature and requirements of the international community at large"); TOMASIC, BOTTOMLEY & MCQUEEN, *supra* note 46, at 52 (noting "the manner in which lawyers, judges, economists, accountants, regulators, politicians, and corporate insiders talk about corporations, corporate law, and corporate activity reflects different assumptions about the nature of the corporation, the role of the corporation in society and the degree to which corporate activity should be regulated").

of human beings.[153] The extent to which human rights protections are granted or denied to these entities has a direct effect on the human ownership and management or those directly impacted by their operations. A blanket denial of human rights protections to transnational corporations would imprudently limit the primary purpose of human rights law to remedy only direct violations perpetrated solely upon human beings.[154] Effective protection mandates that human rights be extended to transnational corporations in appropriate circumstances.[155]

However, care must be exercised in the application of this standard. The identity of those human beings benefited by the extension of a specific human right to a corporation must be ascertained. The size of the benefited group, the nature of the benefit to be received, and the detrimental impact on other groups of human beings must be determined. Furthermore, attempts to differentiate between types of corporations must be handled with caution. Admittedly, there are a wide variety of motivations underlying corporate actions depending upon their organizational principles. Thus, as has been noted by one commentator, "[c]ommercial corporations wish to maximize profits; labor unions wish to enhance the rights and wealth of workers; ideological organizations champion various social or ethical causes; charitable organizations support certain groups or issues; [and] government institutions forward particular mandates."[156] As a result, different rights and degrees of protection may be extended to corporations depending upon these principles.[157] Although such approach is reality-based to the extent it recognizes the lack of corporate homogeneity, it must be carefully tailored to avoid violation of the right to equal protection.

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153. Addo, s*upra* note 29, at 188. Addo identifies these groups as shareholders, managers, directors, employees, and consumers. *Id.* at 188 nn.5- 6.

154. *Id.* at 189.

155. *Id.*

156. Graver, *supra* note 15, at 247.

157. *Id.* at 250. Graver concludes that:

> [a] corporeal analysis suggests that juxtaposing the interests of two fictional persons, the public utility and the public interest organization, without regard to the nature of their bodies is not the best way of preserving or enhancing the rights of natural persons. Instead, one needs to determine what rights particular kinds of fictional bodies need in order to bestow their benefits upon human beings. . . . Rather than accord the same constitutional rights to all artificial persons, a theory of corporeality allows us to grant and withhold rights in order to make the bodies of these artificial persons most supportive of the constitutional rights of human beings.

Id. Graver's conclusion does not address U.S. Supreme Court precedent recognizing equal protection rights for corporations or how a motivation-based theory of corporate constitutional rights would be reconciled with such precedent.

The second part of the test provides that transnational corporations be granted a particular human right only if the reason for extending the protection to corporations is identical to that for granting the protection to human beings.[158] This determination requires examination of the specific right at issue "in light of the values and policies that are thought to underlie it."[159] This examination ensures that the purpose of the right would not be compromised if its application was extended beyond human beings.[160] The background and purpose of each individual human right is crucial to this determination.[161]

D. Human Rights Possessed by Transnational Corporations

Several of the rights set forth in the International Bill of Rights may be extended to transnational corporations. For example, transnational corporations should be entitled to equal protection of the law.[162] This entitlement benefits natural persons who would otherwise forfeit equal protection of the law as a condition for the conduct of their business affairs in a collective manner. The size of the benefited group and the benefit received are large to the extent the group consists of all human beings whose interests may be affected should equal protection of the law be denied, including investors, officers, directors, and employees. The benefits may be increased if the shared interest of all human beings in the preservation of equal protection of the law is included in this calculation.[163]

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158. Krannich, *supra* note 14, at 64. This test closely resembles that utilized to determine the extent of corporate rights pursuant to the Bill of Rights contained in the South African Constitution. *See supra* note 122 and accompanying text.

159. DAN-COHEN, *supra* note 14, at 86; *see also* Krannich, *supra* note 14, at 64.

160. Krannich, *supra* note 14, at 106.

161. *Id.* at 105-06; *see also* BLUMBERG, *supra* note 11, at 26 (noting that " 'nature, history and purpose' not constitutional terminology and theories of corporate personality control" in this area). Inquiry into the background and purpose of each individual right not only has support within the applicable literature but also within U.S. Supreme Court precedent. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision"); United States v. White, 322 U.S. 694, 698 (1944) (refusing to apply the self-incrimination privilege contained within the Fifth Amendment to an unincorporated labor union on the basis that the nature, history, and purpose of the privilege was to protect natural persons from abuse of the legal process through "torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence").

162. International Covenant on Civil and Political Rights, *supra* note 2, arts. 14(1), 26 (stating, in part, that "[a]ll persons shall be equal before the courts and tribunals" and "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law"); Universal Declaration of Human Rights, *supra* note 2, art. 7 (stating, in part, "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law").

163. All human beings have an interest in the equal application of the rights, privileges, and duties extended by the law to all persons. To contend otherwise could serve to

The reason for extending this right to human beings--specifically, the recognition of equality of all such persons before the law--is also applicable to transnational corporations. It is an indisputable principle of human rights law that all human beings are entitled to equal protection of the law regardless of their diversity, including race, color of skin, national origin, indigenous status, gender, religious affiliation, age, and disability. These factors do not disappear nor are less worthy of protection simply because the people possessing them elect to conduct their affairs through a corporation. Similarly, there are many types of corporations possessing a diversity of characteristics, including publicly traded, privately held, or state-owned; domestic, foreign, or alien; and national or transnational. There are also differences in structure, governance, capitalization, and fields of operation. In a manner identical to the recognition of equality before the law with respect to human beings, no corporation should be denied application of national law or equal treatment within the international legal system based solely upon ownership, nationality, organizational, financial, or management differences with other corporations. Although perhaps less diverse than their human counterparts, corporations nevertheless possess a sufficient degree of variance that must be protected by equal protection of the law. These considerations of fundamental fairness and equality under the law also mandate extension of human rights associated with civil and criminal judicial processes to transnational corporations, including entitlement to an effective remedy, a fair and public hearing in a civil context[164], and the presumption of innocence and freedom from ex post facto laws in a criminal context.[165]

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excuse the exclusion of a particular group of people from rights and privileges as well as unfairly burden such group with duties without the concomitant benefit of protections afforded by law.

164. International Covenant on Civil and Political Rights, *supra* note 2, art. 14(1) (stating, in part, that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"); Universal Declaration of Human Rights, *supra* note 2, arts. 8, 10 (stating "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" and "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him").

165. International Covenant on Civil and Political Rights, *supra* note 2, arts. 14(2), 15 (providing "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law" and "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed"); Universal Declaration of Human Rights, *supra* note 2, art. 11(1-2) (stating "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" and "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not

The right to be free from double jeopardy should also be extended to transnational corporations.[166] This prohibition benefits natural persons as forfeiture of this right should not be a condition for the conduct of one's business affairs in corporate form. The size of the benefited group and the benefit received are significant and consist of all human beings whose interests may be affected by repeated criminal prosecution, including investors, officers, directors, and employees. The number of benefited people and the size of the benefit are significantly larger if the shared interest of all human beings in the preservation of the fundamental fairness underlying the prohibition upon double jeopardy is included in this calculation. These persons have an interest not only in the fair administration of justice exemplified by this prohibition, but also in the responsible expenditure of public funds spent on repeated prosecutions.

Furthermore, the reason for extending this freedom to human beings is equally applicable to transnational corporations. The prohibition upon double jeopardy, at least in the American context, has been interpreted to protect human beings from further peril to life and limb as well as spare further embarrassment, attributes which may not ordinarily be associated with corporations. A broader interpretation of protected interests encompasses transnational corporations and is supported by precedent in the United States as well as the International Covenant on Civil and Political Rights, which makes no reference to the preservation of life and limb as an underlying reason for the prohibition.[167] In any event, although they do not possess human attributes that may be placed in peril by repeated criminal prosecution, transnational corporations and human beings do share financial harm that may occur as a result of such prosecution. This harm consists of costs and fees associated with litigation, which may be burdensome to even the largest transnational corporation. Repeated prosecution may in fact have a greater effect upon corporations to the extent share value, creditworthiness, and other indicia of financial well being are negatively impacted. Additionally, corporations may also suffer embarrassment in a manner similar to human beings through pub-

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constitute a penal offense, under national or international law, at the time when it was committed").

166. International Covenant on Civil and Political Rights, *supra* note 2, art. art. 14(7) (stating that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country").

167. *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (noting that the prohibition upon double jeopardy applies to corporations in order to shield them from "embarrassment, expense and ordeal"); Am. Tobacco Co. v. United States, 328 U.S. 781 (1946).

lic shaming and damage to reputation and brand image. Finally, the principle of fundamental fairness prohibiting repeated criminal prosecution for the same offense once jeopardy has attached is identical whether the defendant confronting the government is a solitary human being or a transnational corporation.

Transnational corporations should possess the right to privacy to an extent similar to that of human beings.[168] The extension of the right to privacy to transnational corporations, including freedom from unreasonable search and seizure, benefits human beings to the extent that incorporators and management may be ensured of the ability to operate their businesses without undue interference by the government. Such rights to conduct one's affairs free from unreasonable government intrusion should not be forfeited as a result of collectivization of business efforts. The general public is also benefited by the extension of the right to privacy to corporations to the extent it acts as a limitation upon the arbitrary exercise of governmental power and ensures the fair administration of justice by imposing requirements upon law enforcement prior to the seizure of non-public information.

The affinity of human and corporate interests with respect to privacy leads to the conclusion that the reason for the extension of this right to both interests is identical. As noted in *Marshall v. Barlow's, Inc.*, privacy protections, including freedom from unreasonable search and seizure, date back to the colonial era and were adopted to protect not only human beings in their private residences, but also businesses in their commercial premises.[169] The reason underlying this equation of human and business privacy rights is identical: the safeguarding of personal and commercial interests against arbitrary invasion by governmental officials. Although individual privacy may be more pressing and fragile given the often sensitive nature of personal information, the constant pressure by government to amass increasing amounts of such information and the difficulties encountered by individuals in resisting such inquiries, the stakes are no less important for business. These stakes may in fact be even greater than those generally associated with matters of personal privacy to the extent businesses are already subjected to comprehensive government regulation or

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168. International Covenant on Civil and Political Rights, *supra* note 2, art. 17 (1-2) (providing, in part, that "[n]o one shall be subjected to arbitrary . . . interference with his privacy . . . or correspondence . . . [and] [e]veryone has the right to the protection of the law against such interference or attacks"); Universal Declaration of Human Rights, *supra* note 2, art. 12 (providing, in part, that "[n]o one shall be subjected to arbitrary interference with his privacy . . . or correspondence . . . [and] [e]veryone has the right to the protection of the law against such interference or attacks").

169. 436 U.S. 307, 311-12 (1978).

may be seeking to preserve confidentiality with respect to proprietary information in which they have invested extensive resources and which may be of considerable interest to their competitors. Thus, given the history, the inclusive language within the International Bill of Rights, and the absence of any national or international efforts to differentiate between human beings' personal and commercial affairs, it may be fairly concluded that the principle underlying privacy--the right to be left alone in the conduct of one's life--extends equally to human beings as well as transnational corporations.

Property rights, including those associated with intellectual property, should also be extended to transnational corporations.[170] Any limitation upon corporate rights regarding property ownership improperly penalizes business associations to the detriment of their management and shareholders. The general public also benefits from the extension of property rights to corporations. For example, the recognition and preservation of corporate rights associated with real property may result in commercial development that benefits the community at large by enhancing community standing, providing employment opportunities, and increasing property and sales tax revenues. Recognition and protection of corporate intellectual property rights provides the impetus for continued research and development, which may ultimately lead to the discovery or invention of products, processes, and techniques that benefit the health and welfare of the general public. Businesses may lack the incentive to conduct research and development without such recognition and protection, thus depriving the community of potential benefits.

The identical nature of the reasons for extending property rights to human beings and corporations is expressly recognized in the Universal Declaration of Human Rights, which grants protection of property rights to "everyone . . . alone as well as in association with others."[171] The identical nature and reasons for extending property rights to transnational corporations, however, also means that they are no greater than those possessed by human beings. Additionally, they are subject to the same limitations im-

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170. International Covenant on Economic, Social and Cultural Rights, *supra* note 2, art. 15(1)(c) (granting "everyone" the right to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"); Universal Declaration of Human Rights, *supra* note 2, arts. 17 (1-2), 27(2) (stating "[e]veryone has the right to own property alone as well as in association with others . . . [and] [n]o one shall be arbitrarily deprived of his property" as well as "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

171. Universal Declaration of Human Rights, *supra* note 2, art. 17(1).

posed by government (such as environmental regulation, zoning and building codes, and eminent domain), as well as privately imposed restrictions with respect to real property and conditions applicable to the grant, maintenance, and utilization of intellectual property rights.

Perhaps most controversially, transnational corporations should possess the right to freedom of speech.[172] The extension of free speech rights benefits human beings by preventing individuals from being required to surrender such rights upon associating with others. The size of the benefited group and the benefit received are large to the extent the group consists of all human beings whose interests may be affected should their speech rights be denied upon the initiation of their collective business efforts. The number of benefited people and the size of the benefit are further increased if the shared interest of all human beings in the preservation of speech rights is included in this calculation.

The extension of speech rights to transnational corporations expands the marketplace of ideas to the benefit of human beings. No matter how inane the message, human judgment with respect to which content to ignore or heed is more preferable than government censorship. This approach avoids difficulties associated with the identity of the speaker and the resultant adoption and enforcement of different and quite possibly arbitrary levels of protection. Rather, as noted by the U.S. Supreme Court, the message protected by the First Amendment speech clause takes primacy over the identity of the speaker.[173] These holdings recognize that corporations as well as their human counterparts "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[174] Judgments regarding the strength of the message relative to the strength of the speaker do not serve a compelling state interest such as to deny corporations access to the marketplace of ideas.[175]

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172. International Covenant on Civil and Political Rights, *supra* note 2, art. 19(2) (granting "[e]veryone . . . the right to freedom of expression . . . includ[ing] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"); Universal Declaration of Human Rights, *supra* note 2, arts. 19, 21(1) (stating "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" and "[e]veryone has the right to take part in the government of his country").

173. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 544 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

174. *Pac. Gas & Elec. Co.*, 475 U.S. at 8 (citation omitted).

175. *Id.* at 19.

International human rights instruments make no distinction with respect to protected speech based upon the identity of the speaker, its access to the market, its resources, or the resultant strength of its message. The International Covenant on Civil and Political Rights grants the right to freedom of expression to "[e]veryone" for "information and ideas of all kinds."[176] Several of the aspects of this right appear to relate to modes of expression within the competency of corporations, such as the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" and the selection of "any other media" for distributive purposes.[177] The Universal Declaration of Human Rights contains an identical grant of freedom of expression to everyone for expressions of all kinds.[178] The Universal Declaration extends this freedom further to the extent that "[e]veryone has the right to take part in the government of his country" without distinguishing between the identity of the speakers.[179] This implies that transnational corporations, as well as human beings, possess the right to freedom of expression with respect to political issues, including the right to address the electorate and attempt to influence the political branches of government. The Universal Declaration also references modes of expression most commonly utilized by transnational corporations, including those crossing international borders in a manner similar to the International Covenant on Civil and Political Rights.[180]

Finally, neither of these instruments restricts freedom of expression differently depending upon the identity of the speaker. Rather, all speakers are subject to "special duties and responsibilities" and restrictions relating to "respect of the rights or reputations of others," "the protection of national security or of public order . . . or of public health or morals," "propaganda for war," and "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[181] These provisions lead to the conclusion that the message trumps the identity of the speaker. The absence of differentiation between human and corporate speakers in international human rights instruments also supports the conclusion that the reasons for extending free speech rights to corporations are identical to those with respect to human beings.

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176. International Covenant on Civil and Political Rights, *supra* note 2, art. 19(2).
177. *Id.*
178. Universal Declaration of Human Rights, *supra* note 2, art. 19.
179. *Id.* art. 21(1).
180. *Id.* art. 19.
181. International Covenant on Civil and Political Rights, *supra* note 2, arts. 19-20.

E. Human Rights Not Possessed by Transnational Corporations

There are human rights to which transnational corporations should not be entitled. These rights include the rights to life[182] and residence.[183] Human beings would not benefit through the extension of the right to life to transnational corporations. Such a result would too closely equate corporations with human beings. In addition, recognition of a corporate right to life would unduly interfere with necessary state regulation of corporations. National, state, and local governments may be hampered in their efforts to suspend or revoke the charters of corporations delinquent in the payment of taxes or fees or in making required filings. Perhaps more importantly, revocation of the charters of corporations engaged in fraud or other abuses of the corporate form of business would be hindered to the extent that corporations are entitled to the same protection of their existence as human beings. The most extreme consequence of extending the right to life to corporations would be elimination of state registration and chartering laws altogether as incorporators could contend that the entities they create exist regardless of state action based upon an inherent right to life.

Furthermore, the reasons for extending the right to life to transnational corporations are not identical to those with respect to human beings. To the extent transnational corporations are deemed to have "lives," they can hardly be equated to human life, the most highly cherished and protected status in the law. Unlike their corporate counterparts that live in perpetuity and are subject to judicial process prior to the revocation of their charters, individual human life is subject to random and spontaneous extinction. Furthermore, human beings may be positively or negatively impacted by a multitude of "micro-events" associated with their daily lives whereas corporations are more likely to be affected by an entirely different set of "macro-events." Corporations are largely impervious to the micro-events that impact the lives of their individual human counterparts. Corporate life lacks the frailty of human life, which thus requires special protection. To the extent corporations are more robust persons, they do not require the full panoply of protections extended to human life in international human rights instruments.

Transnational corporations also should not possess the right to residence to the same extent as human beings. Granting corpora-

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182. Universal Declaration of Human Rights, *supra* note 2, art. 3 (providing, in part, that "[e]veryone has the right to life").

183. Universal Declaration of Human Rights, *supra* note 2, art. 13(1) (stating, in part, that "[e]veryone has the right to freedom of . . . residence within the borders of each State").

tions the right to freedom of residence within the borders of any state too closely equates corporations with human beings. The creation of an absolute right to residence for corporations unduly interferes with state regulation, including the establishment of rules with respect to corporate domicile. Although corporate residence is perhaps of diminishing importance in the modern global economy, federal and local governments nevertheless retain the right to establish and enforce standards by which such entities may be deemed residents. Recognition of a right to residence for corporations equal to that possessed by human beings would entitle corporations to establish such residence and enjoy the benefits thereof with minimal, if any, state regulation.

Additionally, the reasons for extending the right to residence to transnational corporations are not identical to those with respect to human beings. Human beings most often become residents of a particular state by accident of birth, and the vast majority remain residents of their state of birth rather than change residences through immigration. By contrast, transnational corporations do not become residents of a particular state by accident. Rather, corporate residence is a conscious selection based upon a wide variety of factors, including the presence of a favorable legal and regulatory environment, a ready pool of affordable labor, favorable treatment of income (including tax consequences), risk management, and miscellaneous political, cultural, and economic considerations. Furthermore, without a right to residence, human beings are rendered stateless. By contrast, corporations are not negatively impacted from the lack of direct ties to a particular state. Rather, modern transnational corporations are increasingly distant from their home jurisdictions without seemingly suffering serious consequences. Finally, it is indisputable that human beings attach considerable personal significance to national identity. Such is not the circumstance for transnational corporations that value financial and legal considerations of residence over personal considerations of shareholders and management.

Finally, contrary to holdings of some national courts, transnational corporations should not be extended the right to be free from self-incrimination.[184] This right is not necessary to protect management and employees as such persons already possess a personal privilege. While perhaps beneficial to management and shareholders concerned about the negative impact of disclosure of

184. International Covenant on Civil and Political Rights, *supra* note 2, art. 14(3)(g) (guaranteeing everyone freedom from being "compelled to testify against himself or to confess guilt"); *see also supra* note 90 and accompanying text (discussing corporate entitlement to freedom from self-incrimination in Canada, New Zealand, and the United Kingdom).

corporate misdeeds, permitting transnational corporations to assert international human rights protection with respect to self-incrimination does not benefit the public at large. The existence of such a corporate privilege discourages disclosure by whistleblowers and encourages concealment of corporate wrongdoing. Members of the general public who have an interest in effective law enforcement as well as protection of their financial interests would suffer as a result of this lack of transparency. The existence of such a privilege may also hinder state regulation. As noted by the U.S. Supreme Court, the existence of a corporate self-incrimination privilege would produce a "strange anomaly" contrary to the state's exercise of sovereignty to inquire through requests for production of documents how an entity created pursuant to its own laws had been employed or abused.[185] State regulation would also be hindered to the extent it is based upon a disclosure regime with respect to chartering and required filings such as offering documents, registration statements, and annual and quarterly reports.

The reasons for extending freedom from self-incrimination to transnational corporations are not identical to those with respect to human beings. As previously noted, human beings acquire life and residence through the accident of birth rather than conscious choice, as is the case with transnational corporations. Human beings are not subject to mandatory filings and accompanying disclosures in order to acquire or continue their personhood. By contrast, transnational corporations acquire and maintain personhood only through such filings and continuing state consent. Any policy that discourages candor in such filings is detrimental to state monitoring efforts necessary to determine the desirability of continuing corporate existence.

Furthermore, individual human beings often lack the power to resist government pressure asserted through law enforcement agencies. The self-incrimination privilege serves to shield human beings from the exercise of such pressure. By contrast, corporations are far better equipped to resist state coercion. Although owing their continuing existence to the state, corporations possess greater financial resources and access to influential decision-makers that may blunt the power of government, factors which may not be as readily available to their human counterparts. As noted by the U.S. Supreme Court, freedom from self-incrimination

185. Hale v. Henkel, 201 U.S. 43, 74-75 (1906); *see also* Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911).

must remain an essentially personal right solely applicable to human beings rather than shared with transnational corporations.[186]

VI. CONCLUSION

Transnational corporations and international human rights law have come into increasing contact with one another in the modern era of globalization. Although the primary focus of this contact has been whether and to what extent human rights obligations may be imposed upon such corporations, the related questions of whether and to what extent transnational corporations possess rights under international instruments must also be addressed.

Transnational corporations must be recognized as rights-carrying as well as duty-bearing entities. However, this recognition must resist the equation of transnational corporations with human beings. Although sharing some similarities, transnational corporations merely mimic human beings and thus are entitled to a lesser degree of protection. The standard proposed in this article seeks to address these differences by offering a test by which to determine the circumstances in which it is permissible to extend human rights protections to transnational corporations. The focal point of this standard is recognition that the primary intended beneficiary of human rights law is human beings. Only by recognizing the "human" in human rights may the rapid expansion of corporate entitlements be limited to those instances truly essential to corporate existence and the interests of society. Failure to interrupt the steady progression of corporate rights through the implementation of reasonable limitations elevates such entities at the expense of the human beings they are intended to serve.

VII. APPENDIX

UNIVERSAL DECLARATION OF THE RIGHTS OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

Preamble

> Recalling that the Universal Declaration of Human Rights, in proclaiming a common standard of achievement for all peoples and all States, provides that every individual and every organ of society, including transnational corporations and other business enterprises, shall strive by teaching and

186. *White*, 322 U.S. at 698.

education to promote respect for human rights and freedoms and, by progressive measures, secure their universal and effective recognition and observance,

Recalling that the standards regarding respect for and protection of human rights set forth in the Universal Declaration of Human Rights have been implemented in numerous international instruments specifically applicable to transnational corporations and other business enterprises, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises and the numerous international instruments listed therein as well as regional instruments such as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man and the Convention for the Protection of Human Rights and Fundamental Freedoms,

Reaffirming that transnational corporations and other business enterprises have human rights obligations and responsibilities pursuant to the above-referenced instruments,

Recognizing however that some of the rights and freedoms granted to "individuals," "organs of society," "groups" and "persons" within the above-referenced instruments may be applicable to transnational corporations and other business enterprises as well as human beings,

Acknowledging the universal recognition of corporate personality throughout the vast majority of national legal systems throughout the world,

Recognizing the fundamental fairness inherent in recognizing transnational corporations and other business enterprises as not only duty-bearing entities but also rights-carrying persons pursuant to international human rights instruments,

Taking note of global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most States and in interna-

tional economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system,

Noting also that the increasing role of transnational corporations and other business enterprises has resulted in the continuous emergence of new international human rights issues and concerns,

Acknowledging however that the primary intended beneficiaries of international human rights instruments are human beings and that transnational corporations and other business enterprises are not nor should be deemed the equivalent of human beings for purposes of fully enjoying the rights, freedoms and protections granted by such instruments in an identical manner,

Consequently noting that standard-setting with respect to the interrelationship of the rights of transnational corporations and other business enterprises and the freedoms, guarantees and protections set forth in international human rights instruments are required at this time and that this Declaration will contribute to the making and development of international law as to these freedoms, guarantees and protections,

Solemnly proclaims this Universal Declaration of Rights for Transnational Corporations and Other Business Enterprises and urges that every effort be made so that they become generally known and respected.

Article 1 - Personhood

Transnational corporations and other business enterprises have the right to recognition everywhere as persons before the law.

Article 2 - Non Discrimination

Every transnational corporation and other business enterprises are entitled to all of the rights and freedoms set forth

in this Declaration without distinction of any kind, including national origin, ownership of property or other status.

Article 3 - Equal Protection of the Law

All transnational corporations and other business enterprises are equal before the law and are entitled without any discrimination to equal protection of the law.

Article 4 - Privacy

1. No transnational corporation or other business enterprise shall be subjected to arbitrary or unlawful interference with its privacy, documents or correspondence.

2. Transnational corporations and other business enterprises have the right to the protection of the law against such interference.

Article 5 - Property

1. Transnational corporations and other business enterprises have the right to own property alone as well as in association with others.

2. Transnational corporations and other business enterprises have the right to the protection of their moral and material interests resulting from any scientific, literary or artistic production of which they are the author or owner.

3. No transnational corporation or other business enterprise shall be arbitrarily deprived of its property rights set forth in Articles 5(1) and (2) herein.

4. Transnational corporations and other business enterprises are entitled to respect for the freedom indispensable for scientific research and creative activity.

Article 6 - Expression

1. Transnational corporations and other business enterprises shall have the right to freedom of expression.

This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of their choice.

2. The exercise of the rights provided for in Article 6(1) carries with it special duties and responsibilities. It may therefore be subject to certain restrictions only as provided by law and as are necessary:

   (a) For respect of the rights or reputations of others;

   (b) For the protection of national security or of public order or of public health or morals;

   (c) For the prevention of the dissemination of any propaganda for war; and

   (d) For the prevention of dissemination of any expression advocating national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 7 - Minimal Guarantees in Criminal Proceedings

1. In the determination of any criminal charge against it, or of its rights and obligations in a suit at law, a transnational corporation or other business enterprise shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of national security in a democratic society, the maintenance of the confidentiality of any trade secret or proprietary information the public disclosure of which would cause material harm to the transnational corporation or other business enterprise or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. However, any judgment rendered in a criminal case or in a suit at law shall be made public.

2. A transnational corporation or other business enterprise charged with a criminal offense shall have the right to

be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against it, a transnational corporation or other business enterprise shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail of the nature and cause of the charge against it:

   (b) To have adequate time and facilities for the preparation of its defense and to communicate with counsel of its own choosing;

   (c) To be tried without undue delay;

   (d) To be tried in the presence, and to defend itself through its representatives or legal assistance of its own choosing;

   (e) To examine, or have examined, the witnesses against it and to obtain the attendance and examination of witnesses on its behalf under the same conditions as witnesses against it;

   (f) To have the free assistance of an interpreter for use in court if necessary.

4. Every transnational corporation or other business enterprise convicted of a crime shall have the right to its conviction and sentence being reviewed by a higher tribunal according to law.

5. No transnational corporation or other business enterprise shall be liable to be tried or punished again for an offense for which it has already been finally convicted or acquitted in accordance with the law and penal procedure of each State.

6. No transnational corporation or other business enterprise shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at

the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 8 - Effective Remedies for Violations of Rights

1. Transnational corporations and other business enterprises have the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to them by the constitution, by law or by this Declaration, notwithstanding that the violation has been committed by persons acting in an official capacity.

2. Transnational corporations and other business enterprises claiming such a remedy shall have their rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.

3. Transnational corporations and other business enterprises are entitled to assurance that the competent authorities shall enforce such remedies when granted.

Article 9 - Limitations

1. In the exercise of their rights and freedoms, transnational corporations and other business enterprises shall be subject to such limitations as are determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

2. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein.

3. Nothing in this Declaration may be interpreted as implying for any transnational corporation or other business enterprise any right to engage in any activity or perform any act inconsistent with its obligations pursuant to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.

Article 10 - Derogation

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, a State may take measures derogating from their obligations under the present Declaration to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the basis of national origin, ownership of property or other status.

2. No derogation from Articles 1 and 7(6) may be made under this provision.

Article 11 - Definitions

1. The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

2. The phrase "other business enterprise" includes any business entity, regardless of the international or domestic nature of its activities; the corporate, partnership or other legal form used to establish the business entity; and the nature of the ownership of the entity. This Declaration shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation or if the impact of its activities is not entirely local.
3. The term "State" refers to a person of international law that possesses the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.

CHINA'S TWO-DIMENSIONAL SKIES: THE "CHINESENESS" OF AVIATION LAW IN CHINA AND HOW IT HELPS US UNDERSTAND CHINESE LAW

ALEX BURKETT*

When the China Airlines Airbus A330 touched down at Beijing's Capital Airport on January 29, 2005, it had flown a circuitous two-thousand-mile routing nonstop from Taipei that ended in something of a watershed: the first landing of a Taiwanese airliner on Chinese soil[1] since Chiang Kai-shek's desperate crossing of the strait more than a half-century earlier.[2] The meandering route of China Airlines Flight 581—southwest toward Hong Kong, then northwest into an air corridor to Beijing that added nearly one thousand miles to its flight path—was symbolic in many respects: it was the first direct scheduled air link since 1950 between the estranged island nation and the mainland,[3] a unification of families long split apart by the Communist revolution, a message from

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1. Unless otherwise stated, this Note will refer to the People's Republic of China as "the PRC" or "China," and to Taiwan as "Taiwan," where appropriate. China Airlines is the flag carrier of Taiwan, not to be confused with Air China, the flag carrier of the PRC.

2. Ted Wang, *Flight CI581 Creates History in the Year of the Rooster*, AIRWAYS, June 2005, at 10. The flight was not technically China Airlines' first foray across the strait, however; the company already served Hong Kong.

3. *Id.*

the Beijing government that economic sensibilities might finally trump the political pride which heretofore prevented an air-bridge between the two nations.[4] But it was chiefly reflective, particularly in its wandering indirectness, of the broad strokes with which China's civil aviation sector is responding to decentralizing reforms, opening the country's air corridors to more international flights and the country's airlines to foreign investors, and meandering toward a more robust liberalization.[5]

Party policies for the aviation sector in the last decade have been generally consistent with the overall themes of decentralization and liberalization that have generally colored much of the Party's decision-making during that period.[6] Laws and regulations governing airlines, airports, and other participants in the Chinese aviation industry either directly track the language of international aviation treaties or hauntingly mimic the texts of European and American regulations.[7] But behind the Western façade of aviation laws is a deep gray space with a distinctly socialist dimension. Party policymakers have engineered a complex consolidation scheme designed solely within the framework of China's unique laws on mergers and acquisitions, and predicated entirely on the socialist proposition that the State, and hence the population at large, owns the airline enterprises involved.[8] Other statutory enactments echo the central socialist premise of the legal superiority of the collective.[9] I contend that aviation law in China supports the country's magnificently growing airline industry because of its duality: its philosophical flexibility and its unapologetic selection of both leftist-socialist and capitalist principles to achieve a primary instrumental end—economic growth.

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4. To be sure, the flight wasn't an exercise in complete openness and cultural exchange: Passengers' Taiwanese magazines and newspapers were confiscated on arrival. *Id.* at 11.

5. *See generally* Wolfgang Schürer, *A Geopolitical and Geo-economic Overview: On the Rise of China and India as Two Asian Giants*, 29 FLETCHER F. WORLD AFF. 145 (2005). Schürer's research focuses on the policy dimension of China's economic liberalization and retreat from staunch communist doctrine in favor of expanding international trade.

6. Wu Jianduan and Xu Lining, *Corporate Takeovers: Legal Aspects of Takeovers Among Chinese Airlines*, 68 J. AIR L. & COM. 583, 583 (2003). *See also* Wu Jianduan, *A Milestone of Air Legislation in China – Some Thoughts on the Civil Aviation Law of the People's Republic of China,* 62 J. AIR L. & COM. 823 (1996).

7. Wu, *supra* note 6, at 824.

8. Wu & Xu, *supra* note 6.

9. *See, e.g.,* Civil Aviation Law of the People's Republic of China, *available at* http://www.ec.com.cn/pubnews/2004_03_29/200861/1005160.jsp (last visited May 1, 2006) [hereinafter Civil Aviation Law]. The Civil Aviation Law was enacted in 1995 by the National People's Congress. Wu, *supra* note 6, at 826. But as is the case with many legislative enactments, its official text in English is inaccessible to the Western researcher. The electronic source cited above is a translation by the Ministry of Commerce, published electronically by the Ministry's economic information arm, and is consistent with depictions of the statutory text in the various journal and law review articles cited herein.

Two curious questions, then, arise. First, are the two dimensions of China's aviation law—one Western, the other socialist—necessarily inconsistent? Second, perhaps more pointedly, can we learn something from that tension about China's larger system of laws and norms?

This Note will seek to deconstruct that duality, to show that the quintessence of aviation law in China is its "Chineseness": that remarkable and unique signature of a system of laws exploring the frontier between socialism and free-market capitalism. To explain how the free-market façade of the country's civil aviation industry can coexist with the deeply socialist philosophy in which it is rooted, this Note will advance the theory that aviation law in China is an expression of the country's status as an experiment in free-market socialism. Major airline companies are State-owned and subject to extensive market regulations; the same law applying those regulations recognize—explicitly in some cases, implicitly in others—the airlines' collective status as a public utility, as opposed to Western airlines' freedom from domestic regulation and general freedom from substantial international limitations.[10]

This Note will show that law in China works for the country's civil aviation network. Part I will place the industry in historical context through the 1990s, showing how law respecting civil aviation has responded to both China's changing economic climate and the Party's evolving policies of liberalization. Part II will describe the extent to which China has modeled certain components of its aviation law regime on foreign examples, and it will explain the reasons why China has looked outward to reform those laws. Part III will describe the quintessentially Chinese socialist components of aviation law in the country. The Note concludes in Part IV by offering one theory on why the Party-state has successfully managed two diametrically opposite administrative philosophies—one wholly ensconced in the socialist ideal of state ownership of enterprises, the other an acknowledgement that liberalization of trade is necessary to the country's continuing economic health—in its aviation law regime. Part IV also makes observations about the usefulness of an understanding of the curious duality of Chinese aviation law to our understanding of the Chinese system in its entirety. Aviation law in China is distinctly "Chinese," wavering at varying amplitudes on either side of the baseline socialist doctrine.

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10. This statement is true with respect to the U.S. airline industry after the Airline Deregulation Act of 1978, which eliminated the U.S. government's tight control over U.S. airlines' route networks and management. *See* Richard D. Cudahy, *The Airlines: Destined to Fail?*, 71 J. AIR L. & COM. 3 (2006), for an illuminating, if pessimistic, appraisal of the effects of deregulation on the U.S. airline industry.

It is appropriate here to set out a preliminary assumption upon which this Note is based: To work in China, law need not have a capitalist flavor. Indeed, it need not have any Western dimension at all. This analysis will avoid many scholars' common practice of using Western systems as a benchmark for legal progress in the East.[11] Much of the Western scholarship on Chinese law offers exhaustive analyses of statutes, regulations, and Party policies that do not meet normative Western standards of rule of law.[12] They inspire "to-do" lists, of sorts: things to fix in order to fix China. Aviation law is perhaps a convenient discipline in which to make the assumption described above, and to avoid writing such a Western prescription, because it regulates a public utility whose necessity is manifest and whose objectives are clear.[13] Persons and entities who participate in the aviation industry might fairly be said to serve the public—the collective—rather than groups of investors or the economic system in a broader context. Therefore, when we ask the question of whether or not law is working for civil aviation in China, we need not consider the economic efficiencies that otherwise would be implicated in an analysis within the capitalist framework. As a result, this Note will offer no "to-do" list or recipe for a better China in ten laws or less.

I. A BRIEF HISTORY OF AVIATION REGULATION IN CHINA

An understanding of the legal history of the Chinese airline industry is essential to an apprehension of the current regulatory posture. Until a few years ago, the term "civil aviation" was entirely oxymoronic in China. For the better part of the Communist era, there was nothing "civil" about the nation's dense framework of state-owned and state-run air transport. Among the first strokes of the Maoist pen was an order creating the Civil Aviation Administration of China (CAAC),[14] charged with the dual mandates of both operating airlines and regulating them.[15] In 1952

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11. *See, e.g.,* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999). Each source was invaluable to the author during his study of Chinese law, but each applies the Western rule-of-law method of analysis to Chinese legal fixtures–and each reaches a different conclusion.

12. Examples abound. Lubman's work, for instance, offers a detailed chapter-by-chapter appraisal of the extent to which legal reform has worked in certain contexts.

13. *See generally* Wu, *supra* note 6, at 824 (analyzing the goals and objectives of aviation law in China).

14. At various times in its history, and today, the CAAC is referred to alternatively in English texts as the General Administration of Civil Aviation of China. This Note will use the former appellation. *See, e.g.,* CAAC Online, http://www.caac.gov.cn/E_PubWebApp/index.aspx (Mandarin Chinese text only) (last visited May 1, 2006).

15. Wu & Xu, *supra* note 6, at 606.

the CAAC established China's first state-owned enterprise, the short-lived People's Airline, but disbanded the operation and folded it into the Administration's general operations eleven months later, prosecuting its bifurcated role as provider and regulator of air services in China for the next thirty years while ultimately forming up to ten individual airlines.[16]

Although the sources describing the early regulatory environment are sparse, due principally to numerous barriers to access among foreign researchers to period administrative regulations, it appears there were substantial gaps in aviation regulations during the years of the CAAC's dual functions as airlines operator and regulator. Indeed, before the 1980s, meaningful regulations were sporadic and inconsistent.[17] For example, there were no airworthiness regulations for newly manufactured civil aircraft; the CAAC did not draft or promulgate regulations governing original airworthiness until 1985.[18] Wu briefly refers to the Civil Aviation Law of 1995, the first clear and comprehensive iteration of aviation regulations in China, as a "summary of the civil aviation *practices* that developed in the People's Republic over [the forty-six years preceding the Civil Aviation Law]."[19] During those forty-six years, "the People's Republic of China enacted no national legislation concerning [international or domestic civil aviation]."[20] Wu does not clarify precisely the meaning of the curious reference to "practices" which evolved during that time, but multitudinous other sources suggest that law in communist China, like that of all legal systems, is discernible not only in the rote of statutes and regulations but also in the informal habits and customs of interpretation which, over time, arise in a system whose codified enactments are often inaccessible by the public in general and by lawyers in particular.[21] The sorts of gap-filling "practices" that emerged in the absence of positive CAAC regulations before 1980 likely involved adherence to the language of multilateral treaties, chiefly the Warsaw Convention of 1929, which governs air carriers' liability for loss of life or property, and the Chicago Convention of 1944, which provides the framework for the legal nationalities of transnational air carriers.[22] In that sense, participants in the Chinese

16. *Id.* at 606-07.

17. Wu, *supra* note 6, at 832-33.

18. *Id.* at 833.

19. *Id.* at 824 (citing Chen Guanyi, Director of the General Civil Aviation Administration of China (CAAC), Adress at the First National Confernce of Legal System of CAAC (1995))(emphasis provided).

20. *Id.*

21. *See, e.g.,* LUBMAN, *supra* note 11.

22. Wu, *supra* note 6, at 824. Wu is a particularly helpful authority because of his experience as a practitioner and lawyer for China Eastern Airlines. *Id.* at 823.

aviation industry and their legal advisers gained early experience in looking beyond China for guidance on how to structure their activities, and in the process developed an informal regulatory approach defined largely by unpublished directives and foreign influences. It was a practice that would prove useful later.[23]

By the 1980s, however, partially as a result of the government's progressive move to decentralize the Party bureaucracy and its 1979 decision to permit foreign direct investment,[24] the CAAC's legal authority was revised during several waves of decentralizing legal reforms. The agency entered into lease agreements with American aircraft manufacturer Boeing for a fleet of Boeing 747SPs,[25] long-range aircraft that permitted Air China, by then the national carrier, to serve destinations some six thousands miles distant. During the reforms of the 1980s, the CAAC had become institutionally separate from the airlines which it operated, including Air China, and had become a regulatory organ largely removed from day-to-day management responsibilities.[26] The commercial operations which the CAAC had heretofore managed were divided among ten airlines, with virtually one carrier for each point on the compass rose: China Northern Airlines, China Northwest Airlines, China Southern Airlines, China Southwest Airlines, China Eastern Airlines, Air China, XinJiang Airlines, Yunnan Airlines, China Airlines,[27] and China General Airlines.[28]

The ten companies (nine after the China Eastern-China General merger) were entirely state-owned and operated, as many of their brand names imply, in discrete operating regions with little overlap.[29] After the first wave of decentralizing reforms, the CAAC retained its legal status as both guardian of the state-owned assets used by the airlines and investment organ responsible for increasing their value.[30]

Subsequent reforms would see the CAAC rewrite, in broad strokes, its role altogether.[31] Perhaps the most remarkable structural change in the Chinese aviation sector is the Party's 2002 Scheme of Restructure, mandating consolidation among the nine

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23. *See infra* Part II.
24. *See* LUBMAN, *supra* note 11, at 192.
25. Wu, *supra* note 6, at 832.
26. Wu & Xu, *supra* note 6, at 607.
27. To be distinguished from China Airlines, the flag carrier of Taiwan. *See supra* note 1.
28. Wu & Xu, *supra* note 6, at 607 n.119. China General and China Eastern merged shortly after the CAAC's withdrawal from tight commercial management. *Id.*
29. *Id.* at 607.
30. *Id.* at 612.
31. *See id.*

airlines listed above into three holding companies.[32] Scholars' interpretation of the Scheme's requirements signals a fundamental shift in aviation policy:

> It was said that the CAAC's duty would be transformed into maintaining a fair market environment and protecting consumer's fundamental interests. In other words, the CAAC will not be responsible for managing the assets of those airlines after the take-overs because the structure of the combined role of assets-owner and industry regulator no longer suits China's fast developing market economy.[33]

The three holding companies, rather, "will be separated financially [from] the CAAC and will act as airline enterprises, State authorized investment institutions, and share holding companies." [34] This change is significant chiefly in that it fundamentally changes the regulatory philosophy in a country in which state-owned companies, such as airlines, are owned by the people and managed by government agencies.[35] The Scheme of Restructure sees the CAAC retreating from its role as manager of China's air carriers.[36]

The consolidation process today is not without legal curiosities. It is ongoing and is expected to produce numerous cost savings among the nine individual carriers as they become integrated into their respective holding companies and fully realize the synergies of cooperation.[37] But the Scheme of Restructure effectively assigns upon the three holding companies, which are state-owned enterprises, the traditional functions of asset management and investment organs: functions historically reserved to the CAAC. The CAAC, in turn, begins to resemble proto-Western regulatory agencies such as the U.S. Federal Aviation Administration (FAA) and the European Union's Joint Aviation Authorities (JAA) as its function becomes increasingly limited to one of restricted oversight and impartial regulation.

The diminution of the CAAC's marketplace involvement is consistent with the theme of liberalization elsewhere in the Beijing government's policy pronouncements. Wu's and Xu's research suggests it is also consistent with the themes of other national enactments. For example, laws governing mergers and acquisitions

32. *Id.* at 609.
33. *Id.* at 610 (citations omitted) (describing the CAAC's ever-changing status).
34. *Id.* at 612 (citing *Abstract of the Scheme of Restructure*, CAAC J. (Oct. 11, 2002)).
35. *Id.* at 614.
36. *See id.*
37. *See id.* at 609.

reflect an explicit policy preference for the formation of mammoth companies to counter the threats posed by foreign competitors wielding newfound access to the Chinese market since China's 2001 accession to the World Trade Organization (WTO).[38] China's Company Law permits three types of business entities: joint stock limited companies, limited liability companies, and wholly state-owned enterprises.[39] For each type, mergers, acquisitions, and takeovers are illegal without an intensive consultation process with the appropriate government ministry and its approval.[40] The regulatory scheme, nonetheless, provides a fertile ground upon which to orchestrate mega-mergers such as those proposed by the Scheme of Restructure, largely in deference to the government's policy preference of encouraging home-based competition to foreign competitive threats.[41] The management arrangement within the three holding companies will similarly be reflective of communist leadership doctrine, which emphasizes decisive, top-down decision-making.[42] General managers will be the companies' legal representatives, giving them "far reaching powers" with potential system-induced "biased incentives toward short-term accounting profits."[43] The impartiality with which CAAC apparatchiks managed the country's dense network of carriers has thus been replaced by a set of incentives motivating powerful general managers to exaggerate fiscal success while exerting a considerable, although yet unspecified in the scholarship or empirical data, amount of control.

Of course, one cannot understand fully the implications of these changes in the civil aviation sector without understanding the economic context in which reforms, complete with their attendant challenges, are taking place. The rate of growth in China's aviation sector is staggering. President Hu Jintao told an assembly of Boeing employees gathered at the planemaker's Seattle headquarters in April 2006 that China would require up to two thousand Boeing jets before 2020, six hundred of them in the next five years.[44] That news came one week after China Aviation Supplies Import & Export Group, the state arm responsible for pur-

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38. *Id.* at 599.

39. *Id.* (citing Company Law of the People's Republic of China (Dec. 29, 1993), *available at* http://www.chinaonline.com/refer/legal/laws_regs/pdf/pdf_e/c9100371e.pdf)

40. *See id.* at 599-600.

41. *See id.* at 609. Wu and Xu estimate that the three holding companies, among them, will amass assets totaling more than 147 billion yuan. *Id.* at 609.

42. *Id.* at 614.

43. *Id.*

44. *China Needs 2,000 Aircraft Over Next 15 Years, President Hu Jintao Tells Boeing,* FLIGHT INTERNATIONAL, April 20, 2006, *available at* http://www.flightglobal.com/ Articles/2006/04/20/-Navigation/177/206065/China+needs+2%2c000+aircraft+over+next+15+years%2c+President+Hu+Jintao+tells.html.

chasing and disbursing aircraft and equipment to state-owned airlines, announced the purchase of eighty Boeing 737s,[45] and it echoed a similar government initiative to stimulate growth in the business aviation sector by rewriting regulations on small business aircraft operations to mirror their counterparts in the United States' Federal Aviation Regulations.[46] In short, the industry restructuring and consolidation come at a time of unprecedented growth in the Chinese civil aviation sector, and reforms such as the Scheme of Restructure of 2002 have occurred roughly contemporaneously to the industry's substantial growth.

This is the structural situation of China's civil aviation industry, in very broad terms. Its history of strict regulation, juxtaposed to its recent and ongoing structural reconfiguration, provides the backdrop for the balance of this Note's analysis of the effectiveness of specific components of Chinese aviation law, and its account of China's bifocal vision both toward Western regulatory fixtures and back into its own socialist past.

II. LOOKING WITHOUT

Giovanni Bisignani, director general and chief executive of the International Air Transport Association (IATA), glowingly summarized the international perspective on China's airline industry in a 2005 speech to journalists in Japan: "In China we see a plan and action. Open skies were declared for Hainan. Liberal bilateral agreements are being signed. And China's airline industry is growing and generating profits."[47]

There is no doubt that Bisignani's and other officials' optimism stems at least in part from China's recent willingness to engage in the international multilateral process with respect to aviation regulation. That willingness, however promising, is the sum of several phenomena in the evolution of China's own domestic aviation laws. This Part will outline China's increasing reliance on

45. *China Confirms Deal for 80 More Boeing 737s,* FLIGHT INTERNATIONAL, April 12, 2006, *available at* http://www.flightglobal.com/Articles/2006/04/12/Navigation/177/205953/-China+confirms+deal+for+80+more+Boeing+737s.html.

46. *China Seeks to Encourage Growth,* FLIGHT INTERNATIONAL, March 21, 2006, *available at* http://www.flightglobal.com/Articles/2006/03/21/205548/China+seeks+to+encourage +growth.html. *See infra* Part II(A) for a discussion of the significance of the new regulations and the role of their U.S. counterparts in the drafting process.

47. Giovanni Bisignani, Speech to the Foreign Correspondents Club of Japan (April 12, 2005) (transcript available at http://www.iata.org/pressroom/speeches/2005-04-12-01.htm).

foreign influences as it creates a working jurisprudence of aviation regulation.[48]

A. Treaties' Transformation in the Law-Drafting Process

The keystone of China's modern aviation law is the Civil Aviation Law of 1995, a comprehensive set of regulations providing a framework of rules within a wide range of subject matters, from nationality of aircraft to rights of operators to pilot certification to operational safety.[49] The Civil Aviation Law is by definition a Party product, the result of a sixteen-year consultative effort by the State Council, the CAAC, and the Central Politics and Law Group to draft a body of consistent aviation regulations.[50] That process, which began in earnest in 1979,[51] antedated by some fifteen years the explosive growth in China's airline industry. Ostensibly, therefore, its product, the Civil Aviation Law, is colored less by the economic exigencies which compelled the Scheme of Restructure[52] and more by deliberative and slowly adopted policy judgments which have largely embraced Western regulatory solutions to the industry's inherent universal problems.

Before the promulgation of the Civil Aviation Law, substantial gaps in aviation regulations and other legislative enactments existed which were filled largely by resort to the provisions of international conventions on air travel.[53] The Law's enactment did not immediately fill those gaps, though; airline tickets issued as late as 1997, for example, admonished passengers of the Warsaw Convention's liability limits instead of similar rules contained in the new law, which by then had been in effect for one year.[54]

The influential role of multilateral, largely West-driven treaties in the drafting process of the Civil Aviation Law is extensive and textually obvious. Shan's research respecting Chinese in-

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48. Because of this Note's rather formalistic focus on the framework of rules and norms at the heart of Chinese aviation law, I reluctantly pass over the tempting fodder of daily breakthroughs in the China aviation market, including significant manufacturing boosts at Chinese factories in the supplier networks of competing aircraft manufacturers Boeing and Airbus. *See* William Mellor and Andrea Rothman, *Boeing-Airbus Fight Boosts China,* SEATTLE POST-INTELLIGENCER, March 7, 2007, *available at* http://seattlepi.nwsource.com/business/306778_boeingchina09.html. There is no doubt that for airplane manufacturers, business is booming in China.

49. Civil Aviation Law, *supra* note 9.

50. Wu, *supra* note 6, at 826.

51. *Id.*

52. *See supra* Part I for a brief discussion of the use of international treaties and other interpretive habits and customs as gap-fillers where existing regulations left off.

53. *See generally* Wu, *supra* note 6. *See also infra* Part I, for a contextual examination of the role of multilateral treaties and international conventions as interpretive tools to fill in gaps left by sparse and inconsistent regulations.

54. *Id.* at 838.

vestment law helpfully describes the phenomena by which international treaties take root in legal systems:

> A survey of different countries' practices on the reception of international law reveals two basic approaches to give effect to international treaties within a given legal system: incorporation or transformation. "Incorporation" implies a process of integration whereby international treaties become a part of the domestic legal system and as such can be directly applicable. This process may be achieved via enactment or amendment of constitutional provisions, the ratification and publication of treaties or via judicial means. "Transformation" implies that an international treaty will not be binding and applicable until domestic legislation is adopted to accept or absorb the contents of the treaty within national law.[55]

The Civil Aviation Law, Shan concludes, is a reflection of the latter method:[56] "transformation" of the terms of the Geneva Convention[57] into a domestic legislative enactment whose cardinal provisions borrow heavily from international liberal thinking and legal philosophy. The Supreme People's Court has used the same approach in decreeing, somewhat formalistically, that trade accords are enforceable in Chinese courts only when their provisions are introduced into Chinese law through legislative enactments.[58] The transformative approach, then, is common in other legal disciplines, and the SPC's edict respecting trade agreements might one day apply to other types of bilateral and multilateral agreements to which China is a party. At the least, one certainly sees evidence

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55. Shan Wenhua, *The International Law of EU Investment in China,* 1 CHINESE J. INT'L L. 555, 562 (2002) (hypothesizing that the Civil Aviation Law was enacted as a "preparatory step" toward acceding to the terms of the Geneva Convention, whose language in key provisions is similar and based on fundamental notions of rights in aircraft) (citations omitted).

56. *Id.* at 563.

57. Convention on the International Recognition of Rights in Aircraft, art. I, June 19, 1948, 4 U.S.T. 1830, 310 U.N.T.S. 151 [hereinafter Geneva Convention]. China acceded to the Geneva Convention in 1999.

58. Shan, *supra* note 55, at 563 (citing Provisions on Some Issues on the Adjudication of Administrative Cases Concerning International Trade (The Trade Cases Provisions), promulgated by the Supreme People's Court, Aug. 29, 2002).

of that formalism in the Civil Aviation Law's remarkable use of treaty provisions.

The Law's threshold provisions pertain to aircraft nationality, a foundational concept of global aviation law tracked directly from the Chicago Convention of 1944, whose Article 17 provides that "[a]ircraft have the nationality of the State in which they are registered;"[59] Article 6 of the Civil Aviation Law provides that a civil aircraft registered in China "has the nationality of the People's Republic of China."[60] The principle of nationality is a significant concept in international law because it gives rise to claims that "embrace economic, political, and financial considerations of the highest importance" and describes the relationship between the legal person and the state.[61]

Article 6, whose text requires a quasi-Western understanding of the concept of nationality, raises several compelling issues. Its full text provides that "[a] civil aircraft that has performed its nationality registration with the competent civil aviation authority under the State Council of the People's Republic of China according to law" receives Chinese nationality.[62] But how does the *aircraft* "perform its nationality registration," as the text of Article 6 requires? An "aircraft" certainly cannot complete those formalities. The key to understanding the import of Article 6, Wu suggests, is its reference to the concept of nationality, which cements a "fixed legal connection between a single person and a state, with the state obligated to protect its citizen:"[63] a legal recognition of the relationship between the person and the state. The Law's reflection of the concept of nationality parallels, in key respects, the Party's slow recognition of the sovereignty of the legal person, a notion eminently familiar to Western legal thought. Lubman notes approvingly the extent to which China's 1986 General Principles of Civil Law, one of the government's first explicit contemplations of the rights of the legal person, "reflects the intellectual debt that Chinese law and legal theory owe to continental European law."[64] The GPCL, he writes, creates the foundation for the contract by embracing the notion of the legal person and a set of attached rights: chiefly the rights to contract and to enjoy specific privileges

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59. Convention on International Civil Aviation, art. 17, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

60. Civil Aviation Law, *supra* note 9, at art. 6.

61. Wu, *supra* note 6, at 828 (citing R. Y. Jennings, *International Civil Aviation and the Law*, 22 BRITISH Y.B. INT'L LAW 207 (1945)).

62. Civil Aviation Law, *supra* note 9, at art. 6.

63. Wu, *supra* note 6, at 828.

64. LUBMAN, *supra* note 11, at 178 (citing Anthony Dicks, *The Chinese Legal System: Reforms in the Balance*, 119 CHINA QUARTERLY 540-76 (1989)).

in state-owned property.[65] The notion of nationality of aircraft is rooted in the same state-person relationship because it is reflective of the maxim that "[a] citizen 'belongs' to the state and must be loyal to the state while the state is obligated to protect its citizens."[66] That the GPCL's articulation of the legal rights of the legal person emerged just as Party policymakers began to apprehend the significance of that concept, and just as they began drafting early versions of the Civil Aviation Law and its guarantee of nationality, is telling of the determinative weight which Western legal philosophy has been accorded in the lawmaking process.

Other provisions of the Civil Aviation Law are tracked equally directly from sister provisions of the Chicago Convention and other multilateral agreements and treaties, albeit with less philosophical force. Article 18 of the Chicago Convention prohibits dual nationality of an aircraft;[67] so does Article 9 of the Civil Aviation Law, prohibiting the registration elsewhere of an aircraft registered in the PRC with Chinese nationality.[68] Wu found that other provisions "mirror those of the Geneva Convention almost exactly,"[69] primarily those respecting property rights in aircraft. Article 11 of the Civil Aviation Law, for example, requires "[t]he person entitled to the rights of a civil aircraft" to register four of those rights in particular with the CAAC:

> (1) The ownership of the civil aircraft; (2) The right for the acquisition and possession of the civil aircraft through an act of purchase; (3) The right to possess the civil aircraft in accordance with a lease contract covering a lease term of six months or over; and (4) Mortgage of the civil aircraft.[70]

The identification in Article 11 of those four particular rights is tracked directly[71] from Article I of the Geneva Convention, which requires the state to give full effect to "(a) rights of property in aircraft; (b) rights to acquire aircraft by purchase coupled with possession of the aircraft; (c) rights to possession of aircraft under leases of six months or more; (d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for

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65. *Id.*
66. Wu, *supra* note 6, at 828 (citing WU JIANDUAN, A DICTIONARY OF INTERNATIONAL LAW 207 (1945)).
67. Chicago Convention, *supra* note 59, at art. 18.
68. Civil Aviation Law, *supra* note 9, at arts. 6, 9.
69. Wu, *supra* note 6, at 830.
70. Civil Aviation Law, *supra* note 9, at art. 11.
71. Wu, *supra* note 6, at 830-31.

payment of an indebtedness . . .."[72] The legal recognition of mortgages in civil aircraft is important primarily because it gives rise to specific rules governing secured transactions in those assets, increasing the confidence with which creditors can finance aircraft acquisitions and their certainty interest in adhering to a predictable set of transactional rules. The Geneva Convention recognized the value of such definite rules; its Article I protects the rights of creditors with security interests in aircraft as long as those rights "(i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and (ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality."[73] Article 16 of the Civil Aviation Law advances a substantially similar registration rule, albeit simplified slightly: "The mortgage of a civil aircraft shall be established by registering the mortgage of the civil aircraft with the competent civil aviation authority under the State Council jointly by the mortgagee and the mortgagor; no mortgage may act against a third party unless registered."[74] The registration rule of Article 16 functionally provides notice to other potential creditors that aircraft are encumbered by security interests. The article's effect is much broader, though, textually making registration of the encumbrance a condition precedent to "establishment" of the mortgage.[75] Article 16 reflects the drafters' recognition of the utility of a system of definitive and clear transactional rules governing security interests in aircraft, complementary to other statutory rules on secured transactions.[76]

These articles together turn to the international system to create a well-defined scheme of rights conferred upon individual legal persons. They chiefly "protect creditors and . . . guarantee their rights under the law," Wu observes.[77] But they do more: They confer a variety of types of property interests in aircraft—security interests, possessory interests, ownership interests—which create patterns of self-interest in the behavior of participants in the system. Endowed with these specific (admittedly narrow) rights, the participants—airlines, financiers, and other creditors—can create something of a marketplace, entering into security agreements and mortgages and transferring certain rights, but they are of course

72. Geneva Convention, *supra* note 57, art. I.
73. *Id.* at art. I(1)(d).
74. Civil Aviation Law, *supra* note 9, at art. 16.
75. *Id.*
76. For a discussion of another dimension of Article 16, see *infra* Part III.
77. Wu, *supra* note 6, at 831.

limited by the reality that the state is ultimately the owner of assets and controls their disbursements.[78]

Still other provisions of the Civil Aviation Law are reminiscent of the language of multilateral treaties. Article 13, which prohibits the transfer to foreign jurisdictions of PRC-nationalized aircraft before the extinguishment of all creditors' rights in those aircraft, except in the case of a sale or auction mandated by law,[79] parallels neatly the Geneva Convention's Article IX, which imposes the same restriction in approximately the same language.[80] Airlines are subject to particular certification rules[81] just as they are in the United States and European Union.[82] The Warsaw Convention, which sets the limits of airlines' liability to passengers, caps damages awards to passengers at 125,000 francs[83] and provides that carriers may absolutely defend their liability by showing they took all available measures to prevent damages or loss.[84] The Civil Aviation Law imposes a similar liability cap,[85] but stops short of adopting the Warsaw Convention's absolute defense to liability, instead advancing a sophisticated comparative-negligence scheme by which carriers can avoid some or all liability by pointing to the fault of the claimant.[86]

The Civil Aviation Law copies in some places, parallels in others, the language and legal concepts articulated in some of the foundational components of international jurisprudence on civil aviation. In instances in which the provisions of treaties to which

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78. *See generally* Wu & Xu, *supra* note 6. Indeed, the China Aviation Supplies Import & Export Group Corp. (CASC) is the state arm which purchases aircraft on behalf of China's state-owned airlines and allocates those acquisitions among the carriers. *See Company Briefing, CASC*, *available at* http://www.casc.com.cn/english/corporation/ companyBriefing.htm (last visited May 1, 2006), for a self-written account of the CASC's most recent activities, noticeably minimizing its state ownership and structural linkage with the PRC government and the Party.

79. Civil Aviation Law, *supra* note 9, at art. 13.

80. Geneva Convention, *supra* note 57, art. IX.

81. Civil Aviation Law, *supra* note 9, at art. 93.

82. *See* 14 C.F.R. 121 for U.S. rules on the certification of air carriers. Article 93 of the Civil Aviation Law differs somewhat from its American and European counterparts, however, requiring Chinese airlines to maintain a minimum amount of capital and to register that capital with the State Council. Civil Aviation Law, *supra* note 9, at art. 93.

83. Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 22, Oct. 29, 1934, 49 Stat. 3000 [hereinafter Warsaw Convention].

84. *Id.* at art. 20.

85. Civil Aviation Law, *supra* note 9, at art. 129. Liability is limited to 16,600 "units of account," which varies according to exchange rate, but it may be more generous than the Warsaw Convention's 125,000-franc limitation. *See* Wu, *supra* note 6, at 838 n.66.

86. Civil Aviation Law, *supra* note 9, at art. 127. Article 127 is significant because it expands upon the general liability limits that are part and parcel of the Warsaw Convention's provisions defining carrier liability and limiting it. The article provides, in relevant part, that "if the carrier proves that the damage was caused by or contributed to by the fault of the claimant, the carrier may be wholly or partly exonerated from his liability in accordance with the extent of the fault that caused or contributed to such damage." *Id.*

China is a party conflict with statutory enactments, the treaties prevail "unless . . . China has announced reservations" with respect to those conflicting treaty provisions.[87] Numerous other laws give the same controlling effect to treaty provisions.[88] Shan concluded that, at the very least, China's legislative enactments of provisions similar or identical to treaty provisions often precede accession to those treaties because those enactments effectively bring the treaty provisions through the back door of validity in China.[89] However, if one accepts that theory as a workable explanation of why China has given such prominent play to the language of multilateral treaties in its own law-drafting practices, it falls short of explaining China's willingness, for example, to track key provisions from the U.S. Federal Aviation Regulations when writing its own new regulations on business aircraft operations.[90] Recent media reports indicate that the CAAC has already drafted regulations tightly based on U.S. operating standards for business aircraft (a category of operations which include small business jets and fractional-ownership companies)[91] and that adoption of the proto-American regulations in China will stimulate "operating efficiencies" while encouraging growth.[92] The government's willingness to use a proto-Western system of rules as a model for its own drafting process indicates more than a signal in the language of international law that it will bring in a treaty provision on point through the back door; rather, it indicates a philosophical concurrence with the marketplace-friendly approach of Western regulations: an inclination to consult the regulatory attitudes of other, liberal legal systems in the pursuit of its own regulatory enactments.

The government's general willingness to consult not only the texts of international treaties but also the legal principles which underpin them is cardinal evidence of its willingness to look outside the boundaries of the People's Republic for answers to the regulatory dilemmas of an increasingly market-based aviation sector.

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87. Wu, *supra* note 6, at 839 (citing General Principles of Civil Law of the People' Republic of China, art. 142, and 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 347 (Bureau of Legislative Affairs of the State Council of the People's Republic of China ed., 1991)).

88. Shan, *supra* note 55, at 562.

89. *Id.* at 563.

90. *China Seeks to Encourage Growth*, *supra* note 46.

91. *See* 14 C.F.R. 135.

92. *China Seeks to Encourage Growth*, *supra* note 46.

B. Stimulating Foreign Investment

As early as 1979, the Party resolved as a matter of policy to promote foreign direct investment (FDI) into Chinese enterprises.[93] In the years since, numerous legislative enactments have created sophisticated regulatory schemes governing Sino-foreign enterprises, taxation on capital gains, intellectual property, lending and guarantees, and labor.[94] Those legislative enactments have produced a remarkable rate of FDI activity, with the European Union rising above the United States and Japan as the single-largest source of FDI in Chinese enterprises.[95]

While foreign investment treaties and trade agreements are not directly applicable in Chinese courts without some transformative or incorporative process,[96] national laws have echoed the Party policy of encouraging FDI as a means of ensuring economic growth.

Since 1994, the government has permitted foreign investors to hold up to thirty-five percent of privately held airlines in China.[97] Chinese securities law is particularly relevant to this analysis because of the Party's general willingness to invite more foreign ownership of participants in the country's airline industry, particularly air carriers. To be sure, Chinese law lacks certain legal principles common in other jurisdictions, particularly the European Union and the United States, which legally empower shareholders to take an active role in corporate management.[98] But the mere fact that the Chinese marketplace includes some seventy-two million securities trading accounts[99] is evidence of a burgeoning marketplace of potential investors in the country's privately held aviation infrastructure, notwithstanding the limits of its corporate-accountability laws. Airlines partially owned by foreign shareholders enjoy the same legal status as their state-owned competitors and are subject to the same CAAC regulatory regime.[100]

Progress in attracting significant amounts of FDI in the aviation industry has been slow, however, due perhaps in large part to China's reluctance to sign an open-skies agreement with the

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93. *See* LUBMAN, *supra* note 11, at 192.

94. *Id.* at 192-93.

95. *See* Shan, *supra* note 55, at 555.

96. *See* Part II(A), *infra*; Shan, *supra* note 55, at 564.

97. Wu, *supra* note 6, at 835.

98. There are limits, however. *See* Jiong Deng, Note, *Building an Investor-Friendly Shareholder Derivative Lawsuit System in China*, 46 HARV. INT'L L.J. 347 (2005), for a discussion of one gaping hole in the legal regime of shareholder-accountability law.

99. *Id.* at 348.

100. Wu, *supra* note 6, at 835 (citing Wu Jianduan, *Investments in China Civil Air Transportation—Some Legal Aspects*, 20 AIR & SPACE L. 201, 201-05 (1995)).

United States which would open the door to more voluminous trans-Pacific air traffic between the two countries,[101] and would boost investor confidence in the proposition of investment in Chinese carriers. The slow progress also might be explained by the dearth of remedies available to aggrieved shareholders, such as the lack of shareholder-derivative lawsuits empowering them to hold recalcitrant airline management responsible for injuries to investors,[102] and foreign companies' lack of confidence in Chinese courts' ability to produce consistent outcomes.[103]

The absence of legal remedies for perceived injuries to shareholders and the West's perception that Chinese law generally is opaque rather than transparent to outsiders increase Western investors' perception of risk in Chinese airlines investment, and may have chilled some FDI activity in China. It does not, however, seem to have discouraged major Western aircraft manufacturers from entering the market: Both Boeing and Airbus participate intensely in the Chinese market. Airbus, for example, has maintained a physical presence in China since 1990, operating a support and training center there,[104] and relying on Chinese suppliers to build portions of passenger jets whose final assembly takes place in Europe.[105] Indeed, one Airbus executive unabashedly summarized the company's relationship with China as follows: "The Chinese have said to us, 'Give us some of your technology, and we guarantee we will purchase some of your aircraft.' We have to get our share of the cake."[106]

C. International Terrorism

It is worth mentioning briefly that China's cooperation with foreign jurisdictions has not been limited to modeling statutory texts after their global counterparts and reaching out for foreign investment. With global aviation come its many problems, chief among them the issue of global terrorism, which in recent years has slammed the worldwide aviation network into a new reality. By 2002, China had joined every global anti-terrorism convention

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101. Steven Lott, *China, U.S. Share Proposals; Chinese Frustrated By U.S. Visas*, AVIATION WEEK, Apr. 24, 2006, *available at* http://www.aviationnow.com/avnow/search/autosuggest.jsp?docid=3045&url=http%3A%2F%2Fwww.aviationnow.com%2Favnow%2Fnews %2Fchannel_comm_story.jsp%3Fview%3Dstory%26id%3Dnews%2FUSBC04246.xml.

102. *See, e.g.,* Deng, *supra* note 98.

103. Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System,* 25 B.C. INT'L & COMP. L. REV. 59, 59 (2002).

104. *Airbus in China*, Airbus S.A.S., *available at* http://www.airbus.com/en/worldwide/airbus_in_china.html.

105. *See* Mellor & Rothman, *supra* note 48.

106. *Id.*

then in effect[107] and had incorporated into the Civil Aviation Law specific prohibitions of aircraft hijackings and other terrorist acts.[108]

III. LOOKING WITHIN

If China's close attention to foreign sources of law is evidence of flexibility and openness to reform, then its adherence to socialist principles at the law- and policymaking levels is telling of its determination to steep liberal reform in socialist doctrine. Notwithstanding their apparent reflection on numerous foreign models and agreements to which China is a party, those who draft Chinese law within the halls of the State Council and government agencies are at once Chinese, products of a nearly sixty-year-old socialist society which emphasizes, at all levels, the legal superiority of the collective. The collective and its interests are present in every instance of the Chinese legal calculus; aviation law is no exception.

A. Civil Aviation Law Article 16 as a Reflection of Socialist Norms

Part II(A) discussed at some length the relevance of Article 16 of the Civil Aviation Law and its registration rules with respect to mortgages of aircraft.[109] Article 16 provides a clear transactional rule that protects the rights of creditors in aircraft, and the interests of potential creditors, by imposing upon the parties to an aircraft mortgage a duty to register the mortgage with the CAAC as a condition of its "establishment."[110] The rule is on one level a pragmatic rule of notice common among all legal systems which contemplate secured transactions as a method of collateral acquisition and disposition. More significantly, though, Article 16 adapts the Geneva Convention's recognition of specific concerns respecting aircraft security interests[111] to China's broader philosophical sensibility. The totality of Chinese rules reflects, at some level, the consciousness of the collective, the notion that valid rules advance the state's interest and increase the wellbeing of all the participants in the socialist society. Elegant rules, at all levels of the Party-state, impose duties upon the individual of responsibility to the collective. At all times are the presence and interests of the collective apparent in rules of the system. One might consider the

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107. Chen Qiang & Hu Qian, *Chinese Practice in International Law: 2001,* 1 CHINESE J. INT'L L. 328, 332 (2002).

108. Civil Aviation Law, *supra* note 9, at arts. 191-95.

109. *See supra* Part II; Civil Aviation Law, *supra* note 9, at art. 16.

110. Civil Aviation Law, *supra* note 9, at art. 6.

111 *See* Geneva Convention, *supra* note 57, at art. I.

famous line by model government mediator Aunty Wu, "If I didn't depend on everyone, nothing could be solved,"[112] as a reflection of the presence of the collective even in the most private and arm's length transactions.

Article 16's registration rule is symbolic in many respects of the tension which this Note seeks to describe between Chinese law's accession to Western liberal norms on one hand and its repeating emphasis on socialist norms, traditions, and legal canons on the other. It requires state registration of aircraft mortgages as a condition of their establishment:[113] a communication and publication of the private creditor-debtor transaction to the collective, an appeal to the state—and hence to the people—for formal approval of the transaction.

B. Remnants of Heavy Regulation and Marketplace Involvement

Despite the liberalization heralded by the Civil Aviation Law, airlines in China remain heavily regulated. Carriers governed by Article 91 must apply for and receive the CAAC's approval both to operate new routes and to cease service on existing routes.[114] The government's top-down involvement in airlines' strategic network planning decisions reflects a regulatory mentality in which the central government, rather than the marketplace of travelers and shippers, performs the essential resource-allocation function, the classic philosophy behind airline regulation seen even in the United States prior to deregulation in the 1970s.

The aggressive tenor of such marketplace regulation is rooted chiefly in the law's institutional classification of airlines as "public utility enterprises" (PUEs).[115] Heavy regulation of PUEs during the major part of the communist years has abated as the Chinese marketplace has liberalized.[116] The focus since 2000 has largely shifted from protectionist policies favoring PUEs to optimistic anti-monopoly laws seeking to limit their naturally chilling effect on market-based economics.[117] Such reforms have come in the form of both sweeping anti-monopoly laws and industry-specific laws such as the Civil Aviation Law,[118] which falteringly tailors economic

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112. LUBMAN, *supra* note 11, at 40.
113. Civil Aviation Law, *supra* note 9, at art. 16.
114. *Id.* at art. 96.
115. Zheng Shao Hua, *A Discourse on the Legal Framework of China's Public Utility Enterprises*, 7 SING. J. INT'L & COMP. L. 86, 86 (2003).
116. *Id.*
117. *Id.*
118. *Id.*

regulation to the unique needs of the growing airline industry.[119] Professor Zheng Shao Hua's appraisal of the Civil Aviation Law's success in breaking up the natural monopolies of China's regionally segregated state-owned airlines is as pessimistic as Wu's: Laws such as the Civil Aviation law "are not only unable to protect consumers' rights and realize social justice but are also unable to increase economic efficiency."[120] Airlines and other PUEs are naturally monopolistic because of:

> [T]he indispensable nature of the goods and services they provide, the huge amount of investment capital and sunk costs involved, the restrictions imposed by economies of scale and technical conditions, and the special requirement of efficiency in resource allocation. In addition, with the influence of a planned economy, PUEs are essentially state-owned and state-managed.[121]

The latter problem seems the most troubling. PUEs are often structurally subordinate to government regulatory agencies that are also the guardians of their assets and the recipients of their profits.[122] This is true in China's railroad industry today[123] but will be less applicable to the airline industry after the Scheme of Restructure completes industry consolidation and further removes the CAAC from its role as beneficiary of the industry.[124] Nonetheless, if the government is structurally configured as the beneficiary of air services—with a legitimate self-interest in maximizing its gains—it has less incentive to respond to concerns over consumers' rights and to afford consumers social protections,[125] particularly as air carriers expand and accommodate record numbers of travelers.

The government acknowledged as much in a 2003 filing with the Organisation for Economic Co-operation and Development, commenting in part on the monopolies of PUEs and other structural monopolies in the socialist system. The report stated:

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119. For a perspective on the Civil Aviation Law's weaknesses in this respect, see Wu, *supra* note 6, at 839-40.

120. Zheng, *supra* note115, at 86, noting that, "China needs to consider the uniqueness of her monopoly phenomenon when formulating her anti-monopoly laws in [the] future so as to handle acts of unfair competition committed by naturally monopolistic PUEs, a product of natural and administrative monopolistic behaviour." *Id.* at 86-87.

121. *Id.* at 87.

122. *Id.* at 88.

123. *Id.*

124. *See* Part I, *supra.* The Scheme of Restructure should also insulate the CAAC as an administrative authority whose chief job is regulation.

125. Zheng, *supra* note 115, at 91.

> [T]he unfair competition practices done by government or government agencies are still under the supervision and check of their superior authorities. In practice, we have found that the government or government agencies are seldom punished for their unfair practices, as the objectives such as regional development, the increase of the revenue of local government and employment generally prevail over the objective of competition protection in dealing with such cases. Therefore, it is evident that the unfair competition of government and government agencies is still rampant.[126]

Other scholars have noted other weaknesses in China's Unfair Competition Law, legislation ostensibly applicable to PUEs and other market participants, designed to curb monopolistic and abusive practices. Wu and Xu identified several "unaddressed concerns," including: "restriction of potential anti-competitive results of a takeover (a merger or acquisition) of a business or company; the restriction of the market share percentage by which a takeover can prevent, restrict, or distort competition in the market; or the abuse of the dominant position in the market."[127]

Regardless of the law's inability to combat effectively the monopolistic tendencies of PUEs, China has steadfastly adhered to the general scheme in place respecting PUEs and, aside from mandating consolidation in the airline sector, has done little to privatize or deregulate PUEs in a way that would reduce the likelihood of monopolistic and abusive behavior. The important point with respect to PUEs for the purpose of this analysis, however, is their distinctly socialist dimension. They are industries of immeasurable necessity to the national infrastructure and are the prototypical and natural subjects of stringent government regulation. In that respect China has adhered to the socialist premise of its desire to create a market-based socialist economy.

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126. *Objectives of the Competition Law of PRC and the Optimal Design of Competition Authorities,* Organisation for Economic Co-operation and Development, Global Forum on Competition 3, Jan. 9, 2003, *available at* http://www.oecd.org/dataoecd/58/25/2485968.pdf (last visited May 1, 2006).

127. Wu & Xu, *supra* note 6, at 597.

IV. WHY AVIATION LAW IS A USEFUL TOOL FOR UNDERSTANDING CHINA

Aviation law in China is occasionally inconsistent, but it is predictable. It is largely uniform and complete, but it has its share of gaps. It is altogether socialist with a gaze toward Western liberalism: it is at once uniquely Chinese, blending together all of the paradoxes of Chinese law—its predictable inconsistency, its occasional mysterious inaccessibility, its curious blend of socialism with free-market liberalism—which fascinate and confound legal thinkers of the Western tradition.

If they are to succeed in bringing sustainability to China's airline industry, China's aviation laws and policies must provide flexibility for the industry to capitalize on its recent exponential growth. Insofar as the Civil Aviation Law and other CAAC regulations and decisions have promoted liberalization, stimulated foreign direct investment in the sector, introduced stringent safety regulations, and removed the Party-state by several degrees from its pecuniary interest in aviation enterprises, those laws have generally worked.

When we consider aviation law in China, though, we must ask: What do we think about when we think about Chinese law? What can aviation law contribute to our understanding of how China's legal system works—indeed, *if* it works at all?

There are no doubt multiple answers to that question across the disciplines of law, political science, economics, and history, but the primary reason for aviation law's usefulness as a small window on the Chinese legal system in its entirety is aviation law's general effectiveness. Aviation law, to be sure, is a paradox: a distinctly Chinese blend of rigorous socialist doctrine with dashes of liberal policies, here and there, that seem wholly inconsistent with socialism's basic premise of collective ownership of productive assets. It is in that sense representative of a great many legal disciplines and areas of law in China, which recognize essentially liberal notions of personal rights and apply them to the socialist framework.

Aviation law has incubated a national industry whose growth is perhaps greater than that of any other airline sector since the Wright brothers first took flight. China's aviation law has adopted the texts of international treaties and U.S. regulations; it has incorporated, thematically, universal principles of personal rights into statutory and regulatory provisions; and it has preserved the socialist fixtures of the state-owned enterprise and the PUE, and above all else it has emphasized the supremacy of the collective. It has worked in those two dimensions, the Western and the Eastern,

to create a jurisprudence that largely sets out the framework for a fantastic story of growth and evolution. The next big test for aviation law in China will be whether the system can continue to negotiate successfully the craggy border between socialism and a free market as the national airline industry continues to grow.

PUBLIC PURPOSE, PRIVATE LOSSES: REGULATORY EXPROPRIATION AND ENVIRONMENTAL REGULATION IN INTERNATIONAL INVESTMENT LAW

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I. INTRODUCTION TO REGULATORY EXPROPRIATION

In what was called a "roadshow at times reminiscent of high farce" by the global press, representatives from the Russian government in October 2006 led a group of journalists and environmental activists on a "breakneck tour of alleged environmental violations" perpetrated by Western energy companies laying the infrastructure for a massive oil and gas project, dubbed Sakhalin-2, in eastern Siberia.[1] Due to these supposed violations, the Russian Ministry of Natural Resources used its regulatory power to revoke the foreign investors' environmental operating license, freezing the construction process and throwing completion of the project into doubt.[2] However, following two and-a-half months of deadlock, in late December 2006, the foreign investors acquiesced to handing over a majority stake in the project to a government-controlled energy company and agreed to revise the contract between themselves and the Russian government to the enormous benefit of the government.[3] Shortly thereafter, Russian President Vladimir Putin announced that Sakhalin-2's environmental issues were "considered resolved," and construction was able to continue.[4]

The Sakhalin-2 incident is simply the most recent example of what international law refers to as "regulatory expropriation." Regulatory expropriation is a term describing any scenario in which a capital-importing state uses its regulatory powers to deprive foreign investors of their property or the effective enjoyment thereof.[5] In the past, states were frequently open about seizing

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1. Tom Parfitt, *Kremlin Attack Dog Vows to Take on Shell in the Battle of Sakhalin*, THE GUARDIAN (London), Guardian Financial Pages, Oct. 4, 2006, at 25, *available at* http://business.guardian.co.uk/story/0,,1886783,00.html.

2. *See id.*

3. *See Shell's Sakhalin Rout Shines Light on Others*, PETROLEUM INTELLIGENCE WKLY, Jan. 1, 2007.

4. Steven L. Myers, *Russia Strong-arms Energy-hungry West; Moscow Can Afford to Ignore its Critics*, INT'L HERALD TRIB., Dec. 28, 2006, at 5.

5. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 rep. note 7 (1987) (referring to "regulatory expropriation" as "creeping expropriation"); Elyse M. Freeman, Note, *Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons From the European Court of Human Rights*, 42 COLUM. J. TRANSNAT'L L. 177, 181 (2003). Generally, "regulatory expropriation," "creeping expropriation," and "regulatory takings" all refer to the same legal concept. For one author's interchangeable use of "regulatory expropriation" and "regulatory takings," *see* Rainer Geiger, *Regulatory Expropria-*

property held by foreign investors. Indeed, states have often passed laws which, on their face, forced a transfer of property rights out of the hands of foreign nationals. Such was the case in *Kuwait v. Aminoil*, where the Kuwaiti government enacted a Decree Law terminating a valuable petroleum concession granted to the American Independent Oil Company (Aminoil) and taking away the company's remaining facilities in Kuwait.[6]

While customary international law recognized early on that governments engaging in expropriation had a duty to compensate foreign investors for their losses, there were few limits on how government expropriation of foreign investments might take place, or even a clear notion of what expropriation constituted.[7] However, in the interest of attracting capital from abroad, many countries over the last two decades have begun participating in bilateral investment treaties (BITs), as well as multilateral investment treaties such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). These treaties work to attract capital to the treaty parties by limiting the potential for host government interference with foreign investments. Moreover, the proliferation of treaties like NAFTA, the ECT, and numerous BITs has also shaped the development of the customary international law of expropriation. As a result, it has become more difficult for governments who are not parties to such investment treaties to engage in open takings without paying significant compensation. NAFTA, the ECT, and almost all BITs are united in requiring governments to pay compensation to foreign investors when direct governmental expropriation occurs which resembles a physical taking. Article 1110 of NAFTA, Article 13 of the ECT, and Article 6 of the U.S. Model BIT all use similar language in requiring compensation for actions constituting expropriation or measures equivalent to expropriation.[8] Yet besides *de jure* expropriation of a direct nature approximating a physical taking (as in *Aminoil*), there continues to be considerable controversy over which behavior constitutes expropriatory action (much less measures "equivalent

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tions in International Law: Lessons from the Multilateral Agreement on Investment, 11 N.Y.U. ENVTL. L.J. 94, 96 (2002).

6. *See* Kuwait v. American Indep. Oil Co. (Aminoil), 21 I.L.M. 976, para. lxv, at 997 (1982).

7. *See* Chorzów Factory, Claim for Indemnity (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 41 (Sept. 13), *available at* http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf.

8. *See* North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 1110, 107 Stat. 2057, 32 I.L.M. 605, 641 (1993) [hereinafter NAFTA]; The Energy Charter Treaty, art. 13, Dec. 17, 1994, 34 I.L.M 360. [hereinafter ECT]; Office of the United States Trade Representative, *U.S. Model Bilateral Investment Treaty*, art. 6 (Nov. 2004), http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html [hereinafter U.S. Model BIT].

to" expropriatory action) under international law. This is particularly true in the realm of government regulation, when a government, often through subsidiary agencies, asserts its sovereign right to limit how industry located within its borders carries on business. By regulating in this manner, these government controls can have the effect of diminishing the value of a foreign-owned investment without the government necessarily taking ownership of the investment.

The primary purpose of this analysis is to determine the point at which the normal exercise of government regulatory powers becomes compensable regulatory expropriation under the arbitral jurisprudence of NAFTA, customary international law (as captured in various BITs), and the standards of the ECT. Furthermore, it will attempt to compare and contrast notions of regulatory expropriation between these three international regimes. Overall, through this tripartite comparative approach, the reader should emerge with a fuller understanding of the current state of regulatory expropriation in international law.

This note will also review and respond to existing critiques of regulatory expropriation. While some of these criticisms of the international legal doctrine of regulatory expropriation are economic in nature, others focus on the threat that regulatory expropriation poses to government efforts at progressive environmental regulation.[9] This analysis will highlight many awards in which environmental regulation was used as a genuine tool of government expropriation and attempt to rebut the argument that the doctrine of regulatory expropriation has been misused by multi-national corporations in order to avoid environmental standards set by government regulatory agencies.

In sum, the analysis below will proceed in a bifurcated fashion. In the first section, it will summarize the current state of the doctrine of regulatory expropriation under NAFTA, customary international law (plus various BITs), and the ECT. In the second section, this analysis will attempt to respond to those critics who claim there is no place in international law for regulatory expropriation, or that environmental regulation by sovereign governments should be exempt from the doctrine of regulatory expropriation.

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9. *See* Vicki Been, *Does an International "Regulatory Takings" Doctrine Make Sense?*, 11 N.Y.U. ENVTL. L.J. 49, 50-51 (2002); Howard Mann & Konrad von Moltke, *Nafta's Chapter 11 and the Environment* 47 (Int'l Inst. for Sustainable Dev., Working Paper 1999).

II. CHRONOLOGICAL ANALYSIS OF REGULATORY EXPROPRIATION IN NAFTA ARTICLE 1110 JURISPRUDENCE

A. Introduction to NAFTA Article 1110

One of the best-developed, and most controversial, provisions in international law covering regulatory expropriation is Article 1110, Chapter XI of the North American Free Trade Agreement (NAFTA).[10] Article 1110(1) states that NAFTA parties may not

> directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1) [Minimum Standard of Treatment]; and (d) on payment of compensation in accordance with paragraphs 2 through 6.[11]

Article 1110 is only one of many NAFTA provisions geared towards protecting foreign investors; other sections include Article 1102 (national treatment), Article 1103 (most favored nation treatment) and Article 1104 (minimum standard of treatment). However, Article 1110 has played a prominent role in a number of arbitrations brought under the NAFTA dispute resolution mechanism set out in Articles 1116(1)(a) through 1137.[12] To resolve Article 1110 disputes, NAFTA member states (Canada, Mexico, and the United States) consented to arbitration in Article 1122 either through the auspices of the International Center for Investment Disputes (ICSID) or under UNCITRAL rules, with the choice between the two left up to the initiating party.[13]

The broad language used in Article 1110(1), such as "indirectly nationalize or expropriate" and "measure tantamount to nationalization," plainly takes aim at government behavior beyond traditional expropriatory acts such as government occupation of an investor's property, or forced transfer of title. Moreover, it is clear that Article 1110 applies equally to both government regulations and legislation, as NAFTA's investor protections cover "any law,

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10. *See* NAFTA, *supra* note 8, art. 1110.
11. *Id*. art. 1110.
12. *See id*. arts. 1102-04, 1110, 1116-37.
13. *See id*. arts. 1120, 1122.

regulation, procedure, requirement or practice."[14] Article 1110's standards for expropriation (limiting it to non-discriminatory measures enacted for a public purpose in accordance for due process) are not all that remarkable and were primarily drawn from widely accepted provisions of pre-existing BIT's signed by NAFTA members, along with customary international law. In spite of this, it is worth noting that many battles relating to the expropriatory qualities of environmental regulation revolve around the public purpose prong in Article 1110(1)(a).

The larger debate, however, has frequently tended to center on how far a regulation must go to achieve the act of expropriation in the first place. Vicki Been and Joel Beauvais write that "[n]o attempt was made . . . in NAFTA itself to address directly the problem of how to distinguish legitimate noncompensable regulations having an effect on the economic value of foreign investments and 'regulatory takings' requiring compensation."[15] Thus, in the regulatory context, although NAFTA provides strong guidelines on how to properly engage in expropriation once an expropriation has been identified, it has been left to NAFTA arbitral tribunals to determine which regulatory actions should be categorized as expropriations.[16]

B. Article 1110 Jurisprudence

Fortunately, there is a significant, if not always consistent, body of arbitral awards involving matters of regulatory expropriation and the interpretation of NAFTA's Article 1110. Foremost among these arbitral awards is that of *Metalclad Corp. v. United Mexican States*, decided through the auspices of ICSID.[17] Although this case has received substantial analysis by scholars of international law, an overview is merited here as *Metalclad* remains the strongest pro-investor interpretation of Article 1110 that any NAFTA tribunal has yet issued.[18] Decided in 2000, the series of expropriatory acts in *Metalclad* began when the Mexican municipality of Guadalcazar denied a building permit to the

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14. *Id*. art. 201(1).

15. Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U.L. REV. 30, 54 (2003).

16. *See id*. at 55.

17. Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB/(AF)/97/1, Award of the Tribunal, 40 I.L.M. 36 (2001) (NAFTA Ch. 11 Arb. Trib. 2000), *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf [herinafter *Metalclad Corp*.].

18. *See* Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 19, 37 (2002).

American company, Metalclad Corp., which had just completed construction of a hazardous waste disposal facility based on assurances by the Mexican federal government that the company had acquired all the necessary permits.[19] After Metaclad initiated arbitration, the Governor of the Mexican State of San Luis Potosi designated the Metalclad property as an ecological preserve, which "had the effect of barring forever the operation of the landfill."[20]

The tribunal easily determined that an expropriation had occurred, stating that

> expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[21]

Thus, in breaking down this definition of regulatory expropriation, it becomes clear that the tribunal is focusing on three interlinked factors: (1) interference with *use*, (2) interference with reasonable *investor expectations*, and (3) *diminution in value* of the investment.

First, it is apparent that the tribunal views interference with actual use as a crucial element of regulatory expropriation. According to the tribunal, the actions of San Louis Potosi "barr[ed] forever the operation of the landfill."[22] The tribunal's emphasis on Metalclad's *use* of the investment, rather than on the traditional question of *control* of the investment (which relates back to notions of physical possession), is an essential departure from older ideas of expropriation.[23] It is important at this juncture to distinguish "use" of an investment and "control" of an investment as two separate concepts. "Control" is "[t]he direct or indirect power to direct the management and policies of a person or entity" and is closely tied to the ownership, possession, and holding title to a physical

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19. *See Metalclad Corp.* at paras. 33, 38.
20. *Id.* at para. 109.
21. *Id.* at para. 103.
22. *Id.* at para. 109.
23. The difference between *use* and *control* is illustrated by a hypothetical situation in which the Mexican government passes a law giving it the power to appoint the management of Metalclad's hazardous waste facility, while still allowing the facility to operate. Such a decision would certainly deprive Metalclad of *control* (even if Metalclad continued to receive income from the operation), whether or not the *use* of the investment changes.

asset.[24] The question of use is a different matter altogether, as "use" is the "application or employment of something."[25] A foreign investor may control his or her asset but may not have a legal right, due to government regulation, to put it to its intended use. To draw a rough analogy, an individual may own an automobile that sits in her driveway but has at the same time been denied a license by the government and is therefore unable to drive it. This small example demonstrates the basic idea behind regulatory expropriation through denial of expected use. Conversely, it may be that the asset of a foreign investor is being put to its intended use, but the foreign investor no longer has control of it because she is not the titled owner of the investment under local law and receives no profits from its intended use. Tribunals relying on the *use* concept of expropriation are more likely to find government action to be regulatory expropriation than tribunals relying on the *control* concept of expropriation, although the two concepts are not mutually exclusive.

While use of the Metalclad property as a hazardous waste facility was no longer possible because the Governor's ecological decree forbade "any conduct that might involve the discharge of polluting agents on the reserve soil," the tribunal seemed unconcerned with alternative, less profitable uses for the facility, ultimately granting Metalclad the full value of its initial investment.[26] The tribunal's determination that a total deprivation in value had occurred can be traced to the complete disappointment of the expectations of the investor, thus introducing the second element of *Metalclad*'s definition of expropriation. Even though the Metaclad property and facility may have been put to a range of less profitable uses, the primary use, which the Mexican government had led the company to believe was acceptable, was foreclosed following the actions of Guadalcazar and San Luis Potosi officials. The tribunal mentions several times that "Metaclad was entitled to rely on the representations of federal officials,"[27] and "the representations of the Mexican federal government, on which Metalclad relied," led it to conclude that an indirect expropriation had taken place.[28]

Third, there is the matter of the diminution in value of the investment. In the damages section of the award, the tribunal opined that the actions of the local and state governments had "negate[d] the possibility of any meaningful return on Metalclad's

24. BLACK'S LAW DICTIONARY 353 (8th ed., 2004).
25. *Id.* at 1577.
26. *Metalclad Corp.*, at paras. 110-12, 131.
27. *Id.* at para. 89.
28. *Id.* at para. 107.

investment," ultimately stating that "Metalclad has completely lost its investment."[29] However, the tribunal was unclear as to whether a complete deprivation of value was a necessary condition of regulatory expropriation, or was simply a sufficient condition.

In examining the *Metalclad* award, it is interesting that the tribunal generally seems unconcerned about the purpose for which the expropriation occurred, even though "public purpose" is one of the three key guidelines for proper or "legal" expropriation under Article 1110.[30] This raises questions regarding the utility of the public purpose prong of measuring proper expropriation in international law. Initially, the tribunal, in determining that an expropriation occurred, notes that Guadalcazar's denial of the permit took place "without any basis in the proposed physical construction or any defect in the site" (perhaps hinting that public purpose considerations are not entirely dead).[31] However, when considering the Governor's ecological decree, the tribunal states that it need not "decide or consider the motivation or intent of the adoption of the Ecological Decree" and that "implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation."[32] These statements indicate that in instances where government regulatory action achieves a complete taking, the purpose of this taking is more or less irrelevant.

In the same year *Metalclad* was handed down, a very different decision dealing with the matter of regulatory expropriation under NAFTA emerged. The dispute in *S.D. Myers, Inc. v. Canada* arose when an American company, planning to engage in PCB remediation (the extraction and recycling of PCBs) by exporting PCB materials from Canada to the United States, found its potential business eliminated when the Canadian government issued a series of orders banning the export of PCBs out of Canada.[33] Eventually, the Canadian government reopened the border for PCB export; however, damage to the American company was already done.[34] The decision of the Canadian government had a thinly veiled protectionist motive and can be partly attributed to intensive lobbing by the Canadian PCB disposal industry.[35] Even so, the tribunal in its award determined that an expropriation had not taken place.[36]

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29. *Id.* at para. 113.
30. *See* NAFTA, *supra* note 8, art. 1110.
31. *Metaclad Corp.*, at para. 106.
32. *Id.* at para. 111.
33. *See* S.D. Myers, Inc. (U.S.) v. Canada, First Partial Award, paras. 117, 123, 127, 40 I.L.M. 1408 (2001) (NAFTA Ch. 11 Arb. Trib. 2000), *available at* http://www.naftaclaims.com/disputes_canada_sdmyers.htm [hereinafter S.D. Myers, Inc.]
34. *See id.*at para. 127.
35. *See id.* at para. 122.
36. *See id.* at para. 287.

In rendering its decision, the *S.D. Myers* tribunal relied on the definition of expropriation (as it believed it to be) under customary international law.[37] The tribunal stated that "the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the 'taking.'"[38] The tribunal followed up this opaque definition of expropriation with a declaration directly contradicting the reasoning of the *Metalclad* tribunal.[39] In paragraph 281 of the Partial Award, the tribunal wrote that "[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of NAFTA, although the Tribunal does not rule out that possibility."[40] The tribunal continued, stating that "[e]xpropriations tend to involve the deprivation of ownership rights; regulations a lesser interference" and that "[t]he distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs."[41] Altogether, paragraphs 281 and 282 of *S.D. Myers* are a broad departure from the *Metalclad* award, in which the tribunal held that expropriatory acts under NAFTA included "incidental interference" with the use of an investment which diminished the economic benefit of that investment.[42]

The *S.D. Myers* tribunal concentrated on two areas in particular in rejecting the plaintiff's expropriation argument. First, the tribunal focused on the length of time that the deprivation of the investor's use of the property took place. The tribunal determined in its review of S.D. Myers's expropriation claim that

> [a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate

37. *See id.* at para. 280.
38. *Id.*
39. *See id.* at paras. 281-82.
40. *Id.* at para. 281.
41. *Id.* at para. 282.
42. Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB/(AF)/97/1, Award of the Tribunal, para. 103, 40 I.L.M. 36 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

> to view a deprivation as amounting to an expropriation, even if it were partial or temporary.[43]

The tribunal's discussion of expropriation in terms of "the ability of an owner to make *use*" of an investment reinforces the *Metalclad* tribunal's definition of expropriation ("interference with the *use* of property"), [44] particularly its focus in the context of regulatory expropriation on *use* of an investment over that of *control*.[45] More importantly, the *S.D. Myers* award adds a temporal element to the *use* prong of the *Metalclad* test for expropriation when it states that "[i]n this case the closure of the border was temporary" and that "[t]his may have significance in assessing the compensation to be awarded in relation to CANADA's violations of Articles 1102 and 1105, but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110."[46] The important lesson to be taken away from this award seems to be that temporary deprivations of property (eighteen months or less, as was the case here) are unlikely to be found to be expropriations under Article 1110, although such a finding is not impossible.

Second, the *S.D. Myers* tribunal rejected the investor's argument that the language in Article 1110, requiring compensation for government actions "tantamount to nationalization," expanded traditional notions of expropriation to include any government action interfering with property rights.[47] In the award, the tribunal took an approach similar to *Pope & Talbot* in opining that the "tantamount to" language did not expand NAFTA's protections to state action "beyond the customary scope of the term 'expropriation' under international law," although it did recognize that "the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation' [indirect expropriation]."[48] It should also be noted that the *S.D. Myers* tribunal, in examining the meaning of the "tantamount to" language of Article 1110, remarked that NAFTA tribunals "must look at the real interests involved and the purpose and effect of the government measure" rather than "technical or facial considerations."[49] This is

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43. *S.D. Myers, Inc.*, at para. 283.
44. *Metalclad Corp.*, at para. 103 (emphasis added).
45. *Id.*
46. *S.D. Myers, Inc.*, at para. 284.
47. *See id*. at para. 142.
48. *Id.* at paras. 285-86.
49. *Id*. at para. 285.

clearly a different approach from the *Metalclad* tribunal's emphasis of effect over purported public purpose.[50]

While the *S.D. Myers* opinion appears to provide some ammunition to those wishing to eliminate regulatory takings from the purview of NAFTA Article 1110, the award has significant weaknesses limiting its usefulness in this regard. Even though the tribunal does write that "[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation," it qualifies this declaration by stating that "the Tribunal does not rule out [the] possibility" that regulatory conduct by public authorities may be the subject of a "legitimate complaint" under Article 1110.[51] Moreover, it is likely that the tribunal was overcompensating for the plaintiff's attempts to broaden Article 1110 to cover governmental action outside those areas recognized under customary international law. Finally, the assertion in *S.D. Myers* that regulations promulgated for a public purpose are not expropriatory was rejected in no uncertain terms by the tribunal in the 2006 award of *Azurix Corp. v. Argentina*.[52]

The interim award in the *Pope & Talbot, Inc. v. Canada* arbitration, although issued only several months before *S.D. Myers* and *Metalclad*, draws from a different concept of expropriation.[53] Pope & Talbot, an American-owned company in the business of exporting lumber from Canada to the United States, lodged the complaint in this arbitration.[54] The alleged expropriation occurred when Canada put into force a fee-quota system to limit the export of lumber to the United States from the province where Pope & Talbot harvested its trees, while allowing the unlimited fee-free export of lumber from other provinces in which Canadian-owned lumber companies were operating.[55] The tribunal agreed with Pope & Talbot that "access to the . . . market is a property interest subject to protection under Article 1110," although it eventually determined that no expropriation had occurred.[56]

The *Pope & Talbot* tribunal at first appears to be headed towards a broad interpretation of Article 1110, when it states in the

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50. *See Metalclad Corp.*, at para. 111.

51. *S.D. Myers, Inc.*, at para. 281.

52. See Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, paras. 310-11 (Jul. 14, 2006), *available at* http://www.worldbank.org/icsid/cases/pdf/ARB0112_Azurix-Award-en.pdf. (*Azurix*, though not a NAFTA case, has nonetheless exercised significant influence in later NAFTA arbitral awards).

53. *See* Pope & Talbot, Inc. (U.S.) v. Canada, Interim Award, 40 I.L.M. 258 (2001) (NAFTA Ch. 11 Arb. Trib. 2000), *available at* http://www.naftaclaims.com/disputes_canada_pope.htm [hereinafter Pope & Talbot, Inc.]

54. *See Pope & Talbot, Inc.*, at paras. 4-5.

55. *See id*. at paras. 6-7.

56. *Id*. at para. 96.

award that "[r]egulations can indeed be exercised in a way that would constitute creeping expropriation" and that "a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation."[57] However, it quickly returns to the traditional concept of control originating from physical *de jure* expropriations, in emphasizing that Pope & Talbot continues to direct the day-to-day operations of the investment.[58] The tribunal goes on, stating:

> Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.[59]

The *Pope & Talbot* tribunal acknowledges that regulatory "interference with the Investment's ability to carry on its business" can be a taking, but only when "that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner."[60] This notion of sufficiently restrictive interference seems to require a substantial deprivation in value, coupled with a loss of control over the enterprise.[61]

Altogether, the *Pope & Talbot* tribunal supports a narrow standard of regulatory expropriation that would require an investor to demonstrate loss of control over the property resulting in a substantial drop in value. The tribunal's exclusive reliance on indicators of *control* in determining whether an expropriation has taken place (rather than the investor's ability to make expected *use* of the property) is surprising, given the decisions in *Metalclad* and *S.D. Myers* emphasizing *use*. Furthermore, a significant weakness in the *Pope & Talbot* award becomes manifest when one considers that investor expectations—a crucial aspect of the *Metalclad* and *Feldman* awards (and most other present-day expropriation cases)—are hardly mentioned by the tribunal.

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57. *Id*. at para. 99.
58. *See id*. at para. 100.
59. *Id*.
60. *Id*. at paras. 101-02.
61. *Id*. at para. 102.

Nevertheless, the *Pope & Talbot* opinion remains useful for one major point of NAFTA regulatory expropriation law: the tribunal's determination that the "tantamount to expropriation" language in Article 1110 means nothing more than "equivalent to."[62] In so holding, the tribunal rejected the complainant's argument that the "tantamount to" language in NAFTA expanded in one fell swoop the concept of expropriation beyond customary international law.[63] The determination in *Pope & Talbot* that "something that is 'equivalent' to something else cannot logically encompass more" was adopted in *S.D. Myers* and remains relatively well accepted.[64] Notably, *Pope & Talbot's* notions of control (i.e., loss of control approximating a direct physical taking) have also remained influential, as they were accepted as customary international law by the tribunal in the 2005 *CMS Gas v. Argentina* award.[65]

The award in *Feldman v. Mexico*, which remains somewhat overlooked in regulatory expropriation literature, emerged two years after the decision in *Metalclad* and reflects an attempt by the tribunal to reconcile the diverse approaches to regulatory expropriation law under NAFTA Article 1110. The dispute in this case arose from a disagreement between an American-owned company (CEMSA) and the Mexican government regarding tax rebates available for the export of cigarettes from Mexico.[66] The complainant alleged that Mexican producers applied political pressure to the Mexican government, causing the government to take administrative and legislative steps to provide rebates for exports undertaken by domestic cigarette producers but "deny[ing] rebates for exports by resellers of cigarettes" like the complainant.[67] Although the government decided to apply the special rebate to resellers the following year after the complainant initiated litigation in the Mexican courts, government officials continued to take measures making it difficult for the complainant to recover the rebates to which it was entitled, eventually driving it out of the cigarette export business.[68]

In response to the actions of the Mexican government, CEMSA requested arbitration under NAFTA and the ICSID Convention,

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62. *Pope & Talbot, Inc.*, at para. 104.

63. *See id*. at para. 103.

64. *See S.D. Myers, Inc.*, at para. 286.

65. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8, Final Award, para. 263, 44 I.L.M. 1205 (2005), *available at* http://www.worldbank.org/icsid/cases/CMS_Award.pdf.

66. *See* Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, paras. 1, 7, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002), *available at* http://www.worldbank.org/icsid/cases/feldman_mexico-award-en.PDF.

67. *Id.* at para. 10.

68. *See id*. at paras. 13-18, 91.

asserting that "the various actions of the Mexican authorities . . . in denying the . . . rebates on cigarette exports to CEMSA, resulted in an indirect or 'creeping' expropriation of the Claimant's investment and were tantamount to expropriation under Article 1110."[69] In making its argument, the complainant emphasized its reasonable reliance on the statements of Mexican officials relating to the rebate program, perhaps hoping to repeat the success of a similar argument in the *Metalclad* case.[70]

Because *Feldman* involved the tax policies of the Mexican government—taxation being an essential regulatory power at the heart of state sovereignty—the tribunal manifested a desire to reaffirm the general right of governments to regulate for the public good.[71] Unfortunately, the *Feldman* tribunal overcompensated in attempting to guard against a scenario in which every government regulation resulting in a decrease in the value of a foreign investment becomes expropriatory. In holding that CEMSA's property was not expropriated, numerous statements by the tribunal indicated a return to defining regulatory expropriation in terms of the deprivation of control over the investment approaching a direct physical taking, rather than as a substantial limitation on its use. *Metalclad* was distinguished on the grounds that the investor "was deprived of *all* beneficial use of its property."[72] The fact that the *Metalclad* tribunal was concerned with *use* over physical *control* escaped the reasoning of the *Feldman* tribunal, which held:

> [T]he regulatory action (enforcement of long-standing provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products for which he can obtain from Mexico the invoices required under Article 4, although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has

69. *Id*. at para. 89.

70. *See* Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB/(AF)/97/1, Award of the Tribunal, paras. 41, 107, 40 I.L.M. 36 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

71. *See Feldman*, paras. 103, 113.

72. *Id*. at para. 148 (emphasis added).

> been no "taking" under this standard articulated in *Pope & Talbot*, in the present case.[73]

It should also be noted that the *Feldman* tribunal did examine the expectations of the investor as was recommended by *Metalclad*, but it determined that while "[t]he assurances received by the investor from the Mexican government in *Metalclad* were definitive, unambiguous and repeated," the statements by government officials in *Feldman* were contradictory and informal.[74] This standard for examining investor expectations is a valuable one, and can be expected to reappear in future NAFTA rulings.

The most recent regulatory expropriation case which has emerged from NAFTA, *Methanex v. United States*, caps off the post-*Metalclad* trend towards a narrowing of Article 1110's application to regulatory expropriations.[75] *Methanex* involved a claim in the amount of $970 million "by a Canadian corporation that California regulations requiring the phase out of the gasoline additive MTBE effected a 'regulatory taking' by reducing the Canadian company's market for methanol, a substance used to produce MTBE."[76] The investment alleged to have been subjected to measures "tantamount to expropriation" was Methanex's share in the California and US gasoline oxygenate markets.[77] The tribunal reluctantly accepted that intangibles such as market share and goodwill could be expropriated, while pointing out that "it is difficult to see how they might stand alone."[78]

More importantly, the tribunal unmistakably favored the *control* concept of expropriation over the *use* concept. In holding that Methanex failed to establish "that the California ban manifested any of the features associated with expropriation," the tribunal pulled directly from the regulatory expropriation standard in *Feldman v. Mexico*, and stated that a regulatory action must "deprive[ ] the Claimant of control of his company," "interfere[] directly in the internal operations," or "displace[ ] the Claimant as the controlling shareholder."[79]

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73. *Id*. at para. 152.

74. *Id*. at paras. 148-49.

75. Methanex Corp. v. United States, Final Award, 44 I.L.M. 1345 (2005) (NAFTA Ch. 11 Arb. Trib. 2005), *available at* http://naftaclaims.com/Disputes/USA/Methanex/Methanex_ Final_Award.pdf [hereinafter Methanex Corp.]

76. Been, *supra* note 18, at 19. *See also Methanex Corp.*, at pt. IV, ch. D, para. 1.

77. *See Methanex Corp.*, at pt. I, para. 1.

78. *Id*. at pt. IV, ch. D, para. 17.

79. *Id*. at pt. IV, ch. D, para. 16 (quoting Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, 42 I.L.M. 625, 657 (2003) (NAFTA Ch. 11 Arb. Trib. 2002)).

Finally, the *Methanex* tribunal moved closer to the determination in *S.D. Myers* and away from that of *Metalclad* in ruling that regulations passed for a pubic purpose are not expropriations, even if there is a diminution in value and no compensation is paid. However, the *Methanex* tribunal provided an important qualification to this holding, stating:

> [A] non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[80]

The *Methanex* tribunal's ideas about the public purpose justification in regulatory expropriation are fascinating in two respects. First, they run directly counter to the *Feldman* ruling, where the tribunal opined that "[i]f there is a finding of expropriation, compensation is required, *even if* the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1)."[81] It therefore appears *Methanex* has completely abandoned Article 1110(1)(d) of NAFTA Chapter XI, which requires the payment of compensation in most instances of regulatory expropriation. Second, the *Methanex* tribunal makes a special exception to the general "rule of no compensation" if the foreign investor can demonstrate that it relied on specific government commitments.[82] In doing so, *Methanex* fashions investor expectations the doorway through which all regulatory expropriation claims must pass. Moreover, this doorway is a particularly small one, as the claimant must demonstrate "specific government commitments" (reflecting the *Feldman* requirement of "definitive, unambiguous and repeated" government statements), and additionally that the investor has relied on these commitments. Altogether, the *Methanex* tribunal's assertion that public purpose trumps all is wildly inconsistent with the majority of previous NAFTA holdings, and has yet to be ratified by any further arbitral

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80. *Id. at* pt. IV, ch. D, para. 7.

81. Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, para. 98, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002) (emphasis added).

82. *See Methanex Corp.*, at pt. IV, ch. D, para. 8.

award rendered under NAFTA, the ECT, or customary international law.

In sum, the string of recent Article 1110 regulatory expropriation cases, beginning in 2000 with *Pope & Talbot* and continuing through 2005 with the *Methanex* award, constitutes a complex, sometimes contradictory, but not entirely incoherent jurisprudential tangle. While Barry Appleton takes the position that the unifying factor among these NAFTA cases is that regulatory expropriation exists when "a government action . . . deprives a property holder sufficiently," this explanation seems overly broad.[83] Furthermore, it fails to account for the expansion and contraction of the scope of regulatory expropriation as one moves from *Metalclad* and *S.D. Myers* to *Feldman* and *Methanex*, and the accompanying change in the control-use paradigm. Rather, in order to best comprehend the present state of NAFTA regulatory expropriation doctrine, it is necessary to return to the three interlinked factors of *Metalclad,* placing them in the context of subsequent awards. Although the first *Metalclad* factor (interference with use) might initially appear to have been supplanted by the control test set out in *Feldman* and reaffirmed in *Methanex*, there is a viable and more satisfying explanation which reconciles these cases.

It is the position of this analysis that control and use constitute *two separate* standards by which NAFTA regulatory expropriation can be determined and that each standard has a "continuum" or spectrum on which government acts may be measured to determine if they are expropriations.[84] A complete deprivation of use alone (without any diminution in control) is clearly a taking, whereas anything less than a complete use deprivation has since been found by NAFTA tribunals to be insufficient.[85] Moreover, there is a temporal dimension to use expropriation, in that any deprivation of use must generally be more than temporary or fleeting (at least longer than one year) to be a regulatory expropriation.[86] On the other hand, regulations that significantly (but perhaps not completely) interfere in the internal operations of an in-

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83. Barry Appleton, *Regulatory Takings: The International Law Perspective*, 11 N.Y.U. ENVTL. L.J. 35, 45 (2002).

84. See Michael G. Parisi, *Moving Toward Transparency? An Examination of Regulatory Takings in International Law*, 19 EMORY INT'L L. REV. 383, 390 (2005), who writes that in determining matters of regulatory expropriation, one must ask "at what point along the continuum of interference does a host government expropriate rather than exercise its police powers through implementing regulatory measures?".

85. *See* Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB/(AF)/97/1, Award of the Tribunal, para. 113, 40 I.L.M. 36 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

86. *See* S.D. Myers, Inc. (U.S.) v. Canada, First Partial Award, para. 284, 40 I.L.M. 1408 (2001) (NAFTA Ch. 11 Arb. Trib. 2000). *See also* Parisi, *supra* note 84, at 396.

vestment or displace the claimant as the controlling shareholder doubtlessly constitute regulatory expropriation under the control standard, although the investor may retain some small ability to direct the management of the investment.[87]

Besides interference with control/use, investor expectations also serve a vital function in a NAFTA Article 1110 analysis. Although secondary to questions of use or control, the disappointment of investor expectations may serve as a "booster" by pushing a government regulation that lies within the grey area of the use or control spectrums towards the side of expropriation. The NAFTA cases reviewed here indicate that there are limits to investor expectations, and that disappointment of reasonable investor expectations is only a factor where government officials have made affirmative representations to the foreign investor regarding the state of regulation affecting its investment.[88] Furthermore, these representations by government officials must be of a formal and consistent nature, as well as "definitive, unambiguous and repeated."[89]

Of course, for an expropriation to have taken place, the Article 1110 claimant must also demonstrate that the government regulation has led to some diminution in value of its investment.[90] A government regulation which deprives the investor of the total value of the investment, as occurred in *Metalclad*, is certainly sufficient to meet the damages criteria under the NAFTA expropriation standard.[91] Indeed, regulation resulting in a complete loss may constitute expropriation regardless of whether the use/control or expectations criteria are met. Vicki Been and Joel Beauvais write, "*Metalclad* is . . . commonly cited as applying the U.S. courts' per se rule requiring compensation whenever regulation destroys one hundred percent of the value of the property."[92] The bulk of regulatory expropriation cases under Article 1110, however, involve only a partial deprivation of value due to government regulation, rather than a complete deprivation as occurred in *Metalclad*. Thus, in instances where there is not a complete taking, the investor must demonstrate that the regulations at least caused a "substantial deprivation" in value or "negate[d] the possi-

87. *See Methanex Corp.*, at pt. IV, ch. D, para. 16.

88. *See* Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, paras. 148-49, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002) [hereinafter Feldman]; *Metalclad Corp.*, at para. 89.

89. *Feldman*, at paras. 148-49.

90. *See Metalclad Corp.*, at para. 103.

91. *Id.* at para. 113.

92. Been & Beauvais, *supra* note 15, at 62-63.

bility of any meaningful return."[93] Regulations having only an incidental effect on the value of an investment are not expropriations, as "[r]easonable governmental regulation . . . cannot be achieved if any business that is adversely affected may seek compensation."[94]

Finally, the five NAFTA cases reviewed in this section are significantly split on the weight a tribunal should accord to the public purpose justification for government regulation resulting in a loss of control/use, the disappointment of government-created investor expectations, and a deprivation of value. On the one hand, the tribunal in *Methanex*, the most recent NAFTA case, seems to suggest that a regulation enacted in good faith for a public purpose is almost never expropriatory.[95] On the other hand, the *Metalclad*, *Feldman*, and *Pope & Talbott* awards indicate that a public purpose justification advanced under Article 1110(1)(a) is perhaps not even relevant in determining whether an expropriation has taken place.[96] The *Feldman* tribunal's statement that "[i]f there is a finding of expropriation, compensation is required, *even if* the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1)" is unambiguous in this regard.[97] The *S.D. Myers* tribunal appears to cut a middle path, opining that NAFTA tribunals must consider both "the purpose and effect of the government measure."[98] In light of the preceding jurisprudence, the *Methanex* tribunal's decision to grant governments a *carte blanche* in regulating runs directly counter to almost all previous awards, as well as the text of Article 1110 itself. After all, although Article 1110(1)(a) states that governments may not "directly or indirectly nationalize or expropriate an investment of an investor of another Party . . . except: (a) for a public purpose," it also requires "(d) payment of compensation" for the investor.[99] There is absolutely nothing in Article 1110(1) to indicate that the "public purpose" requirement trumps the "payment of compensation" requirement. Also, Article 1110(1)(a) would become redundant if one accepts that a government regulation enacted for a "public purpose" and meeting the previously discussed aspects of

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93. *Metalclad Corp.*, at para. 113. *See also Pope & Talbot, Inc.*, at para. 102.

94. *Feldman*, at para. 103. *See also* Parisi, *supra* note 84, at 396.

95. *See* Methanex Corp. v. United States, Final Award, pt. IV, ch. D, para. 7, 44 I.L.M. 1345 (2005) (NAFTA Ch. 11 Arb. Trib. 2005).

96. *See Feldman*, at para. 98; *Metalclad Corp.*, at para. 111; Pope & Talbot, Inc. (U.S.) v. Canada, Interim Award, para. 99, 40 I.L.M. 258 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

97. *Feldman*, at para. 98 (emphasis added).

98. *See* S.D. Myers, Inc. (U.S.) v. Canada, First Partial Award, para. 285, 40 I.L.M. 1408 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

99. NAFTA, *supra* note 8, art. 1110(1).

expropriation is not expropriatory. Given that Article 31 of the Vienna Convention on the Law of Treaties requires that "[a] treaty [like NAFTA] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,"[100] *Methanex*'s decision to ignore Article 1110(1)(d) while rendering Article 1110(1)(a) redundant runs counter to the ordinary meaning of Article 1110 and should thus be strongly questioned.

III. ELEMENTAL ANALYSIS OF REGULATORY EXPROPRIATION IN CUSTOMARY INTERNATIONAL LAW AND BILATERAL INVESTMENT TREATIES

A. Identifying Regulatory Expropriation

1. *Introduction to the Law of Regulatory Expropriation in Customary International Law and Bilateral Investment Treaties*

Even though jurisprudence specifically related to NAFTA Article 1110 has helped shape the contours of the law of international regulatory expropriation, the cannon of transnational takings extends well beyond the realm of NAFTA. In fact, NAFTA is only one recent development in the long history of expropriation law. Today, in addition to NAFTA jurisprudence, the elements of regulatory expropriation in customary international law have been influenced by a plethora of bilateral investment treaties (BITs) between capital-exporting and capital-importing countries and are detailed in the many awards issued by arbitral tribunals. The importance of BITs in the development of the law of regulatory expropriation cannot be exaggerated, as BITs have served both to capture the essence of expropriation doctrine under customary international law and in some instances to modify its terms. Today, there are more than 1500 BITs between approximately 160 nations.[101] Scholars have determined that "[v]irtually all of these agreements contain expropriation provisions."[102] As a result, in order to understand the current state of regulatory expropriation in international law outside of the *lex specialis* of NAFTA, numerous arbitral awards using international law to examine the meaning of BIT expropriation clauses will be considered.

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100. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

101. *See* Been & Beauvais, *supra* note 15, at 50.

102. *Id.*

However, one must not forget that outside the context of BITs with detailed expropriation clauses, doctrines relating to expropriation are also part of non-treaty customary international law. According to § 712 of the Restatement (Third) of Foreign Relations Law:

> A state is responsible under international law for injury resulting from:
> (1) a taking by the state of the property of a national of another state that
> (a) is not for a public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by provision for just compensation.[103]

Unfortunately, § 712 does not outline the aspects of a "taking," although the comments to the section explain that "[a] state is responsible . . . for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property."[104] Regulatory expropriation's role in customary international law has also been recognized by the Iran-U.S. Claims Tribunal, which declared in the *Harza Engineering Co*. award that "a taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property."[105]

2. Identifying Regulatory Expropriation: Loss of Control

The basic elements of regulatory expropriation under customary international law, as captured through numerous BITs and related arbitral awards, do not differ all that much from the elements of expropriation previously explored in the Article 1110 NAFTA cases. Plaintiffs alleging the breach of a BIT expropriation clause, or expropriation under customary international law, must still demonstrate a loss of control over the investment, the disappointment of certain expectations regarding the investment,

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103. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

104. *Id*. § 712 cmt. g.

105. Allahyar Mouri, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL 70 (Martinus Nijhoff Pub. 1994) (citing *Harza Engineering Co*., 1 Iran-U.S. Cl. Trib. Rep. 499, 504-05 (1982)). *See also* Parisi, *supra* note 84 at 394-95.

and a diminishment of value due to government action. This useful tripartite approach appears in Annex B of the U.S. Model BIT, which is "intended to reflect customary international law concerning the obligation of States with respect to expropriation."[106] Notably, the split between customary international legal notions of regulatory expropriation (as included in BIT clauses and fleshed out by ICSID arbitral panels) and the NAFTA concept of regulatory expropriation stems from divergent ideas about the interplay among the three elements of expropriation, as well as the degree of interference/loss necessary to activate each of these elements. Regarding the element of "control," two recent arbitral awards indicate that under customary international law, the spectrum of government actions constituting "loss of control" is narrower than that of many NAFTA expropriation cases.[107]

The two awards addressing the issue of loss of control in matters of expropriation include *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica* (*Santa Elena*), rendered in 2000, and *Azurix Corp. v. Argentina*, handed down in 2006.[108] The *Santa Elena* award, decided through the ICSID dispute resolution mechanism, is unique in that no BIT applied to the dispute.[109] Instead, the tribunal based its decision purely on the customary international law of expropriation.[110] The controversy in this case involved a disagreement regarding the proper amount of compensation owed under international law by the Costa Rican government to a group of American investors whose property was expropriated in order to expand the size of the Santa Rosa National Park.[111] Although the taking was achieved through a government decree which declared "the property . . . is hereby expropriated," thus placing the dispute somewhat outside the realm of normal regulatory expropriation, the context of the *Santa Elena* case and the issues explored by the tribunal make it an award which cannot be ignored in any thorough examination of environmental regulatory expropriation.[112]

Although this was "a case of expropriation in which the fundamental issue before the Tribunal [was] the amount of compensa-

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106. U.S. Model BIT, *supra* note 8, Annex B, §1.

107. *See* Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, para. 322 (Jul. 14, 2006) [hereinafter Azurix]; Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID (W. Bank) Case No. ARB/96/1, Final Award, para. 77, 39 I.L.M. 1317 (2000), *available at* http://www.worldbank.org/icsid/cases/santa elena_award.pdf [hereinafter Santa Elena].

108. *See Santa Elena*; *See Azurix Corp*.

109. *See Santa Elena*, at para. 65.

110. *Id.*

111. *See id*. at paras. 15-18, 20.

112. *Id*. at para. 18.

tion to be paid by Respondent," and although "Respondent's right to expropriate the Property [was] not in dispute," Costa Rica and the American investors disagreed on the actual date when the expropriation took place.[113] Costa Rica asserted that the expropriation decree expressed only an "intention" to expropriate, and that the actual expropriation of the property occurred later, whereas the foreign investors claimed that the expropriation occurred around the date of the decree.[114] As a consequence of this disagreement regarding the date of the expropriation, the tribunal found itself looking into what constituted expropriatory action in the first place. Altogether, the tribunal, in examining the question of control, opined that one of the key steps in determining whether expropriation has taken place is identifying "the extent to which the measures taken have deprived the owner of the normal control of his property."[115] In its award, the tribunal held "[t]here is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property."[116] Ultimately, the arbitrators stated that the date of expropriation occurred when the Costa Rican government issued its decree, which is when the "practical and economic use of the Property by the Claimant was irretrievably lost."[117]

The remarks of the tribunal in the *Santa Elena* case reveal that under international law, the loss of control must be complete before expropriation will be found, and moreover that this loss must be for some significant period of time. For instance, throughout the award, the tribunal remarked that expropriation occurred where government interference has rendered property rights "practically useless" or when the use of the property has been "irretrievably lost."[118] This language suggests that a partial deprivation of control under international law would not constitute measures of sufficient extent to comprise expropriation, in contrast with NAFTA cases such as *Feldman*, which imply that a substantial, but less-than-total deprivation of control (such as interference with an investment's internal operations) can still constitute expropriation.[119] Another difference between the *Santa Elena* and NAFTA

113. *See id*. at paras. 54-55, 74.
114. *See id*. at paras. 79-80.
115. *Id*. at para. 76.
116. *Id*. at para. 77.
117. *Id*. at paras. 80-81.
118. *See id*. at paras. 78, 81.
119. *See* Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, para. 152, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002).

approaches is that the *Santa Elena* tribunal did not appear to differentiate between matters of *control* and *use*, often mentioning the two interchangeably. In contrast, the control-use divide significantly affected almost every NAFTA case reviewed in this analysis.[120] Lastly, as for the temporal dimension of deprivation of control, the *Santa Elena* panel relied on an earlier decision from the Iran-U.S. Claims Tribunal, in stating that a deprivation must be more than "merely ephemeral," indicating that the time-element of control cannot be overlooked in customary international law.[121]

The tribunal in *Azurix Corp. v. Argentina* also dealt with the control element of expropriation, although this time in the context of the United States-Argentina BIT.[122] Under the terms of Article IV(1) of the BIT, investments in either signatory nation may not

> be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization . . . except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2).[123]

Azurix Corp., the subsidiary of an American corporation and the complainant in this case, had received a concession to provide water and sewage services to the Province of Buenos Aires, Argentina.[124] Azurix claimed that its investment in Buenos Aires was damaged by "measures . . . tantamount to expropriation," when the regulatory agency in charge of overseeing the concession (among other things) refused to allow Azurix to increase tariffs for water and sewage delivery.[125] The tribunal, while acknowledging that "cumulative steps which individually may not qualify as an expropriating measure may have the effect equivalent to an outright expropriation,"[126] opined that an expropriation had not occurred.[127] The tribunal decided that there was no expropriation because

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120. *See Santa Elena*, at para. 77.

121. *Id*. (citing *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, (Jun. 22, 1984) (reprinted in 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1986)).

122. *See* Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, paras. 3, 9 (Jul. 14, 2006).

123. Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. IV(1), Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993).

124. *Azurix*, at paras. 38, 41.

125. *Id*. at paras. 43, 82-83, 92, 144, 277.

126. *Id.* at para. 308.

> Azurix did not lose the attributes of ownership, at all times continued to control [its Argentine subsidiary] and its ownership of 90% of the shares was unaffected. No doubt the management of [Azurix's Argentine subsidiary] was affected by the Province's actions, but not sufficiently for the Tribunal to find that Azurix's investment was expropriated.[128]

In this respect, the *Azurix* tribunal's notion of the control element of expropriation closely parallels that of the *Feldman* tribunal, in which a NAFTA panel held that a loss of control in a regulatory expropriation case must approach the level of a direct physical taking.[129] This quasi-physical concept of control also appears in the *CMS Gas Transmission Co.* award, which dealt with Argentina's regulation of its natural gas pipeline industry.[130] Interestingly, the idea of control appearing in *CMS Gas* and *Azurix* can be traced to the NAFTA case of *Pope & Talbot*, demonstrating the influence of NAFTA *lex specialis* on larger customary international law.[131] Finally, the narrow notion of loss-of-control communicated by the *Azurix* panel plainly reflects the earlier *Santa Elena* award, where that tribunal indicated a partial loss of control (even quasi-physical control of the *Pope & Talbot* variety) was insufficient to find that expropriation had occurred.[132]

Furthermore, the *Azurix* arbitrators, like those in the *Santa Elena* case, attributed a time element to the loss of control and did so with greater clarity.[133] The *Azurix* tribunal held that "[w]hen considering multiple measures," a determination of expropriation "will depend on the duration of their cumulative effect."[134] Although the tribunal stated that "[t]here is no specific time set un-

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127. *Id*. at para. 322.

128. *Id.*

129. *See* Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, para. 152, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002). Interference with the day-to-day operations of an investment should be imagined as a quasi-physical taking, in that management's oversight of the ordinary operations of an investment (such as a factory) is equivalent to physical possession of the investment. Without the ability to direct the day-to-day operations of an investment, or select the personnel who operate the investment, one can hardly be said to hold even physical possession of the investment in question.

130. *See* CMS Gas Transmission Co. v. Argentina, ICSID (W. Bank) Case No. ARB/01/8, Final Award, para. 263, 44 I.L.M. 1205 (2005).

131. *See id*. at para. 263; *Pope & Talbot*, at para. 100. *See also Feldman*, at para. 152.

132. *See Santa Elena*, at paras. 78, 81.

133. *See Azurix Corp*., at para. 313. *See also Santa Elena*, at para. 77 (citing Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA (Award No. 141-7-2, Jun. 22, 1984)) (reprinted in 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1986)).

134. *Azurix Corp*., *at* para. 313.

der international law for measures constituting creeping expropriation to produce that effect," it agreed with previous arbitral decisions that a single measure (rather than a "creeping" set of measures) would not be expropriatory if it only caused the property to be "out of the control of the investor for a year."[135]

3. Identifying Regulatory Expropriation: Disappointment of Investor Expectations

After convincing an arbitral panel that they have suffered a loss of control over their property, foreign investors alleging regulatory expropriation must further demonstrate the disappointment of certain expectations regarding the investment. The importance of investor expectations in determining regulatory expropriation is recognized by scholars and arbitrators alike. For example, Thomas Wälde and Abba Kolo believe:

> Investors are ready, and can be expected to be ready, to accept the regulatory regime in situations in which they invest. Investment protection rather turns around the issue of unexpected change with an excessive detrimental impact on the foreign investor's prior calculation, and the—in domestic politics natural—favouring of national competitors.[136]

This concern for unforeseen regulatory changes causing an "excessive detrimental impact on the foreign investor's prior calculation"[137] has also received considerable emphasis in awards interpreting the customary international law of regulatory expropriation. The *Santa Elena* tribunal took investor expectations into account when it determined that expropriation occurred on the date that the property could no longer "be used for the development purposes for which it was originally acquired."[138] Investor expectations assumed a role of parallel importance in the *Azurix* award, where the complainant and respondent battled over their meaning and centrality.

The complainant in *Azurix* argued that investor expectations could be generated either by affirmative government action, by prevailing norms, or even originate from the contract itself, and

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135. *Id.* (citing Wena Hotels Ltd. v. Egypt, ICSID (W. Bank) Case No. ARB/98/4, Committee Decision on Application for Annulment, 41 I.L.M. 933 (2002)).

136. Thomas Wälde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L.Q. 811, 819 (2001).

137. *Id.*

138. *Santa Elena*, at para. 81.

that a violation of such expectations might alone constitute expropriation provided the result was the deprivation of some economic benefit.[139] In contrast to Azurix's argument, the Argentine government presented a novel theory of its own, claiming that investor expectations are not an element of expropriation at all, but are instead a part of measuring compensation.[140] The investor's notion that relevant expectations could be generated by prevailing norms or stem from the contract itself (in addition to originating from affirmative government representations) is particularly interesting in that it runs counter to NAFTA's *Metalclad* and *Feldman* cases.[141] In these awards, NAFTA tribunals determined that investor expectations only assumed importance in a determination of regulatory expropriation where state officials made specific representations to the foreign investors.[142] In the end, the *Azurix* tribunal refused to remove investor expectations from the calculus of regulatory expropriation and remained ambivalent as to whether prevailing norms (and not just statements by government officials) could serve as acceptable generators of investor expectations.[143] It may be inferred from the tribunal's decision that action taken by government officials undermining the terms of the contract can violate investor expectations originating from the contract, but disappointment of investor expectations alone is an insufficient basis for a finding of expropriation.[144]

Unlike *Azurix*, where the matter of regulatory expropriation became pertinent due to provisions in the United States-Argentina BIT, the regulatory expropriation claim in *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.* was based on an indemnity contract between Revere, an American company investing in Jamaica, and the Overseas Private Investment Corporation (OPIC), an arm of the United States government.[145] Under the terms of the contract, OPIC agreed to insure Revere against any expropriatory action by the Jamaican government that prevented the investor "from effectively exercising its fundamental rights with respect to the Foreign Enterprise" or which inhibited the investor "from exercising effective control over the use or disposition

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139. *Azurix Corp.*, at paras. 286-87.

140. *See id.* at para. 302.

141. *See* Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, paras. 148-49, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002); *Metalclad Corp.*, para. 89.

142. *See Feldman*, paras. at 148-49; *Metalclad Corp.*, at para. 89.

143. *See Azurix Corp.*, at paras. 316, 320-22.

144. *See id.* at paras. 320-22.

145. *See* Revere Copper and Brass, Inc. v. Overseas Private Inv. Corp., Award, Aug. 24, 1978, 56 I.L.R. 258, 261 (1980).

of substantial portion of its property."[146] Revere was engaged in bauxite mining to supply its aluminum production, and had entered Jamaica via an agreement with Jamaican officials who promised to fix certain taxation and royalty levels for bauxite mining.[147] Following a change in government, the new Jamaican administration imposed a special bauxite levy on foreign investors such as Revere, which ultimately led the company to shut down its Jamaican operation.[148] In response, Revere filed suit against OPIC to recover the depleted value of its investment, alleging that the loss resulting from the Jamaican government's regulatory actions fell within OPIC's policy coverage for expropriation.[149] Initially, the arbitral tribunal recognized that Revere was "still in possession of its plant" and that it shut down the plant "not because the Government had physically intervened in the affairs of [Revere] so as to prevent it from using or disposing of its property."[150] Nevertheless, the tribunal concluded that the actions of Jamaican officials deprived Revere of effective control over its property, and were therefore expropriatory.[151]

The tribunal drew a link between the actions of the Jamaican government and the loss of effective control by returning to the element of investor expectations. In its opinion, the tribunal stated:

> Control in a large industrial enterprise, such as that conducted by [Revere] in Jamaica, is exercised by a continuous stream of decisions.. . . .
>
> Rational decisions require some continuity of the enterprise. In a large enterprise like the present one, with the [government agreement] gone, decisions simply become gambles. Risks are inherent in all such decision making, but without the [government agreement] the odds cannot be calculated. There is no way in which rational decisions can be made. What the Government did yesterday, it can do tomorrow or next week or next month. . . . . This is the antithesis of the rational decision making that lies at the heart of control.[152]

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146. *Id*. at 261-62.
147. *Id.* at 261-63.
148. *See id*. at 269.
149. *Id*. at 268-69.
150. *Id*. at 270.
151. *Id.* at 291.
152. *Id*. at 292.

In essence, the tribunal declared that the Jamaican government's promise not to alter the tax or royalty scheme for bauxite mining created certain expectations for the future in Revere. These expectations gave Revere the power to make rational business decisions, which is a central basis of control (according to the tribunal) in a business enterprise. When the government reneged on its promise and changed its tax regulatory structure, Revere's expectations were disappointed and it was left without the ability to make rational decisions, causing it to lose control of its enterprise. This loss of control resulted in the expropriation of the investment.

Overall, the decision of the *Revere* tribunal to break down the wall between the control element of expropriation and the investor-expectations element of expropriation is revolutionary, even if it has not been repeated in subsequent arbitrations. By eliminating the tripartite division to expropriation which has taken form in both NAFTA law, customary international law, and the law of the ECT, *Revere* gives a heightened effect to investor expectations and increased power to foreign investors alleging regulatory expropriation. However, later awards, such as *Azurix*, have declined to ratify the *Revere* approach in its entirety, by refusing to hold that violations of investor expectations may by themselves constitute regulatory expropriation.[153]

4. Identifying Regulatory Expropriation: Deprivation of Value

The third element of regulatory expropriation is the showing of some diminishment in the value of the investment caused by governmental regulatory action. Yet in customary international law and in most BITs, it remains an open question as to the extent of loss which a foreign investor must prove in order to cross this final hurdle on the path to demonstrating an expropriatory taking. Generally, just as in the existing NAFTA jurisprudence, ICSID tribunals interpreting BIT provisions and customary international law tend to find that regulatory deprivation has occurred where government environmental regulation has totally wiped out the value of an investment.[154] Wälde and Kolo are aware of this basic rule, when they stipulate that an environmental regulation "which effectively or *totally* renders the investment/property [of a foreign investor] without *any* economically beneficial use or imposes on the owner a special sacrifice in favour of the community at large is

153. *See* Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, paras. 320-22 (Jul. 14, 2006).

154. *See, e.g., Pope & Talbot,*at para. *102. See also, Revere Copper and Brass, Inc.* at 269.

compensable."[155] Many disputes, of course, lie in the grey area where government regulation has damaged the investment, without leaving it totally valueless or depriving the investor of all beneficial use.

If a tribunal basing its decision on the combination of a non-specific BIT expropriation provision and customary international law is faced with a dispute in which government regulations have deprived the foreign investor of less than the total value of its investment, the tribunal will hold that expropriation has occurred only if the investor has suffered a "substantial deprivation," or the regulations have had a "devastating effect" on the investment.[156] In the *CMS Gas* award, the tribunal provided that there must be a "substantial deprivation of the fundamental rights of ownership," and declined to find that expropriation had occurred, partly on the grounds that "the value of shares of a comparable company has been increasing" since the government implemented its regulatory measures.[157] Although *CMS Gas* borrows the "substantial deprivation" description from *Pope & Talbot*, the tribunal's confusing language tends to obscure whether the "substantial deprivation" standard applies to the control element or the value element of regulatory expropriation.[158] However, the reference to the *value* of the shares of comparable companies suggests that the "substantial deprivation" standard was, in fact, meant to apply to the value prong of the expropriation test.[159]

The *Azurix* award also deals with value prong of the test for expropriation, though in a more circumspect manner.[160] The tribunal in this case reasoned that actions by the Argentine government did not breach either international law or the agreement between the complainant and Argentina, when it stated that "[w]ere this not the case, the Tribunal would agree that the breaches . . . would have had a devastating effect on the financial viability of the Concession . . . ."[161] Although the *Azurix* taking was more or less a complete one, the tribunal's reference to government actions having a "devastating effect" on the value of an investment is useful language which may be applied to expropriations resulting in a

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155. Wälde & Kolo, *supra* note 136, at 827 (emphasis added) (citing Agins v. Tiburon, 447 US 255 (1980)).

156. *See* CMS Gas Transmission Co. v. Argentina, ICSID (W. Bank) Case No. ARB/01/8, Final Award, para. 259, 44 I.L.M. 1205 (2005) [hereinafter CMS Gas]; *Azurix Corp.*, at para. 321.

157. *CMS Gas*, at para. 259.

158. *See* Pope & Talbot, Inc. (U.S.) v. Canada, Interim Award, para. 102, 40 I.L.M. 258 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

159. *See id.*

160. *See Azurix Corp.*,at para. 321.

161. *Id.*

deprivation of less than 100% of the value of an investment. In summation, the value deprivation element of regulatory expropriation under customary international law and the law of bilateral investment treaties does not differ all that much from the NAFTA standard reviewed above. A total deprivation of value, like in *Metalclad*, appears to always fulfill the necessary requirement, while partial deprivations of value must be either "substantial" in nature, or of "devastating effect."

B. Elements of Proper or "Legal" Regulatory Expropriation Under Customary International Law

1. Introduction to Proper Regulatory Expropriation Under Customary International Law

This analysis breaks down regulatory expropriation under customary international law, along with the arbitral awards applying this law to the interpretation of expropriation provisions set out in BITs, into two main phases. First, the complainant must show that expropriation via governmental regulatory action has occurred. This involves a demonstration of some loss of control over the investment, the disappointment of certain investor expectations regarding the investment, and a substantial or total loss in the value of the investment. If the foreign investor can overcome the first hurdle and convince a tribunal that an expropriation has occurred, it must continue on to the second step, which involves proving to the tribunal that the regulatory expropriation was not in accordance with international law or the terms of an applicable BIT. This is not to imply, of course, that governments cannot expropriate or nationalize, provided they fulfill the legal requirements to be discussed below.[162]

Most bilateral investment treaties, as well as § 712 of the Restatement (Third) on Foreign Relations Law, set out four main requirements in order for an expropriation (once one has been identified) to occur properly. The 1998 Costa Rica-Canada BIT is a good example.[163] Article 8(1) of the Costa Rica-Canada BIT provides:

> [i]nvestments of investors of either Contracting Party shall not be nationalized, expropriated or sub-

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162. *See* Kuwait v. American Indep. Oil Co. (Aminoil), 21 I.L.M. 976, paras. 86, 143 (1982).

163. *See* Agreement Between the Government of the Republic of Costa Rica and the Government of Canada for the Promotion and Protection of Investments, art. VIII(1), Costa Rica-Can., Mar. 18, 1998, 1999 Can. T.S. No. 43, *available at* http://www.treaty-accord.gc.ca/ViewTreaty.asp?Treaty_ID=101533.

> jected to measures having an effect equivalent to nationalization or expropriation . . . in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the fair market value of the investment expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is earlier.[164]

In a similar manner, Article 4(1) of the Jamaica-Argentina BIT states that expropriatory measures must be taken "in the public interest, on a non-discriminatory basis and under due process of law," and that the foreign investor must receive "payment of prompt, adequate and effective compensation."[165]

The United States, as the world's major capital-exporting country, has taken great care in crafting a model BIT to serve as a template for all its international investment agreements. The current U.S. Model BIT appeared in 2004 and is a product of the Office of the United States Trade Representative and the Department of State working in tandem.[166] Under the terms of the U.S. Model BIT:

> Neither party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
> (a) for a public purpose;
> (b) in a non-discriminatory manner;
> (c) on payment of prompt, adequate, and effective compensation; and
> (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment] (1) through (3).[167]

Therefore, as is required by customary international law, and repeated in the text of numerous BITs, a proper or "legal" regulatory expropriation under international law must be for a public pur-

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164. *Id.*

165. Agreement between the Government of Jamaica and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments, art. 4(1), Feb. 8, 1994, *available at* http://www.sice.oas.org/bits/jamarg_e.asp.

166. U.S. Model BIT, *supra* note 8.

167. Id. art. 6.

pose, non-discriminatory in nature, occur through due process, and in the end, the foreign investor must receive some form of compensation.

2. Proper Regulatory Expropriation Under Customary International Law: The Public Purpose Element

Of the four requirements for proper regulatory expropriation under international law, the public purpose element has been the subject of the most heated debate. While there is general agreement among international legal scholars and across arbitral tribunals that regulatory actions resulting in expropriation must be taken for the public good, the effect of such a finding is highly disputed once this public purpose element has been invoked. On one side, it is argued that as long as a regulation is passed for a public purpose, the enacting government need not pay compensation to the foreign investor even if the regulation results in a total deprivation of value. A position similar to this one was taken by the NAFTA tribunal in the *Methanex* and *S.D. Myers* cases.[168] On the other side, it is argued that even if a regulation is enacted for a public purpose, this prong of the expropriation test does not trump the requirement that compensation be rendered to foreign investors where government regulation has damaged or totally destroyed the value of their investments. The NAFTA awards adopting the latter approach include *Metalclad*, *Feldman*, and *Pope & Talbot*.[169]

Influential sources such as the Restatement (Third) on Foreign Relations Law and the 2004 United States Model BIT support the proposition that under customary international law, regulations resulting in harm to an investment's value do not necessitate compensation by the government to the foreign investor provided they were enacted for a public purpose. For example, the comments to § 712 of the Restatement provide that "[a] state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police

168. *See* Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, para. 311 (Jul. 14, 2006) (explaining *S.D. Myers*); Methanex Corp. v. United States, Final Award, pt. IV, ch. D, para. 7, 44 I.L.M. 1345 (2005) (NAFTA Ch. 11 Arb. Trib. 2005).

169. *See* Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, para. 98, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002); Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB/(AF)/97/1, Award of the Tribunal, para 111, 40 I.L.M. 36 (2001) (NAFTA Ch. 11 Arb. Trib. 2000); Pope & Talbot, Inc. (U.S.) v. Canada, Interim Award, para. 99, 40 I.L.M. 258 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

power of states . . . ."[170] In addition, Annex B to the U.S. Model BIT severely circumscribes the requirement of compensation for regulations enacted for a public purpose.[171] The drafters of the U.S. Model BIT believed that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[172] Under this approach, almost all environmental regulations would fall, by definition, under the public purpose rubric, and as a consequence the enacting government would owe no compensation to the foreign investor no matter how much the regulation in question affected the value of the foreign investment. Although this view of the public purpose prong necessitates the removal of all environmental regulations from the customary international law of expropriation, some scholars have shown themselves to be quite comfortable with this outcome. Indeed, the International Institute for Sustainable Development (IISD) and the World Wildlife Federation (WWF) argue that "any environmental law worth adopting will affect business operations," and thus environmental measures should be excepted from the rule requiring compensation for expropriations.[173]

In spite the significance of the position adopted by the Restatement and the U.S. Model BIT on the issue, three recent influential arbitral awards have taken a different tack to the public purpose question under customary international law. Of the three, the *Santa Elena* award presents the most convincing response to those arguing for a public purpose *carte blanche* to expropriation, or the exceptionality of environmental regulations as suggested by the IISD and WWF. *Santa Elena* provides that

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature of the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property

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170. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. g (1987).

171. *See* U.S. Model BIT, *supra* note 8, Annex B, § 4(b).

172. *Id*.

173. International Institute for Sustainable Development & World Wildlife Federation, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* 32 (Int'l Inst. for Sustainable Dev. 2001), *available at* http://www.iisd.org/pdf/trade_citizensguide.pdf.

> was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.[174]

The tribunal continued, concluding that

> Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[175]

The *Santa Elena* tribunal, which issued its award in 2000, has not been alone in refusing to give special treatment under the international law of expropriation to regulations enacted for a public purpose. In *Azurix*, the respondent government, citing *S.D. Myers*, claimed that "[p]arties to [the Bilateral Treaty] are not liable for economic injury that is the consequence of *bona fide* regulation within the accepted police powers of the State."[176] The *Azurix* tribunal rejected outright the *S.D. Myers* approach as "contradictory" and held that just because a regulation was passed for a legitimate public purpose did not excuse the state from paying compensation when the value of an investor's property was damaged.[177]

ADC Affiliate Ltd. v. Hungary ("*ADC*") is the last, and most recent, of the three main awards in which arbitrators have come out against a public purpose *carte blanche*.[178] The complainants in the *ADC* award, decided in 2006, rested their claim for expropriation on Article 4 of the Cyprus-Hungary BIT, which required compensation in instances of "any [governmental] measure depriving . . . directly or indirectly . . . investors . . . of their investment."[179] ADC Affiliate Ltd., a Cypriot company, had originally partnered with the Hungarian Air Traffic and Airport Administration (ATAA) to

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174. *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID (W. Bank) Case No. ARB/96/1, Final Award, para. 71, 39 I.L.M. 1317 (2000).

175. *Id*. at para. 72.

176. *Azurix Corp.*, *at* para. 278.

177. *Id*. at paras. 310-11.

178. *See* ADC Affiliate Ltd. v. Hungary, ICSID (W. Bank) Case No. ARB/03/16, Award, para. 432, (Oct. 2, 2006), *available at* http://www.worldbank.org/icsid/cases/pdf/ARB0316_ADCvHungary_AwardOctober2_2006.pdf.

179. *Id*. at paras. 295, 426.

renovate, build, and operate several terminals at Budapest's main airport. However, in the middle of the lease period, the Hungarian Ministry of Transport eliminated the ATAA via a regulatory decree (referred to as a "ministerial order"), thereby voiding ADC Affiliate Ltd.'s agreement with the ATAA.[180] The regulatory decree was passed thanks to authority granted by the Hungarian Parliament's 2001 amendments to the Air Traffic Act, which also made impossible any further partnerships "of the type previously performed by the Project Company."[181] In reviewing Hungary's defenses to the complainant's expropriation claim, the *ADC* tribunal remarked:

> [A] treaty requirement for "*public interest*" requires some genuine interest of the public. If mere reference to "*public interest*" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.[182]

Yet the tribunal made what was perhaps its most important point regarding the ability of a state to regulate in the public interest, and the consequences of such regulation, when it held that "while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries."[183]

In general, even while due deference must be offered to the academic position taken in the comments to § 712 of the Restatement (Third) on Foreign Relations and by Annex B to the 2004 U.S. Model BIT regarding the public purpose element, the weight of arbitral jurisprudence appears to the contrary. *Santa Elena*, *Azurix*, and *ADC Affiliate Ltd.* all indicate that even if a regulation (environmental or otherwise) resulting in an expropriation is enacted for the genuine benefit of the public, this does not excuse the state from its obligation under customary international law to compensate the foreign investor for its losses. It remains to be seen whether the 2004 changes in the U.S. Model BIT—particularly the addition of Annex B—may alter the present vector of customary international law dealing with the public purpose element.

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180. *See id*. at paras. 80, 94-95, 116, 176, 186, 191.
181. *Id*. at para. 181.
182. *Id*. at para. 432.
183. *Id*. at para. 423

3. Proper Regulatory Expropriation under Customary International Law: The Compensation Element

Even when foreign investors and capital-importing states agree that all three elements of expropriation are present, controversy often arises over the amount of compensation owed to the foreign investor. Developing states in the 1970's asserted that the quantum of compensation in instances of expropriatory regulation should be determined based on the domestic law of the regulating state, to the chagrin of foreign investors.[184] This position, obviously favorable to the capital-importing states, was adopted in the General Assembly's 1974 Charter of Economic Rights and Duties, which was largely influenced by the developing New International Economic Order of the time.[185] In contrast to the announced policy of the capital-importing states, the capital-exporting states proceeded to back the "Hull formula," which required "prompt, adequate and effective compensation" when expropriation was identified.[186]

Unlike the public purpose element of "legal" or "proper" expropriation, which remains the subject of substantial debate, the controversy over the compensation element of regulatory expropriation has been definitively resolved in favor of the capital-exporting countries. The Trade Unit of the Organization of American States, in *Investment Agreements in the Western Hemisphere: A Compendium*, provides that "most [investment] agreements use the Hull formula" and that only in very few cases (Brazil-Venezuela, Ecuador-Paraguay, Peru-Paraguay BITs) is the more general formula of "just compensation" used.[187] Naturally, a wide variety of methods for valuing an expropriated investment fall under the Hull formula's requirement of "prompt, adequate, and effective compensation," with the arbitral tribunal making the ultimate choice as to which method is to be used. Nevertheless, many recent awards have rendered effective compensation to foreign investors based on the "fair market value" of the property prior to the date of expropriation.[188]

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184. *See* Been & Beauvais, *supra* note 15, at 47.

185. *See id*. Wälde & Kolo, *supra* note 136, at 811-12.

186. Patrick M. Norton, *Back to the Future: Expropriation and the Energy Charter Treaty*, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 373 (Thomas Wälde ed., Kluwer L. Int. 1996).

187. *See* Organization of American States, Trade Unit, *Investment Agreements in the Western Hemisphere: A Compendium* parts II(D)(1), II(E)(2)(c) (1999), *available at* http://2005.sice.oas.org/cp_bits/english99/main.asp.

188. *See* Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, para. 438 (Jul. 14, 2006); *ADC Affiliate Ltd.*, at para. 501.

For instance, the fair market value concept of property valuation is expressly provided for in the US-Argentina BIT and was quickly put to use by the tribunal in *Azurix* once it determined expropriation had taken place.[189] In the words of the tribunal, "in assessing fair market value, a tribunal would establish that value in a hypothetical context where the State would not have resorted to [expropriatory] maneuvers but would have fully respected the provisions of the treaty and the contract concerned."[190] In essence, the tribunal is looking back at the value of the investment at the time prior to when the expropriatory action occurred.[191]

The fair market value requirement also appears in the Cyprus-Hungary BIT, which lies at the heart of the *ADC Affiliate Ltd. v. Hungary* case.[192] Article 4(2) of the BIT provides that "[t]he amount of compensation must correspond to the market value of the expropriated investments at the moment of expropriation."[193] However, in contrast to *Azurix*, the *ADC* tribunal chose not to apply the BIT standard of fair market value prior to expropriation. This was because the regulatory action in *ADC* constituted "unlawful" or improper expropriation, and thus the BIT (which "only stipulates the standard of compensation that is payable in the case of a lawful expropriation," i.e., expropriation carried out for a public purpose, etc.) did not apply.[194] The tribunal, in looking beyond the BIT to the origins of the law of expropriation, instead adopted the test set out in the *Chorzów Factory* award, where the Permanent Court of International Justice held:

> [R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. [195]

Employing the *Chorzów Factory* test led the *ADC* tribunal to grant the complainants the market value of the investment at the time of the award rather than at the moment prior to expropriation, mainly because the value of the investment had increased follow-

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189. *See Azurix Corp*., at para. 419.

190. *Id*. at para. 417.

191. *Id*. at para. 438.

192. *See* ADC Affiliate Ltd. v. Hungary, ICSID (W. Bank) Case No. ARB/03/16, Award, (Oct. 2, 2006), *available at* http://www.worldbank.org/icsid/cases/pdf/ARB0316 _ADCvHungary_AwardOctober2_2006.pdf.

193. *Id*.. at para. 295.

194. *Id*. at para. 481.

195. *Id*. at para. 484 (citing Chorzów Factory, Claim for Indemnity (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17).

ing the expropriation.[196] As a result, the foreign investors received more than they otherwise might have under the compensation provisions of the BIT.

The *ADC Affiliate Ltd. v. Hungary* arbitration, while intriguing due to its reliance on the *Chorzów Factory* case, raises as many questions as it seeks to answer. For example, even though the vast majority of BITs apply the fair market value standard only to the pre-expropriation value of the investment, the *ADC* tribunal implies that these collective BIT provisions do not represent customary international law on the matter.[197] But even in choosing to utilize the *Chorzów Factory* standard over the standard set out in the Cyprus-Hungary BIT, the tribunal remarks that the "application of [this] restitution standard . . . has led to use of the date of the expropriation as the date for the valuation of damages."[198] In reality, then, it seems that the tribunal (which acknowledges the *ADC* case as *sui generis*) has invented its restitutionary approach out of whole cloth.[199] In the wake of *ADC*, academics and arbitrators must closely monitor future cases where the value of the expropriated investment increases following the date of expropriation, in order to determine whether damages in these cases will now be the fair market value of the post-expropriation investment, or the fair market value of the pre-expropriation investment.

4. Proper Regulatory Expropriation Under Customary International Law: The Elements of Non-Discriminatory Treatment and Due Process of Law

The last two elements of proper regulatory expropriation include the requirement that the regulation in question be non-discriminatory and that it be enacted through due process of law. Because these two elements, in the regulatory expropriation paradigm, do not involve considerations all that different from those present in the normal expropriation context, their appearance in this analysis will be rather brief. As in the previous explanation of the compensation element of proper regulatory expropriation under international law, the *ADC Affiliate Ltd. v. Hungary* award serves as a helpful guide to the due process and non-discrimination prongs.

In *ADC*, the claimants argued that because all foreign investors were prohibited from operating the airport under the provi-

196. *See id*. at paras. 495-96, 499.
197. *See id*. at paras. 483-84.
198. *Id*. at para. 496.
199. *See id*. at para. 497.

sions of the Ministry of Transport's regulatory directive, the anti-discrimination standard in Article 4 of the Cyprus-Hungary BIT (covering "measures depriving, directly or indirectly, investors . . . of their investments") was violated.[200] The Hungarian government denied that its actions were discriminatory, reasoning that because ADF Affiliate Ltd. was the only foreign investor involved in the airport project, the Ministry of Transport's regulatory decree and the related amendments to the Air Traffic Act did not achieve any real "singling out" or discrimination against foreign investors.[201] Eventually, the tribunal held that it could not "accept the Respondent's argument that as the only foreign parties involved in the operation of the Airport, the Claimants are not in a position to raise any claims of being treated discriminately."[202] The tribunal continued, holding that "in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties."[203] The tribunal took the view that there was indeed discrimination in the effect of the government's regulation, because ADC Affiliate Ltd. had been treated differently from the "Respondent-appointed operator" that took over control of the airport from ADC.[204] Overall, this goal of demonstrating "different treatments to different parties" through expropriatory regulation is at the core of the discrimination prong.[205]

In addition to its non-discrimination analysis, the *ADC* tribunal also examined due process considerations relating to the Hungarian government's expropriatory actions. In its memorial to the arbitrators, ADC alleged that the Hungarian government's actions, such as Parliament's amendments to the Air Traffic Act and the Ministry of Transport's regulatory decree, violated due process because ADC received no reasonable notice of the change in government policy.[206] Furthermore, ADC claimed that due process was denied because the foreign investor was not presented with the "opportunity to seek judicial review" of the government's actions through a "fair hearing" before an "impartial adjudicator."[207] The tribunal accepted ADC's due process arguments without reservation, opining that

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200. *Id*. at paras. 295, 411.
201. *See id*. at para. 397.
202. *Id*. at para. 441.
203. *Id*. at para. 442.
204. *Id*.
205. *Id.*
206. *See id*. at para. 376.
207. *Id*.

> *"due process of law"*, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.[208]

This expansion of due process by the *ADC* tribunal, which went beyond requiring states to accept outside input in enacting the regulation to include giving foreign investors some judicial route to challenge the legality of the expropriatory regulation itself, is a vital tool which foreign investors will certainly take advantage of in the future.

Beyond these conventional "notice and a hearing" requirements that have become almost dogmatic in American procedural due process review, the *ADC* award also states that due process was violated because Hungary "failed to establish a connection between the '*need to transform the ATAA*' and the deprivation of the Claimants investments in the Airport Project."[209]

This statement by the tribunal appears to introduce a substantive due process-style inquiry into the due process prong of proper "legal" regulatory expropriation, and is reminiscent of the U.S. Supreme Court's statement in *Penn Central Trans. v. New York* that a regulation can "constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[210] It remains uncertain as to whether or not this substantive due process requirement introduced by the *ADC Affiliate Ltd.* award will take root in the customary international law of regulatory expropriation.

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208. *Id*. at para. 435.
209. *Id*. at para. 437.
210. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

IV. CHRONOLOGICAL ANALYSIS OF REGULATORY EXPROPRIATION IN THE JURISPRUDENCE OF THE ENERGY CHARTER TREATY

A. Introduction to Energy Charter Treaty Article 13

In comparison to the customary international law of expropriation captured in numerous BITs, the Energy Charter Treaty (ECT) is a relatively recent arrival on the international legal scene. The ECT is a multilateral investment treaty opened for signature in 1994,[211] which came into effect four years later in 1998.[212] Article 2 of the ECT sets out the purpose of the treaty, which is to create "a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."[213] The ECT, like NAFTA, provides a dispute resolution mechanism whereby investors may take advantage of either the ICSID dispute resolution apparatus, or alternatively those of UNCITRAL or the Stockholm Chamber of Commerce.[214] James Loftis and Mark Beeley explain that the treaty, while still influential in the international legal realm, suffers from two main limitations.[215] First, even though the ECT "expressly prohibits reservations," some signatory countries have attempted to exempt themselves from assorted treaty provisions through various understanding and declarations contained in the ECT's many annexes and protocols.[216] Another weakness "is the limited scope of the signatories themselves,"[217] for while most of Europe and Japan have ratified the ECT, notable energy-exporting states (such as those in the Middle East) have yet to even sign.[218] Other major powers, such as the United States and Canada, maintain observer status while Russia, a signatory to the treaty, continues to delay ratification which would fully subject it to the treaty's standards.[219]

Fortunately, for those foreign investors doing business in ratifying countries, the ECT provides substantial investment safe-

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211. Craig Bamberger, *An Overview of the Energy Charter Treaty*, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 1 (Thomas Wälde ed., Kluwer L. Int. 1996).

212. James L. Loftis & Mark J. Beeley, *The Rise of Energy Charter Treaty Arbitration*, Global Arbitration Review – European Arbitration Review 7 (2007), http://www.velaw.com/pdf/resources/LoftisBeeleyEnergytreatycharter1106.pdf.

213. ECT, *supra* note 8, at art. 2.

214. *See id*. art. 26(1),(4).

215. Loftis & Beeley, *supra* note 212 at 9.

216. Craig Bamberger, *supra* note 211, at 2. *See also* Loftis & Beeley, *supra* note 212 at 9.

217. Loftis & Beeley, *supra* note 212 at 10.

218. *Id.* at 7.

219. *See id* at 7.

guards in addition to its hefty trade provisions. Thomas Wälde, one of the leading experts on the treaty, writes that

> The ECT's investment regime has been largely adopted from NAFTA Chapter XI and U.K. bilateral investment treaties (BITs). It often codifies therefore--in a "progressive direction," contrary to positions taken by the "Third World" and its proponents during the "New International Economic Order" (NIEO) period--customary international law.[220]

Wälde concludes that the ECT is "possibly the most advanced text in terms of extensive investor protection."[221]

As Wälde correctly notes, the ECT is packed full of investor protections. These can be found in Part III of the ECT, and include "fair and equitable treatment" and "minimum treatment under international law" rules (Article 10(1)), a "national treatment" rule for investors (Article 10(3),(7)), and a "due process" requirement (Article 10(12)).[222] The ECT also contains wide-ranging provisions protecting investors in cases of government expropriation. These provisions are bundled together in Article 13 of the ECT, which provides:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation . . . except where such Expropriation is:
> (a) for a purpose which is in the public interest;
> (b) not discriminatory;
> (c) carried out under due process of law; and
> (d) accompanied by the payment of prompt, adequate and effective comp-ensation.[223]

The ECT, in referring to "measures having effect equivalent to nationalization or expropriation," is obviously intended to address acts of regulatory expropriation, along with more traditional types of physical takings, although this was not definitively stated until

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220. Thomas W. Wälde*, Energy Charter Treaty-based Investment Arbitration*, TRANSNAT'L DISP. MGMT, Jul. 2004, at 1, 6, *available at* http://www.transnational-dispute-management.com.

221. *Id*.

222. *See* ECT, *supra* note 8, arts. 10(1), (3), (7), (12).

223. *Id*. art.13.

the *Nykomb* award.[224] In fact, Article 13 of the ECT closely resembles its cousin, Article 1110 of the NAFTA treaty, which also prohibits signatories from "tak[ing] . . . measures tantamount to nationalization or expropriation" without meeting the four elements of proper expropriation.[225] Todd Weiler and Thomas Wälde, in their comparison of the ECT and NAFTA jurisprudence, note that neither multilateral treaty could afford to ignore the issue of regulatory expropriation, as "[i]t is one of the several disciplines with which modern treaties seek to impose good-governance rules on economic regulation."[226]

Although on its face it might appear that the ECT heavily skews towards the side of foreign investors, consequently disfavoring state regulation, this is in fact not the case. Particularly in the area of environmental regulation, the ECT presents a much more level playing field for states than most BITs. Article 19 of the ECT provides that "each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area."[227] Other, more specific Article 19 obligations include "tak[ing] account of environmental considerations in the policy process," having particular regard to energy efficiency, renewables, cleaner fuels and pollution-reducing technologies, and promoting transparency with regard to environmentally significant investments.[228] Crucially, the impact of Article 19 of the ECT remains somewhat circumscribed by Article 27(2), which removes disputes regarding the "application or interpretation" of Article 19 from the purview of the ECT's dispute resolution mechanisms.[229] Nonetheless, it would be a mistake to deduce from this limitation that the environmental aspects of the ECT present in Article 19 have no role to play in Article 13 disputes centered on expropriation via environmental regulation. According to Kolo and Wälde:

> [T]he environmental obligations [of the ECT] may be relied upon by an international tribunal in interpret-

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224. *See* Nykomb Synergetics Tech. Holding AB v. Latvia, Award, § 4.3.1 (Stockholm Chamber of Com. Inst. Dec. 16, 2003), 2003 WL 24045555 (APPAWD). *See also* Todd Weiler & Thomas Wälde, *Investment Arbitration under the Energy Charter Treaty in the light of new NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation*, TRANSNAT'L DISP. MGMT., Feb. 2004, at 1, 29, *available at* http://www.transnational-dispute-management.com.

225. *See* ECT, *supra* note 8, art. 13(1); NAFTA, *supra* note 8, art. 1110.

226. Weiler & Wälde, *supra* note 224, at 29.

227. ECT, *supra* note 8, art. 19(1).

228. *Id*. *See also* Bamberger, *supra* note 211, at 19.

229. *See* ECT, *supra* note 8, art. 27(2).

> ing other provisions of the treaty (e.g. the expropriation or sanctity-of-contract provisions). Since the distinction between 'normal' regulation and a compensable 'regulatory taking' is not easy and requires a balancing process, the environmental standards recognized in a treaty are suitable to serve as factors to be taken into account in such balancing process. They help to define the legitimacy of environmental policies underlying national regulation.[230]

Kolo and Wälde are not alone in writing that Article 19 could be influential in future regulatory expropriation disputes under the ECT, as Craig Bamberger also believes that "the absence of [Article 19] ECT dispute resolution does not eliminate the possibility that it might be cited in dispute resolution concerning other articles."[231] Together with Article 18(1) of the Charter, which promises to "recognize state sovereignty and sovereign rights over energy resources . . . subject to the rules of international law," Article 19 offers state respondents the ability to counter some investor claims of regulatory expropriation, although it is not certain to what extent.[232]

B. Article 13 Jurisprudence

The publicly available jurisprudence of the ECT, in contrast to that of the NAFTA treaty, remains rather paltry. As of January 2007, only two final awards on the merits have been rendered, along with one award on jurisdiction.[233] Although both awards involved claims of expropriation, the arbitral tribunals rejected the complainant's allegations in each instance.[234] The *Nykomb Synergetics Technology Holding AB v. Latvia* award, delivered in 2003, is the earlier of these two awards, and the first award rendered under the ECT since it came into force in 1998.[235] In *Nykomb*, the complainant, a Swedish company, entered into a business agreement through its Latvian subsidiary with Latvenergo, a Latvian state-owned enterprise, to sell electricity for redistribution over the

230. Wälde & Kolo, *supra* note 136, at 817.

231. Bamberger, *supra* note 211, at 20.

232. ECT, *supra* note 8, arts. 18-19. *See* Wälde, *supra* note 220, at 12.

233. *See* Loftis & Beeley, *supra* note 212.

234. *See* Petrobart Ltd. v. Kyrgyz Republic, No. 126/2003, Arbitral Award, § VIII(8) (Stockholm Chamber of Com. Inst. Mar. 29, 2005), *available at* http://www.investment-claims.com/decisions/Petrobart-kyrgyz-rep-Award.pdf.; Nykomb Synergetics Tech. Holding AB v. Latvia, Award, § 4.3.1 (Stockholm Chamber of Com. Inst. Dec. 16, 2003), 2003 WL 24045555 (APPAWD).

235. *See Nykomb*.

Latvian power grid along with the heat generated by the power-plant which was to be piped to a neighboring municipality.[236] Following the construction of the complainant's cogeneration plant, built to provide the heat and electricity contracted for, a dispute broke out between the complainant (Nykomb) and Latvenergo regarding the price Latvenergo was paying for Nykomb's electricity.[237] Originally, foreign investors like Nykomb were induced into investing in Latvia by government provisions granting builders of cogeneration power plants the ability to charge twice the average tariff for electricity, which was typically fixed below market levels due to heavy government regulation of the energy industry in addition to cheap imported electricity.[238] Moreover, this special tariff rate had been guaranteed in the contract between the complainant's Latvian subsidiary and Latvenergo.[239] Nevertheless, various laws and regulations enacted by the Latvian government following Nykomb's entry into the Latvian energy market resulted in the "gradual limitation and eventually the abolishment of the double tariff as a mandatory incentive prescribed by statute."[240] As a result of the Latvian government's legal and regulatory actions and Latvenergo's subsequent refusal to pay the agreed-upon double tariff rates, Nykomb initiated arbitration on the grounds that several provisions of the ECT had been violated.[241] Among Nykomb's claims was that Latvia had engaged in regulatory expropriation in such a way as to violate Article 13 of the ECT.[242]

In its expropriation argument, Nykomb asserted that the behavior of the Latvian government and Latvenergo, its state-owned power monopoly, constituted indirect expropriation.[243] From the complainant's point of view, "[b]y taking away a substantial part of [Nykomb's] income from sales [Latvia] makes the enterprise not economically viable and the Claimant's investment worthless."[244] After considering Nykomb's argument, the tribunal rejected its expropriation claim, responding:

> The tribunal finds that "regulatory takings" may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive fac-

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236. *See id.* § 1.1.
237. *See id.*
238. *See generally id.*
239. *See id.* § 3.3.
240. *Id.* § 3.5.10.
241. *See id.* § 4.3.
242. *See id.*
243. *Id.* § 4.3.1.
244. *Id.*

> tor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail. In the present case, there is no possession taking of [Nykomb] or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise - apart from ordinary regulatory provisions laid down in the production license, the off-take agreement, etc.[245]

The *Nykomb* tribunal's comments on regulatory expropriation are noteworthy on two grounds. First, in stating that "regulatory takings may . . . amount to expropriation or the equivalent of an expropriation," *Nykomb* set an important precedent for including regulatory expropriations within the coverage of Article 13 of the ECT.[246] Second, the *Nykomb* tribunal's focus on the control element of expropriation, and in particular its refusal to recognize expropriation without some "possession taking of [Nykomb] or its assets" by the Latvian government or "interference with . . . management's control" over the investment,[247] sets a strict regulatory expropriation control standard under the ECT resembling that of *Azurix* or *Feldman*, rather than the more-inclusive standard of *Metalclad*.[248] This development in the regulatory expropriation law of the ECT is critical and marks a retreat away from expansive notions of investor's rights for a legal regime which was once believed to be more favorable to investors than NAFTA itself.[249]

In 2005, roughly two years after *Nykomb*, the second full award on the merits based on the ECT emerged.[250] *Petrobart Ltd. v. Kyrgyz Republic* grew out of the dealings between Petrobart, a Gibraltar-based company, and KGM, a utility company controlled by the

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245. *Id.*

246. *See id.*

247. *Id.*

248. *See* Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, para. 322 (Jul. 14, 2006); Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, para. 152, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002); Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB/(AF)/97/1, Award of the Tribunal, para 103, 40 I.L.M. 36 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

249. *But see* Thomas Wälde & Kaj Hobér, *The First Energy Charter Treaty Arbitral Award*, TRANSNAT'L DISP. MGMT., Oct. 2004, at 15, *available at* http://www.transnational-dispute-management.com (Rejection of expropriation claim by *Nykomb* tribunal was only a compromise due to the "political character of this tribunal").

250. *See* Petrobart Ltd. v. Kyrgyz Republic, No. 126/2003, Arbitral Award, § II (Stockholm Chamber of Com. Inst. Mar. 29, 2005), *available at* http://www.investment claims.com/decisions/Petrobart-kyrgyz-rep-Award.pdf.

Kyrgyz government.[251] Petrobart had initially contracted to supply gas to KGM, but KGM soon found itself unable to pay due to "a series of restructurings that removed the state energy company's assets."[252] KGM eventually slipped into bankruptcy, with most of its operations and assets having been taken over by the newly created state-owned companies of Kyrgyzgaz and Munai.[253]

Because both Gibraltar, as part of the United Kingdom, and the Kyrgyz Republic are signatories to the ECT, Petrobart Ltd. chose to pursue ECT arbitration through the Stockholm Chamber of Commerce, following extended litigation in the Kyrgyz courts and one failed attempt at UNICTRAL arbitration.[254] Among the various allegations against the Kyrgyz Republic, Petrobart asserted that governmental regulatory action, such as presidential orders "transfer[ing] . . . KGM's assets but not its liabilities," in conjunction with interference in the local Kyrgyz courts that delayed Petrobart from seizing the assets of the bankrupt KGM, amounted to "measures equivalent to expropriation in circumstances which are not in conformity with Article 13(1) of the Treaty."[255] The tribunal declined to accept Petrobart's regulatory expropriation argument, holding that "the measures taken by the Kyrgyz Government . . . although they had negative effects for Petrobart, were [not] directed specifically against Petrobart's investment or had the aim of transferring economic values from Petrobart to the Kyrgyz Republic."[256]

While the *Petrobart* tribunal's discussion of regulatory expropriation was rather limited, the tribunal's decision to emphasize governmental measures having the "aim of transferring economic value," over measures depriving the foreign investor of control, appears a reconsideration of *Nykomb*'s narrow construction of Article 13(1)'s treatment of regulatory expropriation.[257] Even so, because *Petrobart Ltd.* is only the second of two full awards issued under the ECT, it is impossible to tell whether this award represents a larger movement in the ECT's regulatory expropriation jurisprudence away from *Nykomb*, and towards acceptance of the broader *Metalclad* "use" paradigm in identifying acts of regulatory expropriation. Regardless, the ECT should be "constructed in alignment with the emerging NAFTA and BIT jurisprudence."[258]

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251. *See id.*
252. Loftis & Beeley, *supra* note 212, at 8. *See also Petrobart Ltd.*, § II.
253. *See Petrobart Ltd.*, § II.
254. *See id.* §§ II, V; Loftis & Beeley, *supra* note 212, at 8.
255. *Petrobart Ltd.*, § VII(1)(C)(g).
256. *Id.* § VIII(8).
257. *See id.* § VIII(8).
258. Wälde, *supra* note 220, at 10.

Given the approach of the *Feldman* (NAFTA) and *Azurix* (U.S.-Argentina BIT) arbitral tribunals, this rule-of-thumb suggests that *Nykomb*'s focus on physical possession and management *control*, rather than on the *use* of the investment, remains the appropriate standard for identifying regulatory expropriation under the ECT.[259]

V. IN DEFENSE OF REGULATORY EXPROPRIATION: RESPONDING TO CRITIQUES OF REGULATORY EXPROPRIATION

A. Economic Critique of Regulatory Expropriation

This analysis of the current state of regulatory expropriation under NAFTA, various BITS and accompanying customary international law, along with the arbitral jurisprudence of the Energy Charter Treaty, has shown that in spite of the differences among these legal regimes, there is also an important point of common agreement in that all three recognize the existence of regulatory expropriation. Peaking around the time of the *Metalclad* decision, however, a number of scholars began to question whether a doctrine of regulatory expropriation was desirable from a policy perspective.[260] While some have attacked regulatory expropriation as a whole, others have attempted to carve out state-enacted environmental regulations from the coverage of the law of regulatory expropriation.[261]

Vicki Been, in her article *Does an International "Regulatory Takings" Doctrine Make Sense?*, identifies three central justifications for a regulatory expropriation rule, and then subsequently attempts to rebut these justifications.[262] These economic and equitable justifications for an international legal rule of regulatory expropriation highlighted by Been in her piece are accurate and helpful, even if her critique suffers from substantial weaknesses. First, Been discusses the theory of cost-internalization, whereby compensation in instances of regulatory expropriation by sovereign states is justified on the grounds that requiring governments to

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259. *See* Feldman v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal, para. 152, 42 I.L.M. 625 (2003) (NAFTA Ch. 11 Arb. Trib. 2002); Azurix Corp. v. Argentine Republic., ICSID (W. Bank) Case No. ARB/01/12, Award, para. 322 (Jul. 14, 2006).

260. *See, e.g.,* Been, *supra* note 9, at 49-50; Howard Mann & Konrad von Moltke, *Working Paper: NAFTA's Chapter 11 and the Environment -Addressing the Impacts of the Investor-State Process on the Environment* 47 (Int'l Inst. for Sustainable Dev. 1999), *available at* http://www.iisd.org/publications/pub.aspx?id=409.

261. *See* Been & Beauvais, *supra* note 15, at 142; Mann & von Moltke, *supra* note 260, at 47.

262. *See* Been, *supra* note 9, at 49-50.

pay for the regulations they enact (and thus "internalize" the cost of these regulations) results in more efficient regulation.[263] This is to say that governments will not regulate where the cost of enacting the regulation exceeds the benefits of that regulation. Been attacks the cost-internalization approach, arguing that

> [b]ecause politicians and bureaucrats do not maximize profits, having to expend funds to cover a compensation award will not necessarily have any effect on their decision, unless those expenditures make it harder for the decision-makers to achieve whatever it is that they do try to maximize. In other words, unless compensation awards transmit political, rather than market-based, incentives, those awards may do little to discourage inefficient regulation.[264]

Been's critique of the cost-internalization justification for regulatory expropriation suffers from her decision to draw an artificial distinction between political and market-based incentives. Although Been may be correct in stating that governments are not necessarily interested in maximizing profits (i.e., the size of the government treasury) alone, she is mistaken in assuming that just because governments do not attempt to generate "profits," that they are not interested in the economically efficient allocation of the revenues that they do acquire.

Essentially, Been misconstrues the incentives that drive government. In reality, there is a logical imperative for governments to provide the maximum possible level of services for the amount of revenues they collect. For instance, if a government is subject to an arbitration award that diverts funding for public services, this will have the "market-based effect" of decreasing the pool of funding available for government programs (i.e., social services, infrastructure development, etc.), which will result in a political effect of decreased support for the government. If support for the government drops too low, then a new party will be elected, or in non-democratic systems, the citizens may overthrow the presiding regime. Clearly, the "political incentive" is closely tied to the "market-based effect" of the government's expropriatory activity. Although government is not as efficient as private industry at the allocation of resources available to it, to suggest that forcing states to pay compensation does not have a significant effect on govern-

263. *See id.*
264. *Id.* at 51.

mental behavior, as is the only possible conclusion from Been's argument, is difficult to accept.

Been and Joel Beauvais attempt to counter the above response to Been's cost-internalization critique, by claiming that even if a constituent "chooses to vote for the candidate who promises to prevent regulations that would trigger [international] compensation requirements, a constituent will then have to monitor the behavior of the candidate she elects" to guarantee the government does not engage in expropriatory conduct.[265] Yet, in reality, a constituent need not monitor government officials in order for the threat of a regulatory expropriation award to have an effect on government behavior. In short, taxpayers do not have to know that the decrease in services they enjoy is tied to a regulatory compensation award in order to vote politicians out of office. Simple recognition that their standard of living has diminished under the current regime should be sufficient. Governing elites are well aware of this dynamic, and adjust their expropriatory actions accordingly.

The second basis for the doctrine of regulatory expropriation is tagged by Been as the "insurance rationale."[266] A rule of compensation for the expropriatory actions of states is justified on these grounds because skittish foreign investors will normally refuse to invest capital outside of their home countries, fearing that losses occurring abroad caused by governmental expropriation will otherwise remain unaddressed.[267] Here, Been asserts that investors should not be able to demand arbitration for expropriatory actions because there already exists a system of government-provided political risk insurance, namely OPIC, made available through the American government, and MIGA, through the World Bank.[268] Thus, "compensation should not be paid when an investor had the opportunity to purchase insurance against the risk, and chose not to do so."[269]

Been's effort at penalizing foreign investors who are too "cheap" to purchase political risk insurance by eliminating the legal doctrine of regulatory expropriation is founded on a misunderstanding of how the insurance system operates. Clearly, Been has forgotten that once an insurance company pays out a claim to a policy holder, it normally becomes subrogated to that claim, and may attempt to recover against the offending party. Few private (or public) insurance companies would remain solvent, if they were

265. Been & Beauvais, *supra* note 15, at 95.
266. *See* Been, *supra* note 9, at 50.
267. *See* Been & Beauvais, *supra* note 15, at 109-11.
268. Been, *supra* note 9, at 56-57.
269. *Id*. at 57.

to pay out time and again claims in the millions or billions of dollars without attempting to recover some of their losses. The request for arbitration in the 2004 *United States v. India* case, where OPIC took over the claims of GE, Bechtel, Enron, and Bank of America against the Indian government, after paying out $110 million on political risk insurance policies, is an excellent example of the subrogation principle at work.[270] Although OPIC and the Indian government eventually settled, OPIC's arbitration request, which alleged (among other wrongs) expropriatory action by the Indian government, was obviously a determining factor in the final outcome of the dispute.[271]

As for governmental political risk insurance programs in particular, it is doubtful that capital-exporting states will continue to support these programs if capital-importing states are allowed to expropriate property through regulation without being subject to a compensation requirement under international law. Although the investor may emerge whole thanks to insurance payments, the government insurer becomes that much poorer, while those taxpayers backing the government insurance scheme are the ones who ultimately bear the monetary cost. Under Been's system, it would be foreign taxpayers (those who subsidize the government political risk insurer) who ultimately pay for the capital importing-state's regulation. This is hardly a fair or economically efficient way to arrange matters.

The third rationale for an international regulatory takings doctrine moves out of the economic and into the equitable realm. Beavais and Been describe this "fairness rationale" as including:

> [T]heories [which] would require that foreign investors receive compensation either whenever they are burdened by regulations imposed by levels or types of governments whose processes do not afford the advantages of pluralist politics, or whenever particular kinds of foreign investors or foreign investors as a class are 'singled out' by regulations and are unable to protect themselves against legislative or regulatory change in normal political processes.[272]

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270. *United States. v. India*, Request for Arbitration, paras. 1, 20, 37, Nov. 4, 2004, *available at* http://www.opic.gov/insurance/claims/ awards/documents/GOI110804.pdf.

271. *Id*. para. 37; Sucheta Dalal, *How the Dabhol Deal was Swung by the Government*, INDIAN EXPRESS (Oct. 9, 2005),*available at* http://www.indianexpress.com/res/web/pIe/full_story.php?content_id=79717.

272. Been & Beauvais, *supra* note 15, at 104.

The "fairness rationale" for regulatory expropriation also reflects Frank Michelman's seminal academic work, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, in which the concept of demoralization costs for uncompensated takings is introduced.[273] Been criticizes the fairness justification for regulatory expropriation in asserting that arbitral tribunals have no right to "review the balance legislatures have struck between the interests of investors and those of broader society,"[274] and in arguing that fairness theories "ignore the role that the availability of exit plays in disciplining government regulators."[275]

Been's focus on the lack of democratic legitimacy of arbitral awards, and her attempt to place the primacy of the legislature ahead of any determination of regulatory expropriation by an arbitral tribunal, is incorrect in three respects. First, Been seems to forget that arbitral panels do not have the power to overturn regulatory decisions of the government in issuing an award requiring compensation for regulatory expropriation, nor in doing so are they second-guessing legislative judgments. Rather, panels can only impose costs on the government which ensure that affected foreign investors receive back the fair value of their investments, when the government takes action in a manner depriving investors of that value. Second, Been overlooks the fact that governments also struck another "balance" which subjected them to the customary international law of expropriation, in deciding to open their doors to foreign investors, and in signing numerous BITs and other multilateral agreements in order to attract foreign investment. Third, it may be that government action ending in regulatory expropriation is not the result of any careful legislative decision weighing individual property rights against the public good, but is rather the self-interested determination of a small ruling clique to benefit a select few. After all, many capital-importing nations are not democracies, and to excuse the controlling elites in these countries of the few legal restraints upon them would be disastrous for foreign investors.

As for the threat of capital flight, Been seems to believe that "[c]ompetition from other jurisdictions for new investment will discipline the host jurisdiction's propensity to change its regulations"

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273. *See* William A. Fischel, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 141, 144-45 (Harvard. U. Press 1995) (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165).

274. Been, *supra* note 9, at 62.

275. *Id.* at 60.

in a manner damaging to foreign investors.[276] Yet even if the host state discovers that it is suffering from underinvestment following its initial expropriatory act and changes its future behavior, this does nothing to make whole the party who was deprived of the value of its investment. Finally, Been's arguments against the "fairness rationale" for regulatory expropriation also gloss over the many revolutions and regime changes which have carried ideologically-motivated governments into power who are unconcerned with attracting foreign investment, and who view foreign economic involvement in their countries with a hostile eye. Hugo Chavez's recent decision to expropriate Venezuela's foreign-owned power and telecommunications utilities,[277] along with Evo Morales's efforts to nationalize Bolivia's natural gas sector,[278] are part of a new wave of expropriations which fall into this category.

B. Environmental Critique of Regulatory Expropriation

Given the many holes in Been's sweeping attack on regulatory expropriation in its entirety, some scholars have instead theorized that only a certain area of governmental control, such as environmental regulation, should be exempt from the international regulatory takings doctrine. Muthucumaraswamy Sornarajah, author of *The International Law of Foreign Investment*, warns of a "definite clash . . . between the protection of the environment and the protection of foreign investment," stating:

> The progressive evolution of the right to a clean environment as a human right and as a norm incorporating higher values may lead to an inflexible right for the state to interfere in order to protect the environment and to regard this interference as not amounting to a taking which is not compensable.[279]

Because international law does not yet recognize an unlimited right for states to engage in environmental regulation without compensating foreign investors for resulting regulatory expropriation, Howard Mann and Konrad von Moltke, of the International Institute for Sustainable Development (IISD), suggest that multi-

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276. *Id*. at 61.

277. *See* Jose de Cordoba, David Luhnow & Sara Silver, *State Control of Firms Brings Risk for Chavez*, WALL ST. J., Jan. 11, 2007, at A7.

278. *See* Juan Forero, *U.S. Aid Can't Win Bolivia's Love as New Suitors Emerge*, N.Y. TIMES, May 14, 2006, at sec. 1, p. 4.

279. Muthucumaraswamy Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 125 (2nd ed. 2004).

lateral investment treaties like NAFTA risk "freezing the development of sound environmental regulations, as well as other public welfare protection measures."[280] Lauren Godshall goes further, implying that the doctrine of regulatory expropriation could cynically be "turned into a tool for foreign investors to extract huge settlements from [governments attempting to protect the environment] under expansive claims of expropriation."[281]

As a remedy for these phantom threats, the IISD has created its own *IISD Model International Agreement on Investment for Sustainable Development*.[282] Although Article 8 of the IISD Model Agreement does include certain provisions protecting investors from expropriatory actions of the state, a significant exception is written into that article, which provides:

> [*B*]*ona fide*, non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article.[283]

This attempt to exclude environmental regulation from the general international legal doctrine of regulatory expropriation is furthered in Articles 20 and 25 of the Model Agreement, which state that parties to the agreement promise not deviate from environmental protective measures simply to encourage foreign investment,[284] and that host states have an inherent right "to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development."[285] In sum, for Sornarjah, Mann, Godshall, and others of this persuasion, arbitral awards like the *Santa Elena* decision, in which a tribunal held that "the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be

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280. Mann & von Moltke, *supra* note 260, at 47.

281. Lauren Godshall, Note, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 N.Y.U. ENVTL. L.J. 264, 315 (2002).

282. *See generally* Howard Mann et al., *IISD Model International Agreement on Investment For Sustainable Development* 12, 14 (Int'l Inst. for Sustainable Dev. 2005) *available at* http://www.iisd.org/publications/pub.aspx?id=685.

283. *Id*. art. 8(I).

284. *Id*. art. 20.

285. *Id*. art. 25(B).

paid," are an anathema which require an immediate change in international law.[286]

Although this picture of a "freezing [of] the development of sound environmental regulations" due to the implementation of the international legal principle of regulatory expropriation is a compelling one, it is also highly inaccurate.[287] In spite of Godshall's allegations that investor-protection mechanisms such as Article 1110 of the NAFTA treaty and Article 13 of the ECT were "being hijacked by private corporations in arbitration proceedings to . . . coerce national governments into settlements for vast sums of money,"[288] Kaj Hobér and Thomas Wälde, writing several years after the hysteria surrounding the *Metalclad* award passed, determined that

> As in many if not all NAFTA cases and in many BIT-based cases, it is rather small or middle-sized entrepreneurial investors with limited prior experience in, and exposure to the risk of, international operations who get caught in the net of changes in government, domestic political volatility, xenophobic resentment of foreigners and the exclusion of foreign companies . . . linking domestic politics and local business.[289]

For these small and medium-sized investors, the compensation requirement that applies in instances of regulatory expropriation is a vital lifeline that allows them to recover their investment in an unpredictable developing state, where government regulations may be enacted for a combination of factors, both self-serving and for the public good.

In contrast to the unfounded worries of Godshall and Mann, the *Nykomb* award, where a Swedish investor constructed a highly efficient co-generation power plant, serves as an example of a dispute in which an environmentally friendly foreign investor was confronted with the "'environment-unfriendly' strategies of the ex-Soviet state electricity monopoly."[290] Indeed, one of the reasons the Latvian government was unwilling to pay the agreed-upon double tariff for energy provided by the foreign investors, was because it was receiving cheap energy from Russian power plants operating

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286. *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID (W. Bank) Case No. ARB/96/1, Final Award, para. 71, 39 I.L.M. 1317 (2000).

287. Mann & von Moltke, *supra* note 260, at 47.

288. Godshall, *supra* note 281, at 265.

289. Wälde & Hobér, *supra* note 249, at 18.

290. *Id*. at 19.

with almost no environmental controls.[291] In reality, *Nykomb* is "the reverse image of the scenario of a big-investor wishing to downgrade the environment against a domestic community upholding national environmental aspirations painted as a rule by the NGO commentators."[292]

Even as many foreign investors are attempting to make a profit while meeting high environmental standards set by host governments, there is also a dark side to environmental regulation which did not appear in the *Nykomb* case. In some instances, governments have used environmental regulation as a sort of "Trojan horse" to allow them to selectively chip away at the value of foreign investments in their country for the purpose of benefiting domestic competitors, or appeasing anti-foreigner populist sentiments.[293] Kolo and Wälde explain that "[b]ecause of the moral high ground it occupies, concern over the environment provides a convenient platform for even the most unlikely bedfellows to challenge the emerging institutions of the global economy under environmental, human rights, protectionist, nationalist and sovereignty-based, statist and communitarian headings."[294]

Nowhere is Kolo and Wälde's warning proven more fully than in the *Metalclad v. Mexico* award.[295] Although the tribunal identified a number of expropriatory actions in this award, the most egregious by far was the decision of the governor of the Mexican state of San Luis Potensi to create a "Natural Area for the protection of rare cactus" which just happened to encompass the Metalclad site.[296] The effect of the governor's environmental decree was to permanently bar operation of the landfill.[297] In issuing the special environmental decree, the governor, of course, was in no way concerned about the preservation of any rare plants which might happen to have been in the area, but was rather caving in to the "NIMBY-ism" of residents living in San Louis Potensi who opposed the landfill.[298]

A prime example of the abuse of environmental regulation, in which a capital-importing country has used its regulatory powers to intentionally expropriate the investment of a foreign business, is that of the Sakhalin-2 dispute discussed briefly in the introduc-

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291. *See id.*

292. *Id*. at 18.

293. *See* Wälde & Kolo, *supra* note 136, at 812.

294. *Id*.

295. *See* Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB/(AF)/97/1, Award of the Tribunal, paras. 59, 109, 40 I.L.M. 36 (2001) (NAFTA Ch. 11 Arb. Trib. 2000).

296. *Id*. at para. 59.

297. *Id*. at para. 109.

298. *See generally id*. at para. 46.

tion. The Sakhalin-2 story begins in 1994 when Royal Dutch Shell, a global energy company incorporated in the United Kingdom, signed an agreement with the Russian government to exploit a vast oil and natural gas field discovered in eastern Siberia.[299] Under the terms of the agreement, Shell and its Japanese partners (Mitsui and Mitsubishi) had the right to recover the billions of dollars in engineering costs spent in preparing Sakhalin-2, before the Russian government could receive its share of the oil and gas profits from the project's production sharing agreement.[300] By 2006, Sakhalin-2 had become the "largest foreign investment project in Russia,"[301] but with oil and natural gas prices at all-time highs, the government began reconsidering its initial bargain with Shell and its co-investors.

Instead of taking over the concession by an expropriation decree, Russia sought a renegotiation of the terms of the investment agreement by pressuring Shell on the environmental performance of the project.[302] The government appointed Oleg Mitvol, Deputy Head of Inspection for the Russian Natural Resources Ministry, to investigate alleged environmental breaches committed in the course of construction on and around Sakhalin island.[303] The Russian government's sudden and unexpected interest in the environmental merits of the project was a pleasant surprise to environmentalists opposed to the drilling. "We are prepared to be prostitutes with anyone if the end result is protection of the environment," stated Igor Chestin, head of the Russian branch of the World Wildlife Fund, while speaking about Sakhalin-2.[304]

Having already spent $12 billion on the project, Shell refused to renegotiate the 1994 agreement, arguing that the construction of Sakhlain-2 was being performed within the bounds of Russia's environmental laws.[305] In response to Shell's attempts to enforce the terms of the initial bargain, the Russian Ministry of Natural Resources revoked a key environmental permit for the project, halting construction in its tracks and threatening to add billions of dollars more in costs.[306] In addition, Mitvol threatened to open a criminal case against Shell for the "destruction of the forest" which

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299. *See* Andrew E. Kramer, *Moscow Gets Further Concession From Shell; 3 Foreign Partners at Sakhalin-2 Project Lose Upfront Payment*, INT'L HERALD TRIB., Dec. 29, 2006, at 1.

300. *Id*.

301. Myers, *supra* note 4, at 5.

302. Parfitt, *supra* note 1.

303. *See* Tony Halpin, *Russia Accuses Shell of Damaging Sakhalin Forests*, THE TIMES (London), Sep. 21, 2006, at 56.

304. Parfitt, *supra* note 1.

305. *Id.*

306. *See* Parfitt, *supra* note 1.

supposedly occurred during the construction of pipelines on Sakhalin island.[307] Finally, in December 2006, Shell, Mitsui, Mitsubishi, and the government reached an accord, under which the companies agreed "not [to] recoup their costs upfront," which had the effect of "giving the government a bigger take without formally renegotiating the production sharing agreement."[308] Moreover, Shell and its foreign partners agreed to give Gazprom, an energy company controlled by the Russian government, a 50% plus one share stake in the private side of the venture.[309] As a result of the new agreement, "Mitsui's share drops from 25% to 12.5%, and Mitsubishi's from 20% to 10%," while Shell's share drops from 55% to 27.5%.[310] According to the *International Herald Tribune*, a short time after the new agreement was announced, President Vladimir Putin "declared instantaneously that the project's environmental problems 'could be considered resolved.'"[311]

While Shell chose not to pursue arbitration in this case, perhaps hoping to avoid endangering its remaining investments in Russia or maybe because Russia is not a signatory to the investor-friendly ECT, the facts plainly show that the actions of the Russian government constituted regulatory expropriation. In revoking a crucial environmental permit and threatening to criminally prosecute Shell and its partners under Russian environmental laws, the Russian government managed to force the project's foreign investors to renegotiate the terms of an investment agreement, and unwillingly hand over majority control of an investment which was previously 100% foreign-owned. Altogether, the Sakhalin-2 dispute is an excellent model of expropriatory action masquerading as environmental regulation. This is also precisely the kind of government behavior which will inevitably become more prevalent if environmental regulation is removed from the scope of regulatory expropriation. Already, Shell's decision not to seek compensation for the expropriation of its investment has emboldened the Russian government, which is now threatening to withdrawal the environmental licenses from Total's Kharyaga project, and BP's Kovykta field.[312] The lesson of Sakhhalin-2 is that a broader approach to regulatory expropriation is warranted in order to protect foreign investors, who may be wary of losing other investments in a country if their initial claim of regulatory expro-

307. *See* Halpin, *supra* note 303, at 56.
308. Kramer, *supra* note 299, at 1.
309. *See Shell's Sakhalin Rout Shines Light on Others*, *supra* note 3.
310. *Id*.
311. Myers, *supra* note 4, at 5.
312. *See Shell's Sakhalin Rout Shines Light on Others*, *supra* note 3.

priation fails—the precise opposite of what Been, Mann, von Moltke, Sornarajah, and Godhsall have advocated.

VI. CONCLUSION

The jurisprudence of NAFTA, customary international law as captured in various BITs, and the Energy Charter Treaty points to three unique but intertwined strands of thought on regulatory expropriation. Generally, there seems to be agreement amongst tribunals interpreting international law in each of these three areas that a finding of regulatory expropriation requires a showing by the foreign investor of some loss of control or use of the investment, the disappointment of certain expectations regarding the investment, and a diminishment of value due to government regulatory action. However, there is discernable disagreement as to how the first element of the three-prong regulatory expropriation test should be measured, or even whether it is *control* or *use* that matters.

On the one hand, although the law is still developing, it seems that NAFTA tribunals have taken a bifurcated approach to the control/use element of regulatory expropriation. As was stated earlier, *control* and *use* under NAFTA jurisprudence appear to constitute two separate standards by which regulatory expropriation can be determined. On the other hand, the post-*Nykomb* jurisprudence of the ECT indicates acceptance of the narrower *control* approach to regulatory expropriation, with a focus on quasi-physical expropriation and interference with management's power over the day-to-day operations of the investment. This parallels the holding in *Azurix* (a case based on customary international law and the US-Argentina BIT), rather than the more-inclusive NAFTA standard of *Metalclad*.

Moving beyond the control-use dichotomy, there are other large swathes of commonality among the jurisprudential approaches to regulatory expropriation in NAFTA, customary international law, and in the ECT. All three strands accept that proper or "legal" expropriation can only take place if the state enacting the expropriatory regulation does so for a public purpose, in a non-discriminatory manner, in accordance with due process, and if compensation for the foreign investor's losses is paid. Also, in spite of the efforts of some NGOs and scholars, the general trend across these three categories of regulatory expropriation law seems to be a rejection of the public purpose *carte blanche* for government regulations, even if such regulations are for the protection of the environment.

In arguing for special public purpose or environmental exceptions to the doctrine of regulatory expropriation, Been, Mann, von Moltke, Sornarajah, and Godhsall have all offered compelling reasons for why the international law of regulatory expropriation should be relaxed or eliminated. However, in a world where environmental regulation has increasingly become just another weapon in the arsenal of governments who seek to renege on previous commitments for diverse political and economic reasons, the doctrine of regulatory expropriation has become even more vital to foreign investors than in the past. This is not to disparage valid environmental regulation, but like anything else worthwhile, preserving the environment is an important goal involving substantial costs which should be shared by all citizens, rather than being passed off to comparatively powerless foreign investors.

Unfortunately, the actions of the Russian government in the Sakhalin-2 incident prove that environmental regulation serves as a useful curtain to shield what is in reality the fleecing of foreign investors. Furthermore, the widespread abuse of environmental regulations in such a manner is certain to generate increased resistance against *valid* attempts to protect increasingly fragile ecosystems in capital-importing states. But given Russia's victory in the Sakhalin-2 dispute, it is likely that environmental (and other) regulations will be used more frequently in upcoming years to pressure foreign investors, necessitating further study of the law of regulatory expropriation. Whether or not the future development of regulatory expropriation in NAFTA, customary international law, and the ECT, will take the more expansive route of *Metalclad*, which would help protect against further Sakhalin-like incidents, or will instead stick to the narrower path of *Azurix*/*Nykomb*, remains to be seen.

PERU'S TOO EXPENSIVE—I'LL GET MY CHEESE FROM CHILE: THE AGRICULTURAL MARKET ACCESS PROVISIONS OF THE *U.S.-CHILE FTA* AND THE *U.S.-PERU TPA*

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I. INTRODUCTION

The United States exports more than two billion dollars per year in goods and services to Peru.[1] If the United States ratifies

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1. OFFICE OF THE U.S. TRADE REP., PERU TPA FACTS, FREE TRADE WITH PERU: SUM-

the *U.S.-Peru Trade Promotion Agreement* (*U.S.-Peru TPA*), this number will rise dramatically. The *U.S.-Peru TPA* seeks to promote trade between the United States and Peru by reducing trade barriers over seventeen years.[2] Specifically, the *U.S.-Peru TPA* proposes to eliminate tariffs on roughly 80 percent of U.S. consumer and industrial exports to Peru "immediately upon entry into force of the Agreement."[3] "Tariffs on most remaining U.S. farm products will be phased out within fifteen years, with all tariffs eliminated nearly all in seventeen years."[4] Textiles and apparels will be completely duty-and quota-free immediately, so long as the products meet the rule of origin provisions of the Agreement.[5] At its broadest level, this Agreement will continue the success of Peru's membership in the Andean Trade Promotion Agreement.[6]

Countless commentators have criticized the *U.S.-Peru TPA*. Some argue the Agreement fails to address worker rights.[7] Others argue the environment will certainly suffer.[8] International organizations criticize the Agreement in that it fails to secure life-saving medicines at affordable prices for Peruvians.[9] According to the President of Oxfam America, "Agreements between trading partners should offer opportunity and development, not the demise of a poor country's agriculture sector or impediments to public health. . . . This agreement's provisions on intellectual property, agriculture and investment do not add up to a good deal for farmers, workers and consumers in Peru."[10]

MARY OF THE U.S. PERU TRADE PROMOTION AGREEMENT, at 1 (Dec. 2005), *available at* www.ustr.gov/assets/Document_Library/Fact_Sheet/2005/asset_upload_file490_8547.pdf [hereinafter USTR, PERU TPA FACTS].

2. *Infra* Part III.A.

3. USTR, PERU TPA FACTS, *supra* note 1.

4. *Id.*

5. *Id.* U.S. Peru Trade Promotion Agreement, Apr. 12, 2006, Annex 3-A, U.S.-Peru, Hein's No. KAV7623, State Dep't. No. 06-128, *available at* www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter Peru TPA].

6. Andean Trade Preference Act, Pub. L. No. 102-182, §§ 201-208, 105 Stat. 1233, 1236-44 (1991) (codified as amended at 19 U.S.C. §§ 3201-3206 (2000)).

7. *See* Press Release, Congressman Sandy Levin, U.S.-Peru FTA Fails to Address the Realities on the Ground in Peru (Apr. 12, 2006) (*available at* www.house.gov/apps/list/press/mi12_levin/pr041206.html) ("Without basic internationally-recognized worker rights Peruvians will not be able to fully address the conditions of poverty and deep income inequalities which are causing such turmoil in the electoral process."); Cyril Mychalejko, *U.S.-Peru TPA in Jeopardy* (March 15, 2006), *available at* http://upsidedownworld.org/main/content/view/229/68/.

8. *See* SIERRA CLUB, DON'T TRADE AWAY OUR ENVIRONMENT: OPPOSE THE U.S.-PERU FREE TRADE AGREEMENT (2006), *available at* www.citizenstrade.org/pdf/sierraclub_peruftaactionalert_022006.pdf.

9. Press Release, Oxfam America, U.S. Peru Free Trade Deal a Step Back for Development (Apr. 12, 2006) (*available at* www.oxfamamerica.org/newsandpublication/press_releases/press_release.2006-04-12.9607759677).

10. *Id.* (quoting Raymond C. Offenheiser).

This paper takes another approach in its critique of the *U.S.-Peru TPA*. Rather than focusing on its human rights, labor, or environmental contexts, this paper argues that the *U.S.-Peru TPA* does not sufficiently liberalize trade, at least insofar as multilateral liberalization of trade is the ultimate goal. Specifically, this paper argues that the *U.S.-Peru TPA* does not meet the trade-liberalization mark established by the *United States-Chile Free Trade Agreement* (*U.S.-Chile FTA*), signed by the United States and Chile only three years ago.

Despite the trade-liberalization potential of the *U.S.-Peru TPA*, the *U.S.-Chile FTA* liberalizes agricultural trade more deeply and quickly than the *U.S.-Peru TPA*. Upon enactment, the *U.S.-Chile FTA* eliminated tariffs on 90 percent of U.S. exports to Chile and 95 percent of Chilean exports to the United States;[11] the *U.S.-Peru TPA*, if enacted, will eliminate tariffs immediately on approximately 80 percent of total goods.[12] With regard to agricultural goods[13], the *U.S.-Chile FTA* immediately eliminated tariffs on 71.6 percent of U.S. exports to Chile; the *U.S.-Peru TPA* immediately eliminates tariffs on only 52 percent of U.S. exports to Peru.[14]

The *U.S.-Peru TPA* phases out the remaining tariffs on agricultural goods in seventeen years, whereas its Chilean counterpart does so in twelve. During these five years U.S. consumers will economically prefer Chilean imports, and U.S. suppliers will economically prefer to export to Chile, given the lower tariffs under the *U.S.-Chile FTA*. Significantly, the *U.S.-Peru TPA* protects certain sensitive products much more significantly than the *U.S.-Chile FTA*. For example, the United States never phases out its tariff-rate quotas (TRQs) and safeguard measures on Peruvian sugar. In contrast, the *U.S.-Chile FTA* phases out TRQs and safeguard measures on sugar within twelve years after the Agreement enters into effect. This discrepancy encourages sugar trade between Chile and the United States at the expense of sugar trade from Peru to the United States.

The economic effect of these discrepancies between bilateral free trade agreements has not been previously studied. Countries

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11. USTR, THE U.S.-CHILE FREE TRADE AGREEMENT: AN EARLY RECORD OF SUCCESS (2004), *available at* www.ustr.gov/Document_Library/Fact_Sheets/2004/The_U.S.-Chile_Free_Trade_Agreement_An_Early_Record_of_Success.html [hereinafter USTR, Chile FTA: EARLY RECORD OF SUCCESS].

12. USTR, PERU TPA FACTS, *supra* note 1.

13. This article utilizes the term "agricultural goods" to refer to goods in Chapters 1 through 24 of the Official Harmonized Tariff Schedule of the United States (HTSUS).

14. TARIFF INFO. CTR., U.S. INT'L. TRADE. COMM., OFFICIAL HARMONIZED TARIFF SCHEDULE, *available at* www.usitc.gov/tata/hts [hereinafter HTSUS]. This calculation refers to the Category A and F goods in both Agreements that correspond to classifications in Chapters 1 through 24 of the HTSUS.

signing bilateral free trade agreements have nearly ignored the resulting trade diversion effect—thus ignoring the problem that a bilateral agreement itself may be a "stumbling block" to broader trade liberalization.[15] In a multilateral liberalization regime, a bilateral trade agreement that fails to liberalize trade further than existing bilateral agreements between the parties and their respective trading partners contributes to trade diversion. Instead, a trade agreement conducive to multilateral liberalization would seek to encourage future bilateral trade agreements through competition by liberalizing trade more significantly than preceding trade agreements. Viewed through this lens, bilateral trade agreements can serve as "stepping stones" rather than "stumbling blocks" of the trade liberalization debate.

This paper argues that the *U.S.-Peru TPA* has not met the agricultural tariffs free-trade standard in Latin America as established by the *U.S.-Chile FTA*. In failing to do so, the *U.S.-Peru TPA* has missed an opportunity to fuel multilateral trade liberalization. Part II discusses the origins of the *U.S.-Peru TPA* and the *U.S.-Chile FTA*.[16] Part III compares the trade agreements' provisions, showing how the *U.S.-Chile FTA* liberalizes agricultural trade more thoroughly than the *U.S.-Peru TPA*.[17] Part IV makes two arguments to explain this distinction. First, it argues that Chile was likely more willing to utilize its agricultural goods as bargaining chips than Peru.[18] Chile nearly "sold its farm,"[19] perhaps in exchange for increased market access for important Chilean exports, such as copper. Second, it argues that Peru had significant bargaining power, a factor that may be attributed in part to the negotiating bloc of the Andean countries vis-à-vis the United States.[20] Part V explores, first, whether, as a theoretical matter, the discrepancy in trade liberalization of agricultural goods between the *U.S.-Chile FTA* and the *U.S.-Peru TPA* is justifiable from multilateral trade system lens and, second, the potential economic effect of these discrepancies.[21] Part VI concludes and describes lessons that one may learn from the *U.S.-Peru TPA* regardless of its success in the U.S. Congress.[22]

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15. RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 582 (Thompson/Sweet & Maxwell 2005) (making this point regarding regional trade agreements in the automobile industry in Latin America).

16. *Infra* Part II.

17. *Infra* Part III.

18. *Infra* Part IV.A.

19. *See also infra* Part IV.A. for development of this concept.

20. *Infra* Part IV.B.

21. *Infra* Part V.

22. *Infra* Part VI.

II. A HISTORY OF THE CHILE AND PERU FTAS

A. The United States-Chile Free Trade Agreement

Chile and the United States signed the *U.S.-Chile FTA*, the first comprehensive FTA between the United States and a South American country,[23] on June 6, 2003.[24] Negotiations began under President George H. W. Bush's "America's Initiative." President George H. W. Bush signed into law the *U.S.-Chile FTA* on September 3, 2003.[25] The *U.S.-Chile FTA* went into effect January 1, 2004.[26]

According to the Office of the United States Trade Representative, U.S. exports of manufactured goods to Chile have increased by 19.5 percent, and exports of U.S. agricultural products have grown 22.6 percent.[27] By the end of 2005, U.S. exports to Chile rose by almost $2.5 billion, reaching $5.2 billion.[28] The Chilean export economy has similarly benefited. According to the USTR, "during the first quarter of [2004] Chilean exports to the U.S. grew 12.1%, to a total of . . . $1.17 billion."[29]

B. The United States-Peru Trade Promotion Agreement

The United States and the Andean countries signaled their commitment to free trade with the Andean Trade Preference Act (ATPA). The ATPA seeks to assist the Andean countries in eliminating the production of illegal drugs, to foster economic activity, and to facilitate export diversification in the Andean countries.[30]

The ATPA achieved its goal of increasing trade. According to the Congressional Research Service,

> In 2004, the United States imported $15.5 billion

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23. USTR, 2004 TRADE POLICY AGENDA AND 2003 ANNUAL REPORT (2004), *available at* www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html?ht= ; United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, Section 101, 117 Stat. 909, 910 (2003).

24. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, FREE TRADE AGREEMENTS, *available at* www.iipa.com/fta_issues.html.

25. *Id.*

26. *Id.*

27. USTR, CHILE FTA: EARLY RECORD OF SUCCESS, *supra* note 11.

28. USTR, TRADE AGREEMENTS WORK FOR AMERICA (May 26, 2006), *available at* www.ustr.gov/Benefits_of_Trade/Section_Index.html.

29. USTR, CHILE FTA: EARLY RECORD OF SUCCESS, *supra* note 11.

30. Hale Sheppard, *The Andean Trade Preference Act: Past Accomplishments and Present Circumstances Warrant its Immediate Renewal and Expansion*, 34 GEO. WASH. INT'L L. REV. 743, 743 (2003).

> from the four Andean countries and exported $7.7 billion. Colombia accounted for about half of U.S. trade with the region. Peru and Ecuador almost evenly split the other half, and Bolivia represented a very small share. The leading U.S. import from the region in 2004 was crude petroleum oil, which accounted for 37 % of imports. Leading U.S. exports to the region were mining equipment, wheat, broadcasting equipment, and maize.[31]

Similarly, Peruvian officials attribute the recent increase in Peru-U.S. economic activity largely to the ATPA. According to the Peruvian Ministry of Exterior Commerce and Tourism, Peruvian exports to the United States increased from $696 billion to $5,100 billion, an increase of roughly 633 percent in twelve years.[32] The number of businesses exporting to the United States increased from 1,260 in 1994 to 2,301 in 2004, an increase of 82.6 percent.[33] From 1994 to 2005, more than 550,000 exportation jobs were created in Peru.[34] From 1993 to 2005, Peruvian agricultural exports to the United States increased by 561 percent.[35] Leading categories included asparagus, mangoes, onions, grapes, bananas and flowers.[36]

The United States and the Andean countries have negotiated a six-month extension of the ATPA.[37] To replace the ATPA, the United States is seeking to establish bilateral trade agreements with the individual Andean countries. In late 2003, the United States Trade Representative Robert Zoellick informed the U.S. Congress of his intent to initiate trade talks with the Andean countries, Bolivia, Colombia, Ecuador, and Peru.[38] The United

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31. Bilaterals.org, Congressional Research Services, *CRS Report for Congress: Andean-U.S. FTA Negotiations* (Dec. 16, 2005), *at* www.bilaterals.org/article.php3?id_article=3321.

32. EL SISTEMA DE INFORMACIÓN SOBRE COMERCIO EXTERIOR (SICE), MINCETUR, RESULTADOS DE LA LEY DE PROMOCIÓN COMERCIAL Y ERRADICACIÓN DE LA DROGA ATPDEA (December 2005), at 3.

33. *Id.* at 5.

34. *Id.* at 7.

35. *Id.* at 9.

36. *Id.* at 11.

37. Press Release, Doc Hastings, Hastings Stands with Asparagus Growers in Opposition to Andean Trade Act Extension (Dec. 8, 2006) (*available at* http://hastings.house.gov/Read.aspx?ID=753); *see also Ministra Aráoz: ATPDEA Podria Ingresar Mañana a la Agenda del Congreso de EE.UU.*, http://www.tlcperu-eeuu.gob.pe/index.php?id_noticia=354.

38. USTR, USTR NOTIFIES CONGRESS OF INTENT TO INITIATE FREE TRADE TALKS WITH ANDEAN COUNTRIES (Nov. 18, 2003), *available at* www.ustr.gov/Document_Library/Press_Releases/2003/November/USTR_Notifies_Congress_of_Intent_to_Initiate_Free_Trade_Talks_with_Andean_Countries.html.

States and the Andean countries held their first round of negotiations with Colombia, Ecuador, and Peru, with Bolivia participating as an observer, in Cartagena, Colombia, in May of 2004.[39] The United States has finalized agreements with Colombia and Peru[40] and continues negotiations with Ecuador,[41] though the future of the Ecuadorian negotiations is bleak.[42]

The negotiations between Peru and the United States took nineteen months and concluded in Washington, D.C. on December 7, 2005.[43] Peru signed the *U.S.-Peru TPA* on April 12, 2006.[44] The Peruvian Congress ratified the Agreement on the early morning of June 28, 2006 by a vote of 79 in favor, 14 against, and 7 abstentions.[45] The U.S. Senate Committee on Finance held a hearing on the agreement's implementation on June 29, 2006, and the U.S. House Committee on Ways and Means held one on July 12, 2006. Each held a "mock markup"—an informal vote before the Agreement's submission—with votes of 12-7 and 23-13 in favor of the Agreement, respectively, with Democrats mostly opposing the Agreement.[46]

Congress will determine the *U.S.-Peru TPA*'s fate within the next year. In the last congressional election, Democrats took the majority of both houses of Congress. During the 110th Congress, the Senate will be comprised of 49 Republicans, 49 Democrats, and 2 Independents who have aligned themselves with the Democrats. The House of Representatives is comprised of 234 Democrats and 201 Republicans, a solid Democratic majority. Because the Democratic majority is likely to oppose ratification, whether the United States will ratify the Agreement is uncertain. Nevertheless, the comparative lessons of the *U.S.-Peru TPA* are ripe for ex-

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39. *Id.*

40. Press Release, USTR, U.S. and Peru Sign Trade Promotion Agreement (2006) (*available at* www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html) [hereinafter USTR, U.S.-Peru Sign TPA].

41. Press Release, USTR, United States and Peru Conclude Free Trade Agreement (Dec. 7, 2005) (*available at* www.ustr.gov/assets/Document_Library/Press_Releases/2005/December/asset_upload_file744_8518.pdf).

42. Bilaterals.org, *U.S.-Ecuador Free Trade Agreement Frozen* (May 14, 2006), *at* www.bilaterals.org/article.php3?id_article=4710; Bilaterals.org, *Ecuador-US FTA Hinges on Farming* (Feb. 16, 2006), *at* www.bilaterals.org/article.php3?id_article=3857.

43. TRATADO DE LIBRE COMERCIO PERU-ESTADOS UNIDOS, RENUNDACIÓN DE RONDA XIII EN WASHINGTON (Dec. 7, 2005), *available at* www.tlcperu-eeuu.gob.pe/index.php?ncategoria1=206&ncategoria2=207.

44. USTR, U.S.-Peru Sign TPA, *supra* note 40.

45. *Por amplia majoría Congreso aprobó ratificación del TLC*, El Comercio (June 28, 2006), *available at* http://www.elcomercioperu.com.pe/EdicionOnline/Html/2006-06-28/onlEconomia0531424.html.

46. Mark Drajem, Bloomberg News, *Senate Committee Approves Trade Legislation for Peru, Vietnam* (July 31, 2006), *at* www.bloomberg.com/apps/news?pid=newsarchive&sid=alc4kXOtpYFg.

ploration, as the United States continues its bilateral agenda with other Latin American countries, such as Panama.[47]

III. A COMPARATIVE LOOK AT THE *U.S.-CHILE* AND *U.S.-PERU* TRADE AGREEMENTS

This part shows that the *U.S.-Peru TPA*'s provisions in market access of agricultural goods simply have not met the *U.S.-Chile FTA*'s trade-liberalizing mark. This part makes this comparison in two steps. First, the agreements differ in one of their more general points—timing.[48] The *U.S.-Chile FTA* phases out tariffs on agricultural goods much more quickly than the *U.S.-Peru TPA* does.[49] Second, the *U.S.-Peru TPA* is more protectionist of its sensitive agricultural products, particularly sugar, than the *U.S.-Chile FTA*.[50] By combining tariffs, tariff-rate quotas (TRQs), and safeguard measures, the *U.S.-Peru TPA* indefinitely protects the U.S. sugar market from Peruvian sugar exports.[51]

A. Timing: Phase-Outs on Agricultural Goods and Related Factors

1. The Phase-Outs in the U.S.-Peru TPA Encourage U.S. Consumers to Import from Chile

The Agreements discourage agricultural business between the United States and Peru for two reasons. First, the phase-out periods in the *U.S.-Peru TPA* subject Peruvian agricultural goods to five more years of tariffs. Second, the possible four-year difference between the ratification of the *U.S.-Chile FTA* and the *U.S.-Peru TPA* hinders trade between Peru and the United States. Because the parties to the *U.S.-Peru TPA* did not negotiate around this timing factor, these possible four additional years may affect all tariffs not immediately phased out by the *U.S.-Peru TPA*.

At its broadest, *U.S.-Peru TPA* immediately eliminates tariffs on approximately 80 percent of goods;[52] whereas the *U.S.-Chile FTA* immediately eliminates tariffs on 90 percent of goods.[53] The *U.S.-Chile FTA* immediately eliminates tariffs on 71.6 percent of

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47. Press Release, USTR, U.S. and Panama Complete Trade Promotion Agreement Negotiations (Dec. 19, 2006) (*available at* www.ustr.gov/Document_Library/Press_Releases/2006/December/US_Panama_Complete_Trade_Promotion_Agreement_Negotiations.html).

48. *Infra* Part III.A.

49. *Infra* Part III.A.

50. *Infra* Part III.B.

51. *Infra* Part III.B.

52. USTR, PERU TPA FACTS, *supra* note 1.

53. USTR, CHILE FTA: EARLY RECORD OF SUCCESS, *supra* note 11.

U.S. exports to Chile,[54] whereas the *U.S.-Peru TPA* immediately eliminates tariffs on only 52 percent of U.S. agricultural exports to Peru.[55]

Regarding the remaining tariffs, the *U.S.-Peru TPA*'s longer phase-outs encourage U.S. consumers to demand Chilean imports at the expense of Peruvian imports, and U.S. suppliers to export to Chile, as opposed to Peru. The *U.S.-Chile FTA* phases out all tariffs on agricultural goods in twelve years. The tariff elimination schedule of the *U.S.-Chile FTA* outlines eight categories. The Agreement eliminates tariffs on Category-A goods on the date the Agreement enters into force and on Category-E goods, the longest time period for tariff elimination, in twelve equal annual stages beginning on the date the Agreement enters into force.[56] The specific tariff schedules of Chile and the United States provide for an additional nine categories, all phasing out within the twelve-year period.[57]

In contrast, the *U.S.-Peru FTA* phases out tariffs in seventeen years.[58] Specifically, the Agreement eliminates tariffs on Category-A goods immediately upon the date the Agreement enters into force.[59] Tariffs on Category-E goods remain at base rates through years one through ten and subsequently are reduced in seven equal annual stages until eliminated.[60] Cheese and condensed and evaporated milk are examples of Category-E goods under the U.S. Annex to the U.S. Tariff Schedule.[61]

The additional five years indicate a longer, and thus more protectionist, phase-out period. Although all goods the United States exports to and imports from Chile will be duty-free on January 1, 2016, tariffs on goods exported to and imported from Peru will not expire until January 1, 2025, assuming the *U.S.-Peru TPA* enters into effect on January 1, 2008. During the eight-year difference, U.S. exporters and importers will prefer to conduct business with Chile—at least with respect to agricultural goods for which tariffs have yet to phase out. True, this conclusion assumes that U.S. consumers are motivated primarily by price in deciding what

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54. HTSUS, *supra* note 14.

55. *Id.*

56. U.S.-Chile Free Trade Agreement, 2003, Annex 3.3(1)(a),(e), U.S.-Chile, Hein's No. KAV6375, Temp. State. Dept. No. 04-35, *available at* www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter Chile FTA].

57. *Id.*at Annex 3.3(3),General Notes: Tariff Schedule of the U.S. at 1; Annex 3.3(4), General Notes: Tariff Schedule of Chile, at 2.

58. Peru TPA, *supra* note 5, Annex 2.3(3)(a), General Notes: Tariff Schedule of the U.S. (2003), at 1.

59. *Id.* at Annex 2.3(1)(a).

60. *Id.* at Annex 2.3(1)(e).

61. *Id.* at Annex 2.3, Appendix I.

products to buy and applies only with respect to Peruvian and Chilean goods that are substitutes. However, with respect to many agricultural products this will be the case; many U.S. consumers will generally not distinguish between, say, Peruvian and Chilean cheese. Price may be one of the only factors considered by buyers.[62]

Even if, under both Agreements, a good phases out in ten years, the simple fact that the *U.S.-Peru TPA* may come into effect four years after its Chilean counterpart compounds the tariff discrepancy. Take tuna, for example. Assume, arguendo, the United States ratifies the *U.S.-Peru TPA* in 2007 and it enters into effect in 2008. A U.S. client wants to import $10,000 worth of tuna from either Chile or Peru in 2008. Under the proposed contract terms, his company has to pay the import tariffs, so the client is interested in determining from which country he should import the tuna. HTS classification 1604.14.20 provides a base-rate tariff of 6 percent to tuna imports from Peru and from Chile.[63] The U.S.-*Chile FTA* classifies this type of tuna as a Category-D good,[64] and the *U.S.-Peru TPA* classifies it as a Category-C good.[65]

A Category-D good under the *U.S.-Chile FTA* phases out in ten equal annual stages beginning in 2004, the date the Agreement entered into force.[66] Five years will have passed at a .6 percent[67] reduction per year, which means the duty on Chilean imports of tuna in 2008 will be 3 percent. Thus, the tariff on $10,000 of Chilean tuna will be $300. A Category-C good under the *U.S.-Peru TPA* also phases out in ten equal annual stages, this time beginning in 2008. One year will have passed at a .6 percent reduction per year, so the duty on Peruvian imports of tuna in 2008 will be 5.4 percent. Thus, the tariff on $10,000 in Peruvian tuna will be $540. All else being equal, the four-year difference between the Agreements' ratifications encourages the client to import tuna from Chile—at least until the Peruvian tuna tariffs phase out. The phase-out provisions thus encourage U.S. business to import certain products, such as certain forms of tuna, from Chile and discourages Peruvian tuna imports.

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62. The author draws some of the economic reasoning from BHALA, *supra* note 15, at 575-84.

63. Peru TPA, *supra* note 5, Annex 2.3, General Notes: Tariff Schedule of the U.S.; Chile FTA, *supra* note 57, Annex 3.3, General Notes: Tariff Schedule of the U.S.

64. Chile FTA, *supra* note 56, Annex 3.3, General Notes: Tariff Schedule of the U.S.

65. Peru TPA, *supra* note 5, Annex 2.3, General Notes: Tariff Schedule of the U.S.

66. Chile FTA, *supra* note 56, Annex 3.3(d), Tariff Elimination, at 3-25.

67. 6 percent / 10 = .6 percent

2. The Interplay Between the U.S.-Peru TPA and the U.S.-Chile FTA Encourages U.S. Suppliers to Export to Chile

The client now wants to export $10,000 of corn flour to either Peru or Chile in 2008. He will pay the tariffs on the goods and is thus interested on the most preferential tariff treatment. His attorney has classified the product under HTS 1102.20.00.[68] The *U.S.-Chile FTA* classifies corn flour as a Category-B good.[69] This means the 6 percent base tariff[70] on corn flour phases out in eight equal, annual stages beginning in 2004, the date the Agreement entered into force.[71] Five years will have passed at a .75 percent[72] reduction per year, so the duty on U.S. exports of corn flour to Chile in 2008 will be 2.25 percent.[73] Hence, the tariff will be $225. The tariff on U.S. exports of corn flour to Peru in 2008 will be significantly higher. The *U.S.-Peru TPA* classifies corn flour as a Category-C good.[74] This means the 17 percent base tariff rate[75] on corn flour phases out in ten equal annual stages beginning in 2008.[76] One year will have passed at a .17 percent reduction per year, so the duty on U.S. corn flour exports to Peru in 2008 will be 15.3 percent. Hence, the tariff will be $1,530.

One can note an important discrepancy from this example. The Peruvian base tariff rate on corn flour is much higher than the Chilean base tariff rate on corn flour. The rest of the agricultural goods in the tariff schedules echo this discrepancy. With limited exceptions, the Chilean base tariff rates on agricultural goods are 6 percent.[77] In sharp contrast, most of the Peruvian base tariff rates are 12 percent, with many between 17 and 25 percent.[78] The corn flour example, above, suggests that the overall phase-out periods will be further affected by the base tariff rates. This overall base tariff rate discrepancy will significantly affect many U.S. ag-

68. HTSUS, *supra* note 14.

69. Chile FTA, *supra* note 56, Annex 3.3(4), General Notes: Tariff Schedule of Chile, at 21.

70. *Id.*

71. *Id.* at 3-25.

72. 6 percent / 8 = .75 percent

73. The total reduction equals 3.75 percent, or .75 percent times five years. 6 percent - 3.75 percent = 2.25 percent.

74. Peru TPA, *supra* note 5, Annex 2.3, Peru Tariff Schedule, at 48.

75. *Id.*

76. *Id.* at 2-16. Again, throughout these examples, we have assumed that the Peru TPA enters into force in 2008.

77. Some of the exceptions are some forms of turkey, at 25 percent, HTSUS, 0207.26.00, wheat flour, at 31.5 percent, HTSUS, 1101.00.00, cane sugar, at 98 percent, HTSUS, 1701.11.00-.99.00, and various oils, at 31.5 percent, HTSUS, 1507.10.00-1514.90.00.

78. Several base tariff rates are 4 percent. A very limited number of exceptions set the base tariff rate at 0 percent.

ricultural goods exported to Peru for which tariffs do not phase out immediately.

B. Sensitive Products: The Case of Sugar

The *U.S.-Chile FTA* states that each Party "may impose a safeguard measure in the form of additional import duties . . . on an originating agricultural good . . . ."[79] The *U.S.-Chile FTA* also limits the use of safeguard measures. For example, the safeguard amount cannot exceed "the lesser of: (a) the prevailing most-favored-nation (MFN) applied rate; or (b) the MFN applied rate of duty in effect on the day immediately preceding the date of entry into force of this Agreement."[80]

Most importantly, the *U.S.-Chile FTA* phases out the parties' ability to impose these measures with three provisions. According to Article 3.18(6), Chile and the United States "may impose a safeguard measure only during the 12-year period beginning on the date of entry into force of this Agreement. Neither party may impose a safeguard measure on a good once the good achieves duty-free status under this Agreement. Neither party may impose a safeguard measure that increases a zero in-quota duty on a good subject to a tariff-rate quota."[81]

Together, these three elements provide significant limitations on the use of safeguard measures. The first element provides for a twelve-year phase-out: the parties may not impose safeguard measures past twelve years after the date of entry into force of the Agreement. The second element prohibits parties from imposing a safeguard measure on a good once the good achieves duty-free status. The tariff phase-out provisions are critical to an understanding of the effect of this sentence. As mentioned above, the general tariff elimination phase-out provisions require all duties to be removed by January 1, 2016, with a few exceptions.[82] For example, tariffs on malt extract, a category B item, under HTSUS 190.90.20, expire on January 1 of year four. The United States cannot impose safeguard measures for malt extract after January 1, 2008, because tariffs on malt extract will have expired on that date. The third provision pertains to goods subject to TRQs. This provision prohibits Parties from imposing safeguard measures on a good before it exceeds the in-quota quantity permitted under the TRQ.

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79. Chile FTA, *supra* note 56, art. 3.18(1), at 3-11.
80. *Id.*
81. *Id.* art 3.18(6), at 3-12.
82. Chile FTA, *supra* note 56, Annex 3.3, Tariff Elimination, at 3-25.

The *U.S.-Peru TPA* provides less stringent limits on the use of agricultural safeguards. The *U.S.-Peru TPA* provides that "[n]o Party may apply or maintain an agricultural safeguard measure on a good: (a) on or after the date that the good is subject to duty-free treatment under the Party's Schedule to Annex 2.3; or (b) that increases the in-quota duty on a good subject to a TRQ."[83] The *U.S.-Peru TPA*, in contrast with the *U.S.-Chile FTA*, does not provide for an overall phase out of agricultural safeguard measures.

The lack of such a provision significantly affects sugar. Although both Agreements share a clause limiting safeguard measures once the good achieves duty-free status, the *U.S.-Peru TPA* does not phase out U.S. tariffs on Peruvian sugar. Rather, the *U.S.-Peru TPA* imposes a growing in-quota quantity of 180 metric tons per year followed by a provision that imposes MFN treatment to goods entered in excess of the in-quota quantity. Theoretically, once the in-quota quantity exceeds the quantity that under a purely-free trade system Peru would export to the United States, the tariffs will have "expired." But that point is speculative, and the key here is that the United States did not agree to a set phase-out on sugar, thus protecting it for a significant period of time. Similarly, both Agreements prohibit safeguards that increase a zero in-quota duty on goods subject to TRQs. However, this provision in the *U.S.-Peru TPA* will not benefit Peruvian sugar exporters for several years because the sugar TRQ never reaches a zero in-quota duty.

If the *U.S.-Peru TPA* had a provision similar to Chile's twelve-year phase-out, then the United States could not impose a safeguard measure on sugar after the phase-out. However, the *U.S.-Peru TPA* lacks such a provision, and no other provision in the Agreement prevents the United States from imposing an agricultural safeguard measure on sugar that exceeds the in-quota quantity.

This part compared the agricultural market access provisions of the *U.S.-Peru TPA* with the corresponding provisions of the *U.S.-Chile FTA*, concluding that the *U.S.-Chile FTA* liberalizes agricultural trade more significantly than the *U.S.-Peru TPA* on two grounds. First, the *U.S.-Peru TPA* liberalizes agricultural trade more slowly than the *U.S.-Chile FTA*.[84] Second, the *U.S.-Peru TPA* protects sensitive agricultural goods, in particular sugar, much more that the *U.S.-Chile FTA*.[85] The following part at-

83. Peru TPA, *supra* note 5, Chapter 2, National Treatment and Market Access for Goods, art. 2.18(5)(a)(b), at 2-11.

84. *Supra* Part III.A.

85. *Supra* Part III.B.

tempts to explain these discrepancies.[86]

IV. EXPLAINING THE DIFFERENCE: ECONOMIC AND POLITICAL FACTORS

In explaining the discrepancies described in the previous part, this part makes two arguments (1) Chile nearly "sold the farm," perhaps in exchange for increased market access of copper and for protection of some of its bottom-line domestic industries;[87] and (2) a recently emerging political bargaining bloc among the Andean countries strengthened Peru's bargaining power during its negotiations of the *U.S.-Peru TPA*.[88]

A. Chile "Sold the Farm"

Chile made significant agricultural concessions. It eliminated nearly all tariffs on agricultural goods immediately upon entry into force of the *U.S.-Chile FTA*. Furthermore, those tariffs that the *U.S.-Chile FTA* did not immediately eliminate phase out within twelve years of the Agreement's date of entry into effect. In contrast, the *U.S.-Peru TPA* eliminates tariffs immediately on a substantially lower number of agricultural products immediately and phases out tariffs within seventeen years.[89]

As the copper capital of the world, Chile may have sold its farm in exchange for access for its copper industry into the U.S. market.[90] To illustrate, Chile is the prime copper exporter to China. In May of 2005, Chile and China signed a joint venture free trade agreement on copper, which "will function as a vehicle to secure long-term copper supply from CODELCO [Corporacion Nacional del Cobre de Chile] to China Minmetals."[91] Similarly, copper is the most substantial source of income for Chile.[92] Being the premier copper exporter in the world, Chile ensured market access of its copper products into the United States through the *U.S.-Chile FTA*. Although the United States and Chile agreed on a TRQ on Chilean copper exports at 55,000 metric tons for the first year, the

86. *Infra* Part IV.
87. *Infra* Part IV.A.
88. *Infra* Part IV.B.
89. *Supra* Part II.A.
90. Español Pueblo en Línea (Spanish People's Daily Online), *Antofagasta, Capital Mundial del Cobre, Concentra Turismo en Chile* (Aug. 10, 2005), *available at* http://spanish.peopledaily.com.cn/31620/3748952.html.
91. English People's Daily Online, *China, Chile Sign Agreement on Copper Cooperation* (May 31, 2005), *available at* http://english.people.com.cn/200505/31/eng20050531_187740.html.
92. Español Pueblo en Línea, *supra* note 90.

U.S.-Chile FTA eliminated the TRQ on the second year after the agreement entered into effect. Thus, Chile negotiated nearly-duty-free treatment for its copper.

Making a causal connection here may be difficult—after all, evidence suggesting that the Chilean negotiators exchanged U.S. market access into several agricultural goods for better treatment of its copper exports is difficult to come by. For one, one cannot simply ask the negotiators for the respective countries, as this might well violate an attorney-client privilege. For another, the negotiation reports generally do not provide this information; they merely provide the results of the negotiations. In any event, the Agreement in its entirety shows that Chile significantly opened its agricultural industries to trade and that the United States significantly opened up its market to Chilean copper. The negotiations thus make sense—Chile may have decided it can obtain its greatest export gains from copper.

And indeed it has. Despite the diversification of exports in the last fifteen years, copper exports are still a significant percentage of Chilean exports to the United States.[93] In 2005 alone, a total of 2,092 Chilean enterprises exported an estimated 2,066 different products to the United States. Copper represented almost 28 percent of total exports with sales at almost $1.8 billion, an increase of 117 percent from the previous year.[94]

B. Policy and Political Factors

This section provides two additional arguments to explain the discrepancies between the *U.S.-Peru TPA* and the *U.S.-Chile FTA*. First, it argues that Peru and Chile differ significantly with respect to their overall trade policy. Whereas Peru is currently defining its position in favor of free trade, Chile has, over the years, established a significant commitment to democracy and free trade. Further, it argues that Peru and the rest of the Andean nations have united as a negotiation bloc, which may explain Peru's ability to ward its agricultural sector from United States products.

1. Trade Policy

On one hand, the Latin America's state of political disarray has forced many countries to take sides in the free trade/protectionist

93. MINISTERIO DE ECONOMÍA,GOBIERNO DE CHILE, TLC CON EEUU: OPORTUNIDADES Y DESAFÍOS, *at* www.economia.cl/aws00/servlet/aawsconver?1,,102730.

94. Amcham Chile, Business Chile, *Chile-U.S. Trade in 2005* (Nov. 2006), *at* www.businesschile.cl/portada.php?w=old&id=280&s=0&lan=en&q=main.

debate. Bolivia, Cuba, and Venezuela have clearly sided with protectionist measures and rejected trade with the United States. Venezuelan President Hugo Chaves has spoken of a "government-led rebellion."[95] Venezuelan investors watch the "Chavez risk," namely, "the risk that Chavez might change laws and legislation at his will and adopt market unfriendly policies that negatively impact investor's interests in Venezuela."[96] Moreover, Venezuela has left the Community of Andean Nations (CAN), and Bolivia is following close behind.[97] Significantly, in April 2006, Bolivia and Venezuela joined Cuba in signing People's Trade Agreement (PTA) in opposition to the Free Trade Agreement of the Americas and other FTAs.[98] This PTA "is a response to the failed neo-liberal model, based as it is on deregulation, privatization and the indiscriminate opening of markets," and aims to promote "a model of trade integration between the people that limits and regulates the rights of foreign investors and multinationals so that they serve the purpose of national productive development."[99]

Other Latin American countries have opted for strengthening their trade relations with the United States, sometimes at the expense of furthering or continuing trade relations with other Latin American countries. Colombia and Peru signed FTAs with the United States and negotiations between the United States and Ecuador continue.[100] Morales called former Peruvian President Alejandro Toledo a "traitor" to South America for signing the *U.S.-Peru TPA*,[101] and Chavez called current Peruvian President a "corrupt and shameless thief."[102] Recently, Bolivia has even expressed its desire to recover the Pacific territories that it lost in a war

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; *see also* Jason Tockman*, Bolivia Advocates Alternative Vision for Trade and Integration* (July 11, 2006)*, available at* http://upsidedownworld.org/main/content/view/355/31/ .

99. Timothy A. Wise & Kevin P. Gallagher, *The Doha Deal: More Harm than Good to Developing Countries?*, THE SOUTH BULLETIN (May 1, 2006), *available at* www.sarpn.org.za/documents/d0002030/South_bulletin_May2006.pdf, at 223.

100. Press Release, USTR, United States and Peru Sign Trade Promotion Agreement (Apr. 12, 2006) (*available at* www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html.

101. World Public Opinion.org, *Peruvians Unsympathetic to Chavez, Morales* (May 26, 2006), *available at* www.worldpublicopinion.org/pipa/articles/brlatinamericara/199.php?nid=&id=&pnt=199&lb=btgl.

102. *Latinoamerica Tiene una Nueva Politica: La Desunión*, El Nuevo Herald, May 23, 2006. This is particularly interesting because, according to Peruvian Minister of Exterior Commerce Alfredo Ferrero, the FTAs negotiations between the United States and the CAN countries began after unanimous authorization from the members, including Bolivia and Venezuela. *Bolivia y Venezuela se Oponen a los TLC con EEUU*, El Comercio, April 25, 2006.

against Chile in the Nineteenth Century.[103]

On the other hand, Chile has established its place as Latin America's free trade champion. According to the Chilean government, "one of the pillars of Chile's economic development strategy in the last three decades has been trade liberalization" at the bilateral and multilateral levels.[104] In accord with this policy, Chile has signed bilateral trade agreements with several countries, including Canada, Mexico, South Korea, China, the CACM nations (Costa Rica, El Salvador, Honduras, Guatemala, Nicaragua), the EFTA, and the European Union and has entered a multilateral trade agreement with New Zealand, Singapore and Brunei, the Trans-Pacific Strategic Economic Partnership.

The *U.S.-Peru TPA* negotiators bargained among a state of trade policy development, where most of Latin America is in the process of determining its stance in the free trade debate. At the time of the *U.S.-Chile FTA* negotiations, Chile was nearly unencumbered by this theoretical debate—it had already opted for free trade, and it was in the process of liberalizing trade at full force. Thus, Chile may have seen the negotiations as a win-win situation. Through the *U.S.-Chile FTA*, Chile would further strengthen relations with the United States and, in doing so, it would gain market access of its goods into the U.S. market. On the other hand, Peru may have been more wary of the trade negotiations, as the countries negotiated the *U.S.-Peru TPA* during a time in which Peru itself was defining its overall trade policy. The basic policy and theoretical differences between Chile and Peru significantly influenced the text of the two Agreements.

2. The Andean Negotiating Bloc

Peru also possessed significant bargaining strength in its negotiations with the United States. After all, Peru negotiated a trade agreement that protects many of its agricultural goods, despite the United States' emphasis in liberalization. This may have been the result of a bargaining bloc of the Andean nations vis-à-vis the United States. In other words, the United States bargained and continues to do so with a bloc of Andean nations, not just Peru as an individual country.[105] In a letter to the United States, the

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103. *Latinoamerica*, *supra* note 102.

104. MINISTERIO DE ECONOMÍA,GOBIERNO DE CHILE (Chilean Government, Ministry of the Economy), *Sexto Catastro Nacional Sobre Barreras Externas al Comercio 2005* (2005), *available at* http://www.economia.cl/aws00/Estatico/repositorio/j/e/P/AOIL9qiypE5VJZYj_1R_8yXk=.pdf .

105. *Perú se Solidariza con Andinos para Pedir más Preferencias Arancelarias de EEUU*, El Comercio (Ecuador), June 14, 2006.

presidents from Bolivia, Colombia, Ecuador, and Peru reproached an extension of the ATPA and instead opted for creating a bloc in their negotiations with the United States.[106] As a general matter, the negotiation bloc may have prompted the Andean countries to resist significant concessions on their part and seek more concessions from the United States.

Despite Peru's bargaining power, sugar stands out as a product in which the United States did not give in to Peruvian demands. The combined effect of the TRQ, the MFN rate as a penalty for sugar that exceeds the TRQ, and the seemingly indefinite ability of the United States to impose safeguard measures on this product[107] may suggest that the apparent trend in favor of Peruvian negotiators may not hold true with respect to all goods.

However, this conclusion does not necessarily follow from the United States' reluctance to offer sugar as a trade-in concession. Rather, if one looks at the United States' reluctance through a negotiation lens, one sees that the United States may have simply reacted to Peru's negotiation position. Unlike Chile's negotiation strategy of conducive trade, Peru may have established a zero-sum atmosphere during negotiations, whereby it emphasized the protection of its industries from U.S. exports. While Chile traded spinach, apples, grapes, and avocado with the United States for market access in goods and services, Peru made less concessions and slowly eliminated tariffs on the products it did concede. This, in turn, may have prompted the United States to solidify its stance with respect to sugar and other sensitive products. In other words, Peru's bargaining power and stance may have induced the United States to substantially limit Peruvian sugar access from the U.S. market.

V. IS SUCH A DISCREPANCY JUSTIFIABLE AS A FREE TRADE MATTER?

Free trade theory may very well support a progressive system of liberalization, whereby countries liberalize trade more extensively with every step they take. In this sense, trade liberalization may be horizontal. Every step the United States takes with Peru and other Andean countries ought to liberalize trade further than the previous step. Each new trade agreement ought to reach broader, deeper, faster—it should cover more trade in goods and services, should seek to reduce tariffs and control other non-tariff

106. *Id.*
107. *Supra* Part III.B.

measures, and should do so as quickly as possible.

Even assuming this perspective is a proper critique of free trade policy, the *U.S.-Peru TPA* should not be criticized under the idea that it does not liberalize trade "enough." Such is too simplistic a point of view and, more importantly, contradicts the facts. If ratified, the Agreement will liberalize trade tremendously between the United States and Peru. The ATPA never sought to eliminate tariffs; the *U.S.-Peru TPA* does so with respect to nearly all goods, albeit eventually. Moreover, because the base tariff rates in the *U.S.-Peru TPA* are higher than the base tariff rates in the *U.S.-Chile FTA*, Peru may have conceded a great amount—maybe even greater than Chile with the *U.S.-Chile FTA*—in tariffs. From this perspective, the *U.S.-Peru TPA* may be significantly trade-liberalizing.

Whether this step is in the "right" direction may be better answered after an evaluation of the *U.S.-Peru TPA*'s effects on both the Peruvian and U.S. economies. Nevertheless, at this point one may still explore the potential effect that one agreement will have on the other. One way of analyzing this question is through the concept of trade diversion.[108] At issue is whether the *U.S.-Peru TPA*'s potential for trade creation outweighs the potential for trade diversion. This part concludes that the trade-liberalization potential of the *U.S.-Peru TPA* will likely be hindered by the trade diversion effect of the *U.S.-Chile FTA*. In this sense, the *U.S.-Peru TPA* is less trade-liberalizing than it seems at first glance.

If the United States enacts the *U.S.-Peru TPA*, the parties may expect a significant trade-creation effect. Peruvian consumers would enjoy a greater range of goods at lower prices.[109] As the United States and Peru reduce tariffs, import prices between these countries will fall, thereby stimulating a higher demand for imports. Trade creation ought to occur from the demand stimulation induced by the *U.S.-Peru TPA*. Similarly, U.S. consumers would enjoy Peruvian goods at lower prices than other goods. These consumers would theoretically demand the lower-priced Peruvian goods, thus encouraging Peruvian imports and strengthening the Peruvian economy by increasing Peru's export output. This logic assumes that consumers are principally motivated by price and that the goods produced within and outside the *U.S.-Peru TPA* ae-

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108. *See generally* JACOV VINER, THE CUSTOMS UNION ISSUE (Carnegie Endowment for International Peace, New York; Stevens & Sons, London, 1950) for background on the concept of trade diversion.

109. *See* BHALA, *supra* note 15, at 575—84 for a neoclassical portrayal of trade creation and diversion.

gis are substitutes.[110]

By the same token, if ratified the *U.S.-Peru TPA* would cause significant trade diversion. As a general rule, the trade-distortion theory holds that liberalization of trade between country X and country Y distorts trade between country X and Y, on one hand, and all other countries, on the other hand (assuming, of course, that these other countries do not liberalize trade with countries X and Y). One may expect trade diversion to result from the elimination of tariff barriers between the United States and Peru. Non-members to the TPA do not benefit from the tariff cuts. Consumers in Peru and the United States are likely to shift to the lower-priced goods from the two countries, away from higher priced substitute products from non-TPA members.

However, trade diversion may also occur among Chile, Peru, and the United States. The distinction is that the *U.S.-Chile FTA* will continue to divert trade between Peru and the United States, albeit to a lesser degree. Peru, as a non-member to the *U.S.-Chile FTA*, does not benefit from the tariff cuts and shorter tariff phase outs of the *U.S.-Chile FTA*. Consumers in Chile and the United States are thus likely to continue buying lower-priced goods from these countries and to continue rejecting the relatively higher priced substitute Peruvian products. Peruvian prices on agricultural goods will not fall as quickly and as much as the Chilean prices have, which then encourages U.S. consumers to continue their demand of Chilean goods at the expense of the substitute Peruvian goods. If one assumes that U.S. consumers are motivated primarily by price in deciding what to buy and that the goods produced in Chile and Peru are substitutes, then the Peruvian goods will simply be unable to compete with the Chilean goods in the U.S. market. In this sense, the complex and overlapping tariff structures of the *U.S.-Chile FTA* and the *U.S.-Peru TPA* may encourage trade in favor of Chile and away from potentially more efficient Peruvian suppliers. If this is the case, then the Peruvian economy may be better off if Peru extends the concessions it granted to the United States to other trading partners.

Theoretically, trade diversion between the agreements rules out, in the short term, movement toward a multilateral regime in the Americas.[111] The *U.S.-Peru TPA* may signify the loss of an opportunity to liberalize trade progressively, to the extent trade diversion would be a necessary corollary of a trade agreement. The

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110. This paragraph draws its economic reasoning from BHALA, *supra* note 15, at 575-84.

111. *See id.* (making this point with respect to trade diversion, generally).

free-trade cost is clear: by diverting trade between Peru and its other trading partners, the interaction between the agreements temporarily prevents the multilateral trading regime from getting closer to its free trade goal.[112] Thus, the *U.S.-Peru TPA* takes two steps forward by liberalizing trade between the United States and Peru, and one step back by failing to liberalize trade in agriculture more deeply and more quickly than the *U.S.-Chile FTA*.[113]

One may argue that if the *U.S.-Peru TPA* liberalized the agricultural provisions more significantly than the *U.S.-Chile FTA*, then a similar trade diversion would occur. This time, trade between Chile and the United States would suffer and the deeper, quicker tariff elimination of the hypothetical *U.S.-Peru TPA* would do little to benefit the global trade balance. However, this argument misses a central point—the danger here is not in that, by failing to liberalize trade more significantly than Chile, Peru and the United States ultimately will harm the multilateral trade liberalization ideal. Rather, it is in the Parties' failure to see themselves as players within the multilateral trade liberalization regime, whereby liberalization of trade between two countries will generally lead to deeper liberalization between those countries and other trading partners seeking to compete with the already established free trade agreements. Viewed through this lens, each free trade agreement acts as a stepping stone to encourage other countries to further liberalize trade. With respect to its agricultural provisions, the *U.S.-Peru TPA* simply missed its opportunity to encourage other members of the multilateral community to liberalize trade.

VI. CONCLUSION: LESSONS LEARNED

If ratified by Congress, the *U.S.-Peru TPA* promises to significantly liberalize trade between the United States and Peru.[114] Following the Chilean initiative,[115] the *U.S.-Peru TPA* is the United States' second major bilateral trade agreement with Latin America.[116] Despite their similar goals, the *U.S.-Peru TPA* and the

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112. *Id.*

113. *See* BHALA, *supra* note 15, at 576; Jagdish Bhagwati & Arvind Panagariya, *Preferential Trading Areas and Multilateralism—Strangers, Friends, or Foes?, in* THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS, (Jagdish Bhagwati & Arvind Panagariya eds. 1996); and Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 L. & POL'Y IN INT'L BUSINESS 865 (1996) for various arguments regarding the negative effect of trade diversion.

114. *Supra* Part II.

115. *Supra* Part II.A.

116. *Supra* Part II.B.

U.S.-Chile FTA differ significantly in their timing and depth of trade liberalization.

The *U.S.-Peru TPA* liberalizes agricultural trade less significantly than the *U.S.-Chile FTA* in at least two areas.[117] First, the *U.S.-Peru TPA* protects the Peruvian economy from many U.S. exports.[118] Second, the United States has significantly protected some of its sensitive products, such as sugar, in its negotiations with Peru, but not in its negotiations with Chile.[119] Query whether this discrepancy results from the United States' failure to recognize the importance of protecting its sugar industry from Chilean imports or whether the United States simply conceded more to Chile because of the deep and broad Chilean concessions. Regardless of the reason, the *U.S.-Peru TPA* could have reached deeper and either the United States, Peru, or both were not as trade-liberalizing as they could have been.

Several factors contributed to the sharp contrasts between the *U.S.-Peru TPA* and the *U.S.-Chile FTA*.[120] First, Chilean negotiators may have been more willing to open up its agriculture industry in exchange of access of more profitable goods, such as copper, to the U.S. market. Second, Chile has firmly established its trade policy, whereas Peru has not, which may have influenced Peruvian negotiators to be more wary during negotiations with the United States.[121] Third, Peru and the other Andean countries have formed a political negotiation bloc, thereby strengthening the Peruvian negotiation prowess vis-à-vis the United States.[122]

The broad question is whether the discrepancies are justified under free trade principles.[123] The theory of trade diversion argues that dismantling trade barriers between two countries ultimately may divert trade between those countries and the countries not parties to the trade agreement. In this situation, trade diversion may also occur, whereby the source of the trade diversion is the status quo, the *U.S.-Chile FTA*, rather than the new trade agreement, the *U.S.-Peru TPA*. By neither meeting nor exceeding the depth and timing of the Chilean paragon, the *U.S.-Peru TPA* has missed an important opportunity to encourage other countries to liberalize trade and instead has continued the trade diversion effect under the *U.S.-Chile FTA*.

Given the newly-elected Democratic Congress, the *U.S.-Peru*

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117. *Supra* Part III.
118. *Supra* Part III.A.
119. *Supra* Part III.B.
120. *Supra* Part IV.
121. *Supra* Part IV.B.1.
122. *Supra* Part IV.B.2.
123. *Supra* Part V.

TPA may fail ratification. Regardless, the United States and other countries may learn at least two lessons from the U.S.-Peru negotiations. The first lesson concerns trade analysis. During negotiations, trade partners ought to analyze the effects of neighboring trade agreements—or, more specifically, those trade agreements that cover substitute goods in the respective trade partners of the parties. As in this case, the United States negotiated a trade agreement with Peru that was more protectionist than it first appears. The *U.S.-Peru TPA* then resulted in two sets of trade barriers. First, the tariffs in the *U.S.-Peru TPA* itself protected the Peruvian agricultural industries, to the detriment of free trade. Second, the interaction between the *U.S.-Peru TPA* and the *U.S.-Chile FTA* create a trade diversion effect, whereby the *U.S.-Peru TPA* does not capitalize on its trade creation potential because of the more trade-liberalizing *U.S.-Chile FTA*. Thus, Peru and the United States developed a free trade agreement that, if enacted, will liberalize trade only to the extent the *U.S.-Chile FTA* does not interfere with trade between Peru and the United States.

The second lesson concerns trade policy. Insofar as multilateral trade liberalization is a goal, trade partners ought to consider themselves part of the multilateral system, even during bilateral negotiations. During the *U.S.-Peru TPA* negotiations, Peru and the United States may have forgotten that their trade agreement would play a crucial role in the greater multilateral trade scheme. The Agreement could have served as a significant stepping stone to encourage other trading partners to further liberalize trade with the parties. In this sense, the United States and Peru may have missed an opportunity to strike a bilateral free trade agreement that fuels the momentum toward multilateral trade liberalization.

THE STEPCHILDREN OF THE EU: BULGARIA AND ROMANIA

RUTH JACKSON LEE*

I. INTRODUCTION

The European Union's boarders were "stretched eastward to the Black Sea"[1] with the accession of Bulgaria and Romania on January 1, 2007 when over 30 million individuals from the most impoverished neighborhoods of Europe were adopted into the EU family.[2] The two Balkan nations, "often intertwined by the West due to their geographic proximity and common past"[3] had recently escaped communism in 1989 before applying for EU membership in 1995 leading to accession talks in 2000.[4] Both persevered seven years of negotiations over economic and political matters to join Western Europe as the EU-2 by becoming the 26th and 27th members of the Union.[5]

Completing the EU's fifth round of enlargement, the accession of Bulgaria and Romania was heralded in newspapers headlines across the world as a major success to be celebrated.[6] The expansion was said to not only offer new opportunity for business and trade, but more importantly, project stability in a historically

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1. Gareth Harding, *Bulgaria, Romania join EU: 'Historic' move wins few plaudits from within bloc,* The Washington Times, Jan. 1, 2007, at 1 [hereinafter *Bulgaria, Romania join EU*].

2. Nevyana Hadjivska, *Bulgaria, Romania celebrate joining EU*, Associated Press, Jan. 2, 2007, at 1.

3. Dana Neacsu, *Romania, Bulgaria, the United States and the European Union: The Rules of Empowerment at the Outskirts of Europe*, 185 BROOK. J. INT'L L. 201-02 (2004).

4. *Id.*

5. *Id.* at 201.

6. Hadjivska, *supra* note 2.

volatile region signifying the complete destruction of the Berlin Wall.[7] Nevertheless, "few outside of Bulgaria, Romania and the Brussels beltway [were] in a mood to toast the accession of the former communist states." Only a mere quarter of the citizens of EU's largest member states had positive attitude towards the two countries' grand entrance into the EU.[8]

The Union has been expanding ever since its creation in the 1950s but enlargement fatigue emerged after the "big bang" in 2004 when 10 nations joined, eight that were former Soviet satellite states in Central and Eastern Europe (CEE) that hardly resembled the West.[9] The admittance was three times larger by number of entrants than any prior enlargement, straining the EU institutions and programs.[10] Not surprisingly, there has been a strong public sentiment that the EU-10 has not yet sufficiently assimilated into the Union and many prominent Member States were hesitant to accept more countries without restructuring the Union.[11] The EU-2's accession therefore was quite unwelcome and the potential benefits the duo add to the organization were grossly, if not intentionally, overlooked.[12]

Though Enlargement Commissioner Olli Rehn vows to maintain the Union's values and standards while admitting CEE countries into the exclusive trading-block, opponents of enlargement fear that the differences of the two newcomers jeopardize the 'ever closer'[13] Union. Economically, Bulgaria and Romania are much poorer with per capita income below 4,000 euros, nearly a third of the norm for the Union's former 25 member states.[14] Socially, the nations favor EU-US military cooperation, the accession of EU applicants such as Turkey, Ukraine, Moldova and Georgia, and

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7. *Bulgaria, Romania join EU*, *supra* note 1.

8. *Europeans Still Take a Dim View of the Euro*, The Fin. Times, Jan. 28, 2007 (polling 5,292 citizens from Great Brittan, France, Italy, Spain and Germany).

9. Michael Emerson, Senem Aydin, Julia De Clerck-Sachsse & Gergana Noutcheva, *Just what is this 'absorption capacity' of the European Union?,* CENTRE FOR EUR. STUDIES, 1-8 (Sept. 2006). Notable Member States arguing that the EU has met its capacity to absorb new countries include: Austria, Germany, the Netherlands and "most particularly" France. *Id.* at 2.

10. Thomas C. Fischer, *An American Looks at the European Union*, 19 EMORY INT'L L. REV. 1489, 1519 (2005).

11. *Bulgaria, Romania join EU*, *supra* note 1.

12. *See E.g.* Eur. Comm'n, The European Union: Still Enlarging 3-4 (2001) (describing the benefits of enlargement for both new and existing Member States).

13. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, O.J. (C 364) 1, 5 (2000) at preamble ("The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.").

14. *Bulgaria and Romania face more reforms after joining EU*, EU Business, Dec. 28, 2006 *available at* http://www.eubusiness.com/news_live/1167271212.88/.

deeper integration of the new members.[15] These disparities, along with struggles of corruption and civil service that are "far behind EU norms"[16] have led to the development of a second class in the EU family, creating a wide gulf between the EU-2 and the former Members States. "[F]or the first time in enlargement history, Brussels has [imposed] 'safeguard clauses' that could see the newcomers shut out of EU justice and home affairs co-operation and will force them to submit 'progress reports' every six months."[17]

This article addresses the secondary status of Bulgaria and Romania, both in the eyes of the other members of the EU family and through policies that will subject them to heightened barriers to full membership benefits. To provide the appropriate context, the article will initially describe the development of the Union and its subsequent enlargement and integration. Part II explores the geography and history of the Union's newest Member States, Bulgaria and Romania. Finally, Part III details the two nations' prolonged accession to the Union because of their past separation from the West and discusses the discrimination each must endure from Old Europe despite being officially invited to join the EU.

II. BACKGROUND: THE EU'S EASTWARD EVOLUTION

The European Union arose from the ashes of World War II when six western European nations formed the European Coal and Steel Community (ECSC), a mere trade organization that developed into a supranational and intergovernmental body consisting of 27 member states known today as the European Union.[18] Only a few years after the violence in Europe ended splitting the continent into the East and West, French foreign minister Robert Schumann proposed the combined management of France's and West Germany's coal and steel industries to prevent the manufacturing of weapons of war.[19] Scholars consider this the first step towards a European federation as the proposal directly led to the

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15. Andrew Rettman, *Fireworks fly as Romania and Bulgaria limp into EU*, EU Observer, Dec. 31, 2006, *available at* http://euobserver.com/9/23154.

16. *Id.*

17. *Id.* For a detailed discussion of Bulgaria and Romania's human right concerns. *See Bulgaria and Romania: Amnesty International's Human Rights Concerns in the EU Accession Countries,* EUR 02/001 (2005) (urging the Union "to continue to monitor the countries' adherence to universal human rights standards").

18. *See* Alexander A. Jeglic, *The European Enlargement Eastward: A Historic Development*, 1 INT'L L. REV. 81, 8. *See also* Michael Burgess, *Introduction: Federalism and Building the European Union*, 26 PUBLIUS 1 (1996).

19. PHILIP THODY, A HISTORICAL INTRODUCTION TO THE EUROPEAN UNION 1 (1997); Natalie Shimmel, *Welcome to Europe, But Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union*, 24 BERKELEY J. INT'L L. 760, 761 (2006).

formation of the ECSC by Belgium, France, (West) Germany, Italy, Luxembourg and the Netherlands by the signing of the Treaty of Paris in 1951.[20]

To further integration, the founding six countries signed the Treaty of Rome in 1957 creating a common market known as the European Economic Community (EEC) that would have not only economic implications, but political.[21] From its origination, the EEC went further than any other European treaty before "[laying] the foundation of an ever closer Union among the people of Europe"[22] allowing its citizens, goods and services to freely move across borders.[23] The EEC Treaty provided for a customs union, a common commercial and transport policy as well as a limited monetary policy. Additionally, three distinct institutions were consummated by the EEC Treaty: the European Commission, the European Parliament and the European Court. The new institutions, in conjunction with the Single European Act, created an environment that supported further integration of the continent.[24] Still, it was not until 1992 that the European Union was officially established by the signing of the Maastricht Treaty setting "clear rules for the future single currency as well as for foreign and security policy and closer cooperation in justice and home affairs."[25]

There have been multiple waves of enlargement since 1973 when Denmark, Ireland and the United Kingdom joined the original six country trading organization.[26] The second wave began with the admittance of Greece in 1981 followed by Spain and Portugal in 1986.[27] Nearly a decade later in 1995, the third wave expanded the European Union boarders to include Austria, Finland and Sweden.

The end of the Cold War initiated the fourth wave when several post-communist governments sought unification with Western

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20. Duncan E. Alford, *European Union Legal Materials: A Guide for Infrequent Users*, 97 LAW LIBR. J. 49, 50 (2005).

21. *Id.*

22. Treaty Establishing the European Economic Community, art. 1, Mar. 25, 1957, 261 U.N.T.S. 11, 4 EUR. Y.B. 412.

23. Shimmel, *supra* note 19.

24. Neacsu, *supra* note 3 at 195.

25. *Europe on the move: The story of the European Union*, Europa (2005) *available at* http://ec.europa.eu/publications/booklets/others/58/timeline_en.pdf.

26. THE EUROPEAN UNION IN THE WAKE OF EASTERN ENLARGEMENT, 10 (Amy Verdun & Osvaldo Croci eds., 2005).

27. Rather than considering Spain and Portugal's membership as part of the second wave along with Greece, a number of scholars consider it a separate enlargement, and therefore the 'third' and not 'second' enlargement. Similarly, a few regard Bulgaria and Romania's admission as the completion the fifth wave whereas the majority views the Balkan states' admittance distinct from the 'big bang.'

Europe via entrance into the elite club.[28] CEECs started submitting membership applications in the mid 1990s as their subjugated economies transitioned into free markets.[29] "[Seizing] the historic opportunity for building a larger democratic family of European nations" the EU introduced the Poland and Hungary: Assistance for Restructuring their Economies (PHARE) programm offering potential applicants financial assistance to prepare the recovering nations for assumption of membership obligations.[30]

However, the applicants were different than Old Europe.[31] Even after signing European Agreements—mutually binding political dialogues—the Union did not begin considering the former Soviet satellite states serious potential candidates until after the Copenhagen European Council in 1993 that imposed arduous political and economical prerequisites to accession.[32] The Copenhagen Criteria "[reassured] EU states that the Central and Eastern European Countries (CEE) will—if they become members—look like familiar, west European countries, not bringing instability, authoritarianism, or economic collapse to the Union."[33] The Copenhagen Criteria states that:

> Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of member-

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28. Verdun, *supra* note 26 at 12.

29. Jill Parker, *West Meets East: A Discussion of European Union Enlargement and Human Rights*, 11 TULSA J. COMP. & INT'L L. 603, 604 (2004).

30. Eur. Parliament, Briefing No 33, The PHARE Programme and the enlargement of the European Union, (1998).

31. Alain Monnier & Godfrey I. Rogers, *The European Union at the Time of Enlargement*, 59 POPULATION 315, 324-32 (2002) (highlighting the different characteristics between the E-15 and the E-10).

32. Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 LOY. U. CHI. INT'L L. REV. 15, 24 (2005) (concluding "for the first time [the European Council determined] that at least some of the fledgling democracies in Central Europe could ultimately join the EU").

33. Heather Grabbe, *European Union Conditionality and the Acquis Communautaire*, 23 Int'l Political Sci. Rev. 249-268 (2002). *See also* Heather Grabbe, *The Process of EU Accession: What will it bring to Southeast Europe?,* GDN-SEE 4 (2003) (concluding that the "conditions were designed to minimize the risk of new entrants becoming politically unstable and economically burdensome to the existing EU. They were thus formulated as much to reassure reluctant member-states as to guide the candidates.").

> ship including adherence to the aims of political, economic and monetary union.[34]

To further the integration of counties into the EU single market, prospective candidates are also required to implement and enforce the entire body of EU law known as the *acquis communautaire* which includes all EU treaties, regulations, and directives, along with the judgments of the Court of Justice.[35] Nonetheless, a country only becomes a part of the EU family when each existing member state signs the Accession Treaty which then must be ratified by the candidate.[36] "This approach has required that the countries in question have themselves been eager and willing to participate in the difficult process of transition to and convergence with the EU standards."[37]

When Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia met the rigorous requirements of membership and were accepted into the common market by each member of the EU family in 2004, the fourth wave of enlargement was finally complete. However, according to Heather Grabbe, Deputy Director of the Centre for European Reform, an independent think-tank, Bulgaria and Romania were not recommended for accession along with the other post-communist states due to their unimpressive economic and political progress.[38] Despite their great geostrategic importance,[39] the two Balkin nations had not met the "heavy burden [of transposing and implementing] standards of internal democracy, state administration, and detailed regulatory protection that the EU-15 have had a half century to accommodate."[40] Arguably, Communism had a more draconian grip on Bulgaria and Romania thus

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34. 26 EC Bull 6/93, at 13 (1993).

35. Ian Ward, *The Culture of Enlargement*, 12 COLUM. J. EUR. L. 199, 205 (2005) ("All Member States are expected to accept the broad principles and parameters of Union legal, political, and economic jurisprudence, as it is expounded in the 80,000 plus pages of the acquis.").

36. Goebel, *supra* note 32 at 20.

37. Hiski Haukkala & Arkadv Moshes, *Beyond "Big Bang": The Challenges of the EU's Neighbourhood Policy in the East*, FIIA REPORT 13 (2004).

38. Heather Grabbe, *The Sharp Edges of Europe: Extending Schengen Eastwards, International Affairs*, 76 ROYAL INST. OF INT'L AFFAIRS 519-36 (2000).

39. Mustafa Aydin, INST. FOR SEC. STUDIES, *Europe's Next Shore: The Black Sea Region*, 12 (2004) (arguing that "aspirations are urgent for the wider Black Sea region not only because of the political, economic, administrative, ecological and social challenges which the basin is faced, but also in the view of the recurrent conflicts/instability in the region of the EU's eastern flank.").

40. Andrew Moravcsik & Milada Anna Vachudova, *National Interests, State Power, and EU Enlargement*, 17 EAST EUR. POLITICS & SOCIETIES 42, 45.

their escape from it has been significantly slower and plagued by more difficulties than any other CEEC.[41]

The Evolution of the European Union

European Economic Community
(established by the Treaty of Rome on March 25, 1957):
1957: Belgium, France, Germany (Federal Republic), Italy, Luxembourg, Netherlands;
1973: accession of United Kingdom, Republic of Ireland and Denmark;
1981: accession of Greece;
1986: accession of Spain and Portugal.

European Union
(established by the Maastricht Treaty on November 1, 1993):
1995: accession of Austria, Finland and Sweden:
2004: accession of Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.
2007: accession of Bulgaria and Romania.

III. THE WINDOW TO THE BLACK SEA – THE EU-2

A. The Republic of Bulgaria

"Bulgarians have always been Europeans in spirit and identity."
-Bulgarian President Georgi Parvanov

With a total boundary length merely 1,123 miles long, the small Southeastern European country of Bulgaria is surrounded by Romania, Turkey, Greece, Macedonia, Serbia, Montenegro as well as the Black Sea that connects it Russia, Ukraine and Georgia.[42] Of the 7.8 million people who reside within the crossroad nation, over a million are ethnic minorities.[43] Nonetheless, eighty

41. WINNERS AND LOSERS OF EU INTEGRATION: POLICY AND ISSUES FOR CENTRAL AND EASTERN EUROPE 98 (Helena Tang, ed. 2000) [Winners and Losers].
42. CIA, World Factbook, *Bulgaria*, *available at* https://www.cia.gov/cia/publications/factbook/geos/bu.html (last visited Mar. 10, 2007).
43. *Id.*

percent are Orthodox Christians, twelve percent are Muslim and among the remaining portion is an sizable Jewish community. [44]

Communism emerged within the plains, mountains and deep river valleys of Bulgaria following World War II.[45] Though Bulgaria remained largely neutral throughout the deadliest conflict in history, in 1944 the Red Army invaded only to withdraw three years later, "leaving behind a communist government" that would soon be recognized as the closest satellite of the former Soviet Union.[46] For twenty-seven years under the onerous dictatorship of Todor Zhivkov, "democratic opposition was crushed, agriculture and industry were nationalized, and the Bulgarian Orthodox Church fell under the control of the state."[47]

Following the collapse of several Stalinist governments across Eastern Europe, the longest serving leader of any Soviet block nation relinquished control in 1989 after Bulgaria had been isolated from Western Europe for several decades. Less than a year later, the first multi-party elections since the Second World War were held. However, under the name of the Bulgarian Socialist Party, the governing communist faction won the vote.[48] It was not until 1992 that the anti-Communist Union of Democratic Forces (UDF) took office and began to privatize the weak economy.[49]

Bulgaria had not yet evaded the social and economic turmoil lingering from the ravage of communism.[50] To further stabilize the economy "and put Bulgaria on the Euro-Atlantic path" former Prime Minister Ivan Kostov initiated major market reforms allowing Bulgaria to join the World Trade Organization in 1996.[51] Bulgaria subsequently became a member of the Central European Free Trade Agreement (CEFTA) and additionally entered free trade agreements with Turkey, Macedonia, Croatia, Lithuania, Estonia, Israel, Albania and Latvia.[52]

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44. *Id*.

45. R.J. CRAMPTON, A CONCISE HISTORY OF BULGARIA 180-91 (2d ed. 2005).

46. Scott R. Safranski, Stephanie Dirscherl, & Ellen Harshman, *What Went Wrong in Bulgaria: Experience with Bulgaria's Foreign Investment and Privatization Laws*, 9 INT'L LEGAL PERSP. 1, 3 (1997).

47. U.S. DEPT. OF STATE, BACKGROUND NOTE: BULGARIA, 2007, http://www.state.gov/r/pa/ei/bgn/3236.htm#history (last visited Feb. 12 2007) [hereinafter BACKGROUND NOTE: BULGARIA].

48. CRAMPTON, *supra* note 45 at 212; Derek C. Jones, *The Transformation of Labor Unions in Eastern Europe: The Case of Bulgaria*, 45 INDUS. & LAB. REL. REV. 452, 455 (1992).

49. BACKGROUND NOTE: BULGARIA, *supra* note 47.

50. WINNERS AND LOSERS *supra* note 41 at 99.

51. BACKGROUND NOTE: BULGARIA, *supra* note 47.

52. *Id*; BULGARIA IN EUROPE: CHARTING A PATH TOWARD REFORM AND INTEGRATION 17 (Dimitris Keridis et al. eds., 2006).

In 2001, Bulgaria's ex-king Simeon Saxe-Coburg-Gotha became the first former monarch in post-communist Eastern Europe to be elected Prime Minister. The new leader "[continued to pursue] Euro-Atlantic integration, democratic reform, and development of a market economy." Before Saxe-Coburg-Gotha left office, on March 29, 2004, Bulgaria became a member of the North Atlantic Treaty Organization.[53]

The former leader of the Bulgarian Socialist Party, Georgi Parvanov became the first Bulgarian president to be re-elected in 2006.[54] Even with limited constitutional powers, Purvanov consistently supported pro-Western foreign policies, continuing Bulgaria's Euro-Atlantic integration.[55] Notwithstanding the considerable advancements, "[t]he strains of the transition to a free market economy are visible everywhere [….] Billboards advertise international schools, Western liquor brands and Black Sea real estate, while Stalinist government buildings rub up against scrappy but charming Parisian-style buildings from the late 19th century, when Bulgaria won independence from the Ottoman Empire."[56]

B. Romania

"It was hard, but we arrived [. . .] in Europe. Welcome to Europe."
-Romanian President Traian Basescu

Sharing boarders with the Republic of Moldavia, Ukraine, Bulgaria, Serbia, Hungry and the Black Sea, Romania is a strategic geopolitical area situated on the Balkan Peninsula between Central and Eastern Europe.[57] Over 22.6 million Romanian, including Hungarian and Roman minorities, inhabit the twelfth largest country in Europe. Most of the population belongs to the Orthodox Church, though thirteen percent are either Catholic, Protestant or Jewish.[58]

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53. *Enhancing Security and Extending Stability Through NATO Enlargemen*t, NATO pamphlet (Apr. 2004), available at www.nato.int/docu/enlargement/enlargement_ eng.pdf. For a discussion of NATO's enlargement, *see* Prasad P Rane, *NATO Enlargement and Security Perceptions in Europe*, 29 Strategic Analysis 470 (2005).

54. Eur. Com'm, Enlargement Newsletter, http://ec.europa.eu/enlargement/press_corner/newsletter/311006_en.htm (last visited Mar. 7, 2007).

55. BACKGROUND NOTE: BULGARIA, *supra* note 47.

56. Matthew Brunwasser, *Why Location Matters to Outsources*, Int'l. Herald Tribune, Sept. 8, 2006 at 1.

57. MINTON F. GOLDMAN, REVOLUTION AND CHANGE IN CENTRAL AND EASTERN EUROPE: POLITICAL, ECONOMIC, AND SOCIAL CHALLENGES 266 (1997).

58. U.S. DEPT. OF STATE, BACKGROUND NOTE: ROMANIA, 2007, http://www.state.gov/r/pa/ei/bgn/35722.htm (last visited Feb. 12, 2007).

Similar to Bulgaria, Romania was invaded by the Soviet Union in 1944 and became a nation ruled by communism in 1947.[59] The country remained under direct control of the Soviet Union until Romania began to pursue independent foreign policies in the late 1950s.[60] In 1967, however, Nicolae Ceauşescu successfully climbed governmental ranks to become president of the State Council instituting an extremely repressive regime.[61]

For twenty-three years, Ceauşescu remained in power until a violent protest in opposition to the forced relocation of a Hungarian minister removed the philistine commander from office. After a closed trial by a military court, Ceauşescu and his wife were executed on Christmas Day in 1989 for their pivotal roles in one of the cruelest regimes in the continent after World War II.[62] The dictator had impoverished the nation[63] "[by] paying off its national debt in full and continuing with fabulously expensive construction projects; much of the food produced was exported, while what remained for Romanians was rationed."[64]

The National Salvation Front (NSF) took control after the overthrow and established a provisional government that immediately repealed bans on abortion and contraception, Ceauşescu's most opposed regulations.[65] Multi-party elections were held in 1990 and a new constitution was adopted under which parliamentary and presidential elections took place in 1992. The West was surprised and disappointed when a previous communist reformer won the vote by a landslide, delaying the nation from developing into a functioning market economy. It was not until Emil Constantinescu, a member of the Romanian Democratic Convention (RDC), was elected president in 1996 that Romania embarked on a

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59. STEVEN D. ROPER, ROMANIA: THE UNFINISHED REVOLUTION 13-17 (2000).

60. *Id.* at 35-36 (noting that Romania successfully negotiated the withdrawal of Soviet troops); *Id.* at 49-50 (noting that Romania refused to participate in the Soviet's invasion of Czechoslovaki).

61. Jim Rosapepe, *Romania: Don't Bet Against It*, 26 FLETCHER F. WORLD AFF. 159, 162 (2002).

62. *Id.* at 277; POST COMMUNIST ROMANIA: COMING TO TERMS WITH TRANSITION 14 (Duncan Light & David Phinnemore, eds., 2005); Michael Hitchcock, *The Romanian Revolution: Media Coverage and the Minorities*, 6 ANTHROPOLOGY TODAY 2 (1990).

63. Micea Geoana, *Romania: Euro-Atlantic Integration and Economic Reform*, 21 FORDHAM INT'L L.J. 12, 20 (1997).

64. Peter W. Schroth & Ana Daniela Bostan, *International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotations: Romania in Comparative Perspective*, 52 AM. J. COMP. L. 625, 642 (2004).

65. George A. Critchlow, *Teaching Law in Transylvania: Notes on Romania Legal Education*, 44 J. LEGAL EDUC. 157, 157-58 (1994) (stating "[m]any observers, inside and outside Romania, believe that the popular revolution was stolen by the ruling National Salvation Front (FSN), recently renamed the Social Democratic Party of Romania (PDSR), many of whose leaders are former Communist Party functionaries.").

transition from a Stalinist state.[66] The new government struggled to reverse the grave destitution caused by years of totalitarian communism but the standard of living among the nation continued to decline ever since the fall of the Iron Curtain. As recently as 1999, more than one-third of Romanians still lived in poverty.[67] Romania's political and social heritage is therefore still regarded by the existing Member States as a paramount hindrance to further integration into EU institutions.[68]

IV. THE ACCESSION: A CINDERELLA STORY?

Symbolic and practical integration with the West through admittance to the European Union has been of great importance to liberated CEECs such as Bulgaria and Romania.[69] Amid boisterous concerns that the EU had reached its absorption capacity,[70] the supranational organization similarly recognized that enlargement of the Balkan nations provided an historic opportunity to unify the war-torn continent. Thus, at the Helsinki European Council of December 1999 the Union formally agreed to the future accession of both countries making membership practically inevitable.[71] Negotiations ensued thereafter where the European Commission individually met with representatives from each applicant state to mutually agree on the logistics of adopting, implementing and enforcing the *acquis*.[72] In spite of these outward gestures, however, "both countries [continued to be perceived] as laggards of the eastern enlargement family."[73]

As a result, the European Commission involvement in overseeing the implementation and compliance of the *acquis* increased dramatically.[74] Previously, becoming a member of the Union merely required "a little more than a process of checking that the candidates have adopted EU law, chapter by chapter and page by

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66. Christopher Costa, *The Tie That Binds: The Story of Foreign Investment Law in Romania*, 4 J. INT'L LEGAL STUD. 105, 125-26 (1998).

67. *Id.* at 199-200.

68. *Id.*

69. Schroth, *supra* note 64 at 643-44.

70. Daniel Dobrovoljec & Katrin Nyman-Metcalf, *Enlargement of the European Union- a Regatta with Moving Goal Posts?*, 3 EUR.J L. REFORM 131, 132 (2001).

71. Jeroen Bult, *Bulgaria and Romania Will Join the EU, But What About the Others?,* World Press, Oct. 15, 2006*, available at* http://www.worldpress.org/Europe/2524.cfm.

72. Parker *supra* note 29 at 607-08.

73. Othon Anastasakis & Dimitar Bechev, *EU Conditionality in South East Europe: Bringing Commitment to the Process*, South East Eur. Studies Programme, Eur. Studies Centre (2003).

74. David Phinnemore, *The Changing Dynamics of EU Enlargement,* CENTRE FOR EUR. STUDIES*,* Apr. 29, 2005 (stating that "[n]ot only have the accession criteria been extended and tightened, but it is clear that the EU's institutions are examining more closely the extent to which candidates are meeting them.").

page" whereas the progress of Bulgaria and Romania has been monitored much more stringently.[75] In fact, the EU announced in 2002 that Bulgaria and Romania had not sufficiently advanced in the fulfillment of the Copenhagen criteria to join the Union along with ten of their neighbors in 2004.[76]

Both struggling with required reforms—Romania more than Bulgaria—the two nations continued their forward movement towards the goal of integration with Western Europe and were rewarded at the Thessaloniki Summit in 2003 when an accession date was tentatively set for January 1, 2007.[77] When Bulgaria successfully closed all accession negotiation chapters in 2004, Romania had only closed twenty-seven chapters due to a poor economic and political record. The EU nonetheless refused to bifurcate the two applicant's accession process.[78] Together Bulgaria and Romania signed Accession Treaties in Luxemburg on April 25, 2005 that contained protocols for a possible one-year postponement.[79] Upon the conclusion of extensive negotiations, however, the European Commission confirmed their accession date in September 2006 without any delay.[80]

To pacify the Member States that staunchly opposed enlargement, the European Commission "[kept] a watchful eye on the candidate countries" by the use of safety mechanisms and regular evaluations as Bulgaria and Romania continued to implement the *acquis*."[81] Six months before the accession date, a monitoring report that commended the applicants' achievements of attaining democracies and market economies was issued describing the necessary improvements to implement and enforce the *acquis*. It also verified the compliance of the terms reached by previous negotiations.[82]

A. The Family Estate

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75. Moravcsik *supra* note 40 at 45.

76. Eur. Com'm, *Commission confirms Bulgaria's and Romania's EU accession on 1 January 2007*, IP/06/1257, Sept. 26, 2006.

77. *Id.*

78. Neacsu, *supra* note 3 at 201.

79. Decision of the Council of the European Union on the admission of the Republic of Bulgaria and Romania to the European Union, OFFICIAL J. OF THE EUR. UNION, Apr 25, 2005, L 157/9.

80. *Id.*

81. Parker *supra* note 29 at 609.

82. Eur. Com'm, *Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, May 16, 2006 COM/214.

Long before being accepted into the Union, the Balkan duo enormously profited from funding and assistance, such as PHARE, aimed at reforming their institutions and economic regulation to meet EU standards.[83] PHARE was originally a purely financial program developed in 1989 to restructure post-communist economies without the specific objective of furthering human rights. It was later adapted to "be an operational tool for preparation of integration."[84] Among its many advantages, civil servants from Member States are provided to work with counterparts in applicant states.[85]

Notwithstanding other benefits received as applicants, as a member of the Union, Bulgaria is expected to receive 3.9 billion euros in structural funding and rural development assistance during its first few years as part of the EU family while 10.5 billion euros are earmarked for Romania.[86] The financial support is being poured into rapidly expanding economies. Bulgaria's economic growth rate is more than double the EU average and Romania's rate is expected to be an impressive 7.2 percent.[87]

Entrance into the EU has improved the nations' image abroad.[88] Foreign investors from a variety of industries are placing their chips in Bulgaria and Romania with little hesitation. Moreover, both newcomers are experiencing an unrivaled demand for real estate following their recent membership into the Union.[89] In Bulgaria and Romania, property values in certain locations have more than doubled over the past three yeas. The International Business Times recently reported, "There's no end in sight [to the boom]. It's a far cry from the 1990s when mortgage lending was not permitted and banks languished under state control in both countries."[90]

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83. Tom Burgis, *FT Briefing*: *Enlargement of the European Union*, The Fin. Times, Dec. 14, 2006 at 1.

84. Dobrovoljec *supra* note 70 at 135.

85. *Id.*

86. Burgis, *surpra* note 83.

87. Eur. Com'm., *The economies of Bulgaria and Romania*, European Economy News, (2007) *available at* http://ec.europa.eu/economy_finance/een/005/article_4326_ en.htm.

88. *Bulgaria increasingly attractive for foreign investors*, The Sophia Echo, Feb. 26, 2007. (Foreign investors are "flocking" to the following industries: computer and data processing, tourism, agriculture, automobile and retail.).

89. Matthew Brunwasser, *On the new edge of the EU, a Bulgaria and Romania boom*, Int'l Herald Tribune, .Jan 18, 2007 ("Prices for apartments in Bulgaria increased by an average of 15 to 20 percent in 2006. In Romania, values rose at an average of 8 to 10 percent [...] in some parts of Bucharest and Sofia the increases are much higher, with rates of return on investments among the highest in Europe.").

90. Alison Mutler, *New Balkan EU Members See Housing Boom*, Int'l Business Times, Jan. 21, 2007.

B. Stepchildren Status

Bulgaria and Romania, however, will not receive the full benefits of belonging to the EU family any time in the near future.[91] "From a club of rich nations at roughly the same level of development and with similar political, cultural and social institutions, the European Union has become an organization comprising two groups of countries with fundamentally different economies and societies."[92] Instead, the Balkan members will be afflicted by heightened barriers from the *acquis communautaire* in addition to the possibility of being sanctioned if found in breach of "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states" according to Article 6 of the Treaty on European Union.[93]

The EU-2 will be strictly controlled during their developmental years in the EU family.[94] The safeguard clauses included in Bulgaria and Romania's Accession Treaties allows Member States to institute protective measures for up to three years against the newcomers. Although similar provisions exist in the Accession Treaties of the ten countries admitted in the "big bang" in 2004 but applying them was never considered a realistic option.[95]

Existing members also have the ability to take advantage of a seven year transitional arrangement allowing them to restrict the free movement of workers, one of the EU's fundamental principles.[96] Britain, Ireland and Sweden were the only nations that did not apply such restrictions in 2004 but Britain has already announced its intention to limit Bulgarian and Romanian workers because it received an excessive amount of migrant workers during the last enlargement.[97] The leaders of the EU-2 have responded with a twofold contention: (1) growing economies coupled with skill

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91. *Id.*

92. Boris Kagarlitsky, *Europe's New Second-Tier*, The Moscow Times, Oct. 5, 2006 at 1.

93. *Id.* at 3 (citing the Treaty on the European Union).

94. Alison Mutler, *Romania and Bulgaria join the European Union*, Associated Press, Jan. 1, 2007.

95. Gergana Noutcheva, *Bulgaria and Romania's Accession to the EU: Postponement, Safeguards and the Rule of Law*, CENTRE FOR EUR. POL'Y STUDIES, CEPS Policy Brief No. 102, May 2006, at 2.

96. Catherine Drew & Dhananjayan Sriskandarajah, *EU Enlargement in 2007: No Warm Welcome for Labor Migrants*, INST. FOR PUBLIC POL'Y RESEARCH (2007) *available at* http://www.migrationinformation.org/Feature/display.cfm?id=568 ("EU states Italy, Germany, France, the UK, the Netherlands, Austria, Denmark, Hungary, Ireland, and Belgium [imposed] restrictions on Romanian and Bulgarian workers heading west.").

97. Burgis, *supra* note 83.

shortages resulting from potential flow of migrant workers will substantially reduce the potential flow of migrant workers; and (2) citizens who do leave will more likely relocate to countries with warmer climates, such as Spain or Italy.[98] Existing Member States have found these arguments unpersuasive; "[s]o far, only little Estonia has officially announced that it will welcome Bulgarian and Romanian labor-immigrants."[99]

Protective measures adopted by the EU furthermore require the two countries to report specific progress to the European Commission every six months to avoid losing economic aid.[100] The first report is due on March 31, 2007. Bulgaria must provide satisfactory evidence of improvement in judicial reform whereas Romania must demonstrate advancement in combating corruption.[101] If the two newest Member States are unable to provide adequate proof of development in these areas, as well as several others, warrants issued by their Courts will not be recognized in the EU.[102]

The EU-2 are also bound by a plethora of other heightened regulations. Russia's threat that it will boycott all EU meat imports because of perceived safety concerns over Bulgarian and Romanian meat and milk will subject the countries to discriminating agriculture restrictions.[103] Until future assessments are completed, only a few producers in the two countries will be permitted to sell produce in the internal market.[104] The European Commission has further adopted a measure prohibiting aircraft certified by the Bulgarian authorities from accessing to the EU transport market because of failure to ensure the airworthiness of their aircrafts.[105] In addition, both Bulgaria and Romania citizens are provisionally excluded from benefiting from the "Schengen Zone", a travel region free of border posts and checks between signatory EU Member States. Finally, economists predict that 2010 will be the earliest date that Bulgaria will be capable of adopting the single currency of the European Economic and Monetary Union used by

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98. *Id.*

99. Bult, *supra* note 71.

100. *Id.*

101. Todor Roussanov, *Bulgaria and Romania: The new kids on the block*, The Economist, Jan. 4, 2007.

102. Bult, *supra* note 71.

103. *Id.*

104. *Id.*

105. *Bulgaria bans five carriers from making EU flights*, EU Business, Feb. 23, 2007 *available at* http://www.eubusiness.com/Transport/bulgaria-air.1/.

twelve Member States. Romania, on the other hand, may not be have the ability join the eurozone until 2014.[106]

V. CONCLUSION

The truth will be glaringly apparent even before the celebratory fireworks that radiate the midnight sky in Sofia and Bucharest fade to gray. In the eyes of the Union, Bulgaria and Romania are considered but stepchildren that are conditioned by heightened restrictions and strenuous obligations.[107] The two orphaned countries were only accepted into the family after both tenaciously endured nearly a decade of "'conditionality' whereby Brussels [compelled] the two countries to implement tens of thousands of pages of EU law and to improve domestic administration and adjudication, as well as fight crime and corruption."[108] The very conditionality that brought them from the doorstep to the hearth however, will segregate the newcomers from their fellow siblings, creating a secondary status within the family. The heightened barriers imposed by the existing Member States is a reminder of the difficulty in preserving balance of community mores of free movement with the self-interested national labor-market protection.[109] Until the Balkan duo can pass as one of the Union's own, Bulgaria and Romania have merely been provided a roof over their heads.

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106. Rettman, *supra* note 15.

107. Carsten Volkery, *A Trial Period in the EU*, Spiegel Int'l, Jan. 3, 2007 *available at* http://www.dw-world.de/dw/article/0,2144,2261323,00.html.

108. Andrew Moravcsik, *Open the Doors,* Newsweek Int'l Ed., Oct. 2, 2006 *available at* http://msnbc.msn.com/id/14974997/site/newsweek/.

109. Drew, *supra* note 96.

DENUCLEARIZATION OF THE KOREAN PENINSULA: RECENT AGREEMENTS AND LESSONS FROM THE PAST

JARED M. LEE*

I. INTRODUCTION

Just a mere five months after the Democratic People's Republic of Korea (DPRK or North Korea) successfully tested its first nuclear weapon, possibly signaling the most dismal point in the efforts to denuclearize the Korean Peninsula, the International Atomic Energy Agency (IAEA) Director General Mohamed El-Baradei concludes a visit to North Korea symbolically representing a surprising reversal in the international political landscape. El-Baradei's visit followed an agreement announced on February 13, 2007 at the Six Party Talks in Beijing, China.[1] The February Implementing Agreement (the February 13 Agreement) is one of the largest steps towards denuclearization of the Korean Peninsula since the 1994 Agreed Framework.[2]

However, the current agreement has received instant criticism for its similarities to the 1994 Agreement[3] that not only failed to stop North Korea's renouncement of the Nuclear Non-Proliferation Treaty (NPT),[4] but was also unsuccessful in preventing the development of as many as eight nuclear weapons[5] and the testing of

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1. Condoleezza Rice, Sec'y of State, U.S., Briefing on the Agreement Reached at the Six-Party Talks in Beijing (Feb 13, 2007) (transcript available at http://www.state.gov/secretary/rm/2007/feb/80496.htm).

2. Tom Lantos, Chairman, Committee on House Foreign Affairs, North Korea: The February 13 Agreement (Feb. 28, 2007) (stating that "it would be profoundly unwise not to recognize the enormous significance of this deal.").

3. *Id.* (noting the criticism in Washington for the similarity between the February Agreement and the 1994 Agreed Framework).

4. Assia Dosseva, *Recent Developments*, 31 Yale J. Int'l L. 265, 266 (2006); Devon Chaffee, *North Korea's Withdrawal from Nonproliferation Treaty Official*, Nuclear Age Peace Foundation, Apr. 10, 2003.

5. Sharon Squassoni, North Korea's Nuclear Weapons: Latest Developments, Congressional Research Service, *available at* http://italy.usembassy.it/pdf/other/RS2 1391.pdf (North Korea may have enough Plutonium for eight to ten weapons).

both long-range missiles and nuclear weapons.[6] Similarly, the Joint Statement in September 2005[7] was also ineffective in stifling the communist state's nuclear ambitions, partially undermined by the United State's accusation and investigation of money laundering by Pyongyang that resulted in the freeze of a $25 million DPRK bank account.[8] Nevertheless, it is on the framework of the 2005 Joint Statement on which the current agreement moves forward.[9]

The most recent agreement is the first step to instituting the September 2005 Joint Statement. If legitimized as a basis for future action and cooperation, the product of the Fifth Round is a solid starting point for achieving the goals and objectives outlined by the Six Party Talks in 2005, namely the imperative denuclearization of the Korean Peninsula.[10] If the U.S. instead denies North Korea's credibility, history risks repeating itself. This time, however, nuclear weapons will be involved, jeopardizing not regional but global stability.

II. BACKGROUND

North Korea has an inauspicious history of back-and-forth agreements and retractions on nuclear weapons.[11] It has often been accused of using nuclear weapons as a negotiating or blackmail technique.[12] Many hardliners and hawks in Washington are unwilling to trust Pyongyang and have outspokenly denied the

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6. *Id*. at 1; Paul Richter, *N. Korea Pact Marks Major Shift for Bush* , L.A. Times, Feb. 14, 2007, at A1.

7. *Joint Statement of the Fourth Round of the Six-Party Talks,* Six Party Talks (September 19, 2005) *available at* http://www.state.gov/r/pa/prs/ps/2005/53490.htm [Hereinafter 2005 Joint Statement].

8. Barbara Demick, *Macau Getting Image Makeover*, L.A. Times, *available at* http://seattletimes.nwsource.com/html/nationworld/2002934645_ macau17.html.

9. Christopher R. Hill, Asst. Sec'y for East Asian and Pacific Affairs, Statement Before the House Foreign Affairs Committee (Feb. 28, 2007), *available at* http://www.state.gov/ p/eap/rls/rm/2007/81204.htm (Hill stating that the Feb 13 agreement is a step to implement the Sept 2005 Joint Statement); Chirstopher R. Hill, Asst. Sec'y for East Asian and Pacific Affairs, Evening Walkthrough With Reporters at the Six-Party Talks (Feb. 8, 2007), *available at* http://www.state.gov/p/eap/ rls/rm/2007/80298.htm; Condoleezza Rice *supra* note 1 (stating that the Feb. Agreement is an "initial implementing agreement of the joint statement of September 2005").

10. *See* John R. Crook, *U.S. and Other Powers Reach Tentative Understanding on North Korea's Nuclear Program*, 99 AM. J. INT'L L. 914, 914 (2005) (The Six Parties began as and remain the United States, North Korea (DPRK), China, Japan, Russia and South Korea (The Republic of Korea or ROK).

11. *Id.* at 914-15.

12. DYER, Gwynne, *North Korea: the `05 deal again*, The Daily News (New Plymouth, N.Z.) Feb. 22, 2007 (quoting former US ambassador to the UN John Bolton as saying "North Korea has been going through its blackmail handbook, but we're not going to play.").

credibility of the recent development.[13] However, Washington is not without unclean hands, and just like the armed communist state, it has failed to live up to all the tenants of the previous agreements.[14]

Nuclear disagreements with North Korea date back to the discovery of uranium in the mid-sixties.[15] In 1974 and 1985 respectively, DPRK joined the International Atomic Energy Agency (IAEA) and the Nuclear Non-Proliferation Treaty (NPT).[16] Yet flippantly in 1993, North Korea threatened to withdraw from the NPT and denied IAEA inspection of nuclear facilities.[17] After bilateral negotiation with the United States[18] and the voluntary, guest appearance by former President Jimmy Carter,[19] the Geneva Protocol, also known as the Agreed Framework, was adopted in October of 1994.[20]

The Agreed Framework outlined a number of goals including the normalization of relations between North Korea and the U.S. The U.S. promised to supply the DPRK with heavy fuel oil while it coordinated the construction of two proliferation resistant light-water reactor power plants.[21] Eight years later, in 2002, the reactors had not been built and plans for their construction were publicly abandoned when possession nuclear weapons were admitted by a DPRK official.[22] This was later formally denied by the North Korean government.[23] The heavy oil shipments were also stopped in 2002 after President George W. Bush named North Korea a part of his "Axis of Evil."[24] Then, after the U.S. stopped shipment of oil, the DPRK accused the U.S. of breaching the Agreed Framework.[25]

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13. *See* Donald Kirk, *North Korea hawks down but not out*, The Asian Times, Mar. 14, 2007*, available at* http://www.atimes.com/atimes/Korea/IC14Dg01.html.

14. *See* Karen M. Takishita, *U.S. Economic Sanction Against North Korea: An Unsucessful and Sanctimonious Policy Ripe for Modification*, 14 PAC. RIM L. & POL'Y J. 515 (2005); *see also infra* notes 21 & 22 (discussing the failure to build light water reactors).

15. Eric Yong-Joong Lee, The Six-Party Talks and the North Korean Nuclear Dispute Resolution Under the IAEA Safeguards Regime, 5 ASIAN-PAC. L. & POL'Y J. 3 (2004).

16. *Id.*

17. Dosseva, s*upra* note 4 at 265-266.

18. *Id*.

19. Morse Tan, *The North Korean Nuclear Crisis: Part Failures, Present Solutions*, 50 ST. LOUIS U. L.J. 517, 532 (2006); Lee, *supra* note 15.

20. *Id.*

21. Lee, *supra* note 15; Takishita, *supra* note 14 at 534.

22. Kristen Eichensehr, *Broken Promises: North Korea's Waiting Game*, Disease, Vol. 23 (3) (2001).

23. Tan, *supra* note 19.

24. Abid Mustafa, *US Normalising Relations With The Axis Of Evil,* Countercurrents.org, *available at* http://www.countercurrents.org /mustafa100307.htm.

25. Tan, *supra* note 19 at 533.

Early in 2003, North Korea withdrew from the NPT without warning and without following the steps outlined in the treaty.[26]

Six nations including China, the United States, Russia, Japan and the two Koreas, "gathered at a hexagonal table in Beijing for a three-day meeting [in August 2003], to discuss how to resolve the pressing issue of North Korea's suspected nuclear weapons program."[27] After several rounds of Six Party Talks, in September 19, 2005, they appeared to reach a successful milestone.[28] Without outlining the implement stages of the agreement, the parties released the Joint Statement of the Fourth Round of the Six-Party Talks.[29]

While surprisingly silent on the steps to denuclearization of the DPRK, the Joint Statement announced that Pyongyang was committed to abandoning all nuclear programs and weapons, a return to the NTP and supervision under the IAEA.[30] In addition to the United States' pronouncement that it had no nuclear weapons on the Korean Peninsula, the U.S. also stated that it had no intention of attacking or invading the "DPRK with nuclear or conventional weapons."[31] The Republic of Korea (South Korea or ROK) concurrently affirmed that it had no nuclear weapons on the peninsula.[32] The agreement ends with a statement of consensus that the six parties would continue to meet to discuss the implementing steps for that statement in "phased manner" explaining that it would be "commitment for commitment, action for action."[33] However broad, the Joint Statement left no doubt that its purpose was the denuclearization of the Korean Peninsula and it is now the basis for the current implementing agreement.

The Joint Statement expressed that all of the nations were committed to helping the DPRK through energy assistance. While the statement includes an assertion by the DPRK that it has a right to the peaceful use of nuclear energy, it explicitly declines to address the timeline of the development of the light water reactor that was promised by the 1994 Agreed Framework stating that the parties "agreed to discuss, at an appropriate time, the subject of the provision of light water reactor to the DPRK." Similarly, it does not promise oil or any other assistance specifically other than

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26. Chaffee, *supra* note 4; Dosseva, *supra* note 4 at 265-266.
27. Lee, *supra* note 15.
28. Dosseva, *supra* note 4 at 265 (the Joint Statement was also hailed as a breakthrough).
29. 2005 Joint Statement, *supra* note 7.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

a pledge by ROK to provide "2 million kilowatts of electric power to the DPRK."[34] The agreement clearly anticipates other "implementing agreements" that will follow and supplement the skeleton of goals.[35]

Nonetheless, the DPRK withdrew from the Six Party Talks because of sanctions placed upon it by the U.S. related to the investigation of possible money laundering and counterfeiting by Pyongyang and the resulting freeze placed on a $25 million DPRK bank account in Macau, China.[36] The Joint Statement appeared to be dead for over a year as Pyongyang tested both long-range missiles and proceeded to contradict its stated goal of denuclearization by performing tests of a nuclear weapon.[37] The DPRK tested at least seven missiles in July 2006 including a long-range Taepodong, which is speculated to be able to reach Hawaii and parts of Alaska.[38] In October, the DPRK threatened imminent nuclear testing[39] that later occurred on October 9.[40] The world was given little warning that the test was about to occur. In fact, China was informed only twenty minutes before the blast. Other nations received frighteningly less notification.[41]

North Korea blamed the "[United States'] extreme threat of a nuclear war and sanctions and pressure"[42] for the need to conduct the nuclear tests and ironically called for a multilateral disarmament that would lead to "world-wide nuclear disarmament and the ultimate elimination of nuclear weapons."[43] Still, the nuclear test-

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34. *Id.*

35. 2005 Joint Statement, *supra* note 7.

36. *N Korea offers nuclear talks deal*, BBC Apr. 13, 2004 http://news.bbc.co.uk/2/hi/asia-pacific/4905308.stm.

37. *See* Squassoni *supra* note 5 at 1; Michael Evans, *A test wrapped up in a Riddle*, The Australian (Austl.), Oct 11, 2006. *Compare* 2005 Joint Statement, *supra* note 7 with the DPRK's stated goal of denuclearization and abandonment of all nuclear weapons with nuclear tests in Oct. 2006.

38. The Taepodong missile launch appeared to be unsuccessful as it seemed to exploded midair minutes after launch and went no further than other short-range missiles tested. *See*, Barbara Demick, *A Big, Booming Cry for More Attention?*, L.A. Times, Jul. 6, 2006; Stephen J. Hedges, *Missile fizzle hurt N. Korea*, Chicago Tribune, July 6, 2006, at C17; Paul Richter and Barbara Demick, *A Level Reply to N. Korea Missiles ,* L.A. Times, July 6, 2006, at A1.

39. *N Korea statement on nuclear test*, BBC News, Oct. 3 2006, *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/5402292.stm (summarizing the N. Korean Statement on Oct. 3) [hereafter DPRK Statement].

40. *See generally*, *North Korea Conducts Nuclear Test*, Center for Nonproliferation Studies Monterey Institute of International Studies, Oct 10, 2006*, available at* http://cns.miis.edu/pubs/week/pdf/061010_dprktest.pdf; Squassoni *supra* note 5 (discussing the North Korean nuclear test including a technical analysis).

41. *1st lead: U.S. Congressman thanks China for informing U.S. of DPRK nuclear test,* Xinhua General News Service, Oct. 10, 2006.

42. DPRK Statement, *supra* note 39.

43. *Id.*

ing lead to an escalation of international tension as the United Nations voted only five days later to impose sanctions on the already impoverished nation.[44] Even Pyongyang's friendliest neighbor and "key alley" China voted in support of the economic sanctions.[45] North Korea responded by declaring the sanctions and political pressure an act of war. [46]

Possibly because of international pressure, or potentially because it felt a new bargaining advantage as a nuclear nation, DPRK expressed at the end of October 2006 that it would return to the Six Party Talks.[47] It was reported that its return to the table was a result of "frantic behind-the-scenes negotiations" by the Chinese to restart the derailed diplomacy.[48] The Second phase of the Fifth round of negotiation resumed in December. The round concluded, however, without a written agreement[49] and resumed in the Third phase from February 8-13.[50] Through many days of negotiation as well as multiple intermittent bilateral negotiations, a "breakthrough" agreement was drafted and released.[51]

III. CURRENT AGREEMENT

The February 13 Agreement is the first step in implementing and reestablishing the legitimacy of the September 2005 Joint Statement. While there are many issues yet to be resolved such as the light water reactors, the Agreement is a much-needed diplomatic triumph that has been welcomed by the Bush administration. By creating working groups, allowing the IAEA back into DPRK and delivering energy assistance to the impoverished nation, it will actually start to put flesh on the skeleton of the Joint Statement

The current agreement introduces a number of straightforward tasks accompanied by an expeditious timeline. North Korea is

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44. David Usborne, *U.N. Imposes Sanctions on North Korea*, Independent on Sunday (London), Oct.15, 2006.

45. *North Korea Talks Set to Resume,* BBC, Oct. 31, 2006, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/6102092.stm [hereafter Talks Resume].

46. *U.N. Imposes Sanctions on North Korea,* CNN, aired Oct 14, 2006, *available at* http://transcripts.cnn.com/TRANSCRIPTS/0610/14/cnr.08.html.

47. Talks Resume*, supra* note 45.

48. *Id.*

49. *See* Six-Party Nuclear Talks Recess, Issuing Chairman's Statement, People's Daily Online, *available at* http://english.people.com.cn/200612/22/eng20061222_335123.html.

50. *Id.* The *Fifth Round of Beijing Six-party Talks Wraps Up Adopting a Document on the Initial Step to Implement the Joint Statement*, Consulate General of the People's Republic of China in San Francisco, *available at* http://www.chinaconsulatesf.org/eng/xw/t298177.htm.

51. Rice, *supra* note 1.

given a sixty-day "initial phase"[52] to "shut down and seal for the purpose of eventual abandonment the Yongbyon nuclear facility."[53] The agreement also invites the IAEA back to the Asian peninsula to monitor nuclear sites and additionally develops and discusses a comprehensive inventory of all nuclear programs and material that will eventually be abandoned.[54] Meanwhile, the U.S. and DPRK will embark on the process of normalizing relations by bilaterally discussing the removal of the "state-sponsor of terrorism" label and the associated economic sanctions.[55] Japan will similarly attempt to rehabilitate the unstable relationship it has with its communist neighbor.[56] All five counties agree to provide "economic, energy and humanitarian assistance to the DPRK," specifically in the shipment of 1 million tons of heavy fuel oil, though only 50,000 tons to be shipped during the initial phase.[57]

The most recent agreement is the first of many steps required to implement the 2005 Joint Statement. However, unlike previous agreements and subsequent statements, it establishes a timeline for an initial sixty-day window of implementation. This quickly approaching deadline allows defined and verifiable steps to be completed on both sides. To develop specific plans for implementing the 2005 Joint Statement, the February 13 Agreement behests:

> Five working groups [that] will meet within the [first] 30 days to implement the Initial Actions and the Joint Statement of September 2005. These working groups will focus on denuclearization of the Korean Peninsula, normalization of relations between North Korea and the United States, normalization of relations between North Korea and Japan, economy and energy cooperation, and Northeast Asia peace and security.[58]

Unlike previous U.S – DPRK measures such as the 1994 Agreed Framework, the 2005 Joint Statement and February 13 Agreement are multilateral.[59] Secretary of State Condoleezza Rice and Assistant Secretary Christopher Hill have focused on the

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52. North Korea - Denuclearization Action Plan, Six Party Talks, *available at* http://www.state.gov/r/pa/prs/ps/2007/february/80479.htm [hereafter Action Plan] .

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *North Korea: An Important First Step,* U.S. State Dept, *available at* http://www.state.gov/r/pa/scp/80575.htm; Action Plan, s*upra* note 52.

59. Hill, Statement Before the House Foreign Affairs Committee, *supra* note 9.

stake that all of the players in the region have in enforcing this agreement.[60]

On March 14, IAEA Director General Mohamed ElBaradei completed his visit to Pyongyang.[61] After meeting with high level DPRK officials he reported that the nation appeared to be "fully committed" to the "Initial Actions" agreement declaring that "[t]hey are ready to work with the Agency to make sure that we monitor and verify the shutdown of the Yongbyon facility [and are] committed to the denuclearization of the Korean peninsula."[62]

The Sixth round of the Six Party talks commenced on March 19[63] and all of the working groups should have met and discussed the initial steps to beginning their work.[64] Intentionally or coincidently, just as the parties embarked on another round of negotiations, the U.S. publicly announced that it had resolved the dispute surrounding the North Korean bank account with Banco Delta Asia that was frozen eighteen months ago obliterating any immediate potential solutions to the nuclear crisis.[65] The current resolution, however, is expected to lead to the swift shutdown of the Yongbyon site and opening it to IAEA inspection.[66]

IV. CONCLUSION

Nuclear weapons, economic sanctions, UN restrictions and international pleasure have only further isolated the North Korean nation. Although there is an acknowledgeable risk that the repeat offender may again use nuclear weapons as an attention-getting

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60. Christopher R. Hill, Assistant Secretary for East Asian and Pacific Affairs, Update on the Six-Party Talks, Feb. 22, 2007, *available at* http://www.state.gov/p/eap/rls/rm/2007/81050.htm; Condoleezza Rice *supra* note 1.

61. *IAEA Director General Concludes Trip to the DPRK*, International Atomic Energy Agency , Mar. 15 2007, *available at* http://www.iaea.org/NewsCenter /News/2007/dg_dprk_concludes.html.

62. *Id.*

63. Luis Ramirez, *US, N. Korea Resolve Dispute Over Frozen Funds*, Voice Of America, Mar. 19, 2007, *available* at http://voanews.com/english/2007-03-19-voa9.cfm; *New round of six-party nuke talks launched,* The Hindu, Mar. 19, 2007, *available at* http://www.hindu.com/thehindu/holnus/ 003200703191022.htm.

64. See *Six-party talks move into practical phase*, People's Daily Online, Mar. 19, 2007, a*vailable at* http://english.people.com.cn/200703/19/ eng20070319_359041.html.

65. Ramirez, *supra* note 63; Mark Magnier, *Frozen funds to be released to North Korea*, L.A. Times, Mar. 19, 2007, *available at* http://www.latimes.com/news/nationworld/world/la-fg-norkor19mar19,1,1270784.story?coll=la-headlines-world; Joseph Kahn, *U.S. clears fund dispute that stalled North Korea nuclear pact*, San Francisco Chronicle, Mar. 19, 2007, *available at* http://www.sfgate.com; Byun Duk-kun, *Six-way talks resume under shadow of lingering financial sanctions dispute*, Yonhap News, Mar. 19, 2007, *available at* http://english. yonhapnews.co.kr; *N. Korea says will halt reactor if accounts unfrozen*, Interfax, Mar. 19, 2007, *available at* http://www.interfax.ru/e/B/politics/28.html?id_issue=11694989 [hereafter Unfrozen].

66. Unfrozen, *supra* note 65.

device, options are scarce and worldwide stability depends on the removal all nuclear threats from the peninsula. Fortunately, regardless of the similarities to the 1994 Agreed Framework, a number of key distinctions provide reason for the U.S. to commit full support to the February 13 Agreement. The most consequential difference is that the 1994 Agreed Framework was bilateral whereas the present agreement is multilateral, linking China and Russia to the arrangement. This variance creates a burden sharing affect where the global powers have incentive to enforce the denuclearization because they are sharing the cost of the support that is being given to North Korea. At the same time, North Korea is discouraged from breaching the agreement because of the regional players' involvement. Moreover, the careful and artful phrasing of agreement builds trust and credibility among each of the parties, supporting the verification of the agreed objectives.

The lack of a realistic military option due to U.S. troops stretched across the Middle East and the desperate importance of halting proliferation in Asia makes this a compact that the U.S. must accept as a legitimate starting point for implementing the 2005 Joint Statement. For the North Koreans, severe economic isolation and the need for aid and normalized relations are likely to be incentives to allow IAEA verification and abandonment of all nuclear programs. To avoid past mistakes, the U.S. and other parties in the talks should follow through on the agreement and move towards discussion of providing Pyongyang with proliferation resistant light-water reactors as an effective and safe energy replacement for the dangerous nuclear facilities it currently possesses. Verification and inspection of all North Korean nuclear sites with international oversight of all plutonium that has been processed must occur immediately. Let's not allow history to repeat itself.