Indiana International & Comparative Law Review

Vol. 19 No. 1 2009

TABLE OF CONTENTS

ARTICLES

LECTURE

NOTES

"I KNOW NOT WITH WHAT WEAPONS WORLD WAR III WILL BE FOUGHT, BUT WORLD WAR IV WILL BE FOUGHT WITH STICKS AND STONES."

EINSTEIN[1]

THE RIGHT TO SELF-DEFENCE IN NATIONAL AND INTERNATIONAL LAW: THE ROLE OF THE IMMINENCE REQUIREMENT

Onder Bakircioglu*

This article explores the doctrine of self-defence within the context of the challenges directed at the imminence requirement, from the perspective of both national and international law. The article will attempt to illustrate that the requirement of imminence underlines the political character of the self-defence doctrine wherein private force may only be resorted to in the absence of institutional protection. This study will argue that the imminence rule can not merely be regarded as a "proxy" for establishing necessity; rather, the elements of imminence, necessity, and proportionality are inextricably connected to ensure that defensive force is only resorted to when national or international authorities are not in a position to prevent an illegal aggression, and that the defensive lethal force is not abused.

INTRODUCTION

The September 11 attacks aroused controversy as to whether anticipatory or pre-emptive self-defence[2] is allowed under customary international law, and if so, under what circumstances. Following the devastating attacks on New York and Washington, the 2002 National Security Strategy (NSS) made it clear that the United States would act unilaterally to protect its security against "emerging threats before they are fully formed."[3] This approach signified a radical departure from the collective security system by the sole existing super power. Indeed, while the right to national self-defence has been recognized as an inherent right of states since the very emergence of international law,

---

* Onder Bakircioglu, Lecturer in Law, Queen's University Belfast. The author is indebted to Professor Caroline Fennell for her constructive comments on earlier drafts of this article.

1. OFFICIAL REPORT OF THE PROCEEDINGS OF THE TWENTY-FOURTH REPUBLICAN NATIONAL CONVENTION 165 (1948);.CAMERON HUNT, PAX UNITA 96 (2006).

2. In this study these terms will be used interchangeably as a distinct category from *preventive* wars.

3. David Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 121 (2007).

according to the United Nations Charter,[4] states are prohibited from resorting to defensive force unless the threat is actual or imminent and the Security Council is unable to contain the situation.

The Bush Administration, however, argues that modern warfare and recent innovations in military technology, which may also be employed by non-state actors engaged in terrorist activities, changed the whole calculus of self-defence.[5] Warfare warfare is now much more devastating and can occur with less warning, which gives considerable advantage over an opponent if allowed to strike first. It would thus be unreasonable and unrealistic to employ the orthodox principles governing the right to self-defence, namely to await the occurrence or the threat of an imminent "armed attack" to use defensive force. Nations threatened by such weapons may not have the time to appeal to the United Nations and may be compelled to use pre-emptive force to prevent an opponent from gaining an overwhelming military advantage.

However, the controversy over the need to modify the right to self-defence is not exclusive to international law. The equivalent of such a debate has also been conducted in domestic criminal law particularly within the context of the battered woman's self-defence claims raised in non-confrontational settings. On behalf of the "battered woman," some scholars, in particular feminist commentators, have challenged the non-responsiveness of the self-defence doctrine in domestic violence cases. These scholars, as shown below, have questioned the patriarchal construction of the self-defence discourse and opposed the rigid application of the temporal (imminence) requirement in cases where victims of domestic abuse employ fatal force against their abusers when the anticipated threat is not imminent. According to this school of thought, the requirement of imminence is merely a "translator" or "proxy" for the concept of necessity, which should, therefore, be discarded from the traditional contours of the self-defence doctrine.[6]

This article examines the bounds of self-defence through the domestic analogy, where the imminence rule is analyzed within the context of battered women's and the Bush Administration's claims. An analogy is drawn with the domestic context not only because there exist considerable similarities between the rights and duties of national and international persons in the theory of aggression and self-defence, but also because national law has a rich jurisprudence on self-defence with significant lessons and insight to offer to the analogous debate in international law. Admittedly, arguments produced at the domestic and international level were meant to address different scenarios, yet

4. U.N. Charter art. 51.

5. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf [hereinafter THE WHITE HOUSE].

6. *See* Onder Bakircioglu, *The Contours of the Right to Self-Defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?* 72 J. CRIM. L. 131, 156-59 (2008).

the striking closeness of the logic and reasoning behind the attempt to alter the doctrine of self-defence gave the present author the impetus to study the doctrine of self-defence from a wider and comparative perspective. It must be noted that this study does not blindly deny the relevant differences of interstate and interpersonal relations. A comparative analysis of the self-defence doctrine must naturally take such differences into account.

This article will attempt to demonstrate that the requirement of imminence underlines the political character of the self-defence doctrine wherein private force may only be resorted to in the absence of institutional protection. The study will further show that the imminence rule can not merely be regarded as a "proxy" for establishing necessity; rather the elements of imminence, necessity and proportionality are inextricably connected to ensure that private force is only resorted to when national or international authorities are not in a position to prevent an illegal aggression, and that the defensive lethal force is not invoked for ulterior motives.

NATIONAL SELF-DEFENCE AND THE DOMESTIC ANALOGY

The relationship between national and international law has long been the subject of controversy among legal scholars. There are two essential theories, along with a number of various interpretations, explaining the nexus between international and domestic law. The first position, the monist view, proposes a unitary perception of the law according to which both national and international law form part of a single legal order.[7] The roots of this doctrine emanate from Kantian philosophy which favours a unitary conception of law. This view advocates the supremacy of the law as opposed to the concept of unlimited sovereign prerogative: the idea of law to which jurisdictional reference must be made is not dependent on the sovereign, but is determinative of its own limits.[8] The most radical form of monist theory was formulated by the influential Austrian jurist Hans Kelsen, who rejected any absolute borderline between national and international law. To him, norms that have the character of international law may possess national law qualities, and vice versa. The difference between these two bodies of law is merely a relative one; that is, while "[n]ational law is a relatively centralized legal order," international law has a relatively decentralized legal order.[9] Kelsen argues that international law is not independent of the national legal order, for norms of international law could only be valid if they have become parts of national legal order through recognition by national authorities. "If," he argues, "their ultimate reason of

7. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 63 (Routledge 7th ed. 1997) (1970).

8. Daniel P. O'Connell, *The Relationship Between International Law and Municipal Law* 48 GEO. L.J. 431, 432-33 (1960).

9. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 325 (Anders Wedberg trans., The Lawbook Exchange 1999) (1945).

validity is the presupposed basic norm of this legal order, then the unity of international law and national law is established, not on the basis of the primacy of the international legal order, but on the basis of the primacy of the national legal order."[10] Yet, this hypothesis does not address the status of customary international norms that are not recognized or are violated by certain states. These non-recognized or violated norms of international law will, in principle, continue to exist independently of the domestic legal norms of such states.[11] In his later work, however, Kelsen recognizes the supremacy of international law over domestic law. He regards "[t]he conflict between an established norm of international law and one of national law [as] a conflict between a higher and a lower norm."[12] The monist conviction of the primacy of international law is partly related to the practical concern to overcome the assumption that international system is anarchic where each state may decline to be bound by its international obligations whenever national interests so require.[13]

The second school of thought, known as the dualist view, treats international law as completely independent of national law. These two branches of law are perceived to be regulating two mutually exclusive sets of relations that completely differ from one another in content. In Oppenheim's language, "[i]nternational and [m]unicipal law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches – but separate branches – of the tree of law."[14] The dualist approach, therefore, does not dwell upon the notions of conflict or rivalry, neither of superiority or subordination of one system over the other.[15]

Despite the heated controversy over the nature of the relationship between international and national law, no widely recognized consensus has emerged among scholars.[16] The dualists are right in their contention that the

---

10. HANS KELSEN, PURE THEORY OF LAW 335 (Max Knight trans., University of California Press 1967) (1934).

11. As Finch rightly argues, "[w]hen a general rule of customary international law is invoked against a state, it is not necessary that the state in question shall have assented to the rule either diplomatically or by having acted on it. It is enough to show that the general consensus of opinion within the limits of civilization is in favour of the rule." GEORGE A. FINCH, THE SOURCES OF MODERN INTERNATIONAL LAW 48 (William S. Hein & Co., Inc. 2000) (1937).

12. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 421 (1952). *See also* MALANCZUK, *supra* note 7, at 63.

13. *See* Edwin Borchard, *The Relation Between International Law and Municipal Law*, 27 VA. L. REV. 137, 142 (1940).

14. L. Oppenheim, *Introduction* to CYRIL M. PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND THE UNITED STATES OF AMERICA 10 (1915).

15. J. Walter Jones, *The 'Pure' Theory of International Law*, 16 BRIT. Y.B. INT'L L. 5, 5 (1935).

16. Gerald Fitzmaurice, in his Hague Academy Lectures in 1957, noted that "the entire monist-dualist controversy is unreal, artificial and strictly beside the point." Ilmar Tammelo, *Relations Between the International Legal Order and the Municipal Legal Orders – A "Perspectivist" View*, AUSTRALIAN Y.B. INT'L L. 211, 211 (1967) (quoting Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of*

sources of international law differ from those of national law: while domestic law is a product of law-enacting and law-determining branches of national authorities, international law emerges from customs and law-making treaties in the international sphere.[17] It is also true that they differ with respect to the relations they govern: domestic law regulates relations between individuals under the sway of a centralized state and the relations between the state and the individual. By contrast, international law in principle governs relations among states. National law and the law of nations further differ in hierarchical terms; that is, while the former involves the law of a sovereign over individuals subjected to its authority, the latter regulates the relations of theoretically equal sovereigns.[18]

These schools of thought, however, appear to adapt a mutually exclusive approach and thus overlook the overlapping qualities of the two systems. It must be remembered that not until the 17th century was there any specific legal formulation exclusively applicable to international relations. The legal inauguration of the modern state system and the actual foundation of international law were essentially laid with the Treaty of Westphalia of 1638, which ended the religious wars within Europe and established a secular system of territorial authority. In other words, international law was effectively midwived in the 17th century as the natural law doctrine gradually lost its supremacy in favour of positive law.[19] Thus, only after the secularization of natural law thinking was the law of nations believed to have a unique character qualitatively different from the law governing interpersonal relations. The source of this new body of law, according to Grotius, was not divine; in contrast, it had received its obligatory force "from the will of nations."[20]

Furthermore, the just war tradition was profoundly affected by the principles of domestic criminal law. Indeed, ideas about the legitimate resort to lethal force first emerged over the debate whether Christians could lawfully perform military service for the imperial Roman army, which inevitably involved the practice of deadly force as opposed to the pacifistic philosophy of early Christianity.[21] The just war doctrine attempted to affirm that under

---

Law, 92 HAGUE RECUEIL 70, 71 (1957-II)). *See also* Adolphus G. Karibi-Whyte, *The Twin Ad Hoc Tribunals and Primacy Over National Courts*, 9 CRIM. L.F. 55, 70 (1999).

17 *See* FINCH, *supra* note 11, at 59.

18. *See* L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 37 (H. Lauterpacht ed., Longmans, Green and Co., 8th ed. 1955).

19. Natural law sought the binding authority of the law in some source other than sovereignty, such as in nature, reason, or religious and moral values. *See* David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, (1997).

20. HUGO GROTIUS, THE LAW OF WAR AND PEACE 44 (Francis W. Kelsey trans., 1925) (1625), *available at* http://www.lonang.com/exlibris/grotius/gro-100.htm. From this perspective, positivist understanding rooted the binding force of international law in the consent of sovereign nations, an analogy based on the private law of contract. *See* Kennedy, *supra* note 19, at 113; Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66, 73 (1991).

21. *See* MOHAMMAD TAGHI KAROUBI, JUST OR UNJUST WAR? INTERNATIONAL LAW AND

extreme circumstances a Christian could shed blood for his country, insofar as this was executed with love, restraint and with the pure intention to punish the sinful. The major evil did not lie in war itself, but in the love of cruelty, violence, greed and the lust for rule and vengeance.[22] This philosophy was later extrapolated, with little modification, to the inter-state level, where states, similar to private persons, could wage war for purportedly noble purposes, such as punishing the wicked, enforcing the law, or self-defence, rather than for oppression or the acquisition of territory.[23]

Grotius, in this respect, after enumerating the conditions for a rightful exercise of private self-defence, notes that "[w]hat has been said by us up to this point, concerning the right to defend oneself and one's possessions, applies chiefly, of course, to private war; yet it may be made applicable also to public war, if the difference in conditions be taken into account."[24] Vattel was of the same opinion: "Every nation," he wrote, "as well as every man, has . . . a right to prevent other nations from obstructing her preservation, her perfection, and happiness, – that is, to preserve herself from all injuries . . . ."[25] The contemporary American political philosopher Walzer also argues that the comparison of international to civil order is of extreme importance for the theory of aggression. "Every reference to aggression," he writes, "as the international equivalent of armed robbery or murder, and every comparison of home and country or of personal liberty and political independence, relies upon what is called the domestic analogy. Our primary perceptions and judgments of aggression are the products of analogical reasoning."[26] Indeed, international law was founded upon one of the main premises that there exists a direct connection and analogy between the rights and duties of natural and international persons. The early structure and main pillars of international society were thus based on such a reasoning, which justified wholesale borrowing from the Roman *ius gentium* and many other concepts, principles, and rules from diverse systems of municipal law. In other words, domestic analogy has constantly been invoked since the law of nations acquired political significance to regulate international relations. "An examination of the writings of the great publicists," announces Dickinson, "particularly those of the seventeenth and eighteenth centuries, reveals something of the extent to which

---

UNILATERAL USE OF ARMED FORCE BY STATES AT THE TURN OF THE 20TH CENTURY 29-30 (2004); *see also* CHRISTIANITY AND PAGANISM: THE CONVERSION OF WESTERN EUROPE 350-70 (J.N. Hilgarth ed., University of Pennsylvania Press 1986) (1969).

22. *See* SAINT AUGUSTINE, THE CITY OF GOD 693-94 (Marcus Dods trans., Random House Inc. 1950); THOMAS AQUINAS, SUMMA THEOLOGIAE 83-85 (Thomas R. Heath O.P. trans., London Blackfriars vol. 351972); FREDERICK HOOKER RUSSELL, THE JUST WAR IN THE MIDDLE AGES 16 (Cambridge University Press 3d ed. 1975).

23. *See* Stephen C Neff, *A Short History of International Law*, *in* INTERNATIONAL LAW 33 (Oxford University Press 2d ed. 2006).

24. GROTIUS, *supra* note 20, at bk. II/I/XVI.

25. Monsieur De Vattel, *The Law of Nations*, (Philadelphia: T. & J. W. Johnson & Co., 1883), at bk. II/IV/XLIX.

26. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 58 (Basic Books 3d ed. 2000) (1977).

we are indebted to this analogy for almost everything that is regarded as fundamental in modern international law."[27]

Nevertheless, it is not the focus of this study to examine the role of municipal law in the construction of the international legal system. Neither does the study suggest that domestic analogy offers an entirely accurate depiction of international society. As Walzer writes, "[s]tates are not in fact like individuals (because they are collections of individuals) and the relations among states are not like the private dealings of men and women (because they are not framed in the same way by authoritative law)."[28] A resort to domestic analogy, nonetheless, has been made for a better understanding of the self-defence doctrine. Therefore, despite the controversial status of such an analogy in the study of international relations,[29] this study employs domestic analogy as a practical tool to analyze the role, rationale and objectives of the right of self-defence with a view to questioning whether the requirement of imminence should be discarded from the traditional self-defence doctrine in national and international law.

THE TEMPORAL REQUIREMENT OF SELF-DEFENCE IN MUNICIPAL AND INTERNATIONAL LAW

Under the U.N. system, the regulation of force can be said to dramatically parallel that of its domestic counterpart. Particularly over the course of the last century, international law made significant advances toward the notion of centrality and abandoned its primarily customary character in favour of more systematic and clear-cut treaty rules.[30] This is essentially noticeable with respect to the regulation of armed aggression in the U.N. Charter where (1) the use of armed force is strictly prohibited; (2) the Security Council is designated as a central authority, which holds a monopoly on the lawful use of force; and (3) national self-defence is only permitted when the Security Council is unable to provide protection against an illegal attack.[31] Furthermore, defensive lethal

27. Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 YALE L.J. 564, 564 (1917).

28. WALZER, *supra* note 26, at 72.

29. Many international lawyers, particularly those of the late 19th and early 20th century, rejected the domestic analogy because they deemed international law *sui generis*. They mainly argued that whether or not international law is primitive or defective cannot be determined by reference to the standards of municipal law, for international law exists independently of municipal law. *See* HIDEMI SUGANAMI, THE DOMESTIC ANALOGY AND WORLD ORDER PROPOSALS 9-10 (Steve Smith et al. eds., Cambridge University Press 1989); MALANCZUK, *supra* note 7, at 63. Today some modern scholars argue that "rules derived from the criminal law are ill-suited for interactions between nation-states in an international system characterized by anarchy." John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 732 (2004).

30. Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and U.S. Predominance in International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 150 (Michael Byers & Georg Nolte eds., Cambridge University Press 2003).

31. *See* DAVID RODIN, WAR AND SELF-DEFENCE 107 (2002). The reliance on the domestic

force has been restricted by the elements of "imminence," "necessity" and "proportionality" both at the international level.

Likewise, both domestic and international law prohibit measures of self help; instead, legal entities must rely on the central bodies to act on their behalf. At the national level, individuals are forbidden to assert their rights through force, because the state, with its monopolistic and legitimate coercive machinery, is designed as an objective body to secure rights and establish order.[32] However, in extreme circumstances, individuals may exercise their right of self-preservation, particularly when their survival, physical integrity or liberty is threatened by unlawful aggression.[33] Similarly, despite its relatively decentralized structure, under the current frame of international law, the use of armed force is unlawful unless it is authorized by the Security Council or fits the legal paradigm of self-defence. In other words, national self-defence is the sole *justified* unilateral armed aggression that is permitted without the Security Council's mandate.

Nevertheless, the legality of self-defence is dependent upon the satisfaction of certain conditions. Namely, that the defendant must reasonably believe that there is a "present" or "imminent" danger of armed aggression and that the use of lethal force is absolutely "necessary" and "proportionate" to ward off this illegal threat.[34] If lethal force was considered to be the only alternative to avoid an unlawful attack, the putative defender must show[35] that the threat was severe and imminent and that the use of force was proportionate and necessary. Both in national and international law, necessity demands that the defendant had no less harmful alternative to prevent the attack, no chance of retreat (if this is required by the national system),[36] or recourse to the relevant

---

analogy in the establishment of the U.N. charter was vividly expressed by President Franklin Roosevelt in his speech in the Foreign Policy Association in 1944: "Peace, like war, can succeed only where there is a will to enforce it, and where there is available power to enforce it. The Council of the United Nations must have the power to act quickly and decisively to keep the peace by force, if necessary. A policeman would not be a very effective policeman if, when he saw a felon break into a house, he had to go to the Town Hall and call a town meeting to issue a warrant before the felon could be arrested." *U.S. President Franklin D. Roosevelt, Radio Address at a Dinner of the Foreign Policy Association* (Oct. 21, 1944), *available at*: http://www.presidency.ucsb.edu/ws/index.php?pid=16456; SUGANAMI, *supra* note 29, at 121.

32. *See* MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 178 (H.H. Gerth & C. Wright Mills eds. & trans., Routledge 1991) (1948).

33. *See* Suzanne Uniacke, *Self-Defense and Natural Law*, 36 AM. J. JURIS. 73, 73-74 (1991).

34. *See* RODIN, *supra* note 33, at 107-08; Michael Skopets, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 760 (2006).

35. However, in criminal law, the defender does not have to prove anything in order to be granted a jury instruction on self-defense, which is in line with the presumption of innocence. As Dressler notes, "[a] defendant is entitled to an instruction on a defence if he presents some credible evidence in support of the claim." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 241 (Bender & Company 3d ed. 2001).

36. It is important to note that most jurisdictions do not impose a retreat requirement on the putative defender before his exercise of lethal force. *See* ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 91 (Jules Coleman ed., Cambridge University Press 1998);

national or international authorities.[37] Proportionality requires the balancing of the interests of both the aggressor and the defender. Therefore, the use of defensive force must not be excessive or disproportionate to the harm threatened by the illegal attack.[38]

The requirement of imminence, on the other hand, signifies the temporal facet of self-defence. Traditionally, pleas of self-defence are only accepted when the lethal response of the defendant is immediate, directly following the untoward threats or acts of the aggressor. A time lag between the illegal threat or act and the response usually undermines the validity of self-defence claims.[39] As Fletcher notes:

> The requirement of *imminence* means that the time for the use of force will brook no delay. The defender cannot wait any longer. This requirement distinguishes self-defence from the illegal use of force in two temporally related ways. A pre-emptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late. Legitimate self-defence must be neither too soon nor too late.[40]

The requirement of imminence plays a critical role in assessing the seriousness of the threat, the proportionality of the lethal response, the availability of legal alternatives and the real motive of the defender.[41] Therefore, pre-emptive strikes, as a matter of principle, are illegal in international law and in domestic legal systems. Such pre-emptive strikes, as Fletcher observes, "are illegal because they are not based on a visible manifestation of aggression; they are grounded in a prediction of how the feared enemy is likely to behave in the future."[42] However, as noted above, the temporal requirement has been subject

---

Mitchell N. Berman, *Justification and Excuse, Law and Morality,* 53 DUKE L.J. 1, 13-14 (2003); Catherine L. Carpenter, *Of the Enemy, Within the Castle Doctrine, and Self-Defense,* 86 MARQ. L. REV. 653, 664 (2003).

37. *See* James Slater, *Making Sense of Self-Defence,* 5 NOTTINGHAM L.J. 140, 142 (1996).

38. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 135 (1998).

39. *See* BELINDA MORRISSEY, WHEN WOMEN KILL: QUESTIONS OF AGENCY AND SUBJECTIVITY 73 (Maureen McNeil et al. eds., Routledge 2003).

40. FLETCHER, *supra* note 38, at 133-34.

41. Time has always been a touchstone for criminal law, particularly in the law of murder and self-defence. In many common law jurisdictions, time has essentially marked the difference between provoked homicide and first-degree murder. *See* V. F. Nourse, *Self-Defense and Subjectivity,* 68 U. CHI. L. REV. 1235,1244 (2001).

42. FLETCHER, *supra* note 38, at 134. In this regard, acts *preparatory* to the use of defensive force should be treated similarly. This issue arose in *Attorney General's Reference* where it was held that the preparation of petrol bombs to protect oneself and one's property against an unlawful threat was not necessarily illegal. "The fact that in manufacturing and storing the petrol bombs the respondent committed offences [under the Explosives Act 1875 . . .] did not necessarily involve that when he made them his object in doing so was not lawful. The means by which he sought to fulfil that object were unlawful, but the fact that he could never without committing offences reach the point where he used them in self-defence did not render

to challenge both at the international and national levels. The relevant claims raised by the proponents of the preventive war doctrine will now be examined.

THE BUSH DOCTRINE: ARBITRARINESS WITHIN THE REALM OF FORCE

Firstly, the implications of discarding the element of imminence appear to be much graver at the international level, because warfare, be it defensive or offensive, by its very nature results in the killing of large numbers of people, irrespective of age, sex, nationality or political belief. Unlike private killings, warfare often results in far-reaching destruction of human life, environment, culture, and property. Inevitably, it further causes the death of civilians and those who are not directly the sources of the illegal threats. Since one of the most important requirements of self-defence is that defensive lethal force must be directed to the source of danger, the non-discriminatory feature of warfare renders the tasks of preventing state aggression and clearly defining its exceptions more pressing.

This paper will attempt to illustrate that the Bush Doctrine went well beyond the confines of anticipatory self-defence, which, despite its controversial status, might satisfy the requirements of Article 51 of the U.N. Charter.[43] The Bush Administration's "preventive war" doctrine is essentially based upon contingencies and fear, where war may be launched against an incipient threat, which, if permitted to fully form, could purportedly be neutralized at a much higher cost.[44] In this respect, the Bush Doctrine appears to attempt to revive the positivist conception of warfare, where armed hostilities were simply regarded as being beyond the realm of law in inter-state relations, characterized by marked decentralization and anarchy.[45] As is well-known, in

---

his object in making them for that purpose unlawful. The object or purpose or end for which the petrol bombs were made was not itself rendered unlawful by the fact that it could not be fulfilled except by unlawful means." MICHAEL J. ALLEN, TEXTBOOK ON CRIMINAL LAW 200 (Oxford University Press 2007) (quoting *Attorney General's Reference* (No. 2 of 1983) [1984] Q.B. 456, 470 (C.A.)). However, if the defendant has the opportunity to resort to the state authorities against the illegal threat he faces or has the chance to contain the threat with non-violent means, he is not entitled to make illegal preparations to defend himself. It can therefore be argued that the legality of preparations is dependent upon the legality of the defensive force, which should only be invoked as a last resort. Having stated that, extreme cases may emerge wherein the defendant has to carry weapons (if, for instance, he is incessantly being followed by his enemies and the police cannot provide him constant protection) for his self-protection. *See id.* at 200-01. In *Evans v. Hughes*, the Divisional Court noted that the possession of a metal bar in a public place could only be justified by showing that there was an imminent threat affecting the particular circumstances in which the weapon was carried. Evans v. Hughes, (1975) 1 W.L.R 1452 (Q.B). For more information see ALLEN, *supra* note 42, at 200-01.

43. *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984).

44. *See* Michael Cox, *Empire? The Bush Doctrine and the Lessons of History*, *in* AMERICAN POWER IN THE 21ST CENTURY 22-23 (Davis Held & Mathias Koenig-Archibugi eds., 2004); Donald R. Rothwell, *Anticipatory Self-Defence in the Age of International Terrorism*, 24 U. QUEENSLAND L.J. 337, 338 (2005).

45. SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 7-8 (1996).

the positivist era, because states used armed force for the implementation of their national policies and in furtherance of their political interests, the concept of self-defence lost its significance.[46] However, following the horrific consequences of the World Wars, not only was the sovereign era's unqualified right of warfare abolished,[47] but traditional just war reasons,[48] including the recovery of property, securing redress for wrongdoings, and avenging injuries, were reduced to the right of self-defence under the U.N. Charter. The U.N. Charter, in this regard, has been the most important legal tool in restricting the legitimacy of "unilateral use of force" to the single case of self-defence. National-defence, therefore, has become today's sole *casus belli* in the absence of Security Council authorization for the use of force.[49]

Under the U.N. collective security system, Member States are now obliged to settle their disputes through peaceful means and refrain not only from the use of force, but also from the threat of force in their international relations. The general prohibition on the use of force, as stipulated under Article 2(4), constitutes a peremptory norm of international law, from which Members cannot derogate.[50] The Charter reserves to the Security Council the full authority to use military force. Indeed, under Article 2(4), the Security Council is conferred with the primary responsibility for the maintenance of international peace and security and the competence to enjoy a monopoly on the use of force to this end. Furthermore, Article 2(5) expressly provides that "[a]ll

---

46. Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 875-76 (1947).

47. *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 19-27 (1996); STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 168-70 (2005).

48. Just war tradition provided guidelines as to *when* and *how* to engage in warfare, which initially emerged as an attempt to provide a theoretical basis to make war religiously possible and endeavoured to introduce morality within warfare. Yet such moral principles did little to prevent or restrict warfare; rather they were ignored as the practical considerations overshadowed morality. "Even in its heyday," notes Dinstein, "the 'just war' doctrine was mostly a convenient tool or fig-leaf, and states went to war whenever they deemed fit, using or abusing an arbitrary list of just causes." Yoram Dinstein, *Comments on War*, 27 HARV. J. L. & PUB. POL'Y 877, 877 (2004).

49. Although, the notion of humanitarian intervention, an unauthorized coercive action undertaken on humanitarian grounds, has been posited to be a legitimate use force that is compatible with Article 2(4) of the U.N. Charter, this reading of the Charter is not technically correct. Dinstein notes that "[n]o individual state (or group of states) is authorized to act unilaterally, in the domain of human rights or in any other sphere, as if it were the policemen of the world. Pursuant to the Charter, the Security Council – and the Security Council alone – is legally competent to undertake or to authorize forcible 'humanitarian' intervention." *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 90-91 (Cambridge University Press 4th ed. 2005) (1988); *cf.* Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1750-51 (2000); Emily Schroeder, *The Kosovo Crisis: Humanitarian Imperative Versus International Law*, 28 FLETCHER F. WORLD. AFF. 178, 181 (2004).

50. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, paras. 187-01 (June 27).

Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."[51] The U.N. Charter has thus created a whole set of legal norms regarding the legitimate use of force. Today, therefore, the religious or moral *justness* of a given conflict is not relevant to an assessment of whether the use of force is compatible with the collective security system under the U.N. Charter.[52]

The preventive war doctrine, however, claims entitlement to employ high levels of unilateral force to arrest an incipient development that is not yet operational or threatening, but that if permitted to mature, could purportedly be neutralized only at a higher cost. Preventive war thus differs from anticipatory self-defence in that the latter can only be waged against a tangible and imminent danger, which might therefore fit the legal framework of Article 51.[53]

The rationale of the preventive war doctrine is grounded upon the assumed irrationality of relying on the U.S. Cold War strategies of deterrence and containment, which have been deemed ineffective particularly against "shadowy terrorist networks" in a post-September 11 world.[54] Although the United States had been following a pattern of favoring American values and interests over adherence to international norms, what changed dramatically after the September 11 attacks was the assertion that America had confronted a state of emergency that could only be eliminated with a robust, unilateral approach to eventually uproot terrorism.[55] In this context, the spatial and temporal limit of the so-called "war on terror"[56] has been left uncertain. It was announced that "[t]he war against terrorists of global reach is a global enterprise of uncertain duration."[57] This new approach stands in stark contrast to traditional warfare that is characterized by definite spatial and temporal boundaries. Indeed, as Hardt and Negri note:

> The old-fashioned war against a nation-state was clearly

---

51. U.N. Charter art. 2, para. 5.

52. Dinstein, *supra* note 48, at 880.

53. *See generally* W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525,538-46 (2006).

54. George W. Bush, President of U.S., Prevent Our Enemies from Threatening Us, Our Allies and Our Friends with Weapons of Mass Destruction (June 1, 2002), *available at* http://www.whitehouse.gov/nsc/nss5.html.

55. Gerry Simpson & Nicholas J. Wheeler, *Pre-emption and Exception: International Law and the Revolutionary Power, in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 120 (Thomas J. Biersteker et al. eds., 2007).

56. *See* Katharine Q. Seelye & Elisabeth Bumiller, *After the Attacks: The President: Bush Labels Aerial Terrorist Attacks 'Acts of War,'* N.Y. TIMES, Sept. 13, 2001, at A16; Interview by ABC News with Colin L. Powell, U.S. Sec'y of State (Sept. 12, 2001), *available at* http://www.globalsecurity.org/military/library.news.2001.09.mil-0109120usia10.htm.

57. *See* The White House, The Information Warfare Site, http://www.iwar.org.uk/military/resources/nss-2002/nssintro.htm (last visited Oct. 5, 2008).

> defined spatially, even if it could at times spread to other countries, and the end of such a war was generally marked by the surrender, victory, or truce between the conflicting states. *By contrast, war against a concept or set of practices, somewhat like a war of religion, has no definite spatial and temporal boundaries. Such wars can potentially extend anywhere for any period of time.*[58]

The Bush Doctrine rationalizes such a perpetual state of war on the premise that the existing international legal frame is inadequate to meet the demands of modern threats posed by "terrorists" and "rogue states," and that the United States' unilateralism is necessary to counter such threats in a world characterized by a Hobessian state of nature.[59]

The apologists of the Bush Doctrine attempt to discard the imminence rule by indicating that modern technology is capable of causing unparalleled damage and loss of human life. In other words, it is argued that modern weaponry (including nuclear, biological and chemical weapons) poses an unprecedented threat to the world security. Such weapons are portable, relatively easy to make, cheap to produce, and therefore are perfect weapons for "rogue states" and "terrorists." Consequently, "if necessity can be demonstrated before the attack, then a nation should not be required to wait to be attacked before it can defend itself, especially if the first blow is potentially devastating."[60] The 2002 National Security Statement declares that such an intention to undertake preventive military action protects American interests even against impalpable threats:[61]

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.[62]

---

58. MICHAEL HARDT & ANTONIO NEGRI, MULTITUDE: WAR AND DEMOCARCY IN THE AGE OF EMPIRE 14 (2004) (emphasis added).

59. *See* Michael Hirsh, *Bush and the World*, 81 FOREIGN AFF. 5, 39-40 (2002); Robert Kagan, *Power and Weakness*, 113 POL'Y REV. 3, 3 (2002).

60. *See* Mark L. Rockefeller, *The "Imminent Threat" Requirement for the Use of Preemptive Military Force: Is it Time for a Non-Temporal Standard?*, 33 DENV. J. INT'L L. & POL'Y 131,139 (2004).

61. *See* Jorge Alberto Ramírez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 CAL. W. INT'L L.J. 1, 3 (2003).

62. THE WHITE HOUSE, *supra* note 5, at 15.

Hence, it was made clear that America would not solely rely on a reactive posture because of the alleged difficulty of deterring potential dangers posed by the "terrorists" or "rogues," and by the magnitude of harm that could occur from their possible use of weapons of mass destruction (WMD). This approach clearly expands the traditional scope of Article 51, which requires the occurrence of an armed attack before the right to self-defence may be invoked. Yet, it also reaches well beyond the bounds of the controversial notion of anticipatory self-defence that finds its classical formulation in the *Caroline* case, according to which the necessity for anticipatory self-defence must be "instant" and "overwhelming," "leaving no choice of means" and "no moment for deliberation."[63]

The Bush Doctrine presents the existence of "terrorist groups" and "rogue states," armed with "modern weaponry," as the primary reason for the United States' opposition to the traditional bounds of the self-defence doctrine. This approach, however, essentially reiterates the main premises of the *realist school,* which presumes that in a decentralized, anarchic international society, where there is no global police force or compulsory jurisdiction, self-help remains critical for state conduct. Therefore, armed force may not only be used in cases of self-defence, but also for the vindication of rights, correction of unjust wrongs, and for humanitarian reasons.[64] In fact, the United States has long been one of the few states that presses for a broader reading of exceptions to the general prohibition on the use of force. The United States has sought to include the protection of nationals abroad, humanitarian intervention, responses to terrorism, and anticipatory use of force within the traditional matrix of self-defence. Since the 1990s, the United States has further claimed a right to forcefully implement Security Council resolutions that evidently did not contain authorizations for the use of military force.[65]

The United States' attempt to relax the strict limits on the use of force presents serious challenges to the collective security system, for other states

---

63. *See* Daniel Webster, *Letter from U.S. Secretary of State Daniel Webster to British Minister Henry Fox (24 April 1841)*, 29 BRIT. & FOR. ST. PAPERS 1137 (1841).

64. *See* EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 86-88 (Harper & Row 1946) (1939); CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 167 (Deborah J. Gemer & Eric Selbin eds., 2005); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 136 (1991); PRINCIPLES AND PROBLEMS OF INTERNATIONAL POLITICS: SELECTED READINGS 33 (Hans J. Morgenthau & Kenneth W. Thompson eds., 1950).

65. *See* Krisch, *supra* note 30, at 148. The Bush Administration and its allies, before resorting to the preventive war doctrine, sought a Security Council Resolution explicitly authorizing the use of force against Iraq. Yet as the Council denied such an authorization, the allied forces argued that the war was legal under prior Security Council Resolutions 678 and 687. *See* S.C. Res. 678, ¶ 2, U.N. Doc. S/Res/678 (Nov. 29, 1990); S.C. Res. 687, ¶¶ 14, 29, 34, U.N. Doc. S/Res/687 (Apr. 3, 1991). The international community did not accept the validity of this claim simply because these resolutions were passed within the context of Kuwaiti liberation in 1991.

might also employ a similar logic and wage wars of aggression under the pretext of self-defence or humanitarian intervention. As the North Korean foreign ministry threateningly underlined, "[p]re-emptive attacks are not the exclusive right of the US."[66] Indeed, once the legitimacy of preventive wars is accepted then states may legitimately commence hostilities against one another, particularly when the latter's past practices or hostile intentions suggest that in an indefinite future it might conceivably pose a threat to the former's political independence or territorial integrity.

Since the preventive war doctrine does not require the perceived threat to be material, imminent, or overwhelming, it inevitably grants full discretion to states as to *whether* and *when* a putative aggressor constitutes a potential threat to their security. Of course, as highlighted in the case of *Nicaragua,* "it is the state *which is the victim of an armed attack* which must form and declare the view that it has been so attacked.".[67] Nevertheless, in the absence of an actual armed attack or pending danger, any calculation of inevitability is doomed to be speculative and presumptive, which would eventually serve the interests of militarily superior countries.[68] The United States currently enjoys the strongest economic and military capacity in the world, and may accordingly adopt exceptional measures other states cannot afford. America could also use its privileged position in the Security Council to prevent other states from using force, as it has done many times during the Cold War years and in the 1990s.[69]

In summary, the Bush Doctrine takes the already controversial concept of anticipatory self-defence a step further into the murky realm of subjectivity that may justify military venturism "from the Korean peninsula to the Taiwan straits, to Kashmir and beyond."[70] Therefore, it attempts to modify the current law of self-defence by envisioning a general licence for the use of force in cases where a state believes that a putative aggressor possesses or develops WMD, and thus might pose a possible future threat to its own security. The elimination of the imminence rule, however, would not only discard the authority of the Security Council, but might also trigger many unwarranted

---

66. Jonathan Watts, *N. Korea Threatens US with First Strike*, THE GUARDIAN, Feb. 6, 2003, *available at* http://www.guardian.co.uk/world.2003/fed/06/usa.northkorea.

67. Military and Paramilitary Activities, *supra* note 50, at ¶ 195 (emphasis added).

68. *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 227 (James Crawford & John S. Bell, eds., 2004); JOYNER, *supra* note 64, at 170. The danger of granting exclusive authority to states to judge the necessity of defensive force was clearly underlined by the Nuremberg Tribunal as Germany claimed self-defence in the events leading to World War II. The court concluded that the nature of any action taken under the claim of self-defence "must ultimately be subject to investigation or adjudication if international law is ever to be enforced." HUMPHREY WALDOCK, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 407 (1963); Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 261-62 (1989).

69. *See* Thomas Schindlmayr, *Obstructing the Security Council: The Use of Veto in the Twentieth Century*, 3 J. HIST. INT'L L. 218, 233 (2001).

70. Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 599 (2003).

conflicts under the flag of self-defence, because the Bush Doctrine does not define the circumstances in which a suspected threat might justify military action.[71] As Schachter observes, "[t]o say that each state is free to decide for itself when and to what extent it may use arms would remove the principal ground for international censure, and, in effect, bring to the vanishing point the legal limits on unilateral recourse to force."[72] Naturally, the necessity to retain the temporal requirement is tied to the legitimate concern that permissive opportunities to use unilateral force might invite abuse from powerful states, which, throughout history, have frequently sought to enhance their own national interests at the expense of weaker states and international order.

RELAXING THE IMMINENCE RULE IN BATTERED WOMEN'S SELF-DEFENCE CLAIMS?

As indicated above, the legal framework of self-defence is also sought to be modified by a feminist critique on the ground that the traditional contours of self-defence do not fit with a battered woman's experience in which the concepts of "imminence," "reasonableness," "proportionality," and "retreat" are comparatively less apparent and more case-specific. Since the 1970s, some feminist commentators[73] have underlined the subordination of women and sexist presumptions within the legal discourse that create inequalities for women in general and for battered women's self-defence claims in particular. These scholars principally posit that self-defence rules were established to exonerate a man who uses lethal force to defend himself or his family in the face of an unlawful attack posed by a man of similar size and strength with whom the defender usually had an isolated or single confrontation.[74] Women

71. *See* Yoo, *supra* note 29, at 735.

72. SCHACHTER, *supra* note 64, at 263. Similarly, Franck rightly argues that: "[A] general relaxation of Article 51's prohibitions on unilateral war-making to permit unilateral recourse to force whenever a state feels potentially threatened could lead to . . . *reductio ad absurdum*. The law cannot have intended to leave every state free to resort to military force whenever it perceived itself grievously endangered by actions of another, for that would negate any role for law." THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 98 (2002).

73. Although there is no single feminist response to criminal law, criminal justice, and domestic violence issues, it can safely be argued that many feminists resist biased theories and highlight the significance of attentiveness to particularity and specific context. Indeed, many feminist scholars stress a larger pattern of inequalities that are based upon gender, race and class differences. Feminist approaches to domestic violence, to put it simply, focus on the rights of the victims of abuse and call for empathic responses to such women who risk criminal charges for committing untoward acts against their abusers. For an interesting discussion see Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, *in* NANCY E. DOWD & MICHELLE S. JACOBS, FEMINIST LEGAL THEORY 384 (2003). However, it should be reiterated that this study is confined to analyse the feminist critique in a narrow sense, and restricts its scope to those scholars who challenge the strict application of the temporal rule in non-confrontational killings.

74. Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on*

are thus gravely disadvantaged to fit into such a masculine paradigm of self-defence, for they usually differ from an ordinary male defender in size, strength, socialization, defensive behaviour, etc.[75] The requirements of private self-defence, such as the imminence rule, consideration of the circumstances immediately surrounding the deadly defensive force, and the employment of an "objective reasonable man" standard,[76] also weaken female defendants' claims.[77] More importantly, women's experiences with constant domestic abuse were simply not envisioned when the legal bounds of self-defence were drawn.[78]

The main challenge, however, is directed at the strict temporal requirement.[79] Firstly, it is important to note that, contrary to common belief, the majority of battered women kill their abusers in confrontational settings where the imminence rule does not pose any significant challenge to self-

---

Behalf of Battered Women Who Kill, 36 AM. U. L. REV. 11, 34 (1986).

75. Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679,1701 (1986).

76. Taylor forcefully argues that there is no common law reference to the concept of a reasonable woman. "Rather than developing a separate standard for women, criminal law has held and continues to hold female defendants to a male standard of reasonableness. . . . The historical development of the standard reveals its male bias, but the language of the standard reveals more. Linguistic theory has confirmed that women have been present in official language only as the 'other,' and experience proves that the use of male pronouns effectively excludes a woman's perspective and experience. In short, 'man' does not include 'woman,' nor are the terms interchangeable. Asking a woman to behave as a reasonable man places her violent behaviour –when it does not comport with a male norm – outside the boundaries of reason." Taylor, *supra* note 75, at 1679, 1691-92.

77. Rosen, *supra* note 74, at 34.

78. It is well known that historically women have been treated as inferior to men. For example, in Roman times, a husband was allowed to employ reasonable amount of violence to discipline or chastise his wife. English rape laws regarded rape as a crime committed against the victim's husband, father or fiancé. Marital rape was inconceivable. *See* Michael Dowd, *Dispelling the Myths about the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567,568 (1992); Shane Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1754 (2004). The common law doctrine of coverture also rendered women dependent on their husbands in private law matters. As Blackstone explained, "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (5th ed., Cavendish Publishing Limited, The Glass House, 2001) (1773). There also existed grave inequality in the law of homicide: "Petit treason . . . may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person . . . his superior, to whom he owes faith and obedience. . . . So if a wife . . . kills [her] . . . husband, she is a traitor. The punishment of petit treason . . . in a woman [is] to be drawn and burned. . . ." *Id.* at 203-04.

79. The concept of proportionality has also been criticised, for women are often physically weaker than men, which sometimes compels them to employ more force in comparison to men in similar conditions. The possibility of escape or retreat from the cyclical abuse also appears to be problematic for battered women due to socio-economic reasons or the possibility of further violence. *See* Gena Rachel Hatcher, *The Gendered Nature of the Battered Woman Syndrome: Why Gender Neutrality Does Not Mean Equality*, 59 N.Y.U. ANN. SURV. AM. L. 21, 22 (2004).

defence claims.[80] However, when the killing occurs in a non-confrontational scenario, courts often refuse to admit evidence of past abuse to support the claims of self-defence.[81] In other words, there is a disinclination to admit expert testimony when the deadly force does not match the traditional temporal requirement, i.e., when the killing occurs during a lull in the violent encounter or some time after the illegal act or threat. Many courts focus on the temporal element and thus do not admit evidence relevant to self-defence claims unless the battered woman strikes the fatal blow against an actual or imminent aggressor. Therefore, the imminence rule usually deprives the battered woman of a valid claim of self-defence even if all the other requirements of self-defence are met.[82]

Some feminist scholars, on the other hand, have underlined the significance of looking at a broader spectrum of time and context in which the fatal force was resorted to.[83] This new insight recently led many jurisdictions to show greater latitude in the admission of expert testimony on battering and its effects to support female defendants' self-defence claims. The testimony is used to inform the fact-finder about the overall social context that led the battered woman to employ force against the quiescent abuser. Yet the main purpose is to shed light on why the "defendant reasonably believed that she was in imminent danger of death or great bodily harm."[84] This naturally brings the history of abuse within the calculus of the reasonable man standard and the imminence rule. The rationale is that an ordinary juror might not grasp the true nature of a particular incident without taking the underlying abusive history into account.[85] A broader temporal understanding,[86] however, enables the jury to

---

80. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, at 397-99 (1991); Nourse, *supra* note 41, at 1253; FIONA LEVERICK, KILLING IN SELF-DEFENCE 91 (Andrew Ashworth ed., 2006).

81. *See* Skopets, *supra* note 34, at 763.

82. An example of a broader perspective of imminence can be observed in the case of *State v. Leidholm*: "Under the subjective standard the issue is not whether the circumstances attending the accused's use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect himself against immediate unlawful harm, but rather whether the circumstances are sufficient to induce in the accused an honest and reasonable belief that he must use force to defend himself against imminent harm . . . . [Therefore] the finder of fact must view the circumstances attending an accused's use of force from the standpoint of the accused. . . . " State v. Leidholm, 334 N.W.2d 811, 817-18 (N.D. 1983); Martin E. Veinsreideris, Comment, *The Prospective Effects of Modifying Existing Law to Accommodate Pre-emptive Self-Defense by Battered Women*, 149 U. PA. L. REV. 613, 617-19 (2000).

83. *See* Jane Campbell Moriarty, *While Dangers Gather: The Bush Pre-emption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 2-3 (2005).

84. Janet Parrish, *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, 11 WIS. WOMEN'S L. J. 75, 79 (1996).

85. *See* Hatcher, *supra* note 79, at 22.

86. Without doubt, the determination of one's intent and culpability is closely linked to the choice of time-frame. In this respect, the choice of adopting a narrower or broader time frame might (depending on the concrete circumstances of each case) change the judgement

understand the abused woman's particular experiences with her abuser and the former's "heightened ability to sense that she was in grave danger at the time of killing. It provides the jury with the appropriate context in which to decide whether her apprehension of imminent danger of death or great bodily harm was reasonable."[87]

It has also been posited that women do not commit homicide as often as men do. When they do, however, they usually kill their partners in response to constant abuse. In this respect, some feminist commentators, among others, legitimately questioned the validity of the reasonable man standard which sometimes undermines the claims of battered women in self-defence cases,[88] because it is premised on the way in which men stereotypically respond to imminent aggression. This ignores the fact that "women do not and cannot respond immediately and proportionately to male violence, because of their inferior size, strength and fighting abilities."[89]

The state of "cumulative terror," economic dependence, threats of the abusing partner, and the ineffectiveness of the legal system are argued to be the main underlying causes of battered women's deadly strike.[90] From this perspective, it has been maintained that the strict application of the temporal requirement should be removed from the traditional self-defence paradigm, because: "[b]attered women are most likely to be killed by their abusers after they leave the relationship or report abuse. Women should not be forced to await such a fate if they have a reasonable fear that it is inevitable, but not

---

about voluntariness in committing the wrongdoing. As Kelman notes, "often, conduct is deemed involuntary (or determined) rather than freely willed (or intentional) because we do not consider the defendant's earlier decisions that may have put him in the position of apparent choicelessness. Conversely, conduct that could be viewed as freely willed or voluntary if we looked only at the precise moment of the criminal incident is sometimes deemed involuntary because we open up the time frame to look at prior events that seem to compel or determine the defendant's conduct at the time of the incident." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 594 (1981).

87. M. Elizabeth Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 511 (1996).

88. Such criticism has also been directed at provocation cases which reflect a male understanding of losing self-control, i.e., in a "sudden and temporary" manner. It is argued that women generally experience a "slow burn" anger. *See* Aileen McColgan, *General Defences*, *in* FEMINIST PERSPECTIVES ON CRIMINAL LAW 145 (Donald Nicolson & Lois Bibbings eds., Cavendish Publishing 2000). Interestingly, in *Camplin*, Lord Diplock stated: "[F]or the purposes of the law of provocation the 'reasonable person' has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today." DPP v. Camplin [1978] AC 705, 716-17 (H.L.).

89. DONALD NICOLSON, *Criminal Law and Feminism*, *in* FEMINIST PERSPECTIVES ON CRIMINAL LAW, *supra* note 88, at 12.

90. M. J. Willoughby, Comment, *Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer*, 38 U. KAN. L. REV. 169, 170-71 (1989). Although most jurisdictions do not impose a formal duty of retreat, Battered Woman Syndrome is employed to explain why the woman did not leave her abusive partner despite the consistent pattern of violence within the relationship. *See* David L. Faigman & Amy J. Wright, *Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 81 (1997).

necessarily imminent."[91] More importantly, the "concept of imminence has no significance independent of the notion of necessity."[92] In other words, since the main pillar of self-defence is the "necessity" to resort to force, the requirement of imminence should only be regarded as a "translator," or "proxy" for necessity.

Rosen, in this context, argues that imminence is required merely "because of the fear that without imminence there is no assurance that the defensive action is necessary to avoid the harm."[93] Similarly, Murdoch notes that "imminence is merely a way of measuring necessity"; thus, if these two concepts conflict, "imminence should not be permitted to interfere."[94] In short, this school of thought asserts that a proper application of the necessity requirement is sufficient to prevent possible abuses of self-defence in cases where the threat is not imminent.

This point is bolstered by Paul Robinson's well-known leaking ship hypothetical, in which the crew of a vessel discovers a slow leak shortly after leaving the port for a long journey. The Captain of the ship unreasonably refuses the request of the crew to cancel the journey. Absent intervention, the slow leak will capsize the vessel within two days. Therefore, although the leak does not pose an imminent danger, it definitely poses a certain future risk to the lives of the crew. The question is whether the sailors should mutiny to gain control of the vessel while they are close to the shore and have the chance to survive, or wait until the danger is *imminent*, even though waiting means they will be too far away from the port where their chance of survival would be slim.[95] Once the dilemma is assessed within the narrow calculus of mutiny and the certainty of facing death, the solution appears to lie in discarding the requirement of imminence. However, the imminence and necessity rules, although closely connected, have distinct roles. An incipient threat, in the face of inaction, may ripen into an imminent danger, but this does not automatically entitle the individual to invoke deadly force; because, as argued earlier, if the threat is merely incipient, it is the right and obligation of the state apparatus, in the first place, to extend its protection to the would-be victim. If the state is capable of thwarting a non-imminent threat then the individual must not take the law into his own hands, for defensive lethal action is meant to be a measure of last resort.

---

91. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 N.C. L. REV. 211, 274 (2002).

92. *See* Richard A. Rosen, *On Self-defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371,380-81 (1993).

93. *Id.*

94. Jeffrey B. Murdoch, *Is Imminence Really Necessity: Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 212 (2000).

95 2 PAUL ROBINSON, CRIMINAL LAW DEFENCES 56-57 (1984); Rockefeller, *supra* note 60, at 139.

THE POLITICAL CHARACTER OF THE IMMINENCE RULE

Criminal law aims to protect human life at all costs; thus, private force may only be inflicted after the exhaustion of all possible non-violent alternatives. Self-defence, therefore, naturally has a social dimension. As Kremnitzer points out, through the act of self-defence, the individual is not only protecting his personal autonomy, but his action also has an impact upon the legal and social order:[96]

> By virtue of his action, the law-breaker has become an enemy of the law in the broad sense of the word. When his victim employs self-defence to resist him, he is serving as the representative and defender of society, the public order and the legal system (since his action is meant to neutralize the violation of law created by the illegal act). Self-defence in such a situation is not only justified, it is in effect, an "*an acte de police*," since the authority charged with enforcing the law would not – had it been present at the time – have acted differently from the person employing it, and his act thus serves the public's interest in the deterrence and prevention of crime.[97]

Of course, the social dimension of self-defence only becomes visible against unlawful aggression posed by culpable aggressors.[98] It is such aggression against the would-be victim's individual autonomy and community rules that makes the right to self-defence understandable.[99] However, individuals are not allowed to undertake an *acte de police,* as posited by Kremnitzer, because self-defence is neither a punishment nor an act of law enforcement. It is rather an *act of emergency* that is temporally and materially confined with the narrow purpose of warding off the pending threat, not to re-establish the disturbed public order or to penalize the offender. Besides, state authorities –had the police been present at the very time of the illegal attack – could well employ less or even no force to neutralize the aggressor due to the deterrent effect they create upon the would-be offender or their experience and ability in containing violence. The defender is, therefore, not allowed to assume the role of the state machine to prevent violence from plaguing society or to re-establish social order. As Fletcher argues, the requirement of imminence has a political

---

96. Mordechai Kremnitzer, *Proportionality and the Psychotic Aggressor: Another View*, 18 ISR. L. REV. 178, 189 (1983).

97. *Id.* at 190.

98. *Id.* at 195; Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defence,* 39 TULSA L. REV. 875, 885-86 (2004).

99. K. K. Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 259 (2004).

character, rather than moral:[100]

> The issue is the proper allocation of authority between the state and the citizen. When the requirement is not met, when individuals engage in pre-emptive attacks against suspected future aggressors, we fault them on political grounds. They exceed their authority as citizens; they take the "law into their own hands." Precisely because the issue is political rather than moral, the requirement must be both objective and public. There must be a signal to the community that this is an incident in which the law ceases to protect, that the individual must secure his or her own safety.[101]

This stance is consistent with the theoretical role of the state: by placing itself above the conflicting parties, it ensures security and peace in society. Indeed, the concept of security has long been viewed as the centrepiece of theorizing about the state apparatus.[102] This finds its early formulations in Aquinas' philosophy where the power to use national force was exclusively deemed to be the function of the legitimate authority. To Aquinas, a private individual had no business in declaring warfare, nor was he allowed to resort to violence if he was in a position to seek redress of grievances by appealing to the judgment of his superiors.[103]

Security is also a critical concept in Locke's state theory. Locke regarded the state of nature as a "state of perfect equality" where "there . . . [was] no superiority or jurisdiction of one over another."[104] However, violence gave rise to the state and the institution of punishment.[105] By disturbing the peace and safety of the community, the wrongdoer posed danger to mankind against

---

100. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996).

101. *Id.*

102. V.F. Nourse, *Reconceptualizing Criminal Law Defenses* 151 U. PA. L. REV. 1691, 1736 (2003). Marxist theory, in this respect, explains the emergence of the state with the irreconcilable contradictions between classes with conflicting economic interests. In order to prevent these classes from annihilating each other, reasons Engels, "a power becomes necessary that stands apparently above the society and has the function of keeping down the conflicts and maintaining order." FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE 206 (Ernest Untermann trans., Charles H. Kerr 1902).

103. AQUINAS, *supra* note 22, at 81; THOMAS AQUINAS, ST. THOMAS AQUINAS: PHILOSOPHICAL TEXTS 348 (Thomas Gilby trans., Oxford University Press 1967) (1951). By allowing individuals to use force in the absence of state protection, Augustine radically departed from Aquinas' philosophy where private use of force was deemed unlawful on the ground that such an act would involve hatred and lack of love. According to Augustine, only officials could kill without being motivated by sinful sentiments. *See* FREDERICK HOOKER RUSSELL, THE JUST WAR IN THE MIDDLE AGES 18 (Walter Ullman ed., Cambridge University Press, 1977) (1975).

104. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 4-6 (C.B. Macpherson ed., Hackett Publishing Co. Inc., 1980) (1690).

105. *Id.* at 7.

whom institutional measures had to be applied.[106] According to Locke, only lawful authorities could be the legitimate agent of force except in cases where there was no chance to appeal to the common superior for relief:

> [B]ecause the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable.[107]

Again, Hobbes assumed that the "social contract" was concluded by man for self-preservation. In the state of nature, he argued, "every man will, and may lawfully rely on his own strength and art, for caution against all other men."[108] Furthermore, nature had made men so equal in the faculties of body and mind that even "the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself."[109] Therefore, the key solution to the problem of violence lied in the urgent task of establishing a sovereign power, namely the *Leviathan,* in front of whom men had to stand in awe and be tied together in security by the fear of punishment.[110] The legitimacy of this sovereign power would last as long as it provided security to its subjects. Consequently, to Hobbes, the use of private force could be used only when *Leviathan* failed to provide protection.[111]

Montesquieu in his seminal work, *The Spirit of the Laws,* came to a similar conclusion:

> With individuals the right of natural defence does not imply a necessity of attacking. Instead of attacking they need only have recourse to proper tribunals. They cannot therefore exercise this right of defence but in sudden cases, when immediate death would be the consequence of waiting for the assistance of the law.[112]

---

106. *Id.*

107. *Id.* at 13.

108. THOMAS HOBBES, LEVIATHAN: OR, THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL 115 (A.R. Waller ed., Cambridge University Press 1904); Kinji Akashi, *Hobbes's Relevance to the Modern Law of Nations*, 2 J. HIST. INT'L L. 199 (2000).

109. HOBBES, *supra* note 108, at 115.

110. *Id.*

111. To Hobbes, right of self-defence was a natural right which could not be relinquished by any Covenant: "In the making of a Common-wealth, every man giveth away the right of defending another; but not of defending himself." *Id.* at 156, 224.

112. BARON DE MONTESQUIEU & JEAN JACQUES ROUSSEAU, THE SPIRIT OF LAWS 62 (Robert

Blackstone's authoritative *Commentaries on the Laws of England* confirms this position:

> This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible means of escaping from his assailant.[113]

The imminence rule, therefore, not only confirms the force monopoly held by the state, but it also aims to prevent putative defenders from taking innocent lives on the basis of their subjective and speculative reasoning. The importance of letting no man be his own judge and the need for an objective body to settle the disputes between individuals was noticed by influential jurists and philosophers. Locke, for instance, noted that:

> [I]t is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends, and, on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others, and hence nothing but confusion and disorder will follow; and that therefore God has certainly appointed government to restrain the partiality and violence of men.[114]

Grotius also recognized the importance of an objective body in resolving disputes between conflicting parties:

> It is . . . much more consistent with moral standards, and more conducive to the peace of individuals, that a matter be judicially investigated by one who has no personal interest in it, than that individuals, too often having only their own interests in view, should seek by their own hands to obtain that which they consider right . . . .[115]

The imminence rule, in this context, prevents the superfluous use of lethal force by requiring individuals to retreat or exhaust all viable non-violent

---

Maynard Mutchins ed., Encyclopedia Brittanica 1952).

113. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 145 (5th ed., Cavendish Publishing Limited, The Glass House, 2001).

114. LOCKE, *supra* note 104, at 9.

115. GROTIUS, *supra* note 20, at bk. I/III/I/II.

responses to counter an incipient threat before it matures into an imminent risk. This prevents the abuse of the self-defence doctrine and reaffirms the role of the state whose monopoly on the use of force only cedes when it cannot provide protection to putative victims.

Returning to Robinson's scenario, it should be reiterated that the dilemma is presented within the narrow frame of mutiny or death, excluding other possible alternatives. Firstly, since the crew determines the slow but inevitable leak, they may simply inform the police about the definite risk they face. This would bring the legitimate state intervention into play. Naturally, as the state is not bound by the imminence rule it may use preventive force, if necessary, to protect the lives of the sailors.[116] Secondly, it appears that the captain acts imprudently for refusing the crew's demands to cancel the perilous journey during which the incipient threat would certainly ripen into an inevitable danger. The crew, therefore, faces *an already immediate* threat to their lives and liberties, which, if state protection is not available, entitles the crew to use a proportionate amount of force to take control of the vessel. The existence of the temporal requirement, therefore, does not necessarily mean that individuals must await death like "sitting ducks"; on the contrary, one of its main functions is to press individuals to take prudent steps before prematurely resorting to deadly force.

THE INTERCONNECTION BETWEEN THE ELEMENTS OF SELF-DEFENCE: JUSTIFIED FORCE VERSUS ACTS OF RETALIATION

The temporal requirement is closely connected with the notions of necessity and proportionality; that is, imminence provides an objective yardstick against which the necessity of private force can be measured and the interests of the putative aggressor and defender can be balanced. Indeed, absent an imminent threat, it is not only difficult to judge to a degree of certainty that the anticipated harm would have ever occurred (necessity), but also whether the defendant could have avoided the lethal threat without employing any force, or just enough force to repel the threat (proportionality) until the state steps to the forefront to contain the situation. Since defensive action is meant to protect a vital interest of the defendant, such as his life, liberty, or physical integrity, the imminence rule enables the adjudicator to assess whether such an interest was *actually* threatened and whether a *just balance* between the harm inflicted and the good preserved was properly struck by the defendant.

In other words, the imminence rule, by requiring the would-be victim to seek non-violent alternatives to deal with the perceived threat, ensures that lethal force is only invoked against threats that are present or likely to materialize, and that the defensive force is employed within a concrete scenario

116. *See* Whitley R. F. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 351 (2007).

where the notion of proportionality can appropriately be appraised. This point is of particular relevance for battered women cases, where the majority of abuse victims face a certain level of violence that does not meet the threshold of death or bodily harm to justify the use of lethal force. Indeed, except for extreme cases (such as the well-known *Norman*[117] case), "the fact that a battered woman has been assaulted on many occasions in the past but has *not* been killed might suggest that she is unlikely to be killed by her partner in the future."[118] From this perspective, the temporal requirement is inseparably interconnected with the elements of necessity and proportionality, and its relaxation would adversely affect the whole matrix of the self-defence doctrine.

Of equal significance, the temporal requirement ensures that the deadly action, carried out under the flag of self-defence, has been a preventive measure, rather than an act of retaliation. In criminal law, actors frequently establish their own justice through vengeance, and in order to escape punishment they usually hide behind the shield of self-defence.[119] In a successful self-defence case, however, the focus must shift from past to future violence; that is, from retaliation, if that was the real motive, to an argument of defending oneself from an imminent threat. This, Fletcher notes, "is the standard manoeuvre in battered-wife cases. In view of her prior abuse, the wife arguably has reason to fear renewed violence. Killing the husband while he is asleep then comes into focus as an arguably legitimate defensive response rather than an illegitimate act of vengeance for past wrongs."[120]

Of course, battered women are legitimately concerned about the repeated cycle of violence (which renders them helpless, immobilized, passive, and thus unable to break the vicious circle in a non-violent fashion), the masculine construction of criminal law and the failure of state agencies to protect them.[121] Given the dreadful conditions they are in, it might appear plausible to grant them leniency in non-confrontational killings. In this vein, Ayyildiz makes an interesting argument:

> The battered woman is by definition a victim, one who has not received justice, one who has not seen her batterer punished for the abuse he has heaped upon her. Thus, by killing her batterer, the battered woman becomes a spontaneous vigilante –she apprehends a criminal that the law has failed to bring to justice and metes out the punishment he richly deserves . . . . Thus, rather than continue waiting for the state, all the while

117. State v. Norman, 378 S.E. 2d 8 (N.C. 1989).

118. LEVERICK, *supra* note 80, at 91-92.

119. *See* James Q. Whitman, *Between Self-Defense and Vengeance/between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 902 (2004).

120. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENCE: BERNHARD GOETZ AND THE LAW ON TRIAL 22 (1988).

121. *See* Celia Wells, *Battered Woman Syndrome and Defences to Homicide: Where Now?*, 14 LEGAL STUD. 266 (1994).

> receiving beating after beating, the battered woman, by killing her abuser, repairs the moral order herself.[122]

This view, however, fails to notice the political rationale of the self-defence doctrine. It is important to emphasize that the battered woman's self-defence claim cannot be based upon the notion of *just desert*. Indeed, even if the death of the abuser might satisfy the common sense of moral justice, if the lethal strike does not fall within the confines of the self-defence doctrine, it cannot be regarded as an act of *justification*.[123] As noted above, self-defence is neither a punitive measure nor an act of law enforcement; it is rather a measure of last resort to fend off an illegal attack in the absence of state protection. Moreover, a valid self-defence claim requires the intent of the defendant to be defensive as well,[124] that is, a fatal act must not have been motivated by the aggressor's past misdemeanour.[125] If the theory of self-defence was built upon the notions of punishment and just desert, this would merely open the doors for vigilantism against suspected offenders.[126] In centralized legal orders, criminal punishment is a prerogative of legitimate state power. In Fletcher's language, "criminal punishment is the most elementary and obvious expression of the state's sovereign power."[127] The battered woman, as a result, may only justify her killing by showing that she was in imminent danger of being killed or seriously injured, and that the employment of deadly force was the only alternative to ward off the threat involved.[128] Therefore, no matter how much one is inclined to consider the killing of the abusing partner as "just," the criminal procedure must go beyond the luring trap of "desert," and establish whether or not the elements of the offence/defence are satisfied.

---

122. Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 147-48 (1996).

123. As Weinreb asserts, "[j]ustice as desert is contrasted with the idea of entitlement, with which it is said commonly to be confused. Entitlements are the product or rules, which may, but need not, reflect desert and, therefore, justice." Lloyd L. Weinreb, *The Complete Idea of Justice*, 51 U. CHI. L. REV. 752, 752 (1984).

124. This position finds its roots in Aquinas' understanding of individual self-defence, known as the double effect doctrine, which also had profoundly influenced the justification of defensive wars in international law. According to this doctrine, an act might lead to a good and bad result; yet in order for its moral permissibility the intended act must be good, the ensuing bad result must not be desired, and that the intended good must be proportionate to the bad outcome. *See* THOMAS AQUINAS, POLITICAL WRITINGS 263-64 (R.W. Dyson ed., trans., Cambridge University Press 2002).

125. *See* 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 14 (2007).

126. *See* George P. Fletcher, *Self-Defense as a Justification for Punishment*, 12 CARDOZO L. REV. 859, 865 (1991).

127. George P. Fletcher, *Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 287 (1998).

128. John W. Roberts, *Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defence in Non-Confrontational Homicides*, 27 LAW & PSYCHOL. REV. 135, 136 (2003).

This point is also decisive for the theory of justification and excuse: an outwardly wrongful act might be excused or justified by society, which consequently may exclude the actor from criminal liability. Although both defences are based on the absence of the requisite *mens rea*, a necessary condition for culpability, their theoretical bases are fundamentally different. A successful defence of justification renders an otherwise criminal conduct legal, because the exceptional circumstances under which an ostensibly wrongdoing was committed negate criminal liability. An excuse defence, on the other hand, recognizes the illegal character of the act, yet posits a lack of culpability due to the actor's incapacity for criminal condemnation.[129] In this context, the Canadian Law Reform Commission notes that:

> Despite their common fundamental nature, duress, self-defence and necessity [should be] kept separate ... [because] *the distinction is based on moral differences between the three defences*. . . . In self-defence the accused seeks protection against aggression and in so doing promotes a value supported by the law. In duress, he avoids harm wrongfully threatened to him but does so at the expense of an innocent third party or by contravention of the law and therefore does not promote a value supported by the law. In necessity he may sometimes promote a value supported by the law and contravene the letter of the law to secure some greater good (e.g. an unlicensed motorist drives an emergency case to hospital to save life); at other times he may fail to promote such a value but may avoid harm to himself at the expense of an innocent person or of contravention of the law (e.g. a shipwrecked sailor saves himself by repelling another from a plank sufficient to carry one).[130]

The difference is not merely based on moral grounds though; instead, justification defences also involve serious legal consequences. Indeed, in justification defences, the actor does not breach any legal norm, but only resorts to his legal/moral right to protect his vital interests. Justification claims stress the *rightfulness* of an act, which nominally violates the law and is subject to punishment.[131] In other words, a justified conduct no longer fits into the paradigm of a criminal offence. Claims of excuse, on the other hand, concede the *wrongfulness* of the act committed, but attempt to avoid the attribution of

---

129. *See* Peter D. W. Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975).

130. Canadian Law Reform Commission, *Criminal Law the General Part: Liability and Defences* 90-91 (Ottowa: Working Paper 29 1982) (emphasis added).

131. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 69 (Little, Brown and Company 1978).

criminal liability to the actor due to extreme circumstances under which he acted, or his diminished capacity in discerning the right from the wrong. The often-quoted passage of Hart clearly illustrates this point:

> In the case of 'justification' what is done is regarded as something that the law does not condemn or even welcomes. But when the killing ... is excused, the criminal responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplifies one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals. This is a requirement of fairness or of justice to individuals.[132]

The difference between justification and excuse plays a significant role in determining the rights and obligations of the third parties as well; i.e., when the actor is merely excused, this does not affect others' right to resist or assist the wrongful actor, for excuses are personal to the actor. A justified act, however, not only deprives the wrongful actor of the right to resist, but it also enables, if not encourages, the third parties to assist the justified actor.[133] More importantly, a justified act, in contrast to an excused act, may be *modelled* by other members of society.[134] Hence, while the employment of fatal force has been one of the gravest threats posed against the social order,[135] societies have found it an *acceptable* form of behaviour, if performed within the legal contours of self-defence. Defensive force, in other words, may serve as guidance for human behaviour that can be performed by other individuals under analogous circumstances.

The distortion of the self-defence doctrine may therefore legitimize the notion of private punishment by providing a "licence to kill" where the actor subjectively believes (or claims to have believed) that deadly force is necessary

---

132. HLA HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS ON THE PHILOSOPHY OF LAW 13-14 (Oxford University Press 1968).

133. *See* George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985).

134. One of the main functions of the law is to regulate individual behaviour by attaching sanctions to untoward acts. KELSEN, *supra* note 10, at 320. In other words, law envisages a rule of human conduct that is deemed obligatory and binding upon all citizens to govern the relationships between individuals with the promise of a suitable sanction for the disobedient. *See* J. M. Coady, *Morality and the Law*, 1 U. BRIT. COLUM. L. REV. 442, 442 (1959).

135. Homicide has always been met by a solemn reaction by usually depriving the perpetrator of his life or liberty for long years. It is the function of social order to bring about a certain type of behaviour that is deemed socially desirable. Societies, to this end, command certain mode of human conduct by attaching punishment to the opposite behaviour. As Kelsen notes, "[f]rom a sociological-psychological point of view, reward or punishment are ordered to make the desire for reward and the fear of punishment the motives for a socially desirable behavio[u]r." KELSEN, *supra* note 10, at 26.

to repel the threat, even if objectively the anticipated attack is not imminent. In addition, the phenomena of dominance, exploitation, abuse, violence and ensuing helplessness, or other detrimental mental conditions, are not peculiar to battered women. Such circumstances do affect the members of other vulnerable groups, including the members of ethnic, religious and linguistic minorities, homosexuals,[136] children, and the disabled in their daily environments where all forms of authority can, in one way or another, be exercised. The elimination of the imminence rule would be of no help other than curing the symptoms without removing the root causes of the problem.

The concept of imminence cannot merely be relaxed with respect to battered women's self-defence claims, because the law must be applied equally to those under analogous circumstances, which might finally render the right of self-defence meaningless. The newly formulated syndromes, including the old-age syndrome, battered children syndrome, the battered husband syndrome,[137] the holocaust syndrome, the battered person syndrome, the Vietnam War syndrome, and the premenstrual syndrome, which mushroomed after the introduction of the battered woman syndrome, indicate the danger in breaking down the traditional contours of the self-defence doctrine.[138]

---

136. Interestingly, particularly in the United States, the notion of "homosexual advance defence" can be raised in provocation cases to mitigate the sentence. Homosexual panic has been invoked to back up defendants' claim that the use of lethal force was triggered by an acute panic they suffered as a result of the belief that they were being molested sexually. Celia Wells, *Provocation: The Case for Abolition*, *in* RETHINKING ENGLISH HOMICIDE LAW 85, 90 (Andrew Ashworth & Barry Mitchell eds., Oxford University Press 2000). The "homosexual panic" defence has legitimately been criticised for institutionalising "homophobia that perpetuates paranoia of gay men and lesbians and justifies extreme violence in the face of a 'homosexual confrontation.'" Allyson M. Lunny, *Provocation and 'Homosexual' Advance: Masculinised Subjects as Threat, Masculinised Subjects Under Threat*, 12 SOC. LEGAL STUD. 311, 312 (2003). 137 Studies indicate that a significant number of men exist who have been the victims of spousal abuse. However, such abused husbands, due to their fear of ridicule and shame, often do not admit that they have been the victims of abuse by their wives. Such battered spouses at times claim self-defence as they kill their spouses in non-confrontational settings. For instance, in the case of *Walker* the defendant unsuccessfully claimed that he was an emotionally battered husband and that his mind could not think of any non-violent option to end the repressive situation he was in. *See* People v. Walker, 145 Cal App.3d 886, 900 (Cal. Ct. App. 1983). Some commentators argue that a battered man, similar to a battered woman, has different perceptions of imminent danger. Therefore, "even though men have not had the same cultural background advocating meekness, passivity, and submissiveness, this would not preclude them from developing the same personality traits common to battered women. The lack of societal-based reasons for passivity should not be the determinative factor for denying battered husbands the same treatment by the courts as battered wives." Nancy L. Guerin, *People v. Walker: The Battered Husband Defence*, 7 CRIM. JUST. J. 153, 168 (1984); *see also* Richard Jackson Harris & Cynthia A. Cook, *Attributions about Spouse Abuse: It Matters Who the Batterers and Victims Are*, 30 SEX ROLES 553 (1994).

138. In the *Werner* case, one of the judges wittily observed that there already existed the Battered Woman Syndrome, the Battered Child Syndrome, the Battered Husband Syndrome, the Police Officer Syndrome, the Battle-Weary Syndrome, and the Holocaust Syndrome, and that further syndromes will certainly appear, such as the Appellate Court Judge Syndrome. *See* Werner v State, 711 S.W.2d 639, 649 (Tex. Crim. App. 1986); BOAZ SANGERO, SELF-DEFENCE

The same logic applies to international relations, where self-defence constitutes the *sole justification* for the use of force without Security Council authorization.[139] Therefore, if the Iraq War is to be recognized as a legitimate form of anticipatory self-defence, then it must legally be categorized as a *justified* act, which may be used as a norm setting paradigm due to its legal character. Put differently, if the claims of the Bush Administration are accepted, then most states in the world's hot spots, including Pakistan and India, North and South Korea, Israel and Syria, Congo and Rwanda, and Iran and the United States, could legitimately be the objects of alleged "anticipatory" self-defence.[140] In his Nobel Peace Prize Lecture, former U.S. President Jimmy Carter also underlined such danger: "Today there are at least eight nuclear powers on earth, and three of them are threatening to their neighbours in areas of great international tension. For powerful countries to adopt a principle of preventive war may well set an example that can have catastrophic consequences."[141]

However, the main difference between the claims of battered women and those of the United States lies in the fact that the former suffer from systematic abuse and violence, giving rise to serious physical and mental conditions that might trigger the wrong belief that the victim was in grave danger at the time of killing. This is a typical example of an excuse defence. Indeed, as discussed earlier, when a faulty act is committed owing to the agent's mistaken belief, society often *excuses* the innocuous agent for causing a needless harm, rather than *justifying* him. Uniacke, in this respect, rightly notes that "to excuse an agent implies that his or her conduct was wrongful *by some standard;* and this standard can be derived from a more informed, a more objective perspective than that of the agent in the circumstances.[142] In the light of the above, battered women's mistaken belief as to the circumstances may arguably be regarded as an *excuse* of the agent.

IN CRIMINAL LAW 345 (2006); Rosen, *supra* note 74, at 15; *see generally* Tina Beers, *Children Who Kill Their Parents: The Battered Child Syndrome*, 14 CHILD. LEGAL RTS. J. 2 (1993).

139. Similar to domestic law, the concept of necessity, or rather, *emergency actions*, did exist in international law. Such acts differed from reprisals, which required the existence of prior unlawful acts by target states. In other words, acts of necessity could be initiated without the need for culpability on the part of the target state. Such forceful measures were justified under the basic need of survival, where the actor intended to avoid the danger at the expense of the *innocent* third party. The archetypical example of an act of necessity was provided by Britain in 1807, where the partial destruction of the Danish fleet and the capture of the remainder at Copenhagen were justified with the intent to stop the advancing French armies that could have invaded Denmark and capture the Danish fleet in order to use it against the British. Another famous example is the invasion of the then neutral Belgium by Germany on the ground of imperious necessity. The rationale was quite similar, namely that Belgium was to be invaded by France through which French attacks could be realized against Germany. The invasion was also aimed at forestalling the anticipated threat by France. *See* NEFF, *supra* note 47, at 239-40.

140. *See* David J. Luban, *Preventive War*, 32 PHIL. & PUB AFF. 207, 227 (2004).

141. Jimmy Carter, Nobel Peace Prize Speech (Dec. 10, 2002), http://news.bbc.co.uk/1/hi/world/americas/2562301.stm.

142. SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE 16 (Jules Coleman ed., 1994).

The United States, on the other hand, never faced an actual attack, nor was in a position to *reasonably* believe that Iraq posed an imminent threat against it. Neither can the mental conditions of the battered woman be applied to the United States, for national self-defence is governed by objective standards. Indeed, the right to national self-defence requires credible proof that lethal force is directed at an actual[143] or imminent danger where no other alternative exists. The International Court of Justice (ICJ) confirms this strict approach in the case of *Oil Platforms*:[144]

> [I]n order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. . . . The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.[145]

The United States, in the case of Iraq, lacked such evidence from the outset. Rather, to give the United States the benefit of the doubt and assume that its attack was not motivated by economic and political considerations, it, in any scenario, acted *preventively* to deny Iraq the potential to pose dangers in an indefinite future. Hence, Operation Iraqi Freedom is not an act of *justification*, and the category of *excuse* does not exist within the matrix of national force. Indeed, in international law, unlawful use of national force cannot be excused on the grounds of infancy, insanity, intoxication or any other condition that manipulates the decision making process. These are peculiar to individuals; therefore, states, particularly absent imminent danger, do not have the luxury of committing mistakes due to the magnitude and destructive nature of any military venture. Notably, wars are generally engaged in following serious domestic and international deliberations, particularly when peaceful alternatives fail or it becomes clear that they are unlikely to produce successful results. As Walzer rightly states, even in cases of imminent threats[146] "[t]here is often

143. Thomas Franck, *Comments on Chapters 7 and 8*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 30, at 268.

144. Oil Platforms (Iran v. U.S.), 2003 I.C.J.161.

145. *Id.* at ¶ 51.

146. It is important to note that *Al-Qaeda*, which was paradoxically heavily supported by the United States and its allies during the Afghani-Russian war, had long been conducting terrorist activities against the United States, well before the September 11 attacks. *See* Chitra Ragavan, *Tracing Terror's Roots*, U.S. NEWS & WORLD REP., Feb. 16, 2003, *available* at http://www.usnews.com/usnews/news/articles/030224/24wtc.htm; Richard Miniter, *An*

plenty of time for deliberation, agonizing hours, days, even weeks of deliberation, when one doubts that war can be avoided and wonders whether or not to strike first."[147] This was the case with the Iraq War where, despite the unprecedented worldwide protests against the commencement of hostilities, the matter was even taken to the Security Council as it appeared that authorization would not be granted.

DOUBLE STANDARDS IN THE APPLICATION OF INTERNATIONAL LAW: THE ELEMENT OF POWER

International law is aimed at fashioning common legal rules for nations that differ from one another in cultures, histories, languages, religions and economic, political and legal systems.[148] Universalisation of international law cannot be separated from the notion of equal application of the law; yet, international affairs have always been characterized by extreme inequalities and dominated by a few powerful states. Indeed, even when the concept of sovereign equality was first coined, it was merely applicable to the newly emerged independent states in Europe following the "decline of the authority of the Holy Roman Empire and the disintegration of Christendom."[149] This inequality became blatantly evident with the positivist distinction between civilized and uncivilized nations where only the practices of European states were considered to be decisive in the formation of international law.[150] Non-European states, in other words, were excluded from the domain of law and denied the capacity to assert their rights through legal means.[151] It is, therefore, not wrong to say that the foundations of international law had largely been shaped by successive hegemons.[152] Today, the U.N. Charter, despite its

---

Unheeded Warning, WALL ST. J., Sept. 30, 2003, *available at* http://www.opinionjournal.com/extra/?id=110004081; NOAM CHOMSKY, FAILED STATES: THE ABUSE OF POWER AND THE ASSAULT ON DEMOCRACY 22 (2006). For a list of Al-Qaeda's terrorist activities see Timeline: Al-Qaeda, BBC NEWS, http://news.bbc.co.uk/2/hi/3618762.stm.

147. *See* WALZER, *supra* note 26, at 75.

148. Mark Weston Janis, *The American Tradition of International Law: Exceptionalism and Universalism*, 21 CONN. J. INT'L L. 211, 211-12 (2006).

149. Krisch, *supra* note 30, at 138.

150. It is no accident that today Afghanistan, Iran, Iraq, North Korea and Libya are designated as "rogue states," a term used as a substitute for "uncivilized nations." This pejorative label evokes images of an aggressive state that regularly violates the norms of international law and which therefore cannot be deterred by peaceful means.

151. ANGHIE, *supra* note 68, at 54; Christine Gray, *International Law 1908-1983*, 3 LEGAL STUD.267, 267-68 (1983).

152. Michael Byers, *The Complexities of Foundational Change*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 30, at 1. Interestingly, this contention, to a certain extent, overlaps with a feminist critique, which posits that the formation of legal discourse has never been neutral but "produced under conditions of patriarchy." CAROL SMART, FEMINISM AND THE POWER OF LAW 86 (Maureen Cain ed., 1989). This line of argument is somewhat reminiscent of the Marxist assertion that "[t]he ideas of the ruling class are in every epoch the ruling ideas, i.e. the class which is the ruling *material* force of society, is at the same time its ruling *intellectual* force." KARL MARX & FREDERICK ENGELS, THE GERMAN IDEOLOGY 64 (C.J. Arthur Ed., Lawrence & Wishart 1970) (1845). There is no

reference to the principle of "sovereign equality,"[153] contains a significant legal limit to the equality of member states, namely the binding character of the Security Council resolutions and the decisive role played by the permanent members in their adoption.[154]

Currently, the notion of equal application of the law is being challenged by the United States,[155] which often acts according to its perceived interests, and whose superpower status evidently generates greater impact on the rules of the international community.[156] The power of the United States is manifestly apparent when it undermines the process of international lawmaking in crucial areas from global warming and arms control to the International Criminal Court (ICC).[157] It is, apparently, this very power that also exempts the United States from being labelled as a "rogue" when it refuses to cooperate with the international community on such critical matters.

An important illustration of American reluctance in undertaking international responsibilities and engaging with multilateral efforts was its decision to ignore the global effort of combating climate change, and its rejection of the Kyoto Protocol on the ground that it was "flawed" and not in the economic interest of the United States.[158] The United States also prevented the adoption of a protocol to the Biological Weapons Convention, which would have introduced an effective inspection regime similar to that of the Nuclear Non-proliferation Treaty[159] and the Chemical Weapons Convention. The U.S. Senate further blocked the Comprehensive Nuclear Test-Ban Treaty, and it appears that the Landmines Convention will also not be ratified by the United

---

denial that there exists a rather close connection between power/authority relations and the law, and that it is of extreme difficulty to detach the legal superstructure from the historical, sociological and economic circumstances of a given community. Patriarchy, in this sense, has undoubtedly contributed to the formation of the legal discourse, rather than being the sole determining factor.

153. U.N. Charter art. 2, para. 1.

154. Andreas Paulus, *War against Iraq and the Future of International Law: Hegemony or Pluralism*, 25 MICH. J. INTL'L L. 691, 724 (2004).

155. It is important to note that the United States, along with three other members of the Security Council, opposed an important General Assembly resolution in 1979, which condemned hegemonism in all its manifestations. Inadmissibility of the Policy of Hegemonism in International Relations, G.A. Res. 34/103, U.N. Doc. A/Res/34/103 (Dec. 14, 1979); Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 845 (2001). The resolution was apparently rejected since it equated Zionism with racism. *See* Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT'L L. 607, 610 (2003).

156. Edward Kwakwa, *The International Community, International Law, and the United States: Three in One, Two Against One, or One and the Same?, in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 30, at 37.

157. *See id.* at 4.

158. *See* Greg Kahn, *Fate of the Kyoto Protocol under the Bush Administration*, 21 BERKELEY J. INT'L L. 548, 548-49 (2003).

159. It is to be noted that the *Non-Proliferation Treaty*, currently the most significant tool to prevent the spread of nuclear weapons, is criticized for establishing a system of "nuclear apartheid," for it allows the nuclear powers to retain their weapons, yet prohibits the non-nuclear states from producing or acquiring nuclear armoury. *See* Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OSGOODE HALL L. J. 45, 53 (2005).

States in the foreseeable future. As Paulus argues, "the lack of an effective non-proliferation regime is not only due to the existence of 'rogue states,' but just as much to the U.S. reluctance to build on the existing institutions to control the further spread of WMD."[160]

The United States' renunciation of the Rome Treaty that established the ICC is another noteworthy example of American unilateralism.[161] The United States rejected the jurisdiction of the ICC, simply because a special immunity from prosecution for United States nationals was not included in the Rome Statute. According to Defence Secretary Donald Rumsfeld, "there is a risk that the ICC could attempt to assert jurisdiction over U.S. service members, as well as civilians, involved in counterterrorist and other military operations – something we cannot allow."[162]

From this point of view, the United States arguably attempts to create explicit double standards in the application of international law. This apparently derives from its capacity to employ devastating force against any state that is perceived as hostile, willing to acquire WMD, or considered to be supporting terrorism. Yet, as long as the United States and its allies obstruct multilateral efforts and avoid undertaking international responsibilities, their complaints about the ineffectiveness of the collective security framework in forestalling modern threats posed by the "rogues" and "terrorists" will sound insincere.[163]

While the United States' "ineffectiveness argument" is somewhat analogous to that of the battered woman's complaint about the negligent behaviour of the law enforcement authorities, which fail to take effective measures to prevent the vicious circle of domestic abuse, the weight of these two arguments fundamentally differ from one another. Indeed, the latter claim is put forward by a physically weak (relative to the abuser) and systematically abused person, who not only suffers severe psychological conditions, but who is also rarely taken seriously by law enforcement bodies.[164] In contrast, the

---

160. Paulus, *supra* note 154, at 723.

161. *See* MICHAEL WALZER, ARGUING ABOUT WAR 156-57 (2004).

162. Jim Garamone, *U.S. Withdraws from International Criminal Court Treaty*, U.S. Department of Defence, May 7, 2002 *available at* http://www.pentagon.mil/news/newsarticle.aspx?id=44089. It is to be briefly noted that United States resistance has manifested itself in three extreme forms. Firstly, Congress passed a law, known as the "Hague Invasion Act," authorizing the President to employ any possible means, including the use of military force, to rescue United States citizens from the custody of the International Criminal Court. Secondly, the United States has engaged in a global effort to sign bilateral treaties, named as "Article 98 Agreements," with International Criminal Court member states, where parties agree not to turn one another's nationals over to the International Criminal Court. Thirdly, the United States lobbied states to abrogate the Rome Treaty, and cut off its military aid to states refusing to cooperate and sign the Article 98 agreements. *See* Luban, *supra* note 140, at 238.

163. *See* Paulus, *supra* note 154, at 722-23.

164. The case of *Stonehouse* is a striking example of how difficult it is for the battered woman to escape from her abuser or to prevent the escalating level of violence, particularly when confronted by the indifference of the relevant State authorities to end the cycle of abuse.

United States, due to its superpower capabilities in all spheres, may not only implement its policies via force, but may also sit as a judge in its own cause. The decentralized and markedly politicized character of international law,[165] in this respect, increases the United States' chance to engage in unilateral force, whenever convenient, and prevent any possible collective security measure against it.

It might of course be claimed that United States' unilateralism against incipient threats is a necessary response against unpredictable and premeditated terrorism that is sponsored by the "rogue states," which have no regard for the norms of international society and attempt to produce and proliferate WMD. It might further be claimed that the United States has been "traumatized" after the September 11 attacks, and thus more latitude must be accorded to its acts, just as the advocates of battered women sometimes argue. However, as Fletcher argues, "this aspect of domestic self-defence law is highly unlikely ever to be accepted in the international context,"[166] because, as argued above, claims of excuse cannot be advanced by states in international law, they are peculiar to individuals.

The United States' attempt to broaden the scope of self-defence and

---

Commonwealth v. Stonehouse, 555 A.2d 772 (1989); *see also* Willoughby, *supra* note 900, at 170-171.

165. International law is considered to be a body of rules governing the mutual relations between states and other agents in international politics. Yet, the decentralized structure of the international legal system caused significant hesitation for many legal theorists to ascribe the character of "law" to international law on the ground that law cannot be separated from the notions of sanctions, force or coercion. To date, the questions of whether or not enforceability is an essential component of the law, whether the purpose of sanctions is that of law enforcement, punishment or retribution, and whether the concepts are applicable within the decentralized structure of the international legal system have not yet been conclusively settled. *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 124 (Columbia University Press, 3d. ed., 2002) (1977); Peter L. DeStefano, *The Emerging Moral Framework of International Law*, 1 FORDHAM INT'L L.J. 1, 1 (1977); Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55, 59 (1994). Some consider enforceability to be a necessary characteristic for a valid legal system. For instance, in LEVIATHAN, Hobbes argues that "covenants, without the Sword, are but words, and of no strength to secure a man at all." HOBBES, *supra* note 108, at 115. Again in DE CIVE, he notes that law is sometimes confounded with counsel, yet "law is not a counsel, but a command . . . of that person (whether man or court) whose precept contains in it the reason of obedience." THOMAS HOBBES, DE CIVE: OR, THE CITIZEN 155 (Sterling P. Lamprecht ed., 1949). Following Hobbes' logic, Austin also asserted that positive international law is confounded with positive international morality: "the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations . . . of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 201 (B. Franklin 1970) (1885).

166. George P. Fletcher, *How would the Bush Administration's Claims of Self-Defence, Used as Justifications for War Against Iraq, Fare Under Domestic Rules of Self-Defence?*, FINDLAW.COM, Sept. 10, 2002, http://writ.news.findlaw.com/commentary/20020910_fletcher.html#bio.

employ unilateral force as a means of achieving national policy objectives well precedes the September 11 attacks. For instance, almost three decades ago, Reagan's "peace through strength" doctrine sought to include covert U.S. military activities in support of anti-communist insurgents within the self-defence doctrine. The United States' doctrine to support "freedom fighters" was tested in Afghanistan, Ethiopia, Cambodia, Nicaragua and Angola.[167] President Reagan justified such a policy as follows:

> Our mission is to nourish and defend freedom and democracy, and to communicate these ideals everywhere we can. . . . We must not break faith with those who are risking their lives – on every continent, from Afghanistan[168] to Nicaragua – to defy Soviet-supported aggression and secure rights which have been ours from birth. . . . Support for freedom fighters is self-defence . . . .[169]

The Reagan Doctrine, however, received a blatant rejection by the ICJ in the *Nicaragua* case.[170] However, before the International Court of Justice's ruling, the Reagan Administration withdrew from the court's compulsory jurisdiction, which constituted a radical departure from the long-standing U.S. tradition of supporting international adjudication.[171] Indeed, while the United States has called upon the ICJ many times in the past, it questioned the authority of the court as it appeared that the United States was likely to lose.[172] The rationale of the United States' withdrawal from the proceedings is worth quoting:

> [M]uch of the evidence that would establish Nicaragua's aggression against its neighbors is of a highly sensitive intelligence character. We will not risk U.S. national security by presenting such sensitive material in public or before a

---

167. Pete Du Pont, *Freedom, Foreign Policy, and Public Opinion: A Strategy for Fostering Democracy*, 11 FLETCHER F. WORLD AFF. 207, 207-08 (1987).

168. Ironically, it was the U.S. Central Intelligence Agency that armed, trained, and supported Osama Bin Laden and his organisation, today's greatest terrorist threat, against the then Soviet-supported regime in Afghanistan. *See* Marcelo G. Kohen, *The Use of Force by the United States after the End of the Cold War, and its Impact on International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 30, at 206. This paradoxically confirms the cliché saying of "one man's terrorist is another man's freedom fighter."

169. President Ronald Reagan, State of the Union Address, (Feb. 6, 1985) *in* Du Pont, supra note 163, at 210; *see also* Charles Krauthammer, *The Reagan Doctrine*, TIME, June 24, 2001, *available at* http://www.time.com/time/magazine/article/0,9171,141478,00.html.

170. *See* Kohen, *supra* note 168, at 201.

171. *See* Michael J. Glennon, *Protecting the Court's Institutional Interests: Why Not the Marbury Approach?*, 81 AM. J. INT'L L. 121, 125 (1987).

172. *See* Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1447 (1985).

> Court that includes two judges from Warsaw Pact nations . . . *The right of a state to defend itself or to participate in collective self-defence against aggression is an inherent sovereign right that cannot be compromised by an inappropriate proceeding before the World Court.*[173]

The United States' withdrawal from the court's compulsory jurisdiction and its rationale for doing so plainly illustrated that the Reagan administration cared little about the international legal framework governing the use of force and that it was also ready to ignore the procedures and institutions of international adjudication.[174] Such unilateralism was maintained after the Cold War, as the United States unquestionably remained the world's sole superpower with its matchless economic and military capabilities. Although this era also witnessed significant multilateral enforcement actions, the United States, as the raids on Panama (1989), Iraqi intelligence (1993), Afghanistan and Sudan (1998) demonstrated, kept the door open for unilateral action whenever national interests so required.[175] This approach was clearly expressed by President Bush Sr. in his West Point Military Academy speech in 1993:

> At times, real leadership requires a willingness to use military force. And *force can be a useful backdrop to diplomacy, a complement to it*, or - - if need be - - a temporary alternative. . . . Using military force makes sense as a policy where the stakes warrant, where and when force can be effective, where no other policies are likely to prove effective, where its application can be limited in scope and time, and where the potential benefits justify the potential costs and sacrifice. . . . The United States can and should lead, but we will want to act in concert, where possible involving the United Nations or other multinational grouping. . . . *A desire for international support must not become a prerequisite for acting, though.*

---

173. U.S. WITHDRAWL FROM THE PROCEEDINGS INITIATED BY NICARAGUA IN THE ICJ – INTERNATIONAL COURT OF JUSTICE – TRANSCRIPT (Jan. 18, 1985) in DEP'T ST. BULL. March 1985, *available at* http://findarticles.com/p/articles/mi_m1079/is_v85/ai_3659121/pg_2 (emphasis added).

174. David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 49-50 (1994).

175. *See* Gregory P. Harper, *Creating a U.N. Peace Enforcement Force: A Case for U.S. Leadership*, 18 FLETCHER F. WORLD AFF. 49, 49-51 (1994); Dadid Von Drehle & R. Jeffrey Smith, *U.S. Strikes Iraq for Plot to Kill Bush*, WASH. POST, June 27, 1993, at A01, *available at* http://www.washingtonpost.com/wp-srv/inatl/longterm/iraq/timeline/062793.htm; Simon Chesterman, *Rethinking Panama: International Law and the U.S. Invasion of Panama, 1989, in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 57-95 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999); James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, *available at* http://partners.nytimes.com/library/world/africa.082198attack-us.html.

Sometimes a great power has to act alone.[176]

The subsequent Clinton Administration simply elaborated upon the Bush Doctrine by envisioning three categories of national interests with corresponding guidelines as to the use of military force.[177] The first category involved interests of fundamental importance to the U.S. survival, security and economic well-being. It was declared that "we will do whatever it takes to defend these interests, including — when necessary — *the unilateral and decisive use of military power.*"[178] The second category included important, but non-vital, U.S. interests that called for limited military means when success was likely, the costs and risks were commensurate with the threatened interests, and other means failed to achieve the objectives. The third category was related to the use of force for humanitarian interests, which, however, envisaged combat power only in urgent scenarios, while taking minimal risk with American troops.[179]

In essence, the doctrines follow a pattern of viewing military force as being complementary to diplomacy, or rather "an instrument of national policy," which was outlawed by the Kellogg-Briand Pact of 1928 and explicitly contravenes the U.N. Charter. While the doctrines express the desire for multilateral use of force, when the circumstances dictate otherwise unilateral force is considered to be a viable option for the protection of national interests. In other words, what is central to these doctrines is not respect for international legal norms, but decisive and quick victory with minimal financial and human cost.[180] This position was further confirmed, well before the September 11 attacks, by the Joint Vision 2020 report, released on May 30, 2000:

> The complexity of future operations also requires that, in addition to operating jointly, our forces have the capability to participate effectively as one element of a unified national effort. This integrated approach brings to bear all the tools of statecraft *to achieve our national objectives unilaterally when necessary,* while making optimum use of the skills and resources provided by multinational military forces, regional

176. President George Bush, America's Role in the World, West Point, (Jan. 11, 1993), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/military/force/bush.html (emphasis added).

177. *See* Kohen, *supra* note 168, at 200.

178. PETER L. HAYS ET AL., AMERICAN DEFENSE POLICY 288 (1997) (emphasis added).

179. THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT (Feb. 1996), *available at* http://www.fas.org/spp/military/docops/national/1996stra.htm; Charles Stevenson, *The Evolving Clinton Doctrine on the Use of Force*, 22 ARMED FORCES & SECURITY 511, 511-16 (1996).

180. *See* Kohen, *supra* note 168, at 201; Stevenson, *supra* note 179, at 516-19.

and international organizations . . . when possible.[181]

Following the atrocities of September 11, however, the same philosophy found its extreme form in Bush's loosely formulated press-conference answer that, in the face of deadly attacks such as those of September 11, "there are no rules."[182] Currently, the War on Iraq is being fought under the banner of self-defence without due regard to multilateralism and the established criteria formulated in the case of *Caroline*.[183] Rather, the war was engaged upon the belief that "military conflict, while not imminent, is inevitable, and that to delay would involve greater risk."[184] Nevertheless, the Bush Administration did not act upon Iraq's capacity or intention of attacking the United States or any other country. Instead, the emphasis was placed on a calculation of inevitability or probability.[185] Moreover, the United States did not refer the matter to the Security Council as it was obvious that the recourse to warfare against Iraq would not be endorsed, which may itself constitute an answer to George W. Bush's memorable question, posed in his September 12, 2002 speech to the General Assembly: "[w]ill the United Nations serve the purpose of its founding, or will it be irrelevant?"[186] At least for the purposes of the War on Iraq, the United Nations apparently became irrelevant to the Bush Administration.

The War on Iraq, unlike the military response directed at the Taliban regime (where Al Qaeda's responsibility for the September 11 attacks was amply demonstrated and the prospect of future attacks appeared to be imminent), did not receive extensive approval by the international community either,[187] because the U.S. military venture did not even satisfy the requirements of anticipatory force. Indeed, as Falk rightly noted:

> The facts did not support the case for pre-emption, as there was neither *imminence* nor *necessity*. As a result, the Iraq War seemed, at best, to qualify as an instance of *preventive war,* but there are strong legal, moral, and political reasons to deny both legality and legitimacy to such use of force. Preventive

---

181. JOINT CHIEFS OF STAFF, JOINT VISION 2020 (DEP'T DEF. 2000), *available at* http://www.fs.fed.us/fire/doctrine/genesis_and_evolution/source_materials/joint_vision_2020.pdf (emphasis added); Randolph B. Persaud, *Shades of American Hegemony: The Primitive, the Enlightened, and the Benevolent*, 19 CONN. J. INT'L L. 263, 265 (2004).

182. Press Conference, (September 17, 2001) *in* Andrew Hurrell, *"There are no Rules" (George W. Bush): International Order after September 11*, 16.2 INT'L REL. 185, 186 (2002).

183. *See* Webster, *supra* note 63.

184. Jules Lobel, *Preventive War and the Lessons of History*, 68 U. PITT. L. REV. 307, 312 (2006).

185. *Id.*

186. George W. Bush, President's Remarks at the United Nations General Assembly, (Sept. 12, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html.

187. *See* Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 592 (2003).

> war is not an acceptable exception to the Charter system, and no effort was made by the U.S. government to claim such a right, although the highly abstract and vague phrasing of the pre-emptive war doctrine in the *National Security Strategy of the United States of America* would be more accurately formulated as a "preventive war doctrine." But even within this highly dubious doctrinal setting, to be at all convincing the evidence would at least have to demonstrate a credible future Iraqi threat that could not be reliably deterred, and this was never done.[188]

The Iraq War, launched in March 2003, achieved military victory and ousted the Baathist regime within only three weeks, and with a minimal loss of American lives.[189] Nonetheless, despite the failure of finding WMD and establishing a link between Al Qaeda and Iraq, not only does the occupation of Iraq continue, but the 2006 U.S. National Security Strategy reaffirms the preventive war doctrine by using the same rationale.[190] In his introductory remarks to the 2006 Strategy, President George W. Bush declared that "*[w]e fight our enemies abroad* instead of waiting for them to arrive in our country. *We seek to shape the world*, not merely be shaped by it; to influence events for the better instead of being at their mercy."[191] Most notably, the new National Security Strategy is far from answering any legitimate concern as to the spatial and temporal scope of the war undertaken against an undefined enemy.[192] Indeed it was merely announced that "[t]he war against terror is not over."[193] The promise that "[t]he reasons for our actions will be clear, the force measured, and the cause just,"[194] on the other hand, does not clarify the vague basis of the preventive war doctrine, which is again sought to be justified with no explicit reference to international law:

> [W]e do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with

---

188. *Id.* at 598.

189. *See* JOYNER, *supra* note 64, at 187.

190. *See* The NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Mar. 2006) [Hereinafter NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

191. *Id.* at 3 (emphasis added).

192. *See* Christine Gray, *The Bush Doctrine Revisited: .The 2006 National Security Strategy of the USA*, 5 CHINESE J. INT'L L. 555, 563 (2006).

193. NATIONAL SECURITY STRATEGY, *supra* note 190, at 8. The 2006 National Security Strategy shifted the focus from Iraq and North Korea to Syria and Iran, and put the latter on notice with a solemn warning that "any government that chooses to be an ally of terror, such as Syria or Iran, has chosen to be an enemy of freedom, justice and peace. The world must hold those regimes to account." *Id.* at 12.

194. *Id.* at 23.

> WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of pre-emption. The place of pre-emption in our national security strategy remains the same.[195]

From this perspective it can well be argued that the United States can readily bypass international law without practically risking any diplomatic, economic or military sanctions due to its hegemonic capacity and privileged position in the Security Council. The lack of an independent and superior agency for the formulation and implementation of international law,[196] in this context, illustrates the most notable weakness of international legal order[197] relative to municipal legal systems where obedience to law may be coercively ensured.[198] As noted, nation-states do not need any higher authority to enforce their law, because they are equipped with force monopoly and coercive machinery.[199] Punishment may thus be meted out irrespective of the power status of individuals in society, i.e. nobody is immune from criminal liability for one's wrongdoing unless there are excuses or justifying conditions. In this respect, if the lethal force employed by an individual does not match any justification or excuse defences, such act will constitute a criminal offence for which

---

195. *Id.*

196. *See* John H. Crabb, *An Introduction to Some International Law Concepts*, 37 N.D. L. REV. 198, 201 (1961).

197. There is no doubt that international law is not as weak as it used to be. For instance, within the last century, international treaties and customs have produced a significant body of rules prohibiting atrocities, such as genocide, crimes against humanity and war crimes, or banning the use of biological and chemical weapons. Also, the atrocities committed in the former Yugoslavia and Rwanda galvanized the international will to establish two ad hoc tribunals, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The creation of the said tribunals, on the other side, significantly contributed in establishing the International Criminal Court (ICC), as a permanent instrument to investigate and prosecute international crimes. However, despite such achievements, states have often been unable or unwilling to properly apply international norms due to political considerations. *See* Roy S. Lee, *The Rome Conference and Its Contributions to International Law*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS 1-13 (Roy S. Lee ed., 1999); Nancy Amoury Combs, *Establishing the International Criminal Court*, 5 INT'L L. F. 77 (2003); Susan W. Tiefenbrun, *Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551 (2000); Adrian Hole, *The Sentencing Provisions of the International Criminal Court*, 1 INT'L L.J. PUNISHMENT SEN'G 37 (2005).

198. Oppenheim notes that "compared with Municipal law and the means available for its enforcement, the Law of Nations is certainly the weaker of the two." OPPENHEIM, *supra* note 18, at 14.

199. The sovereign, nonetheless, is not vested with unlimited authority, but is bound by the law; that is, the modern state system does not rest on the paradigm of legal despotism, wherein the power of the sovereign is unsusceptible of legal limitation. By contrast, the delegated state power is subordinate to the duty of protection: in Hobbes' language, "the end of obedience is protection." HOBBES, *supra* note 108, at 156; Akashi, *supra* note 108, at 205; *see also* George H. Smith, *The Theory of the State*, 34 PROC. AM. PHIL. SOC'Y 181, 201-06 (1895).

punishment must proportionately be inflicted.

In international law, on the other hand, not only is there no world government,[200] but the Security Council is also technically and physically unable to use its Chapter VII mandates against the United States. Indeed, although the Security Council is vested with broad powers under the U.N. Charter, its effectiveness has always depended upon the Great Powers, which are often motivated by their political interests.[201] Through the self-interested use of veto power, the Security Council has many times come to a stalemate to the detriment of international peace and security.[202] For that reason, while international law envisages grave consequences for state aggression, the most untoward act in international relations, it ultimately lacks the teeth to impose obedience and prevent hegemonic state aggression.[203]

Regrettably, the U.N. Charter does not envisage a standing army at the service of the Security Council to undertake military action under Article 42 of the Charter. Instead, under Article 43, member states are obliged to provide armed forces to be employed on the call of the Council to enforce international peace and order. Yet this duty is to be realized "in accordance with a special agreement or agreements."[204] To date, political and ideological rifts among the Great Powers prevented the establishment of such an army.[205] This not only paralyzed the whole collective security system during the Cold War period, but also hitherto precluded any possible enforcement action from being taken

---

200. *See* G. G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 2 (1956); F. H. HINSLEY, POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES 336 (1963). 201 During the Cold War, due to a lack of cooperation among the Big Powers, the Security Council made very little resort to the collective security measures. Mandatory sanctions were merely imposed twice: Southern Rhodesia in 1966 and South Africa in 1977. The use of force was explicitly authorized only in the case of Korea and, despite its limited character, in the Congo during the early 1960s. *See* T. G. WEISS ET AL., THE UNITED NATIONS AND CHANGING WORLD POLITICS 30-31 (2004); D. M. MALONE, THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 10 (2004).

202. *See* Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 330, 333-34 (2000).

203. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 108 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992).

204. EDWARD H. LAWSON ET AL., ENCYCLOPEDIA OF HUMAN RIGHTS 1492 (1996).

205. In 1992, Boutros-Ghali, the then UN Secretary-General expressed such a need as follows: "Under the political circumstances that now exist for the first time since the Charter was adopted, the long-standing obstacles to the conclusion of such special agreements should no longer prevail. The ready availability of armed forces on call could serve, in itself, as a means of deterring breaches of the peace since a potential aggressor would know that the Council had at its disposal a means of response. Forces under Article 43 may perhaps never be sufficiently large or well enough equipped to deal with a threat from a major army equipped with sophisticated weapons. They would be useful, however, in meeting any threat posed by a military force of a lesser order." The Secretary-General, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-Keeping*, 43, U.N. Doc. A/47/277=S/24111, (June 17, 1992), *available at* http://www.un.org/Docs/SG/agpeace.html.

against a powerful state.[206] It appears that military adventurism against non-tangible threats may only be exercised by the Great Powers. At the domestic level, in contrast, abused individuals, such as battered women, tend to resort to lethal force in non-confrontational settings in large part because they lack viable options to effectively counter the endless cycle of violence.

THE LEGAL STATUS OF THE PREVENTIVE WAR DOCTRINE: IS THERE AN EVOLVING CUSTOMARY NORM?

While the preventive war doctrine might be conceived as an attempt to modify the use of force discourse, such legal change must widely be supported to take effect.[207] Indeed, as stated in *Nicaragua*, "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law."[208] Currently, there are deep divisions among states as to the exact contours of the legal framework governing the use of force. Yet it is important to note that the majority of the international community does not accept the concept of anticipatory self-defence, let alone the vaguely formulated *preventive war* doctrine. In other words, there has been no significant indication that a new customary rule is evolving regarding this matter. In contrast, hegemonic use of military force received significant resistance from most nations (including the majority of western states), a great majority of international law scholars and the Secretary General Kofi Annan.[209] Although there have been some indications that states like Russia (against Chechen terrorism), China (against Taiwan), Iran (against the United States and Israel), North-Korea (against the United States), and Japan (against North Korea) do not disregard the possibility of employing anticipatory self-defence, it is still dubious whether they fully embrace the preventive war doctrine as articulated by the United States and its allies.[210]

Significantly, the stance of the ICJ has essentially remained the same since the September 11 attacks. In fact, in its decisions and advisory opinions, the ICJ avoided giving explicit opinions as to the legality of *preventive* force.[211] In the *Wall* advisory opinion, the ICJ, making reference to its *Nicaragua* decision and the U.N. Declaration on Friendly Relations, preserved its strict reading of Article 51.[212] Again, in *Oil Platforms*, the ICJ clearly maintained its

206. *See* JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? 21-23 (2006).

207. *See* Simpson & Wheeler, *supra* note 55, at 123.

208. Military and Paramilitary Activities, *supra* note 50, ¶ 207.

209. *See* Lobel, *supra* note 184, at 309; *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, *available at* http://news.bbc.co.uk/2/hi/middle_east/3661134.stm.

210. *See* Reisman & Armstrong, *supra* note 53, at 538-46; Gray, *supra* note 192, at 566.

211. *See* Gray, *supra* note 192, at 568.

212. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, at 87-88 (July 2004), *available at* http://www.icj-cij.org/docket/files/131/1671.pdf; Military and Paramilitary Activities, *supra* note 50, ¶¶ 187-

approach by requiring the United States to prove Iran's responsibility for the attacks (the United States failed to prove this to the court's satisfaction), which had to be of such a nature to qualify as armed attacks within the meaning of Article 51.[213]

In the case of *DRC v. Uganda*,[214] the court unfortunately expressed no view as to the legality of military force undertaken against an anticipated attack on the ground that the parties merely relied "on the right to self-defence in the case of an armed attack which has already occurred."[215] The court nevertheless noted that while Uganda claimed to act in self-defence, it had failed to prove that DRC was actually involved in armed attacks against Uganda[216] and/or that DRC was in support of anti-Ugandan rebel groups.[217] The court further observed that Uganda's expressed objectives were essentially "preventative," that is, they were "to ensure that the political vacuum did not adversely affect Uganda, to prevent attacks from 'genocidal elements' . . . to safeguard Uganda from irresponsible threats of invasion, [and] to 'deny Sudan the opportunity to use the territory of the DRC to destabilize Uganda.'"[218] The court thus concluded that the preconditions for the exercise of self-defence did not exist in the circumstances of the case:[219] "*Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down.* It does not allow the use of force by a state to protect perceived security interests beyond these parameters. *Other means are available to a concerned state*, including, in particular, recourse to the Security Council."[220]

The unilateral use of force against Iraq also attracted serious criticism from Kofi Annan. In his annual address to the General Assembly, six months after Operation Iraqi Freedom, the Secretary-General expressed his concerns as to the preventive employment of force:

> [It is argued that] States are not obliged to wait until there is agreement in the Security Council. Instead, they reserve the right to act unilaterally, or in ad hoc coalitions. This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years. . . . The United Nations is by no means a perfect instrument, but it is a precious one. . . . [It aims] to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to re-establish

---

90.

213. Oil Platforms, *supra* note 144, ¶ 51.

214. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19).

215. *Id.* at 124.

216. *Id.*

217. *Id.* at 228.

218. *Id.* at 125.

219. *Id.* at 126.

220. *Id.* at 127-28 (emphasis added).

> the basic conditions for justice and the rule of law, and to promote social progress and better standards of life in larger freedom. The world may have changed . . . but those aims are as valid and urgent as ever.[221]

In February 2003, Annan appointed a panel of eminent experts to assess common threats to collective security and the appropriateness of the unilateral use of force. The resultant report on Threats, Challenges and Change announced that although international law does not prohibit anticipatory military action taken against an imminent threat,[222] the main question arises where the threat is not imminent but claimed to be real. The report clearly stated that:

> [I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option. . . . For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all. . . . We do not favour the rewriting or reinterpretation of Article 51.[223]

A U.N. World Summit, held in September 2005, considered the controversial issue of whether the current collective security system should be modified. It was unambiguously underlined that "the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security."[224] Similarly, "the authority of the Security Council to mandate coercive action to maintain and restore international peace and security" was reaffirmed.[225]

---

221. The Secretary-General, *Address to the General Assembly, delivered to the General Assembly* (Sept. 23, 2003), *available at* http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm.

222. The Secretary-General, *Note by the Secretary-General on the Follow-up to the Outcome of the Millennium Summit*, ¶ 188, *delivered to the General Assembly*, U.N. Cov. A/59/565, (Dec. 2, 2004), *available at* http://www.un.org/secureworld/report.pdf.

223. *Id.* ¶¶ 190-92 (emphasis omitted).

224. GENERAL ASSEMBLY, RESOLUTIONS AND DECISIONS ADOPTED BY THE GENERAL ASSEMBLY 15 (2003).

225. High-Level Plenary Meeting, Sept. 14-16, 2005, *2005 World Summit Outcome*, ¶ 79,

The inhuman consequences of modern warfare, widespread practice of secret detentions, "enhanced interrogation techniques," and denial of fundamental human rights, particularly the outrages of Abu-Ghraib and Guantanamo, have similarly generated worldwide protests and disapproval of the preventive war doctrine. This is also a crucial element affecting the course of customary law creation. In other words, the stance of the United Nations, the state practice and the ICJ decisions are not the only relevant factors in assessing the customary evolution of the law on the use of force; non-state actors also have an important impact upon the process of customary norm formation.[226] Indeed, universal protests against the hegemonic use of force undeniably influence the notion of *opinion necessitates,* an essential component for the crystallization of a customary norm.[227]

CONCLUSION

The main rationale of the temporal requirement, common to both criminal and international law, lies in the legitimate purpose of preventing unnecessary killings. Self-defence is a *justified* usage of deadly force against a present or imminent aggression; i.e. it is not an entitlement to cause irrevocable harm whenever the defendant subjectively believes in the necessity of lethal action to *prevent* an anticipated threat that might ripen into a real threat sometime in the future. Furthermore, the requirement of imminence may not merely be regarded as a "proxy" for establishing necessity; in contrast, imminence, necessity and proportionality are closely connected to one another and are meant to ensure that the private force is only resorted to when national/international authorities are not in a position to prevent an illegal aggression, and that the defensive lethal force is not abused or used for other motives rather than for defensive purposes. By requiring the would-be victim to take alternative measures to deal with an incipient threat, the imminence rule also ensures that a just balance is struck between the rights of the aggressor and defender.

The use of private aggression is too serious a phenomenon to be left to subjective judgments. Hence, within the context of battered women, it is to be reiterated that the solution does not lie in abolishing the legal categories that provide safeguards against arbitrary killings or vigilante actions. The institution of punishment is the prerogative of the state machine; battered women, in this sense, may not act as judges in their own causes and impose the death penalty upon the abusers who may well be acting under excusing or

---

U.N. Doc. A/RES/60/1, (Sept. 20, 2005).

226. *See* Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib,* 37 CASE W. RES. J. INT'L L. 449, 451-52 (2006); Jens Meierhenrich, *Analogies at War,* 11 J.CONFLICT & SEC. L. 1, 28-29 (2006); Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq,* 30 YALE J. INT'L L. 431, 468 (2005).

227. Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force,* 16 MINN. J. INT'L L. 407, 425 (2007).

mitigating conditions, or who are likely to receive a less severe punishment, even in jurisdictions where the death penalty still exists. Therefore, focus should be shifted to the negligent state institutions that do not provide effective protection to the victims of abuse.

At the international level, the motives of the United States in attempting to alter the self-defence doctrine differ fundamentally from those of the battered women, for the former has never been the object of constant abuse or violence. Instead, the primary motive of the United States, in seeking to relax the traditional contours of self-defence, lies in its desire to have the upper hand in international relations by employing unilateral force as a potential instrument of national policy. However, preventive war doctrine has not hitherto received any significant international approval; rather, it aroused a legitimate concern that the doctrine might undermine the hard-won international accomplishment in abolishing warfare, which, as the preamble of the U.N. Charter stresses, has so far brought nothing but "untold sorrow to mankind."[228] If the United States and its allies are sincerely concerned about the ineffectiveness of international law in the face of new threats, then it is worth concluding with Habermas, who offers not only a practical, but also a durable solution:

> In the face of enemies who are globally networked, decentralized, and invisible, the only effective kinds of prevention will be on other operative levels. Neither bombs nor rockets, neither fighter jets nor tanks will be of any help. What will help is the international networking of flows of information among intelligence services and prosecutorial authorities, the control of flows of money, and the rooting out of logistical supplies. . . . Other dangers which arise from failures of negligence in non-proliferation policies (concerning nuclear, chemical, and biological weapons) are at any rate better handled through stubborn negotiation and inspection than with wars of disarmament. . . .[229]

228. U.N. Charter pmbl.

229. Jurgen Habermas, *Interpreting the Fall of a Monument*, 4 GER. L.J. 701, 705-06 (2003).

THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS LAW

Jamie Mayerfeld*

INTRODUCTION

International human rights law is gaining strength. Its tenets have been absorbed into the discourse of international politics.[1] It has mobilized successful resistance to the organized violence of state and non-state actors, and contributed to democratic consolidation.[2] Its provisions are increasingly incorporated into domestic law.[3] Of course, human rights violations persist on a massive scale – a reminder that, despite the impressive achievements of the past few decades, much work remains.

Yet international human rights law has drawn increasing criticism, not least from Americans. It has been attacked on various grounds – as an imperialist project threatening local values and traditions,[4] as a naïve quest oblivious to the realities of power politics,[5] as an infringement of state

---

* Associate Professor of Political Science; Adjunct Professor of Law, Societies and Justice, University of Washington. A Laurance S. Rockefeller Fellowship from the Princeton University Center for Human Values enabled me to write this Article, an early version of which I presented to Princeton's Program in Law and Public Affairs. I am sincerely grateful to both institutions. I thank all those who gave me their comments. I owe the greatest debts to Laura Back, Charles Beitz, Paul S. Berman, Barbara Buckinx, Laura Dickinson, George Kateb, Stanley Katz, Alan Patten, Deborah Pearlstein, Jennifer Rubenstein, Kim Scheppele, William Talbott, Jack Turner, Wibren van den Burg, and John Wallach.

1. *See, e.g.*, JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS ch. 1 (3rd ed. 2007); Charles R. Beitz, *Human Rights as a Common Concern*, 95 AM. POL. SCI. REV. 269 (2001) (discussing different conceptions of human rights in international law).

2. *See* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink, eds., 1999) [hereinafter THE POWER OF HUMAN RIGHTS]; NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54(2) INT'L ORG. 217 (2000).

3. *See* FUNDAMENTAL RIGHTS IN EUROPE: THE ECHR AND ITS MEMBER STATES, 1950-2000 (Robert Blackburn & Jörg Polakiewicz eds., 2001) [hereinafter FUNDAMENTAL RIGHTS IN EUROPE] (discussing how the European Convention on Human Rights has been incorporated into individual European states); Christopher Harland, *The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents*, 22 HUM. RTS. Q. 187, 257 (2000) (providing table listing which countries have incorporated the ICCPR into their domestic law).

4. *See* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (Admantia Pollis and Peter Schwab, eds., 1979).

5. *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 13 (2005).

sovereignty,[6] and as a denial of democracy.[7] In this Article, I do not respond to all these objections, but instead focus on the last one, which I call the democracy objection. This objection sometimes contains echoes of the others, especially the sovereignty objection. So the other objections also need to be addressed, but I leave that task for another day.[8]

The democracy objection rests on two broad arguments, not always distinguished. The first is that international human rights law is insufficiently responsive to the popular will. Critics charge that the treaty-drafting process is cut off from the input of ordinary citizens[9] and that too much power is placed in the hands of international judges.[10] They also lament the indeterminate character of customary international law, which, they argue, leaves too much discretion to judges and too much influence to legal scholars.[11] In sum, international human rights law is said to bypass the democratic processes that, at least ideally, guide the formation of domestic law.

Whether and to what extent international human rights law excludes popular input is a matter for debate. As Oona Hathaway points out, the ratification of treaties in almost all countries follows a procedural path similar to that of domestic legislation,[12] so popular control over the adoption of treaty law varies according to the democratic attributes of individual states.[13] (In the

---

6. *See* JEREMY A. RABKIN, LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2005).

7. *E.g.*, Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1986 (2004); Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 93 (2000); RABKIN, *supra* note 6; ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 10 (2003); David B. Rivkin, Jr., & Lee A. Casey, *The Rocky Shoals of International Law*, NAT'L INT. 62 (2000-01) 35; Madeline Morris, *The Disturbing Democratic Defect of the International Criminal Court*, 12 FINNISH Y.B. INT'L L. 109, 113 (2001). I will concentrate my analysis on the arguments of Rubenfeld and Anderson.

8. For a response to several of these objections, see Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 5).

9. *See* Rubenfeld, *supra* note 7 at 2007-08; Anderson, *supra* note 7 at 116-19.

10. *See* Rubenfeld, *supra* note 7 at 2023; BORK, *supra* note 7.

11. *See* BORK, *supra* note 7 at 38.

12. *See* Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 125 n. 33 (2007).

13. This observation is in turn subject to at least two qualifications. *See id.* at 126-27, 137-40. First, treaties are usually presented to legislatures on a take-it-or-leave-it basis without opportunities for amendment, except to the extent that reservations, understandings, and declarations are permitted. Note, however, that in democracies the people exercise ultimate control over the selection of delegates charged with drafting treaties in the first place. Moreover, refusal to ratify can lead to a renegotiation of the terms of the treaty, a recurrent pattern in the evolution of the European Union. The second qualification is that powerful states may sometimes use strong-arm tactics to make weaker states ratify (or not ratify) treaties. But powerful states have also pressured weaker states when it comes to the passage of ordinary legislation. No simple contrast distinguishes the extent of popular control over domestic versus international law. *See id. See also* Andrew Moravcsik, *In Defence of the 'Democratic Deficit':*

United States, treaty ratification follows a different path from federal legislation, bypassing the House of Representatives, but requiring consent from two-thirds of the Senate.[14] The upshot is that treaty ratification is *more difficult* than passing ordinary legislation.) International courts owe their authority to treaties, and thus (at least in democratic countries) to the consent of the people's representatives.[15] Customary international law rests ultimately on the practices and statements of public officials, who, in democracies, owe their position to the democratic process.[16]

A second argument for the democracy objection, however, is invulnerable to such observations. This is the belief that the nation-state is the necessary locus of democracy. International human rights law allows outsiders to participate in decisions that (on this view) should be left only to us, members of the nation-state. The problem, therefore, resides in the very premise of international human rights law: the idea of a global human rights legal code that can be applied across national jurisdictions and should override contrary national laws and policies. In the critics' view, this idea is a standing affront to the democratic right of nation-states to define and redefine human rights for themselves.[17]

These two arguments, woven together, find forceful expression in a recent article by Yale Law School professor Jed Rubenfeld. "The entire contemporary discourse of 'international human rights,'" he writes, "is predicated on the idea that there exists an identifiable body of universal law, everywhere binding, requiring no democratic provenance. In this sense, contemporary international law is deeply antidemocratic."[18] Kenneth Anderson, a law professor at American University, finds in international human rights law a lack of popular consent and democratic legitimacy and asks rhetorically, "We count democratic legitimacy to be the *sine qua non* of legitimacy of the sovereign national state, but why, I wonder, do we suddenly jettison it when it comes to the international system[?]"[19] He describes the effort to empower international human rights law as "international legal

---

Reassessing Legitimacy in the European Union, 40 J. COMMON MKT. STUD. 603 (2002) (arguing that the structure of the European Union is consistent with existing advanced industrial democracies).

14. U.S. CONST. art. II, § 2, cl. 2.

15. Some critics argue that the International Criminal Court (ICC) deviates from this rule, because it enjoys limited jurisdiction over non-party nationals. I defend the democratic credentials of the ICC below. *See infra* text accompanying notes 120-122.

16. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 41-50 (3d ed. 1999). Furthermore, it is widely held that states can exempt themselves from customary international law by means of early and persistent objection. *See* ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 7 (2005). Not all jurists accept this view, however. *See* ANTONIO CASSESE, INTERNATIONAL LAW 163 (2d ed. 2005).

17. In addition to the views of Rubenfeld and Anderson, discussed below, see also RABKIN, *supra* note 6.

18. Rubenfeld, *supra* note 7, at 1976.

19. Anderson, *supra* note 7, at 103.

imperialism," because it seeks "the establishment of an international system that is genuinely constitutionally supreme with respect to both nation states and the people that, in the best of cases, they democratically represent."[20]

Such claims recall familiar criticisms of judicial review, specifically the power of domestic courts in many countries to overturn legislation held to violate constitutional rights.[21] In both cases, the complaint is that the popular will is thwarted, because important decisions are removed from the ordinary legislative process. Though some critics of international human rights law do not extend their objections to domestic judicial review,[22] the arguments against both institutions are often very similar.[23] In this Article I seek to defend both institutions against the charge of being undemocratic.

Debates over the legitimacy of international human rights law assume new importance after the well-publicized human rights abuses by the United States in the "Global War on Terror." Hundreds, if not thousands, of people from around the world have been secretly detained by U.S. officials, kept in incommunicado detention without charge, and subjected to inhuman treatment. Many have been tortured. Under the George W. Bush administration, many faced the prospect of lifelong imprisonment without trial,[24] while others faced trial before military commissions lacking in basic due process protections, and could be kept in detention despite being acquitted or completing their sentence.[25] U.S. courts have not stopped these policies.[26] They even failed for

---

20. *Id.* at 104. Here Anderson speaks of "international law" in general, but the examples used in his article are two human rights treaties: the Ottawa Convention to Ban Landmines and, secondarily, the Rome Statute of the International Criminal Court. *See id.* at 92.

21. Many of these criticisms take their cue from Alexander Bickel's observation of what he called the "countermajoritarian difficulty." *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962). For an excellent rebuttal of the countermajoritarian critique, see Scott E. Lemieux & David J. Watkins, *Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory,* 41 POLITY 30 (2009).

22. *E.g.*, Rubenfeld, *supra* note 7, at 1993-99. *But see* BORK, *supra* note 7 (decrying what he sees as a similar pattern of judicial activism in both international human rights law and judicial review).

23. For example, see Rubenfeld, *supra* note 7, whose arguments bear a striking resemblance to Jeremy Waldron's critique of judicial review. *See* JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993).

24. For an outstanding overview, see JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006). Amnesty International and Human Rights Watch have produced excellent reports on the United States' detention policies. *See* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2008, STATE OF THE WORLD'S HUMAN RIGHTS (2008), http://thereport.amnesty.org/eng/Homepage (last visited Nov. 24, 2008); HUMAN RIGHTS WATCH, U.S. TORTURE AND ABUSE DETAINEES (2004), http://hrw.org/campaigns/torture.htm (last visited Nov. 24, 2008).

25. *See* David Glazier, *A Self-Inflicted Wound: A Half Dozen Years of Turmoil Over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008).

26. Despite dealing some significant defeats to the Bush administration, U.S. courts have not prohibited the CIA's use of "enhanced interrogation techniques" (the standard euphemism for methods widely regarded as torture). Nor have they put an end to indefinite detentions or

over three years to halt the incommunicado detention and apparent torture of American citizen José Padilla, held on U.S. soil.[27] For good measure, Congress passed a law in the fall of 2006 that restricts the ability of U.S. courts to rule on the detention or treatment of foreign inmates accused of terrorism, and that, by introducing an indecipherable new definition of war crimes, gives C.I.A. officials effective impunity for many kinds of torture.[28]

A major reason why the government was able to implement these policies is that the United States has not bound itself to international human rights law in any but the loosest sense.[29] The incorporation of such law into its domestic legal system is one of the steps the United States must take if it hopes to restore human rights and place them on a secure footing. This eminently practical reason for strengthening international human rights law would be offset by the principled objection that such law subverts democracy. There is a lot at stake,

---

the procedurally deficient military commissions. A complicated legal journey led to the landmark ruling of the Supreme Court in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), that inmates at Guantánamo Bay have a constitutional right to habeas corpus. The decision was not issued until six and a half years after inmates started arriving in Guantánamo Bay. The ruling, though clearly helpful to the Guantánamo Bay inmates, does not specify which law should govern their detention ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined"), and its application to detainees held in overseas locations other than Guantánamo Bay remains unclear. *Id.* at 2277. By January 2009, only three of the approximately 250 remaining Guantánamo prisoners had been released as a result of *Boumediene*, and their release came more than six months after the Supreme Court ruling. Peter Finn, *Three Algerian Detainees Set for Transfer to Bosnia*, WASH. POST, Dec. 16, 2008, at A-2.

27. Warren Richey, *U.S. Government Broke Padilla Through Intense Isolation, Say Experts*, THE CHRISTIAN SCIENCE MONITOR, Aug. 14, 2007, at 11.

28. Military Commissions Act, Pub. L. No. 109-366, 7 Stat. 2600 (2006). For a discussion of the law, *see* Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 107, 135-36 (2007). In *Boumediene v. Bush, supra* note 26, the Supreme Court restored the habeas corpus rights of Guantánamo Bay inmates, but did not address the numerous other court-stripping provisions of the Act. As this Article goes to press in early 2009, President Barack Obama has recently issued executive orders banning torture by the C.I.A., closing C.I.A. prisons, rejecting George W. Bush administration legal opinions on interrogation, requiring access by the International Committee of the Red Cross to all detainees in U.S. military custody, and mandating the closure of Guantánamo Bay detention center within one year. Barack Obama, Exec. Order – Ensuring Lawful Interrogations (Jan. 22, 2009), available at <http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/> (last visited Jan. 31, 2009); Barack Obama, Exec. Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/ (last visited Jan. 31, 2009). In addition, President Obama asked prosecutors to halt military commission trials for six months while the use of such trials is reconsidered. Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantánamo*, WASH. POST, Jan. 21, 2009, at A-2. These dramatic reforms occurred neither because of court order nor congressional legislation, but because a new president assumed office more than seven years after the abuses started. Had a different president been elected in 2008, the reforms easily might not have been adopted. Moreover, the executive orders by themselves cannot stop future administrations from resuming the abuses in the future.

29. *See* Mayerfeld, *Playing by Our Own Rules, supra* note 28.

therefore, in our evaluation of this objection. Does it have any merit?

I shall argue that it does not.[30] Very briefly: international human rights law is not undemocratic, because it leaves ample room for popular self-government. The policies barred by international human rights law are policies that governments should not consider anyway, so their removal from legislative consideration represents no loss for democracy. There is no "democratic" right for legislatures to enact or even consider policies that violate human rights. Indeed, as I shall argue, the best conception of democracy is one with a built-in commitment to human rights; therefore, international human rights law, by reinforcing human rights, enhances democracy. Critics exaggerate the extent to which international human rights law has developed without state consent.[31] But their deeper mistake is to suppose that consent is morally required for the prohibition of human rights violations.

The difficulty with my position, some will say, is that it ignores disagreement about human rights. I do not deny such disagreement, nor that it poses a problem. But, as I argue below, the fact of disagreement is not a reason to reject international human rights law, or judicial review for that matter. The constitutionalization of human rights through domestic and international law, backed by judicial review, offers the best known method for responding to disagreements about human rights.

My goal is not to defend every provision of existing international human rights law, but rather its mission — the protection of human rights through international law. Actual international human rights law can fail its mission in different ways. First, some human rights treaties may include obligations that, even if desirable, do not correspond to *human* rights in the true sense. States may legitimately opt out of these obligations at the time of ratification. Some provisions, moreover, may actually threaten genuine human rights. The International Covenant on Civil and Political Rights (ICCPR) arguably goes astray in demanding a general legal prohibition on hate speech.[32] Not only is it questionable whether there is such a human right, but the prohibition, framed this broadly, may even entail the violation of human rights.[33] To take another example, the assertion in Common Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[34] that "all

30. For other arguments defending the same view, see Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, INT'L ORG. (forthcoming); and Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government* 20 ETHICS & INT'L AFFAIRS 477 (2006).

31. *See, e.g., supra* notes 12-16 and accompanying text.

32. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR].

33. JOHN STUART MILL, ON LIBERTY ch. 2 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859). *See also* George Kateb, *The Freedom of Worthless and Harmful Speech, in* LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR (Bernard Yack, ed., 1996).

34. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A

peoples have the right of self-determination" may seem like an intrusion into a pair of documents avowedly dedicated to *human* rights, and may be too easily invoked to override the actual human rights of individual persons.[35]

Second, international human rights law may adopt flawed means of implementation. The former UN Human Rights Commission (the "Commission") made monumental contributions to human rights, above all by overseeing the creation of the Universal Declaration of Human Rights, but also through its numerous thematic and country reports that shed light on human rights abuses throughout the world, and through the resolution process that brought public pressure to bear on repressive governments. Its impact was limited, however, by a UN voting system that allowed notorious human rights abusers, such as China, Saudi Arabia, Zimbabwe, Libya, and Sudan, to sit on the 53-member body.[36] These countries, not surprisingly, succeeded in blocking condemnations of many countries responsible for severe abuses. Unfortunately, the new Human Rights Council, intended to remedy the weaknesses of the Commission, may suffer from some of the same problems.[37]

So the existing body of international human rights law is not without flaws, and to the extent that the flaws hinder the promotion of human rights, they render international human rights law less democratic. But the flaws can be repaired; international human rights law is not undemocratic *per se*. We make it more democratic by strengthening it and bringing it into line with its stated mission.

Part I of this Article discusses the meaning and basis of human rights. I identify what I believe is a persuasive rationale that enjoys widespread (though not universal) agreement. Part II outlines the argument for the harmony of international human rights law and democracy. Since this argument presumes a conception of democracy with a built-in commitment to human rights, I devote the rest of the paper to defending such a conception of democracy. Part III argues that this conception is linguistically and philosophically respectable, while Part IV argues that it is the conception of democracy that we ought, morally, to adopt. I am especially interested in showing that persistent disagreement about human rights is no reason for rejecting either international human rights law or judicial review.

(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm [hereinafter ICESCR].

35. ICCPR, *supra* note 32, at art. 1; ICESCR, *supra* note 34, at art. 1 (emphasis added). These claims may be contested. With regard to Article 1, Common Article 5 helpfully adds that "[n]othing in the present Covenant may be interpreted as implying . . . 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." ICCPR, *supra* note 32, at art. 5; ICESCR, *supra* note 34, at art. 5. Moreover, collective self-determination has often proven a necessary bulwark for human rights. Yet history records too many occasions on which it has been used to justify the violation of human rights.

36. *See* DONNELLY, *supra* note 1, at 83.

37. Warren Hoge, *Dismay over New U.N. Human Rights Council*, N.Y. TIMES, March 11, 2007, at 18, *available at* http://www.nytimes.com/2007/03/11/world/11rights.html.

Today, international human rights law encompasses a large body of treaty and customary law. [38] A primary source of such law continues to be the Universal Declaration of Human Rights, adopted by the UN General Assembly without dissent in 1948.[39] Although the Declaration is not a treaty, its language has been widely reproduced in national constitutions and international treaties, and many of its provisions have acquired the status of customary international law. Its wisdom and eloquence give it lasting authority. Contemporary human rights treaties can be grouped into different categories. The UN-based treaties create formal legal obligations for ratifying states and establish international committees to monitor compliance. [40] The power of these committees is limited, however, because of staff and resource constraints and because the committees' views are not legally binding. Regional human rights treaties, by contrast, establish supranational courts with the power to issue legally binding judgments.[41] The European Convention on Human Rights, in particular, has acquired a remarkable degree of power, partly because of the energy of its Court and partly because its provisions have been incorporated into the

38. Among many excellent textbooks, see HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (3rd ed. 2007).

39. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights/html [hereinafter Universal Declaration of Human Rights].

40. These treaties include: ICCPR, *supra* note 32; ICESCR, *supra* note 34; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (Dec. 10, 1984), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm [hereinafter Torture Convention]; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Dec. 18, 1979), *available at* http://www.unhchr.ch/html/menu3/b/e1cedaw.htm; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966) 660 U.N.T.S. 195 (Dec. 21, 1965), *available at* http://www.unhchr.ch/html/menu3/b/d_icerd.htm; Convention on the Rights of the Child, G.A. Res. 44/25 (Nov. 20, 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm [hereinafter Convention on the Rights of the Child]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990) (Dec. 18, 1990) *available at* http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm; Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/Res/61/611 (Aug. 25, 2006).

41. See the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, Nov. 4, 1950), 312 E.T.S. 5, *as amended by* Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 Sept. 1953 (Protocol No. 3 *on* 21 Sept. 1970, Protocol No. 5 *on* 20 Dec. 1971, Protocol No. 8 *on* 1 Jan 1990, Protocol No. 11 *on* 11 Jan 1998) [hereinafter the European Convention on Human Rights]; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. In 2004 a new court was established to enforce provisions of the African Charter on Human and Peoples' Rights. African [Banjul] Charter on Human and Peoples' Rights, Jun. 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Jun. 10, 1998, O.A.U. Doc. OAU/LEG/AFCHPR.

domestic legal systems of most member states.[42] Human rights law is reinforced by the rich tradition of international humanitarian law, whose sources include the Nuremberg and Tokyo trials following World War II, the 1948 Genocide Convention, the 1949 Geneva Conventions and their Protocols (1977), the war crimes tribunals for Rwanda and the former Yugoslavia, and the Rome Statute of the International Criminal Court (1998).

This Article confines its attention to human rights law and does not address the democratic credentials of international law in general.[43]

PART I: HUMAN RIGHTS

There is a rich contemporary literature on the meaning and justification of human rights.[44] In this section I articulate what I believe to be a set of widely (though not universally) held beliefs underlying the human rights idea. I aim to show that human rights are grounded in a set of basic principles that can be shared by people holding diverse philosophical and religious doctrines.

Human rights are rights that we possess because we are human. They are therefore universal, the common possession of all human beings. Their universality exerts something of a downward pressure on their content: we can only identify as a human right that which we are prepared to acknowledge as the entitlement of all human beings. Human rights are also understood to be important, their fulfillment an urgent matter, so that other projects,

---

42. *See* FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 3; MICHAEL D. GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2007). Other factors have also contributed to the Convention's impact. *See* STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 28-30 (2006).

43. For a discussion showing how international law can sometimes undermine both human rights and democracy, see Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency, in* THE MIGRATION OF CONSTITUTIONAL IDEAS 347 (Sujit Choudhry ed., 2006). For a discussion of how to balance the claims of domestic democracy and international law, see Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement, in* THE MIGRATION OF CONSTITUTIONAL IDEAS, 256 (Sujit Choudhry ed., 2006).

44. The following list is only a sample: CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS (forthcoming); SEYLA BENHABIB, THE RIGHTS OF OTHERS (2004); ALLEN E. BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW ch. 3 (2004); Joshua Cohen, *Minimalism About Human Rights: The Best We Can Hope For?*, 12 JOURNAL OF POLITICAL PHILOSOPHY 190 (2004); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2nd ed. 2007); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1979); JAMES GRIFFIN, ON HUMAN RIGHTS (2008); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (Amy Gutmann ed., 2001); GEORGE KATEB, THE INNER OCEAN (1992); Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHILOSOPHY AND PUBLIC AFFAIRS 315 (2004); JAMES NICKEL, MAKING SENSE OF HUMAN RIGHTS (2nd ed. 2007); BRIAN OREND, HUMAN RIGHTS: CONCEPT AND CONTEXT (2001); HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (2d ed. 1996)WILLIAM J. TALBOTT, WHICH RIGHTS SHOULD BE UNIVERSAL? (2005); Charles Taylor, *Conditions of an Unforced Consensus on Human Rights* in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer and Daniel A. Bell eds., 1999); and JEREMY WALDRON, LIBERAL RIGHTS (1993).

commitments, and attachments must give way whenever they conflict with human rights.

Human rights are concerned with the interests of individual persons; they adopt the perspective of the individual.[45] This does not imply individualism of a rigid or extreme variety, since human rights also protect a wide range of social activity. But human rights value social groups because of their benefits to people, rather than the other way round. The starting point is the vulnerability of the individual; the main object, to protect individuals from various kinds of harm. These harms are typically inflicted by groups, although one of the principal harms inflicted is to deprive individuals of the benefits and rewards of social life.

Human rights, despite their superficial variety, possess an underlying rationale. There is a point to human rights. If we look, for example, at the Universal Declaration of Human Rights and the entitlements asserted over the course of its thirty articles, we can perceive unifying themes and persistent concerns. I do not mean here to introduce anything intellectually abstruse or metaphysically controversial, just to elicit some general values that are reflected in, and rendered more concrete by, specific enumerations of human rights. These are familiar values, whose appeal is widely felt, although not everyone accords them the same degree of importance.

The following is an attempt to render the basic ideas that underlie human rights. The precise wording is unimportant: other people may prefer different formulations that convey the same general idea.

On the account I present, human rights may be tied to the following four principles:

1. Persons Have a Fundamental Interest in Security

There are certain fates which all people have an interest in avoiding. These include untimely death, severe injury, physical confinement, torture, terror, disease, chronic or severe pain, hunger, starvation, abandonment, forced isolation or separation, social humiliation, and lack of basic education and socialization. Everyone ought, as much as possible, to be protected from these evils. Of the various principles that support the human rights idea, this is the least contested.[46] It underlies some of the most firmly established human rights, such as the right not to be tortured, arbitrarily imprisoned, or extrajudicially executed. The main challenge – a partial one – is from those who deny the existence of socioeconomic rights, such as economic subsistence, social

45. For a cogent defense of this principle, see IGNATIEFF, *supra* note 44, at 63-77.

46. In Stuart Hampshire's words, "There is nothing mysterious or 'subjective' or culture-bound in the great evils of human experience, re-affirmed in every age and in every written history and in every tragedy and fiction: murder and the destruction of life, imprisonment, enslavement, starvation, poverty, physical pain and torture, homelessness, friendlessness. That these great evils are to be averted is the constant presupposition of moral arguments at all times and in all places...." STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 90 (1990).

security, and primary and secondary education.

2. *Persons Have a Fundamental Interest in Autonomy*

Everyone should be allowed to lead a life of their own choosing. They should be allowed to think their own thoughts, make their own plans, and choose their own company. The principle of autonomy recognizes that, once our most basic needs are guaranteed, individuals should be given considerable scope to define what is, for each, the most desirable life. In the world as a whole, belief in individual autonomy is somewhat less robust than belief in individual security. It encounters resistance from traditional cultures (which believe individuals should adhere to prescribed roles), conservative religious groups (which seek the legal enforcement of scriptural rules limiting religious freedom, sexual freedom, and women's freedom), and autocratic governments (which limit freedom of expression and association). When critics complain about the "Western" bias of human rights, they generally have in mind the importance attached to personal autonomy.

3. *Persons are Inviolable*

Persons may not be treated as means only. They cannot be used as a mere instrument for the pursuit of other goals, however worthy. That includes the goals of furthering other people's security or autonomy. In the example well known to moral philosophers, a surgeon may not kill a healthy man to save the lives of five other people in need of the man's transplanted organs. For the same reason, the police may not suspend due process and thereby condemn a certain number of innocent people to punishment, even if doing so will save a larger number of citizens from violent crime. Inviolability affirms our status as creatures *whom it is morally forbidden* to injure in certain egregious ways. Although philosophers debate how best to explain the principle of inviolability, it is politically indispensable for blocking the consequentialist rationales used by governments to justify all manner of cruelties.[47]

4. *Persons Deserve to be Recognized and Treated as Equals*

This principle goes beyond noting our equal inviolability and equal interest in security and autonomy. It upholds a claim to be accorded equal standing in the communities, especially the political communities, to which we belong. The principle excludes arbitrary or invidious discrimination, rigid social caste systems, and stigmatization of entire groups. It bars the political subordination of one group of people to another. Equality is incorporated into

47. For a thorough philosophical defense, see 2 F. M. KAMM, MORALITY, MORTALITY: RIGHTS, DUTIES, AND STATUS (1996). For a helpful discussion, see Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83 (1995).

most completed conceptions of human rights. It is emphasized by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,[48] as well as the 14th Amendment to the U.S. Constitution.[49] It is trumpeted in the classical human rights texts of John Lilburne,[50] John Locke,[51] and Thomas Jefferson.[52] An argument can be mounted (though I will not take time to do so here) that it is an essential political condition for the respect of one's other rights.

Security, autonomy, inviolability, and equality are the point of human rights. If we are asked, "Why human rights?", these are the principles we can invoke. Their powerful appeal explains why the idea of human rights is so difficult to resist.

This may not be the philosophically most airtight, or intellectually most rigorous, way of explaining human rights. Yet it has decisive virtues. Stealing from John Rawls, we may call this a "political conception" of human rights.[53] That is, it is an argument for human rights with which a great many people can agree, although their reasons for supporting it may vary.[54] Do we want a deeper, philosophically more solid justification? There are a great many to choose from: Kantianism, consequentialism, contractualism, intuitionism, conventionalism, social constructionism, communicative rationality, Aristotelian perfectionism, natural law, and any number of different religions. Each has been identified as providing the strongest basis for human rights. All have inspired discussions that enrich our understanding and appreciation of the values constitutive of what I am calling the "political conception." All the same, they tend to place heavy demands on our intellects, especially as they seek ever greater rigor – i.e., they can be quite difficult to understand – and each is premised on the denial of at least some of the others. Focusing on these deeper justifications can therefore bring uncertainty and dissension. It is worth recalling the existence of an overlapping consensus on a set of core principles that make sense of, help explain, and render coherent the human rights idea, even if the search for reasons behind the principles leaves us perplexed and divided.[55]

---

48. Universal Declaration of Human Rights, *supra* note 39, at art. 7; ICCPR, *supra* note 32, at art. 26.

49. U.S. CONST. amend. XIV, § 1.

50. JOHN LILBURNE, THE FREE-MAN'S FREEDOM VINDICATED (1646), *reprinted in* GREAT BRITAIN ARMY COUNCIL, PURITANISM AND LIBERTY: BEING THE ARMY DEBATES 317 (A. S. P. Woodhouse ed., 2d ed. 1950).

51. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 4 (C. B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

52. THE DECLARATION OF INDEPENDENCE pmbl., para. 2.1 (U.S. 1776).

53. JOHN RAWLS, POLITICAL LIBERALISM § 2, at 11-15 (1993). I leave aside Rawls' discussion of human rights in JOHN RAWLS, THE LAW OF PEOPLES § 10, at 78-81 (1999).

54. For defense of a similar approach, applied to legal reasoning in general, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

55. For a contrasting perspective, *see* Eunjung Katherine Kim, On the Significance of an Overlapping Consensus on Human Rights (2008) (Ph.D. dissertation, University of

The important point about the political conception of human rights is that it is self-sustaining.[56] It can stand on its own. It furnishes its own reasons to believe in human rights, and the reasons are satisfying ones. They are satisfying, even if some of us will want to buttress them with additional support from the particular, more controversial theoretical commitments we individually subscribe to. But no doubt, for others, the reasons are *fully* satisfying (or very nearly so). Such people will not feel a particular need to seek deeper reasons. Nor should any Socratic types among us take them to task for intellectual complacence. Perhaps belief in the sufficiency of the political conception – reliance on the values it expresses – possesses its own kind of wisdom.

The fact is that we do care about people's vulnerability to calamity and people's ability to make their own choices in life (not have others decide for them). We care that people be spared the worst griefs, terrors, and humiliations. We care that their capacity to think, decide, and act not be forced down by the overriding preferences of others. For some of us, this is a moral starting point; for others, an inference from prior moral, religious, or philosophical premises. In either case, these are robust convictions, difficult to shake, which we have little reason to doubt, and which supply their own motivating power.

As befits a political conception of human rights, nothing about this story is original. The idea that security and autonomy are the two fundamental interests underpinning human rights has been invoked by many thinkers, though in different ways. Ronald Dworkin writes, "Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived."[57] George Kateb echoes this idea, though he notes as a third feature of the human condition our capacity to treat others as equals:

> Public and formal respect for rights registers and strengthens awareness of three constitutive facts of being human: every person is a creature capable of feeling pain, and is a free agent capable of having a free being, of living a life that is one's own and not somebody else's idea of how a life should be lived, and is a moral agent capable of acknowledging that what one claims for oneself as a right one can claim only as an

---

Washington) (arguing that the justificatory force of an overlapping consensus is less than often supposed).

56. Rawls draws close to this idea when he uses the term "freestanding" to describe a political conception of justice. RAWLS, *supra* note 53, § 2, at 12-13. He means that in public discourse, reference need not be made to any of the comprehensive doctrines from which a political conception may be derived. We may go further and propose that a political conception need not be derived from any comprehensive doctrine at all.

57. DWORKIN, *supra* note 44, at 272.

equal to everyone else.[58]

The idea makes clear and immediate sense. Major human rights declarations and manifestos acquire a new coherence when read in the light of these premises, though inviolability and equality (ideas of equal intuitive power) are also prominent in such documents.

Of course not everyone believes in human rights. Personal freedom is the value most frequently contested – whether in the name of tradition, community, or religion. Some of the fiercest and most determined opposition comes from religious fundamentalists who believe themselves authorized to coerce others into scripturally required forms of belief and behavior. This is a tyrannical attitude, rightly resisted, because it forces other people to conform their own lives to religious views they do not share.[59]

The human rights idea, as has often been pointed out, is not a totalizing doctrine. It is not a comprehensive blueprint for what to think or how to live. It deliberately leaves many areas open for individual and collective judgment, valuing people's ability to decide important matters on their own. It is therefore compatible with a wide range of ethical, political, and religious viewpoints. All it does is erect certain limits: not to impose great suffering, and not to stifle individual autonomy. We should not be deterred when these limits are challenged in the name of "culture." Every culture is a mixture of good and bad; the aspects of a culture that authorize human rights violations are among the aspects that need to be reformed. To say that certain human rights should be rejected because they offend "our culture" cannot settle matters for any thinking person.

It is curious that arguments against universal human rights often draw inspiration from a principle central to the human rights idea. The principle is autonomy: living according to one's own values, not having other people impose their values on one, not being coerced. The idea of universal human rights is accused of being imperialistic or coercive. This gets things backwards. Because the human rights idea claims that individuals should be free to live as they choose, it is not properly described as coercive. It seeks a reduction of coercion in every walk of life. Insisting on universal human rights is not about imposing one's views on others. It is about stopping others from imposing *their* views on others.[60]

---

58. KATEB, *supra* note 44, at 5.

59. See the powerful arguments of JOHN LOCKE, A LETTER CONCERNING TOLERATION (John Horton & Susan Mendus eds., Routledge 1991) (1689); and RAWLS, POLITICAL LIBERALISM, *supra* note 53.

60. Self-described friends of human rights sometimes forget to uphold this logic. For example, it is wrong to make women, Muslim or not, wear a veil against their will. But a woman should be allowed without penalty to wear a veil at home, at school, and in the workplace if she so chooses.

PART II: THE HARMONY OF INTERNATIONAL HUMAN RIGHTS LAW AND DEMOCRACY

The thesis of this Article is that international human rights law strengthens rather than undermines democracy. The argument for this proposition may be briefly stated:

First premise: Democracy is a form of government founded on two principles: rule by the people and respect for human rights. Under democracy, laws emerge from a process of popular deliberation and decision-making, subject to the proviso that human rights are not violated.

Second premise: While domestic institutions such as a bill of rights, a representative legislature, an independent judiciary, and political checks and balances are necessary for the protection of human rights, they are not sufficient. Such institutions may fail for any number of reasons. International human rights law helps prevent such failure. It reinforces human rights at the domestic level.

Conclusion: Because international human rights law reinforces human rights, it serves one of the two constitutive features of democracy. Far from displacing democracy, it bolsters democracy.

In what follows, I shall devote most of my attention to the first premise in this argument. A full defense of the second premise lies beyond the bounds of this paper, but let me suggest, in broad outline, the form such a defense would take. There are several reasons why the defense of human rights may fail at the domestic level. (1) Necessary human rights safeguards have not been established. (2) The necessary safeguards are formally in place, but are not well developed. Relevant institutions lack adequate resources and staff, or personnel are not properly trained. Practices and procedures that defend human rights are not integrated into bureaucratic routines. (3) Political leaders subvert or undermine human rights safeguards in order to bolster their power or pursue otherwise unobtainable goals. (4) The voting public, media, and elites demonstrate weak support for, or poor understanding of, human rights. Consequently, they mount little resistance to systematic human rights violations or the dismantling of human rights safeguards. (5) Domestic institutions do not cope adequately with the international dimension of human rights. They do not prevent foreigners from violating the human rights of citizens and residents. Or they do not restrain the government and citizenry from violating the human rights of foreigners. (6) Perpetrators of human rights crimes are not brought to justice before domestic courts.

International human rights law helps to address these problems. It bestows added authority on human rights, and becomes a resource for educating citizens, bureaucrats, and elites about the value and significance of human rights. It gives states a formal obligation to institute human rights safeguards, and to improve the functioning of such safeguards once established. (The latter

goal is promoted by devices such as the reporting mechanism of the UN-based treaties and the rulings of regional human rights courts.)[61] It identifies gaps in the domestic human rights regime that national law (even in relatively free societies) may have overlooked.[62] It raises the costs to leaders who remove human rights safeguards or systematically violate human rights.[63] It withdraws impunity from major human rights violators, and provides a remedy for individuals whose rights have been violated by foreign governments.[64]

Some people may deny that international human rights law is effective.[65] This view, even if true, would not invalidate the *project* of international human rights law, just so long as we can identify reforms that would make it effective.[66] But the claim is not plausible anyway: the indisputable impact of the European Convention on Human Rights is a lesson in what international human rights law is capable of achieving. The effectiveness of international human rights law is a vast and complex subject, our understanding of which is still in its infancy. By and large it has exerted most influence on states that take it most seriously – those which ratify human rights treaties without crippling reservations, scrupulously adhere to their treaty commitments, and incorporate them into domestic law.[67] That these states' human rights records are already comparatively good does not show that international human rights law is superfluous, for there may still be room for significant improvement, and, moreover, backsliding is deterred. What it shows is that international human rights law furthers the *domestic* purposes of states that are genuinely committed to human rights.

For purposes of this Article, let us assume as true the second premise of my argument – that international human rights law makes, or can make, important contributions to the defense of human rights. The first premise — that respect for human rights is a constitutive element of democracy — is likely to prompt wider skepticism. I will use the rest of this Article to defend it. I will argue that it presents a conception of democracy that is both linguistically

---

61. *See* SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); GREER, *supra* note 42.

62. FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 3.

63. *See* THE POWER OF HUMAN RIGHTS, *supra* note 2.

64. These are among the functions of the International Criminal Court. *See* Jamie Mayerfeld, *The Mutual Dependence of External and Internal Justice: The Democratic Achievement of the International Criminal Court*, XII FINNISH Y.B. INT'L L. 71 (2001).

65. Oona A. Hathaway raises doubts about the effectiveness of international human rights law in her article, *Do Human Rights Treaties Make a Difference?* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). For criticisms of Hathaway's article, see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003). For a sustained defense of the effectiveness of international human rights law, see BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (forthcoming Jul. 31, 2009).

66. Hathaway herself offers proposals to this effect. Hathaway, *supra* note 65, at 2020-25.

67. DONNELLY, *supra* note 1, at 87-88.

reasonable and morally attractive.

PART III: HUMAN RIGHTS AS PART OF THE DEFINITION OF DEMOCRACY

The claim, to repeat, is that democracy rests on two principles: popular self-government and respect for human rights. For convenience, I shall sometimes refer to this as the "compound conception of democracy." This understanding of democracy is not particularly exotic. "Majority rule plus individual rights" is a familiar shorthand. Political scientists who study democracy in comparative perspective not infrequently include both components in their definition of the term.[68] It is striking that the measure of democracy most frequently used by scholars of comparative politics is the Freedom House ranking of countries as "free, partly free, or not free" – a ranking based in equal measure on political rights and civil liberties.[69] The former refer to rights of political participation. The latter refer to individual rights that face possible violation by governments, even popularly elected ones.

So the compound conception of democracy does not depart notably from existing usage. The main revision is that it refers to "human rights" rather than "civil liberties." If human rights are thought to include social and economic rights as well as civil and political rights, the revision may seem significant. My own view, though I do not defend it here, is that human rights *should* include social and economic rights such as economic subsistence, education, and dignified conditions of work.[70] But the revision does not make a big difference to the argument presented in this Article. That is because contemporary international human rights law is predominantly concerned with civil and political rights.[71] Because civil and political rights provisions form the bulk of contemporary international human rights law, critics usually have these provisions in mind when voicing the democracy objection.[72]

---

68. For example: "A democratic system ... requires (1) *government accountability* achieved through elections (and other political processes) open to the participation of virtually all adults, and (2) *respect for individual and group rights* guaranteed through legal processes and constitutional structures." Mary Ellen Fischer, *Introduction* to ESTABLISHING DEMOCRACIES 4 (Mary Ellen Fischer ed., 1996). "In mature democracies, government policy, including foreign and military policy, is made by officials chosen through free, fair, and periodic elections in which a substantial proportion of the adult population can vote; the actions of officials are constrained by constitutional provisions and commitments to civil liberties; and government candidates sometimes lose elections and leave office when they do." JACK SNYDER, FROM VOTING TO VIOLENCE, DEMOCRATIZATION AND NATIONALIST CONFLICT 25-26 (2000).

69. *See* Freedom House, Freedom in the World, http://www.freedomhouse.org/template.cfm?page=15 (last visited Nov. 24, 2008).

70. The classic argument for this view is SHUE, *supra* note 44.

71. Only a few treaties such as the ICESCR and the European Social Charter devote themselves exclusively to social and economic rights. ICESCR, *supra* note 34; European Social Charter, C.E.T.S. No. 35, (Oct. 18, 1961). The Convention on the Rights of the Child, not surprisingly, asserts the right of children to health care, education, and a decent standard of living. Convention on the Rights of the Child, *supra* note 40.

72. The ICCPR, *supra* note 32; the Torture Convention, *supra* note 40; the European

It is true that basic socioeconomic entitlements are recognized as human rights under such international instruments as the Universal Declaration of Human Rights, the ICESCR, and the European Social Charter, the weakness of the available remedies notwithstanding. Readers skeptical about social and economic rights may question the democratic legitimacy of international human rights law for this reason. But such readers could still believe in the democratic legitimacy of international laws protecting civil and political rights.

The compound conception of democracy resembles the theory of political legitimacy expressed in the celebrated human rights declarations of the eighteenth century, including the founding documents of the American republic. The declarations asserted that human rights are primary and that the only legitimate form of government is one which respects human rights. They demanded representative government, with separation of powers, as the political system best suited to the defense of human rights and the realization of the people's will, but they took the precaution of itemizing certain individual rights that their elected representatives must not transgress. The declarations combine a desire for representative government with a commitment to human rights. Madison wrote in the *Federalist Papers*: "To secure the public good and private rights against the danger of [majority] faction, and at the same time to preserve the spirit and the form of popular government, is . . . the great object to which our inquiries are directed."[73] If we want a conception of democracy faithful to the political vision of the American founders, we should choose the compound conception of democracy.

Those who challenge international human rights law in the name of the American tradition of democracy confront the embarrassing fact of the founders' belief in a set of natural rights that limit legitimate government activity. To avoid this embarrassment, scholars sometimes resort to questionable historical narrative. Thus, Jed Rubenfeld distinguishes between what he calls European and American understandings of constitutionalism.[74] Europeans are drawn to "international constitutionalism," which "is based on the idea of universal rights and principles that derive their authority from sources outside of or prior to national democratic processes."[75] Eighteenth-century America, Rubenfeld tells us, rejected this understanding, inventing an alternative conception of "democratic constitutionalism" to take its place.[76] Under democratic constitutionalism, constitutional rights "represent the nation's self-given law."[77] He elaborates:

Convention on Human Rights, *supra* note 41; and the Rome Statute of the International Criminal Court (Statute of the ICC), A/CONF, 183/9 (July 1, 2002) – to mention a few of the flashpoints – do not include social or economic rights.

73. JAMES MADISON, THE FEDERALIST NO. 10: THE SAME SUBJECT CONTINUED: THE UTILITY OF THE UNION AS A SAFEGUARD AGAINST DOMESTIC FACTION AND INSURRECTION 125 (Isaac Kramnick ed., 1987) (1787).

74. Rubenfeld, *supra* note 7, at 1999.

75. *Id.*

76. *Id.* at 2001.

77. *Id.* at 1994.

> This is the reason why it is much less typical for Americans (as compared to Europeans) to speak of "human rights." The American constitution does not claim the authority of universal law. It claims rather the authority of democracy – of law made by "the People," of self-given law. "Human Rights" are natural rights. Constitutional rights are man-made.[78]

This view is not supported by the text of the U.S. Constitution or its well-known antecedents, the Declaration of Independence and the Virginia Bill of Rights. The Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[79] The Virginia Bill of Rights, appearing only a few weeks earlier, opens with the following words: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity."[80] Did the signers of the Declaration of Independence forget their belief in natural rights in eleven short years? The text of the Constitution suggests not, for the Ninth Amendment states as plainly as one could imagine that the Constitution is not the source of our rights: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[81] Madison drafted the Bill of Rights in fulfillment of a promise to his fellow Virginians, many of whom had opposed the original Constitution because such a bill was lacking.[82] His earlier ambivalence about adding a Bill of Rights reflected a fear that it would imply the non-existence of rights not mentioned;[83] the purpose of the Ninth Amendment was to prevent any such implication.[84] The wording of other clauses suggests that the Constitution recognizes rights that exist independently of its authority.[85] Jefferson, for his part, maintained his belief in the universal

---

78. *Id.* at 2000-01.

79. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776). Rubenfeld acknowledges the Declaration of Independence but refuses to associate its doctrine of natural rights with American constitutionalism. Rubenfeld, *supra* note 7, at 2001.

80. VA. BILL OF RIGHTS art. 1 (1776), *available at* http://www.constitution.org/bor/vir_bor.htm.

81. U.S. CONST. amend. IX.

82. JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 88-92 (3d ed. 2007).

83. JAMES MADISON TO THOMAS JEFFERSON (October 17, 1788), *in* JAMES MADISON: WRITINGS 418, at 420 (Jack Rakove ed., 1999).

84. JAMES MADISON, SPEECH IN CONGRESS PROPOSING CONSTITUTIONAL AMENDMENTS, JUNE 8, 1789, *in* JAMES MADISON: WRITINGS, *supra* note 83 at 448-49. Madison's belief in inalienable rights that no government has authority to infringe is forcefully proclaimed in JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT, JUNE 20, 1785 *in* WRITINGS, *supra* note 83, at 29-36.

85. Consider the language of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

underpinnings of constitutional rights. Writing to Madison in December 1787, the author of the Declaration of Independence had this to say: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."[86]

It is true that the Constitution was ratified by the people's representatives, and that it permits amendments when approved by a super-majority of state legislatures and members of Congress. But this is no reason to infer any belief on the framers' part that the U.S. government was unconstrained by natural rights or that the Constitution would remain legitimate if it were amended to authorize the violation of natural rights.[87] The Virginia Bill of Rights, the Declaration of Independence, and the Ninth Amendment plainly tell us the contrary.[88]

The double commitment of the American founders to human rights and popular self-government found permanent expression in the U.S. Constitution and survives in current understandings of the term "democracy." Moreover, as I shall now discuss, these two values are not independent of each other. In the view of most theorists who have turned their attention to the matter, human rights and popular self-government are strongly connected. The upshot is that we do not need to choose between them. If we embrace one, we should embrace the other, too.

The connection has been drawn in different ways. One view holds that popular self-government is impossible, even unintelligible, unless the people enjoy all the rights and liberties necessary to form and express opinions about public policy.[89] These rights assume even greater importance if one associates popular self-government not with the expression of people's pre-existing preferences, but with informed public deliberation.[90] The rights needed to

---

shall not be violated." U.S. CONST. amend. IV. Also: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9. The wording implies that the right to habeas corpus would still bind the government even if the Constitution never mentioned it.

86. THOMAS JEFFERSON, TO JAMES MADISON, DECEMBER 20, 1787, *in* THE PORTABLE THOMAS JEFFERSON 428, 430 (Merrill D. Peterson ed., 1975). Jefferson identified the rights that he believed should be included: "freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations." *Id.* at 429.

87. The truth is that the *original* Constitution was illegitimate because of provisions that supported slavery. It was (if one may say so) illegitimate on its own terms. Note that one cannot lean on the slavery provisions of the original Constitution to deny that it expressed a commitment to natural rights and simultaneously assert that it expressed a commitment to democracy. Slaves did not "ordain and establish" the Constitution. Neither did women.

88. *See* Miriam Galston & William A. Galston, *Reason, Consent, and the U.S. Constitution: Bruce Ackerman's "We the People,"* 104 ETHICS 446, 452-59 (1994).

89. *See* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION ch. 1 (1971); DAVID BEETHAM, DEMOCRACY AND HUMAN RIGHTS ch. 5 (1999).

90. *See* Stephen Holmes, *Constitutionalism, in* 1 THE ENCYCLOPEDIA OF DEMOCRACY 299-306 (Seymour Martin Lipset ed., 1995).

maintain popular self-government include, at a minimum, freedom of thought and discussion and freedom of association and assembly. There is disagreement on how many rights are required: all human rights, or only civil and political rights?[91] All civil and political rights, or only some? Another question is whether popular self-government requires respect for the human rights of foreigners. What is agreed is that it requires many (if not all) human rights. In a nutshell: "If you like popular self-government, you'll want human rights."

Another view holds that popular self-government is necessary to make human rights secure.[92] Popular election of legislative and executive officials is among the devices needed to prevent government's abuse or culpable neglect of the people. Citizens have enough enlightened self-interest and empathy to exert a salutary watch on government's activities. So important is the role of representative institutions in preventing government misconduct that some thinkers classify popular self-government as a human right in itself. In brief: "If you like human rights, you'll want popular self-government."

A third view holds that the values that underlie one of these two principles (human rights or popular self-government) underlie the other as well. Often the argument is posed in terms of autonomy. We value popular self-government (the argument runs) because we value autonomy – being able to exercise some control over the direction of our lives. Popular self-government is an important dimension of autonomy, but not the only one. Autonomy depends on a complete package of human rights.[93] Or (to run the argument in the other direction) we value human rights because of the importance we attach to autonomy. But we ought to recognize that popular self-government is a crucial dimension of autonomy.[94] In sum: "If you like popular self-government, you already like human rights (or vice versa)."

This broad sketch ignores the different versions of each type of argument. Moreover, there are other ways of connecting popular self-government and human rights not captured in this three-part scheme.[95] *How* one connects these

---

91. For the argument that it requires all human rights, including social and economic rights, see BEETHAM, *supra* note 89.

92. SHUE, *supra* note 44, at ch. 3; AMARTYA SEN, DEVELOPMENT AS FREEDOM ch. 6 (1999); TALBOTT, *supra* note 44, at chs. 6-7.

93. *See generally* CAROL C. GOULD, GLOBALIZING DEMOCRACY AND HUMAN RIGHTS (2004); MICHAEL GOODHART, DEMOCRACY AS HUMAN RIGHTS: FREEDOM AND EQUALITY IN THE AGE OF GLOBALIZATION (2005). George Kateb proposes that the common underlying value is equal respect for persons. *See* George Kateb, *Remarks on Robert B. McKay, "Judicial Review in a Liberal Democracy," in* NOMOS XXV: LIBERAL DEMOCRACY 145, 149 (J. Roland Pennock & John W. Chapman eds., 1983) [hereinafter *Remarks on Robert B. McKay*].

94. WALDRON, LAW AND DISAGREEMENT, *supra* note 23, at chs. 10-11.

95. *See e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996). Jürgen Habermas' argument for the co-originality of public and private autonomy seems to combine elements of all three types of argument. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY ch. 3 (William Rehg trans., 1996).

values matters for the practical implications of one's view. Needless to say, those who perceive a connection argue with each other about how the connection should be drawn.

I will not enter into the details of this debate, but will content myself with the assertion that each of the three kinds of argument contains a substantial degree of truth. (This is not to endorse every version of each argument.) Popular self-government becomes meaningless unless citizens are free to express and advocate their views without fear. Representative institutions provide an important check on government abuse. Autonomy, offered as a reason for popular self-government, is an argument for human rights also.[96] All of these arguments give us a reason to adopt the compound conception of democracy.

Theorists who draw a connection between human rights and popular self-government usually refer to the latter as "democracy."[97] I find no compelling reason for this practice. Perhaps theorists tacitly assume that a single concept must refer to a single idea. This assumption is unwarranted: a single concept can (and in this case should) refer to two (or multiple) ideas in combination. We should avoid the assumption that because the compound conception defines democracy as *bounded self-government*, the conception itself is *less democratic*. The mistake of thinking so has played havoc with our understanding of democracy and human rights. Consider the analogy with liberty. As Locke plausibly observed, our liberty is not diminished by laws that prohibit morally criminal acts such as murder, because liberty *never included* permission to commit such acts.[98] In the same way, prohibitions on human rights violations are no limitation of democracy, because democracy never included permission to violate human rights. As George Kateb writes, speaking of the judicial protection of human rights, "What judicial review may take away from the majority, the majority could never claim. The legitimate will of the majority is the constitutional will, the constitutionally restricted will of the majority."[99] Democracy is not group license.

To sum up, the compound conception of democracy draws support from linguistic usage, constitutional tradition, and political theory. In the immediately preceding paragraphs, I have described different ways of theorizing the connection between popular self-government and human rights. I won't try to choose between the alternative accounts. In the next and final section of this Article, I will switch gears and argue that the only *morally*

---

96. I hesitate to assert the converse, for reasons articulated by TALBOTT, *supra* note 44, at 140. However, I am not ready to deny it either.

97. One exception is GOODHART, *supra* note 93.

98. LOCKE, *supra* note 51, at § 6. "Though [the state of nature] be a *state of liberty*, yet *it is not a state of licence* . . . . The *state of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions." *Id.*

99. Kateb, *Remarks on Robert B. McKay*, *supra* note 93, at 148-49.

legitimate conception of democracy is one with a built-in commitment to human rights. If we want our conception of democracy to be morally legitimate, the compound conception is the one we should adopt.

I have resisted the equation of "democracy" with popular self-government *simpliciter*. Some readers may think that, because of the practical and conceptual connections between popular self-government and human rights, such resistance is unnecessary. We do not need to build human rights into the *definition* of democracy, they will say, because the above-noted connections show that a commitment to "democracy," understood simply as popular self-government, necessarily entails a commitment to human rights. I shall not follow this path, partly because I do not want the compound conception of democracy made hostage to such connections. Although the connections are strong, it takes considerable work to argue that they are airtight, and the success of such efforts is uncertain. It can be doubted, for example, whether popular self-government requires a complete or only a partial set of human rights. (Nor is it certain whether it precludes human rights violations against foreigners.) And while representative institutions generally reinforce human rights, they may undermine them in some circumstances.[100] There is reason to believe, for example, that the introduction of representative institutions in ethnically divided societies sometimes gives an impetus to civil war.[101] While the compound conception of democracy draws support from the practical and conceptual connections between popular self-government and human rights, it should not be made dependent on them.

My goal has been to recommend a conception of democracy as popular self-government bounded by respect for human rights. Of course I cannot compel readers to adopt this definition; people may use terms as they choose. But I have sought to show that this definition has certain virtues, and that, at the very least, it is neither eccentric nor self-contradictory. It should not be ignored. In the rest of the Article, I shall argue that this conception of democracy is morally preferable. To avoid dogmatism, I shall refer to this conception as "constitutional democracy." I believe that democracy *is* constitutional democracy, but I realize that not everyone agrees.

PART IV: DEFENDING CONSTITUTIONAL DEMOCRACY

I shall now turn to a defense of constitutional democracy, understood here as the view that human rights should place limits on popular self-government. This view has many opponents, particularly those who consider it an infringement on democracy. Opponents include both critics of international human rights law and domestic-level judicial review. Both groups fault what

100. *See* Charles Beitz, *Democracy and Human Rights*, 7 HUM. RTS. AND HUM. WELFARE 100 (2007), *available at* http://www.du.edu/gsis/hrhw/volumes/2007/symposium-2007.pdf.

101. *See* SNYDER, *supra* note 68; and NEIL DE VOTTA, BLOWBACK: LINGUISTIC NATIONALISM, INSTITUTIONAL DECAY, AND ETHNIC CONFLICT IN SRI LANKA (2004).

they see as the removal of important questions from the realm of political debate and contestation, quintessentially located in the ordinary legislative process. By the "ordinary legislative process" I have in mind the set of policy debates – between legislators, between rival candidates seeking popular election to legislative office, and among an engaged public – that culminate in laws passed by a legislative majority.[102]

A complication is that not all "pro-democratic" critics of international human rights law extend their objections to domestic-level judicial review. Rubenfeld argues that American-style judicial review meets the criteria of "democratic constitutionalism" because the Constitution and its amendments were ratified by a super-majority of Congress and the states.[103] The weakness of this argument is that, given the difficulty of amending the Constitution, the American public has little ability to rewrite constitutional rights clauses. If citizens want to alter these provisions, a minority favoring the status quo can "undemocratically" defeat a majority favoring constitutional change. Not surprisingly, such attempts rarely get far and almost never succeed.[104] Indeed, treaty law is much more easily altered than the Constitution. Treaty ratification requires the support of the President and consent of two thirds of the Senate, rather than two thirds of both Houses and three quarters of the states.[105] Also, if Congress passes a statute expressly contradicting a previously ratified treaty, the statute will prevail in U.S. courts.[106] The same is not true for a statute that contradicts the Constitution.

Rubenfeld's arguments against international human rights law undermine judicial review as well. If political deliberation is the proper way to resolve a disagreement over human rights, we should not be bound by constitutional restrictions ratified by earlier generations of citizens any more than by international human rights law. One suspects that Rubenfeld's conception of "democratic constitutionalism" rests in part on a nationalist identification with

---

102. As Kim Lane Scheppele argues, however, the legislative process is not always as representative as we may think. Kim Lane Scheppele, *Democracy by Judiciary. (Or Why Courts Can Sometimes Be More Democratic than Parliaments), in* RETHINKING THE RULE OF LAW IN POST-COMMUNIST EUROPE: PAST LEGACIES, INSTITUTIONAL INNOVATIONS, AND CONSTITUTIONAL DISCOURSES (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

103. Rubenfeld, *supra* note 7, at 1994. He is influenced by the arguments of Bruce Ackerman regarding the dualist character of U.S. law. *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991). Rubenfeld (*supra* note 7, at 1995, 1998) says that another reason for associating American judicial review with democratic constitutionalism is that the process of appointing judges is highly politicized: the people shape the content of constitutional rights inasmuch as they can influence the selection of judges whose task it is to interpret those rights. One can take this argument only so far, since judges must frame their interpretations within limits set by the constitutional text.

104. Rubenfeld, *supra* note 7, at 1998. Rubenfeld claims that the possibility of amending the Constitution shows that constitutional rights derive their authority from the people's endorsement. However, the high constitutional hurdles to constitutional amendment suggests the opposite.

105. U.S. CONST. art. II, § 2, cl. 2.

106. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

earlier generations of American citizens who got to make the decisions. Their constitutional decisions are ours also, because we imagine them as ourselves.[107]

In what follows, I shall assume that the "pro-democratic" critics of international human rights law and judicial review (not always the same people) locate their preferred venue for settling human rights questions in the ordinary legislative process. Rubenfeld may object that his preferred venue is the domestic legislative *and* judicial process. However, this makes little difference in practice. There are few conflicts between international human rights law and the U.S. Constitution. International human rights law seeks to supplement rather than displace the provisions of the U.S. Constitution.[108] Therefore, in practice, international human rights law seeks to decide matters that, in the United States, would otherwise be left to the ordinary legislative process.

We may now turn to the argument for constitutional democracy. That argument is very straightforward. Constitutional democracy is the best form of democracy because it is committed to respect for human rights. International human rights law, because it strengthens respect for human rights, is not undemocratic in any objectionable sense.

Yet constitutional democracy faces continuing theoretical resistance. Some objections have almost obtained the status of conventional wisdom. Even thinkers who assert the primacy of human rights temper their view with damaging qualifications. Jürgen Habermas writes:

> However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. Indeed, the idea of citizens' legal autonomy demands that the addressees of law be able to understand themselves at the same time as its authors. It would contradict this idea if the democratic legislator were to discover human rights as though they were (preexisting) moral facts that one merely needs to enact as positive law.[109]

Habermas claims that human rights and popular self-government require each other, but adds, in a manner reminiscent of Jean-Jacques Rousseau, that

---

107. Stanley N. Katz argues convincingly that a certain kind of reverence for the Constitution has raised psychological though not legal obstacles to the domestic incorporation of international human rights. Katz, *A New American Dilemma?: U.S. Constitutionalism vs. International Human Rights*, 58 U. MIAMI L. REV. 323 (2003).

108. An exception is Article 20(2) of the ICCPR, requiring prohibition of hate speech, in conflict with the First Amendment as interpreted by the Supreme Court. Since (as noted) I believe that Article 20(2) ought to be modified if not removed, I believe that the United States was entitled to enter a reservation against it at the time of ratification. 138 CONG. REC. S4781-01 (daily ed. April 2, 1992) (U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights) [hereinafter U.S. RUDs to the ICCPR], first reservation.

109. Jürgen Habermas, *On the Internal Relation between the Rule of Law and Democracy, in* THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 260 (Ciaran Cronin & Pablo De Greif eds., MIT Press 1998) (1996).

the specific content of human rights must be spelled out through political deliberation.[110] Jeremy Waldron, a well-known defender of human rights, has argued at length that the legal definition of human rights should be left to the ordinary legislative process. He defends this view in the name of the right to participation, which he calls "the right of rights."[111] Both Habermas and Waldron trouble the notion of constitutional democracy as it is defined here.

What could the objection to constitutional democracy be? Some may say that it limits public autonomy. This does not seem plausible. There is no limitation of public autonomy worth complaining about if we insist, in advance of political deliberation, that people have the right to be free from religious persecution, censorship, arbitrary imprisonment, unfair trials, capital punishment, and cruel and degrading treatment, especially torture; and that they have the right to education, economic subsistence, health care, and dignified conditions of labor. Public autonomy is not enhanced in any desirable way by letting citizens propose violations of human rights. Public proposals to reintroduce slavery or torture,[112] for example, would not enhance but on the contrary degrade our political discourse.[113]

Some people may object that the last example is oversimplified. We now agree that slavery and torture are wrong, but not everyone agrees that capital punishment or the denial of health care or primary education is a violation of human rights. It is precisely because we disagree about the content of certain portions of the human rights catalogue that we should let the content of human rights be determined through political deliberation.

The bulk of my discussion will be devoted to answering this objection, but I want to begin by suggesting that it does less work than advertised. If we look hard enough, we will find citizens who support the reintroduction of slavery or the use of torture. Surely that is no reason to open the legislative process to the possible adoption of these practices. It is not because we *agree* about the wrongness of slavery and torture that such proposals should be kept off the legislative table. It is because they constitute an unacceptable assault on human dignity. That, however, is a feature shared with other all other human rights violations. The reason why slavery and torture should be kept off the legislative table is the same reason why other human rights violations should be kept off the legislative table.

---

110. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 95, at 125. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, Book II, ch. 4, at 205 (G. D. H. Cole trans., Everyman 1993) (1762).

111. WALDRON, LAW AND DISAGREEMENT, *supra* note 23, chs. 10-13; Waldron, *A Rights-Based Critique of Constitutional Rights*, *supra* note 23, at 36-38.

112. Torture is now a topic of political debate in the United States, and Congress recently passed a law facilitating its use. *See supra* note 28. These developments do not represent a gain for public autonomy.

113. This is not an argument for censorship. Individuals should not face punishment for advocating human rights violations, but we may take precautions to prevent their proposals from taking effect.

Moreover, the example of slavery and torture is far from irrelevant in the context of international human rights law since several treaties (not to mention principles of customary international law) are specifically directed to prohibiting these kinds of extreme human rights violations. Such treaties include the Slavery Convention, the Torture Convention, the Genocide Convention, the Human Trafficking Convention, the Consent to Marriage Convention, the Forced Disappearances Convention (not yet in force), and the treaty creating the International Criminal Court, authorized to punish individuals guilty of genocide, war crimes, and crimes against humanity.[114] Prohibitions against torture, slavery, and extrajudicial killing are also built into other treaties such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights.[115]

Insistence on respect for those rights that *truly are* human rights does not limit public autonomy in any objectionable way. The problem is that we do not agree about the content of human rights. Political deliberation, it is suggested, is the right way to resolve such disagreement. Human rights legitimately constrain normal democratic politics if and only if they are endorsed by the people, as represented by the electoral and deliberative mechanisms of the legislative process.

The argument from disagreement (as we might call it) is widespread. Referring to the Declaration of Independence, Rubenfeld writes:

> [T]he truth about self-evident truths is that they cannot govern, not by themselves. If Enlightenment principles are to be made into governing law, it must be done by real human beings, who will disagree with one another, perhaps radically, about what the principles are or how to interpret them or how to apply them in real life. How are these disagreements to be resolved? The American answer was: . . . by the people themselves, through democratic deliberation and

114. Slavery Convention of 1926, 60 L.N.T.S. 254, *entered into force* March 9, 1927; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951; Council of Europe Convention on Action against Trafficking in Human Beings, E.T.S. No. 197 (May 16, 2005); Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 521 U.N.T.S. 231, *entered into force* Dec. 9, 1964; International Convention for the Protection of All Persons from Forced Disappearance, G.A. Res. 61/177, U.N. Doc. A/61/488 (Dec. 20, 2006); Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* Jul. 1, 2002.

115. ICCPR, *supra* note 32 at arts. 6, 7, 8; European Convention on Human Rights, *supra* note 41 at arts. 2, 3, 4; African Charter on Human and Peoples' Rights, *supra* note 41 at arts. 4, 5; American Convention on Human Rights, *supra* note 41 at arts. 4, 5, 6.

consent . . . .[116]

Disagreement about rights is Waldron's underlying argument for leaving the legal definition of human rights to the legislative branch of government. He puts the word "disagreement" in the title of his book-length critique of judicial review.[117]

The argument may seem plausible, but it is, I shall argue, misleading. Its weaknesses appear when we stop to ask *why* disagreement about human rights is a problem. Three possible reasons may be distinguished:

1. *The legitimacy problem.* It is wrong to impose a conception of human rights on someone who disagrees with it.
2. *The fallibility problem.* Disagreement about human rights shows that someone has an incorrect view, and it might be us.
3. *The political weakness problem.* If I have the correct understanding of human rights, but others disagree, I have less chance of successfully realizing my conception of human rights.

As I shall argue, the first of these is a false problem, while the second and third, though genuine problems, are not resolved by referring questions about rights to the ordinary legislative process. Moral disagreement poses a less formidable objection to international human rights law and judicial review than critics have supposed.

A. *The Legitimacy Problem*

The thought is that it is wrong to impose one's conception of human rights on those who do not share it. As Michael Ignatieff writes, "If human rights principles exist to validate individual agency and collective rights of self-rule, then human rights practice is obliged to seek consent for its norms and to abstain from interference when consent is not freely given."[118]

But this view is wrong. Human rights do not require consent. That they do not is part of their point. Human rights allow us to take certain actions regardless of other people's opinions, just as they place obligations on other people whether or not the other people agree.

This point may be illustrated by means of a primal example. If you form a desire to kill me, I have a right to defend myself. When you raise your weapon to strike me, I may knock it from your hand. It does not matter whether you or anyone else agrees, because my right to life does not depend on anyone's agreement. There is nothing wrong with the imposition of my conception of human rights on you when I knock the weapon from your hand.

Of course, my right to life extends beyond permission to defend myself in

116. Rubenfeld, *supra* note 7, at 2001.

117. WALDRON, LAW AND DISAGREEMENT, *supra* note 23, at ch. 5. *See also* the pointed remarks of RABKIN, *supra* note 6, at 163.

118. IGNATIEFF, *supra* note 44, at 18.

situations of immediate peril. Just as I may knock the weapon from your hand, I may demand institutional arrangements that provide me with a reasonable degree of safety. I have a right to general protection by a police force of some kind, and to a socially maintained threat that people attempting to kill me will be punished. I also have a right to institutional devices that protect me from being killed by government agencies (including the police). To say that my right to these things requires general consent is a gratuitous and impertinent demand. It raises an illegitimate hurdle to the fulfillment of my rights.

My right to life is not the only human right that I have. Just as I may insist on my right to life, I may insist on the essentials of a dignified existence – on a right to food, shelter, clothing, decent working conditions, freedom of speech, freedom of religion, freedom from abuse, and the right to a fair trial. These rights do not depend on consent. To say that they do is to make my dignity hostage to other people's opinions.

It makes all the difference in the world whether human rights precede or derive from public deliberation. Imagine we are speaking to a young West African girl who is being threatened with forced early marriage.[119] If we believe that human rights precede public deliberation, we may say, "You have the right to an education; to health training and basic medical care; to be trained in an occupation of your choice; to be spared the severe pain and danger of genital cutting and attendant loss of sexual pleasure; to choose your own spouse; to be free from domestic violence; to refuse sex; to decide whether to have children, and, if so, how many; and to have an equal voice in the conduct of your marriage and your community." (These are all rights that the institution of forced early marriage denies.)

However, if we believe that human rights are derived from public deliberation we must instead say something like the following: "You have the right (perhaps not now, but at least when you become an adult) to participate equally with all the other members of your community in determining what rights you have. We cannot guarantee that you have a right to an education, etc., because that will depend on what your community ends up deciding." And further: "If your father wants to force you into marriage with a much older (and perhaps polygamous) man of his choosing, you have the right (or will have it, when you are an adult, after your forced marriage) to engage your father in a dialogue about whether you have a right to refuse. But if your father is not persuaded that you have such a right, it would be wrong to refuse his demand in the name of your human rights."

---

119. I draw instruction from the work of human rights NGO Tostan, whose courses on human rights have helped persuade hundreds of villages in Senegal to collectively renounce female genital cutting and early marriage. *See* Tostan: Community-led Successes, http://www.tostan.org (last visited Nov. 24, 2008). Early marriage is a worldwide problem. *See UNICEF: Innocenti Research Centre, Early Marriage: Child Spouses*, 7 INNOCENTI DIG., Mar., 2001, http://www.unicef-icdc.org/publications/pdf/digest7e.pdf (last visited Nov. 24, 2008).

I submit that the first message does far more good than the second. It does more to help girls take control of their future, and makes a greater ultimate contribution to the creation of communities built on equal respect for the dignity and agency of all their members. Deriving human rights from public deliberation is the death of human rights. Human rights are the precondition of any healthy form of public deliberation.

Confusion about consent bedevils discussions of international human rights law. Anderson writes that in today's world authority must "be perceived to be legitimate by those over whom [it] is exercised."[120] This is untrue: a law prohibiting murder does not require the consent of the would-be murderer. Some American critics of the International Criminal Court have invoked the principle of consent to protest the Court's jurisdiction over war crimes, crimes against humanity, and genocide committed on the territory of a state party by citizens of a non-state party.[121] Such jurisdiction is illegitimate, the critics complain, because the state whose citizens stand accused has not given its consent. This argument denies the right of vulnerable states to invoke the assistance of an international court in defending their inhabitants from foreign-perpetrated atrocities. Arguments like this abuse the notion of consent. It is a mistake to suppose that, until an individual or a state grants its consent, no rules apply.[122] We might call this the law of the jungle, but it is not a view with which we should want to associate the idea of democracy.

The Declaration of Independence states that governments "deriv[e] their just powers from the consent of the governed[.]"[123] It is a mistake, I have argued, to suppose that human rights themselves require our consent, and the Declaration of Independence certainly expresses no such view.[124] Indeed one can go further and argue that the very idea of "government by consent" implies a government constrained by human rights not derived from consent. The argument proceeds as follows.

Suppose that "government by consent" means that no one may be governed without his or her consent. This sets a high bar: laws must receive consent not from the majority but from everyone. Of course no law can literally satisfy such a requirement. But we may say that a legitimate government is one that comes as close to meeting this requirement as possible. It does not apply laws that receive literally every person's consent – that is impossible – but instead laws that are *capable* of receiving every person's consent, in the sense that everyone has reason to accept them. Now, there are some laws that *cannot*

120. Anderson, *supra* note 7, at 113.

121. *See* Lee A. Casey & David B. Rivkin, Jr., *The International Criminal Court vs. the American People*, Backgrounder #1249, THE HERITAGE FOUNDATION, Feb. 5, 1999, http://www.heritage.org/research/internationalorganizations/BG1249.cfm (last visited Nov. 25, 2008). *See also* Morris, *supra* note 7, at 110-11.

122. *See* Jamie Mayerfeld, *The Democratic Legacy of the International Criminal Court*, 28 FLETCHER F. OF WORLD AFF. 147, 153 (2004).

123. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

124. *See* Galston & Galston, *supra* note 88, at 454-55.

receive everyone's consent. Let us call them "unreasonable" laws. Laws that permit or authorize human rights violations fall under this category. Such laws impose unacceptable costs on their victims. Because there is no possible justification for these laws, we will not attempt to justify them. For this reason, government by consent excludes human rights violations from legislative consideration.[125]

B. The Fallibility Problem

I have argued that the authority of human rights does not depend on consent.[126] But how do we know that our conception of human rights is the right one? Other people may disagree, and if so, their disagreement shows that we may be mistaken.

This is a serious problem, but notice that the problem is the possibility of error rather than disagreement itself. We could all agree and all be mistaken. Disagreement is not the problem, but rather a sign of the problem. Nor does it always signify a problem. When you raise your weapon to kill me, I may be reasonably sure, despite your apparent disagreement, that I have a right to defend myself. It is clear in this situation that I am right and you are wrong.

But not all cases are this clear-cut. The possibility of error grows when we try to draw up a complete human rights code and apply it in practice. How to prevent such error is a vast question demanding our full attention. I do not pretend to offer a full answer, but hope to show that an intelligent response to the problem does not entail the rejection of international human rights law or judicial review.

The mistake to be avoided here is an all-embracing skepticism from which political deliberation is thought to be the only outlet. The reasoning to be avoided goes like this: "Ultimately, we do not know how to prevent error about human rights. To prevent such error, we would need a standard that distinguishes truth from error, but our very fallibility places such a standard out of reach. Our views are shrouded in doubt, as are the methods needed to resolve such doubt. Under these circumstances, the only reasonable policy is to let the people decide, through ongoing political deliberation, which human rights we do and do not have."

Such skepticism is excessive. We are confident that such practices as torture, slavery, extrajudicial execution, race and sex discrimination, and the denial of due process are wrong. Centuries of experience and reflection have

125. One problem with the phrase "government by consent" is that it leaves the status of non-citizens unclear. If the "governed" do not include foreigners, are we theoretically free to violate their human rights? The problem continues to haunt the theoretical literature on democracy. For an indispensable discussion, see GOODHART, *supra* note 93, at chs. 6-7.

126. This is not to deny that agreement about human rights has justificatory, rhetorical, and political value. Clearly it does, as my remarks in the text accompanying notes 53-55 *supra* and notes 153-55 *infra* acknowledge. For a discussion of the moral significance of agreement, see Kim, *supra* note 55.

nourished and reinforced these convictions, and have generated theoretical insights into the nature, basis, and content of our human rights. We don't have to start from scratch; we may retain our reasonable convictions, and use them to test new arguments and theories, and to assess the reliability of alternative procedures for formulating and applying human rights codes.

John Rawls coined the term "reflective equilibrium" to describe such reasoning.[127] The idea has been further refined, with particular reference to human rights, in recent work by William Talbott.[128] The goal is to avoid skepticism on the one hand and epistemic complacency on the other. On Talbott's account, we improve the reliability of our moral judgments when we strive to adopt an impartial perspective informed by empathic understanding of the needs and interests of others. To avoid error, we must stand guard against, and endeavor to correct, the distorting influence that self-interest and social pressure can exert on our beliefs. When we take these steps, we can form reasonably reliable, though not infallible, moral judgments about particular kinds of acts. These moral judgments in turn justify broader moral principles that make sense of our beliefs as a whole and that in some instances cause us to re-examine and revise our particular moral judgments. The more we bring our particular moral judgments and moral principles into equilibrium, and the more we test our moral beliefs against other people's arguments and against the known facts about human nature and human society, the more reliable our moral beliefs become.[129]

Debate is essential to this process. It exposes faulty reasoning and the operation of influences (such as self-interest and social pressure) likely to produce error. It contributes new information and new ideas. Therefore, we need to guarantee the communicative and associative freedoms and minimum welfare provisions that give all persons a voice and permit them to hear what others have to say. We also need to promote universal education, an independent media, and a vigorous civil society. If debate is to promote understanding rather than error, however, we need to lay a foundation of public support for and understanding of basic human rights values. Knowledge of human rights law and the values on which it rests should be a required element of everyone's education. Such education does not prevent citizens from revising their views about human rights through further reflection and debate. Of course, the pedagogic effect of human rights law itself must not be underestimated.[130]

---

127. JOHN RAWLS, A THEORY OF JUSTICE 20 (Belknap Press of Harvard University Press 1971).

128. TALBOTT, *supra* note 44. Part of this paragraph is reproduced from Jamie Mayerfeld, *William Talbott's WHICH RIGHTS SHOULD BE UNIVERSAL?: An Overview and Appreciation*, 7 HUM. RTS. AND HUM. WELFARE 68, 69 (2007), *available at* http://www.du.edu/gsis/hrhw/volumes/2007/symposium-2007.pdf.

129. TALBOTT, *supra* note 44, at chs. 2-4.

130. *See* MADISON, *supra* note 83, at 501. "In proportion as government is influenced by opinion, it must be so, by whatever influences opinion. This decides the question concerning a

Human rights education, freedom of thought and discussion, and mutual encouragement to engage in equilibrium moral reasoning help foster trustworthy views about human rights in the general public. We still face the question of which system to adopt for formulating and applying an enforceable human rights code. While this task should be informed by debate, the debate must be properly *structured* in order to generate good outcomes. The protection of human rights should not be dictated by the ordinary legislative process, where human rights become one issue in a sea of other issues – an issue, moreover, to which the voting public has historically devoted little attention. Unless human rights are constitutionally entrenched, we can expect them to be eroded by legislative patterns of logrolling and scapegoating, and by the competitive bidding of legislators seeking to prove their toughness on hot-button issues like crime, terrorism, and immigration. What is necessary is a constitutional structure in which human rights are given primacy and in which difficult questions about human rights receive the undivided attention of qualified deliberators.

We need to distinguish between the adoption and enforcement of a human rights code. As to the former, the task of drafting human rights provisions in domestic constitutions and international treaties is sensibly entrusted to learned and intelligent people who have demonstrated a sincere commitment to and sophisticated understanding of human rights, and who collectively represent, either through personal experience or acquired knowledge, a reasonable cross-section of social interests.[131] There are different ways of selecting such people, and political constraints will often dictate which method is adopted. But we should strive to prevent uncommitted or unqualified people from playing too great a role. A common danger at the domestic level is the influence of those seeking to preserve or restore authoritarian forms of rule. A common danger at the international treaty level is the influence of delegates seeking to undermine rather than strengthen the protection of human rights.

Human rights non-governmental organizations (NGOs) play an invaluable role in both settings.[132] Though not given voting powers, they remind delegates of relevant precedents in international law and domestic bills of rights. They share lessons learned from the history of human rights abuses and give voice to the victims of those abuses. They mobilize pressure from a broader constituency of human rights supporters. They provide logistical and technical assistance to delegates in the pro-human rights camp. Their vigilance deters maneuvers to undermine human rights. Though not popularly elected, NGO leaders are evaluated by peers who are passionately committed to the cause of human rights. They have been tested by the discipline of producing

---

Constitutional Declaration of Rights, which requires an influence on government, by becoming a part of the public opinion."

131. For an illuminating discussion of the institutional processes favoring the adoption of legitimate human rights codes, see Allen E. Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 LEGAL THEORY 39, 61-65 (2008).

132. *See* WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE" ch. 8 (1998); and MERRY, *supra* note 61.

factual reports whose every detail must survive microscopic examination and by the experience of challenging hostile governments in highly charged settings. Their contributions to human rights law are difficult to overstate. Contrary to the claims of some scholars,[133] their participation in the treaty-drafting process is vital to the legitimacy of international human rights law.

Submission of constitutional bills of rights and international human rights treaties to legislative ratification or popular referendum does not alter the fact that the actual work of drafting tends, for practical reasons, to be handled by a relatively small number of people. The point is to choose individuals fit for the task. In objection to this view, some might point to the South African Constitution, claiming that it shows how to involve the public more directly in the drafting process. The Constitutional Assembly, its members chosen by direct or indirect popular election, made extensive use of talk radio, television, mailings, and the internet to inform citizens about the drafting process and to solicit their input.[134] Citizens responded with millions of "petitions, comments, objections, and proposals."[135] Passage of the Constitution required approval by two thirds of the Assembly. I am persuaded that this process succeeded in instilling in the public a deeper loyalty to and understanding of the final Bill of Rights. However, what must be remembered is that public deliberations occurred within clear boundaries, demarcated in advance. The Constitutional Court was assigned the duty of rejecting any constitutional provisions in conflict with the Constitutional Principles in the Interim Constitution, one of which stated that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution . . . ."[136] In other words, the people were free to develop and expand, but not water down, internationally recognized human rights.[137]

After a human rights code is adopted, some mechanism is needed to ensure compliance from the executive and legislative branches of governments. It makes sense to establish a separate governmental body – call it a court – with the responsibility of monitoring and enforcing such compliance. Such a system has been adopted, with important variations, in many countries around the world. Certain factors are likely to increase the quality and effectiveness of judicial decisions concerning human rights: a reasonably complete human

133. Anderson, *supra* note 7, at 113-14.

134. *See* Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669, 675-77 (1997); *see also* Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809, 816 (2001).

135. Sachs, *supra* note 134, at 675.

136. S. AFR. (Interim) CONST. 1993, sched. 4, princ. II, *available at* http://www.info.gov.za/documents/constitution/93cons.htm#SCHEDUL4.

137. Moreover, the Constitutional Court acted on its duty, ruling that the 1996 Constitution made amendment of the Bill of Rights too easy and therefore left human rights inadequately entrenched. The Constitutional Assembly made the requisite alterations in the Final Constitution of 1997. Sachs, *supra* note 134, at 678; Murray, *supra* note 134, at 835-37.

rights code (but not so detailed as to magnify the risk of constitutional error); a constitutional structure that gives primacy to human rights and is sufficiently specialized so that the relevant judges can give sustained attention to human rights; the appointment of judges with a demonstrated commitment to and sophisticated understanding of human rights; an obligation to issue human rights rulings as reasoned judgments, with the right of outvoted judges to publish dissenting opinions; direct access to the judicial system by individuals whose rights have been violated or are under threat; a system of abstract review that permits inspection of legislation on human rights grounds prior to enactment; and a rule of precedent that makes human rights rulings binding on lower-court judges and other government officials.[138]

Legislatures have too many policy issues to address and are too vulnerable to electoral pressure to be given the final word in interpreting and enforcing human rights. We need a corrective to what Kateb describes as the "energies of interests" that "animate laws, regulations, and acts."[139] Human rights need more attention, and attention less influenced by extraneous interests, than legislators can supply. There is also some justification for choosing those entrusted with the final guardianship of human rights by means other than direct popular election. As Kateb writes, we want judges "unbeholden to anyone, to be free of identifiable supporters, to have only one prepossession – namely, that in favor of protecting the rights of individuals."[140] (I do not discount the possibility of direct popular election, but it would have to be designed in a manner, perhaps as yet undiscovered, that would preserve the necessary level of judicial impartiality.) Needless to say, these observations do not imply that judicial review, by itself and regardless of its form, guarantees respect for human rights. Judicial review is only one element of an adequate system of rights protection, and it must be judicial review of the right kind. The flaws in the U.S. political system that contribute to violations of human rights include a flawed system of judicial review.[141]

Debate does not end with the adoption of human rights codes and mechanisms for their implementation. The codes become available for public inspection and criticism. Judges charged with their interpretation and enforcement must defend their opinions against collegial criticism, and such

---

138. An expanding literature on comparative constitutional law has shed light on the factors that contribute most to protecting rights. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES, ch. 1 (Cambridge University Press 2003) (1967); *see also* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE, ch. 4 (2000); *and* HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE, ch.2 (The University of Chicago Press 2000) (1931).

139. Kateb, *Remarks on Robert B. McKay*, *supra* note 93, at 150.

140. *Id.*

141. Flaws include the excessive politicization of the appointments process, procedural rules that limit individual access to the courts, the absence of abstract review, and, perhaps most important, an incomplete and underspecified bill of rights. Too many writers continue to assume that the general advisability of judicial review may be inferred directly from its record in the United States.

disagreements stimulate (and respond to) a debate in the public at large. Citizens and legislatures can register satisfaction or dissatisfaction with judicial rulings. The debate extends across national borders. Increasingly, judges test their own reasoning against human rights arguments made by foreign courts.[142] International courts, such as the European Court of Human Rights, listen carefully to the domestic courts of member states, but sometimes find reasons for overturning their decisions.[143] Differences in the way particular treaties and constitutions define human rights force us to evaluate and compare. Why is this human right defined differently here than there? Which definition is better and why?

Debate does not merely shape the judicial interpretation and application of human rights codes. It may also illuminate defects in the codes themselves, thereby encouraging their revision. Such revisions can be accomplished in different ways: through ordinary legislation (when not prohibited by constitutional law), constitutional amendment, adoption of a new constitution, ratification of a human rights treaty, domestic incorporation of treaty law through legislation or constitutional amendment, negotiation of a new human rights treaty, or the amendment of an existing human rights treaty. This process is most advanced in Europe, where concerted and continuing dialogue among numerous domestic and international actors has led to profound changes in the human rights provisions of domestic statutory and constitutional and international treaty law.[144] A similar, if less accelerated, process can be observed elsewhere in the world – for example, in the domestic constitutional and legislative reforms prompted by ratification of the Rome Statute of the International Criminal Court.[145]

Though domestic legislatures should not be given exclusive power to make and unmake human rights law, they can make constructive contributions to domestic and international debates over human rights. They can add human rights protections to those already existing under the constitution, ratify human rights treaties and incorporate their provisions into domestic law, and seek to amend their national constitutions. And, within limits set by customary international law and *jus cogens*, they can sometimes "talk back" to international human rights law. They can refuse to support ratification of human rights treaties. They can accompany ratification with substantive reservations (where these are not barred by the terms of the treaty, and do not

142. *See* Sujit Choudry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 827 (1999); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 79-82 (2004).

143. FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 3, at ch. 3.

144. *See id.*; *see also* GOLDHABER, *supra* note 42, at ch. 17; FRANK SCHIMMELFENNIG, STEFAN ENGERT, & HEIKO KNOBEL, INTERNATIONAL SOCIALIZATION IN EUROPE: EUROPEAN ORGANIZATIONS, POLITICAL CONDITIONALITY AND DEMOCRATIC CHANGE ch.3 (2006); *and* JANNE HAALAND MATLÁRY, INTERVENTION FOR HUMAN RIGHTS IN EUROPE ch. 2 (2002).

145. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 20 (2d ed. 2004).

oppose a treaty's "object and purpose").[146] In some countries they can even pass legislation in direct conflict with previous treaty commitments. Such laws, though invalid under international law,[147] are often upheld by domestic courts.[148]

Is legislative resistance to international human rights law morally legitimate? Yes, if the law being resisted is not genuinely required by human rights (or indeed undermines genuine human rights). What if there is disagreement on this very point? Then, at the very least, a national legislature should present a credible good-faith argument that its resistance does not subvert (or is indeed necessitated by) human rights. Mattias Kumm argues that widely ratified human rights treaties are entitled to a certain measure of deference, given that they "establish a common point of reference negotiated by a large number of states across cultures" and therefore overcome "limitations connected to national parochialism."[149] This does not mean that such treaties are 100% correct, but it does mean that national legislatures should give human rights-based reasons when seeking exemption from specific treaty provisions. Such reasons have the potential to persuade other members of the international community. Just as national legislatures can learn from international human rights law, so international human rights law can learn from national legislatures.

The United States provides an example of what not to do. When ratifying human rights treaties, it routinely exempts itself from all obligations not already enshrined in U.S. law.[150] (The obligations it rejects include several that would pose no conflict with the Constitution.) There is no discussion whether U.S. law would be improved by assuming new obligations – no discussion whether these obligations remedy a failure of existing U.S. law to protect genuine human rights.[151] In this way, the United States found itself narrowing treaty prohibitions on the use of "cruel, inhuman, or degrading treatment or punishment," and stating, in response to a treaty prohibition on the execution of juvenile offenders, that it reserved the right "to impose capital punishment on any person (other than a pregnant woman)."[152] By refusing to reevaluate its laws and policies in light of international human rights law, the United States demonstrates a dangerous oblivion to its own fallibility.

Disagreement about human rights is troubling because it points out the

146. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331.

147. *Id.* art. 27.

148. AUST, *supra* note 16, at 81.

149. Kumm, *supra* note 43, at 278.

150. Mayerfeld, *Playing by Our Own Rules*, *supra* note 28, at 118.

151. *See International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102d Cong. (1991).

152. U.S. RUDs to the ICCPR, *supra* note 108, second and third reservations; 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), first reservation.

possibility that our conception of human rights is mistaken. Deliberation is needed to minimize the possibility of error. But the necessary deliberation is compatible with, and indeed requires, the constitutionalization of human rights through domestic and international law, backed by judicial review. International human rights treaties and domestic bills of rights encourage disciplined inquiry into the meaning of human rights. They foster constructive debate. There is little reason to believe – and much reason to doubt – that the fallibility problem is properly addressed by handing over human rights controversies to the ordinary legislative process. Therefore, we have not yet encountered a good argument for rejecting international human rights law or constitutional bills of rights.

C. The Political Weakness Problem

Finally, disagreement poses the problem of political weakness. To make human rights secure, we need the support of the powerful. If I lived under an absolute despot, it would be worth my while to convert him or her to a sound conception of human rights. If we live in a society ruled by the people, it is worth our while to convert *them* to a sound conception of human rights. Disagreement in a society ruled by the people raises the danger that people with a faulty conception of human rights, or none at all, will run roughshod over human rights.

Persuading the despot or the empowered demos to adopt a sound conception of human rights will win us some temporary protection, but needless to say neither absolute despotism nor unfettered popular self-government can provide reliable protection of human rights in the long term. The best system is constitutional democracy – that is, popular self-government bounded by human rights. So our task is to persuade the absolute despot or the empowered demos, as the case may be, to give way to the establishment of constitutional democracy.

However, even after the creation of constitutional democracy the people may disagree about the content of human rights. Perhaps a majority subscribe to the wrong conception of human rights, and perhaps they will use the power of their numbers to impose a flawed constitutional bill of rights or to block adoption of sound international human rights law. The best solution to this problem is the kind of constitutional system discussed above. But perhaps the people will block such a system, or successfully exert pressure on the judicial guardians of constitutional and international law to cast bad decisions. In that case we must persuade the people to correct their views. Public debate is one of the necessary means – along with human rights education and the enshrinement of human rights values in international treaties and declarations, bills of rights, and ordinary laws – for correcting public opinion.

There is, however, a crucial difference between acknowledging that public persuasion may be necessary to provide human rights with the requisite degree of popular support, and saying that a conception of human rights is illegitimate without collective endorsement. The point is that we need to use a

variety of means to cultivate and maintain the people's support for a sound conception of human rights and for the constitutional architecture that fosters accurate understanding of human rights and gives them maximum protection. The people, when persuaded of such views, will not insist on opening the legislative process to the reconsideration of genuine human rights. There are no grounds here for rejecting constitutional bills of rights or international human rights law.

Another point should be noted. It is a mistake to think that, if human rights lack sufficient popular support, granting legislatures the power to define human rights will solve the problem. Courts tend to be more popular than legislatures.[153] If transferring the definition of human rights from a judicially enforced bill of rights to a legislature vested with parliamentary supremacy reduces the popular backlash against human rights, the reason will not be that the protection of controversial human rights has been entrusted to a more highly respected guardian. Rather, in all likelihood it will be that controversial human rights are no longer being protected.

Backlashes against human rights sometimes take on a national cast, with resentment focused on the international sources of human rights law.[154] But resistance to international human rights law should be combated, not meekly accepted. One helpful strategy is to develop domestic counterparts to international human rights law in the form of national legislation and bills of rights.[155] Another is to redouble our arguments for the legitimacy of international human rights law.

CONCLUSION

International human rights law is not "undemocratic" in any objectionable sense. It bars policies that governments should not undertake anyway. Some readers may object that a flawed conception of human rights could lead international human rights law to exclude policies that are in fact blameless, and that such exclusions would constitute a regrettable restriction of democracy. This danger should not be exaggerated, however; nor should the corresponding benefit be overlooked. Since the vast majority of international human rights obligations are morally justified (most uncontroversially so in the realm of civil and political rights, where international human rights law enjoys

153. *See* Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333, 334 (2001); *see also* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1995).

154. A trend that some are observing in Britain. *See* Francesca Klug, *A Bill of Rights: What For?*, *in* TOWARDS A NEW CONSTITUTIONAL SETTLEMENT, at 5-6 (Chris Bryant ed., The Smith Institute 2007), *available at* http://www.lse.ac.uk/collections/humanRights/articlesAndTranscripts/FK_SmithInstitute_07.pdf.

155. *Id.* at 8.

its greatest leverage), the danger of excluding some blameless policy options pales next to the gain for human rights.

No system of human rights protection is infallible. If we are serious about protecting human rights, we cannot wait for an infallible system that will never come. The proper response to mistaken provisions in international human rights law is not the removal of a "democratic deficit"; it is the correction of the mistaken provisions. As I have argued, there are important resources within international human rights law itself for making the necessary corrections. These resources include the recognizably democratic practices of dialogue, debate, and persuasion.

To say that international human rights law subverts democracy is to adopt an unworthy conception of democracy. On the best conception of democracy, there is no conflict. Indeed, international human rights law strengthens democracy. Human rights require international protections, but the existing protections are far from adequate. Rather than criticize international human rights law as undemocratic, we should study how human rights may be more effectively promoted through international law.

COMPARATIVE ARCHITECTURE OF GENETIC PRIVACY

Khadija Robin Pierce*

INTRODUCTION: PRIVACY: A CONCEPT

"Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."[1] Despite that hurdle, or perhaps because of it, privacy has received enormous attention in the literature of numerous disciplines, including law, sociology, anthropology, philosophy, and medicine. Both the definition and the paradigm of privacy can vary depending on the disciplinary lens through which it is viewed.[2] Furthermore, the general absence of a comprehensive legal framework regarding the protection of privacy can make it difficult to develop a common understanding of what interests are protected by privacy rights. This makes it virtually impossible to devise a common concept that covers the full range of considerations across disciplines. Thus, the scope of this Article is necessarily limited. This Article addresses the issue of biomedical privacy and, more specifically, genetic privacy. The information that follows focuses on two related aspects of genetic privacy—informational autonomy and decisional autonomy.

1. Privacy Architecture

Privacy interests and rights are constructed differently across societies. The interplay between the structure and the substantive right can be significant. These variations in the construction of rights have been the subject of some debate regarding the degree of protection afforded those rights by virtue of their architecture. Frederick Schauer has examined the comparative architecture of freedom of speech rights with regard to constitutions, noting that certain constructions render rights "seemingly absolute" while other constructions are qualified, allowing for overrides; some are universal while others are situational and temporal; and some are worded broadly while others are more precise and narrow in their articulation.[3] Schauer's focus on the freedom of expression

---

* Robin Pierce received her J.D. from Boalt Hall School of Law and her Ph.D. from Harvard University. The author wishes to thank Professors Francesca Bignami, Frederick Schauer, Allan Brandt, and Jonathan Beckwith of Harvard University for helpful suggestions and comments. Dr. Pierce has been an invited speaker in Europe and North America on biomedical law and ethics regarding innovative technologies.

1. Judith Jarvis Thomson, *The Right to Privacy, in* PHILISOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272, 272 (F. D. Schoeman ed., 1988).

2. *See generally* DAVID M. O'Brian, PRIVACY, LAW, AND PUBLIC POLICY (1979).

3. Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A*

bears some parallels to the topic of this Article. The Fourth Amendment allows a warrant to be issued solely upon the showing of probable cause, and thus it is similar to Schauer's view of free speech privacy rights in that it has also been construed in "absolute terms." Yet we understand privacy to be a qualified right, the contours of which are largely crafted by case law (often tort) and, in the biomedical context, regulatory law and agency guidance that set margins based on countervailing interests. Other legal scholars have considered the architecture of rights pertaining, for example, to enforcement, arguing that the structure of enforcement can affect the meaning of the substantive right.[4] There are several ways counties have structured privacy laws. One of which is the less categorical model.

The less categorical model employed in many European countries recognizes privacy as a fundamental right. However, the less categorical model also accommodates other important competing interests. Resolution of competing interests typically calls for a balancing of interests and rights in which the privacy rights of the individual may be weighed against other interests that fall within certain designated categories, for example, "the public interest."[5] The proportionality rule, a multifaceted test, poses three primary questions: 1) Can the intended action achieve its stated goal?; 2) Is the action necessary in order to achieve the goal, and are there less burdensome means of achieving it?; and 3) If a non-economic right is involved, is the burden on the right an acceptable one?[6] Furthermore, it requires a determination of whether the burden on the right to individual privacy is proportionate to the public interest being privileged. However, it has been demonstrated in several types of analysis[7] that this seemingly more flexible model does not necessarily expose fundamental rights to the subordination of societal interest any more than the "absolute" model. Rather, as this Article explores, certain safeguards protecting the underlying principle of the protections seem to remain fairly intact. What this proportionality model does is make the process and rationale that may result in the override of a fundamental right transparent, ensuring that such override occurs only in certain circumstances and in the least restrictive way possible. Indeed, Schauer notes that critics of the American approach say that the European architecture is more transparent in its open declaration that rights are subject to a weighing process as against other interests, whereas the stringent categorical approach of the U.S. system merely obscures the weighing process that has already occurred in the drafting of the right.[8]

Case Study in Comparative Constitutional Architecture, *in* FACULTY RESEARCH WORKING PAPERS SERIES RWP05-019 1 (2005).

4. *See, e.g.*, Colin J. Bennett & Charles D. Raab, The Governance of Privacy (2003).

5. Council Directive 95/46/EC, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (30).

6. *See, e.g.*, Francesca Bignami,. *European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. Rev. 609, 642 (2007).

7. *See e.g., id.*

8. Schauer, *supra* note 3, at 3.

In the biomedical context, innovative uses of genetic information, and the technologies that use it, implicate a wide range of privacy issues. Because of the nature of genetic information, protection of privacy interests and rights in the biomedical context must be viewed anew; traditional protections do not fit the contours of the new privacy vulnerabilities and interests. Indeed, it has been suggested that, for a variety of reasons (including significant technological innovation), a new taxonomy of privacy is needed in order to more accurately understand modern privacy violations.[9] Consequently, lawmakers and judges have great difficulty articulating the privacy harm in contrast to opposing interests like free speech, market interests, and national security, which are more easily articulated.[10] This skewed articulation of rights and interests may well serve to unseat highly valued privacy rights merely because they are poorly articulated.

This Article examines the comparative architecture of privacy in the biomedical context and analyzes specific aspects of genetic privacy, assessing comparative approaches to three pivotal issues in the biomedical context: tissue use, disclosure of genetic test results, and reduced capacity to consent. I select these issues because they illustrate different levels and aspects of privacy and, as such, suggest a composite picture of both the degree and nature of protections and to what extent architecture affects the meaning of the substantive right. The third issue, reduced capacity to consent, while not exclusively a genetic issue, is addressed because it reveals something of the non-negotiated boundaries of privacy not modifiable by individual consent.

Often, one thinks of medical privacy as being a matter of protection of medical information and confidentiality. These concepts are indeed central to the scope and force of medical privacy, and, like autonomy, are often considered among the fundamental principles of biomedical ethics. Yet, one of the most important aspects of patient rights in this context is a notion that combines both concepts to create a hybrid interest in what I shall refer to as "informational autonomy"—the right to control information about oneself.[11] This encompasses what Brandeis referred to as the right to be let alone.[12] The European Union, in its Data Protection Directive,[13] also adopts a view of privacy that renders this concept a core concern in privacy protections.

---

9. Daniel Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 483 (2006).

10. *Id.* at 480.

11. *See, e.g.*, GRAEME LAURIE, GENETIC PRIVACY: A CHALLENGE TO MEDICO-LEGAL NORMS 4 (2002); DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES: THE FEDERAL REPUBLIC OF GERMANY, SWEDEN, FRANCE, CANADA, AND THE UNITED STATES 7 (1989); ALAN WESTIN, PRIVACY AND FREEDOM (1970) (for usage of terms describing privacy interests).

12. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. *See* Council Directive 95/46/EC, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Directive].

Concepts of both informational and decisional privacy are implicated in this discussion and serve as the focus for this analysis.

Informational autonomy in the biomedical context arises in many forms. In the age of genetic medicine, the genetic information of one patient may be significant for another. Thus, when deciding whether to share an individual patient's medical information, one should attempt to strike a balance between the rights of a patient to keep his medical information confidential and the rights of a patient who may benefit from the release of another's personal medical records. Often the question comes down to whether the patient has a superseding right to make decisions about who has access to his private medical information when others may benefit from knowing it. As biomedical technology proceeds, the question of individual control of medical information arises with increasing frequency in clinical practice, medical research, and even public health and law enforcement. As the cases of both tissue use and storage and disclosure of genetic test results show, the individual privacy right can come into direct conflict with the pursuit of societal benefit.[14] In the former case, the societal benefit derived from the compromise of personal data protections comes in the form of more informed medical research and potential individual and collective benefits to society. In the later case, the interests of a smaller but less speculative circle of potential beneficiaries can come into conflict with those of individual right to privacy.

With the growing case for encroachment on informational autonomy in the name of public interest, it becomes increasingly important to ascertain the force of privacy protections. By examining this question through a comparative analysis of the structure of rights that protect privacy in the biomedical context, some light can be shed on the nature of privacy protections and where the true source of their comparative force lies. As biomedical innovations increase the value of sharing private medical information, identifying and crafting the protective mechanism of privacy rights becomes increasingly important.

2. Overview of the Sources of Privacy Protections

This comparative analysis begins with an identification of the sources of privacy protections and the hierarchy of legal norms regarding privacy rights. The sources of privacy protections, like many laws and regulating mechanisms, do not operate in a vacuum, but rather rely on various institutional, social, and political factors for their implementation and ultimate effect. While not discounting these extra-legal factors, they generally lie outside the scope of this Article.

Starting with European treaties and the Data Protection Directive of the European Union, this analysis examines the European Union Directive 95/46

14. *See, e.g.*, Bartha M. Knoppers, *Confidentiality of Health Information: International Comparative Approaches*, *in* Protecting Data Privacy in Health Services Research, App. D, 180 (Inst. of Med. 2000), *available at* http://newton.nap.edu/html/data_privacy/appD.html#FOOT19.

(Data Protection Directive) and related national legislation to assess the nature and effect of the architecture of privacy protections. Then crossing the Atlantic, the Article examines the U.S. structure of privacy protections in the biomedical context.

2.1 European Union Membership and Its Effect on Member National Law

The European Union was formed as an outgrowth of a number of treaties and agreements with the primary goal of facilitating trade. Beginning with a core membership of eight member nations, it expanded to a membership of 27 by 2007[15]. Membership in the EU held out a number of benefits to member states, particularly economic benefits, and became a foreign policy goal for several post-communist eastern European states.[16] Of course, membership in the EU carries with it numerous obligations, particularly in the observance of EU law and directives. For some relatively late membership candidates, some East European countries, for example, the obligations operated as both a passive and active leverage, resulting in what has been referred to as "asymmetric interdependence."[17] Some countries that joined the EU after the completion of the internal market but were already members of the European Economic Area (EEA) experienced less EU leverage. This is most likely because, as EEA members, they had already complied in principle or practice with general EU norms, particularly those stemming from status as a market economy.[18] This relatively lower degree of leverage may help to explain some aspects of implementation and application of privacy and freedom of speech law in Norway, an EEA member.

2.2 European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) was adopted by the Council of Europe in 1950.[19] It articulates the right to privacy in two clear and succinct provisions, arguably leaving no room for suggestion that privacy rights are without meaningful legal basis. Article 8 of the European Convention articulates the right to privacy in two provisions:

---

15. *The History of the European Union.* Europa, http://europa.eu/abc/history/index_en.htm (last visited Feb. 13, 2009).

16. MILADA ANNA VACHUDOVA, EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE, AND INTEGRATION AFTER COMMUNISM 108 (2005).

17. *Id.* at 107-10.

18. *Id.* at 111.

19. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No.11. Rome, 4.XI.1950. *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[20]

This Convention and its implementing and institutions of enforcement are critical to the protection of privacy interests.[21]

3. European Directive on Data Protection

In 1995, the European Commission enacted the Data Protection Directive (Directive) addressing the member states of the European Union.[22] This document was designed to facilitate the free flow of information among the member states without compromising the privacy of the citizens in each of the member states.[23] The Directive sets forth with greater particularity the provisions that ensure the processing of personal data in a manner that is consistent with Article 8 of the Convention while aiming to assist in the protection of privacy interests in the domestic and international transfer of information. Article 1 ("Object of the Directive") states: "In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[24]

---

20. European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8, Nov. 4, 1950, Europ. T.S. No. 5, (*entered into force on* Sept. 3, 1953), *as amended by* Protocol No. 3, Europ. T.S. 45 (*entered into force* Sept. 21, 1970); Protocol No. 5, Europ. T.S. 55 (*entered into force on* Dec. 20, 1971); Protocol No. 8, Europ. T.S. 118 (*entered into force on* 1 Jan. 1990); and Protocol No. 11, Europ. T.S. 155 (*entered into force on* Jan. 11, 1998) [hereinafter European Convention].

21. Taking the 1948 Universal Declaration of Human Rights as its starting point, the European Convention was designed to further the goal of collective enforcement of the Universal Declaration of Human Rights. To that end, the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe were set up in subsequent years to enforce the terms agreed to by the contracting states. *See* Universal Declaration of Human Rights, G.A. Res. 217A U.S. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

22. Council Directive 95/46/EC, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

23. *Id.* at 10.

24. Directive, *supra* note 13, at Art. 1.

3.1 Sensitive Information

Although the Directive does not specifically address medical information or research, much can be derived from its provisions with regard to informational privacy protection issues as they arise in the medical arena.[25] Article 8(1) of the Directive on the processing of special categories of data states in relevant part: "Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."[26]

Thus, although medical research is not specifically addressed by the Directive, Article 8 indicates that personal health information falls into a special category of data deserving of special protections in its processing. This is frequently referred to, both in EU contexts as well as in many national laws, as "sensitive" data.

3.2 Derogations, Exceptions, and Overrides

The protections against the processing of this special category of personal data are not absolute. Indeed, Article 8 subsections (2)-(5) serve to derogate the privacy protections afforded in Article 8(1), stating that Article 8(1) shall not apply to the processing of data relating to offences, criminal convictions or security measures, to exemptions laid down by member states in the "substantial public interest," and notably, to instances in which the processing of data is required for "purposes of preventive medicine, medical diagnosis, the provision of care, or treatment or the management of health-care services."[27] Recital 34 elaborates on the derogation contained in the articles of the Directive stating:

> Whereas Member States must also be authorized, when *justified by grounds of important public interest*, to derogate from the prohibition on processing sensitive categories of data where *important reasons of public interest so justify* in areas such as public health and social protection – **especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system – scientific research and government statistics**; whereas it is incumbent on them, however, to provide specific and suitable safeguards

25. *See, e.g.*, IMPLEMENTATION OF THE DATA PROTECTION DIRECTIVE IN RELATION TO MEDICAL RESEARCH IN EUROPE (Deryck Beyleveld et al., eds., 2004) [hereinafter Research].

26. Directive, *supra* note 13, at art. 8.

27. *See id.*

> so as to protect the fundamental rights and the privacy of individuals . . . .[28]

While the Directive does not specifically address medical research and the use of personal medical information in that context, its inclusion of health data as "sensitive information" and its designated derogations in the public interest (as stated in Recital 34, in the interests of public health, social protection, health delivery and administration, and scientific research), indicate that the architecture of privacy protections as designed in the Directive is such that the protection of substantive rights is not stringent. The list of broad derogations appears to yield no predictable precise boundary for the privacy of health data. Nor does the Directive interpret or direct the precise scope or application of these categories of derogation. Thus, social protection in the public interest may actualize more broadly in some countries as an override of privacy interests than in others. Where this is contested, it may be brought to the European Court of Human Rights or Court of Justice.[29]

In accordance with the proportionality rule, which allows for a balancing of interests and rights, implementing member states may derogate individual privacy rights if the countervailing interests constitute an important public interest, such as public health or social protection, and otherwise meet the criteria of the proportionality principle. However, the protection of fundamental rights figures prominently into the balancing of interests, even in the face of broadly articulated exceptions. In order to prevail over a fundamental right, the proportionality rule requires that the countervailing interest may not be frivolous or dismissive of individual privacy. Thus, the proportionality rule does not open the floodgates; rather it operates within certain confines and assurances that the essential character of fundamental rights is not undermined.[30] Still, health information, while accorded special protected status, in many ways stands to lose some important aspects of that status by virtue of how it is used in the field of health and medical research and how the broadly constructed derogations are interpreted and applied nationally.

As this Article explores, the relevant parameters of privacy are likely to be created and enforced by national legislation, the structure and conception of privacy rights, and by the priority placed on privacy by society.

3.3 Implementation of the Directive

One of the Directive's primary objectives is to harmonize data protection across member states in order to facilitate the use of such data across borders within the EU. Additionally, the Directive also addresses standards and practices regarding data protection among non-member states in order to ensure

28. *See id.* at Recital 34 (emphasis added).
29. *See, e.g.*, Z v. Finland, App. No. 22009/93, 25 Eur. Ct. H.R. (1997).
30. *See* Schauer, *supra* note 3.

an adequate level of protection. This is manifest in the requirement that the transfer of personal data from an EU member state can only be done if the protections in the receiving country are equal to those in the EU, or if not, a certificate of adequacy must be acquired from the appropriate authorities.[31] Each member and EEA state was required to effect implementation of the Directive by 24 October 1998.[32] This deadline for compliance was subsequently extended by amendment until 2001.

The implications of the Directive for medical research are substantial. With increasing transnational collaborative research projects, and the desirability of using existing tissue collections, regulations regarding transferability are pivotal to the medical research enterprise. The commitment to fundamental rights and the protection of individual privacy is really called into question when weighed against the range of societal interests that may fall within the list of derogations.

The process of implementing the Directive, however, was not merely a matter of rubber-stamping of Directive provisions. Indeed, it sometimes required changes that involved numerous procedural, institutional, and political hurdles in the member states. Consequently, when the first report on implementation by member states was to be made in 2001, the slow process of transposition among many member states resulted in delay of the first report[33]. At the end of 1999 the European Commission decided to file against France, Germany, Ireland, Luxembourg and the Netherlands in the European Court of Justice for failure to fully implement Directive 95/46.[34] In 2001 the Netherlands and Germany documented their compliance, and eventually the cases against the remaining nations were closed.

National implementation of the Directive also had to be sensitive to national notions, norms, and practices regarding privacy. Particularly in the context of biomedical research and genetic research, the standards set by the EU provide for a fair margin of discretion for Member States in the substantive implementation of certain areas. This broad discretion is very significant to the protection of sensitive information, particularly regarding health information. For example, one of the consistently mentioned justifications for derogation pertains to scientific purposes and research that presumably benefits society.

Despite the fact that the Directive contains no specific reference to medical applications, the transposition of the Directive by Member States has an effect on the policies and regulations governing significant aspects of

---

31. Research, *supra* note 25.

32. *Commission Report on the Transposition of the Data Protection Directive, Analysis and Impact Study on the Implementation of Directive EC 95/46 in Member States, available at* http://ec.europa.eu/justice_home/fsj/privacy/docs/lawreport/consultation/technical-annex_en.pdf (last visited Nov. 11, 2008) [hereinafter *Analysis*].

33. See actions against France, Germany, Luxemburg, Ireland, and the Netherlands, discussed below.

34. *See id.*

biomedical research that use genetic technologies and information.[35] It is generally recognized, although not without controversy, that genetic information has a special character and, at least in some instances, may require separate legislation and oversight.[36] While the Directive does not require this kind of particularized regulation in implementation, several Member States have taken up this matter. In addition, the Commission's Article 29 Data Protection Working Party (Working Party 29) has established a Working Document on Genetic Data in recognition of the concerns arising from the unique nature of genetic information.[37]

Variation with regard to protection of genetic data is considerable. Working Party 29 has noted that regulation of the processing of genetic data is uneven across the EU: "Indeed, while some Member States have explicitly listed genetic data as sensitive data in their Data Protection law with all the safeguards and restrictions associated, in most Member States the issue of the processing of genetic data is not as such regulated by specific legislation."[38] Thus, while some Member States provide for complementary rules in their laws on patients' rights and have enacted legal regulations for the processing of genetic data, the Working Party 29 anticipates a trend toward increased national regulation of the processing of genetic data specifically. For example, in 2005, Portugal, a non-member state, enacted genetic legislation applying many of the principles and safeguards that regulate general medical information, including the nature of permissible overrides.[39]

Where the unique aspects of genetic information have consequence for privacy protections, Member States face the challenge of finding ways to provide the necessary protections, whether in sectoral legislation or broader protective legislation, while leaving sufficient room in which to derive the benefits of developing technologies that challenge the margins of privacy. This Article looks at two largely unsettled issues involving the processing of genetic information – tissue use and storage and disclosure of genetic test results. Regulation of these issues is uneven. The following section provides a very brief view of three national systems of privacy protections pertaining to health information.

---

35. *See* Research, *supra* note 25.

36. Sonia Suter, *The Allure and Peril of Genetic Exceptionalism: Do We Need Special Genetics Legislation?* 79 WASH. U. L.Q. 669, 747 (2001).

37. *Article 29 Data Protection Working Party, Working Document on Genetic Data*, 12178/03/EN WP 91 (Mar. 17, 2004), *available at* http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2004/wp91_en.pdf [hereinafter *Article 29 Data Protection Working Party*].

38. *Id.* at 3.

39. Law No 12/2005 of Jan. 26, 2005, Personal Genetic Information and Information on Health [hereinafter Portugal].

4. Europe: National Hierarchies of Privacy Norms

4.1 France

The Constitution of France does not mention privacy or set forth rights of this type.[40] However, by virtue of its declaration of membership in the European Union,[41] France is obligated to abide by the principles of the Directive. There is no single comprehensive privacy provision in France. Provisions for the protection of privacy interests are found in both the civil and criminal codes of this civil law country.

Article 9 of the Civil Code recognizes privacy as a fundamental right stating that "everyone has the right to respect for his or her private life."[42] What constitutes private life is not defined, but rather has been a matter for the courts, who have over time constructed a meaning that has been said to include a person's "love life, friendships, family circumstances, leisure activities, political opinions, trade union or religious affiliation and state of health."[43] This protection applies to both public and private spaces. Furthermore, Article 9 authorizes the court to take measures to prevent or halt invasions of personal privacy and, in general, at least regarding publication, privacy protections in France may be among the most protective.[44]

Privacy in the health sector is generally provided for at the national level by the Penal Code in Articles 226-13,14). In the section on "Professional Secrecy," Article 226-13 states that disclosure of secret information by one entrusted with such information by virtue of his profession or position is punishable by a year of imprisonment and a fine of 15,000 Euros.[45] It has been noted that, unlike most obligations of physicians, which are "obligations of means," the obligation of secrecy is an "obligation of result"; thus, it is not only what is explicitly or implicitly communicated, it is also that which is understood.[46] It has been noted that, unlike most obligations of physicians, which are "obligations of means," the obligation of secrecy is an "obligation of result"; thus, it is not only what is explicitly or implicitly communicated, it also refers to that which is understood.[47] Therefore, whatever is "communicated," verbally or non-verbally, to a physician by any means within the context of the

40. 1958 La Constitution (Fr.).

41. Title 15 on the European Communities and the European Union, and its agreement, as a result of the Treaty on European Union signed on 7 February 1992.

42. Code civil [C. CIV.] art. 9 (Fr.).

43. Legal and Technical Office of Information and Communication for the Embassy of France, Embassy of France in Washington, French Legislation on Privacy, http://ambafrance-us.org/spip.php?article640 (last visited Nov. 12, 2008).

44. *Id.*

45. Code penal [C. pen.] art. 226-13 (Fr.).

46. *See* Knoppers, *supra* note 14, at 180.

47. *Analysis*, *supra* note 32, at 24.

doctor-patient relationship is privileged. Thus, protections in France are constructed broadly, resting on both the Data Processing Act and relevant provisions in the Codes.

4.2 Implementation of the Data Protection Directive: Act on Data Processing, Files and Individual Liberties

The French Data Protection legislation[48] came into compliance with Data Protection Directive 95/46/CE in 2004, after having been taken to the European Court of Justice for failure to notify all the provisions of the Directive.[49] The French Act on Data Processing, Files and Individual Liberties does contain a chapter specifically regulating the processing of medical data.[50]

5. Norway

The Norwegian Constitution, adopted in 1814, specifically stating that the "search of private homes shall not be made except in criminal cases,"[51] somewhat resembles privacy protections as expressed in the Fourth Amendment of the U.S. Constitution. Additionally, Article 110(c) of the Norwegian Constitution, which broadly sets forth protections of human rights, sets forth further provisions that pertain to privacy rights.[52]

Giving effect to international agreements requires both ratification and implementation of national legislation. The European Convention on Human Rights was incorporated into Norwegian law by the Human Rights Act of 21 May 1999 no. 30. According to Article 3 of the Human Rights Act, the Convention takes precedence over conflicting legislative provisions. The ECHR does not, however, enjoy constitutional status although it clearly has strong force by virtue of its precedence over conflicting legislative provisions.[53] This provision, not surprisingly, is the subject of some debate.[54] Additionally, as in much of Europe, under "the principle of legality," unwritten norms rooted in customary law may also acquire constitutional status.[55]

Since the European Convention on Human Rights (ECHR) specifically provides for protection of individual privacy and Norway is a signatory to the

---

48. Decree No. 2005-1309 of Oct. 20, 2005, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Oct. 22, 2005, p. 16769.

49. *Analysis, supra* note 32.

50. Decree No. 2005-1309 of Oct. 20, 2005.

51. Grunnloven [Grl] [Constitution] § 102 (Nor.).

52. *Id.* at art. 110(c).

53. Lee A. Bygrave & Ann Helen Aaro, *Privacy, Personality and Publicity--An Overview of Norwegian Law, in* INTERNATIONAL PRIVACY, PUBLICITY, AND PERSONALITY LAWS, 333, 333 (M. Henry, ed., 2001).

54. *See* Synne S. Maehle, *Limits of Rettsanvendelsesskjonn: About the Legal Legitimacy of a Tension Between Flertallsmakt and Rettighetsvern, in* GYLDENDAL ACAD. 285, 285-99 (2005).

55. *Id.* at Ch. 22.

Convention and has passed implementing legislation incorporating the ECHR, those privacy protections set forth in the Convention are protected under Norwegian law. Therefore, under Article 8 of ECHR, provisions relating to privacy protections are incorporated into Norwegian law by way of the Norwegian Constitution.

5.1 Data Protection Directive Implementation: Norwegian Personal Data Act of 2001

Norway, a member of the EEA and not the EU (but similarly required to bring its laws into compliance with the Directive), locates primary protections for personal information in the Norwegian Personal Data Act of 2001[56] (replacing the Data Registers Act of 1978).[57] In the context of medical privacy, other laws, regulations, and provisions interact with the Norwegian Personal Data Act to provide the national standard of privacy protection of medical information. Of particular interest in the realm of genetic privacy is the Biobank Law of 2004, which sets forth regulations pertaining to the use of genetic technologies.

Initially, certain provisions of the draft Norwegian Act proved problematic both with regard to the Directive as well as for certain constituencies in Norway, particularly those concerned with research. It has been argued that the final Norwegian Data Protection Act that was passed in 2001 was modified to satisfy the research community as well as comport with Directive provisions as a result of political idiosyncrasies.[58]

The new Norwegian Personal Data Act occasioned a shift in privacy protections, both in content and, significantly, in underlying orientation.[59] The former Norwegian legislative tradition regarding privacy took its rise from a "model of control" in which privacy, as a responsibility of society and the government, was a matter of external supervision, monitoring, and licensing.[60] The new Act, following the lead of the Directive, is oriented toward a "model of consent" and, according to Bygrave and Aaro, introduces more substantive rules and regulation of specific applications rather than the previously favored "framework legislation."[61] Now the Act includes numerous and more detailed substantive rules and clearly delineates specific principles such as purpose

56. Act of 14 April 2000 No. 31 relating to the processing of personal data (Personal Data Act) *available at* http://www.datatilsynet.no.htest.osl.basefarm.net/upload/Dokumenter/regelverk/lov_forskrift/lov-20000414-031-eng.pdf (last visited Feb. 16, 2009).

57. Vigdas Kvalheim, *Implementation of the Data Protection Directive in Relation to Medical Research in Norway*, *in* RESEARCH, *supra* note 25, at 291.

58. *Id.* at 290 (describing idiosyncrasies such as who participated and controlled the process that formed the final law).

59. *Id*, at 290.

60. *Id.* at 291.

61. Bygrave & Aaro, *supra* note 46.

specification (as may be applied to tissue use and storage).[62]

The Norwegian Personal Data Act has been perceived as not only being consistent with the Directive, but exceeding it in the standards for data protection.[63] It has been observed that the Norwegian Act may actually serve to value privacy over furthering scientific knowledge.[64] To the extent that this is true, it is reasonable to expect that this elevated status of individual privacy is consistent across sectors.

The Norwegian government, through its oversight agency, Datatilsynet, states that the express purpose of the Act is to protect persons from violations of their right to privacy when personal information is processed and to ensure that any processing of personal information is done in a way that accommodates a fundamental respect for privacy rights; it aims to protect personal integrity and private life and ensure that any personal data that is processed meets acceptable standards of quality.[65]

In virtually every aspect of the Norwegian approach to privacy protections, the shift toward consent seems to predominate. Consistent with this is the government website for the Data Protection Act: its implementing government agency, Datatilsynet (Data Supervision/Oversight), has as its headline slogan: "Protection of Persons: Your Right to Choose."[66] Consent is the predominating principle and a decisive factor in much of the processing of personal information in the biomedical context in Norway.

Three pieces of legislation constitute the Norwegian Data Protection Act: 1) The Personal Data Act; 2) Personal Data Regulations; and 3) the Personal Health Data Filing System.[67] However, since this Article looks at specific applications involving biotechnology, such as tissue storage and genetic test results, the Biobank Law, a relatively new piece of legislation implemented in 2004, is also implicated. Together, these regulations provide personal data protection in the biomedical context.

6. United States

It is frequently asserted that there is no fundamental right to privacy in the United States, but rather that it is a social construction,[68] undergirded by no

---

62. *Id.*

63. *See* Kvalheim, *supra* note 57, at 290.

64. Kvalheim, *supra* note 57, at 292.

65. Datatilsynet, About the Data Inspectorate, http://www.datatilsynet.no/templates/Page____194.aspx (last visited Feb. 17, 2009).

66. *Id.*

67. Act of 18 May 2001 No. 24 on Personal Health Data Filing Systems and the Processing of Personal Health Data (Personal Health Data Filing System Act) *available at* http://www.regjeringen.no/en/dep/hod/Subjects/The-Department-of-Public-Health/Act-of-18-May-2001-No-24-on-Personal-Health-Data-Filing-Systems-and-the-Processing-of-Personal-Health-Data-Personal-Health-Data-Filing-System-Act-.html?id=224129 (last visited Jan. 26, 2009).

68. *See* Frederick Schauer, *Free Speech and the Social Construction of Privacy*, *in* THE

directly relevant constitutional provision.[69] Yet, the Fourth Amendment would seem to protect at least some aspects of privacy interest. It states in part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause . . . ."[70] The notion of protection against unreasonable search and seizure has been interpreted to apply to a wide variety of activities, communications, and entities that are not specifically enumerated. Wiretapping is a frequently used example.[71]

One might note that, like First Amendment protection of freedom of speech, there is no list of derogations to the Fourth Amendment; it appears as an "absolute" non-derogable right. Arguably, the warrants that may be issued according to specific criteria may be said to provide the opportunity for the balancing that is transparent in European legislation.

But the reality is that there is no overarching privacy legislation in the U.S. comparable to the European Directive on Data Protection or most of the national implementing legislation following a model of comprehensive data protection. Rather, the U.S. has adopted an approach characterized by sectoral privacy legislation. Thus, in the U.S. there is special privacy legislation regarding, for example, credit, banking, communication, and health.

6.1 Sectoral Health Privacy Legislation: HIPAA

Privacy in the biomedical context is governed by the Health Insurance Portability and Accountability Act (HIPAA).[72] Through this 1996 Act and its subsequent amendments, the U.S. system of privacy protections in the biomedical context would appear to offer a strong statement of protections. Yet, in its application in the context of biomedical research, much of the protection is in fact left to the discretion of implementing agencies. Following guidelines and laws set forth in HIPAA, administrative agencies are charged with oversight of the conduct of medical research within the confines of the law largely as applied by institutional review boards (IRBs).[73] This is especially true in the case of new technologies and the novel ethical and legal issues they raise. Because the process of law-making is so slow, the use and application of new technologies often goes forward without regulatory oversight of the vulnerabilities created by such technology. The lacunae created by the

---

JOAN SHORENSTEIN CENTER ON THE PRESS, POLITICS AND PUBLIC POLICY: THE FIRST AMENDMENT SERIES (2000), for an exemplary analysis of the nature of this claim of social construction.

69. *Id.*

70. U.S. CONST. amend. IV.

71. *See, e.g.*, Videotape: In Search of the Constitution: Mr. Justice Brennan (Films for the Humanities & Sciences 1987).

72. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., 42 U.S.C.) [hereinafter HIPPA].

73. 45 C.F.R. § 46.107 (2005).

outpacing of ethical analysis and the regulation spurred by the scientific developments are considerable. One area where this is very apparent is that of tissue use and storage, and the derivation, compilation, and storage of personal data taken from such tissue. The significance of the fact that HIPAA makes no specific reference to genetic data is unclear. HIPAA does not distinguish among different types of personal medical information[74]. However, because of the structure of rights, permissible processing of this data will not necessarily be the same. A use that falls through the cracks in HIPAA legislation and, therefore, might go unregulated in Europe will still receive rigorous analysis if it burdens a fundamental right.

Under HIPAA, protected health information (PHI) refers to individually identifiable health information. This includes information such as demographic information relating to a person's past, present or future health state; the provision of care, payment for health care, or anything that otherwise makes it possible to identify the individual. Common identifiers include birth date, social security number, name, and address.[75]

6.1.1 Explicit Exceptions

Along with the protections, HIPAA contains an extensive list of exceptions to non-disclosure of PHI.[76] This list includes disclosures: 1) for public health activities; 2) about victims of abuse, neglect, or domestic violence; 3) for health oversight activities; 4) for judicial and administrative proceedings; 5) to avert a serious threat to health or safety; 6) for specialized government functions; 7) for research purposes and; 8) for law enforcement purposes.[77] These categories of exceptions are carved out in the legislation, reflecting, as Schauer points out,[78] that the balancing has taken place in the drafting of the legislation. Importantly, these are also distinguishable from the broad derogations characteristic of European legislation precisely because of their specificity and the largely absent opportunity for further balancing.

This absence of opportunity for further balancing is not absolute regarding the use of private health data. The carved-out exceptions allow for some flexibility for the arbiter of disclosure. Thus, "research purposes," for example, absent a specific provision to the contrary, could allow a wide range of practices that would normally be considered in violation of privacy rights. However, typically, an IRB will have the opportunity to conduct a form of balancing[79]. The important point that distinguishes this kind of balancing from

74. *See* HIPPA, *supra* note 72.

75. 45 C.F.R. § 160.103 (2005).

76. 45 C.F.R. § 164.512 (2005) (providing: "Uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required").

77. 45 C.F.R. Section 164.512 (a)-(f).

78. Schauer, *supra* note 3.

79. *See, e.g.*, Nat'l. Inst. of Health, Nat'l. Comm'n. for the Protection of Hum. Subjects of Biomedical and Behav. Res., The Belmont Report: Ethical Principles and Guidelines for the

that performed in accordance with the proportionality principle is that the nature of the balancing at this level is rarely transparent. As a result, it is often not clear what interests are being balanced and what weight is being accorded them. Thus, a decision by an IRB to permit a waiver of consent for the indefinite storage and use of existing genetic samples in an ongoing study may be justified by an oversight committee based on the inconvenience to the research staff, time constraints, or even on the reputation of the researcher, not to mention personal idiosyncrasies of a given IRB in which members expressing reservations about a study may be subjected to subtle (and not so subtle) expressions of disapproval.[80] Still, HIPAA provides a baseline level of protection, which is viewed by some, particularly researchers, as "overly protective."[81]

7. *Genetic Information in Research*

It is widely recognized, although not undisputed, that genetic information has characteristics that set it apart from other medical information.[82] For example, if one parent carries the genetic mutation for Huntington's disease, the children have a fifty percent chance of developing the same fatal and untreatable disease. Information about this genetic information can be of great interest to the offspring as well as siblings.[83] The power of information on a single gene disorder like Huntington's can be overwhelming, but when multifactorial diseases also carry genetic markers which can be tested for, the value of the genetic test result becomes more speculative. For example, questions arise regarding whether a forty-five-year-old who tests positive for the genetic mutation associated with colon cancer should be compelled to disclose this to family members in the interest of providing health benefits.

The ability to access and interpret genetic information as a biomedical tool can offer a range of benefits by virtue of the kinds of information it can provide and interventions to which it might lead. However, genetic technology also presents enormous complexities regarding the use of this information. Indeed, genetic information can trigger the involvement of interests, obligations, and rights of persons that extend beyond those of the individual whose genetic information is at issue. Furthermore, as the Article 29 Data Protection Working Party points out, genetic information can provide personal

---

Protection of Human Subjects of Research (1979) *available at* http://ohsr.od.nih.gov/guidelines/belmont.html#goc2.

80. Sohini Sengupta & Bernard Lo, *The Roles and Experiences of Nonaffiliated and Non-Scientist Members of Institutional Review Boards*, 78(2) ACAD. MED. 212, 212-218 (2003).

81. *See, e.g.*, Robert E. Erard, *Release of Test Data Under the 2002 Ethics Code and the HIPAA Privacy Rule: A Raw Deal or Just a Half-Baked Idea?* 82 J. PERSONALITY ASSESSMENT 23 (2004).

82. *See, e.g.*, Sonia M. Suter, *The Allure and Peril of Genetic Exceptionalism: Do We Need Special Genetics Legislation?* 79(3) Wash. U. L. Q. 669 (2001).

83. *See, e.g.*, ALICE WEXLER, MAPPING FATE: A MEMOIR OF FAMILY, RISK, AND GENETIC RESEARCH (1995).

information relevant throughout an individual's remaining life.[84]

As personal information that, in most circumstances, falls in the category of "sensitive information," such as health data, it is also subject to derogation. The assurance of the protection of personal data that is paramount in the Data Protection Directive is tested in new ways in the context of the collection, use, and dissemination of genetic information. Inasmuch as the Directive lists "the public interest" among the categories of overrides that may be used to justify exemption from certain privacy provisions,[85] individual genetic information may routinely be caught in the paradoxical position of being classified both as "sensitive information" and as information whose benefit to society outweighs the potential harm to the individual's privacy interests and, thus, is less deserving of protection than even non-sensitive personal data.

The rationale for the selection of these two issues is manifold. First, there is no consensus on the resolution of either issue and there is considerable variability in the current approaches to these issues[86]. Second, these issues present profound questions regarding the future of privacy protections. Third, policies regarding tissue use and storage will have long-term effects on privacy interests and the weight of the countervailing potential benefit derived from incursions on those privacy interests[87]. Finally, these two questions gauge different levels of privacy protections as well as suggest key aspects of the nature of the application of the proportionality rule in the balancing between individual rights and third party benefit.

This Article also references the issue of research involving persons with reduced or no capacity to consent. I shall refer to this category of persons as "incapacitated persons." The reasons for the selection of this issue are related to its place as a largely unsettled and controversial aspect of biomedical research and to what it tells us about attitudes toward privacy. In a sense, the issue of research on incapacitated persons forces clarity on the limits of privacy since consent, as a mobile parameter, is not available. As this Article explains, the current trend is to limit research on such persons to that which will provide a direct benefit, and in some instances, only when a surrogate decision-maker has provided consent. This has been a very unpopular policy with researchers, and many countries are re-examining their position on this issue. This issue calls forth a declaration of the balance between incursion into the private sphere without consent and the weight of the public interest. So, while this particular issue is governed primarily by Directive 2001/20/EC (Clinical Trials Directive), the privacy implications are significant, and, in the case of incapacitated persons, the policy resolution of the balance between individual privacy and

84. *Article 29 Data Protection Working Party*, *supra* note 37, at 4.

85. Directive, *supra* note 13, at recital 34.

86. *See, e.g.*, Privireal.org, http://www.privireal.org/index.php (A European Commission Framework 5 Project on the Implementation of the Data Protection Act among Member States).

87. *See, e.g.*, E.W. Clayton, et al., *Informed Consent for Genetic Research on Stored Tissue Samples*, 274 J. Am. Med. Ass'n 1786 (1995).

public benefit can be very telling.

7.1 Tissue Use and Storage

Medical research has taken on new ethical and legal challenges with the advent and development of genetic technologies and various computerized database and advanced sequencing capabilities. Some of the most promising developments are tissue banking and biobanking. The former is generally understood to refer to the storage and processing of human biological material ("HBM"), e.g. blood, tissue, saliva, etc.; whereas the latter is primarily concerned with the collection of data derived from the tissue. A biobank allows for the processing (for research purposes) of HBM and known phenotypic characteristics and thus may include both. This kind of banking allows for longitudinal studies as well as studies on related or unrelated diseases or other epidemiologic phenomena. Tissue and biobanking potentially implicate property and privacy interests, while data-banking more strongly implicates privacy interests, although not exclusively. In most instances, it is the *information* derived from the tissue that is the basis for the privacy concerns.[88] It is this coupling of information and tissue into a "biobank," an optimal research tool, that is the primary focus of this inquiry. Interestingly, as far back as the 1970's, there was growing concern about the increase of data banks of various sorts, which permit "computerized pools of information" about virtually every aspect of people's lives.[89]

Several issues have proven controversial with regard to various aspects of biobanking. First is the issue of informed consent as a mechanism of both decisional and informational privacy.[90] One of the great benefits of biobanking – the ability to analyze the same tissue over time for various characteristics as scientific developments would merit – also constitutes one of the great dilemmas of the enterprise.

The Helsinki Declaration[91], embraced by the European Convention on Human Rights, declares that informed consent is a foundation for biomedical research on human subjects.[92] A typical scenario in biobanking involves a subject (human participant) agreeing to participate in research that involves the taking of a tissue sample for analysis for a specific research project. However, it is increasingly common for researchers to acquire a sample with the idea of

88. The most notable exception to this would be the use of tissue that results in patent. *See, e.g.*, Moore v. Regents Univ. of Cal., 793 P.2d 479 (Cal. 1990).

89. *See* Hyman Gross, Privacy—Its Legal Protection 100 (1976).

90. *See, e.g.*, E.W. Clayton, et al., *Informed Consent for Genetic Research on Stored Tissue Samples*, 274 J. Am. Med. Ass'n 1786 (1995).

91. World Medical Association, Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects, (2008) *available at* http://www.wma.net/e/policy/b3.htm.

92. Research on identifiable human tissue is generally considered human subject research (*See, e.g.*, 45 CFR 46.102(f) and 45 C.F. R. 46.116). Variations on this construction do exist and I examine them here as appropriate.

storing that sample so that it may be analyzed at a later date either for a related study or for a completely new purpose, which may be unforeseen at the time the sample was taken.[93] In order to secure a sample that can be used both for the instant research and for unspecified future uses, the researcher must obtain informed consent from the prospective participant. Herein lies the dilemma: it is much debated whether or not an individual can actually give "informed" consent to unspecified future uses since a participant would be consenting to something about which he is not actually informed at all. There is little resolution about the ethical nature of "blanket consent." However, there is considerable discussion about the degree to which restrictions on blanket consent hinder research efforts.[94]

A second related issue involving informational privacy is that of the identification and anonymization of data derived from HBM, as well as links to other information about the donor, e.g. phenotypic information (observable properties) or family history. Identification and anonymization in this context unfold into a fairly complex set of configurations that is designed to enable the researchers to link analyzed data to individual phenotypic characteristics (possibly the optimal research resource scenario), while simultaneously protecting the privacy of individuals. Simply put, samples can be identified (labeled with a person's personal identifying data), coded (linkable to personal identifying information not readily available to researchers), de-identified (collected with identifiers, but subsequently stripped of all identifying information and links) and anonymized (collected and stored with no identifying information). Among the most central issues on which there is variation in regulation are: 1) which form of identification constitutes human subject research; 2) whether blanket consent can be given to use of identifiable samples; and 3) whether new use of an identifiable (coded) sample requires re-consent, and under what circumstances it can be exempted.

Another set of concerns relates to unforeseen subsequent use. The issue of secondary uses is somewhat less controversial than the issues of consent. Some policies limit secondary use to related research, yet a determination must be made about what constitutes "related" research. This determination must generally be made on a case-by-case basis. Additionally, uses by third parties is a very important issue implicating both informational and decisional privacy, particularly given the Directive's concern with the free flow of information across borders.[95] If consent is given to a particular researcher, a determination must be made about whether that consent extends to a third party who also

93. Philip Reilly, et al., *Ethical Issues in Genetic Research: Disclosure and Informed Consent*, 15 Nat. Genetic 16-20 (1997).

94. *See, e.g.*, Sandra Chandros Hull, et al., *Genetic Research Involving Human Biological Materials: A Need to Tailor Current Consent Forms.*, 26 IRB: Ethics & Hum. Res. 1, 1, 6 (2004).

95. *See* Council Directive 95/46, On the Protection of Individuals with Regard to the Processing of Personal Data and On the Free Movement of Such Data, 1995 O.J. (L 281) 31.

wants to use the sample and data. Clearly, the reasons that may motivate a person to permit one researcher to use her tissue and data may not apply at all to an unknown third party. Various approaches have been taken in this regard, with a common policy being to state this possibility of third-party transfer in the consent form. There is an argument that when a new use of a sample is proposed that the researcher should obtain the participant's re-consent. Matters of practicality have resulted in different approaches to this issue, with perhaps the greatest variation being in who makes the determination of whether an exemption for impossibility or impracticability should be permitted.[96]

Participants' post-consent control over samples is complex. Consistent with basic principles of research ethics, a participant must be able to withdraw from research at any time.[97] Accordingly, a participant is generally allowed to withdraw her sample at any time, up until it has become anonymized or until the data derived from an individual's sample has been compiled with others.

Another related issue is that, given the nature of genetic research, analysis of genetic data could reveal information that would be of beneficial interest to the donor-participant. It is far from resolved whether a researcher should re-contact a research participant to inform them of an incidental finding of a genetic mutation that indicates the likelihood of serious disease with the possibility for early intervention.[98] This issue implicates an interesting aspect of privacy in two ways: 1) the right not to know; and 2) the right to access information being processed about oneself. There are both practical and ethical reasons for not adopting a contact-and-inform[99] approach. Difficulty of follow-up and the need to respect persons' right not to know are just two of the critical considerations.

Finally, another unsettled issue involves the handling and processing of samples taken from minors. In many countries, a parent can consent to the involvement of a minor child in research if certain conditions are met (usually requiring the child's assent).[100] However, when a sample is taken from a minor, some policies permit the indefinite retention of that sample without obtaining consent from the donor when she reaches the age of majority.[101] While there are legitimate issues of practicability, the implications for individual autonomy and privacy are significant. Indeed, if such recruitment occurs on any significant scale, a substantial collection of data could be obtained and stored indefinitely without the consent of the participants.

---

96. *See* Research, *supra* note 25.

97. *See, e.g.*, 45 CFR 46.116 et seq.

98. *See* E. W. Clayton, *Incidental Findings in Genetics Research Using Archived DNA*, 36 J.L. MED. & ETHICS 286 (2008).

99. *Id.*

100. *See* Marina Cuttini, *Proxy Informed Consent in Pediatric Research: A Review*, 60 Early Hum. Dev. 89 (2000).

101. *See, e.g.*, Partners Healthcare System Research Consent Form (2005), *available at* http://healthcare.partners.org/phsirb/consfrm.htm (follow "Tissue Repository Consent Form" hyperlink). [Hereinafter Healthcare].

The challenge presented by the ability to access genetic information that provides information about probable future health states of individuals complicates considerably the analysis of privacy implications and optimal resolutions. Although there is general agreement on the governing principles, the regulation of tissue use and storage is far from harmonized. Principles of self-determination, decisional autonomy, and "control over information about oneself" tend to drive many policy approaches. Yet, even within application of these principles, there is a perhaps surprisingly wide berth for variation in implementation. This Article isolates just a few of the issues involved in tissue use and storage. I intend for these issues to serve as indicators of privacy orientation, sensibilities, and how the architecture serves to create, enforce, or fail to establish substantive boundaries.

7.2 National Approaches to the Regulation of Biobanking: Tissue Use and Storage Issues

Biobanking regulation is still very much in flux. A major debate has been underway in Norway between researchers and those charged with regulating and overseeing human subject research. Countries like the U.K., Estonia, and Iceland have undertaken the establishment of national biobanks for research purposes, sometimes facing considerable resistance.[102] While other countries have not (yet) initiated efforts to establish national biobanks, the establishment of smaller-scale biobanks is undertaken more frequently and involves some of the same issues.[103]

Resolution of issues involving national databases impacts many of those smaller-scale projects. One of the most controversial issues regarding informed consent in national biobanks arose with the DeCode project. The Icelandic Health Sector Database initially instituted a model of "presumed consent." Presumed consent requires that the potential participant opt out of participation. The default is inclusion and use of the sample, so that if the potential participant does nothing, his sample and information are included in the databank. Perhaps not surprisingly, this issue eventually became one of the most contentious of the DeCode project and the model was ultimately modified.

Another of the more problematic issues was the blending of data/samples collected in the health care or therapeutic context and data/samples collected specifically for research.[104] This distinction between residual tissue and tissue

---

102. S.B. Haga & L.M. Beskow, *Ethical, Legal, and Social Implications of Biobanks for Genetics Research*, 60 Advances in Genetics 505 (2008). The DeCode project in Iceland moved swiftly in the beginning, but as concerns mounted, the project was substantially slowed down and forced to address many of the concerns. *See* Skuli Sigurdsson, *Yin-Yang Genetics, Or the HSD deCODE Controversy*, 20 New Genetics and Soc'y, 103 (2001).

103. *E.g.* Jocelyn Kaiser, *NIH Ponders Massive Biobank of Americans*, 304 Sci. 1425, 1425 (2004); *College of Medicine and First Genetic Trust Form Biobank*, How. U. Capstone, June 2, 2003, *available at* http://www.howard.edu/newsroom/capstone/2003/June/news2.htm.

104. Jacquelyn Ann K. Kegley, *Challenges to Informed Consent*, 5 EMBO Rep. 832, 833

collected specifically for research is an important one in European regulatory and ethical analysis.[105] Consent regulations frequently differ for the two types of tissue collection and storage, typically with fewer restrictions on the collection and storage of clinical samples. (There is some suggestion that the norm in many European countries is to treat clinically-derived samples as "abandoned."[106])

The establishment of smaller-scale biobanks creates a number of challenges for researchers, depending on the governing regulations. As mentioned, one of the highest hurdles is that of protecting individual privacy while facilitating legitimate and potentially beneficial research efforts. The issues most heavily implicated in this attempted balance are: 1) the limitation of use to the original research purpose; 2) blanket consent; 3) permissible duration of storage; 4) right to withdraw one's sample after initial consent; and 5) re-consent for new uses. Below is a snapshot of policy positions on these issues among two European Union member states, Norway, and the U.S.

Table 1 Tissue Use and Storage[107]

	Limited to Original Purpose w/o Explicit Consent	**Blanket Consent To Un-Specified Future Use Permitted**	**Permissible Duration of Storage**	**(Re)Consent Exception approved by**
France	Yes	Yes	Necessary	CNIL
Germany	Yes	No	Only as long as necessary	Supervisory Auth[108]
Norway	Yes[109]	No	Only as long as necessary to achieve purpose	Dept, REC
United States	No	Yes	Indefinite	REC

7.3 European Union: Data Protection Directive

The provisions of the Directive suggest that their direct application to the above-mentioned issues of tissue use and storage would result in the regulations

(2004).

105. Ben-Evert van Veen, Letter to the Editor, *Human Tissue Bank Regulations*, 24 Nature Biotech. 496, 496 (2006).

106. *See, e.g.*, Bartha Maria Knoppers, et al., *Ethical Issues in International Collaborative Research on the Human Genome: The HGP and the HGDP*, 34 Genomics 272, 274-75 (1996).

107. Admittedly, this and other tables in this paper grossly oversimplify the nature of the policies and otherwise fail to reflect the nuance of both the underlying reasoning and the application. Nevertheless, as a summary, it serves as a useful point of departure.

108. *See* Bundesdatenschutzgesetz [Federal Data Protection Act], Jan. 1, 2002, § 38 (F.R.G).

109. Biobankloven [Biobank Law], 20 Juni 2008 nr. 44 § 13 (Nor.) [Hereinafter Biobank Law].

contained in Table 1. Notably, with the exception of Norway (which amended its policy effective in 2007), the policies suggested by the Directive are the most restrictive. Article 6(1)(c) and Recital 28 require that member states ensure that the processing of personal data is "adequate, relevant and not excessive in relation to the purposes for which they are collected/further processed." This would suggest that it would be impermissible to keep tissue and data beyond the time necessary to accomplish the original research purposes. Yet, France does not adopt this approach[110]. The architecture of privacy rights in Europe can, in large part, answer why the policies of the member states can be less restrictive. The derogations in Article 13 and Recital 29 affect the Directive provision prohibiting the processing of personal data without the consent of the individual. The basis for different policy outcomes are within the interpretation and applications of these derogations, particularly the "public interest" and "historical, statistical, and scientific" purposes. If application of a provision permitting blanket consent to unspecified future use were permitted and consequently challenged in ECHR, the court would employ the proportionality test to determine the legality of the act.

Consider the following scenario: Claude, a French citizen, voluntarily participates in a diabetes study in which DNA samples are taken in addition to other information, although genetic associations are not the primary focus of this study. Claude, who may have perceived a direct benefit in the form of close monitoring of his health, gave blanket consent to use of his health information. Several years later the French research project sells the samples with personal information to an Estonian research enterprise whose study intends to explore a genetic link between diabetes and alcoholism. Claude reads about the transfer in the newspaper and objects. His success in blocking the transfer in France is not guaranteed. In a similar situation in Norway, Claude would likely prevail. In the U.S., Claude would almost surely lose. I examine resolution of this scenario below.

7.3.1 Specific Provisions Regarding Medical Research (Tissue Use)

7.3.1.1 France

The national legislation of France regarding data protection requires a description of the purpose, population, and nature of data to be involved in the study and processing.[111] This legislation explains some of the reasoning for the determination that blanket consent may be permissible.

The French National Consultative Ethics Committee (CCNE) has taken up the question of tissue storage and use in Opinion No. 77, "Ethical issues

110. Decree No. 2005-1309 of Oct. 20, 2005, *supra* note 48.

111. Decree No. 2005-1309 of Oct. 20, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 25, 2007, p. 16 (Fr.).

raised by collections of biological materials and associated information data: 'biobanks' and 'biolibraries."' The CCNE has determined that blanket consent to unspecified future use is acceptable if the sample is "scrupulously anonymized." This blanket consent is allowable partly because of the impracticality of re-contacting a participant, but primarily for the research value of such tissue and data information.[112] Basing its reasoning on a principle of "solidarity," the CCNE states that "[t]he principle of solidarity would in this case be a justification for concessions regarding the rules observed to safeguard individuals, but it would be true solidarity dependent on voluntary decisions."[113]

The answer to this seeming contradiction can be found in the architecture of French privacy rights. Claude's case against the transfer of his data via blanket consent could conceivably go either way depending on a number of factors. Article 39 of the French Data Processing Act requires consent. The CCNE, while condoning blanket consent, does emphasize that the participation must be voluntary. Claude's case becomes considerably stronger, however, if the sample has been transferred with any identifying information. As the CCNE has stated, blanket consent is acceptable only if the sample is "scrupulously anonymized." Therefore, even with consent, Claude's sample could not be transferred with any personally identifying information. The Directive also requires that the receiving country have the equivalent protections as the transferring country, or at least provide proof of adequate protections. Here, Estonia, as a member of the EU that has ratified the provisions of the Directive, meets the requisite criteria for a receiving country. Thus, if Claude's sample is anonymized, its sale and transfer would be considered legal by a French Court, even if the sample was linked to (unidentifying) phenotypic information.

However, this case might be handled differently in the European Court of Human Rights. The Directive states that storage of personal information is limited to that period and purpose necessary to effect the original goal. The court's application of the proportionality rule would determine: 1) if the intended action can achieve its goal; 2) if the action is necessary to achieve the goal; and 3) if the burden on the right is proportionate to the public interest being privileged at the expense of the right. Here, the issue is whether the burdening of Claude's right is proportional to the public interest being served at the expense of his right. If the sample is anonymized, the right involved is only that of decisional privacy. Although Claude has given blanket consent, he can now claim that this use of the sample is not permissible, since Claude would not have given permission to the use of his sample in a study connected to

112. Nat'l Consultative Ethics Comm. for Health and Life Scis., Opinion n° 77: Ethical Issues Raised by Collections of Biological Material and Associated Information Data: "Biobanks," "Biolibraries" 19 (2003) [hereinafter Ethical Issues Raised by Collections of Biological Material], *available at* http://www.ccne-ethique.fr/docs/en/avis077.pdf.

113. *Id.* at 16.

genetics and alcoholism, especially if the study took place in a foreign country. In this case the burden on decisional privacy may be viewed as either minimal or considerable – minimal in that a completely anonymized sample cannot cause Claude direct harm by virtue of disclosure of sensitive information; considerable since Claude knows that he is now participating in research that he does not support. His right to withdraw his sample has been lost since the sample has been anonymized. Thus, while the harm is minimal, one could argue that a dignitary violation has occurred from which the psychological burden could be considerable. Therefore, although Claude's claim is likely to lose in a French court, it is quite possible that he could prevail in the ECHR.

7.3.1.2 Norway

The Biobank Law largely governs tissue use and storage.[114] The Norwegian law has been regarded as very restrictive as compared to its European counterparts.[115] The problematic restrictions invalidate blanket consent and serve to limit the involvement of incapacitated persons. In April 2006, the Norwegian government announced some important changes to the Biobank and Patients Rights Laws[116] in response to a very public controversy. The controversy concerned researchers decrying the degree of restrictiveness regarding consent and the accompanying short and long term negative effects on the conduct of biomedical research in Norway. [117] The changes to DeCode will allow the collection of HBM from persons who do not have the capacity to give consent, including in circumstances of emergency medicine, or in cases of persons with physical or mental disturbances, dementia, or developmental limitations.

Therefore, if Stein, a Norwegian citizen, also wishes to claim that his sample may not be used for a purpose not related to that of the original study, Stein need only show that the researchers acted in violation of the law. Violations will be relatively easy to prove, as Norwegian law prohibits blanket consent, limiting the storage and use of samples to the original purpose.

7.3.1.3 United States

Tissue use and storage in the United States has been something of a maelstrom for the past five years. As recently as 2004, the annual convention of research ethics committees had as its focus the regulation of tissue use and storage, with part of the program designed to solicit input on what the policies

---

114. Biobank Law, *supra* note 109.

115. Kvalheim, *supra* note 57, at 291.

116. Ot.prp. nr. 64 (2005-2006) Om lov om endringar i pasientrettslova og biobanklova (helsehjelp og forsking – personar utansamtykkekompetanse), http://odin.dep.no/filarkiv/277845/Otp0640506-TS.pdf (last visited Dec. 1, 2006).

117. Johan Votvik, *Åpner For Forskning Uten Samtykke*, Helserevyen Online, Apr. 11, 2006, *available at* http://www.helserevyen.no/index2.asp?newsid=3797.

should be.[118] Guidelines were issued in August 2004[119] but were non-binding and have been interpreted in inconsistent ways across IRBs. For example, some IRBs permit both blanket consent and indefinite storage of identifiable tissue of minors without attempts to consent upon the age of majority,[120] while others restrict the use of blanket consent and limit storage of minor HBM until the donor reaches the age of majority. While the European Directive permits variation in the application of blanket consent, indefinite storage of the tissue of minors seems well outside the scope of the permissible boundaries of European law. Indefinite storage would occur after the original research purpose was achieved, violating the law. Additionally, other aspects of the proportionality test would likely fail. For example, the necessity component would seem to present insurmountable challenges to this practice. Balancing the burden on the right versus the goal to be achieved would likely also cut against indefinite storage.

Consider the following scenario: Debbie, a U.S. citizen, has a family history of alcoholism and objects strongly to the use of her sample in the study. In the United States, although the National Bioethics Advisory Committee has criticized blanket consent, there is no enforceable provision prohibiting it. The terms of the permissible future use of Debbie's sample may be different depending on the identifiability of the sample. However, even if the sample is identified or identifiable, the transfer may still be permissible if the researcher can show that re-consent is impossible or impracticable and the harm is minimal. Thus, Debbie may only have a case if she is likely to suffer actual harm from the further use of her sample and the approval of that use and processing was negligent.

7.4 Unconsented Disclosure of Genetic Tests Results to Relatives

It is widely recognized that genetic test results may provide important information for the person undergoing the test regarding his possible future health state. However, the same test results may be of significant interest to relatives of the tested individual. A test result indicating the presence of a mutation associated with a hereditary disease can have enormous implications for certain relatives, both in terms of future health risks and the possibility of initiating interventions. Indeed, this issue highlights the tension between individual privacy rights and the interests of others in a most dramatic and profound way. To honor the proband's right to control the dissemination of information about him is to disregard an opportunity to confer a potentially life-

118. Public Responsibility in Medicine and Research (PRIM&R), an organization whose mission is to create, implement, and advance "the highest ethical standards in the conduct of research." *See* http://www.primr.org/.

119. Off. for Hum. Res. Protection, Guidance on Research Involving Coded Private Information or Biological Specimens (2004), *available at* http://www.hhs.gov/ohrp/humansubjects/guidance/cdebiol.pdf.

120. *See* Healthcare, *supra* note 101.

saving benefit on the relative. Strong arguments can be made on either side. One pro-disclosure argument makes the point that disclosure to relatives does not violate an individual's privacy since family members share genetic information. The conflict between the individual's right to control information about herself and a relative's interest in having access to information that could potentially afford the opportunity for life-saving measures is one that has not met an easy solution.

Consider the case of Grete, a Norwegian citizen, who has received a positive indication of the presence of the BRCA mutation associated with breast cancer. Knowing that at least one grandmother died from breast cancer, she opted to take the test. Her doctors urge her to tell her three sisters and also two daughters who are considering starting a family. Grete refuses, knowing that her sisters will immediately have prophylactic surgery if they are informed. Grete also does not want to have her daughters live their lives in fear of developing the disease. She has been unable to return to her normal life and deeply regrets having taken the test. The doctor feels strongly that Grete should inform family members since interventions are available, and decides to inform Grete's family members himself.

In Norway, France, and the United States, her doctor would be required to honor Grete's wishes; and in France particularly, the doctor could be subject to criminal penalties for breaching confidentiality. In Portugal[121] and Italy[122], for example, the doctor might be allowed to disclose based on permissible breach of confidentiality to save the lives of third parties. The physician is prohibited from disclosure,[123] but may not be penalized for doing so if he can show that it was necessary to save a life.

7.4.1 Background

In 1992 the Council of Europe took a position that straddled both sides. While recognizing the need for confidentiality, its recommendation called for consideration of disclosure to family members in the case of serious disease risk. Principle 9 of Recommendation on Professional secrecy No. R (92) 3 on Genetic Testing and Screening for Health Care Purposes stated that:

> . . . in the case of a severe genetic risk for other family members, consideration should be given, in accordance with national legislation and professional rules of conduct, to informing family members about matters relevant to their

121. *See* Helena Moniz, *Privacy and Intra-Family Communication of Genetic Information*, 21 L. Hum. Genome Rev. 103, 103-24 (2004).

122. *See Article 29 Data Protection Working Party*, *supra* note 37 at 4.

123. *See* Portugal, *supra* note 39.

health or that of their future children.[124]

This recommendation seems to imply that in certain situations, e.g. in the case of severe genetic risk, that professional secrecy may be, *and even ought to be,* breached. It is important to note, however, that this 1992 recommendation predates the Directive on Data Protection.

Relevant provisions in the Directive could be interpreted to draw a clear line against any unconsented disclosure of genetic test results to anyone. Genetic test results clearly fall within the category of health data and, as such, constitute sensitive information deserving of special protections. The Article 29 Data Protection Working Party also notes that genetic data can also be used to contribute to the identification of a person's ethnic identity.[125] In the United States, recent studies have claimed not only to be able to identify a person's ethnicity or race, but also identify the degree of admixture.[126] The Working Party makes the point that even though this information may not be health data, as an indicator of race and ethnicity, this type of genetic data nevertheless falls in the category of sensitive information[127] deserving of special level of protection.[128] Thus, novel issues deriving from the implications of test results revealing racial or ethnic information could also present problematic complexities. For example, a test result that reveals admixed membership in an ethnic group known to have a higher risk of a particular disease, e.g. breast cancer in Ashkenazi Jews or sickle cell anemia in African-Americans, could also have implications for the future health states of relatives.

In such an instance, the architecture of the protections may actually have significant impact on both the substance and procedure of handling of such a matter. By contrast, a European proportionality model could accommodate such a situation. The Working Party currently advocates a case-by-case approach that could allow disclosure in some instances but not in others, albeit at some sacrifice of predictability and universal application. Because of the practice of defensive medicine in litigious societies, discretionary disclosure is likely to lose much of its discretionary quality.[129]

One of the exceptions to the Directive's prohibition of processing sensitive data is when such processing is required "for the purposes of

---

124. Comm. of Ministers, Council of Eur., Recommendation No. R (92) 3 on Genetic Testing and Screening for Health Care Purposes (1992), http://www1.umn.edu/humanrts/instree/coerecr92-3.html (last visited Jan. 9, 2009).

125. *Article 29 Data Protection Working Party*, *supra* note 37 at 4-5.

126. Mark D. Shriver, et al., *Skin Pigmentation, Biographical Ancestry and Admixture Mapping*, 112 Hum. Genetics 387, 387 (2003).

127. Directive, *supra* note 13, at Art. 8(1).

128. This issue is further complicated by predictions in the scientific literature claiming that it may soon be possible to draw links between degree of ancestral admixture (suggesting racial and ethnic identity) and disease predisposition.

129. Khadija Robin Pierce, Setting Margins for Genetic Privacy (June 2007) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard Kennedy School Library).

preventive medicine, medical diagnosis, the provision of care or treatment or the management of health care services." This exception is subject to national codes of professional confidentiality and other relevant provisions and safeguards.[130] Therefore, as the Working Party points out, in many European countries, an individual's genetic data could conceivably be processed under one of the exceptions of Article 8(3).

7.4.2 The Finality Principle

The Article 29 Working Party takes an interesting approach to the applicability of the Data Protection Directive in the reference to Article 6(1)(b) and (c). The Working Party states that implementing national legislation must provide that personal data may only be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with purposes."[131] The Working Party adds that personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed."[132] The Working Party subtitles the latter segment of the provision as the "proportionality principle" and the former, the "finality principle."[133]

Application of the "finality" rule to the question of unconsented disclosure suggests that test results collected for the specific purpose of diagnostics of the individual submitting to the test should not be further processed for some other purpose. That the Directive specifically prohibits processing that is incompatible with the original purpose begs the question of whether disclosure to the proband's family constitutes incompatible processing. Moreover, even the permitted processing for purposes of various health care services as set forth in Article 8(3) renders such processing subject to norms of professional secrecy. Yet, a plausible rationale for disclosure may be that members of a proband's biological family share this information and, as such, may be considered "data subjects" with the attendant rights.[134] Though plausible, this argument is unpersuasive given that the relatives have neither consented to the test nor voluntarily assumed any risks associated with taking the test. Such a convenient but flawed construction of their status in order to confer rights rapidly unravels. The alternative rationale put forth by the Working Party[135] that family members could assert a right based on the potential effect on their personal interests is more convincing. However, this reasoning currently has no legal basis for superseding the rights of the tested individual.[136] The Working Party concludes that the complexity of the balance

130. Directive, *supra* note 13, at art. 8(3).
131. *Id.* at art. 6(1)(b).
132. *Id.* at art. 6(1)(c).
133. *Article 29 Data Protection Working Party*, *supra* note 37, at 5-6.
134. *Id.* at 8.
135. *Article 29 Data Protection Working Party*, *supra* note 37 at 7.
136. The Working Document on Genetic Data does reference an Italian case in which a

of interests and rights is such that no clear resolution has yet emerged and that "at this stage" a case-by-case approach should be considered.

It is not entirely clear what the implications are for resolving the conflicts inherent in the unconsented disclosure of genetic test results to relatives. Arguments asserting that a new legally relevant social group has emerged in the biologic family[137] have not found widespread acceptance. Many European countries have adopted a policy that disclosure is desirable in certain specified circumstances, but that rules of confidentiality and privacy prohibit such disclosure where the patient has not consented. However, the option to consider the weight of countervailing interests would permit an individual act of discretionary disclosure. See Table 2 below.

Table 2 Unconsented Disclosure of Genetic Test Results to Relatives

	Absolute Confidentiality
European Union (WP)	Unsettled—case-by-case
France	Generally No-case by case
Norway	Yes
United States	Yes
Portugal[138]	Generally No—case by case

7.5 Approaches and Architecture

The French National Consultative Ethics Committee for Health and Life Sciences (CCNE) has issued an opinion on the question of disclosure of test results to relatives. The opinion takes a very careful approach in which it weighs the nature of the patient's interests and those of the family, finding merit in both. However, as with disclosure of HIV status,[139] CCNE holds fast to the principle of absolute confidentiality. Opinion 76 carefully outlines procedures to prepare a proband for disclosing to family members, but it stops short of taking the decision out of the hands of the tested individual, stating that "a strict application of the principle of medical confidentiality, as well as utilitarian attitudes, argue against systematic breaching of confidentiality."[140]

Despite the unsettled nature of the balance between individual rights and

---

woman sought disclosure of her father's genetic data so that she could make "a fully informed reproductive decision." The relevant authorities granted the woman's request despite her father's refusal to consent, stating that the "father's right to privacy was to be overridden by the daughter's right to health – the latter meaning her 'psychological and physical well-being.'" *Id.* at 9.

137. *Id.*

138. Portugal is included here for purposes of illustration as a country that does not distinguish between genetic and other medical information in its privacy protections.

139. Nat'l Consultative Ethics Comm. for Health and Life Scis., Opinion n° 76: Regarding the Obligation to Disclose Genetic Information of Concern to Family Members in the Event of Medical Necessity 6 (2003), http://www.ccne-ethique.fr/docs/en/avis076.pdf (last visited Jan. 9, 2009).

140. *Id.*

the interests of biologic family members, the legal order seems to favor an individual rights model that allows persons to control the flow of information about themselves. Application of a proportionality approach may be seen in some instances, e.g. Sweden, where disclosure is discretionary under specified circumstances if the benefit outweighs the potential harm to the patient and that harm is minimal.[141] In Portugal, genetic data, like other medical information, can be disclosed without consent if the benefit will outweigh the harm and the harm is minimal.[142] Sweden and Portugal implemented the Data Protection Directive in 2003 and 1998, respectively.[143] These widely divergent implementations of the Directive speak to several aspects of the dilemma. First, the categories justifying the overriding of the privacy protections are flexible in their interpretation. Secondly, the issue is very complex with strong competing interests, both of which can find support in the wording of the Directive. Thirdly, the categories of derogation are constructed such that national cultural, legal, and professional norms may resolve the dilemma in a manner most suitable to the national context.

7.5.1 Analogy: HIV Notification

The European Court of Human Rights has not taken up the issue of unconsented disclosure to genetic test results, but one of the few cases involving medical secrecy, *Z versus Finland*,[144] decided by the European Court of Human Rights, may provide some insight on the court's likely position. Given the paucity of case law in this area in Europe, this analysis is well-served by examination of analogous issues. In *Finland*, a husband stood accused of rape. The HIV status of the accused's wife was disclosed, without the wife's consent, to the alleged rape victim. This disclosure was undertaken for the benefit of criminal proceedings against the husband. The wife filed suit, alleging that this unauthorized disclosure of her HIV status to the alleged rape victim constituted unauthorized disclosure of confidential personal data in violation of Article 8 of the Convention. While the court acknowledged the highly sensitive nature of HIV status, it reasoned that an overriding public interest could justify unauthorized disclosure, and thus the burdening of a right to special protection of sensitive information.[145] Here, striking the balance between protecting sensitive information and facilitating the public interest was a complex one. This complexity was due in part to the nature of the information and the weight of that privacy interest, but also to the context in

141. Lag (1998:544) om vårdregister [Health Data Law] (Swed.).

142. Eur. Comm'n, Genetic Testing: Patient's Rights: Insurance and Employment: A Survey of Regulations in the European Union 100 (2002), ftp://ftp.cordis.europa.eu/pub/life/docs/genetic_testing_eur20446.pdf (last visited Jan. 9, 2009).

143. *See* Report on the Implementation of the Data Protection Directive 95/46/EC http://ec.europa.eu/justice_home/fsj/privacy/lawreport/index_en.htm.

144. Z v. Finland, App. No. 22009/93, 25 Eur. Ct. H.R. (1997).

145. *Id.*

which the information was sought and the possibility that additional judgments (such as how important the information was to the investigation) would have to be made.[146]

The court in *Finland* applied a version of the proportionality test in which the burdened right of privacy was outweighed by the state's interest in resolving the criminal investigation.[147] It was not just that the public interest in resolving a criminal investigation was sufficient to override protection of this sensitive information, but that the probative value of this information was significant enough to justify the override. Therefore, it is unlikely that sensitive information that would merely assist in the resolution of a criminal proceeding would be subject to disclosure. Rather, that information, albeit by local standards, must have high probative value, and presumably, must not be obtainable by less burdensome means.

This case may have significant implications for unconsented disclosure of genetic test results to relatives. Like HIV status, information about a genetic disease may be probative regarding someone other than the individual who has been tested. *Finland* suggests that highly sensitive information may lose its protection in the face of its value to a criminal proceeding going to the question of manslaughter.[148] However, because of the mode of transmission of a genetic disease, it is unlikely that an action of manslaughter would ever lie based on the knowing transmission of a genetic disease. However, if a scenario could be constructed in which the genetic information of a relative were probative in a criminal trial, it is possible that this might create the outer bounds for permissible disclosure of highly sensitive information.

Still, one can imagine a situation in which a breadwinner knows that he carries the genetic mutation associated with Huntington's disease, a neurodegenerative disorder. He takes out several major unsecured loans and gives the money to his girlfriend. These gifts result in a criminal proceeding against the girlfriend in which the breadwinner's genetic test results (indicating the presence of the mutation associated with Huntington's disease, which has roughly 99% penetrance) are relevant and highly probative. *Finland* would suggest that the privacy interests of these test results would be outweighed by the public interest.[149] Furthermore, here, unlike in *Finland*, the tested individual is also culpable in some way even though he may not at the time of trial be alive or competent.

By contrast, the process of adjudication of the case of *Finland* in the United States would be very different, largely because of the architecture of the privacy protections. As noted earlier, HIPAA provides for the unauthorized disclosure of personal health information in certain circumstances that are

146. *See e.g., id.*
147. *Id.*
148. *Id.*
149. *Id.*

outlined in section 164.512 of the Code of Federal Regulations.[150] This list includes disclosures for judicial and administrative proceedings as well as for law enforcement purposes.[151] Thus, even though these exceptions have their parameters, the exceptions have been carved out in advance, presumably as a result of a balancing between the weight of the privacy right and the countervailing public interest.[152] The result in this case is probably the same, but one could easily imagine a less clear case in which the PHI of an innocent third party could be disclosed simply by virtue of one of the exceptions; whereas in Europe, a balancing of the rights and interests could conceivably result in a different outcome regarding the permissibility of disclosure. In recent years, a few courts have authorized the subpoena of medical records and other personal data (believed to be of a genetic nature) of the parents of child plaintiffs in lead paint cases, thus allowing a defendant to pursue a defense alleging that the low I.Q. of the plaintiffs was inherited and not the result of lead poisoning.[153] The architecture of the rights, the transparent balancing of the proportionality rule versus the "absolute" articulation with carved out exceptions (e.g. relevance) can, indeed, affect the degree of privacy protection.

The more likely scenario is that involving a civil action. At least one such case has been litigated at the national level in Europe. As noted earlier, the Data Protection Article 29 Working Party mentions an Italian case in which a daughter seeks disclosure of her father's genetic test results to assist her in reproductive decision-making.[154] The court determined that the father's test results should be disclosed to the daughter even against the wishes of the father.[155] How ECHR would resolve this case would probably turn on such factors as the gravity of the heritable disease and the extent to which disclosure burdens the father's privacy interest. However, based on the Working Party recommendations, it seems unlikely at this time that the court would find an overriding interest in preventing a speculative genetic disease. Furthermore, since the override would require a determination that a less burdensome alternative was not available, i.e. that infringement on the right was necessary, the fact that individuals can seek out a genetic test themselves may preclude the authorization of disclosure. This preclusion should at least be the case in instances where gatekeeping arrangements do not rely on the known presence of the disease or mutation in a relevant biological relative. However, in the case of autosomal recessive diseases, genetic testing of the parents may be inadequate to inform the degree of risk.

It is important to note that case law, as a source of rights, does not play

150. 45 C.F.R. § 164.512 (2008).

151. *Id.*

152. *Id.*

153. *See, e.g.*, State v. Idellfonso-Diaz, Tenn. Crim. App. 2006, 2006 WL 3093207 (unpublished).

154. *Article 29 Data Protection Working Party, supra* note 37, at 9.

155. *Id.*

the same role in Europe as it does in the United States. This is particularly true in the area of health privacy law. Health privacy law tends to be statutory and regulatory. To a lesser degree this is also true of U.S. medical privacy. Doctor-patient confidentiality has a line of case law beginning as early as 1920.[156]

The issue of disclosure of genetic test results has appeared in American courts. Interestingly, U.S. case law has demonstrated a leaning toward embracing the importance of disclosure to relatives, but has stopped shy of imposing a duty. The closest the court has come is in *Safer v. Estate of Peck.*[157] In *Safer*, the court found that the physician did owe a duty to the daughter of his patient who had a hereditary disease; however, because the daughter was put on notice by other means, the physician was not held liable.[158] The important thing about these cases, of which there are very few, is that the closest the courts have been willing to come is in the case of vertical disclosure – disclosure to an offspring. No case has embraced horizontal unconsented disclosure to siblings or other related non-offspring. Consequently, if the courts move toward unconsented disclosure of genetic test results to relatives, it is likely to be in the case of offspring wanting to avert serious illness or death or, more likely, to assist in reproductive decisions.[159]

Nevertheless, there are strong reasons why ECHR would hesitate to take this step even in the cases set forth above involving offspring. One of the most important aspects of privacy law is its relationship to cultural and social norms. Unconsented disclosure of a hereditary disease to other family members could be disastrous in some cultures and situations. A decision by ECHR that such disclosure is permissible, and thereby implicitly creates a duty, would mean that all national laws would have to be consistent. Thus, a Norwegian or German court could not deny disclosure to a son or daughter wishing to know the genetic test results of a parent in certain circumstances. Such a decision, while possibly saving lives, may serve to unravel fundamental aspects of social relations and cultural norms. It is not clear that the EU, which was originally created to facilitate trade and pursuit of economic interests, is ready to take this step. Furthermore, permitting unconsented disclosure to relatives further erodes protection of sensitive data.

Finally, it can be argued that this private sphere may be more appropriately regulated by cultural and social norms. The pressure imposed by the norms may be sufficient to achieve the described result in most instances. Additionally, it may be excessive and unnecessary to impose a legal burden on the privacy right in order to force disclosure in the rare cases where it would not

156. Simonsen v. Swenson, 177 N.W. 831, 832 (Neb. 1920) (statutory doctor-patient privilege must be subject to a public health exception).

157. Safer v. Estate of Pack, 677 A.2d 1188, 1192 (N.J. Super Ct. App. Div. 1996).

158. *Id.*

159. This would also be consistent with principles of the duty to rescue between a parent and a minor child where such statutes are in force (e.g. Vermont).

otherwise occur.[160]

8. Conclusion: Measuring the Force of Privacy Protections: Architecture or Substantive Law?

8.1 France

The story told about France by the analysis of these two medical indicators is one of interesting paradoxes, but it is consistent with a host of social and political contextual aspects. We can deduce three key points from the foregoing analysis.

First, the permissibility of blanket consent for future unspecified uses of tissue may suggest a more permissive research climate regarding protections. The architecture of French privacy rights probably contributes to this result by virtue of the heavy reliance on CNIL as an oversight body charged with considerable active and practical regulatory authority and with the administration of privacy protections. Furthermore, the French Data Processing Act looks to the cultural climate of "solidarity" to embrace a risk-benefit calculation when determining whether to allow the processing of sensitive data.[161] This embrace suggests that the processing of sensitive data is allowable because of the use of strong oversight.

Second, the use of a risk-benefit analysis in the case of incapacitated persons rather than a requirement of direct benefit may be inconsistent with a policy of absolute confidentiality honoring the proband's right to control the flow of information about himself. However, as openly stated by the French national ethics committee, a strong value of "solidarity" and the "public interest" may be behind this policy. The policy of absolute confidentiality of genetic test results helps to define the limits of "group consciousness."

Third, consent is exempted when it is impracticable or impossible to obtain; however, saving the life of a relative does not justify unconsented disclosure of genetic test results. Interestingly, this could suggest that the right of privacy receives the greatest protection when it is exercised.

8.2 Norway

The picture we get about privacy protections in Norway shows a strong allegiance to individual rights and autonomy. This may seem surprising, given that Norway has been a highly functioning social democratic welfare state for several decades. However, strong protections of individual rights permeate Norwegian law.

First, Norway's previous prohibition of the involvement of incapacitated

160. Pierce, *supra* note 129.

161. *See Article 29 Data Protection Working Party, supra* note 37.

persons in medical research is that of a tiny minority in the western world. This approach departs from two of the other leading views: 1) research that provides a direct benefit to the incapacitated person is permissible; and 2) the European Union's risk-benefit calculation. However, as mentioned, this law was changed in 2006. Second, the disallowance of blanket consent and the limiting of tissue use to those uses necessary for the original purpose for which it was collected both depart from the European approach. Norway's departure represents a firm commitment to individual autonomy and informed consent. The policy against unconsented disclosure of genetic test results is also consistent with this commitment, even in its convoluted articulation. Third, the approval of any consent exemptions for impracticability or impossibility must come directly from a government entity, consistent with the former Norwegian approach to privacy that relied heavily on government oversight and protection rather than the model of individual consent.[162]

Health privacy practices, the scant case law, and analogous rulings in Norway reveal a strong national commitment to the protection of individual rights even in the face of strong countervailing societal or third party benefit. Recent cases involving freedom of speech have upheld the right of individuals to engage in hate speech, receiving considerable criticism from the rest of Europe.[163] Synne Sæther Mæhle, a legal scholar on judicial review, has explained that the rigidity of the Norwegian Constitution and the privileging of that document over European texts help to explain this result. [164] There are indications that Norwegians may be unwilling to open the door to derogations of the freedom of speech.[165]

Indeed, the rationale for changing the law regarding participation in research by persons with reduced capacity to consent was ostensibly based on the fact that the former degree of restrictiveness made it impossible to include such persons in research. Not including such persons in research hindered the ability to investigate methods and interventions that may improve the services that could be offered to them.[166] Thus, arguably it was not societal benefit that served to outweigh individual privacy rights, but a move towards better serving individual rights by providing a direct benefit.

Thus, it seems reasonable to conclude that the approach to privacy in the biomedical context, even with the recent changes, remains on the restrictive end of the European continuum. The Norwegian human subject research regulations, which incorporate by reference the Patients Rights Law, were recently legalized.[167] (They had "guidance" status up until December 2005.)

---

162. Kvalheim, *supra* note 57, at 289-290.

163. *See* Hvit Valgallianse-kjennelsen, Rt. 1997 s. 1821, Høysterett. 2004; and Boot Boys-dommen. Rt. 2002 s. 1618.

164. Interview with Synne Sæther Mæhle in Bergen, Norway (Dec. 2005).

165. *See* Hvit Valgallianse-kjennelsen and Boot Boys-dommen, *supra* note 163.

166. Johan Votvik, *supra* note 117.

167. *See* De nasjonale forskningsetiske komiteer [Norwegian Regional Ethics Committee], http://www.etikkom.no/English/NEM/REK (last visited Jan. 9, 2009).

These regulations provide that "historical, statistical, and scientific" reasons, as well as "important societal benefit" can exempt data from the data protection provisions. Thus, the balancing does occur in Norwegian decisions involving a burden on individual privacy, but the scale seems to tip in favor of individual rights. However, the scale does not tip in favor of individual rights unless two elements are present: 1) a clear and convincing need to burden the right in order to achieve an important benefit, as in the case of permitting research on persons who do not have the capacity to consent; and 2) the state, through some responsible agency, can provide effective oversight, as was the case before its adoption of the individual consent model upon the passing of the Data Protection Directive.

That a change in this regard has been legislated may represent a move toward a more permissive approach in support of the biomedical research enterprise. In a climate in which public hearings are being held to discuss whether the ban on stem cell research should be lifted, it may well be that Norway is taking steps toward the research imperative. Arising perhaps from the earlier "oversight model"[168] of protection, it is possible that the model of consent with relaxed application may be sufficient to assure society that the research enterprise is not necessarily at odds with individual rights.

8.3 United States

The reality of privacy in the United States, as constructed by the analysis of the three medical indicators, puts forward a sectoral model containing absolute privacy protections with carved out exceptions, along with a heavy reliance on individual consent. This may actually result in fewer privacy protections than the seemingly more elastic proportional approach taken in the European Union.

First, the permissibility of blanket consent for unspecified future uses suggests a "market model" of research participation. There is no overarching oversight body with administrative and enforcement powers, thus leaving the injured plaintiff to file a private tort action as his primary recourse. Unlike in France, the permissibility of blanket consent is not accompanied by a strong oversight body, but rather is left to application and monitoring by individual research ethics committees that employ different standards and policies to review in-house research proposals.

Similarly, that samples/data may be stored indefinitely if the participant has given consent suggests a very strong reliance on individual consent as the mechanism for privacy protections. Official guidance suggests that blanket consent is ethically problematic;[169] yet, to date, this issue remains largely without enforceable regulation.

---

168. *See* Kvalheim, *supra* note 57.

169. Nat'l Bioethics Advisory Comm'n, Research Involving Human Biological Materials: Ethical Issues and Policy Guidance, 1, at 33 (1999).

Third, the requirement that incapacitated persons may participate in medical research only if they will directly benefit from the research suggests a boundary that may be more a matter of historical sensitivity to vulnerable populations than a clear commitment to privacy boundaries. Finally, where the sectoral legislation and exceptions do not specifically address issues arising from new technology, there is no reliable protection of privacy rights.

9. *Concluding Observations*

There are reasons to believe that architecture does matter in the force of privacy protections. In the United States, a stringent prohibition of physician disclosure of genetic test results to relatives does not allow for breach in even the most compelling of circumstances. To permit discretionary disclosure by the physician would require a legislative act carving out an exception (even in specified circumstances) or a high court ruling rendering such disclosure permissible. By contrast, in Europe, even legislative provisions prohibiting discretionary disclosure can be overridden on the basis of the weight of the countervailing interests. However, this same flexibility allows a country like Norway to maintain a policy of strict confidentiality and countries like Sweden and France to decide on a case-by-case basis. Thus, the architecture does matter.

The case of human biological material exemplifies this well. Policies allowing permissive use of HBM, from blanket consent to indefinite storage of a minor's tissue have determined that the balance weighs in favor of competing research interests against individual privacy interests. In contrast, in Europe, the fundamental right of privacy can only be overridden when countervailing interests are found to be greater, thus maintaining the essential privacy right while allowing for circumscribed exceptions with adequate oversight, as in the case of France. That Norway tends to maintain the privacy line speaks to the ability of the European model to accommodate national norms. This leaves us with the conclusion that national law and norms determine the strength of privacy protections in Europe, but that this is enabled by the architecture. Furthermore, the regard for privacy as a fundamental right may be what ultimately sets the margins for privacy.[170] Thus, while the architecture accommodates a range of policy positions, from the very restrictive to the permissive, it is the regard for privacy as a fundamental right that ensures that limits remain regarding how much this essential right may be burdened by countervailing interests.

170. The phrase "sets the margins for privacy" comes from the title of Khadija Robin Pierce's Ph.D. dissertation, Setting Margins for Genetic Privacy. Pierce, *supra* note 129.

THE INTERNATIONALIZATION OF LEGAL EDUCATION

THE JAMES P. WHITE LECTURE ON LEGAL EDUCATION

WYNNE COURTROOM, INDIANA UNIVERSITY SCHOOL OF LAW- INDIANAPOLIS

MARCH 4, 2008 - 5:00 P.M.

Remarks by the President of the University of Puerto Rico

Mr. Antonio García-Padilla

I am deeply honored in coming here today as the fourth James P. White Lecturer. It is impossible to justly appraise contemporary legal education without factoring the work of James P. White. Dean White's role in the ABA accrediting project served as the platform from which he impacted every aspect of legal education in America. In matters related to infrastructure, curricula, clinical and interdisciplinary programs, the incorporation of emerging technologies to the life of law schools, rankings, and the interaction of the legal education system with government regulators, Dean White's leadership was a driving force throughout the latter part of the 20th century and continues to be in the challenging dawn of the 21st.

Of particular value to legal education and to higher education overall was Dean White's intuition in contextualizing the education and practice of Law within the new global cartography that followed the collapse of the Soviet Union. White recognized that the globalized world was becoming part and parcel of our everyday life; that our professional and institutional landscapes were being put into question by the new environment; and he called to action. The creation, during the 2000 ABA meeting in London, of the Out of the Box Committee to address "the training of lawyers in the next millennium," was prompted precisely by his acknowledgment that the pressing scenario of globalization was a challenge for legal education in the United States.

Two years ago, in his lecture to the Conference of Chief Justices here in Indianapolis, Dean White summarized key areas in which legal education has responded to the integrating forces of the these times: law school curricula, cross-border practices, seasonal programs abroad, and dual degree offerings. These are indeed breakthroughs in legal education that describe how globalization is already a strategic vector that modifies traditional outlooks and

responses.

But just as the world grows increasingly interdependent, the challenges we face also grow to make sure that law is actually a tool to support, rather than to impair the new global community in its aspiration to create a better, more democratic and fair civilization.

THE WORLD AND THE LAW:

Throughout the history of the West, there have been pivotal moments in which Law has shined as the language of consensus rather than the language of domination; the language of compromises instead of the language of yielding. In the sixteenth century, amidst the complex process of the occupation of the New World by the European *conquistadores*, the Spanish legal scholar Francisco de Vittoria opened a new sphere for modern Law – *el derecho de gentes*, or international law. From his insights and proposals on the theme of diversity and basic rights, we derive many of the world's protocols and institutions that provide a viable model of global governance.

A second example brings us to a more recent historic event. In 1945 the world knew of the barbaric reality of the Holocaust. Arguably, Law could be considered a willing participant in this crime against humanity. But Law was also able to perform redemption. From the ashes of that terrible tragedy, the concept of human rights emerged as a cornerstone of contemporary international law and international justice.

In our times, globalization processes constitute yet another threshold in the international configuration that started five hundred years ago. Technological and economic transformations seem to have finally eroded temporal and spatial barriers. Assisted by media and telecommunication networks, we are more than ever world citizens. The internationalism that gave birth to the UN Charter and the Declaration of Human Rights in the postwar years is no longer a dream for privileged minorities but a practical reality for millions of human beings, more mobile than ever, never more interconnected. Poverty levels have been reduced dramatically; human ingenuity and productivity are on the rise.[1]

CARTOGRAPHIES OF HOPE; CARTOGRAPHIES OF CONCERN

In the last decades, nearly three billion people have been integrated into the global economy. The rates of economic growth in China and India – in many years at double-digit percentages – supersede the outstanding rates presented by Western democracies during the second postwar period.[2] Globalization appears to be succeeding in overcoming what seemed the intractable problem of world poverty. However, the spectacular growth in the

1. J.D. SACHS, COMMON WEALTH: ECONOMICS FOR A CROWDED PLANET 17 (2008).
2. F. ZAKARIA, THE POST AMERICAN WORLD 86 et seq. (2008).

production of commodities and services is clouded by growing asymmetries. Dramatic inequalities signal the makings of the globalized world. They are disparities that arise from outdated public policies, unfair distribution systems, from corruption and other political vices, from political anachronisms and cultural constraints. But also, from the very same shift in the concept of wealth that puts a premium on the production and circulation of knowledge and information.

The "information density" of modern societies has increased the capacity to produce, select, adapt and commercialize knowledge. Knowledge acquired originally by basic research, and applied by scientists and engineers, is now the raw material and provides the tools for economic growth and well-being. It must be noticed that currently only 12-13% of US production is in manufacturing, with approximately 68% production in the service and information sectors.[3]

While specific figures may change by the minute, there is no doubt that sustained economic growth travels the same path of investment in research and development. In recent years, universities serve as key partners to attract high-power competitive research and have become the foundation of 21st century economic growth.

The American public has benefited greatly from its tax-based investment in research. For instance, the gains inherent to public health that might be attributable directly to institute-funded research are certainly many times the annual appropriation of tax-funded dollars.[4]

The transformation in the concept and production of wealth, exemplified by research and development's protagonist role in economic growth, is not only an aspiration of the developed world. As globalization compresses temporal and spatial coordinates and modifies the understanding of the economic underpinnings, the rest of the world adopts the same paradigms and strives to compete in a new playing field. However, investment in research and development allocation can be unfair for developing countries and resurfaces the specter of old world maps with specific roles for countries and continents.

Like in college football, rankings in the document citation and research production are a graphic instrument to provide an instant assessment of proficiency and achievement in a competitive environment. Recent data regarding research power by countries present a dismal picture of asymmetrical

---

3. USA Economy in Brief: A Service Economy, *2006 GDP Value Added by Industry*, fig.1, http://usinfo.state.gov/products/pubs/economy-in-brief/page3.html (last visited Nov. 14, 2008). *See also* Bureau of Economic Analysis, Gross-Domestic-Product-by-Industry Accounts, http://222.bea.gov/industry/gpotables/gpo_action.cfm?anon=82589&table_id=23492&format_type=0 (last visited Nov. 14, 2008), *and* CIA World Fact Book, United States, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#Econ (last visited Nov. 14, 2008).

4. NAT'L INST. OF HEALTH, NIH RESPONSE TO THE CONFERENCE REPORT REQUEST FOR A PLAN TO ENSURE TAXPAYERS' INTERESTS ARE PROTECTED, EXECUTIVE Summary, *available at* http://www.nih.gov/news/070101wyden.htm.

distribution among the countries of the world. Keeping with the sports analogy, the Big Ten rankings in research power is almost identical with the economic power rankings. The United States is the front-runner with a mammoth production of 3.5 million documents and almost the same amount of citable documents. Japan, the United Kingdom, Germany and China occupy the next positions.[5]

Among the Spanish-speaking countries, only Spain ranks in the first ten. The first Latin American country, Brazil, is number eighteen and Mexico, twenty-eight. Overall, only five Hispanic countries – Spain, Brazil, Mexico, Portugal and Chile – find themselves in the first fifty and only eleven in the first hundred. Puerto Rico, for instance, ranks 69th, with 5,000 documents published in the last decade among 228 countries polled.[6]

If the information economy is the production paradigm for the foreseeable future, this gap is unsustainable not only for the countries that lag far behind but also to the front runners. A world of growing inequalities in research power and international visibility of intelligence goods no longer strictly attached to material production, circulation and consumption, recycles the concept of poverty and poses threats for world peace and stability. A dangerous new layer is added that can overshadow and mute the evident achievements of globalization in bringing millions of people out of deprivation.

Although bibliometrical rankings are powerful indicators, they cannot deliver the behind the scenes factors that foster the uneven competition in the economy of knowledge arena. We must move to another set of indicators such as access to higher education figures, public policy patterns, educational systems, university agendas and other cultural and political considerations. Law, as one of the main social and cultural frameworks for individual and collective behaviors, must also be reexamined, not just to assist in a more holistic evaluation of contemporary asymmetries, but also to assess its potentialities in modifying them.

MOBILITY AS THE GRAMMAR OF THE GLOBAL EXPERIENCE

Today's world is marked by the increasing demands of mobility. The knowledge-based economy, the flux between public and private realms, the interdisciplinary approaches in academia and the relationship between research and development are some of the instances in which mobility asserts its preeminence over the compartmentalization that characterized the

5. SCImago Journal & Country Rank, Country Indicators, http://www.scimagojr.com/countryrank.php (last visited Nov. 14, 2008). Since delivery of this speech, the U.S. has increased to roughly 3.9 million documents, and the United Kingdom has surpassed Japan to take second in the ranks. *Id.* (last visited Nov. 14, 2008).

6. *Id.* (last visited Nov 14, 2008). Since delivery of this speech, Brazil has moved to number seventeen in the ranks, and Puerto Rico is currently at number seventy with 5,867 documents published; furthermore, 233 countries have now been polled. *Id.* (last visited Nov. 14, 2008).

modernization process.

Only six decades separate us from the devastation of the Second World War. Fueled by the Marshall Plan, the rebirth of Europe was an admirable achievement of international cooperation. But the reconstruction had a more lasting effect than the rebuilding of the material foundations of the historic West. It provided the spirit and the opportunity to bring about a new sense of collective identity, a quantum leap from the Europe of nations conceived at Westphalia.

The project, which is one of the war's most fruitful lessons, rested on the ideas of a unified market and currency, a European parliament, protocols for the settlement of regional disputes and other structural and legal standardizing procedures. Among them I would like to underscore the foresightedness of its educational components, one of them so appropriately called Erasmus for the 16th century Dutch thinker who, in an age marked by religious wars, viewed a well-rounded education as an antidote to oppression.

Erasmus brings about important lessons for educators all over the world because it highlights mobility as one of the keys for a successful learning and socialization experience attuned to our times. Education within a mobility framework provides the sensibility, the openness, and the appreciation of diversity, networking, and international cooperation that allows for a more efficient management of global issues and to address its plaguing asymmetries. What is the role for Law in this complex scenario that presents enormous opportunities but still defies us with great divides and unbearable inequalities? What is the role of legal education in fomenting new sensibilities and socializations, in fashioning a new legal professional in our countries?

In a world that seems closely-knit, thanks mainly to the global market, Law lags frequently behind, affected by parochialisms, bound by national idiosyncrasies and traditions. Unlike science, which thrives in the global scenario, Law and legal education in America and in many other countries seem reticent to assume a global outlook. I propose that true cosmopolitism, which is not synonymous with mere economic and technological exchanges, requires the commitment and agency of Law.

Early in the nineteenth century, in a later work, Immanuel Kant, the German philosopher, espoused a cosmopolitan vision of the idea of progress. More than an international government, an idea that Kant rejected as impractical, what humanity needed was international cooperation, transparency, and above all, international law in order to achieve Perpetual Peace. As morality is reason internalized, Law, he argued, is reason externalized. Law as an enabler of peace is one of Kant's greatest concepts.[7] Today, as two centuries ago, Law stands inextricably related to Peace as humanity's project. I may add, it is also related to the mitigation of the great schisms fostered by old and new disparities.

---

7. IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795).

The Conquest of America, the French Revolution, and the Holocaust demanded that Law and legal scholars address issues of fundamental nature for humanity. Globalization makes the same demand today. It is evident that the rule of law is beginning to make its force felt in international trade and globalization now. Increasingly, the powerful are now being held accountable for the effects their behaviors have on others and two to three billion new people are being integrated into the global economy. Democracy and free markets have made dramatic inroads in creating a fair global civilization, but barriers set up by legal parochialisms still preclude its full bloom.

TOWARDS A NEW LEGAL SOCIALIZATION

I would like to elaborate on the intersections of legal education and global inequalities from a vantage frontier between the planet's North and South. As President of the University of Puerto Rico since 2001 and Law School Dean for many years before that, I have witnessed the emergence of global transformations, the opportunities and the challenges they pose, but also their shortcomings. As a legal educator, I propose a renewed cosmopolitanism that positions Law as an enabler of global changes and as an active actor in the mitigation of the new disparities posed by a vertiginous and often unfair globalization process.

This is not a simple enterprise. How can Law and legal educators, all of us, commit to this task?

First, by questioning and then breaking away from nationalistic constraints that hinder a comprehensive and open view of the world we live in. I am not speaking of the deep-rooted allegiances to one's country that give us an immediate and comforting sense of place and identity. I refer to the narrow and chauvinistic attitudes and frames that limit our understanding and judgment. Nationalistic idiosyncrasies work against the grain of mobility, against the grain of contemporary reality.

Second, by questioning and breaking away from the gremial disposition to coalesce with economic and political interests under protectionist and local banners. In many occasions, Law is more prone to erect fences and jurisdictions instead of bridges and common grounds. Law has to recover fully its focus as an agent of change.

Third, by creating a legal education program that generates law professionals and scholars with a global profile. It does not matter if a lawyer sets up his practice in his hometown in Indiana or in a city of southern Puerto Rico and only handles the legal affairs of his small demarcation. Increasingly, local matters are global matters and vice versa: immigration, international contracts, international commerce, and internet business. McLuhan's global village concept is no longer an oddity but a daily occurrence.[8]

---

8. MARSHALL MCLUHAN, THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN, (1962); MARSHALL MCLUHAN & BRUCE R. POWERS, THE GLOBAL VILLAGE: TRANSFORMATIONS

We must ask ourselves why we advance ever so slowly in this direction. Why, even after so many summer internships and exchange programs, are we still placing obstacles in the globalization of our law students? Why, for instance, just as double degree programs emerged for law schools in Europe and America, Standard 507 for Approval of Law Schools, contrary to James White's ideas, was amended to reduce to one-third – half of what it was – the credits that American JD students could take abroad?

One may argue that these limitations are of a technical nature and could be overcome by appropriate modifications. A reference to international bodies whose mission is to harmonize legal languages may come in handy.

As many of you know, The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966. In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the international community could play a more active role in reducing or removing these obstacles. Similarly, the International Institute for the Unification of Private Law (UNIDROIT), an independent intergovernmental organization with its seat in Rome, was founded to study needs and methods for modernizing, harmonizing, and coordinating private and, in particular, commercial law as between States and groups of States. Both organizations have made commendable progress in their homologation endeavors, but not at the pace that a globalized world needs. Political, cultural and professional resistances framed by nationalistic claims remain the most important barriers. The gap between current legal education and global outlooks and profiles for our law students and professionals is more than a technical matter, as the limitations experienced by UNIDROIT and UNCITRAL show.

Subtle, but far more insidious, are the effects of the socialization process prevalent in most of our law schools. Lack of interest in the issues of homologation and mobility between diverse law cultures and dispositions are direct consequences of socialization processes that ignore these international imperatives.[9] The promotion of global attitudes that shy away from parochialism in legal education is an urgent matter if Law is to play a significant role in mapping a more symmetrical and mobile knowledge-based economy.

Law is never neutral to changes. It can nurture transformation but can also be an obstacle in achieving the necessary modifications. Today, Law is in the unique position of reconfiguring much of the unevenness that permeates global processes.

Law can have a major role in improving the securitization of global transactions. Law can procure more efficient arbitration mechanisms for

---

IN WORLD LIFE AND MEDIA IN THE 21ST CENTURY, (1992).

9. Even if late, the Supreme Court's emerging willingness to recognize formally the developments of legal standards and expectations in the rest of the world will have a positive impact in the socialization of lawyers. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

commercial disputes, border issues and migration protocols. Law can produce more accessible and understandable protocols for the emergent knowledge economy in aspects such as technology transfer, patents, copyright legislation, international research agreements and the like. And legal education reform is of paramount importance in repositioning Law as an international player. It is a new attitude that we must help create.[10]

The voyage is one of the favorite metaphors of Western civilization. Many of the great narratives in classic and contemporary literature center upon the experience of the voyage. The voyage always allegorizes human vocation for knowledge of other peoples, of other cultures.

I view the globalization of legal education as a series of voyages through which our students can develop a better understanding of themselves, their communities and the broader panorama of the world. A series of voyages experienced by incorporating more international references to our academic bibliographies, by attending international conferences, by engaging in research projects with universities and research centers all around the world, by contributing to the urgent discussion of the role of Law in expanding networks of solidarity and international cooperation and in reducing the asymmetries that cast a shadow over the otherwise welcome effects of globalization.

Just think for a moment about the graduating Class of 2020: composed of students, all of which have spent at least one semester studying abroad, well-trained in the legal principles, governing statutes and codes adopted all around the world, studying for a national bar, recognized in reciprocity by the European Union and other leading jurisdictions, committed to the enhancement of the well-being of the global village as true agents of change and solidarity.

We must invite Jim White to address them with the commencement speech.

Thanks so much for the invitation.

10. F. ZAKARIA, *supra* note 2, at 41.

THE CHINESE AUTOMOBILE INDUSTRY AND THE WORLD TRADE ORGANIZATION: CHINA'S NON-COMPLIANCE WITH WTO REGULATIONS THROUGH ITS SUBSIDIZING OF AUTOMOBILE MANUFACTURERS

Ann E. Christoff*

INTRODUCTION

Since its accession to the World Trade Organization (WTO)[1] in 2001,[2] China has been the subject of much scrutiny in terms of its compliance with WTO policies and regulations.[3] While government agencies in the United States generally agree that China has made significant progress toward implementing its WTO commitments, there are several aspects of China's commitments that it has yet to fulfill.[4] One such insufficiency is that China still maintains policies of differential tax treatment toward its domestic industries, favoring domestic production and discriminating against imports.[5] The objectionable effect of these practices is that China is able to enjoy the advantages of trading in an international forum while restricting access to its own market by foreign competitors.[6]

---

* J.D. Candidate, Indiana University School of Law – Indianapolis; and M.B.A. Candidate, Indiana University Kelley School of Business at Indianapolis; December 2009. B.A. English, B.A. Latin; Ohio State University, 2006. The author would like to thank Professor Frank Emmert, Indiana University School of Law – Indianapolis; Professor Richard L. Rogers, Indiana University Kelley School of Business at Indianapolis; and Economic Analyst Andrew Szamosszegi of Capital Trade, Inc., for their assistance with this Note. I would also like to thank Jenny Prinz and Zach Miller for their guidance and my Dad for inspiring this inquiry.

1. The WTO is an organization designed to facilitate, promote, and protect free international trade; it currently has 151 Member states. World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Feb. 23, 2009).

2. World Trade Organization, Ministerial Decision of 10 November 2001: Accession of the People's Republic of China, WT/L/432 (2001) [hereinafter Accession of China].

3. SUSAN KRAUSE, U.S. DEP'T OF STATE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES, EXPERTS SAY: SUBSIDIES, TAX BREAKS, PRODUCT STANDARDS CREATE DISCRIMINATORY CLIMATE (2005) *available at* http://usinfo.state.gov/eap/Archive/2005/Jun/02-648829.html [hereinafter KRAUSE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES].

4. THE U.S.-CHINA BUSINESS COUNCIL, CHINA'S IMPLEMENTATION OF ITS WORLD TRADE ORGANIZATION COMMITMENTS: AN ASSESSMENT BY THE U.S.-CHINA BUSINESS COUNCIL 3 (2007) *available at* http://www.uschina.org/public/documents/2007/09/uscbc-china-wto-implementation-testimony.pdf [hereinafter U.S.-CHINA BUSINESS COUNCIL]. *See also* SUSAN KRAUSE, U.S. DEP'T OF STATE, ANNUAL REPORT ON CHINA WTO COMPLIANCE SHOWS MIXED RESULTS, 2005, *available at* http://usinfo.state.gov/eap/Archive/2005/Dec/15-959311.html [hereinafter KRAUSE, ANNUAL REPORT ON CHINA WTO COMPLIANCE].

5. U.S.-CHINA BUSINESS COUNCIL, *supra* note 4.

6. *See id.*

As China is a rapidly rising force in the world economy, it is apparent why China would take steps toward full compliance with the WTO in some respects and yet still provide excessive tax relief or other incentives for industries in which China wants to drastically improve its international competitiveness.[7] The goal of this policy appears to be twofold. First, it allows China to point to its ostensible progress in becoming fully compliant with the WTO so that it can further its integration into the world economy with WTO approval.[8] Second, maintaining domestically favorable tax and subsidy policies enables China to accelerate growth and production of its own manufacturers, boost exports, and thus gradually overtake a significant market share in industries in which China has traditionally been a major importer.[9] However, as long as China continues to implement differential tax incentives and subsidies, the United States and other WTO Member states will have an enormous comparative disadvantage in such subsidized industries.[10] For example, if China should subsidize its steel manufacturers contingent upon exports per year and simultaneously increases tariffs on steel imports, then China would be able to sell steel around the world at low prices with which international competitors would likely be unable to compete.[11] This and other unfair trade practices are precisely what the WTO seeks to prevent,[12] and they are precisely what China agreed to discontinue when it acceded to the WTO in 2001 and became bound by the Agreement on Subsidies and Countervailing Measures.[13]

One industry in which China has historically been a major importer, and has only recently become a global economic force in itself, is the automobile industry.[14] China's increase in net production since 2000 has positioned it far in advance of other potential major automobile producers such as Brazil and

---

7. *See* NICHOLAS R. LARDY, ISSUES IN CHINA'S WTO ACCESSION 1 (2001), *available at* http://www.brookings.edu/testimony/2001/0509foreignpolicy_lardy.aspx.

8. *See* KRAUSE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES, *supra* note 3, at 1.

9. *Id.*

10. KRAUSE, ANNUAL REPORT ON CHINA WTO COMPLIANCE, *supra* note 4, at 3.

11. *See* KRAUSE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES, *supra* note 3, at 1.

12. *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods – Results of the Uruguay Round (1994) [hereinafter Agreement on Subsidies and Countervailing Measures].

13. *Id.* at art. IV. *See also* Committee on Subsidies and Countervailing Measures, *Notification of Laws and Regulations Under Article 32.6 of the Agreement – People's Republic of China*, WT/G/SCM/N/1/CHN/1/Suppl.3 at ch. 2 (Oct. 20, 2004).

14. In the third quarter of 2005, Chinese automobile exported units exceeded imported units for the first time ever, with exports hitting 135,000 units and imports at 128,000 units. However, it should be noted that the *value* of the imports still exceeded that of exports. *Chinese Car Exports Top Imports: Chinese Car Exports Are Exceeding Imports for the First Time, Figures Show, But Officials Have Warned of Possible Over-Production in the Sector*, B.B.C. NEWS, Dec. 6, 2005, at 1, *available at* http://news.bbc.co.uk/2/hi/business/4502098.

Thailand, and it has launched China to third place in world leaders for auto production, surpassing Korea and Germany and trailing only Japan and the United States.[15] Not only has China's auto production rapidly escalated in the past decade, but the compact cars it is producing are very inexpensive.[16] This may have a devastating effect on the United States automobile industry, as major U.S. manufacturers almost certainly could not compete with Chinese manufacturers' low prices.[17] Such price disparity has also aroused suspicions of unfair subsidization practices in China.[18] One way a company can produce products at or below the cost of raw materials without losing money is through receipt of government subsidies.[19] In addition to mere suspicions, the Chinese government has actually engaged in several questionable subsidization practices to promote its own industry.[20] These include: 1) establishing export quotas in 2007 to determine the amount of state funding for its manufacturers, and 2) requiring high levels of domestic content for joint ventures – from requiring forty percent local content at the outset to requiring eighty percent by the third year.[21] These policies aim to enhance Chinese export volume and promote domestic over imported goods.[22] They are also illegal according to the WTO.[23]

All major players in the automotive industry have serious economic interests in Chinese compliance with the WTO.[24] The United States, however, has an especially large stake in demanding Chinese compliance in its production of automobiles: as China prepares to introduce its automobiles in the U.S. market in the near future,[25] it becomes crucial to U.S. competitiveness

---

15. STEPHEN COONEY, CRS REPORT FOR CONGRESS: CHINA'S IMPACT ON THE U.S. AUTOMOTIVE INDUSTRY, at 3 (2006), *available at* http://www.fas.org/sgp/crs/misc/RL33317.pdf. 16 Some Chinese cars have been priced at $4,000. *Cheap Chinese Cars Rattle Industry Giants' Nerves*, THE FIN. EXPRESS, Sept. 14, 2005, at 1, *available at* http://www.financialexpress.com/old/fe_full_story.php?content_id=102548.

17. David Kiley, *Is America Ready for Cheap Chinese Cars? Chinese-Made Autos Are Coming to the U.S., But Recent Quality Concerns Could Make Buyers Choose Safe Cars Over Cheap Ones*, BUS.WK., July 9, 2007, at 1, *available at* http://www.businessweek.com/autos/content/jul2007/bw2007076_421598.htm. *See also* Franklin J. Vargo, Vice President of International Economic Affairs, National Association of Manufacturers, Testimony Before the Subcommittee on Trade of the House Committee on Ways and Means 1, 4 (Feb. 15, 2007), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=5461 [hereinafter Vargo, Testimony Before the Subcommittee on Trade].

18. Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 1.

19. *Id.* at 2.

20. Irina Aervitz, *Chinese Cherish Their Chery*, ASIA TIMES ONLINE, May 25, 2007, at 2 *available at* http://www.atimes.com/atimes/China_Business/IE25Cb01.html. *See also* Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 1.

21. Aervitz, *supra* note 20, at 2.

22. *Id. See also* Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 2; KRAUSE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES, *supra* note 3, at 1.

23. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II.

24. Kiley, *supra* note 17, at 1. *See also, e.g.* Greg Keenan, *Chinese Cars Headed for Canada at Cut-Rate Prices*, REPORTONBUSINESS.COM, Jan. 16, 2008, *available at* http://www.reportonbusiness.com/servlet/story/RTGAM.20080114.wrchina14/BNStory/Business/home.

25. Kiley, *supra* note 17, at 1.

that China engages in fair trading practices.

There are three major purposes of this Note. First, this Note aims to determine the extent to which major Chinese automobile manufacturers are subsidized by the Chinese government, as relative to the extent to which other global industry leaders are subsidized by their respective governments, including Korea, Germany, Japan, and the United States.[26] It should be noted that obtaining precise and accurate subsidy figures for each of the manufacturers scrutinized in this Note is an expensive procedure that could take years to accomplish, even for sophisticated government agencies or the WTO itself.[27] Such a task is beyond the scope of this Note. Instead, this Note will utilize the public financial information of each of the manufacturers, allegations of WTO violations, and other sources of evidence to develop estimates of the relative degrees of subsidization employed by each of the countries surveyed herein.[28]

Second, having established relative degrees of subsidization, this Note will analyze whether and how these subsidies are illegal according to the WTO Agreement on Subsidies and Countervailing Measures.[29] This Note will discuss the countervailing measures available to other Member states of the WTO against those states found to be illegally subsidizing their auto manufacturers.

Third, this Note will analyze the macroeconomic effects of noncompliance with the WTO through use of prohibited subsidies, and it will contemplate how full compliance would affect international automotive trade.[30] This analysis will also discuss the practical reasons for illegalizing certain types of subsidies. It will examine the actual weight of WTO authority along with the effectiveness of the WTO's current remedies for violations.

Part I of this Note will provide background information as to the history of the Chinese automobile industry. It will shed light on China's rise in economic status as an automotive power and will lead into an introduction of the biggest Chinese manufacturers in the industry: First Automotive Works, Shanghai Automotive Industry Corporation, and Dongfeng Motor Corporation.[31]

Part II of this Note will discuss Chinese accession to the WTO and the

---

26. *See infra* Part III.

27. "Sometimes it takes years for WTO experts to attest that subsidization actually took place." Aervitz, *supra* note 20, at 3.

28. *See infra* Part III.

29. *See infra* Parts II-III. Subsidies are not facially unacceptable according to the WTO; only subsidies that fall under the "prohibited" category, such as export contingent subsidies and subsidies contingent upon purchase of imports over exports, are deemed illegal. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II.

30. *See infra* Parts III-IV.

31. EAST MIDLANDS–CHINA BUSINESS BUREAU, CHINA: AUTOMOTIVE OVERVIEW, (Nov. 2001), *available at* http://www.eastmids-china.co.uk/chinasectorreportautomotiverevie.html [hereinafter EAST MIDLANDS].

legal implications of China's agreement to be bound by WTO regulations. It will introduce the Agreement on Subsidies and Countervailing Measures, and explain the various types of legal and illegal subsidies.

Part III will report approximate amounts of subsidies received by the top three auto manufacturers in China, as compared to subsidization of a top manufacturer in each of the other industry-leading countries: Korea, Germany, Japan, and the United States. An analysis of the legality of these subsidies and their macroeconomic effects on the global automobile industry will then invite discussion of currently available remedies for the adverse effects of non-compliance.

Part IV of this Note will provide a reassessment of the effectiveness of the remedies and will also weigh the relative authority of the WTO. This section will also demonstrate the importance of a system of international trade that calls for transparency and accountability, focusing on trade practices in the global automobile industry.

Part V will conclude by revisiting the rationale for the very existence of the WTO: fair international trade. The results and analysis of parts III and IV will provide grounds for recommendations to help ensure global fair trade. These include altering and increasing the severity of the consequences of noncompliance with the WTO, and also allowing unilateral action by a country injured through another's WTO violations so that it may close its own markets to the violator until full compliance is manifest.[32] Finally, the accounting system of each Member state of the WTO should be required to meet a WTO-approved set of accounting principles, thus demanding the same degree of transparency from every Member state.[33] This would improve the accountability of all Member states while allowing them to keep, though perhaps reform, their own systems, without attempting to implement a uniform WTO accounting system.[34] These measures would collectively increase the effectiveness of the WTO, promote fairer trade in the auto industry, and protect the United States from unfair competition with Chinese auto manufacturers in the very near future.[35]

32. *See infra* Part V.

33. *See infra* Part V. *See also* Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 1-3.

34. *See infra* Part V.

35. *See infra* Part V.

PART I: A BRIEF HISTORY OF THE CHINESE AUTOMOBILE INDUSTRY, ITS ESCALATION INTO THE GLOBAL MARKET, AND THE CHINESE "BIG THREE"

A. *The Chinese Automobile Industry, Pre-1965*

For the first three decades of the twentieth century, automobiles in China were extremely sparse.[36] Author Eric Harwit discusses three main reasons for such slow growth in the automobile industry during this period in his book, *China's Automobile Industry: Policies, Problems, and Prospects*.[37] First, there were a minimal number of miles of paved roadways throughout the country; for example, in 1937 there were approximately 25,000 miles of paved roadway in China, whereas there were 1.3 million miles of paved roadway in the United States by 1935.[38] Second, the low standard of living meant that, for many workers, it was virtually impossible to afford an automobile, nor did it make sense to purchase one when rickshaws and horse carts were much more efficient means of transportation.[39] Third, the political climate deterred potential buyers: as civil wars broke out and continued during the 1920's, automobiles were often confiscated by feuding warlords.[40] During the 1930's to mid-1940's, a few small-scale Chinese manufacturers began producing small numbers of automobiles, mainly manufacturing trucks.[41]

Although production was minimal during World War II, the newly founded People's Republic of China set an initiative almost immediately to develop a domestic automobile industry.[42] Soon after, with the assistance of the former Soviet Union, China opened its first automobile manufacturer on July 13, 1956, known as First Automotive Works.[43] This production facility originally produced only one model of medium-sized truck and later began manufacturing compact automobiles.[44] In 1958, China's leader Mao Zedong launched an idealist plan he termed the "Great Leap Forward," which was an attempt to bolster China's economy primarily through extremely expedient

---

36. ERIC HARWIT, CHINA'S AUTOMOBILE INDUSTRY: POLICIES, PROBLEMS, AND PROSPECTS 15 (M. E. Sharpe, Inc. 1995).

37. *Id.*

38. *Id.* at 15-16.

39. *Id.* at 16.

40. *Id.* at 16 (citing WILLIAM IRVINE, AUTOMOTIVE MARKETS IN CHINA, BRITISH MALAYA, AND CHOSEN 10 (Bureau of Foreign and Domestic Commerce 1923)).

41. HARWIT, *supra* note 36, at 15-16. *See also International Auto Manufacturers Eye NE China*, PEOPLE'S DAILY, March 25, 2001, at 1, *available at* http://english.peopledaily.com.cn/200103/25/eng20010325_65915.html.

42. HARWIT, *supra* note 36, at 17.

43. First Automotive Works, History, http://www.faw.com/webcontent/aboutfaw.jsp?pros=history_forword.jsp&phight=550&about=History (last visited Feb. 23, 2009).

44. *Id.*

modernization of industry and agriculture, and which was a move toward self-sufficiency in the auto industry.[45] The excessive spending on industrialization, however, caused the effort to collapse in 1961.[46] The effect of the short-lived "Leap" was that the Chinese auto industry again became reliant on Soviet technology.[47] In sum, there was little economic advancement for the industry during the first half of the twentieth century through the mid-1960's.[48]

B. The Chinese Automobile Industry, 1965-Present

As of 1965, there were approximately twenty automobile manufacturing factories throughout China.[49] While the number of production facilities continued to climb over the next several years, actual production of cars and trucks saw a decline from "55,861 [units] in 1966 to 25,100 in 1968."[50] Author Eric Harwit suggests this was a result of the Cultural Revolution.[51] Mao Zedong launched the Cultural Revolution in 1966 in order to mobilize urban youths, purge society of old ways of thinking, and make society less elitist.[52] The chaos of the Cultural Revolution led to a twelve percent decrease in general industrial production from 1966 to 1968.[53]

The Chinese auto industry took an upward swing in the early 1970s.[54] In 1971, China engaged the largest Japanese auto manufacturer, Toyota, as a trading partner; from this point, Toyota and the Chinese began to cooperate by exchanging technicians, jointly producing new automobile models, and developing an automotive plant.[55] Domestic production of trucks in China rose from approximately fifty percent in 1970 to sixty-five percent in 1975; the opening up of foreign trade sparked substantial acceleration in the Chinese auto industry.[56]

It was during the early 1980's that China's auto production began to spike, doubling from approximately RMB[57] 8.84 billion in 1980 to RMB 16.45

---

45. Chris Trueman, *The Great Leap Forward*, HISTORY LEARNING SITE, 1 (2007), http://www.historylearningsite.co.uk/great_leap_forward.htm (last visited Feb. 23, 2009). *See also* William Harms, *China's Great Leap Forward*, 15 THE UNIVERSITY OF CHICAGO CHRONICLE 13 (1996) *available at* http://chronicle.uchicago.edu/960314/china.shtml.

46. Harms, *supra* note 45, at 15.

47. HARWIT, *supra* note 36, at 20.

48. *Id.*

49. *Id.* at 24 fig. 2.5.

50. *Id.* at 21 (citing *Zhongguo qiche gongye nianjian* (China Automotive Industry Yearbook) 124 (1991)).

51. HARWIT, *supra* note 36, at 21.

52. Thayer Watkins, *The Great Proletarian Cultural Revolution in China, 1966-1976*, San Jose State University Dep't of Economics, *available at* http://www.sjsu.edu/faculty/watkins/cultrev.htm.

53. *Id.*

54. HARWIT, *supra* note 36, at 25.

55. *Id.*

56. *Id.*

57. "Chinese currency is called Renminbi (people's money), often abbreviated as RMB.

billion in 1984, and then doubling again to RMB 37.3 billion by 1988.[58] During this time, the Chinese began to focus more intently on passenger vehicle production, securing an increasing number of joint ventures with foreign manufacturers. [59] For example, in 1983 Beijing Automotive signed the first joint-venture agreement with American Motors Corp. to begin producing Jeeps, and later Shanghai Automotive initiated a joint venture with German manufacturer Volkswagen.[60] With a plethora of small-scale manufacturers having sprouted across China, the government saw a need to consolidate production as a strategy to create a smaller number of large-scale, internationally competitive manufacturers, a policy which is still in place today.[61] China has been successful in restructuring its industry and channeling production, resulting in a handful of present-day automotive giants that continue to rise in the global economy.[62]

C. The Chinese "Big Three": First Automotive Works, Dongfeng Motor Group, and Shanghai Automotive Industry Corporation[63]

While there are approximately 120 auto manufacturers in China, only ten produce over 100,000 units annually.[64] Among these ten are the Chinese "Big Three," including First Automotive Works (FAW), Shanghai Automotive Industry Corporation (Group) (SAIC), and Dongfeng Motor (Group) Corporation (DFM), ranked first through third respectively.[65] The Chinese government especially supports these three manufacturers through subsidies, loans, and priority in establishing joint ventures with foreign manufacturers in order to draw international investment, fund advanced technology, and attract

---

It is issued by The Bank of China and is the sole legal tender within the People's Republic of China. The symbol for RMB is ¥." Currency Matters, http://www.travelcentre.com.au/travel/asia/China/chinese_currency.htm (last visited Feb. 23, 2009). The symbol ¥ (spelled yuan) will be used to denote Chinese currency throughout the remainder of this Note.

58. HARWIT, *supra* note 36, at 27 (citing China Automotive Technology and Research Center, *Zhongguo de qiche gongye* (Automotive Industry of China) 4 (1989)).

59. *Id.* at 29.

60. Gordon Fairclough & Shai Oster, *Bumpy Ride: As China's Auto Market Booms, Leaders Clash Over Heavy Toll*, WALL ST. J., June 13, 2006, at 1, *available at* http://online.wsj.com/article/SB115016484857578577.htm.

61. Aervitz, *supra* note 20, at 3. It should be noted that this consolidation policy employs questionable tactics such as providing state support for those manufacturers that meet annual export quotas; this type of export contingent subsidization is prohibited by the WTO. Further discussion of Chinese auto industry consolidation measures follows in Parts III and IV of this note.

62. *Id.* at 2.

63. This section provides a general overview of each of the three major Chinese auto manufacturers, including a brief history, summary of business operations, and assessment of corporate strategy for each. The financial information for each of these companies is likewise crucial, but is not examined until Part III of this Note.

64. EAST MIDLANDS, *supra* note 31.

65. *See* China Carforums, http://www.chinacarforums.com/chinese_car_manufacturers.html (last visited Feb. 23, 2009).

management expertise.[66]

The third largest Chinese auto manufacturer, DFM, formerly known as Second Automotive Works (SAW), was established in 1969 and has opened multiple major production bases since.[67] These centers are located in Shiyan, Xiangfan, Wuhan, and Guangzhou, and they specialize in the production of medium and heavy duty commercial vehicles, light duty commercial vehicles, and passenger vehicles.[68] Today, DFM production is mainly divided between commercial and passenger vehicles.[69] Contributive to its expansion in the passenger vehicles sector, DFM has engaged in joint ventures with Nissan Motor Co., Ltd.; Honda Motor Co., Ltd.; and Kia Motors Corporation.[70]

A major aspect of DFM's corporate strategy under CEO Xu Ping is Research and Development (R&D).[71] DFM's goals for the next five years include doubling production and sales, strengthening as an internationally competitive manufacturer, and increasing its capability for autonomic development.[72] In furtherance of these goals, Donfeng Automobile Co., Ltd. announced in October, 2007 that it will be investing ¥ 10 billion through 2010 to develop its DFM brand.[73]

SAIC, the second largest Chinese auto manufacturer, was established in the 1950s and began production in 1958.[74] While SAIC's flagship production center is in Shanghai, it has established bases in Liuzhou, Chongqing, Yantai, Shenyang, Qingdao, and Yizheng, and it also has branches in the United States, Europe, Hong Kong, Japan, and Korea.[75] SAIC engages primarily in the production of passenger vehicles and commercial vehicles, producing 91,000 passenger cars and 42,900 commercial vehicles in 2007.[76] To increase production of passenger cars, SAIC set up a joint venture with Volkswagen, an

---

66. EAST MIDLANDS, *supra* note 31.

67. *Id.*

68. The Xiangfan center produces passenger vehicles in addition to light duty commercial vehicles, and the Wuhan and Guangzhou centers both principally produce passenger vehicles. Dongfeng Motor Corporation, Corporate Profile, http://www.dfmc.com.cn/info/introduce_en.aspx (last visited Feb. 23, 2009) [hereinafter Donfeng Motor Corporation, Corporate Profile].

69. China Carforums, http://www.chinacarforums.com/china_auto/dongfeng_motor.html (last visited Feb. 23, 2009).

70. Dongfeng Motor Corporation, Corporate Profile, *supra* note 68.

71. *Id.* As R&D is a common avenue through which government subsidies are allocated, DFM's R&D financials will be further scrutinized in Part III of this Note. *See infra* Part III.

72. Dongfeng Motor Corporation, Corporate Profile, *supra* note 68.

73. *Dongfeng Automobile Co., Ltd. (600006: Shanghai Stock Exchange)*, BUS. WK., Nov. 16, 2007, *available at* http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?capID=5493465.

74. Shanghai Automotive Industry Corporation (Group): SAIC Group – Message from the Chairman, http://www.saicgroup.com/English/sqjt/ldzc/index.shtml (last visited Feb. 23, 2009) [hereinafter SAIC Group – Message from the Chairman].

75. Shanghai Automotive Industry Corporation (Group): SAIC Group – Introduction of SAIC, http://www.saicgroup.com/English/sqjt/gsjs/index.shtml (last visited Feb. 23, 2009) [hereinafter SAIC Group – Introduction of SAIC].

76. *Id.*

automobile manufacturer with an annual output of over 230,000 cars.[77] SAIC is also party to a joint venture with General Motors (GM), which is the largest Sino-American joint venture in China.[78]

The corporate strategy of SAIC under the leadership of President Shen Jianhua centers on the idea of "becoming a corporation of industrial investment and business operation that integrates advanced manufacturing and modern service businesses."[79] One of its goals is to help build an energy-efficient, environmentally-friendly, and maintainable automobile industry.[80] To realize this goal, SAIC announced in October of 2007 that GM and SAIC will jointly be investing $5 million in five years to establish a "vehicular energy technological R&D center" in coordination with Qinghua University, in order to devise a comprehensive energy strategy for China and its auto industry.[81]

The current largest of the "Big Three" Chinese auto manufactures is the same one that started it all for the Chinese auto industry in 1956: First Automotive Works (FAW).[82] FAW production bases are located in Jilin and Heilongjiang provinces in northeast China, Shandong province in east China, Hainan province in south China, and Sichuan and Yunnan provinces in southwest China.[83] While FAW initially only produced one model of medium truck, FAW now produces a diversified array of vehicles, including light, medium, and heavy-duty trucks; cars, buses and luxury tourist coaches, custom bus chassis, and compact vehicles.[84] Its sales volume has surpassed one million units annually.[85] FAW has multiple joint ventures with foreign manufacturers, the largest of which being Volkswagen, Toyota, and Mazda, which deal primarily with passenger vehicles.[86]

Under the leadership of President Zhu Yanfeng, the corporate strategy is currently to place heavier emphasis on the production of passenger vehicles while still holding a dominant position in the commercial truck sector.[87] FAW

77. EAST MIDLANDS, *supra* note 31.

78. *Id.*

79. SAIC Group – Introduction of SAIC, *supra* note 75.

80. SAIC Group – Message from the Chairman, *supra* note 74.

81. Shanghai Automotive Industry Corporation (Group): SAIC Group – News Center: *Deeper Cooperation Between GM and SAIC*, http://www.saicgroup.com/english/xwzx/3682.shtml (last visited Feb. 23, 2009).

82. FAW is ranked 470 in the Fortune Global 500 while SAIC is ranked 475; FAW revenues also exceeded SAIC revenues in 2006. *Fortune 500 Global: China First Automotive Works*, CNNMoney.com, http://money.cnn.com/magazines/fortune/global500/2006/snapshots/4084.html (last visited Feb. 23, 2009). *See also* China Carforums, FAW (First Automotive Works), http://www.chinacarforums.com/FAW.html (last visited Feb. 23, 2009).

83. FAW: About FAW: Profile, http://www.faw.com/webcontent/aboutfaw.jsp?pros=profile.jsp&phight=850&about=Profile (last visited Feb. 23, 2009) [hereinafter FAW: Profile].

84. *Id.*

85. *Id.*

86. FAW: International Cooperation: FAW-Volkswagen, FAW-Toyota, FAW-Mazda, http://www.faw.com/international/volkswagen.jsp (last visited Feb. 23, 2009).

87. FAW: Profile, *supra* note 83.

also focuses intently on R&D, possessing the largest and most comprehensive automotive R&D center in China.[88] In an effort to advance its research capabilities, FAW announced in August that it will be spending ¥13 billion over the next eight years "to enhance its competitiveness in the automobile, commercial truck, and bus sectors."[89]

Although the Chinese auto industry had modest beginnings and endured several setbacks in times of war and political upheaval, it started to see rapid improvement in the mid-1980s as it became more technically advanced and more open to partnerships with foreign manufacturers.[90] China first passed the mark of two million units produced per year in 2000 (including all types of vehicles), and since then it has surpassed France, South Korea, and Germany in annual production rates.[91] By 2006, China had more than tripled its 2000 production output, producing a total of approximately 7.19 million units.[92] Not only is China still improving its own auto industry, but it is the only country in the world that continues to show substantial growth in production.[93] As China's auto industry progresses exponentially and its major manufacturers aim to compete with Japanese and American giants, it becomes imperative now more than ever that the major players in the global auto industry secure assurance of fair international trade practices.[94]

PART II: CHINA'S ACCESSION TO THE WTO, AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, AND DISPUTE RESOLUTION

A. *The Accession of the People's Republic of China to the WTO*

On November 10, 2001, The Ministerial Conference of the WTO entered the following decision: "The People's Republic of China may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this decision."[95] This marked a significant turning point in the dynamics of global trade. As China has become a booming economic power in itself over the past two decades,[96] this

88. *Id.* FAW's R&D funding will also be further scrutinized in Part III of this note. *See infra* Part III.

89. FAW: News Releases 2007: *FAW Highlights Future R&D* (Aug. 11, 2007), http://www.faw.com/webcontent/news.jsp (last visited Feb. 23, 2009).

90. FAW: Profile, *supra* note 83.

91. COONEY, *supra* note 15.

92. Automotive Industry, http://en.wikipedia.org/wiki/Automaker (last visited Feb. 23, 2009).

93. COONEY, *supra* note 15.

94. *Id. See also* Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 2.

95. Accession of China, *supra* note 2.

96. Thomas Rumbaugh & Nicolas Blancher, *China: International Trade and WTO Accession* 1-25 (International Monetary Fund, Working Paper No. 36, 2004), *available at*

accession has meant enormous mutually advantageous trade opportunities for countries across the globe.[97] For example, in 2006 U.S. exports to China amounted to $55.2 billion, marking an increase of 187% since China's accession to the WTO in 2001.[98] Similarly, EU exports to China have drastically increased: in 2006 alone EU exports increased by 22.5%, an increase amounting to €63 billion[99] (approximately $79 billion U.S. dollars).[100] China's accession to the WTO has greatly enhanced multilateral and bilateral trade worldwide.[101] With this said, it is important for purposes of ensuring fair trade to consider the extent to which China is upholding its end of the agreements.[102]

In acceding to the WTO, China agreed to be bound by a series of regulations and policies which require it to not only restructure its laws to open its markets, but also to be transparent and accountable in its trade practices.[103] Article 2(C) of the Accession of the People's Republic of China delineates this transparency requirement: "China shall make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS [trade-related aspects of intellectual property rights] or the control of foreign exchange before such measures are implemented or enforced."[104] The Accession agreement further provides that China's progress in implementing the WTO Agreement will be subject to annual review every year for eight years after accession.[105] The purpose of this is to ensure that China is moving toward policies of transparency.[106]

Having scrutinized China's steps toward fully implementing its WTO commitments over the first four to five years post-accession, experts have found mixed results.[107] On one hand, China has met several of the commitments[108] it was scheduled to fulfill by the fifth year of its WTO membership.[109] Some of the areas in which China is compliant include the "advertising, banking, architectur[e], engineering, urban planning services, insurance, distribution, and

---

http://www.imf.org/external/pubs/ft/wp/2004/wp0436.pdf.

97. U.S.-CHINA BUSINESS COUNCIL, *supra* note 4.

98. *Id.* at 1.

99. European Commission, Trade Issues, Bilateral Trade Relations: China, http://ec.europa.eu/trade/issues/bilateral/countries/china/index_en.htm (last visited Feb. 23, 2009).

100. This amount is calculated based on the exchange rate provided in *Foreign Exchange Rates (Annual)*, FED. RESERVE STATISTICAL RELEASE, (Federal Reserve) at 1 (2007), *available at* http://www.federalreserve.gov/releases/g5a/20070103/.

101. Rumbaugh & Blancher, *supra* note 96, at 3.

102. *See* THE U.S.-CHINA BUSINESS COUNCIL, *supra* note 4.

103. *Id. See also* KRAUSE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES, *supra* note 3.

104. Accession of China, *supra* note 2, at Part I.2.(C).

105. *Id.*

106. *Id.*

107. KRAUSE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES, *supra* note 3.

108. These commitments are provided in the Protocol annexed to the Accession of the People's Republic of China. *See* Accession of China, *supra* note 2, at art. 2.18.

109. THE U.S.-CHINA BUSINESS COUNCIL, *supra* note 4, at 3.

telecom sectors";[110] however, there are still areas in which China continues to enforce policies that "effectively limit market access, impose conditions on market access, or give preferential treatment [to domestic industries]."[111] Examples are industry and export subsidies, both direct and indirect.[112] Upon accession, China was required to notify the WTO, in detail, of all of its subsidy programs, including all prohibited, actionable, and non-actionable subsidies pursuant to the Agreement on Subsidies and Countervailing Measures.[113] Finally, in April of 2006, China submitted a list of seventy-eight various programs – a list that was incomplete for its failure to include several substantial subsidies from local governments to Chinese industries.[114] Although there has been significant delay in notification to the WTO of its subsidization programs, this does not mean that the subsidies China employs are necessarily illegal. In fact, many of them may be legal and even "non-actionable"[115] according to the WTO.[116] The determination of whether China uses illegal subsidies, particularly in its automobile industry, depends on how its subsidies are categorized according to the Agreement on Subsidies and Countervailing Measures.

B. Agreement on Subsidies and Countervailing Measures

The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) addresses the problem of government support of domestic industries to the detriment of other countries participating in the same market.[117] The Agreement clearly defines what constitutes a subsidy according to the WTO, and it also provides remedial measures to those Member states that have been injured by another's use of unacceptable subsidies.[118] The main purpose of the Agreement is to curtail government assistance that economically disadvantages other WTO Member states.[119] Article 1 of Part I of the SCM Agreement defines at length "subsidy" for purposes of the Agreement. It states:

---

110. *Id.* at 2.

111. KRAUSE, CHINA'S INDUSTRIAL POLICIES CONFLICT WITH WTO RULES, *supra* note 3.

112. Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 4.

113. Accession of China, *supra* note 2, at Part I.2.(D).10. *See also infra,* Part II.B.

114. The United States initiated dispute resolution proceedings in 2007 through the WTO against China for implementing prohibited subsidies that have yet to be cancelled. Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 4.

115. Agreement on Subsidies and Countervailing Measures, *supra* note 12 at Part IV.

116. Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 4. *See also infra* Part II.B.

117. DEP'T OF FIN. CAN., SUBSIDIES AND COUNTERVAILING MEASURES INFORMATION PAPER (2007), *available at* http://www.fin.gc.ca/activity/pubs/Sub_e.html [hereinafter DEP'T OF FIN. CAN.].

118. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12 at Part II, art. 3.

119. DEP'T OF FIN. CAN., *supra* note 117.

> [A] subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member . . . i.e. where: (i) a government practice involves a direct transfer of funds . . . , potential direct transfers of funds or liabilities; (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions in (i) to (iii) above which would normally be vested in the government . . . or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) *a benefit is thereby conferred.*[120]

The extensiveness of this definition of "subsidy" illustrates that there are several methods by which a government could directly or indirectly provide financial support to industries within its borders.[121] Without any further limitations, it would be a monumental but futile effort to try to determine instances of subsidization because there would be no test by which to analyze potential subsidies. The SCM Agreement, however, establishes a specificity requirement, which deems that a subsidy will only be subject to the provisions of the SCM Agreement if it is "specific" according to Article 2 of the Agreement.[122]

A specific subsidy is one that is "specific to an enterprise or industry or group of enterprises or industries . . . within the jurisdiction of the granting authority" and is subject to a set of three principles.[123] First, "(a) [w]here the granting authority, or the legislation pursuant to which the granting authority operates, *explicitly* limits access to a subsidy to certain enterprises, such subsidy shall be specific."[124] Second, if the granting authority or its legislation establishes criteria "(b) . . . governing the eligibility for, and the amount of, a subsidy, specificity *shall not* exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to."[125] The third principal is a sort of catchall: if a subsidy is not specific under parts (a) or (b), it still may be found specific based on other factors such as: "use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to

120. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part 1, art. 1 (emphasis added).

121. *See id.*

122. *Id.* at Part I, art. 2.

123. *Id.*

124. *Id.* at Part I, art. 2.1(a) (emphasis added).

125. *Id.* at Part I, art. 2.1(b) (emphasis added).

certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy."[126] In other words, if a certain subsidy seems too singular to a certain enterprise, it will be considered specific and therefore it will be subject to scrutiny under the SCM Agreement.[127] To summarize, Part I of the SCM Agreement defines "subsidy," stipulates that in order for a subsidy to be subject to the provisions of the Agreement it must be "specific," and then provides a three-part test to determine whether specificity exists for a given subsidy.[128]

Parts II, III, and IV of the SCM Agreement are crucial to the determination of whether a WTO Member state's subsidization programs are illegal.[129] These sections of the Agreement respectively establish three categories of subsidies: Prohibited, Actionable, and Non-Actionable.[130] Subsidies are prohibited when they are "*contingent*, in law or in fact, whether solely or as one of several other conditions, upon *export performance*" or "*contingent* . . . upon the use of *domestic over imported goods*."[131] This provision not only prohibits WTO Member states from granting such subsidies, but also requires Members to immediately terminate prohibited subsidies if they already existed in that country when it acceded to the WTO.[132] This has become a problem particularly with China; it was required per its Accession Agreement to notify the WTO of, and terminate, all prohibited subsidies upon accession.[133] As this commitment has yet to be fulfilled, the United States has initiated proceedings against China[134] according to WTO dispute resolution procedures.[135]

There are several reasons for prohibiting export subsidies and subsidies contingent upon use of domestic over imported goods.[136] One is that these types of subsidies heavily promote consumption of only domestically produced

126. *Id.* at Part I, art. 2.1(c).

127. *See id.*

128. *Id.* at Part I, art. 1-2.

129. *See generally id.* at Part II-IV (distinguishing between Prohibited, Actionable, and Non-Actionable Subsidies).

130. *Id.*

131. *Id.* at Part II, art. 3.1 (emphases added).

132. *Id.* at Part II, art. 3.2.

133. Accession of China, *supra* note 2, at Part I.2.(D).10.

134. National Association of Manufacturers, NAM Supports WTO Case on China's Prohibited Subsidies, http://www.nam.org/PolicyIssueInformation/InternationalEconomicAffairsPolicy/NewsReleases.aspx?DID=%7B3FD14137-B84C-4EB9-B518-2E2090CA6035%7D (last visited Feb. 23, 2009). *See also, U.S. Starts Legal Action Against China at WTO Over Subsidies*, INT'L HERALD TRIBUNE, Feb. 2, 2007, at 1, *available at* http://www.iht.com/articles/2007/02/02/business/chitrade.php.

135. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II, art. 3.2.

136. *See* Peter Morici, *Bernanke, Chinese Currency Subsidies and the "P" Word*, GLOBAL POLITICIAN, Dec. 19, 2006, at 1, *available at* http://www.globalpolitician.com/22391-foreign-china.

goods, which unfairly discriminates against foreign competitors.[137] Another is that they enable the subsidizing state to export at below-market prices, likewise undermining foreign competition.[138] Such unfair trade practices are what the WTO expressly aims to prevent.[139]

The second category of subsidies under the SCM Agreement is actionable subsidies.[140] A subsidy is actionable if it causes "adverse effects to the interests of other Members" such as "(a) injury to the domestic industry of another Member; (b) nullification or impairment of benefits accruing directly or indirectly to other Members . . . ; [or] (c) serious prejudice to the interests of another Member."[141] The SCM Agreement then enumerates what constitutes serious prejudice: subsidization of a product in excess of fifteen percent, subsidization to cover operating losses of an industry or enterprise, and "direct forgiveness of debt."[142] A country may be injured by this prejudice when the effect of the subsidy is to displace or impede its exports, to undercut its prices, or to increase the market share of the subsidizing state.[143] These subsidies may not always adversely affect other Member states; thus, the purpose of classifying them as "actionable" is to provide remedial measures to states that *do* suffer injury from these subsidies.[144]

The third category of subsidies is non-actionable subsidies. A subsidy is non-actionable if it is non-specific or if it is specific but meets the conditions outlined in Article 8 of the SCM Agreement.[145] Specific non-actionable subsidies include financial assistance with research, "assistance to disadvantaged regions," or assistance in adapting existing facilities to comply with new environmental regulations.[146] These subsidies are non-actionable because they do not favor particular industries over others, and therefore do not foster a market advantage that would be detrimental to other Member states.[147] Non-actionable subsidies are beyond the concern of this Note insofar as they are not themselves illegal; therefore, China's current use of them in the automobile industry would be of no legal consequence. However, non-actionable subsidies may be suspect in the sense that a country could foreseeably attempt to claim an actionable subsidy as non-actionable.[148] Lack

137. *See* R. Pearce & R. Sharma, *II. Agreement on Agriculture, Module 3: Export Subsidies in* MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE – A RESOURCE MANUAL, 1, 2-3, *available at* http://www.fao.org/docrep/003/x7353e/X7353e03.htm.

138. *See id.*

139. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12.

140. *Id.* at Part III, art. 5.

141. *Id.*

142. *Id.*

143. *Id.* at Part III, art. 6.

144. *See id.*

145. *Id.* at Part IV, art. 8.

146. *Id.*

147. Juris International, Rules Governing Subsidies on Industrial Products, http://www.jurisint.org/pub/06/en/doc/C08.pdf (last visited Feb. 23, 2009).

148. *See* SUSAN R. FLETCHER & MARY TIEMANN, TRADE AND ENVIRONMENT: GATT AND

of transparency in accounting, such as that which exists in China, could facilitate such a scheme.[149]

Of the three types of subsidies provided in the SCM Agreement, prohibited and actionable subsidies are of special importance for purposes of analyzing China's WTO compliance in the auto industry. These are the subsidies that amount to unfair trade practices, and these may have the most injurious effect on the United States and other world leaders in automobile production as China begins, or continues, to market its cars in these forums. Consideration of the remedies available to states injured by such illegal subsidization reveals that dispute resolution is largely left to the Member states themselves.[150]

C. *Dispute Resolution Under the Agreement on Subsidies and Countervailing Measures*

Article 4 and Article 7 of the SCM Agreement provide for remedies in the event that one WTO Member state suspects that another is maintaining either prohibited or actionable subsidies, respectively.[151] The first step in the dispute resolution procedure in actions regarding prohibited subsidies is that the state claiming to have been injured by another's use of illegal subsidies initiates consultations with the allegedly offending state in an attempt to reach a solution between themselves.[152] If this fails after thirty days, either party may refer the matter to the Dispute Settlement Body (DSB) for establishment of a panel to resolve the dispute.[153] This DSB "aims to resolve disputes by clarifying the rules of the multilateral trading system; it cannot legislate or promulgate new rules."[154] The DSB's panel, with the assistance of a Permanent Group of Experts (PGE), reviews the evidence and allows the allegedly offending Member state to demonstrate that the practice in question is not a prohibited subsidy.[155] The panel then issues its conclusions, and if it finds that a prohibited subsidy exists, the DSB will recommend its immediate termination.[156] If this report is not followed within the time period allotted by the panel, the DSB may authorize the allegedly injured country to "take

---

NAFTA 1-12 (1994), *available at* http://www.ncseonline.org/nle/crsreports/economics/econ-5.cfm. *See also*, Institute for the Integration of Latin America and the Caribbean, Industrial Policies for Latin America, http://www.iadb.org/intal/detalle_articulo.asp?idioma=eng&aid=17&cid=700 (last visited Feb. 23, 2009).

149. *See* U.S.-CHINA BUSINESS COUNCIL, *supra* note 4.

150. *See infra* Part II.C.

151. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part III-IV.

152. *Id.* at Part II, art. 4.

153. *Id.*

154. Center for Int'l Development at Harvard University: Global Trade Negotiations Home Page, Dispute Settlement Summary, http://www.cid.harvard.edu/cidtrade/issues/dispute.html (last visited Feb. 23, 2009) [hereinafter Center for Int'l Development at Harvard].

155. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II, art. 4.5.

156. *Id.* at art. 4.7.

appropriate countermeasures."[157] The problem with this ultimate remedy is that the SCM Agreement does not define or otherwise expand upon the phrase "take appropriate countermeasures."[158] This leaves enormous discretion to the Member states themselves, and it also greatly limits the authority of the WTO.[159]

The dispute resolution process for actionable subsidies is similar to that of prohibited subsidies.[160] One major difference is that, at the outset, the complaining state has the burden of proof to show that it has in fact sustained an injury.[161] The parties may then engage in consultations, as with prohibited subsidy dispute resolution, but in this case they have sixty instead of thirty days to reach a solution.[162] If that fails, a DSB-appointed panel will consider the matter and issue a report.[163] Finally, if an actionable subsidy is found to exist and has adversely affected another Member, the DSB will require the offending Member to remove the adverse effects or terminate the subsidy within sixty days.[164] If there is no compliance, the DSB will authorize "countermeasures, commensurate with the degree and nature of the adverse effects determined to exist . . . ."[165] This ambiguous language poses a problem similar to that of "appropriate countermeasures," offered as the remedy for injury by prohibited subsidies.[166] The SCM Agreement does not provide any clarification regarding what type of action would be suitable.[167] When the ultimate means of recourse is "an eye for an eye"[168] counteraction between the parties themselves, the WTO seems to have washed its hands of dealing with any actual conflict.[169]

---

157. *Id.* at art. 4.10.

158. *Id.*

159. *Cf.* Center for Int'l Development at Harvard, *supra* note 154 (stating that the dispute resolution procedure "gives the WTO unprecedented power to resolve trade-related conflicts between nations and assign penalties and compensation to the parties involved"). For recommendations regarding the authority of the WTO and the dispute resolution system currently in place, see *infra*, Part IV-V.

160. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part III-IV.

161. *Id.* at Part III, art. 7.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. J. Michael Finger & Julio Nogues, Abstract, *International Control of Subsidies and Countervailing Duties*, 1 WORLD BANK ECON. REV. 4, 707-725 (1987), *available at* http://www.wber.oxfordjournals.org/cgi/content/abstract/1/4/707 (stating the "code on subsidies and countervailing duties is ambiguous in its definition of 'legal' subsidies, and thus in the appropriate use of countervailing duties").

167. *See id. See also* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part III, art. 7.

168. Known also as the Law of Retribution, the Bible describes this concept in *Exodus* 21: 22-27.

169. The phrase "washing ones hands" comes from the Bible and refers to Pontius Pilot washing his hands to symbolize his refusal to take action or responsibility for the crucifixion of Jesus Christ. *Matthew* 27: 24.

Again, this leads to the conclusion that the WTO has extremely limited authority. Some Member states, such as China, may find this to be a disincentive to comply with WTO regulations in the first place.[170] Part V of this Note will reexamine these remedies in light of evidence of subsidization practices currently employed in the global auto industry.[171]

When China acceded to the WTO, it became party to a number of agreements, including the Agreement on Subsidies and Countervailing Measures.[172] China thereby incurred the commitment to notify the WTO of any and all subsidies it had in place, a commitment which has yet to be fulfilled even after the United States and Mexico initiated WTO cases against China.[173] Although progress in Chinese transparency with regard to subsidies has been relatively unhurried,[174] this does not mean its subsidies are per se illegal.[175] We have seen that there are three categories of subsidies, only one of which is always illegal, and another of which is only illegal depending on whether it adversely affects other states.[176] These two – prohibited and actionable subsidies, respectively – pose significant problems for fair trade.[177] Keeping in mind China's commitments and WTO law on subsidies, let us revisit the Chinese auto industry to determine the extent to which China is WTO-compliant in this microcosm of global trade.

PART III: DETERMINING DEGREES OF SUBSIDIZATION: CHINA COMPARED WITH WORLD LEADERS IN THE AUTOMOBILE INDUSTRY

A. Methodology for Calculating Subsidy Amounts

Part V, Article 14 of the SCM Agreement enumerates guidelines for the "[c]alculation of the [a]mount of a [s]ubsidy in [t]erms of the [b]enefit to the

170. For recommendations on improvements in the SCM Agreement dispute resolution process and amplifying the authority of the WTO, see *infra* Part V.

171. *See infra* Part V.

172. *See* Accession of China, *supra* note 2, at Part I.2.(D).10.

173. Press Release, The Office of the United States Trade Representative, United States Files WTO Case Against China Over Prohibited Subsidies (Feb. 2, 2007) (on file with author). This case was then purportedly resolved as of Nov. 29, 2007, when it was announced that, pursuant to a Memorandum of Understanding (MOU) between the United States and China, China agreed to ensure that by Jan. 1, 2008, all prohibited subsidies complained of would be permanently terminated, never to be reinstated. The United States tellingly reserved its right to reinstate proceedings. Press Release, The Office of the United States Trade Representative, China to End Subsidies Challenged by the United States in WTO Dispute (Nov. 29, 2007) (on file with author). It is unclear whether China has followed the MOU to date.

174. U.S.-CHINA BUSINESS COUNCIL, *supra* note 4, at 3.

175. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II, art. 3.

176. *See id.*

177. *See* Morici, *supra* note 136.

[r]ecipient."[178] The following are not considered to confer benefits unless they are provided in a manner inconsistent with how the enterprise would otherwise conduct business with a private entity: "government provision of equity capital," "a loan by a government," "a loan guarantee by a government," and "the provision of goods or services or purchase of goods by a government."[179] While this places some limitations on what can be considered a subsidy, it does not give any guidance as to how to *calculate* subsidy amounts.[180] A logical method of calculating the subsidies granted to a certain corporation is to look at the company's financial statements.[181] A firm might disclose the amount of government assistance it receives annually, although this is rare and there may be no telling whether this number is comprehensive of all types of subsidies.[182] If there are no direct disclosures, one may find subsidies by scrutinizing the income taxes paid (as compared to national corporate income tax rates), research and development grants, and interest rates paid on loans (as compared to standard interest rates).[183]

The above methods for determining subsidies may or may not render accurate results. As Economic Analyst Andrew Szamosszegi aptly notes, "Quantification is difficult because much of the raw data and information required to calculate subsidies is unavailable."[184] Even if the information does exist, access to this may be very restricted:

> In a subsidy investigation, the Department of Commerce collects detailed data from mandatory respondents and the subsidizing government. The Department then sends officials to view the books of the respondents and verify the information received. This information is only seen by officials and people who certify that they will not divulge any

178. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part V, art. 14.

179. *Id.*

180. *See id.*

181. This is the author's proposal and has been confirmed as a valid method of calculating subsidies by persons with knowledge in the field. Interview with Richard L. Rogers, Professor of Accounting, Ind. Univ. Kelley School of Bus. – Indianapolis in Indianapolis, Ind. (Oct. 17, 2007); E-mail from Andrew Szamosszegi, Economic Analyst, Capital Trade, Inc., to Ann E. Christoff, Indiana International & Comparative Law Review, Ind. Univ. School of Law – Indianapolis (Nov. 14, 2007, 4:20p.m. CST) (on file with author).

182. One example of a company that has disclosed a single subsidy amount in its annual report is Toyota. Toyota Motor Corp., Annual Report (Form 10-K), at 82 (Mar. 31, 2007), *available at* http://www.toyota.co.jp/en/ir/library/annual/pdf/2007/ar07_e.pdf. *See also infra* Part III.C.

183. E-mail from Andrew Szamosszegi, Economic Analyst, Capital Trade, Inc., to Ann E. Christoff, Indiana International & Comparative Law Review, Ind. Univ. School of Law – Indianapolis (Nov. 14, 2007, 4:20p.m. CST) (on file with author).

184. E-mail from Andrew Szamosszegi, Economic Analyst, Capital Trade, Inc., to Ann E. Christoff, Indiana International & Comparative Law Review, Ind. Univ. School of Law – Indianapolis (Nov. 14, 2007, 9:16a.m. CST) (on file with author).

proprietary information.[185]

Thus, with limited access to limited information, the subsidization amounts calculated and discussed herein should be considered rough estimates.[186] In some cases, even basic financial information is unavailable, thus affording no basis (for the purposes of this Note) for determining figures.[187]

B. Subsidy Estimates: The Chinese "Big Three" Auto Manufacturers

To recall from Part I, the Chinese "Big Three" in the automobile industry include First Automotive Works (FAW), Shanghai Automotive Industry Corporation (SAIC), and Dongfeng Motors Corporation (DFM).[188] For the year 2006, FAW's income was ¥163.7 billion,[189] and its assets are currently valued at ¥102.4 billion ($12.4 billion).[190] It is not clear, however, what amount of this income and what percentage of these assets come through government assistance. While FAW does ostensibly post its annual reports on its website, they are only illegible pictures of the annual reports and not the documents themselves.[191] No other means of accessing the reports seems available at this time without purchasing the information for a heavy price.[192] While this information would be highly useful for analysis, its absence nonetheless strongly supports a conclusion of lacking Chinese transparency and a recommendation that the annual reports of all companies under the umbrella of the WTO should be publicly available to other Member states.[193] Further, these annual reports should be required to be prepared in accordance with a standard set of accounting principles which the WTO should adopt. This will heighten accountability of trade practices worldwide. Further discussion of these recommendations continues in Part IV.[194]

SAIC posts its annual reports on its website, although they are virtually

---

185. *Id.*

186. *See infra* Part III.B.

187. One example of a company that does not publicize its financial information is Kia Motors Corp. *See* Kia Motors, http://www.kia.com/index.php. *See also infra*, Part III.C.

188 *See generally* China Carforums, http://www.chinacarforums.com/forum/index.php (last visited Feb. 23, 2009).

189. FAW, Financial Data, http://www.faw.com/webcontent/aboutfaw.jsp?pros=FinancialData.jsp&phight=850&about=Financial%20Data (last visited Feb. 23, 2009).

190. Just-Auto, Factsheets, First Automotive Works, http://www.just-auto.com/factsheet.aspx?ID=217 (last visited Feb. 23, 2009).

191. FAW, Annual Report, http://www.faw.com/webcontent/aboutfaw.jsp?pros=annualreport_2004.htm&phight=500&about=Annual%20Reports (last visited Feb. 23, 2009).

192. One publication comparing the Annual Reports of FAW, SAIC, and Dongfeng, etc. is priced at $1,519.00. FriedlNet, Automotive, Brand Competitiveness of China's Automobile Annual Report 2006-2007, http://www.friedlnet.com/product_info.php?products_id=5207&osCsid=7f46da34172a41920da891fd6c4181e0 (last visited Feb. 23, 2009).

193. For a discussion of this recommendation, see *infra* Part IV.

194. *See infra*, Part IV.

unrecognizable as such; they do not include any financial statements, are approximately three pages long, and contain only a brief overview of their business during the fiscal year.[195] Although this is limited information, there are still disclosures that arouse suspicion in terms of subsidies. For example, the company states, "We focus on research and application of new technology and new energy, including hybrid, alternative energy and hydrogen in order to reduce the energy consumption and create more environmental emission."[196] Since government grants often fund research and development (especially in the interest of reducing energy consumption), it would be prudent to review these funds for their legality under the SCM Agreement.[197]

Another suspect portion of the Annual Report is the section entitled "International Operation."[198] Here, SAIC boasts that its exports grew 174% from 2005 to 2006, with exports at 6,724 units in 2006.[199] Such a drastic increase in one year, with no accompanying explanation, may have partially been the result of government incentives to increase export production.[200] The Chinese government may have subsidized the country's largest automobile exporters, including SAIC, contingent on their export performance, in an effort to increase national export volume.[201] It may prove beneficial to further investigate this export increase for illegal government assistance.

DFM, the third auto manufacturer of the Chinese "Big Three," does not furnish annual reports on its website.[202] However, evidence of specific subsidies to DFM is available through a recent study submitted to the U.S. International Trade Commission.[203] One area of concern with DFM is its access to preferential loans.[204] "The effective interest rates on [DFM's] current loans are as low as 1.69 percent, while rates on long-term loans are as low as

195. *See* Shanghai Automotive Industry Corporation (Group), 2006 Annual Report, http://www.saicgroup.com/English/sqjt/gsnb/2006njtnb/gzhg/index.shtml (last visited Feb. 23, 2009 [hereinafter, SAIC Annual Report].

196. *Id.*

197. *See generally* E-mail from Andrew Szamosszegi, Economic Analyst, Capital Trade, Inc., to Ann E. Christoff, Indiana International & Comparative Law Review, Ind. Univ. School of Law – Indianapolis (Nov. 14, 2007, 9:16a.m. CST) (on file with author).

198. SAIC Annual Report, *supra* note 195.

199. *Id.*

200. Chinese Vice Minister of Commerce Wei Jianguo announced in 2006 that China's goal was to "lift the value of its vehicle and auto exports to . . . ten percent of the world's total vehicle trading volume in the next 10 years." *China Plans Stricter Auto Export Rules*, CHINADAILY (Beijing), Jan. 2, 2007, *available at* http://www.chinadaily.com.cn/china/2007-01/02/content_773224.htm.

201. *See id. See also*, Aervitz, *supra* note 20.

202. Dongfeng Motor Corporation, Corporate Profile, http://www.dfmc.com.cn/info/introduce_en.aspx (last visited Feb. 23, 2009).

203. ANDREW SZAMOSSZEGI, GOVERNMENT POLICIES AFFECTING U.S. TRADE IN SELECTED SECTORS: CHINA, INV. NO. 332-491: ANDREW SZAMOSSZEGI'S POST-HEARING SUBMISSION – ANSWERS TO COMMISSIONER'S QUESTIONS (2007).

204. *Id.* at 2.

two percent."[205] However, "market-based interest rates in 2005 were approximately 9.4 percent for short-term loans and 10.4 percent for long-term loans."[206] The difference between the interest expense of ¥694 million and ¥485 million actually paid in interest amounts to ¥209 million.[207] A second area of concern is R&D incentives.[208] DFM received government grants of ¥464 million in 2005 for research and development in automotive technology.[209] While this subsidy is not prohibited under the SCM Agreement, it may be actionable depending on whether it has adverse effects on other Member states.[210]

Subsidies in the form of R&D grants and export subsidies are suspected for SAIC,[211] and subsidies have been more affirmatively calculated for DFM in the form of R&D grants and preferential loans.[212] These areas of subsidization vary in terms of legality under the SCM Agreement.[213] For example, if an export subsidy was found to exist for SAIC, fostering SAIC's immense improvement in export volume, this would amount to a prohibited subsidy and would need to be eliminated immediately.[214] As another example, government loans may look like non-actionable subsidies, although when the government lends preferentially by reducing the interest rates, this would amount to an actionable subsidy because it favors a particular industry or enterprise.[215] These subsidies are based only on the companies' annual reports, which are not necessarily accurate in themselves.[216] A strict set of WTO accounting principles and specific transparency requirements, coupled with heightened WTO authority, would theoretically bring about Chinese auto manufacturers' full disclosure of their finances, including government assistance.

C. Subsidy Estimates for the Other World Leaders in the Automobile Industry

We have seen that China likely grants subsidies to its major auto manufacturers – subsidies which remain undisclosed. However, if the largest auto manufacturers in the world engage in the same practices, then the question whether there is really unfair trade in the industry becomes more difficult to

---

205. *Id.*
206. *Id.*
207. *Id.* at 3.
208. *Id.*
209. *Id.*
210. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part III, art. 5.
211. SAIC Annual Report, *supra* note 195. *See also China Plans Stricter Auto Export Rules, supra* note 200.
212. SZAMOSSZEGI, *supra* note 203, at 3-4.
213. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II.
214. *Id.*
215. *Id.* at Part III, art. 6.
216. *See* SZAMOSSZEGI, *supra* note 203, at 2.

answer, and the WTO's ability to control subsidization becomes compromised. In terms of motor vehicle production, the current world leaders in the auto industry include, in descending rank: Japan, the United States, China, Germany, and South Korea.[217] An investigation into the extent of subsidization for the top manufacturer of each of these countries will help determine whether the leading nations in the industry are WTO-compliant and how authoritative the WTO regulations actually are.

Japan's largest auto manufacturer, also the largest in the world, is Toyota Motor Corporation.[218] In its 2007 Annual Report, Toyota disclosed that it saw a reduction in operating expenses of ¥47.2 billion during the fiscal year of 2005.[219] This reduction represents the "difference between the benefit obligations of the substitutional portion and the government-specified portion of plan assets of ¥121.5 billion for fiscal 2005 which was transferred to the government."[220] While this subsidy may be actionable if it has adverse effects on other states, it is likely non-actionable because it does not favor this particular enterprise.[221]

One major U.S. auto manufacturer is Ford.[222] Ford disclosed in its 2006 Annual Report that it received a federal subsidy pursuant to The Medicare Prescription Drug Improvement and Modernization Act of 2003, a subsidy used to fund retiree drug benefits.[223] This subsidy resulted in a reduction in the 2006 retirement benefits expense by $270 million.[224] According to the SCM Agreement, this would likely be categorized as a non-actionable subsidy because it is not specific.[225] Recall that in order to be specific, a subsidy must affect a certain industry or enterprise; whereas the subsidy in this case is mandated by legislation and would affect employees across all U.S. industries.[226] Although this is the only subsidy that it discloses, Ford, like Toyota, publishes comprehensive annual reports with detailed explanations of its financial statements.[227] Thus, even if these companies do not expressly claim all of their subsidies, calculating subsidy amounts is not as difficult for

217. Automotive Industry, *supra* note 92.

218. *Id.*

219. Toyota Motor Corp., Annual Report (Form 10-K) at 82 (Mar. 31, 2007), *available at* http://www.toyota.co.jp/en/ir/library/annual/pdf/2007/ar07_e.pdf [hereinafter Toyota Annual Report]. Also note: these amounts are in Japanese Yen. The symbol "¥" is used to denote both Chinese and Japanese currency. International Currency Symbols, http://www.lingo24.com/currency_symbols.html (last visited Feb. 23, 2009).

220. *Id.*

221. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part IV.

222. Automotive Industry, *supra* note 92.

223. Ford Motor Co., 2006 Annual Report (Form 10-K), at 94 (Mar. 7 2007), *available at* http://www.ford.com/doc/2006_AR.pdf [hereinafter Ford Annual Report].

224. *Id.*

225. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part IV, art. 8.

226. *Id.*

227. Ford Annual Report, *supra* note 223; and Toyota Annual Report, *supra* note 219.

these companies as it is for Chinese manufacturers who publish only limited information and in minimally functional format.

The largest German auto manufacturer is Volkswagen.[228] While this company does not disclose any government subsidies in its Annual Report, there are suspect areas where Volkswagen may be receiving undisclosed government assistance.[229] In its Notes to the Consolidated Financial Statements, under Revenue and Expense Recognition, the report notes that "[g]overnment grants are generally deducted from the cost of the relevant assets."[230] There is no further explanation.[231] If these are grants to cover debt repayment, and they have an adverse effect on other states, they would be deemed actionable subsidies according to the SCM Agreement.[232] Further investigation would be necessary to determine specifically what the subsidy's function is here. It should be noted that, Volkswagen, like Toyota and Ford, also publishes comprehensive annual reports including financial statements and explanatory notes.[233] This practice greatly enhances transparency and should be promoted by the WTO.

Finally, the largest Korean auto manufacturers are Hyundai Motors and Kia Motors.[234] These both trade on the Korean Stock Exchange, and although Kia publishes its consolidated financial reports on its website, Hyundai does not.[235] Hyundai's lack of available information reinforces the conclusion that transparency in accounting is crucial to the WTO ability to determine whether illegal subsidization occurs.

This survey indicates that, like the major Chinese auto manufacturers, other world leaders in the auto industry also receive government subsidies.[236] However, the other world leaders are clearly distinguishable from the Chinese manufacturers: with the exception of Hyundai, the largest manufacturers of the other leading countries all publish very thorough annual reports, which not only include financial statements, but provide accompanying explanatory notes as well.[237] While calculating precise subsidy amounts is beyond the scope of this

228. Automotive Industry, *supra* note 92.

229. Volkswagen Group, Annual Report (Form 10-K) (Mar. 31, 2007), *available at* http://www.volkswagenag.com/vwag/vwcorp/info_center/en/publications/2008/03/Annual_Report_2007.-bin.acq/qual-BinaryStorageItem.Single.File/VW_AG_GB_2007_en.pdf [hereinafter Volkswagen Annual Report].

230. *Id.* at 196.

231. *See id.*

232. *See* Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part III, art. 6.

233. *See* Volkswagen Annual Report, *supra* note 229.

234. Automotive Industry, *supra* note 92.

235. *See* Hyundai, http://www.hyundaiusa.com/abouthyundai/ourcompany/home.aspx (last visited Feb. 23, 2009); Kia Motors, http://www.kmcir.com/eng/kire3000/kire3300.aspx (last visited Feb. 23, 2009).

236. *See supra* Part III.C.

237. Ford Annual Report, *supra* note 223; Toyota Annual Report, *supra* note 219; and Volkswagen Annual Report, *supra* note 229.

Note, exemplifying certain areas of concern characterized by sparse disclosure still invites a reconsideration of the SCM Agreement's authority and the authority of the WTO more broadly.[238]

PART IV: REASSESSMENT OF REMEDIES UNDER THE SCM AGREEMENT AND THE AUTHORITY OF THE WTO

A. *The Effectiveness of Available Remedies in the SCM Agreement*

Very little, if any, concrete evidence actually exists as to illegal Chinese subsidization in its auto industry.[239] This is in large part because there is a general "lack of subsidy statistics and transparency in SOE [state-owned enterprise] operations," and as Chinese auto manufacturers are SOEs which conform to this generalization, it is extremely difficult to determine the extent to which China subsidizes its auto industry.[240] While other WTO Member states may have some evidence against China of unfair trade practices, such as gross price disparity between Chinese prices and competitors' prices, without the availability of accurate financial information, they may find it highly problematic to establish a case of prohibited subsidization.[241] On a larger scale, if compliant Member states do not have the means to hold suspected noncompliant Member states accountable, merely because financial information is distorted or unavailable, then ultimately they have limited or no recourse for economic injury under the WTO. In the event that the world leaders in the auto industry have no recourse against China for illegal subsidization of its auto manufacturers, simply for lack of financial data for the Chinese industry, then China could theoretically begin selling automobiles in the United States and other countries at artificially low prices. Thus, China would be engaging in unfair competition and potentially serving a destructive blow to American and other foreign auto manufacturers. In sum, if the WTO is to truly serve as the facilitator and regulator of free international trade, then it is imperative that its dispute resolution system provide adequate remedies for injury caused by WTO violations.

To revisit dispute resolution as introduced in Part II.C, further analysis of the remedies and countervailing measures provided in the SCM Agreement will shed light on their ambiguities and deficiencies.[242] In a case involving *proven* prohibited subsidies, if the offending state does not follow the DSB panel recommendation to withdraw the subsidy within the allotted time period, "the DSB shall grant authorization to the complaining Member to take appropriate

238. Agreement on Subsidies and Countervailing Measures, *supra* note 12.

239. *See supra* Part III.B.

240. Julia Ya Qin, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol*, 7 J. OF INT'L ECON. L. 863, 882 (2004).

241. *See* Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 2.

242. *See supra* Part II.C.

countermeasures."[243] This provision essentially says that if dispute resolution in the WTO forum fails, then the injured country has discretion to correct the situation itself.[244] To analogize, if an American trial court rendered a judgment against a defendant, and the defendant then refused to pay damages within the specified time period, this would be akin to the court then authorizing the plaintiff to engage in self-help to recover whatever damages he/she could. The more logical approach would be to impose fines on the defendant or sentence the defendant to confinement in order to avoid further injury to either party. Similarly, a more efficient and sensible WTO remedial scheme would involve fines for established cases of prohibited subsidization or, depending on the severity and continuity of the violation, expulsion from the organization. If a Member state must ultimately handle its own economic grievances, then the findings of WTO dispute resolution proceedings are non-binding.[245] They become mere suggestions that the offending state desist its violation, and they fail as actual remedies.

Where injurious subsidization has been found and the offending state has not terminated the subsidy, the complaining state may impose countervailing duties "only as long as and to the extent necessary to counteract subsidization which is causing injury."[246] This removes any incentive the offending state may have had to withdraw the subsidy; if it subsidizes to its benefit against the world, and only certain other states impose countervailing duties, then the offending state still benefits from the subsidy and is not deterred from maintaining it. Two paragraphs later, the SCM Agreement says, "[n]otwithstanding [the above duration provision], any definitive countervailing duty shall be terminated on a date not later than five years from its imposition . . . unless the authorities determine . . . that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury."[247] In other words, the injured state may impose countervailing duties for as long as the subsidizing state wishes to maintain its illegal subsidy. Again, the subsidizing state would have no incentive to cancel the injurious subsidy, and so it could continue violating the SCM Agreement with virtually no consequence while simultaneously reaping the benefits of the illegal subsidy.

The remedies provided in the SCM Agreement for injury by subsidization are inefficient and ineffective. They are inefficient in the sense that the dispute resolution process may take several months and generate substantial administrative costs, only for the problem to be deferred back to the complaining state to counteract appropriately.[248] Further, the subsidizing state

243. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II. art. 4.10.

244. *See id.*

245. *See id.*

246. *Id.* at Part V, art. 21.1.

247. *Id.* at Part V, art. 21.3.

248. *Id.* at Part II.

would likely have little interest in reaching an agreement through dispute resolution when it could simply ignore any recommendation to terminate the subsidy and wait for the complaining state to use countermeasures against it.[249] The SCM Agreement remedies are ineffective in that they do not provide the aggrieved state with any assurance that the illegal subsidy at issue, or others, will not be utilized against the state again, that they do not provide terms of compensation to the injured state, that there is no binding power of the DSB's recommendations, and that they ultimately allow the states to decide on subsidization counteractions themselves.[250]

B. The Weight of Authority of WTO and the Importance of a System of International Trade That Calls for Transparency

The WTO is a unique international organization in that it is operated entirely by its Member states, and there is no concentration of power in any organizational head or board of directors.[251] As such, the Member states ultimately determine the course of action in disputes in areas such as illegal subsidization.[252] This could be considered either a great source of power or a great weakness; however, unless the WTO can require of its Member states accurate accounting and transparency in terms of finances and trading policies, and successfully demand their reform in the face of deficiency, the WTO cannot be understood as a body of any great authority. Furthermore, the power of the WTO is only as great as its members' willingness to abide by the agreements they have adopted. Therefore, if a state can violate its WTO obligations by illegally subsidizing an industry, ignore directions to terminate the subsidy, and wait until the injured country counteracts, when ultimately the dispute is out of the WTO's control and is left to the injured state, the WTO has diminished authority. As the WTO itself states, "the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves."[253] While this Member-run approach evidences strength in democracy, it also functions as a limit to authority: the Member states have final say, as opposed to a governing body within the organization.

The automotive industry is the largest manufacturing industry in the United States,[254] and it will face intense competition in the years ahead as China rises as an automotive superpower.[255] Therefore, it should be a major U.S.

---

249. *See id.*

250. *See id.*

251. Understanding the WTO: The Organization: Whose WTO is it Anyway?, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Feb. 23, 2009).

252. Agreement on Subsidies and Countervailing Measures, *supra* note 12, at Part II, art. 4.

253. Understanding the WTO: Settling Disputes: A Unique Contribution, http://www.wto.org/English/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 23, 2009).

254. ECON & BUS GROUP, CENTER FOR AUTOMOTIVE RESEARCH, THE CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR TO THE U.S. ECONOMY: AN UPDATE 2 (2005).

255. InTech: China Rises as Auto-Parts Power, http://www.isa.org/

priority to ensure that global competitors in this industry and others are engaging in fair trade practices. In order to do this, a system must first be in place for regulating and promoting international trade that requires transparency and accountability. Absent such accountability, states utilizing the system could engage in unfair trade practices while other states are unable to prove it for lack of transparent financial information. While the WTO serves to facilitate free international trade, it does not yet require a uniform degree of accountability of its Member states, and it is unable to sufficiently protect Member states from economic injury. An enhancement of the WTO to require transparency of all of its Member states would increase the authority of the WTO so that it would be better able to guard against unfair trade practices. Specifically in the context of the auto industry, if the WTO would require transparent financial accounting of China's major auto manufacturers, evidence of illegal subsidies may surface, as it has in other industries.[256] In light of such evidence, the United States would be able to guard against Chinese auto imports that would be sold on U.S. soil at extremely low prices to the detriment of the U.S. auto industry. This would allow the United States to protect its economy from injury due to unfair trade in the form of illegal subsidization. Imposing the conditions of transparency and accountability on Member states before they are allowed to gain or maintain membership to the WTO would serve as a filter of unfair trade, and would ultimately protect national economies, especially that of the United States, from economic injury.

PART V: CONCLUSION AND RECOMMENDATIONS

As China continues to penetrate the global automobile market, it is essential to fair trade and to the well-being of domestic industries of the United States and other countries that China honors its WTO commitments. China's unique accounting principles lend themselves to confusion and suspicion, as access to accurate financial information is extremely difficult to obtain.[257] Although China is likely not the only WTO Member state that fails to disclose all of its government subsidies, other states in the auto industry at least make comprehensive accounts of their finances available.[258] These ideas of transparency and clear accounting lead to two major recommendations.

The first recommendation is that the WTO should implement a set of standards which all national accounting systems must meet. One such standard would be periodic publication of financial information by one approved Board per Member state. This would eliminate unnecessary variation in accounting form. Another standard would be one of permanence, requiring that a company's financial information be available for the current year and years

InTechTemplate.cfm?Section=Departments5&template=/ContentManagement/ContentDisplay.cfm&ContentID=55745 (last visited Feb. 23, 2009).

256. Vargo, Testimony Before the Subcommittee on Trade, *supra* note 17, at 2.

257. *See supra* Part III.B.

258. *See supra* Part III.

prior for comparison purposes.[259] Others would include consistency of terms, prudence in reporting, and comprehensiveness in terms of reporting all relevant financial information.[260] While these are general examples, the WTO should implement a detailed set of criteria that requires the same depth of information, regardless of format and publisher, of all Member states. This set of principles should be modeled in consideration of the Generally Accepted Accounting Principles of the largest five Member states and the International Financial Reporting Standards. The adopted set of accounting principles would function as a check against any miscommunication or nondisclosure based on unique domestic accounting principles at odds with those of the WTO.

The second recommendation is that the WTO should make its remedial measures stricter in cases involving prohibited and actionable subsidies. At present, the remedies available to injured countries ultimately are left to the country's own discretion. While this provides a great degree of freedom to handle the dispute as necessary, it also undermines the authority of the WTO if Member states know they will never be held accountable by the WTO. Examples of more stringent remedial measures include a financial penalty for proven use of prohibited subsidies, similar to the contracts concept of liquidated damages: if there is a breach of the SCM Agreement, the breaching state automatically agrees to pay a certain amount to the WTO. Further, the offending state would have to compensate the injured state for all losses resulting from the subsidy within a time period specified by the DSB. The offending state would also be required to terminate the subsidy within a specified time period. Failure to abide by these rules and other enhanced remedies would result in more fines, and ultimately, the threatened expulsion of the offending state from the organization. Stricter remedial measures and heightened consequences would provide a disincentive for Member states to engage in injurious subsidization.

As China prepares to launch its automobiles in the United States, it has become essential to the endurance of the American auto industry and the dynamics of the global auto industry to make certain that China is not illegally subsidizing its manufacturers. In light of China's incomplete compliance with its WTO obligations since its accession to WTO in 2001, and in light of allegations of illegal subsidization, it would be prudent for the U.S. International Trade Commission, the WTO, and other pertinent governing bodies to scrutinize China's subsidization practices in the auto industry before China commences sales in the United States. Demanding Chinese compliance with the WTO would be in the best interest of industry leaders and especially the United States.

259. Generally Accepted Accounting Principles, http://en.wikipedia.org/wiki/GAAP (last visited Feb. 23, 2009).

260. *Id.*

A NEW TRADE POLICY FOR AMERICA: DO LABOR AND ENVIRONMENTAL PROVISIONS IN TRADE AGREEMENTS SERVE SOCIAL INTERESTS OR SPECIAL INTERESTS?

Andrea R. Schmidt*

I. INTRODUCTION

In April of 2007, the Bush Administration signed a free-trade agreement with Peru (U.S.-Peru FTA) that contained environmental and labor provisions unprecedented in previous U.S. trade agreements.[1] The agreement also included a new annex on forest sector governance meant to address illegal logging in Peru.[2] The environmental chapter of the U.S. - Peru FTA requires the parties to fulfill their obligations under Multilateral Environmental Agreements (MEAs) that have been ratified by both parties.[3] Under the labor provisions of the U.S.- Peru FTA, both parties agreed to adopt and maintain certain labor rights as detailed in the 1998 International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work.[4] Notably, the labor and environmental provisions in the U.S. – Peru FTA have been elevated to core obligations that are now subject to the same dispute settlement procedures as other core obligations in the agreement.[5]

Labor and environmental provisions in international trade agreements have long been the subject of disagreement between Democrats and Republicans in the United States.[6] Their inclusion in the U.S.- Peru FTA

---

* J.D. Candidate, 2009 – Indiana University School of Law – Indianapolis; BA Sociology 2003, Portland State University.

1. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS, FREE TRADE WITH PERU: SUMMARY OF THE UNITED STATES - PERU TRADE PROMOTION AGREEMENT 2-3 (2007) [hereinafter PERU TPA SUMMARY], *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file672_13066.pdf.

2. *Id.* at 8; International Centre for Trade and Sustainable Development (ICTSD), *US - Peru Bilateral to Address Illegal Logging, Boost MEA Implementation*, 7 BRIDGES TRADE BIORES, NO. 13, July 6, 2007 [hereinafter *US - Peru Bilateral to Address Illegal Logging*], *available at* http://ictsd.net/downloads/biores/biores7-13.pdf.

3. PERU TPA SUMMARY, *supra* note 1. The MEAs covered include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Convention for the Prevention of Pollution from Ships, the Ramsar Convention on Wetlands, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling and the Convention for the Establishment of an Inter-American Tropical Tuna Commission. *US - Peru Bilateral to Address Illegal Logging*, *supra* note 2.

4. PERU TPA SUMMARY, *supra* note 1, at 8.

5. *US - Peru Bilateral to Address Illegal Logging, supra* note 2; PERU TPA SUMMARY, *supra* note 1, at 9.

6. *See* I. M. DESTLER, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, AMERICAN

reflects a shift in the Bush Administration's trade policy, made in an effort to assuage the Democrats who took control of Congress in January of 2007.[7] Although, at first glance, these provisions might merely seem to reflect an increasing concern for labor and environmental rights, specific protectionist groups also stand to benefit from their inclusion in trade agreements and may advocate their inclusion for reasons completely unrelated to environmental preservation or human rights. First, domestic industries seeking to protect themselves from competition with cheap imports which, they fear, could be "subsidized" by less-restrictive labor and environmental laws, may advocate inclusion of labor and environmental standards to impair the competitiveness of imported goods.[8] Second, international firms or industries hoping to achieve a competitive advantage over more efficient producers from other countries on the international market may advocate labor and environmental standards because they will raise the price of production for their international competitors.[9] Third, proponents of a trade agreement that is unpopular due to its potential to harm to the environment or human rights may actually advocate inclusion of nominal labor and environmental standards in order to pacify the agreement's detractors. Finally, politicians may advocate inclusion of labor and environmental standards as campaigning strategies because of their appeal to the patriotism and sympathies of the American public.[10] At the other end of the spectrum, free-trade proponents fear that stricter labor and environmental provisions are a tool for anti-globalization protectionism that will ultimately hurt the world economy.[11]

This Note will argue that labor and environmental standards in trade agreements are vulnerable to manipulation and exploitation by various protectionist groups that stand to benefit from their inclusion in trade agreements. Relying on economic theory, it will assert that when the primary purpose of these provisions is to benefit specific protectionist special interests, the inclusion of such provisions in trade agreements has a high probability of causing significant harm to overall social welfare in the United States.

This Note will proceed in four parts. Part II outlines historical and current trends in domestic and international trade systems and policy. Part II.A provides an overview of Trade Promotion Authority, the U.S. trade mechanism

---

TRADE POLITICS IN 2007: BUILDING BIPARTISAN COMPROMISE 1 (Policy Brief No. PB07-5, 2007), *available at* http://www.iie.com/publications/pb/pb07-5.pdf; *see also* Robert McMahon, *The 110th Congress: Dems and Trade*, COUNCIL ON FOREIGN RELATIONS, Jan. 4, 2007, *available at* http://www.cfr.org/publication/12339/110th_congress.html.

7. DESTLER, *supra* note 6, at 1.

8. Interview by Lee Hudson Teslik with Jagdish N. Bhagwati, Senior Fellow for International Economics, *Bhagwati: U.S. Must Rethink Doha Demands* (Feb. 9, 2007), *in* COUNCIL ON FOREIGN RELATIONS, *available at* http://www.cfr.org/publication/12592/.

9. *See* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 280 (Oxford University Press 2007) (arguing that intense international trade competition provides an incentive for domestic industries to seek out protectionist measures in order to increase the costs of production for competitors).

10. *See infra* Part IV.B and accompanying notes.

11. *See* DESTLER, *supra* note 6, at 1.

through which Congress delegates trade negotiating authority to the Executive Branch. Part II.B describes the formulation of the "New Trade Policy for America," the bipartisan trade policy compromise adopted in May 2007 - the first trade policy to formally include labor and environmental standards. Part II.C examines the relatively recent shift from multilateralism to bilateralism and regionalism as dominant international trade models, and points out the potential loss of efficiency and the inevitable loss of transparency in bilateral and regional trading systems. Part III then considers changing attitudes about globalization and trade liberalization, noting that U.S. public opinion and U.S. politicians increasingly appear to be adopting protectionist views, but that prominent economists continue to advocate trade liberalization accompanied by institutional adjustments to compensate the "losers" in trade liberalization. Part IV highlights the problem of "capture," in which legislative measures can be manipulated and exploited by special interests at the expense of the rest of society. Part IV concludes by arguing that labor and environmental provisions are particularly vulnerable to capture because they represent politically and socially desirable goals. Part V argues that three conditions - the rise of bilateralism, the trend towards protectionism in U.S. public and political opinion, and the status of labor and environmental protection as desirable social goals - converge to create an environment that is ripe for exploitation and manipulation by protectionist special interests, at a high cost to U.S. society overall. As a result, Part V concludes that labor and environmental provisions are not an appropriate component of U.S. trade policy at this time and that labor and environmental issues should be addressed in alternative forums.

II. BACKGROUND: TRENDS IN DOMESTIC AND INTERNATIONAL TRADE

A. An Overview of Trade Promotion Authority

The Constitution dictates that "Congress shall have Power . . . to regulate Commerce with foreign Nations . . . ."[12] In contrast, the President, although having exclusive authority to negotiate treaties and international agreements and broad power over the nation's foreign affairs under Article II, is assigned no specific responsibility for trade by the Constitution.[13] Congress authorizes the President to enter into agreements that regulate international commerce through a legislative grant of Congressional authority called Trade Promotion Authority (TPA). Congress does not completely surrender its power over international trade, but instead maintains a check on the executive power

12. U.S. CONST. art. I, § 8, cl. 3.

13. U.S. CONST. art. 2, § 2, cl. 2; J.F. HORNBECK & WILLIAM H. COOPER, TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL 2 (updated Jan. 7, 2008) (2006).

through a variety of mechanisms,[14] including, for example, providing for TPA expiration after a specified period.[15] As a result, once the President acquires TPA from Congress, he or she has significant authority over trade. The initial obstacle of procuring TPA, however, must first be overcome.

TPA is an important trade tool for several reasons. First, as a practical matter, it is not feasible for Congress, whose members are motivated by the diverse interests of their constituents, to negotiate complex trade agreements.[16] TPA streamlines the process by transferring most of the trade-negotiating initiative to the President, giving him the authority to conclude trade agreements that will then be presented to Congress for a vote without the possibility of amendment.[17] Second, TPA gives U.S. trade partners assurance that final agreements negotiated by the President will not be bogged down by unlimited congressional debates and amendments.[18] TPA also performs a third, less apparent function: it lessens protectionist pressures on Congress.[19]

Congress first expressly delegated trade-negotiating authority to the President in the Reciprocal Trade Agreements Act of 1934 (RTAA).[20] For the first 150 years of the United States' history, Congress exercised its power to regulate foreign trade by setting tariffs on all imported goods.[21] During the 1930's, producers seeking protection from the effects of the Great Depression motivated Congress to pass the "Smoot-Hawley" Tariff Act of 1930, which set prohibitively high tariffs on imports.[22] The Act was passed in spite of a petition signed by 1,028 noted economists warning that its implementation would result in a world-wide depression.[23] As predicted, major U.S. trading partners imposed retaliatory tariffs. The tariffs resulted in severely restricted trade and ultimately deepened and prolonged the effects of the Depression.[24] In an effort

---

14. *Id.* at 15. Congress maintains some authority over trade by requiring that certain trade objectives be included in trade agreements, by requiring periodic TPA reauthorization, and by utilizing various procedural rules and mechanisms. *Id.*

15. *Id.* at 14-15.

16. Clete D. Johnson, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 GA. J. INT'L & COMP. L. 437, 446-47 (2004).

17. *Id.* at 446.

18. HORNBECK & COOPER, *supra* note 13, at 5.

19. *Id* at 3. The initial delegation of authority in RTAA to reduce tariffs and implement the tariffs by proclamation without additional legislation was motivated in part by Congress' desire to lessen protectionist pressure on itself. *Id.*

20. *Id.*

21. *Id.* at 2.

22. *Id.* at 3.

23. *1,028 Economists Ask Hoover to Veto Pending Tariff Bill*, N.Y. TIMES, May 5, 1930, at 1, *available at* http://www.clubforgrowth.org/media/uploads/smooth%20hawley%20ny%20times%2005%2005%2030.pdf; *see also* Audio Interview by Lee Hudson Teslik with Amity Shlaes, Council on Foreign Relations Senior Fellow for Economic History, *Shlaes: Putting Protectionism in Historical Context*, Nov. 14, 2007, *available at* http://www.cfr.org/publication/14803/shlaes.html [hereinafter Interview with Amity Shlaes].

24. HORNBECK & COOPER, *supra* note 13, at 3.

to ameliorate the damaging effects of the tariffs, Congress enacted the RTAA, which allowed the President to negotiate tariff-reducing agreements with foreign nations and "implement the new tariffs by proclamation without additional legislation."[25] Congress renewed presidential reciprocal trade authority under the RTAA model eleven times.[26]

The establishment of the General Agreement on Tariffs and Trade (GATT) in 1947 shifted the major forum for trade negotiations from bilateral to multilateral negotiations and expanded international trade liberalization measures beyond the reduction of tariffs.[27] To accommodate this shift and allow the President to advance trade liberalization, the Trade Act of 1974 gave the President authority to reduce non-tariff barriers (NTBs) but stipulated that agreements involving NTBs could only enter force if Congress passed the implementing legislation.[28] In order to preserve the original goals of efficiency and the diversion of protectionist pressure, however, Congress agreed that if the President met certain procedural criteria, it would suspend its ordinary legislative procedures and give trade agreements expedited treatment.[29] This incarnation of presidential trade authority, which became known as "fast track," required that congressional approval of a trade agreement be subject to time-limited debate without the possibility for amendment.[30] Thus, fast track gave the President additional trade negotiating authority provided that certain requirements of the authorizing statute were satisfied. Fast track was renewed in 1979 and 1988.[31] After its expiration in 1994, the Clinton Administration was unable to achieve renewal authority from Congress.[32] The hiatus has been attributed in part to disagreement between the Clinton Administration and the Republican congressional leadership "on how labor and environmental issues should be addressed in trade agreements."[33]

The core provisions of TPA have remained virtually unchanged since their inception. Each renewal of TPA defines Congress' trade policy priorities and mandates that those priorities be reflected in trade agreements negotiated

---

25. *Id.* Prior to the RTAA, the President's primary role in setting trade policy was exercised under Article II of the Constitution, which states that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2, cl. 2. The President entered into treaties requiring the lowering of domestic tariffs, but only with the support of two-thirds of the Senate. HORNBECK & COOPER, *supra*, note 13, at 3.

26. HORNBECK & COOPER, *supra*, note 13, at 4. Congress later expanded its role in the process in the Trade Expansion Act of 1962, by requiring the President to submit a copy of each concluded agreement for congressional review and a presidential statement explaining why the agreement was concluded. *Id.*

27. *Id.*

28. *Id.* at 5 (citing Trade Act of 1974, 19 U.S.C. §§ 2101-2497 (1975)).

29. *Id.*

30. *Id.*

31. *Id.* at 6.

32. *Id.* at 7.

33. *Id.*

by the President.[34] TPA also contains important limiting procedural mechanisms,[35] but congressionally mandated TPA objectives are the primary way that Congress influences the substance of trade agreements. In fact, history suggests that the single most important predictor of whether a trade agreement will survive is the extent to which it mirrors Congress' TPA objectives.[36] Because of their demonstrated significance, the debate as to what should be included in TPA objectives is of vital importance.

B. The Formulation of "A New Trade Policy for America"

When Democrats took over Congress in January of 2007, the outlook for continued trade expansion appeared grim.[37] President Bush's TPA was set to expire in July of 2007, and it appeared unlikely that he would be able to acquire a renewal from Congress due to the unpopularity of the Bush Administration's trade policy.[38] Trade had become an increasingly partisan issue in the previous decades, with major trade votes coming down almost entirely along party lines.[39] In 2001, President Bush secured TPA authorization by a single vote in the House, with only 21 of 210 Democrats voting in favor of the grant.[40] One estimate suggested that sixteen "trade-friendly" House Republicans were replaced with sixteen "trade-skeptical" Democrats in 2007,[41] easily undermining the slim pro-trade majority. No pro-trade seats were added in either house.[42] Trade agenda was touted as one of the central issues motivating the Democratic shift in Congress.[43]

---

34. *Id.* at 8.

35. All trade agreement authorizations have historically contained "sunset provisions" providing for the expiration of the availability of expedited procedures after a specified time period. *Id.* at 15. TPA legislation also requires the President to request an extension of TPA authority after a certain period of time. *Id.* Either House of Congress can adopt a "disapproval resolution" to deny extension. *Id.* Further, if the President fails to follow the consultation and reporting obligations included in the TPA authorization, Congress can find that the agreement is not eligible for expedited consideration by adopting a joint "procedural disapproval" resolution. *Id.* Finally, either House can withdraw or change its own procedural rules for expedited legislation by a vote. *Id.*

36. *Id.* at 10. "Because the structure of trade agreements mirrors TPA objectives, and highly disputed agreements based on those objectives brought before Congress under TPA have so far survived, often narrowly, all challenges from opponents, the vote on TPA/fast track renewal is among the most critical trade votes Congress takes." *Id.*

37. *See* DESTLER, *supra* note 6, at 1.

38. *Id.*

39. *Id.*

40. *Id.* The Central American Free Trade Agreement - Dominican Republic (CAFTA-DR), was approved by a scant two votes in July 2006, with only fifteen of 202 Democrats voting in favor. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* House Democrat Betty Sutton, writing to the House Committee on Ways and Means Chairman Charles Rangel on behalf of thirty nine new House Democrats, noted that, "[v]ital to our electoral successes was our ability to take a vocal stand against the

With TPA expiration looming, the Bush Administration prepared to face the daunting task of achieving TPA renewal without the advantage of a Republican Congress, and also faced the challenge of obtaining congressional approval of trade agreements negotiated under existing 2002 TPA authorization.[44] In pursuit of a sufficiently timely compromise, House Ways and Means Committee ranking member Jim McCrery and United States Trade Representative (USTR) Susan Schwab plunged into intensive negotiations meant to resolve, in a matter of months, disagreements over labor and environmental standards that had proved divisive for Republicans and Democrats since the Clinton Administration.[45]

The product of those negotiations, labeled "A New Trade Policy for America," announced the amendment of pending U.S. Free Trade Agreements (FTAs) to incorporate key Democratic priorities.[46] The Trade Policy contained minimum core labor standards and environmental provisions that would be subject to the same dispute settlement procedures as trade commitments, in addition to several other provisions.[47] Although the Trade Policy technically altered only pending FTAs, the bipartisan compromise on divisive labor and environmental issues cleared a major obstacle from the Bush Administration's path to TPA renewal.[48] The compromise also suggests that Democrats will likely insist on inclusion of similar labor and environmental provisions among Congress' negotiating objectives in future TPA renewal legislation.[49] In addition, members of Congress have denounced the consultation process as superficial and unresponsive to congressional input and complained that the procedures for deterring the use of TPA, once granted, are ineffective.[50] Thus, proposals for tightening procedural controls on TPA are also anticipated.[51]

The probable inclusion of labor and environmental provisions among

---

Administration's misguided trade agenda, and offer our voters real, meaningful alternatives to the job-killing agreements, such as CAFTA, that the majority of our opponents supported." *Id.*

44. Even with TPA authority, the narrow passage of CAFTA-DR *before* the democratic shift in Congress strongly suggested that trade agreements would not survive congressional approval without significant alterations. *See id.* (CAFTA-DR passes by only two votes).

45. *Id*; HORNBECK & COOPER, *supra* note 13, at 6.

46. HOUSE WAYS AND MEANS COMMITTEE STAFF, NEW TRADE POLICY FOR AMERICA http://waysandmeans.house.gov/media/pdf/NewTradePolicy.pdf [hereinafter TRADE POLICY] (last visited Dec. 1 , 2008).

47. DESTLER, *supra* note 6, at 10. The Policy also contains provisions addressing intellectual property rights in relation to trading partners' health needs, a "port security" exception to U.S. obligations under the services chapter, a provision stating that foreign investors would not be granted greater rights within the United States than U.S. investors, and presented a "strategic worker assistance and training initiative." *Id.*

48. *Id.* at 11.

49. *Id.* at 12. However, there are indications that Democrats may not require inclusion of labor and environmental negotiating objectives for the conclusion of the current WTO Doha Round. *Id.*

50. *Id.*

51. *Id.* (stating: "Ways and Means Democrats are also likely to press for new mechanisms for consultation with Congress during negotiations, new procedures enhancing legislators' leverage in these negotiations, and perhaps involvement of members of Congress in the original choice of FTA negotiation partners").

congressionally required negotiating objectives, in conjunction with enhanced procedural mechanisms for congressional control over trade negotiations, reveal an overall trend towards Congress tightening its grip on trade policy. Because of the potential ramifications of proposed changes to TPA renewal legislation, the likelihood that the changes will achieve their proposed goals should be carefully considered and weighed against the costs of decreased trade.

C. *Bilateral Trade Agreements*

1. The Rise of Regional and Bilateral Free Trade Agreements

The thirteen years since the creation of the World Trade Organization (WTO) in 1995 have been characterized by a shift away from the multilateral trading system that was implemented with the signing of the GATT in 1947[52] towards trade expansion through bilateral and regional trade agreements.[53] This shift from multilateral to bilateral and regional trade agreements is important for several reasons. First, it represents a significant change in dominant trade policies that may be representative of changing attitudes about globalization and should be examined closely to ensure that overall and long term welfare can be achieved. Second, TPA was formulated primarily during a time period characterized by multilateral trade agreements, and will likely function differently in a trade environment dominated by bilateral and regional FTAs. Third, the proliferation of regional and bilateral FTAs may unintentionally allow the undetected advancement of protectionist interests simply due to the number of agreements reached and the complexity of their administration. Finally, the specific provisions of the Trade Policy are likely more readily manipulated by special interest groups for protectionist and other purposes in the context of multiple FTAs. This may exacerbate already unequal distribution of trade benefits for less powerful groups.

Although the Trade Policy may be incorporated into TPA objectives at some point, it was originally drafted to apply specifically to pending bilateral and regional FTAs.[54] FTAs are created when two or more countries grant preferential treatment in trade[55] to other member countries by eliminating tariffs

---

52. HORNBECK & COOPER, *supra* note 13, at 4.

53. Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?* 10 J. INT'L ECON. L. 571, 571 (2007).

54. *See* TRADE POLICY, *supra* note 47.

55. Preferential trade arrangements (PTAs) encompass other arrangements in addition to FTAs, including customs unions, common markets, and economic unions. WILLIAM H. COOPER, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 2 (Congressional Research Service 2006). FTAs require the least economic integration between member countries. *Id.* Customs unions, in addition to conducting free trade among member countries, maintain common trade policies outside the region. *Id.* In common markets, member countries also eliminate barriers to labor and capital flows within the market. *Id.* Economic unions integrate even further by establishing a common currency. *Id.*

and other non-tariff barriers to trade on goods within the FTA but maintain their respective trade policies outside the FTA region.[56] Although bilateral FTAs are a longstanding part of international trade history,[57] they have only recently emerged as a dominant vehicle for trade.[58] Before World War II, bilateral trading arrangements were common throughout the world, especially in the context of imperial trading systems.[59] In the aftermath of World War II, however, the West adopted multilateralism as the preferred post-war institutional model for international trade.[60] This policy preference for multilateralism was officially established by the signing of the GATT in 1947, and it continues under the governance of the WTO.[61] The growth in WTO membership, which today boasts a membership of 150 countries, attests to the historic prevalence of multilateralism, especially when considered in contrast to the original GATT signatories, which numbered only twenty-three states.[62]

In recent years, however, the proliferation of bilateral and regional FTAs has threatened to displace, or at least impede, the multilateral trading system.[63] For example, in 2001, the United States was a member of only two bilateral/regional FTAs,[64] but by the end of 2007, the United States had concluded a total of eleven such FTAs involving sixteen countries.[65] Further bilateral and regional negotiations are pending or anticipated.[66] The explosion of interest in bilateral/regional FTAs is not confined to the United States. The WTO reports that, as of 2004, more than 300 bilateral/regional FTAs had been notified to the WTO, out of which 176 were notified after January of 1995.[67]

---

56. *Id.*

57. *Id.* at 1; Abbott, *supra* note 54, at 572.

58. COOPER, *supra* note 56 at 5.

59. Abbott, *supra* note 54, at 572.

60. *Id.*

61. WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 10-11 (2007), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited Dec. 1, 2008) [hereinafter UNDERSTANDING THE WTO]. The WTO was created during the Uruguay Round of GATT negotiations that lasted from 1986 until 1994. *Id.* at 10.

62. *Id.* at title page. This number is current as of January 2007. *Id.*

63. Sungjoon Cho, *Doha's Development,* 25 BERKELEY J. INT'L L. 165, 193 (2007).

64. The United States created its first FTA with Israel in 1985 and concluded its second with Canada in 1989, which was expanded to encompass Mexico under the North American Free Trade Agreement (NAFTA) in 1993. COOPER, *supra* note 56, at 4.

65. At the time of this writing, the United States had completed and implemented bilateral FTAs with Israel, Jordan, Chile, Singapore, Australia, Morocco, and Bahrain. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, BILATERAL TRADE AGREEMENTS, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Dec. 1, 2008). FTAs with Oman and Peru have been approved but await implementation, while FTAs with Colombia, Panama, and the Republic of Korea await Congressional Approval. *Id.* Regional FTAs in force include the NAFTA (with Canada and Mexico) and the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR) (with El Salvador, Nicaragua, Honduras, Guatemala, and the Dominican Republic). *Id.*

66. *Id.*

67. REPORT BY THE CONSULTATIVE BOARD, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 21 (2004), *available at*

2. *Explaining the Shift From Multilateralism to Bilateralism*

The shift away from multilateralism in favor of bilateral and regional FTAs can be explained by a mix of political and economic factors.[68] Fredrick Abbott, a professor of international law at Florida State University College of Law, suggests that less support for multilateralism now exists among original GATT signatories[69] because their geopolitical interests are no longer most effectively advanced by multilateral trade.[70] After World War II, the GATT nations were united by the common goal of guarding against perceived threats from the ideological and economic enemies of communism and socialism.[71] This created a powerful incentive for cooperation among signatory nations to form a Western bloc that could use its consolidated power to prevail both economically and politically over communist and socialist regimes.[72] The "most-favored-nation" (MFN) principle of multilateral trade was key to achieving cooperation because it eliminated contentions among signatory nations over differential trade preferences between them.[73]

In addition to the benefits of creating a united political and economic bloc to counter the communist threat, the most influential GATT signatories likely stood to make significant economic gains from the original multilateral trade structure and the MFN principle. The majority of original signatories were developed countries whose trade agendas were likely to be similar, meaning that signatory nations were unlikely to face highly objectionable demands from other signatories. Further, because the negotiations depended on economic negotiating leverage, those signatories whose trade agendas did not coincide with the agendas of the economic superpowers generally lacked the necessary leverage to prevail. For example, agricultural products were not included in multilateral trade agreements until 1994, largely because the United States and other developed nations, including those that now comprise the European Union (EU), were unwilling to give up substantial protections for their

---

http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf [hereinafter THE FUTURE OF THE WTO]. Of the 300 FTAs notified to the WTO, 150 were operational in 2004. *Id.*

68. Abbott, *supra* note 54 at 573.

69. The original GATT signatories included Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States.

70. Abbott, *supra* note 54, at 573-74.

71. *Id.* at 573.

72. *Id.*

73. *Id.* at 572. Note that most of the original GATT signatories were either first world countries, colonizers, former colonizers, or recently decolonized countries with large economies which might have been likely to wield considerable power on the economic/political front. Most of these signatories may have seen particular economic gains to be made from this union, in addition to a united political front for defeating communism. Even those member countries whose interests may not have been consistent with the desires of the superpowers were not likely a threat here because they did not have the negotiating leverage to ensure that their demands were met.

agricultural sectors.[74] This omission was perpetuated despite the fact that many developing-country-signatories' economies were heavily dependent on agriculture and would have benefited considerably from liberalization in that sector.[75] Economic superpowers like the United States and present day EU countries had so much leverage in multilateral trade negotiations[76] that they were able to maintain significant agricultural trade barriers throughout the GATT rounds and even avoided making significant concessions in Uruguay Round's Agreement on Agriculture (URAA) in 1994.[77]

The ability of the economic superpowers to dictate terms in multilateral trade negotiations that overwhelmingly favor developed countries, however, has steadily eroded since the signing of the GATT in 1948 as developing countries have continued to join as member countries.[78] Nearly two-thirds of the WTO's current membership – approximately 100 out of 151 total member countries – are developing nations.[79] Of those, thirty-two are defined as "least-developed countries."[80] The priorities of the WTO reflect the shifts in its membership. At the November 2001 commencement of the most recent round of WTO talks in Doha, Qatar (the Doha Round), representatives from 142 WTO member nations proclaimed their commitment to serving the interests of developing countries:

> We seek to place their needs and interests at the heart of the

---

74. *See* Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing countries*, 27 COLUM. J. ENVTL. L. 433, 439-40 (2002).

75. Agriculture accounts for 26% of GDP in developing countries and for more than 50% of GDP in the least-developed countries but for only 3% of GDP among developed countries. THOMAS C. BEIERLE, RESOURCES FOR THE FUTURE, FROM URUGUAY TO DOHA: AGRICULTURAL TRADE NEGOTIATIONS AT THE WORLD TRADE ORGANIZATION 4 (2002), *available at* http://www.rff.org/rff/Documents/RFF-DP-02-13.pdf. In 2007, less than 1% of the U.S. population claimed farming as an occupation. ENVIRONMENTAL PROTECTION AGENCY, DEMOGRAPHICS, http://www.epa.gov.oecaagct/ag101/demographics.html (last visited Dec. 20, 2007). Many developing countries also stood to benefit significantly from agricultural liberalization because they were required to reduce trade barriers as conditions on loans obtained from international institutions during the Third World Debt Crisis of the 1980's. BEIERLE, *supra* note 76, at 4. This state of market openness meant that developing countries' domestic markets were flooded with cheap imported food from subsidized agriculture markets but enjoyed little increased market access for their agricultural products in the developed world. *See* Gonzalez, *supra* note 75, at 447-49.

76. *See* Gonzalez, *supra* note 75, at 449.

77. *See generally* Gonzalez, *supra* note 75 (arguing that Uruguay Round rules governing agricultural trade allow the United States and the European Union to continue subsidizing their agricultural sectors while requiring developing countries to open their markets to subsidized products from developed countries).

78. Karen Halverson-Cross, *King Cotton, Developing Countries and the "Peace Clause": The WTO's US Cotton Subsidies Decision*, 9 J. INT'L ECON. L. 149, 190 (2006).

79. WTO.org, Understanding the WTO: Developing Countries, Overview, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Dec. 1, 2008).

80. WTO.org, Understanding the WTO: The Organization, Least-Developed Countries, http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org7_e.htm (last visited Dec. 1, 2008).

> Work Programme adopted in this Declaration. . . . [W]e shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.[81]

Developing countries' leverage has not increased solely because of their increase in numbers, however. They have also achieved unprecedented solidarity throughout the course of the Doha Round, indicating their willingness to compromise amongst themselves in order to pursue common goals that would be unattainable for individual developing nations.[82] Indeed, in September 2003, the Doha Round was brought to a grinding halt when a coalition of over twenty developing nations walked out of the September 2003 Ministerial Meeting in Cancun, Mexico because they were unsatisfied with a compromise reached between the United States and the European Union on agriculture.[83] The strong showing made by developing countries during the Doha Round demonstrates the potential for changes in the balance of power in the multilateral trade arena. Faced with the potential inability to dictate the terms of multilateral trade agreements, and in the absence of a threat to democracy and capitalism that calls for a unified front, economic superpowers like the United States have little motivation to pursue multilateralism on a large scale.[84]

Another factor in the shift away from multilateralism may be a decline in the multinational business community's faith in the multilateral system's ability to promote its preferred economic agenda.[85] On one hand, businesses may be skeptical about the likelihood that complex negotiations among 151 member countries can reach satisfactory and timely conclusions on tough and vigorously contested issues.[86] On the other hand, businesses may prefer regional or

---

81. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), *available at* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter Doha Declaration].

82. Cho, *supra* note 64, at 180 ("In terms of negotiation dynamics, the developing countries' position was surprisingly united and solidified. The G-20 and the G-90 formed the 'G-110' and issued a joint statement identifying their common objectives. . . . ").

83. Johnson, *supra* note 17, at 444-45.

84. Abbott, *supra* note 54, at 573-74.

85. *Id.* at 574.

86. *See, e.g.* Warren H. Maruyama & Timothy M. Reif, Symposium, Introductory Remarks, *The WTO at 10 and the Road to Honk Kong*, 24 ARIZ. J. INT'L & COMP. L. 1, 2 (2007) (asserting that the U.S. business community has not mobilized fully in support of the Doha Round because of uncertainty about whether an ambitious outcome to the negotiations can be realized). For example, the Multilateral Agreement on Investment (MAI), an important issue for the multinational business community, remains unresolved on the multilateral level, but the United States and the European Union have succeeded to securing higher levels of intellectual property protection in bilateral and regional FTAs. *See* Abbott, *supra* note 54, at 574-75.

bilateral agreements because they are better able to advance their specific interests in the context of more narrow treaties.

Finally, in the absence of multilateral agreements, countries seek out bilateral/regional FTAs as an alternative for achieving higher growth.[87]

3. The Economic Merits of Bilateral and Regional FTAs as Trade Creating Mechanisms

(a) The Most Favored Nation Principle

The increasingly likely prospect that FTAs will become a prominent international trade mechanism has stirred considerable debate over the merits of bilateralism and regionalism as opposed to multilateralism in the international trade arena.[88] One source of contention revolves around the MFN principle that serves as the cornerstone of the multilateral trading system.[89] The MFN principle requires WTO member countries to adhere to a policy of non-discrimination towards all other WTO member countries by awarding the same preferential trade terms to all WTO members as those awarded to the nation receiving the most advantageous terms.[90] According to economic theory, the uniform application of trade preferences among member nations improves the economic welfare of all members by ensuring that a given product is produced by the most efficient producer among member nations. The allocation of resources to their most efficient use allows each member country to maximize production, thereby producing more goods for sale and increasing its overall economic welfare. The MFN principle also allows smaller countries to benefit from advantages enjoyed among larger countries that they typically would not be powerful enough to negotiate. The MFN principle has the further advantage of administrative simplicity and transparency, because member countries have only one set of tariffs for all other countries. Finally, the MFN principle restrains protectionist interests because attempts to implement protectionist measures – raising tariffs, for example – would affect all of a given country's trading partners, including powerful allies, and would result in increased political pressure not to implement them.[91]

---

87. COOPER, *supra* note 56, at 3; Abbott, *supra* note 54, at 575.

88. *See* COOPER, *supra* note 56, at 12-15.

89. Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 134 (2007).

90. COOPER, *supra* note 56, at 11. The MFN provisions of the GATT and the WTO specify that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.* (quoting General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. I [hereinafter GATT]).

91. W. J. Davey & J. Pauwelyn, *MFN-Unconditionality: A Legal Analysis of the Concept*

Regional and bilateral FTAs among WTO member countries violate the MFN principle by definition because they extend preferential trade treatment to products originating with certain members.[92] The original GATT signatories recognized, however, that bilateral FTAs can still be economically beneficial for all members if implemented according to certain conditions that promote overall gains from trade.[93] As a result, bilateral FTAs are generally exempted from the WTO's MFN requirements.[94] Nevertheless, the proliferation of bilateral FTAs has prompted a call from some WTO member countries for clearer rules regarding regional and bilateral FTAs. The failure to reach a conclusion in the Doha Round of WTO negotiations, however, leaves these rules ambiguous.[95]

(b) Trade Creation and Trade Diversion

Although the WTO rules do not prohibit or seriously constrain the formation of FTAs, important questions as to their economic and social desirability as a model for international trade remain. Most FTAs involve reciprocal preferential treatment that, at a minimum, eliminates tariff and some non-tariff barriers over a specified period of time.[96] FTAs typically also contain rules of origin that define what constitutes a product manufactured within the FTA - no small challenge given that most products are constructed of components from many different countries – and procedures for dispute resolution and implementation of border controls.[97] Recent FTAs also often contain rules pertaining to economic activities beyond strict trade in goods, including foreign investment, intellectual property rights protection, trade in services, and the labor and environmental provisions at issue in this Note.[98]

The debate about the economic viability of FTAs is based on the economic concepts of "trade creation" and "trade diversion."[99] Trade creation occurs when a domestically produced good is replaced by a more efficiently created imported good.[100] The replacement should improve economic welfare within the importing country because it can shift its resources to more efficient uses, which ultimately allows more productivity for the same amount of effort expended.[101] In contrast, trade diversion occurs when a product that was

---

in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product", in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW: PAST, PRESENT, AND FUTURE (Petros Mavroidis & Thomas Cottier eds.,2000).

92. COOPER, *supra* note 56, at 11.
93. *Id.*
94. *See* UNDERSTANDING THE WTO, *supra* note 61, at 11.
95. COOPER, *supra* note 56, at 12.
96. *Id.* at 2-3.
97. *Id.* at 3.
98. *Id.*
99. *Id.* at 8.
100. *Id.*
101. *Id.*

previously imported from an efficient non-FTA member country is replaced by a less-efficiently-produced good from an FTA member country.[102] Here, the replacement is said to reduce economic welfare because resources are being diverted from an efficient producer to a less-efficient producer.[103] Thus, even if two countries enter into an agreement under which they achieve freer trade amongst themselves, the FTA could make member countries and the rest of the world worse off if the FTA diverts more trade than it creates.[104]

Whether an FTA results in net trade creation or net trade diversion is typically determined by the structure of the FTA.[105] Economists estimate that trade creation is relatively more likely to exceed trade diversion in the FTA context under the following conditions:

> 1) where large tariffs or other trade barriers existed among FTA members prior to entering the FTA;
>
> 2) where low tariffs and trade barriers exist between members and nonmembers;
>
> 3) where a greater number of countries participate in the FTA;
>
> 4) where FTA member economies are more competitive or less complementary; and
>
> 5) where FTA member countries had a close economic relationship prior to FTA formation.[106]

Not surprisingly, these conditions indicate that FTAs can create trade which will increase member and global welfare most effectively when they are structured to facilitate freer trade rather than protectionism goals. In contrast, an FTA that purports to create freer trade, but, for example, actually reduces barriers only nominally or maintains prohibitively high tariffs against nonmember countries, is considerably less likely to create benefits for member or nonmember countries.

The foregoing discussion is particularly relevant to the Trade Policy labor and environmental provisions because the sensitive trade creation/trade diversion balance could be altered by their inclusion in FTAs. This danger is further exacerbated by the potential for FTAs which create freer trade among member countries but, because of their trade diverting effects, have an overall detrimental impact on global trade, global welfare, and even the welfare of one or more FTA members.

---

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 10.

(c) Dominant Economic Perspectives on the Value of Regional and Bilateral FTAs

Economists and trade experts generally follow one of three dominant perspectives on the economic merits of FTAs. The first perspective asserts that FTAs undermine the multilateral trading system and act as a "stumbling block" to trade liberalization.[107] One proponent of this view, Columbia economist Jagdish Bhagwati, argues that FTAs are trade diverting because they are discriminatory by definition.[108] In addition, high tariffs that currently exist on goods imported into many developing countries increase the likelihood of trade diversion.[109] Bhagwati further points out that companies are more likely to prefer bilateral or regional FTAs over multilateral liberalization because they can achieve preferential treatment over non-member country competitors for their products.[110] This point is particularly important because companies may create political pressure in favor of bilateral rather than multilateral agreements even if the overall welfare of the nation will not be enhanced by the agreement. Economist Anne Krueger argues that FTA rules of origin impair efficiency because they encourage member countries to purchase as many inputs as possible from member countries, resulting in detrimental trade diversion from many efficient producers.[111] According to Krueger, stricter rules of origin in a given FTA make trade diversion more likely.[112]

The second prevalent economic perspective asserts that FTAs can act as a "building block" toward multilateral trade liberalization.[113] Proponents of this view often argue that, although multilateral agreements may be more beneficial for trade liberalization, some free trade is better than none.[114] Proponents also point out that FTAs often facilitate more economic integration in areas not covered by the GATT/WTO, including reductions on barriers in services trade, foreign investment, and other economic activities.[115] Further, FTAs may more effectively address difficult trade barriers on which member countries have failed to reach consensus in the WTO.[116] Economist Fred Bergsten argues that the United States must enter FTAs in order to remain competitive as other countries form their own FTAs.[117] Bergsten advocates the creation of FTAs based on models that would eventually engage most WTO members, thus

107. *Id.* at 12.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 13.
112. *Id.*
113. *Id.* at 12.
114. *Id.* at 13.
115. *Id.*
116. *Id.* at 13-14.
117. *Id.* at 14.

creating a stepping stone towards multilateral liberalization.[118]

A third perspective on the desirability of FTAs opposes trade liberalization in general because of perceptions about the impact on workers in import-sensitive sectors, the environment, or because trade liberalization is thought to undermine U.S. sovereignty.[119] Proponents of this view often include representatives of import-sensitive industries, such as labor unions and representatives of environmental or other social action groups.[120]

III. SHIFTING OPINIONS ON TRADE LIBERALIZATION: THE AMERICAN PUBLIC, POLITICIANS AND ECONOMISTS

In January of 2008, a Business Week Magazine headline proclaimed "Economists Rethink Free Trade."[121] The article begins by asserting that "ordinary Americans have long been suspicious of free trade, seeing it as a destroyer of good-paying jobs."[122] However, the article asserts, U.S. Presidents have long pursued a free-trade agenda because the "academic Establishment . . . [has] always told them that free trade was the best route to ever higher living standards."[123] As the first few lines suggest, the article asserts that economists have traditionally formed the backbone of support for free trade, even when ordinary Americans and politicians have been skeptical of its merits.[124] The article then points out that prominent economists are now "noting that their ideas can't explain the disturbing stagnation in income that much of the middle class is experiencing" and that "there are broader questions [about free trade] being raised that would not have been asked 10 or 15 years ago."[125] Although the article does not explicitly state that economists have renounced continued trade liberalization, it not-so-subtly suggests that even economists, the strongest bastion of support for free trade, have finally conceded to what ordinary Americans have known all along: free trade hurts average Americans. The article neatly encapsulates the shifts, whether real or perceived, in opinions about free trade among three groups whose opinions may have a profound impact on the future role of free trade in U.S. trade policy.

A. The American Public on Trade Liberalization

The American public has become increasingly skeptical about the benefits of international trade in recent years. Among the reasons for shifting

---

118. *Id.*
119. *Id.* at 12.
120. *Id.* at 14-15.
121. Jane Sasseen, *Economists Rethink Free Trade*, BUS.WK., Jan. 31, 2008, *available at* http://www.businessweek.com/magazine/content/08_06/b4070032762393.htm.
122. *Id.*
123. *Id.*
124. *See generally, id.*
125. *Id.*

attitudes about trade is a growing skepticism concerning the ability of globalization to raise domestic standards of living. A poll conducted by the German Marshall Fund in December 2006 revealed that sixty percent of Americans believe that freer trade costs more jobs than it creates.[126] Yale political science professor Kenneth F. Scheve and economist Matthew J. Slaughter assert that the American public is becoming more protectionist as a result of stagnant or falling incomes.[127] According to Scheve and Slaughter, opinions on trade are closely linked to each individual's labor market performance, and because the majority of America's labor force is less-skilled, American public opinion about trade and globalization depends on how the labor market affects less-skilled workers.[128] Although traditional measures of the strength of the U.S. labor market, such as employment growth and unemployment rates, indicate that the U.S. labor market is strong,[129] Scheve and Slaughter point out that real income growth has been extremely skewed in recent years, with only a small number of the highest earners seeing increases while the incomes of the vast majority of workers have stagnated, or even fallen.[130] Despite these dismal statistics, it is estimated that the United States has added between $500 billion and $1 trillion to its annual income as a result of trade liberalization, and that further gains of up to $500 billion could result from a comprehensive multilateral agreement on free trade of goods and services in the Doha round.[131] Falling real incomes among the majority of American workers in spite of significant gains from trade demonstrates that the lion's share of the gains from trade have been enjoyed by a small minority of Americans.[132] However, this realization does not necessarily lead to the conclusion that halting trade liberalization will benefit the majority of Americans.

Prevailing public opinion disfavoring trade has the dual impact of providing incentives for politicians to advocate protectionist policies – their constituents want them – while simultaneously making policymakers more receptive to the lobbying interests of special interest groups whose specific

126. McMahon, *supra* note 6.

127. Kenneth F. Scheve & Matthew J. Slaughter, *A New Deal for Globalization*, FOREIGN AFF., Jul./Aug. 2007, *available at* http://www.foreignaffairs.org/2007/4.html (follow "A New Deal for Globalization" hyperlink).

128. *Id.*

129. Unemployment in October 2007 was 4.7%, which is generally considered full employment by economists. U.S. Dept. of Labor, Bureau of Statistics, TED: The Editor's Desk, Unemployment in October 2007, http://www.bls.gov/opub/ted/2007/nov/wk1/art02.htm (last visited Dec. 1, 2008).

130. Scheve & Slaughter, *supra* note 128. From 2000 to 2005, less than four percent of all workers were in educational groups that experienced increases in mean real money earnings. *Id.* Further, in 2005, the top 1% of earners accounted for a whopping 21.8% share of national income, a level not reached since 1928. *Id.*

131. *Id.*

132. *Id.*

goals can be best achieved through protectionist measures.[133] The danger, according to Scheve and Slaughter, is that "[w]hen most workers do not see themselves as benefiting from the related forces of globalization and technology, the resulting protectionist drift may end up eliminating the gains from globalization for everybody."[134]

B. American Politicians on Trade Liberalization

The decline in trade liberalization's popularity with the American people has been mirrored, and perhaps even expanded and capitalized upon, in the political arena. Some policymakers link growing income inequality, loss of manufacturing jobs, and stagnation in real median household incomes to globalization,[135] while others blame globalization outright for the loss of American jobs and declining incomes. Many have also embraced labor and environmental provisions as a way to minimize the negative effects of trade liberalization.

The campaigns of presidential hopefuls leading up to the 2008 presidential election provide some insight into how politicians deal with and – sometimes – perpetuate skepticism about trade. Many Democrats feel that, at the least, globalization should not be pursued further without simultaneously acting to reduce income inequality.[136] More extreme positions seem to suggest that globalization never should have been undertaken in the first place. For example, in a 2007 campaign speech, democratic presidential candidate John Edwards stated:

> The negative effects from globalization are ripping through the economy. . . . Globalization has helped stunt the growth in wages for American workers. Workers in America must now compete every day with workers overseas earning miserably low wages with no benefits . . . . Globalization is a major reason why income inequality is at its worst since before the Great Depression.[137]

After placing the blame for the economic situations of many American workers on globalization, Edwards went on to tout labor and environmental

---

133. *Id.*

134. *Id.*

135. DESTLER *supra,* note 6, at 2. *See also* HORNBECK & COOPER, *supra*, note 13, at 15 (noting that Congress is increasingly focused on addressing perceived negative effects of trade policy and globalization, including job displacement, falling wages, the growing income gap in the United States (and developing countries), and the U.S. trade deficit).

136. DESTLER *supra,* note 6, at 2.

137. John Edwards, 2008 Democratic Presidential Candidate, Campaign Speech: Smarter Trade that Puts Workers First, (Aug. 6, 2007) [hereinafter Edwards on Trade], *available at* http://www.cfr.org/publication/13995/john_edwards_speech_on_trade_policy.html.

standards as part of the solution, advocating a trade plan with "strong protections for labor and the environment" that would "benefit workers, not just big multinational corporations" and "lift up workers around the world."[138] Further, he advocated the use of environmental provisions as "tools to ensure that poor environmental practices do not create unfair competitive advantages."[139] Edwards also explicitly linked the absence of labor or environmental protections in the core text of the North American Free Trade Agreement (NAFTA) with growing income inequality in the United States, Mexico, and Canada.[140]

Other presidential candidates also weighed in on the trade liberalization issue. President Barack Obama voiced his commitment to "ensure that trade agreements include strong labor and environmental protections and that all Americans share the rewards of globalization."[141] 2008 Democratic presidential candidate Hillary Clinton similarly stated that she is committed to "[t]rade that has labor and environmental standards, that's not a race to the bottom but tries to lift up not only American workers but workers around the world."[142]

2008 Republican presidential candidate Mike Huckabee's support for trade has been described as "limited, but positive," with Huckabee expressing concern that free trade can lead to unfair loss of American jobs.[143] 2008 Republican presidential candidate Ron Paul, although he insists that he supports free trade, has voted against various bilateral trade agreements and supported legislation that would have withdrawn U.S. approval for the WTO because he believes many international trade agreements undermine U.S. sovereignty.[144] Paul also asserts that Congress' delegation of trade authority to the President under TPA is unconstitutional.[145] In contrast, 2008 Republican presidential candidates Mitt Romney and John McCain have been strong free trade advocates.[146]

The trend among politicians that seems to be moving simultaneously away from further trade liberalization and toward the inclusion of labor and environmental standards in free trade agreements is not surprising. Indeed,

---

138. *Id.*

139. *Id.*

140. *Id.*

141. BarackObama.com, Obama'08, Economy, http://www.barackobama.com/issues/economy/#internationaltrade (last visited Feb. 6, 2007).

142. OntheIssues.org, Hillary Clinton on Free Trade, http://www.ontheissues.org/International/Hillary_Clinton_Free_Trade.htm (last visited Oct. 24, 2008).

143. Council on Foreign Relations, The Candidates on Trade, July 30, 2008, http://www.cfr.org/publication/14762/#128 (last visited Dec. 1, 2008) [hereinafter The Candidates on Trade].

144. *Id.*

145. Ron Paul: CAFTA: More Bureaucracy, Less Free Trade, http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=114x16424 (last visited Dec. 1, 2008).

146. *See* The Candidates on Trade, *supra* note 144.

labor and environmental standards are potentially a political goldmine at a time when the looming possibility of a recession conjures protectionist sentiments among the American people while growing concerns for environmental preservation and human rights stir their socially-responsible sensibilities. Economist Jagdish Bhagwati characterizes the push for inclusion of labor and environmental standards in trade treaties this way:

> Such standards may be demanded out of empathy for others or they may be required because of fear and self-interest. The latter motive is clearly at play. It is hoped by those terrified by competition from poor countries that raising standards and therefore costs abroad will moderate the competitive ability of the foreign companies. It is what economists call "export protectionism."
>
> But, instead of admitting that this is their game, they want to mask their demands behind the language of altruism: oh, we are doing it for your workers. . . . [Y]ou need not feel guilty if you can deceive yourself into thinking you are flogging the foreigner in his own interest.[147]

What most politicians fail to address, however, is whether slowing trade liberalization and imposing trade-inhibiting mechanisms will actually stabilize falling incomes. Even if the gains from trade have been skewed towards a small minority of Americans, even if the average American has not shared in those gains, and even assuming that the average American is actually worse off than he or she would have been if globalization had never taken place, will attempting to take a step backwards in time actually *improve* the quality of life for average Americans or halt the decline in real incomes? Understandably, the gut-level response to this question, especially when accompanied by any indication that globalization could be responsible for the current state of affairs, is that the answer lies in a retreat from further liberalization. The question merits more than a gut-level response, however, lest uninformed actions, taken out of fear, result in further declines in income and standards of living for most Americans.

The current tendency towards protectionism among U.S. businesses and consumers during economic uncertainty bears a striking resemblance to the reactions of U.S. producers during the height of the Great Depression, whose efforts to protect themselves from foreign competition resulted in the enactment of the Smoot-Hawley Tariff Act of 1930.[148] The prohibitive tariffs set by the

147. Jagdish N. Bhagwati, *America's Bipartisan Battle Against Free Trade,* FIN. TIMES, Apr. 8, 2007, *reprinted in* COUNCIL ON FOREIGN RELATIONS (2007), *available at* http://www.cfr.org/publication/13009/americas_bipartisan_battle_against_free_trade.html.

148. HORNBECK & COOPER, *supra* note 13, at 3.

Smoot-Hawley Act severely restricted trade and greatly exacerbated the effects of the Great Depression.[149] One economic historian warns that the American public may be more inclined to adopt protectionist measures today than in the past because it is "too young" to remember the deleterious effects of protectionist measures like those pursued in the Smoot-Hawley Act.[150] The resulting "historyless-ness" that characterizes the current public debate about the ongoing value of uninhibited trade leaves the American public more receptive to the idea of isolationism in times of economic hardship.[151] The American people and their elected representatives alike must examine the implications of trade-inhibiting mechanisms closely before electing to pursue protectionist measures that could shut off potential gains from trade and worsen a deteriorating economic situation.

C. Prominent Economists on Trade Liberalization

Is there any truth to the assertion, as the Business Week headline, "Economists Rethink Free Trade," implies, that economists are, in fact, wavering in their support of further trade liberalization? Interestingly, the article itself fails to cite a single economist upon whose "doubts" the article is based who advocates that trade liberalization should be slowed or stopped.[152] Instead, most economists favor mechanisms that would serve to more evenly distribute the gains from trade or ameliorate the detrimental effects trade liberalization may have on certain segments of society. For example, Alan S. Blinder, a former vice-chairman of the Federal Reserve and member of the Council of Economic Advisers in the Clinton Administration, advocates an expansion of unemployment insurance and an overhaul of a program meant to retrain manufacturing workers whose jobs disappear.[153] Similarly, Matthew J. Slaughter[154] argues that an income redistribution mechanism is necessary to spread the gains from free trade.[155]

Renowned economist and Massachusetts Institute of Technology professor Paul A. Samuelson's recent assertion that "sometimes free trade globalization can convert a technical change abroad into a benefit for both regions; but sometimes a productivity gain in one country can benefit that country alone, while permanently hurting the other country by reducing the

149. *Id. See also* Interview with Amity Shlaes, *supra* note 23 (explaining that in spite of prominent economists' predictions that a worldwide depression would ensue if the Smoot-Hawley Act was enacted, the Act was uncontroversial politically and signed into law by President Hoover).

150. Interview with Amity Shlaes, *supra* note 24.

151. *Id.*

152. *See generally,* Sasseen, *supra* note 122.

153. *See* Sasseen, *supra* note 122.

154. See Part III.A, *supra* for a summary of Scheve and Slaughter's theory on declining incomes and globalization.

155. Sasseen, *supra* note 122; *see also* Scheve & Slaughter, *supra* note 128.

gains from trade that are possible between the two countries"[156] has been interpreted by some as a renunciation of free trade principles.[157] Samuelson, however, follows his recognition of potential negative effects of free trade with these observations:

> It does not follow from my corrections and emendations that nations should or should not introduce selective protectionisms. Even where a genuine harm is dealt out by the roulette wheel of evolving comparative advantage in a world of free trade, what a democracy tries to do in self defense may often amount to gratuitously shooting itself in the foot. . . .
>
> If the past and the future bring both Type A inventions that *hurt* your country and Type B inventions that help - and when both *add* to world real net national product welfare - then free trade may turn out pragmatically to be still best for each region in comparison with lobbyist induced tariffs and quotas which involve both perversion of democracy and nonsubtle deadweight distortion losses.[158]

Whether Samuelson should be interpreted as advocating protectionist measures in certain circumstances is a matter of some debate.[159] The message that most clearly comes through in his comments, however, is one of caution. Even if protective measures might be appropriate in some contexts, if used inappropriately, they could have a crippling effect comparable to that of shooting oneself in the foot. It is worthwhile to stop and consider the gravity of this analogy. Without two good feet, *all* sectors of the economy could suffer, not just those directly affected by a particular agreement. Notably, Samuelson specifically cites "lobbyist induced" protectionist measures in his illustration of a situation in which free trade is preferable in spite of harms suffered as a result of its pursuit, suggesting that these are *not* a valid justification for protectionism.

The purpose of this discussion is not to argue empirically in favor of continued trade liberalization, but simply to point out that in spite of

---

156. Paul A Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, 18 J. ECON. PERSPECTIVES 135, 142 (2004), *available at* http://www.wilsoncenter.org/events/docs/SamuelsonJEP042.pdf.

157. BHAGWATI, *supra* note 9, at 276 (indicating that new fears of globalization are based in part on arguments made by Samuelson).

158. Samuelson, *supra* note 157, at 142.

159. *See, e.g.*, Sasseen, *supra* note 122 ("Hillary Clinton agreed with economist Paul A. Samuelson's argument that traditional notions of comparative advantage may no longer apply."); *see also* BHAGWATI, *supra* note 9, at 276-77 (noting that while Samuelson's assertion that external changes, such as the growth of China and India, could be harmful to the United States because they diminish gains from trade, Samuelson "certainly does not advocate protectionism").

whisperings to the contrary, most economists continue to advocate trade liberalization and discourage protectionism. More importantly, although economists differ on whether a protectionist shift is actually taking place or whether certain measures are, in fact, protectionist, they appear to remain solidified on one point: protectionist measures that are driven by powerful special interests have the potential to cause great harm.

IV. LABOR AND ENVIRONMENTAL STANDARDS AND THE PROBLEM OF "CAPTURE"

Economists have long recognized a danger that trade protection would be "captured" by "special interests who would misuse it to pursue their own interests instead of letting it be used for the national interest."[160] When protective measures are "captured" by special interests, society often pays a substantial cost for benefits that accrue only to the special interest.[161]

One cost protectionism places on society is that the consumers in the country imposing it are forced to forgo cheap imports, so the average American pays higher prices but experiences none of the benefits created by the protectionist measure.[162] As an example, economic historian Amity Shlaes describes how consumers in a poor part of Maine pay higher prices for simple items like hairbrushes at Wal-Mart because of Congress' decision not to approve an FTA with Panama.[163] Wal-Mart ability to offer low prices on hairbrushes is dependant in part on trade agreements that allow the United States to ship through the Panama Canal.[164] If Wal-Mart's shipping costs increase, poor Americans suffer because they can no longer afford some basic goods.[165] Shlaes points out that consumers, the "losers" in protectionist trade deals, are typically diffuse, and not represented by any particular candidate or representative.[166] In contrast, specific groups that benefit from protectionist trade deals, such as the textile, furniture, and steel industries, are often organized and readily identifiable.[167] This creates a distortion in perceptions about the value of protectionist measures, because the costs of trade for specific groups are highly visible, but highly diffused gains - in the form of lower prices - are frequently less visible.[168]

Another cost of protectionism involves the lobbying costs incurred by

160. Jagdish Bhagwati, *Protectionism,* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, http://www.econlib.org/library/Enc/Protectionism.html (last visited Dec. 1, 2008).

161. *Id.*

162. *Id.*

163. Interview with Amity Shlaes, *supra* note 24.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

groups seeking protection.[169] These costs, sometimes described as "directly unproductive profit-seeking activities, . . . are unproductive because they produce profit or income for those who lobby without creating valuable output for the rest of society."[170] To explain, the value of the market system for society in general is based, in part, on the premise that when firms compete, they have an incentive to maximize efficiency of production because the firm that is able to produce more output for less cost will ultimately prevail on the market. When firms maximize efficiency, society as a whole benefits from lower prices and the availability of resources that previously would have been used in the inefficient production of a particular good. If firms have no incentive to maximize efficiency, gains realized by the firm may not be accompanied by the concurrent gains for society.

Regulations governing market activities, such as trade, sometimes create incentives for firms to generate profits in ways that do not promote efficiency and, consequently, do not advance overall benefits for society. For example, a firm may have a choice between spending its resources on economizing production to maximize its profits or spending its resources on lobbying Congress for laws that protect it from competition. If it is more cost-effective for the firm to lobby Congress for protectionist laws than to maximize efficiency, the firm will do so, and society will not benefit. Thus, the firm's "profit-seeking" activity is "directly unproductive" for society has a whole.[171] In order for the market to function for the overall benefit of society, regulations of market activities should avoid distorting firms' incentives to maximize efficiency. In the trade context, this means that legislators should actively strive to preserve incentives for domestic firms to compete internationally by maximizing efficiency, rather than by lobbying for protectionism, which may benefit the firm but does not benefit or, at worst, hurts society.

Most industrialized nations now implement what are commonly known as "fair trade" laws.[172] In theory, fair trade laws are meant to complement free trade by ensuring that market incentives and the resulting efficient allocation of activity among the world's nations are not undermined by unfair trade practices by trading nations.[173] However, these laws have historically been particularly vulnerable to capture and use as protectionist instruments against foreign competition when protectionist pressures rise.[174] To illustrate, two "fair trade" mechanisms, the countervailing duty (CVD) and antidumping duty (AD), were intended to ensure that foreign nations do not subsidize their exports or dump

169. Bhagwati, *supra* note 161.

170. *Id.*

171. For a comprehensive discussion of directly unproductive profit-seeking activities, see generally Jagdish N. Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90 J. POL. ECON., no. 5, Oct., 1982, at 988.

172. Bhagwati, *supra* note 161.

173. *Id.*

174. *Id.*

their exports in a predatory fashion.[175] If subsidization or dumping is found to occur, a CVD or an AD can be levied.[176] In the 1980s, however, CVD and AD actions were often started against particularly successful foreign firms to harass them into voluntarily restricting their exports, even if the firm was not actually subsidized or engaged in dumping.[177] Because of their historical susceptibility to manipulation as protectionist instruments, economists have sought to redesign fair trade mechanisms in a way that insulates them from being captured by special interests.[178] In the absence of a workable alternative, however, domestic producers have increasingly labeled a variety of foreign policies and institutions as "unfair trade."[179]

Labor and environmental standards are among the most recent additions to the catalogue of "fair trade" laws.[180] Like other fair trade laws, because labor and environmental standards can enhance a firm's competitiveness on the international market, they create an incentive for firms to spend resources on lobbying for their inclusion instead of on increasing efficiency. Similarly, like other fair trade laws, labor and environmental standards are politically popular because they purport merely to advance the politically desirable goal of pursuing free trade in a fair manner.[181] Labor and environmental standards are particularly vulnerable, however, because they garner support from several key groups that might have otherwise mobilized to oppose the passage of laws that solely benefit particular special interest groups, including labor groups, environmental groups, and human rights groups.

Many labor and environmental groups have offered a "qualified" endorsement of the Trade Policy based on the rationale that the implementation of some labor and environmental provisions is a step in the right direction,[182] even if ultimately the provisions do little to advance their interests.[183] These qualified endorsements of the Trade Policy and resulting FTA provisions illustrate and exacerbate the vulnerability of labor and environmental standards to special interests in several ways. First, the inclusion of even relatively

---

175. *Id.*

176. *Id.*

177. *Id.* In one instance, the United States imposed a CVD on rice from Thailand by establishing that the Thai government was providing a one percent subsidy for rice exports, even though the government also taxed all exports at a rate of five percent, thereby neutralizing any potential detrimental effects from the subsidy on international trade. *Id.* The United States also accused Poland's golf cart industry of dumping golf carts on the international market (dumping is generally thought of as selling goods at a lower price on the international market than in its own market) even though it sold no golf carts in Poland. *Id.*

178. *Id.*

179. *Id.*

180. *See* Bhaghwati, *supra* note 148.

181. *Id.*

182. Statement by Center for International Environmental Law, Defenders of Earth justice, Environmental Investigation Agency, Friends of the Earth, Nature Defense Counsel, Sierra Club (Jun. 26, 2007), *available at* http://www.ciel.org/Tae/Peru_Statement_27Jun07.html [hereinafter Environmental Group Statement].

183. *Id.*

ineffective standards may pacify labor and environmental groups that would have otherwise strongly opposed the agreements. For example, in a joint statement, the Center for International Environmental Law, Defenders of Wildlife, Earthjustice, the Environmental Investigation Agency, Friends of the Earth, the Natural Resources Defense Council, and the Sierra Club proclaimed that "[t]he environmental provisions included in the final text of the Peru Free Trade Agreement mark a significant step forward, and we commend the Democratic leadership for this achievement . . . ."[184] The statement then goes on to say, however, that:

> this deal should not be seen as a final template for trade deals generally or for trade negotiation authority. Much work still remains to be done on the investment and other provisions of our trade rules to ensure that they strengthen, rather than undermine, environmental protections at home and abroad.[185]

The statement endorses the Trade Policy but expresses reservations about its ability to achieve environmental goals without further measures. Nevertheless, environmental groups are significantly less likely to oppose an agreement containing environmental protection provisions simply because it represents an advancement of their interests, however small. Thus, by their presence alone, ineffective environmental provisions may serve to undermine environmental protection by neutralizing any opposition from environmental groups.

The Trade Policy provisions may also be vulnerable to manipulation because they are potentially divisive, as illustrated by organized labor's response to the Trade Policy.[186] Labor unions have taken an ambivalent stance on the Trade Policy and the FTAs that have been amended pursuant to it,[187] with some strongly opposing it on the ground that it is inadequate to protect their interests and others offering limited approval or declining to comment.[188] Like environmental groups, even those labor groups that criticize the Trade

184. *Id.*

185. *Id.*

186. It is worthwhile to acknowledge here that labor groups are often among the special interest groups that support protectionism in order to prevent the loss of American jobs that is perceived to accompany globalization and free trade. The significance of the argument that the Trade Policy standards are vulnerable to manipulation is not only that they may be co-opted for protectionist purposes, but that they may be easily co-opted for any purpose other than that for which they were patently intended. The irony here is that the Trade Policy's labor standards, which one might logically expect to be motivated by some level of protectionism, may actually be co-opted and manipulated in order to *avoid* opposition from protectionist labor groups that might otherwise pose an obstacle to the passage of a particular FTA.

187. Ian Swanson, *Labor Groups Differ on Peru Free Trade Deal*, THE HILL, Sept. 19, 2007, http://thehill.com/business--lobby/labor-groups-differ-on-peru-free-trade-deal-2007-09-19.html (last visited Dec. 1, 2008).

188. *Id.*

Policy as insufficient have declared their support for Trade Policy labor standards to the extent that they represent a step forward, thus weakening opposition to particular agreements containing Trade Policy objectives to a certain extent.[189] The response from labor groups is distinct from that of environmental groups, however, in that the major labor coalitions are divided in their support of the Trade Policy.[190] The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of fifty-four unions, although it denies express support for the U.S.-Peru FTA and the Trade Policy, has not vocally opposed the deal due to a lack of consensus among its labor union members.[191] In contrast, Change To Win, a coalition of seven labor groups that split from the AFL-CIO in 2005,[192] criticizes the terms of the U.S.-Peru FTA and the Trade Policy as insufficient to achieve labor goals.[193] Thus, although many labor unions may strongly oppose the Trade Policy, their effectiveness is undermined because labor is unable to present a unified front on the issue. The division among labor groups may not be a direct result of the standards themselves, but their inclusion does provide an additional opportunity for other special interest groups to co-opt those standards and use them for their own gain.[194]

The vulnerability of labor and environmental provisions to capture is also exacerbated by these "qualified" endorsements from labor and environmental groups because they provide the Trade Policy and resulting FTA provisions with a veneer of credibility as measures taken in the interest of safeguarding labor and environmental preservation. Anyone wishing to justify inclusion of such measures needs merely point to these endorsements to dispel suspicions that the provisions were actually intended to benefit some other interest.

The proposed 2007 Farm Bill,[195] which Congress is expected to pass in

---

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*; ChangeToWin.org, Change to Win, American Dream for America's Workers, About Us, http://www.changetowin.org/about-us.html (last visited Dec. 1, 2008).

193. *See* Swanson, *supra* note 188 (noting that Change To Win, a coalition of labor unions, opposes the Trade Policy as insufficient because key changes, including changes to investment rules, are not addressed). The president of the International Brotherhood of Teamsters, one of Change to Win's seven member unions, remarked, "[i]t is outrageous that Congress and the Bush administration have approved yet another job-killing trade agreement at a time when American families are seeing their jobs shipped overseas, their food and toys tainted, their wages decline and their houses foreclosed upon . . . ." Press Release, Teamsters, Hoffa Condemns Senate Passage of Peru Free Trade Agreement (Dec. 4, 2007), *available at* http://www.citizenstrade.org/pdf/teamsters_hoffacondemssenvote_12042007.pdf.

194. The split among labor coalitions has important implications for the implementation of FTAs generally because it lessens the pressure on the Democrats from organized labor, which tends historically to be skeptical of expanded trade and makes up a significant proportion of the democratic voting base, to oppose trade agreements. *See generally,* Swanson, *supra* note 188 (describing the implications of a labor union split on trade issues for democratic politicians).

195. "Farm Bill" is "the popular, generic term given to current federal omnibus agricultural legislation, usually enacted every four to seven years." Chuck Culver, The National Agriculture

2008,[196] provides a striking example of the potential for capture and exploitation of protectionist fears by special interest groups. Interestingly, the Farm Bill, like the Democratic agenda supporting increased legislative control over trade negotiations, gains support from its platform pledging to safeguard the jobs of the American people.[197] The Farm Bill governs federal farm and food policy,[198] including commodity programs that provide income support to growers of selected farm commodities.[199] In theory, these agricultural subsidies are supposed to provide a safety net for U.S. farmers and help keep food prices down.[200] However, the ongoing efficacy of agricultural subsidies in achieving either of these goals has been repeatedly questioned and criticized in the context of a globalizing economy.[201]

Agricultural subsidies have their roots in President Franklin Roosevelt's New Deal, enacted in response to the Depression.[202] The Agricultural Adjustment Act of 1933 was the first legislation providing support in ways similar to current farm bills.[203] From the time of the enactment of the Agriculture Adjustment Act until 1996, farm policy generally aimed to stabilize agricultural commodity prices through production restrictions and price-linked loan and payment programs.[204] In 1994, however, the Uruguay Round negotiations of the GATT created the WTO, which created global trade rules restricting agricultural subsidies.[205] At that point, the United States began to scale back subsidies in order to comply with WTO rules.

Statistics reveal that agriculture today makes up only two percent of the

---

Law Center, University of Arkansas School of Law, GLOSSARY OF AGRICULTURAL PRODUCTION, PROGRAMS, AND POLICY (4th ed.), http://www.nationalaglawcenter.org/# (follow "Glossary" hyperlink, then select "F" hyperlink and scroll down to "Farm Bill") (last visited Dec. 1, 2008).

196. Robert McMahon, *Troubling Harvest for Trade,* COUNCIL ON FOREIGN RELATIONS, Nov. 9, 2007, *available at* http://www.cfr.org/publication/14732/troubling_harvest_for_trade.html.

197. *See, e.g.*, Edwards on Trade, *supra* note 138 ("It hasn't always been this way. Workers for generations were at the heart of our country. Hard-working men and women have made America the strongest, most prosperous nation in the history of the world. But today, Washington has turned its back on our workers and their futures.").

198. RENEE JOHNSON, CONG. RES. SERV., WHAT IS THE "FARM BILL"? 1 (2008), *available at* www.nationalaglawcenter.org/assets/crs/RS22131.pdf.

199. Income support is provided to growers of wheat, feed grains, cotton, rice, oilseeds, peanuts, sugar, and dairy. *Id.* at 2. Commodity support is provided through various payments, as well as government purchases, marketing quotas, and import barriers. *Id.*

200. McMahon, *supra,* note 197.

201. *Id.*

202. Anne B. W. Effland, *U.S. Farm Policy: The First 200 Years*, AGRICULTURAL OUTLOOK, Mar. 2000, at 21, *available at* http://www.ers.usda.gov/publications/agoutlook/mar2000/ao269g.pdf.

203. Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH. L. REV. 345, 350 (2006). The Act's key aspects included income support to farmers and attempts to increase farm prices by controlling production. *Id.*

204. Matthew C. Porterfield, *U.S. Farm Subsidies and the Expiration of the WTO's Peace Clause*, 27 U. PA. J. INT'L ECON. L. 999, 1002 (2006).

205. *Id.*

U.S. national economy.[206] Since 1986, U.S. direct and indirect farm subsidies have cost the American people more than $370 billion (almost enough to pay for all the farm land in the country).[207] Of the two percent of the national economy that engage in farming, two-thirds of all farmers receive no subsidies under the program, and among the one-third that do receive subsidies, the majority of the subsidies are concentrated in a small number of recipients.[208] During the program years of 2003-2005, the United States spent $34.8 billion on commodity programs.[209] Nationally, 66% of the subsidies for those years went to only 10% of all beneficiaries.[210] These statistics demonstrate the practical inability of the agricultural subsidy programs, in their current form, to protect the job of the average American farmer. To the contrary, it has been argued that U.S. agricultural support programs actually inhibit even those farmers who do receive subsidies because they provide no incentives for farmers to modernize and adjust to the rapidly changing global market.[211] In the long run, even massive government subsidies will not be able to outperform vastly superior production methods that are likely to develop as a result of true competition.

Instead of providing job security for America's farmers, the evidence suggests that the existing 2002 Farm Bill and the 2007 Farm Bill slated to replace it serve the interests of protectionist special-interest groups.[212] In the context of popular attitudes about trade, these special interests are less likely to encounter opposition from other members of Congress who know their constituents will likely perceive a vote for agricultural subsidies as a vote for the American worker.

V. PURSUIT OF A MINDFUL TRADE POLICY AMIDST UNCERTAINTY

The international trade system currently appears to be in a period of transition regarding both the desirability of further trade liberalization in

206. Robert Stumberg, *A Perfect Storm: Trade Pressure on the Farm Bill*, NAT'L ASS'N OF DEV. ORG., (June 5, 2006), *available at* http://www.nado.org/legaffair/issupdate/stumberg.pdf.

207. BRIAN J. FINEGAN, THE FEDERAL SUBSIDY BEAST: THE RISE OF A SUPREME POWER IN A ONCE GREAT DEMOCRACY 118 (2000).

208. *Id.*

209. Environmental Working Group, Farm Bill 2007 Policy Analysis Database, http://farm.ewg.org/sites/farmbill2007/progdetail1614.php?fips=00000&progcode=farmprog&page=conc (last visited Dec. 1, 2008).

210. *Id.*

211. *See generally* Interview by Robert McMahon with Ron Kind, U.S. House Representative, *Kind: Let U.S. Farmers Compete in the Marketplace* (Nov. 7, 2007), *in* COUNCIL ON FOREIGN RELATIONS, *available at* http://www.cfr.org/publication/by_type/interview.html (follow "complete list" hyperlink, then select "By Issue," select "Trade" in "Filter by" field, scroll down to Interview with Ron Kind").

212. *Id.* ([Y]ou've got the inherent status quo on these committees. When [seventy] percent of the agriculture subsidies are going to just thirty congressional districts, and they're well represented on the committee, it's just unrealistic to expect those committees to be agents of change and reform and new ideas.").

general and the designation of a dominant model of international trade for the future. There is a trend toward protectionism in public opinion and within both dominant political parties. In this context of uncertainty, non-trade objectives that are particularly vulnerable to capture by protectionist interests – including the labor and environmental provisions detailed in the Trade Policy – should be excluded from all U.S. international trade agreements, whether multilateral or bilateral. That is, these objectives should not be incorporated into U.S. trade policy objectives for preferential trade arrangements (PTAs), nor should they be adapted and incorporated into future congressional grants of TPA.

A. Labor and Environmental Standards Should be Excluded from TPA Trade Objectives

TPA, as it presently exists, was formulated in the context of a multilateral trading system.[213] The multilateral trading system was rooted in the pursuit of trade liberalization that would create overall gains from trade through non-discrimination under the MFN principle.[214] At this stage, it is difficult to determine whether the same goals of broad trade liberalization and overall net gains from trade liberalization will remain important under a predominantly bilateral trading system. As a result, it is difficult to predict whether TPA will continue to function as an effective mechanism for achieving Congress' trade goals. These uncertainties counsel against additional non-trade standards that could be manipulated by special-interest groups. Until more conclusive indicators about the functioning of bilateralism as a trade model are available, the future implications of including non-trade objectives in trade agreements cannot be properly assessed and should be excluded.

At the same time, Congress should avoid protectionist procedural measures, such as tightening controls on TPA and in specific FTAs. Most readily apparent is the danger of a loss in the expediency of the trade agreement approval process. More importantly, constraining executive power may undermine the President's negotiating leverage with foreign trading partners, thereby decreasing their willingness to negotiate with the United States. Finally, increased congressional control throughout the trade negotiation process may have the ultimate effect of increasing pressure on Congress from constituents and special interest groups to push for particular provisions in individual trade agreements, potentially further burdening the process and inhibiting the opportunity for trade.

B. Labor and Environmental Standards Should be Excluded From Bilateral and Regional FTAs

Current trends suggest that even if bilateralism does not completely stamp

213. See *supra* Part II.A and accompanying notes for a summary of the evolution of TPA.
214. See *supra* Part II.C.3.(a) for a description of the non-discrimination principle.

out multilateral trading efforts, bilateral and regional trading systems are most likely here to stay.[215] Unfortunately, it is precisely in the bilateral context that the inclusion of non-trade objectives is most concerning. The bilateral trading system has been aptly termed a "spaghetti bowl" of trade agreements.[216] The name creates a visual of a multitude of agreements, constantly crisscrossing each other as they connect different trading partners on endlessly variable trade terms.[217] Before long, it becomes impossible to identify which agreements connect to which partners and on what terms. As outlined above in Part II.C, a plethora of variable trading terms undermine the non-discrimination principle and significantly impair the gains that characterize true trade liberalization.[218] But the spaghetti bowl trade framework that bilateral FTAs create makes the inclusion of environmental and labor standards particularly problematic for two reasons. As discussed previously, labor and environmental standards can be easily manipulated by protectionist or other special interest groups to achieve individual goals, which may not serve the greater good of the nation.[219] The spaghetti bowl framework compounds this vulnerability by diffusing the effectiveness of less powerful groups whose interests are affected by trade agreements. U.S. trade policy is largely driven by powerful business interests.[220] Business interests, however, may not be representative of the interests of the nation in general, because businesses are generally profit-driven.[221] In multilateral trade negotiations, other groups with a stake in trade are better equipped to effectively provide a "check" on the ability of powerful business interests to dictate the terms of trade agreements. For example, various interest groups (including small businesses and labor, human rights, and environmental groups) are able to concentrate their resources and efforts in the broad multilateral arena for more effective achievement of their goals. In the FTA trade environment, however, these stakeholder groups' limited resources and energies are stretched thin as they attempt to keep track of every agreement that is signed and analyze how each individual agreement will affect

215. *See* THE FUTURE OF THE WTO, *supra* note 67, at 21 (reporting that 300 PTAs had been notified to the WTO as of October of 2004, 176 of which were notified after January of 1995).

216. *Id.* at 19.

217. *See* Bhagwati, *supra* note 147.

218. *See* THE FUTURE OF THE WTO, *supra* note 67, at 19 ("[W]hat has been termed the "spaghetti bowl" of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment."). *See also supra* Part II.C.

219. See *supra* Part IV (explaining that labor and environmental standards are particularly vulnerable to capture by special interest groups because they neutralize various groups that might otherwise counterbalance special interests).

220. Abbott, *supra* note 53, at 574 ("The difference between the multinational business community and most other stakeholders is that the former can elect to transfer its negotiating agenda to more favorable terms because it generally has the power to direct the focus of trade negotiators.").

221. *See id.* ("Multinational business enterprises are typically pursuing mercantile agendas designed to enhance their returns on investment.").

their interests.

Many economically powerful businesses and industries, on the other hand, are primarily interested in only the few specific trade agreements that affect them directly. This allows them to concentrate their already considerable efforts and economic resources on specific trade agendas in particular agreements rather than on broad trade forums.

A second major concern about labor and environmental standards in the spaghetti bowl framework is that the number of PTAs makes the identification of problematic provisions nearly impossible. Although a debate remains as to whether bilateral and regional FTAs are trade-creating or trade-diverting,[222] economists generally agree that FTAs are most likely to generate trade benefits when they are structured in a way that ultimately fosters freer trade.[223] In the FTA context, the necessary conditions combine to create a delicate balance.[224] From an economic perspective, the motivation behind a provision that has the potential to alter this delicate balance may indicate whether the provision is likely to foster or inhibit gains from trade. Put differently, the inclusion of an environmental provision that is ultimately motivated by an industry's desire to protect itself from competition is protectionist by definition, and therefore is highly unlikely to facilitate freer trade and yield overall trade benefits. A provision that is truly motivated by concern for the environment, on the other hand, may impair trade benefits, or it may not, depending on its structure. In short, motivation matters.

As Congresspersons are presented with more and more trade agreements, the task of analyzing the pros and cons of each individual provision in light of the best interests of their constituents, special interests, and the nation, both in the long and short term, may become overwhelming. As a result, Congresspersons may be more inclined to make decisions based on which special interest group makes the most noise, rather than on other considerations, such as the long-term welfare of the nation. Further, as previously pointed out, because of the relatively narrow nature of bilateral FTAs, Congresspersons are more likely to experience significant pressure from fewer groups on particular issues in a given agreement, so Congresspersons are less likely to develop a comprehensive perspective from competing interest groups. Rather, Congresspersons will be making more decisions based on more limited and more biased information.

A third concern about labor and environmental provisions in the bilateral context relates to the loss of sovereignty among developing countries.[225] "When the United States or European Union tenders a draft PTA to a developing country, it expects the basic template of its proposal to be followed, and in some areas . . . , the possibility for effective counterproposal are almost

222. *See supra* Part II.C.3(b) and accompanying notes.
223. *See supra* Part II.C.3(b) and accompanying notes.
224. See COOPER, *supra* note 55, at 10.
225. See Abbott, *supra* note 54, at 578.

non-existent."[226] Indeed, the Trade Policy's labor and environmental provisions have been specifically cited as an illustration of unequal bargaining power in the bilateral trade context.[227] Instead of retaining discretion to allocate limited resources as they see fit to facilitate growth and development, developing countries are likely to have environmental and labor laws dictated to them by the terms of an international trade agreement. Case in point: one expert notes that the U.S.-Peru FTA's forest sector governance provisions, meant to reduce illegal logging, would require changes in Peruvian legislation, including the penal code, but that Peru currently lacks the necessary capacity to enforce the measures.[228]

C. Conclusion

In 2004, WTO Director Peter Sutherland, addressing the increasing tendency in bilateral agreements to demand significant labor and environmental protection, wrote, "[w]e would argue that if [labor and environmental standards] cannot be justified at the front door of the WTO they probably should not be encouraged to enter through the side door."[229] Sutherland's statement not only reflects the view that these standards are detrimental to the fundamental non-discriminatory goals of multilateralism, it conjures an image of underhandedness in achieving their inclusion, as if the sly side-door entrant has something to conceal. Although Sutherland offers no further explanation of his meaning, the illustration is useful for demonstrating the multiple levels of concealment that facilitate inappropriate labor and environmental standards. The ailing domestic industry, whose attempts to lobby for protection have failed before the WTO, can target those bilateral agreements that are most detrimental to its interests. Such agreements are unlikely to attract much attention from the WTO because they are not formally subject to all WTO rules and because of the sheer number of bilateral agreements in existence. Even if such agreements do not attract attention, by framing their protectionist goals in the socially responsible clothing of labor and environmental standards, the industry's protectionist measures will generally survive scrutiny, even if they benefit only that industry, provide no effective labor or environmental protection, and cause net harm to society overall.

---

226. *Id.*

227. *Id.* at 579.

228. *US - Peru Bilateral to Address Illegal Logging, supra* note 2. Indeed, the problem of illegal logging in Peru has been attributed in large part to the existence of massive poverty, which provides incentives for many families engage in illegal logging in order to survive. News Release, International Tropical Timber Organization, Illegal Logging in Peru blamed on Bureaucracy, Poverty (July 7, 2003), *available at* http://www.itto.or.jp/live/PageDisplayHandler?pageId=217&id=218. In light of these facts, one might question whether requiring the Peruvian government to spend its resources on policing the activities of its poorest people is morally acceptable and, given the desperation of the people, whether such measures are even likely to succeed.

229. THE FUTURE OF THE WTO, *supra* note 67, at 23.

The social goals that labor and environmental standards purport to promote must be decoupled from the convoluting maze of bilateral and regional trade agreements that increasingly characterize the international trade arena. Human rights issues and environmental protection are unquestionably issues of great importance that should be a given high priority by the leaders of nations around the world. These important goals should be pursued directly, however, in a context in which the motivations behind their pursuit are not muddied by the hidden agendas of powerful special interests readily cloaked in a highly untransparent system of international trade.

In a time when social and political trends suggest a tendency toward protectionism, U.S. lawmakers must be exceptionally vigilant in ensuring that laws cannot be manipulated in ways that could ultimately cause considerable harm to social welfare. We live in a global world, and there are no signs that global integration is slowing, in spite of growing skepticism about the merits of globalization. To be sure, as the global citizenry adjust to living in a global market, institutional adjustments in the interest of social welfare will be necessary. These adjustments, however, must be characterized by innovation and progressive thinking rather than by a fearful retreat towards self-protection. As the global trading system transitions, it is particularly important to examine the fundamental tools that a nation uses to achieve its international trade goals, and to ensure that those basic tools are insulated from harmful exploitation and manipulation. To that end, all proposed components of future trade policy, especially as they relate to bilateral and regional trade, must be considered critically and honestly. Under such scrutiny, labor and environmental provisions do not pass muster as a sound component of U.S. trade policy. Rather, their vulnerability to manipulation and exploitation threatens to amount to the United States "gratuitously shooting itself in the foot" as protectionist special interests capture and co-opt them for their benefit at the expense of greater society.

LET HE WHO IS WITHOUT SIN CAST THE FIRST STONE: FOREIGN DIRECT INVESTMENT AND NATIONAL SECURITY REGULATION IN CHINA

Stephen Sothmann*

INTRODUCTION

On August 31, 2007, the National People's Congress (NPC) of the People's Republic of China passed the final draft of a new antitrust law that had been in development for several years.[1] Before the new law, China did not have one unified system of antitrust regulation. There were several anti-competitive rules codified in various forms throughout Chinese law, but those provisions were scarce and scattered over many areas of regulation.[2] As early as 1988, the Chinese government decided that a uniform set of competition laws was necessary in order to preserve the developing free market from what was perceived to be unfair competitive practices.[3] The need for one system of regulation became increasingly important to China's leadership as its economy escalated in the late 1990s and the amount of Foreign Direct Investment (FDI) in the country increased dramatically.[4] Many Chinese citizens and government officials were concerned that multi-national corporations would enter the market, acquire many of China's profitable companies, and deny the Chinese people the benefits of their booming economy. In response to this growing need, the NPC developed a series of laws that would culminate in the passage of the August 31, 2007 antitrust legislation.[5]

A few provisions of the new law have caused concern in the international business community.[6] Among the primary concerns are the large number of exemptions for monopolistic behavior in "critical" economic sectors, potential

---

* J.D. expected 2009. I would like to thank my editors, Jenny Prinz and Matt Morgan, for all of their help, as well as Professor Robert Lancaster for his guidance in the development of this Note. I would also like to thank my parents for all of their support during this process.

1. At the time of writing no official translation of the law existed. For the purposes of comparison, this unofficial translation of the law was used: *Anti-Monopoly Law of the People's Republic of China* (2007), *available at* http://www.antitrustchina.com/default.asp?id=218 (click on "Full Bi-lingual Version," a login username and password is needed to access the material) [hereinafter Anti-Monopoly Law].

2. H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169, 175-76 (2006).

3. *Id.* at 174-76.

4. MSN Encarta – China, http://encarta.msn.com/encyclopedia_761573055/China.html#p7 (last visited Nov. 30, 2008).

5. *Id.*

6. *See* The Law Offices of Clifford Chance, *Chinese Anti-trust: Let the Games Begin* (Aug. 2007), *available at* http://www.cliffordchance.com/expertise/publications/details.aspx?FilterName=@URL&LangID=UK&contentitemid=12590.

abuse of administrative power by regional governments, the applicability of the new law to State Owned Enterprises (SOEs), and the ability of government bureaucrats to manipulate the law in order to achieve economic protectionism.[7] In particular, Article 31 of the legislation has sparked considerable debate among foreign observers because it allows the Chinese government to deny foreign mergers or acquisitions based on "national security interests."[8] Article 31 states:

> Where a foreign investor participates in the concentration of business operators by merging or acquiring a domestic enterprise or by any other means, and national security is involved, besides the examination on the concentration of business operators in accordance with the Law, the examination on national security shall also be conducted according to the relevant provisions of the State.[9]

Under this Article, a foreign party attempting to acquire or merge with a Chinese domestic company will be subject to both an economic antitrust review and an additional review based on national security concerns. If the government deems the foreign merger or acquisition dangerous to the national security of China, the transaction will be denied. The international community is especially concerned that the term "national security" has not been defined anywhere in the legislation, nor has the NPC given any specific instructions as to what types of industries will be affected by this rule.[10] This added level of scrutiny could give the Chinese government the ability to deny foreigners the opportunity to enter the lucrative Chinese market in favor of domestic counterparts.[11] There is concern that such protectionist actions would lead to a form of legalized isolationism in the burgeoning economy.

Given China's well-documented closed-door policies of the past,[12] it is understandable that the international community would question any new laws that allow government officials to effectively deny foreign investment. This is especially true considering the number of SOEs that still dominate many sectors of the country's economy and hold considerable sway in political decision-making.[13] However, it is the purpose of this Note to prove that the international

---

7. *Id.*
8. *See* Anti-Monopoly Law, *supra* note 1, at art. 31.
9. *Id.*
10. *Id.*
11. *Id.*
12. *See generally* Joel R. Samuels, *"Tain't What You Do": Effect of China's Proposed Anti-Monopoly Law on State Owned Enterprises*, 26 PENN ST. INT'L L. REV. 169 (2007) (discussing that China's economy was closed off to foreign investment for many years following the communist revolution of 1949 and remained closed until the open door policies of Deng Xiaoping in the 1970s led to increased foreign investment and economic growth in the 1980s and 90s).
13. *Id.*

uproar over the legislation may be unfounded considering the present political and economic landscape of international trade.

The critical consideration is that several nations, including many western nations, have some form of restriction on international mergers and acquisitions in industries that are considered integral to "national security."[14] Patterns have emerged as to the types of industries that governments usually choose to protect, such as the energy or weaponry sectors of a domestic economy, but many nations also restrict foreign investment outside of these industries.[15]

Most governments also have some form of statutory review process for foreign mergers and acquisitions in the domestic economy that look at a myriad of issues, including national security.[16] Furthermore, many international free trade agreements, including the World Trade Organization (WTO), Association of Southeast Asian Nations (ASEAN), European Union (EU) and the North American Free Trade Agreement (NAFTA), allow signatory nations the right to deny foreign investment in areas of the economy deemed integral to the national security interests of that nation.[17] Even the United States, traditionally the most open and free market in the world, allows for governmental review of foreign takeovers based on national security interests.[18] In fact, the level of governmental oversight for foreign mergers and acquisitions in the United States has been expanding in recent years as a result of post-9/11 national security legislation.[19] Considering these accepted international practices for economic policy and national security review, the Chinese antitrust law is, on its face, no different than the others in terms of the standards it sets for reviewing foreign mergers and acquisitions in its domestic economy.[20]

The international community's reaction to Article 31 of the Chinese antitrust law is largely based on concerns with China's economic past, not on the political and economic realities of the present. As stated above, many nations reserve the right to deny foreign mergers or acquisitions based on national security concerns. This exception to free trade has been a part of the global economy since the earliest free trade agreements. Even the United States uses national security concerns in order to deny foreign takeovers. It is a global trend that has moved towards economic protectionism in "crown jewel" industries within each nation.

This Note will detail that the new Chinese law is in accordance with

---

14. Gaurav Sud, Note, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 VAND. J. TRANSNAT'L L. 1303, 1312 (2006).

15. See *infra* Part IV.

16. See *infra* Part IV.

17. See *infra* Part III.

18. Joseph Mamounas, *Controlling Foreign Ownership of U.S. Strategic Assets: The Challenge of Maintaining National Security in a Globalized and Oil Dependant World*, 13 L. & BUS REV. AM. 381, 388 (2007).

19. *Id.* at 381.

20. *See supra* the analysis that follows.

international standards in terms of foreign merger and acquisition review and should not be isolated by the international community. Part I of this Note examines the international reaction to China's new antitrust law. Part II identifies the industries usually affected by national security exceptions to free trade agreements, specifically, the industries that have previously been affected in China. Part III discusses the legality of those exceptions under current free trade agreements, including the WTO, ASEAN, EU and NAFTA agreements. Part IV shows examples of nations choosing to isolate and protect specific domestic industries based on notions of national security. Part V discusses the history of foreign investment review in the United States and the shift towards economic protectionism in a post-9/11 environment. Finally, Part VI provides recommendations for various parties so that Article 31 of the Chinese antitrust law might assimilate smoothly into the world economy.

I. INTERNATIONAL REACTION TO THE CHINESE ANTITRUST LAW

Both before and after the passage of China's new antitrust legislation, foreign press documented the international business community's apprehension that the law might cause China to slip into economic isolationism. Although several international organizations and western nations have contributed to the development of the new law,[21] many still express concern that the law will give Chinese officials the power to arbitrarily reject foreign investment in domestic assets.[22] "Some fear the forthcoming antimonopolization law, however reasonable its wording, will be used to discriminate against foreign companies or curb their intellectual-property rights."[23] The second level of antitrust review under Article 31, the national security review, specifically causes concern among potential foreign investors. "It is not clear how such a review will be applied, especially given that 'public interest' [national security] is not defined in the law. This concern is further underlined by the law's emphasis on safeguarding certain state-dominated industry sectors."[24] These concerns have led many foreigners to conclude that the new Chinese law "appears to open the door for regulators to target [foreign companies], while strengthening the hand of state-owned monopolies."[25]

The international concern over the resurgence of an economically isolated China may be overstated, but the business community's reaction to the new law is not completely without merit. Some of the NPC's recent actions concerning foreign investment have shown an increase in prolonged investigations, or

---

21. *See generally* Harris, *supra* note 2.

22. Roger Parloff, *Sony's China Problem: Will a Lawsuit Against Sony in China Set a Scary Precedent?*, FORTUNE (Feb. 22, 2007),. *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/05/8401275/index.htm.

23. *Id.*

24. Rowan Callick, *China Anti-monopoly Law Concerns*, THE DAILY TELEGRAPH (Sept. 3, 2007), *available at* http://www.news.com.au/business/story/0,27753,22350658-462,00.html.

25. *Id.*

outright denials, of foreign mergers and acquisitions based on national security issues.[26] Foreign press has been quick to identify and sensationalize examples of these slowdowns, even if they were later approved. For example, in his article, Bradsher describes current Chinese foreign investment regulations by offering explanatory anecdotes: "even a French purchase of a Chinese cookware company was delayed this year for a national security review, although the Commerce Ministry eventually gave its approval."[27] The description of China's economic landscape for foreign investors has been less than favorable for the governmental regulators. However, anecdotes aside, there has been a marked increase in the amount of foreign companies experiencing administrative hang-ups in their attempts to merge or acquire a domestic Chinese company.[28] The percentage of foreign investment in China actually decreased by 8.5% in 2006, due in large part to the administrative obstacles companies endured in order to enter the Chinese market.[29]

One recent high-profile example of this burdensome endurance is Carlyle Group's attempt to acquire the Chinese manufacturing firm Xugong Machinery.[30] In November of 2005, Carlyle Group extended an initial bid of $375 million for an 85% ownership interest in the domestic Chinese company.[31] The company designed and manufactured a wide range of engineering machinery, including cranes, road rollers, earth scrapers, concrete machines and their basic parts and components. The deal was significantly delayed by the Chinese government's foreign acquisitions review process and the delay eventually led to Carlyle restructuring its bid to quicken the process.[32] Instead of the 85% interest it had originally sought, Carlyle Group revised its agreement with Xugong to a $230 million sale worth 50% of the company, with the remaining 50% interest reserved for the regional government overseeing the acquisition.[33]

Due to these types of situations, many foreign investors believe the Chinese government is applying the national security review to a much broader range of companies than other free trade nations.[34] Critics believe that these companies "would not be seen as security risks in the United States."[35] In most cases, the Chinese government's reviews have slowed the process of foreign investment, but they have not denied many companies the opportunity to enter

---

26. Keith Bradsher, *China Casts Wary Eye on Takeovers*, INT'L HERALD TRIB., Aug. 27, 2007, at Business, *available at* http://www.iht.com/articles/2007/08/27/business/monopoly.php.

27. *Id.*

28. Eileen Francis Schneider, Note, *Be Careful What You Wish For: China's Protectionist Regulations of Foreign Direct Investment Implemented in the Months Before Completing WTO Accession*, 2 BROOK. J. CORP. FIN. & COM. L. 267, 270 (2007).

29. *Id.* at 276.

30. *Id.* at 275.

31. *Id.*

32. *Id.*

33. *Id.* at 255.

34. Bradsher, *supra* note 26.

35. *Id.*

the market.

However, a few foreign companies have been outright denied in their attempt to acquire a significant stake in a domestic Chinese entity.[36] For example, on August 29, 2007, the China Securities Regulatory Commission rejected Goldman Sachs' $91 million bid for a 10.7% stake in home appliance manufacturer Midea Electric for national security reasons, but did not disclose why the purchase would be a danger to national security.[37] Similarly, Citigroup ran into problems in 2006 when it tried to buy a 30% stake in China's Shandong Chenming Paper Holdings Ltd, a paper producing company.[38]

Furthermore, government officials have publicly identified several non-defense industries that they consider worthy of protection from foreign interference.[39] Examples of these industries include retailers, soybean processors, automakers, bearings manufacturers, cement producers, telecom agencies, and steel producers.[40] Companies in these industries were able to successfully persuade the government that they needed protection from foreign competitors due to their strategic importance in the domestic economy.[41] The governmental regulators have been quick to deny foreign investment in these sectors in favor of domestic enterprises.[42] This has sparked concern among foreign investors that the list of protected industries will continue to expand as Article 31 of the new antitrust law is applied.

Some foreign investors are not apprehensive of the law itself, but are instead concerned with how the law will be used by officials in Chinese regulatory agencies.[43] "A major concern is how the law will be implemented. The administrative rank of the new [antitrust regulatory] agency and its human and financial resources will be crucial. Lack of administrative and political influence, inadequate funding, and unqualified personnel will make impartial and effective enforcement impossible."[44] It is difficult to assess how the law will be enforced in its early stages of implementation. "Legal analysts [say] the effect of the law [will] not be known until the government [begins] enforcing it."[45] For the next few years, "[f]oreign companies will closely scrutinize [the law's] implementation for signs that it is being used unfairly to prevent foreign takeovers . . . ."[46]

---

36. ECONOMIST INTELLIGENCE UNIT, *China Regulations: Anti-monopoly Law Passed with Provisions for Foreign Business*, Sept. 12, 2007, http://www.eiu.com.

37. *Id.*

38. Schneider, *supra* note 28, at 270.

39. *Id.* at 277.

40. *Id.* at 274.

41. *Id.*

42. *Id.*

43. Mark Williams, *Wal-Mart in China: Will the Regulatory System Ensnare the American Leviathan?*, 39 CONN. L. REV. 1361, 1380 (2007).

44. *Id.*

45. Peter Spiegel, *Beijing Approves Ban on Some Monopolies*, L.A. TIMES, Aug. 31, 2007, at Business, *available at* http://articles.latimes.com/2007/aug/31/business/fi-china31.

46. *Id.*

Despite these indications, Chinese officials, through state-run media outlets, have attempted to ease the international concern by consistently proclaiming that the national security provision of the antitrust law will be enforced sparingly and in accordance with international standards.[47] "The Antitrust Law aims to maintain the security of China's economic system, the same as relative to antitrust laws in other countries. . . . The Antitrust Law governs all social economic entities not just exclusively to foreign enterprises."[48] Furthermore, they state, "checks on mergers of foreign and domestic firms are practiced by many countries."[49] Yet proponents of an economically isolated China still have a voice in the state-run media outlets. For example, Zhang Jiachun, chairman of the East Group, believed that foreign-funded joint ventures were encroaching on the domestic retail sector and was quoted by the state-run media asking, "Who should control the lifeline of China's economy?"[50]

Judging by the sheer number of news articles expressing concern with the heightened level of review against foreign investment, the international business community does not believe that the Chinese government will implement the antitrust law fairly and evenly. Considering the amount of media coverage the Carlyle Group deal received, along with other blocked or stalled acquisitions in China, foreign investors are understandably worried that too many international companies are arbitrarily being denied entrance into the Chinese economy. But not every international corporation looking to operate in China should be concerned with the new law. There seem to be many economic sectors that are inherently immune to national security reviews.

II. GENERALLY ACCEPTED DEFINITION OF "NATIONAL SECURITY" AND INDUSTRIES AFFECTED

The international concern over China's new antitrust law arises directly from the lack of a clear definition for "national security" in Article 31.[51] This lack of a clear definition has led many international observers, including the press and foreign investors, to conclude that Chinese officials will inevitably use the law to deny foreign investment in any industry they see fit.[52] Without a clear definition for national security, the law can theoretically be applied to any

47. Alex Xu, *Experts: No Need to Panic on Antitrust Law*, CHINA.ORG.CN, May 9, 2003, http://www.china.org.cn/archive/2003-05/09/content_1064211.htm (last visited Nov. 30, 2008).

48. *Id.*

49. Harry L. Clark & Lisa W. Wang, *Foreign Investment and National Security*, 35 CHINA BUS. REV. 1 (2008), *available at* http://www.deweyleboeuf.com/files/News/5020bb98-6718-4337-97a6-64667f03834d/Presentation/NewsAttachment/a3420492-97fd-4f45-9b4b-6900e36248eb/Clark.pdf.

50. Xu, *supra* note 47.

51. Anti-Monopoly Law, *supra* note 1, at art. 31 (providing no specific definition of "national security").

52. *See supra* Part I for discussion about the international reaction to the new antitrust law.

industry the government wishes to insulate from international competition. However, it is possible to create a list of the industries that will most likely be affected by the new legislation. By looking at both international standards and previous actions taken by the Chinese government, it is possible to infer the strategic assets that the government is likely to protect against foreign national security threats.

A. *International Standards*

In terms of international standards, "[s]trategic assets are generally any tangible or intangible asset or concern of significant value in a given industry, state, or nation. Intelligence gathering and analysis, the ability to use weapons systems more effectively, pharmaceutical, biotech, and genomic firms, bioweapons, [and] environmental knowledge . . . have all been described as strategic assets."[53] In many cases,

> these strategic assets are not always characterized as such because of the benefits of their use, but rather because of their symbolic, implied ability to exert influence. Thus, strategic assets provide an advantage both because of the raw force and power of their usage and the implicit persuasive power they hold.[54]

In determining whether an industry is strategic and should be sheltered from foreign ownership, "nation[s] must not only consider the asset's value to [the home nation], but also the strategic value of that asset to the purchasing country. If an asset does in fact hold strategic value, then it necessarily is important to the country holding that asset."[55] Once a strategic asset has been identified and is being threatened by a foreign takeover, then "a country must consider the extent and severity of the sale's national security implications."[56]

The United States, for example, has identified several industries that it considers integral assets worthy of protection due to national security concerns. Airlines and air manufacturers, farmland, telecommunications, and defense are all industries on the list.[57] Recent legislative actions in the United States provide some factors for determining whether an industry should be identified as a candidate for a national security review of a foreign acquisition. These factors include:

> [D]omestic production needed for projected national defense

53. Mamounas, *supra* note 18, at 385.
54. *Id.* at 386.
55. *Id.* at 387.
56. *Id.* at 387.
57. *Id.* at 395-400.

> requirements whether domestic industries have the capability and capacity to meet national defense requirements, which include such things as human resources, technology, and materials; the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical or biological weapons and the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.[58]

Although there have been very few instances of the United States exercising its right to reject foreign acquisition based on national security concerns, it is fairly easy to identify the industries that would be subject to future review under these guidelines.[59]

B. Industries Previously Affected in China

Chinese officials have provided indications as to the types of industries that will be affected by the Article 31 national security review. In August of 2006, the Ministry of Commerce (MOFCOM) issued regulations pertaining to the merger and acquisition of domestic companies by foreign investors.[60] Those provisions included an antitrust review process similar to that which is codified in Article 31 of the new antitrust law.[61] The provisions sought to protect the Chinese economy from any threats to its "national economic security," which includes "key industries" and "famous brand names."[62] None of those terms were defined in the regulations.[63] However, the regulations also included a list of strategic sectors in which the State would retain control and therefore are considered subject to national security exceptions to foreign investment. The list includes: military-related manufacturing, power production and grids, petroleum, gas and petrochemicals, telecom manufacturing, coal, civil aviation, and shipping.[64] In most cases, a SOE exists and dominates the market in these industries, and the government is trying to protect the SOE from foreign competition in the sector.[65] This situation also

---

58. Joshua W. Casselman, Note, *China's Latest 'Threat' to the United States: The Failed CNOOC-UNOCAL Merger and its Implications for Exon-Florio and CFIUS*, 17 IND. INT'L & COMP. L. REV. 155, 158 (2007) (quoting JAMES K. JACKSON, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT, 3 (2005)(internal quotation marks omitted)).

59. *See infra* Part V for a discussion of the foreign investment review process in the United States.

60. Schneider, *supra* note 28, at 269.

61. *Id.*

62. *Id.* at 280.

63. *Id.*

64. *Landmark Anti-Monopoly Law Passed*, CHINA DAILY, Aug. 31, 2007, http://www.chinadaily.com.cn/china/2007-08/31/content_6070127.htm.

65. Bruce M. Owens, Su Sun & Wentong Zheng, *Antitrust in China: The Problem of*

exists for several other industries, including electricity, petroleum, banking, insurance, railroads, and aviation.[66] In order to determine if an industry is susceptible to national security reviews, investors should first determine if there is a dominant SOE in that sector and whether the government has an incentive to protect the SOE from outside competition.

But not all industries containing a SOE are considered integral to national security, nor will the SOEs in security-related fields be protected forever under the current system. By both regulating an industry and holding an active role in the industry through the SOEs, the Chinese government "plays a double role; it is both the owner of the major players and the referee."[67] The government realizes that "this dual role is now seen as detrimental to the development of China's market economy,"[68] and it has therefore taken steps to reduce the amount of SOE control in many industries. The government has begun to "retreat from the 'non-essential' industries such as machinery, electronics, chemicals, and textiles. Those industries do not tend to . . . impinge upon national security."[69] This demonstrates that in non-security related industries containing SOEs, the government is open to new competition from foreign investors. Even in industries that do have national security implications, the government has taken steps to "establish separate regulatory agencies for the key industries and to strip the SOEs in those industries of the regulatory power bestowed upon them in the planned-economy era. In so doing, the Chinese government hopes to separate the government's functions as a player and as a regulator."[70] By separating its roles in these security-related sectors, the government is acknowledging that new players are likely to enter the market in the future and need to be treated as equals to the SOEs. Since many of the new players in these industries tend to be foreign firms attempting to enter the economy, these actions demonstrate the government's willingness to accept foreign competition even in security-related sectors.

The international concern surrounding China's lack of a clear definition for "national security" under Article 31 of the new antitrust law is largely based on China's past, and does not take into account the current economic landscape of the country. Comparing the law to previous regulations indicates that the industries that will be affected are fairly identifiable and consistent with international norms. Assuming that Chinese regulatory officials apply the new law according to international standards (and their own previous standards), it is likely that foreign investors will be able to identify whether their proposed merger or acquisition will be subject to the heightened level of review. Furthermore, even if the law is used to shift China towards economic protectionism due to national security in certain industries, most free trade

---

Incentive Compatibility, 1 J. COMPETITION L. & ECON. 123, 129 (2005).

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 129-30.

agreements allow this sort of activity on a limited basis.

III. INTERNATIONAL FREE TRADE AGREEMENTS AND NATIONAL SECURITY EXCEPTIONS

Among the prominent international free trade agreements, there are several exceptions that allow member nations to legally deny foreign investment in sectors they deem integral to national security. For example, the WTO, of which China became a member in 2001, allows for national security exceptions to free trade in several sectors.[71] Similarly, the ASEAN, which China is closely associated with, though not a member of, gives member nations the right to deny the free flow of goods and services if it negatively affects national security.[72] Even the European Union (EU) and the North American Free Trade Agreement (NAFTA) give member states the ability to deny foreign investment based on national security concerns.[73] In light of these common exceptions to international free trade agreements, China has the right to follow international norms and review foreign investment based on national security.

A. The World Trade Organization

The WTO agreements contain several provisions allowing member states to deny foreign investment due to national security interests. Under Article XIV (General Exceptions) of the General Agreement to Trade in Services of the WTO, a member state may prevent foreign investment if it threatens the health, safety, or national security of its citizens.[74] The exception reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

---

71. *See infra* Part III.A.

72. US-ASEAN Bus. Council, *The ASEAN Free Trade Area and Other Areas of ASEAN Cooperation*, http://www.us-asean.org/afta.asp (last visited Nov. 30, 2008) [hereinafter ASEAN].

73. *See infra* Part III.C.

74. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. XIV, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 108 Stat. 4809, 1869 U.N.T.S. 183 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

> (a) necessary to protect public morals or to maintain public order;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:... (iii) safety.[75]

Furthermore, Article XIV gives specific exceptions for national security situations:

> Article XIV bis - Security Exceptions: 1. Nothing in this Agreement shall be construed:
>
> (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
>
> (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[76]

Several other WTO provisions also contain exceptions allowing member states to take action that may be contrary to free trade in order to maintain national security. For example, Article XXIII, section 2 of the Agreement on Government Procurement provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or

75. *Id.*
76. *Id.* art. XIV *bis*.

> unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety . . . .[77]

The inclusion of these exceptions in several different areas of the WTO agreements demonstrates that the international community is committed to preserving national security at the expense of free trade. In order for free trade to prosper, the security of each nation must first be guaranteed. Article 31 of the Chinese antitrust law is, as currently written, in harmony with these WTO provisions. Article 31 gives the Chinese government the right to review foreign investment for national security threats in the same way that the WTO provisions allow member nations to deny international trade if it negatively harms national security.

B. The Association of Southeast Asian Nations

Similarly, ASEAN member nations have the ability to reject foreign investment due to national security concerns. Under the Association's "General Exceptions" clause, any member may reject the free flow of goods which "a country deems necessary for the protection of national security, public morals, the protection of human, animal or plant life and health, and protection of articles of artistic, historic, or archaeological value."[78] Although China is not currently a member of the ASEAN free trade agreement, it is a member of the "ASEAN Plus Three" economic group, which includes the ASEAN nations plus China, Japan, and South Korea.[79] The group was created to extend economic cooperation between the ASEAN nations and the other large economies of Asia.[80] If China were to become a full member of the ASEAN economic free trade zone, Article 31 of the new antitrust law would also be in harmony with the national security exceptions found in the ASEAN guidelines.

C. The European Union and North American Free Trade Agreement

Many of the prominent international free trade agreements which China is not party to also allow national security exceptions to foreign investment. The EU, for example, allows its Member States to apply merger and acquisition

---

77. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Agreement on Government Procurement, Annex 4(b), art. XXIII section 2 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf.

78 ASEAN, *supra* note 72.

79. ASSOCIATION OF SOUTH EAST ASIAN NATIONS, ASEAN PLUS THREE COOPERATION, ¶ 1, http://www.aseansec.org/16580.htm (last visited Nov. 30, 2008).

80. *Id.* ¶ 2.

regulations in order to protect national or public security interests.[81] Under these antitrust regulations, members of the EU may "take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law."[82] The regulation further explains that "[p]ublic security, plurality of the media and prudential rules shall be regarded as legitimate interests . . . ."[83] Member States also have the ability to apply these national security exceptions to other areas of interest or industries if they first report the application to the European Commission for approval.[84] The regulations state that "[a]ny other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures . . . may be taken."[85] Once again, the national security interests of each Member State are preserved through the regulation of foreign mergers and acquisitions.

Similar to the ASEAN, EU, and WTO exceptions, NAFTA allows its member nations to deny foreign investments based on national security interests through Article 2102 (National Security Exceptions) of the Agreement. Article 2102 states:

> [N]othing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; [or] (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests.[86]

Article 2102 is referenced throughout the NAFTA provisions as a reasonable exception to many free trade provisions.[87] The inclusion of Article 2102 in the NAFTA provisions further demonstrates that many free trade agreements consider national security exceptions to be an integral part in the overall construction of the agreement.

Free trade agreements are an essential tool of an integrated global economy.[88] They help to open borders and make trade possible between many

---

81. Council Regulation 139/2004, On the Control of Concentrations Between Undertakings (the EC Merger Regulation), art. 21(4), 2004 O.J. (L 24) 17 [hereinafter EU Merger Regulation].

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. North American Free Trade Agreement, U.S.-Can.-Mex., art. 2102, Dec. 17, 1992, 32 I.L.M. 289, 605 [hereinafter NAFTA].

87. *See generally id.*

88. *See generally* Export.gov, U.S. Free Trade Agreements, http://www.export.gov/fta/ (last visited Nov. 30, 2008).

nations.[89] However, before any nation is willing to enter into a free trade agreement with other nations, it must first be assured that its national security will not be threatened by the influx of foreign goods, services, and investment. Therefore, it is proper that free trade agreements include some type of provision allowing member nations the right to take action when necessary to protect security interests. The WTO, ASEAN, EU and NAFTA agreements have all taken note of this and have provided national security exceptions to the free trade blocs they establish. Article 31 of China's antitrust law also takes note of this national security requirement and gives the Chinese government the ability to exercise its right to protect national security under its own free trade obligations. Article 31 might initially be startling due to protectionist implications and China's history with isolationism, but on its face, it is in harmony with the prominent international trade agreements concerning this issue. Furthermore, China is not the only nation taking advantage of the national security exception found in many of these free trade agreements.

IV. INTERNATIONAL EXAMPLES OF ECONOMIC PROTECTIONISM AND NATIONAL SECURITY

Similar to Article 31 of the Chinese antitrust law, many nations reserve the right to deny foreign mergers or acquisitions of important domestic assets based on national security concerns.[90] The industries considered integral to national security, however, vary widely depending on each individual nation's interests.[91] The industries usually affected by this exception tend to be the typical energy and defense sectors,[92] but other non-traditional economic "crown jewels" may also be protected for national security concerns.[93] Regardless of the industry chosen to be insulated from foreign competition, it is common practice in the global economy for nations to protect certain domestic assets from foreign investors.

A. Governmental Oversight and Procedure

Several nations have set up specific procedures and permanent governmental entities to review bids by foreign companies seeking to gain an interest in domestic assets.[94] These entities can be seen in many of the major European economic powers.

---

89. *Id.*

90. *E.g.* Sud, *supra* note 14, at 1313 (noting that many countries restrict commercial ventures, and discussing Japan's national security restrictions in particular).

91. Hon. Pamela Jones Harbour, *Developments in Competition Law in the European Union and the United States: Harmony and Conflict*, 19-SPG INT'L L. PRACTICUM 3, 5 (2006).

92. *See id.*

93. *Cf.* Editorial, *Takeover Bids by State-Owned Firms*, GLOBE AND MAIL, Oct. 12, 2007, at A26. [hereinafter *Takeover Bids*].

94. Sud, *supra* note 14, at 1312-13.

The Panel on Takeovers and Mergers ("The Panel") reviews foreign takeover bids in the United Kingdom for possible national security risks.[95] The Panel reviews each case based on the statutes set out in the City Code on Takeovers and Mergers.[96]

Similarly, "Germany and Austria . . . have developed a . . . system of takeover regulation, whereby entities exist both in and out of the government to ensure that [foreign] companies are complying with statutory laws, and more significantly, that those companies meet investment approval standards."[97] Case in point:

> [I]n Germany several years ago, the *Bundeskartellamt* decided to prohibit the proposed merger of E.on and Ruhrgas. The parties, however, persuaded the German Economics Ministry to use the authority reserved to it in Germany's competition law to override the decision of the *Bundeskartellamt* and allow the merger to be consummated.[98]

France also requires a review by the Treasury Department of the French Ministry of Economics and Finance if a merger or acquisition results in foreign ownership of twenty-percent or more of a domestic company.[99]

This trend is not limited to European nations. When Japan first developed a review system for foreign investment under their antitrust laws, many international observers believed it was an attempt to isolate Japan from the world economy.[100] However, the Japanese government demonstrated in practice that the measures were not meant to isolate Japan; rather, the regulations were there to protect its legitimate security interests. Japan now requires all foreign investments in domestic assets to be referred to the Committee on Foreign Exchange and Other Transactions for recommendations on various matters, including whether the transaction affects national security.[101] Similarly, the Reserve Bank of India is charged with the regulation of foreign investment in domestic assets.[102] Foreign transactions will only be permitted in India if the Bank first deems those actions to be within the overall national interest.[103]

Canada has also moved towards requiring more stringent governmental

---

95. *Id.* at 1312.
96. *Id.*
97. *Id.*
98. Jones Harbour, *supra* note 91.
99. Sud, *supra* note 14, at 1312-13.
100. *See generally* Alex Y. Seita & Jiro Tamura, *The Historical Background of Japan's Antimonopoly Law*, 1994 U. ILL. L. REV. 115 (1994).
101. Sud, *supra* note 14, at 1313.
102. *Id.* at 1314.
103. *Id.*

oversight in foreign investment.[104] For many years, Canada was one of the few nations that did not screen foreign investment based on national security concerns.[105] However, Canadian citizens became increasingly concerned with the buying power of large state-owned enterprises and investment pools from countries with questionable relationships with Canada.[106] Specifically at issue was the substantial buying power of sovereign funds from the Middle East and other oil exporting nations. This caused Prime Minister Stephen Harper to assert that national security should be a consideration for reviewing foreign investment, but cautioned against its use as a tool of economic protectionism.[107] Canada already has a system in place for reviewing foreign investments in domestic companies under the Investment Canada Act (ICA) of 1985, but the Act does not include a national security component to its review process.[108] This almost changed in 2005, when the state-owned China Minmetals Corporation attempted to acquire the domestic Canadian mineral company Noranda, Inc.[109] The takeover bid was later dropped, but the bid led to a proposed amendment to the ICA by liberal members of government in order to ensure its ability to review and block foreign transactions based on national security concerns.[110] The liberal government members were defeated before they were able to pass the amendment, but as Prime Minister Harper indicated, it appears that national security will now be considered by the conservative government as a viable reason for reviewing foreign investment in the country.[111]

In summary, the Chinese government is not alone in its attempt to set up a regulatory system that will subject foreign investors to a heightened level of review in industries related to national security. Article 31 of the antitrust law seems to embody a universal concern that most governments have for protecting the national security interests of their nation as they face an increasingly global economy. This sense of concern may be well-founded when it is applied to the typical industries, such as energy or national defense, but is decidedly questionable when applied to other, non-traditional industries.

B. Examples of Protected Industries from around the Globe

Throughout the world, nations have chosen to insulate a myriad of industries and companies from foreign ownership using national security as the

---

104. *See Takeover Bids*, *supra* note 93.

105. *Id.*

106. *Id.*

107. *Id.*

108. Investment Canada Act, R.S.C., ch. I-21.8, part IV (1985) (1st Supp.), *available at* http://strategies.ic.gc.ca/epic/site/ica-lic.nsf/en/h_lk00071e.html.

109. Marcela B. Stras et al., *International Legal Developments in Review: 2006*, 41 INT'L LAW. 749, 756 (2007).

110. *Id.*

111. *Id.*

justification for doing so.[112] Among the protected industries, some general themes develop as to the types of companies that are typically affected.[113] However, specific industries considered worthy of protection differ depending on the nation and its national security needs.

For example, Australia maintains strict protectionist policies on its telecommunications sector.[114] Many international observers believe that "[a]mong telecommunications sectors in English-speaking nations, Australia's restrictions are the most stringent."[115] The country places restrictions on the ability of foreigners to own dominant telecommunication carriers.[116] Under these regulations, the majority of the board of directors in any telecommunications company, including the chairman, must be Australian citizens.[117] Furthermore, the Australian government has placed restrictions on foreign ownership in urban land, banking, aviation, airports, and shipping.[118] Although these regulations are somewhat stricter than most common-wealth nations, they still concern industries that are typically affected by national security exceptions to free trade.

Foreign investment restrictions are not limited to typical national security industries. Several nations also limit foreign ownership in less traditional economic sectors and businesses. The nations view these sectors as integral to the livelihood of the nation as a whole, and therefore worthy of national security protection. France, for example, has identified the domestic food and beverage company Danone to be a "national treasure" worthy of protection, and therefore has denied mergers or acquisitions of the company from international investors such as Pepsico.[119] Similarly, Iceland has "a complete ban of foreign ownership in its fishing [industry]" due to the country's reliance on that industry as a significant source of employment and income.[120] Although these industries would hardly be considered "integral to national security" by most international standards, they are important enough to warrant protectionist policies by their home nations.

Although Article 31 of the new Chinese antitrust law has the potential of being applied to a wide variety of industries, the inclusion of non-security related industries in the list of exceptions still seems to be somewhat within international norms. As shown through previous examples, many western and economically "open" nations have chosen to protect domestic industries in ways that are not always in harmony with international standards of free trade. Of course, these practices need to be kept in check if the major free trade

112. Mamounas, *supra* note 18, at 402.
113. *See supra* Part II.
114. Mamounas, *supra* note 18, at 402.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. Harbour, *supra* note 91, at 5.
120. Mamounas, *supra* note 18, at 402.

agreements are going to succeed; however, some leeway should be granted to the Chinese government if it initially chooses to apply Article 31 to non-traditional sectors. As demonstrated below, even the United States, considered to be the most open and free market in the world, has followed recent international examples and has moved towards a policy of economic protectionism based on national security concerns.

V. NATIONAL SECURITY AND THE MOVE TOWARDS ECONOMIC PROTECTIONISM IN THE UNITED STATES

A. *The History of Foreign Investment Review in the United States*

Traditionally, the U.S. government has had a very limited ability to review foreign investment in domestic assets due to national security reasons.[121] In order for the President to deny foreigners their equal property rights in domestic assets, a national state of emergency had to be declared.[122] This was the case until 1975, when President Gerald Ford created the Committee on Foreign Investments in the United States (CFIUS) and gave it the responsibility of "monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy in such investment."[123] The committee's principal duty was to gather information for the executive branch about the possible effects of foreign investment in certain domestic enterprises on national security.[124] The creation of this committee was a direct reaction to the increased international investment capabilities of members of the Organization of Petroleum Exporting Countries (OPEC).[125] The increased spending abilities of these nations were seen as a security threat to domestic U.S. companies, specifically in the oil and defense sectors.[126] However, neither CFIUS nor the President had the statutory ability to reject foreign investment if it threatened the national security of the United States.[127]

This lack of ability to take any meaningful action led to the Exon-Florio Amendments of the Omnibus Trade and Competitiveness Act in 1988, which gave the President the power to both investigate and block foreign investments that might threaten national security.[128] The Exon-Florio Amendment was a

121. Casselman, *supra* note 58, at 157.

122. *Id.*

123. Sud, *supra* note 14, at 1315 (quoting *Foreign Investment on U.S.: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs* (2005) (statement of Patrick A. Mulloy, Member, U.S.-China Economic Security Review Commission)).

124. Sud, *supra* note 14, at 1315.

125. *Id.*

126. *Id.*

127. *Id.*

128. Mamounas, *supra* note 18, at 388.

direct reaction to the government's fear that Japanese acquisition of domestic assets would negatively affect the security of the nation.[129] The President delegated his investigative responsibilities under Exon-Florio to CFIUS.[130]

The original Exon-Florio Amendments contained a four-step process for analyzing and denying foreign investment in U.S. companies:

> (1) voluntary notice by the companies [of the investment activity], (2) a 30-day review to identify whether there are any national security concerns, (3) a 45-day investigation to determine whether those concerns require a recommendation to the President for possible action, and (4) a Presidential decision to permit, suspend, or prohibit the acquisition.[131]

Foreign companies had the ability to forego the review if they deemed their activity to be outside the scope of a national security review, but to do so would subject the company to indefinite Presidential review if it was later determined that the transaction had negative implications.[132] There were many factors the committee considered when conducting a national security review, including:

> (1) domestic production needed for projected national defense requirements, (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies or services, (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security, . . . (5)the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security.[133]

If CFIUS determined that there was "[1] credible evidence . . . to believe that a foreign controlling interest might take action that threatens to impair national security and (2) laws other than Exon-Florio . . . are inadequate or inappropriate to protect national security," then the President had the authority to prohibit the transaction.[134] The President had to provide a written report

---

129. Casselman, *supra* note 58, at 157.

130. Sud, *supra* note 14, at 1316.

131. *Id.*

132. *Id.*

133. Mamounas, *supra* note 18, at 389-90.

134. Sud, *supra* note 14, at 1316. (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS 1, 9-10 (Sept. 2005) [hereinafter GAO REPORT]).

listing the reasons for the denial of the merger or acquisition, but the decision was not judicially reviewable.[135] However, the President could block an action if: "(1) the Committee has informed the companies in writing that their acquisition was not subject to Exon-Florio or had previously decided to forego investigation, or (2) the President has previously decided not to act on that specific acquisition under Exon-Florio."[136]

More importantly, the Exon-Florio Amendments did not explicitly define the term "national security" anywhere in the legislation.[137] The only guidelines the legislation gave concerning the type of industries that should be reviewed were "companies providing technology to the military or to the defense industrial base."[138] The Amendment also gave some indication as to the economic activity that would not need to be reviewed for national security concerns, including "acquisitions of businesses in industries having 'no special relation to national security.'"[139] The regulations cite various examples of items that would not give rise to national security concerns, such as toys, games, hotels, food products, and legal services.[140] The term "national security" was intentionally left undefined so that it could be "interpreted broadly without limitation to a particular industry."[141] The Department of Treasury, which has responsibility for application of Exon-Florio, has rejected any proposals that give a clearer or more definitive definition to "national security" in the legislation.[142] This is not unlike the strategy taken by the Chinese government in its decision to leave "national security" undefined in Article 31 of the new antitrust law.

In 1993, the United States amended Exon-Florio through the 1993 Defense Authorization Act, an amendment known as the Byrd Amendment.[143] The Byrd Amendment made three significant changes to Exon-Florio. The amendment first requires:

> a separate review process focused on national origin, which used a lower threshold requirement and more ambiguous wording in order to permit greater inclusiveness in conducting reviews. Secondly . . . by requiring evaluation of the potential effects of a transaction, 'expanded the scope of national security factors for consideration, laying the foundation for the consideration of third-party transactions.' Finally, the Byrd

135. Mamounas, *supra* note 18, at 389-90.

136. Sud, *supra* note 14, at 1317 (*quoting* GAO Report, *supra* note 134, at 10).

137. *Id.*

138. *Id.* at 1318 (quoting Eric Simonson, *Specialized Areas of Concern in Acquisition Transactions*, *in* A GUIDE TO MERGERS & ACQUISITIONS 243, 262 (2006).

139. *Id.* (quoting Simonson, *supra* note 138).

140. *Id.*

141. Casselman, *supra* note 58, at 157 (quoting JACKSON, *supra* note 58, at 2).

142. Mamounas, *supra* note 18, at 391.

143. *Id.* at 390.

> Amendment requires an immediate report to Congress whether or not action is taken following an investigation, as well as a Quadrennial Report detailing any credible evidence of either industrial espionage or a coordinated attempt by either foreign countries or companies to usurp American control over leading sectors of technology.[144]

The amendment changed some of the transparency issues with Exon-Florio and broadened its potential application, but did not significantly alter the definition of "national security" or the industries to which it can be applied.[145]

Since the creation of CFIUS and the Exon-Florio Amendment, only one foreign investment has been officially blocked by the President. Twenty-five cases have passed into full investigation, and of those cases only twelve were sent to the President for a decision.[146] Of the twelve cases sent to the President, only one has been rejected due to national security implications. In 1990, President George H. W. Bush ordered the China National Aero-Technology Import and Export Corporation to sell its interest in Mamco Manufacturing.[147] However, "the practical effect of Exon-Florio is that foreign entities have voluntarily withdrawn bids to avoid a full CFIUS investigation much more frequently than they have been prohibited from acquiring U.S. companies .... [The national security review process can] persuade foreign entities to restructure the terms of the acquisition in ways that address CFIUS's security concerns."[148] Therefore, although the power given to the President and CFIUS has been exercised infrequently, the mere threat of a review has led a large number of foreign investors to either withdraw their bids or restructure their offers.

B. Recent Legislative Developments in the United States concerning Foreign Investment and National Security

The United States government, through CFIUS, has not officially blocked a foreign merger or acquisition since the early 1990s;[149] however, political pressure from Congress and the American public has effectively denied two recent foreign acquisitions due to national security concerns.[150] It has also led to the passage of the Foreign Investment and National Securities Act of 2007 (FINSA), which strengthens the federal government's ability to deny foreign

144. *Id.* (quoting Christopher R. Fenton, Note, *U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195, 208 (2002)).

145. *Id.*

146. Casselman, *supra* note 58, at 159-60.

147. Mamounas, *supra* note 18, at 393.

148. Casselman, *supra* note 58, at 160-61.

149. *See supra* Part I.

150. Casselman, *supra* note 58, at 160-61.

investment in the United States.[151] These measures have increasingly pushed the United States towards economic isolationism in industries related to national security.

i. CNOOC-Unocal Bid

In June of 2005, the Chinese National Offshore Oil Corporation (CNOOC) placed an unsolicited bid of $18.5 billion to buy the American oil company Unocal.[152] CNOOC was a State-Owned Enterprise of the People's Republic of China, and the bid to buy Unocal was being funded in large part by the State Central Bank and the Chinese government itself.[153] After the bid was announced, forty-one members of the United States Congress urged CFIUS to review the takeover bid for national security implications in the energy sector.[154] The Congressional members were "very concerned about China's ongoing and proposed acquisition of energy assets around the world, including those in US [sic]."[155] Congress then passed House Resolution 344,[156] which came to two significant conclusions concerning the takeover bid:

> (1) the Chinese state-owned China National Offshore Oil Corporation, through control of Unocal Corporation obtained by the proposed acquisition, merger or takeover of Unocal Corporation, could take action that would threaten to impair the national security of the United States; and (2) if Unocal Corporation enters into an agreement of acquisition, merger, or takeover of Unocal Corporation by [CNOOC], the President should initiate immediately a thorough review of the proposed acquisition, merger, or takeover.[157]

The Chinese government was extremely critical of the measure, saying it was an unnatural interference with legitimate international trade.[158]

The President chose not to take any significant action on the proposed merger, likely concerned that it would strain Sino-American relations.[159] However, the Congressional uproar caused by the CNOOC bid had the effect of dissuading the Chinese from entering into such a politically charged

---

151. Jonathan C. Stagg, Note, *Scrutinizing Foreign Investment: How Much Congressional Involvement is too Much?*, 93 IOWA L. REV. 325, 347 (2007).

152. Mamounas, *supra* note 18, at 403.

153. *Id.*

154. *Id.* at 404.

155. *Id.* (quoting John Chan, *China's Bid for Unocal Heightens Tension with the US*, World Socialist Website (July 6, 2005), http://www.wsws.org/articles/2005/jul2005/chin-j06.shtml).

156. H. R. Res. 344, 109th Cong. (2005).

157. Mamounas, *supra* note 18, at 405 (referencing H. R. Res. 344, *supra* note 157).

158. Mamounas, *supra* note 18, at 406.

159. *Id.* at 408.

acquisition. On August 2, 2005, CNOOC withdrew its bid for Unocal and sought oil-related acquisitions elsewhere.[160] Although the foreign acquisition was not officially denied by CFIUS, the political climate surrounding the bid was enough to initiate an economic protectionist outcome based on national security concerns.

ii. Dubai Ports World Acquisition

Similar to the CNOOC bid, national security concerns caused another foreign investment in domestic assets to be effectively denied when the proposed acquisition of Peninsular & Oriental Steam Navigation Company by Dubai Ports World, a company owned by the Dubai government, led to Congressional uproar.[161] In 2005, Dubai Ports World entered into an agreement to buy P&O, a London-based company, which ran port operations in six United States ports.[162] After a preliminary investigation, CFIUS found that the deal did not threaten national security interests, and unanimously agreed to allow the transaction to proceed.[163] Congress then became concerned that a thorough review had not been conducted and prompted Dubai Ports World to resubmit the acquisition for review.[164] Critics of the deal were concerned that although the UAE's government is pro-United States in its policies, many of the 9/11 hijackers used the UAE as an operational and financial base before the attack.[165] Supporters of the proposed acquisition, including the Bush administration, pointed to the fact that Dubai Ports World would not be in charge of any port security duties as a result of the acquisition.[166] While the second CFIUS review was still in progress, Dubai Ports World responded to the strong negative reactions by restructuring its bid for P&O and agreeing to sell the operations of all U.S. ports to a U.S. company.[167] Once again, protectionist assertions in the United States effectively blocked a foreign acquisition due to national security concerns.

iii. Recent Legislative Developments

The CNOOC and Dubai Ports World events led to several legislative reactions that have changed the landscape of foreign investment in the United States. Most significantly, it led to the passage of FINSA. "FINSA is a broad, sweeping revision of Exon-Florio that leaves very little of the former language

160. Casselman, *supra* note 58, at 164.

161. Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 606-07 (2007).

162. *Id.* at 606.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 607.

167. *Id.*

intact."[168] It changes the process and time frame by which reviews are conducted by CFIUS.[169] It also clarifies which transactions the statute is applicable to, and includes additional factors that may be considered in an investigation.[170] These factors include "whether the transaction has a security-related impact on critical infrastructure and critical technologies and whether it is a foreign-government-controlled transaction."[171] CFIUS may also consider any additional factors it deems appropriate, which is a much broader power of review than CFIUS previously held under Exon-Florio.[172]

FINSA also changed CFIUS by adding more members to the committee, including the Director of National Intelligence, and allowing CFIUS to conduct investigations without prior voluntary submission (Exon-Florio required companies to submit for review to CFIUS voluntarily).[173] "If a foreign government controls the acquirer, as with the Dubai and UNOCAL transactions, the acquisition will attract a review, as will deals involving critical US [sic] infrastructure such as the proposed ports acquisitions, significant energy assets, or critical technology."[174] Finally, FINSA also allows CFIUS to place conditions on the proposed acquisition that need to be met before the transaction will be allowed to proceed.[175] This allows CFIUS to restructure acquisition agreements to the benefit of all parties involved, without denying the deal as a whole due to a small national security risk.[176]

Many critics believe FINSA reaches too far with its additional provisions and borderlines on economic isolationism.[177] "FINSA's most significant effect is to politicize the area of foreign investment due to its dramatically increased congressional-reporting requirements."[178] Several members of Congress, including the House Speaker, Majority and Minority leaders, Chairpersons of the Banking, Housing, Urban Affairs, and Financial Services Committees, and other Congressional leaders will all have access to confidential corporate documents during the review.[179] This level of accessibility to sensitive materials will inevitably lead to information leaks, special-interest jockeying, and other highly political effects that previously did not influence most foreign

168. Stagg, *supra* note 151, at 345.
169. *Id.*
170. *Id.*
171. *Id.* at 347.
172. *Id.* at 347-48.
173. Robert A. McTamaney, *Dealmakers Face Regulatory Hurdles for Cross-Border Deals: Exon-Florio Amended to Increase Scrutiny of Foreign Investment in the US*, INVESTMENT DEALERS' DIGEST, Sept. 24, 2007, *available at* http://www.clm.com/docs/idd09242007.pdf.
174. *Id.*
175. Stagg, *supra* note 151, at 349.
176. *Id.*
177. *Id.* at 352.
178. *Id.*
179. *Id.*

investment in the United States.[180] It could also lead to political upheaval and denial of non-security related foreign investments based purely on patriotic hubris. For example, "[w]hen the Japanese bought Rockefeller Plaza in 1989, there was an outcry based on the perceived inappropriateness of a foreign owner taking over a beloved American landmark. But aside from hurt pride at loss of ownership, Americans had no real reason to dispute the soundness of that business decision."[181]

VI. RECOMMENDATIONS

The analysis of foreign investment and national security under China's new antitrust law leads to several recommendations for parties on all sides of the issue. These recommendations include suggestions for the Chinese government as it begins to implement the national security provision, ideas for companies looking to invest in China that may be worried about the new law, and warnings to CFIUS and the United States government as it implements its own national security provisions for foreign investment.

A. China

It is extremely important for the NPC to quickly develop and expand the administrative regulations associated with Article 31 of the new antitrust law. Administrative duties need to be delegated to the State organization that will supervise the implementation of this law. That organization must draft specific guidelines that will give foreign investors an idea as to types of industries that will be affected by the law. At the very least, the term "national security" needs to be defined so foreign investors can assess whether their proposed merger or acquisition will be subject to the new law. The government must avoid the temptation to define the law too broadly to include industries outside traditional security-related sectors. Defining the law broadly will allow the government some flexibility in its application, but will also create more uncertainty among foreign investors. The definition must be sufficiently clear and describe the industries that will most certainly be affected, as well as the industries that will not be affected. This will help assuage the fears of foreign investors that their transaction might be arbitrarily blocked by corrupt government officials. Regardless of the protectionist policies of other nations, including the United States, the Chinese economy will best be served by establishing a clear definition of "national security" under Article 31.

Second, China needs to keep its market open to foreign investors in order to sustain the growth of its economy.[182] The Chinese market is still relatively young and does not have the amount of domestic capital needed for continued

180. *Id.* at 353.
181. Mostaghel, *supra* note 161, at 609.
182. Schneider, *supra* note 28, at 287.

long-term growth.[183] The capital infusion it receives from foreign investors is what is driving most of the growth that would otherwise be outside the reach of domestic investors.[184] Foreign investment also brings new technology and management experience to the immature market.[185] Without the technology and managerial know-how, many Chinese industries would fall behind their global competitors in terms of productivity and quality of the products they offer.[186] This is especially apparent in highly technical sectors, such as banking and financials.[187] Therefore, in order to preserve the astounding growth the Chinese economy has achieved in recent years, the government needs to understand the main factors that are driving most of that growth: foreign investors.

Furthermore, the NPC needs to limit the amount of corruption within the ranks of the state organization overseeing the application of Article 31. It is well known that corruption is a major roadblock to progress within the Chinese government.[188] Many state officials have proven in the past to be susceptible to favoritism and bribery.[189] If this corruption is not controlled, it will have a significant impact on the ability of foreign investors to enter the Chinese economy. Corrupt officials could be persuaded to use the law to arbitrarily block foreign competition in the domestic economy at the behest of domestic enterprises. This would be detrimental to both foreign investors and the Chinese economy. China has greatly benefited from an influx of foreign investment in recent years,[190] and any artificial obstructions to this investment would only serve to hamper the continued growth of the economy.[191] It is in the best interest of the PRC to keep corruption at a minimum in any circumstance, but a complex global market requires special attention to this matter.

B. Foreign Investors

Foreign investors looking to expand into China should consider whether their business has a substantial influence on industries that are typically affected by national security laws. As described previously,[192] these industries tend to

183. *Id.*
184. *Id.*
185. *Id.* at 283.
186. *Id.*
187. *Id.*
188. Edward Cody, *China Cracks Down on Corruption*, WASH. POST, Feb. 15, 2006, at A18, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/14/AR2006021400672.html.
189. *Id.*
190. Anil Kumar, *Does Foreign Direct Investment Help Emerging Economies?*, 2 ECONOMIC LETTER 1, Jan. 2007, *available at* http://www.dallasfed.org/research/eclett/2007/el0701.html.
191. *Id.*
192. *See supra* Part II.

be related to national defense, energy, hazardous chemicals, and telecommunications. As long as the NPC chooses to apply its competition law in accordance with international standards, and keeps corruption to a minimum, these sectors should be fairly identifiable. It is important to monitor the developments in state regulatory agencies to see how the law is being applied. Furthermore, since a large part of the Chinese antitrust law has been adopted from other major anti-monopoly doctrines around the world,[193] foreign investors should first consider whether their merger or acquisition would raise national security questions under those systems of anti-monopoly law.[194] If the takeover were to raise a red flag in the United States or the European Union for antitrust violations, then it is also likely that the Chinese government will subject the transaction to a national security review.

C. *United States*

Finally, the United States government needs to tread carefully as it applies its new powers under FINSA. In an increasingly globalized economy, there are going to be many situations where foreign companies will be looking to acquire domestic U.S. companies that may never have been under foreign ownership. This is especially apparent given the weakening of the dollar compared to many foreign currencies.[195] A weak dollar puts many U.S. companies "on sale" in the eyes of foreign competitors.[196] This is a reality of the emerging global economy. Therefore, it is imperative that CFIUS and Congress exercise its power to block foreign acquisitions only when it has a truly detrimental effect on national security. Anything short of this will be perceived by the international community as an arbitrary interference with global trade. These interferences should be carefully considered due to the potential for economic retaliation by other nations. For example, it is not clear how China will choose to respond to the CNOOC-Unocal event, but it is most likely going to hamper the ability of any U.S. company seeking to acquire a Chinese energy firm in the future. Why should the Chinese government allow a U.S. company to do what the U.S. government did not allow the Chinese to do? It is also possible that this impediment to foreign acquisition will play itself out in other, non-energy related sectors of the Chinese economy.

The broadening of these national security exceptions is not limited to China either. There are already some indications that CFIUS is applying FINSA to a much broader range of industries than ever before: "CFIUS is treating acquisitions of infrastructure, such as oil refineries and toll roads, which would

193. Nathan Bush, *Anticipating Chinese Antitrust Policy*, 35 CHINA BUS. REV. 1, 2008 WLNR 1296406, at 1.

194. *Id.* at 5.

195. Tom Fenton, *The Dollar's Decline Does Matter*, CBS NEWS, Dec. 6, 2004 http://www.cbsnews.com/stories/2004/12/06/opinion/fenton/main659179.shtml.

196. *Weak Dollar Draws Investors*, BALTIMORE SUN, Jan. 8, 2008, *available at* http://www.baltimoresun.com/business/investing/bal-bz.buyouts08jan08,0,6765543.story.

not have even been notified for screening in the past, as having national security importance."[197] If the application continues to broaden into other non-security related industries, there will almost certainly be a backlash from other nations, including China. Therefore, it is extremely important that Congress, CFIUS, and the U.S. government apply FINSA carefully. An increase in governmental interference with the global economy in the name of "national security" will ultimately make it more difficult for domestic companies to acquire foreign assets and enter new markets.

It is possible for Article 31 of the new Chinese antitrust law to be integrated into the global economy quickly and seamlessly. For this to occur, the Chinese government will need to define and implement the law in accordance with international standards. Furthermore, foreign investors need to determine whether their proposed merger or acquisition could have an adverse affect on China's national security in light of recent examples from around the world. Finally, in order to ensure that Article 31 is not arbitrarily applied to U.S. companies, the U.S. government needs to carefully apply its own foreign investment regulations so as to keep retaliation by the Chinese government to a minimum.

VII. CONCLUSION

Article 31 of the Chinese antitrust law is not something to be feared by the international business community. On its face, it may look like an attempt by the NPC to legalize economic protectionism in the burgeoning Chinese economy. However, when compared to international standards on the subject, it does not deviate from the norm. Throughout the world, economic isolationism is accepted in small amounts so as to protect the national security interests of the nation. Most major international trade agreements allow for these national security exceptions, and many of the largest economies in the global market take advantage of these exceptions to protect certain "crown jewel" industries. This may not be the most advantageous model for the developing global economy, but nevertheless it is the international standard and should be applied equally to all nations. Therefore, Article 31, as it is written, is in accordance with global standards and should be viewed as such, until the Chinese government gives the international community reason to believe otherwise.

197. Clark & Wang, *supra* note 49, at 4.