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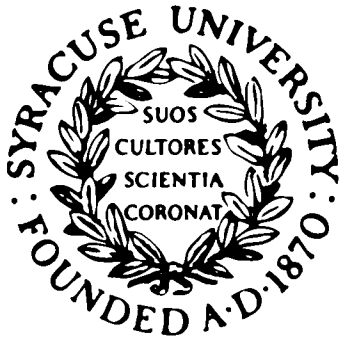

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CONFRONTING THE BEHEMOTH: CHINA, HUMAN RIGHTS, AND THE UNITED NATIONS.

Matthew J. McCartin[1]

I.INTRODUCTION

Human rights abuses have plagued humanity almost since the beginning of recorded history. In 539 B.C., the first known human rights instrument was drafted when Cyrus the Great conquered Babylon and handed down a series of decrees known as the Cyrus Cylinder,[2] which has since been widely recognized as the first human rights charter in the world.[3] Human society continued to develop other documents that ultimately laid the foundation upon which the modern international human regime would be built. In thirteenth century England, the Magna Carta placed limits on the powers of the government.[4] The United States Declaration of Independence of 1776, and the 1789 French Declaration des droits de l'Homme et de du citoyen, built upon the Magna Carta, and aimed to protect future generations from governmental abuses.[5]

At the Nuremberg Trials of 1945 and 1946, the allied powers brought charges of war crimes and crimes against humanity against

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[1] J.D. Candidate (2022) at Syracuse University College of Law; B.A. in Political Science from Virginia Polytechnic Institute and State University. The Author wishes to thank his parents, Tom and Sharon, his sister, Nicole, and his grandmother, Audrey, for their endless support throughout this process, and life in general. Thanks also to Professor Ian Gallacher, Professor C. Cora True-Frost, and Audrey Bimbi for their helpful comments and assistance. Lastly, thanks to Justin Lange and Sofia Calabrese for their friendship and tireless efforts in editing this Note.

[2] Kimberly Halkett, *The Story behind the Cyrus Cylinder*, AL JAZEERA (Apr. 25, 2013), *available at* https://www.aljazeera.com/features/2013/4/25/the-story-behind-the-cyrus-cylinder (last visited Nov. 14, 2021) (Cyrus the Great, after conquering Babylon, issued a decree that recognized the rights of enslaved and exiled peoples and also recognized religious freedom.).

[3] *See* Sonia Narang, *This 2,600-year-old clay cylinder is bringing tears, and pride, to Iranians in the US*, THE WORLD (Dec. 7, 2013, 9:00 PM), *available at* https://www.pri.org/stories/2013-12-07/2600-year-old-clay-cylinder-bringing-tears-and-pride-iranians (last visited Nov. 14, 2021).

[4] Frans Viljoen, *International Human Rights Law: A Short History*, U.N. CHRON. (n.d.) *available at* https://www.un.org/en/chronicle/article/international-human-rights-law-short-history (last visited Nov. 14, 2021).

[5] *Id.*

several Nazi officials for their involvement in the systematic genocide of the Jews of Europe and other minority groups during the Holocaust. The Nuremberg Trials revolutionized the field of international law through holding individuals, and not just sovereign states, responsible for atrocities committed during wartime.[6]

Contemporaneously with the Nuremberg Trials, fifty nations convened in San Francisco to erect a new international legal order, which culminated in the ratification of the United Nations Charter ("Charter").[7] The "promotion and protection of human rights" was a central motivating factor for the creation of the United Nations,[8] a concept that was enshrined in the preamble to the Charter[9] and the Universal Declaration of Human Rights.[10]

However, the international human rights regime is unable to hold the permanent members of the Security Council ("P5 States") and other powerful nations accountable, while unequally holding poorer states from the Global South, particularly African states, accountable for human rights violations.[11] This contradiction is inherent in the international human rights regime and reinforced through the barring of non-P5 States from amending the Charter without the consent and ratification of the P5 States.[12] Even though P5 States had an influential role in drafting human rights treaties, specifically the Rome Statute, they were not required to ratify such treaties, which has resulted in P5 States functionally writing the rules for others, not themselves.[13]

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[6] *See* Orlando Crowcroft, *Nuremberg trials: 75 years on from the world's first war crimes tribunal*, EURONEWS (Nov. 20, 2020), *available at* https://www.euronews.com/2020/11/20/75-years-ago-the-world-s-first-war-crimes-trial-began-in-nuremberg (last visited Nov. 14, 2021).

[7] *History of the United Nations*, U.N. (n.d.), *available at* https://www.un.org/en/about-us/history-of-the-un (last visited Nov. 14, 2021).

[8] *Protect Human Rights*, U.N. (n.d.), *available at* https://www.un.org/en/our-work/protect-human-rights (last visited Nov. 14, 2021).

[9] *See* U.N. Charter pmbl [hereinafter Charter].

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

[11] *See* Callum Ross, *Selective Justice and Persecution? The African View of the ICC-UNSC Relationship* (Sept. 16, 2018) (unpublished Ph.D. thesis, University of Liverpool) (on file with author) ("The contrast between ICC involvement in African situations and lack of involvement in non-African situations displays what the AU considers a neo-colonial agenda.").

[12] Charter, *supra* note 9.

[13] *See* Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International*

This Note will use the Chinese government's alleged human rights violations in the Inner Mongolia Autonomous Region ("Inner Mongolia"), as well as against the Uyghur Muslims in Xinjiang Autonomous Region ("Xinjiang"), as a proxy to show the identified contradiction in the international human rights regime: the powerful States live by a separate and unequal standard, that is not applied to less powerful States. In other words, the United Nations is not currently a democratic form of governance, but instead is a dictatorship of the minority. This "dual-standard system of international criminal justice" has emerged as the United Nations has matured.[14] As Professor Zolo argues, the major world powers operate under an international justice system that is separate and more forgiving than the justice system for the "defeated and downtrodden."[15]

This Note will also argue that the traditional enforcement methods used by states, namely military intervention and economic sanctions, to address human rights violations and enforce human rights treaties, are ineffective when confronting China's human rights violations. The enforcement of human rights treaties and norms through economic sanctions and military intervention has resulted in the United Nations operating more like a neo-imperialist organ of western P5 States; used to exert control over less powerful states and exploit such States for economic gain.[16] In addition, such tools will not be useful when addressing the human rights abuses occurring in both Inner Mongolia and Xinjiang because of China's unique position in the international order.

Finally, this Note will offer alternative solutions to the current human rights crises in China. Additionally, this Note will assert that fundamental changes should be made to the United Nations and the

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Criminal Court Treaty, AM. SOC'Y OF INT'L L. INSIGHTS (May 11, 2002), *available at* https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty (last visited Nov. 17, 2021) ("Although initially a supporter of the proposed Court, the Clinton Administration did not sign the treaty at the Rome conference because of a variety of concerns, including a concern that the treaty contained insufficient protection against politicized prosecutions.").

[14] DANILO ZOLO, VICTORS' JUSTICE: FROM NUREMBERG TO BAGHDAD 37-9 (M. W. Weir trans., Verso 2020) (2009).

[15] *Id.* at 30.

[16] *See* Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L. J. 577 (1998); *see also* Margot Tudor, *'This delicate mosaic may be shattered at any time': The ICC, technocracy and the liberal West's moral imperialism*, 3 RESP. TO PROTECT STUDENT J. 33 (2018).

international human rights regime to address future human rights violations more effectively.

In addition to being an economic superpower, China is a member of the P5, and under the current international legal order is unlikely to be held to account for prima facie human rights abuses in Inner Mongolia and Xinjiang, even though China's actions have been met with criticism by its fellow P5 States.[17] Additionally, the mechanisms for combatting violations of international law outside of an ICC prosecution, such as economic sanctions and military intervention, are ineffective against a powerful nation such as China because it is heavily relied upon for global trade,[18] and such actions could lead to global economic catastrophe.

II.BACKGROUND

China has a complicated history with the United Nations and, as a result, the Security Council.[19] During World War II, China was instrumental to the allied powers' fight in the pacific theater against Imperial Japan.[20] Even though China was far from a major world power in 1945, the Allied powers "rewarded [China] with a seat on the Security

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[17] Edward Wong & Chris Buckley, *U.S. Says China's Repression of Uyghurs Is 'Genocide'*, N.Y. TIMES (Jan. 19, 2021), *available at* https://www.nytimes.com/2021/01/19/us/politics/trump-china-xinjiang.html (last visited Nov. 17, 2021).

[18] *See* Yasmeen Serhan & Kathy Gilsinan, *Can the West Actually Ditch China?*, ATLANTIC (Apr. 24, 2020), *available at* https://www.theatlantic.com/politics/archive/2020/04/us-britain-dependence-china-trade/610615/ (last visited Nov. 17, 2021) (discussing western nations' dependence on Chinese supply chains in many economic sectors, paying particular attention to the dependence on China for medical supplies during the COVID-19 pandemic.).

[19] *See* Xue Lei, *China as a Permanent Member of the United Nations Security Council*, FRIEDRICH EBERT FOUND. (April 2014), *available at* http://library.fes.de/pdf-files/iez/10740.pdf (last visited Nov. 17, 2021).

[20] *See* Thomas Scott-Bell, *The Forgotten Ally: China's Unsung Role in World War II*, CHINA FOCUS (May 8, 2020), *available at* http://www.cnfocus.com/the-forgotten-ally-china-s-unsung-role-in-world-war-ii/ (last visited Nov. 17, 2021) ("China's efforts however ensured that the hardened perimeter envisaged could never be created. Against all odds, China's resistance succeeded in keeping 80 percent of Japan's entire troops locked in battles within the country, stalling them from reinforcing their defensive wall).

Council . . . but no role in constructing a new world order."[21] In 1949, China declared independence and Mao Tse-tung's Communist Party formed a government. Many western powers viewed this independence movement, and movement towards socialism, as a "loss of China."[22] As a result, the newly formed People's Republic of China was not granted "its lawful representative seat at the UN as the legitimate government of China until 1971."[23]

A. CHINESE ETHNIC HOMOGENIZATION POLICIES.

China has been attempting to suppress, sometimes forcefully, ethnic minority populations.[24] The suppression of ethnic cultures has been accompanied by the rise of the so-called "second generation" ethnic policy.[25] The policy aims to unite fifty-six "nationalities" into one Chinese culture, to prevent national disintegration, such as the disintegration seen in the Soviet Union and Yugoslavia.[26] James Leibold has cautioned that the "ethnic blending theory" that is promoted by such a policy could "lead to ideological confusion and social unrest, and actually work against or even harm" China."[27] The policy has been

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[21] *Id.*

[22] *See* Noam Chomsky, *'Losing' the world: American decline in perspective, part 1*, GUARDIAN (Feb. 14, 2012), *available at* https://www.theguardian.com/commentisfree/cifamerica/2012/feb/14/losing-the-world-american-decline-noam-chomsky (last visited Nov. 15, 2021) (". . . China declared independence, an event known in Western discourse as "the loss of China" – in the US, with bitter recriminations and conflict over who was responsible for that loss.").

[23] *See* Lei, *supra* note 18.

[24] *Ethnic minorities and rural migrants suffer discrimination and oppression in China*, IRISH TIMES (Sept. 8, 2001), *available at* https://www.irishtimes.com/culture/ethnic-minorities-and-rural-migrants-suffer-discrimination-and-oppression-in-china-1.326352 (last visited Nov. 15, 2021); *see also* Hum. Rts. in China, *China: Minority Exclusion, Marginalization and Rising Tensions*, MINORITY RTS. GROUP INT'L (2007), *available at* https://minorityrights.org/wp-content/uploads/old-site-downloads/download-165-China-Minority-Exclusion-Marginalization-and-Rising-Tensions.pdf (last visited Nov 15, 2021).

[25] James Leibold, *Toward A Second Generation of Ethnic Policies?*, 12 CHINA BRIEF 7 (Jul. 7, 2012), *available at* https://jamestown.org/wp-content/uploads/2012/07/cb_07_02.pdf?x11990 (last visited Nov. 15, 2021).

[26] *Id.*

[27] *Id.* at 9.

championed by a rising tide of academics, known as "Statists," who view state authority as expansive, and believe that a nation can only thrive when stability in the nation exists.[28]

Under the leadership of President Xi, China has committed itself to "eradicat[ing] absolute poverty in ethnic minority areas."[29] For example, the Chinese government has erected "vocational training programs" in Xinjiang, and other ethnic minority regions, to teach the local populations "new skills to enable them to increase their incomes and improve their livelihoods."[30] While China has been successful in efforts to alleviate poverty,[31] this policy seeks to eradicate local ethnic minority cultures and achieve cultural homogenization of China, to unite the nation under a single banner and culture, in the name of "poverty alleviation."[32]

To fully examine the situation in Inner Mongolia, it is necessary to examine the material conditions in Xinjiang, where the Chinese government has placed Uyghurs into internment camps. The situation in Xinjiang is more advanced than the situation in Inner Mongolia but suggests what the Chinese government may do in Inner Mongolia.

B. RECENT ACTIONS TAKEN BY THE CHINESE GOVERNMENT TOWARDS UYGHURS IN XINJIANG.

The Chinese government has taken steps to eradicate Uyghur culture, and to suppress the practice of Islam, which has ultimately led to the deportation of Uyghur to so-called "re-education" camps.[33] The Chinese government has attempted to justify these actions, stating that it is in a fight against "terrorism, separatism, and religious extremism,"[34]

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[28] Chang Che, *The Nazi Inspiring China's Communists*, ATLANTIC (Dec. 1, 2020), *available at* https://www.theatlantic.com/international/archive/2020/12/nazi-china-communists-carl-schmitt/617237/ (last visited Nov. 15, 2021).

[29] Bertil Lintner, *Xi's masterplan for a homogeneous new China*, ASIA TIMES (Nov. 30, 2020), *available at* https://asiatimes.com/2020/11/xis-masterplan-for-a-homogeneous-one-china/ (last visited Nov. 152021).

[30] *Id.*

[31] *See* Bilal Amodu, *Innovations in Poverty Eradication in China*, BORGEN PROJECT (Oct. 3, 2020), available at https://borgenproject.org/poverty-alleviation/ (last visited Jan. 20, 2022).

[32] Lintner, *supra* note 28.

[33] Hum. Rts. in China, *supra* note 23.

[34] *Id.*

and it has used rhetoric developed by the United States during the "War on Terror" to justify the detainments.[35] China has drawn a link between Uyghur separatist movements and Islamist extremist groups such as al Qaeda;[36] even though such Uyghur separatist movements are largely defunct,[37] or have been forced to move to other regions.[38] To "cure" the Uyghurs who are "infected" with the "wrong kind of thinking," China implemented restrictions on, among other things, the "length of men's beards, regulate[d] women's clothing in public spaces and discourage[d] the use of Muslim names."[39]

The Chinese government also constructed an intrusive surveillance state in Xinjiang.[40] In 2018, Huawei, a prominent Chinese telecommunications enterprise, tested an "AI-powered camera system that could attempt to identify the age, sex and ethnicity of people in a crowd," in Xinjiang.[41] When this technology identified a Uyghur

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[35] Akbar Shahid Ahmed, *China Is Using U.S. 'War On Terror' Rhetoric To Justify Detaining 1 Million People*, HUFFINGTON POST (Dec. 2, 2018, 9:07 PM), *available at* https://www.huffpost.com/entry/china-is-justifying-its-biggest-human-rights-crisis-in-decades-with-made-in-the-usa-war-on-terror-rhetoric_n_5bae375be4b0b4d308d2639c (last visited Nov. 15, 2021) ("In the months after Sept. 11, China began presenting nearly all Uyghur resistance as connected to Islam and the global networks of groups like al Qaeda . . .").

[36] *Id.*

[37] *See* Sha Hua, *China Irate After U.S. Removes 'Terrorist' Label From Separatist Group*, WALL ST. J. (Nov. 6, 2020), *available at* https://www.wsj.com/articles/china-irate-after-u-s-removes-terrorist-label-from-separatist-group-11604661868 (last visited Nov. 15, 2021) (discussing the State Department's decision to remove ETIM from its list of terrorist organizations after the State Department stated that there has been "no credible evidence that ETIM continues to exist.").

[38] Beina Xu, Holly Fletcher, & Jayshree Bajoria, *The East Turkestan Islamic Movement (ETIM)*, COUNCIL ON FOREIGN REL. (Sept. 4, 2014), *available at* https://www.cfr.org/backgrounder/east-turkestan-islamic-movement-etim (last visited Nov. 15, 2021) (". . . ETIM has received 'training and funding' from al-Qaeda and has fought in the group's ranks against the U.S. troops during Operation Enduring Freedom in Afghanistan.").

[39] Ahmed, *supra* note 33.

[40] Kenneth Roth & Maya Wang, *Data Leviathan: China's Burgeoning Surveillance State*, HUM. RTS. WATCH (Aug. 16, 2019), *available at* https://www.hrw.org/news/2019/08/16/data-leviathan-chinas-burgeoning-surveillance-state# (last visited Jun. 8, 2021) ("Yet today, in Xinjiang, a region in China's northwest, a new totalitarianism is emerging—one built... on the state's intrusive collection and analysis of information about the people there.").

[41] Igor Bonifacic, *Huawei tested facial recognition that targeted Uyghurs in China*,

individual, it would trigger a "Uyghur alarm," which was then transmitted to the police.[42] The surveillance program, known as the Integrated Joint Operations Platform,[43] has been used to "arbitrarily" select Muslims for detention for behaviors such as "wearing a veil, studying the Quran or going on the Hajj pilgrimage . . ."[44]

As China's crackdown on Uyghurs in Xinjiang intensified, the government began to deport an estimated one million Uyghurs,[45] to 380 newly-constructed internment camps.[46] In these camps, Uyghurs have been subjected to forced sterilization, torture, and political indoctrination.[47] Additionally, Uyghurs have been used as slave labor, with an estimated 570,000 Uyghurs forced to pick cotton "under a labor program meant to target minority groups."[48] Survivors of such

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ENGADGET (Dec. 8, 2020), *available at* https://www.engadget.com/huawei-facial-recognition-Uyghurs-172304197.html (last visited Nov. 15, 2021).

[42] *Id.*

[43] Nazish Dholakia & Maya Wang, *Interview: China's 'Big Brother' App*, HUM. RTS. WATCH (May 1, 2019), *available at* https://www.hrw.org/news/2019/05/01/interview-chinas-big-brother-app. (last visited Nov. 15, 2021) ("The IJOP is a system of systems. It gathers information from, but not limited to, gas stations, checkpoints on the street, and access-controlled areas such as communities and schools. It pulls information from these facilities, as well as CCTV cameras, integrates them, and monitors them for 'unusual' activity or behavior that triggers alerts that authorities then investigate.").

[44] *China uses big data to select Muslims for arrest in Xinjiang: HRW*, AL JAZEERA (Nov. 9, 2020), *available at* https://www.aljazeera.com/news/2020/12/9/china-uses-big-data-to-select-muslims-for-arrest-in-xinjiang-hrw. (last visited Nov. 15, 2021) ("[T]he rights group said it [analyzed] a leaked list of more than 2,000 detainees in Xinjiang's Aksu prefecture and found that the [program] . . . also flagged people for their relationships, their communications, their travel histories, or for being related to someone the authorities consider suspicious.").

[45] Yasmeen Serhan, *Saving Uyghur Culture From Genocide*, ATLANTIC (Oct. 4, 2020), *available at* https://www.theatlantic.com/international/archive/2020/10/chinas-war-on-Uyghur-culture/616513/. (last visited Nov. 15, 2021).

[46] Emma Graham-Harrison, *China has built 380 internment camps in Xinjiang, study finds*, GUARDIAN (Sept. 23, 2020), *available at* https://www.theguardian.com/world/2020/sep/24/china-has-built-380-internment-camps-in-xinjiang-study-finds. (last visited Nov. 15, 2021).

[47] Serhan, *supra* note 43.

[48] Natalie Colarossi, *More Than Half a Million Uyghurs Forced to Pick Cotton in China, Report Alleges*, NEWSWEEK (Dec. 15, 2020, 2:47 PM), *available at* https://www.newsweek.com/more-half-million-Uyghurs-forced-pick-cotton-china-report-alleges-1554960. (last visited Nov 15, 2021).

internment camps have also reported that "they experienced or saw evidence of an organized system of mass rape, sexual abuse and torture."[49]

The Chinese government has denied that any human rights abuses are occurring in Xinjiang and stated that most people that were sent to these internment camps have "returned to society."[50] But China has not allowed "journalists, human rights groups or diplomats" to visit the camps, and "visitors to the region face heavy surveillance."[51]

Inner Mongolian Crackdown

In the summer of 2020, the Chinese government implemented a set of measures to curtail the use of the Mongolian language in Inner Mongolian schools and replace it with Mandarin Chinese, the dominant language in China.[52] The new rules mandate that courses in literature, politics, and history be taught in Mandarin Chinese.[53] China only announced the policy to Inner Mongolians days before it was implemented.[54] Similar restrictions were utilized in Tibet and Xinjiang to suppress local ethnic groups and their cultures.[55]

The new "bilingual education" program sparked outrage among the Inner Mongolian community. The local community distributed online

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[49] Matthew Hill et al., *'Their goal is to destroy everyone': Uyghur camp detainees allege systemic rape*, BBC (Feb. 3, 2021), *available at* https://www.bbc.com/news/world-asia-china-55794071. (last visited Nov. 15, 2021).

[50] Michael Martina, *China says most people in Xinjiang camps have 'returned to society'*, REUTERS (July 30, 2019), *available at* https://www.reuters.com/article/us-china-xinjiang/china-says-most-people-in-xinjiang-camps-have-returned-to-society-idUSKCN1UP15F. (last visited Nov. 15, 2021).

[51] Graham-Harrison, *supra* note 44.

[52] *Rare rallies in China over Mongolian language curb*, BBC (Sept. 1, 2020), *available at* https://www.bbc.com/news/world-asia-china-53981100. (last visited Nov. 15, 2020).

[53] Graceffo, *supra* note 17.

[54] Alice Su, *China cracks down on Inner Mongolian minority fighting for its mother tongue*, L.A. TIMES (Sept. 3, 2020, 10:21 AM), *available at* https://www.latimes.com/world-nation/story/2020-09-03/china-inner-mongolia-bilingual-education-assimilation-xinjiang-resistance-crackdown. (last visited Nov. 15, 2020).

[55] Antonio Graceffo, *Why critics are asking if Inner Mongolia is the next Tibet or Xinjiang*, INTELLINEWS (Feb. 25, 2021), *available at* https://www.intellinews.com/comment-why-critics-are-asking-if-inner-mongolia-is-the-next-tibet-or-xinjiang-203735/ (last visited Nov. 10, 2021).

petitions in opposition to the program that gained thousands of signatures by teachers, students, and parents.[56] This outrage was not confined solely to Inner Mongolia as the Southern Mongolian Human Rights Information Center, which operates out of New York, quickly posted videos of students protesting and parents clashing with police forces while they tried to pick up their children from school.[57]

Protests over the new language mandate grew quickly, and eventually led to a strike of more than 300,000 students.[58] In coordination with local authorities, the national government banned automobiles from the roads of Tongliao, a city of three million people, in an effort to stop parents from congregating and discussing the mandate and protests.[59] To further quell dissent, the government offered preferential access to government aid programs to parents who sent their children to school.[60] When children did go to school they were greeted by a slogan from President Xi painted onto the wall in Mandarin: "All ethnic groups must embrace tightly like the seeds of a pomegranate."[61]

Additionally, law enforcement authorities entered the homes of ethnic Mongolians, and forced them to sign "pledges to not speak against the bilingual program anymore."[62] If the resident failed to sign the pledge, authorities detained them and marked them in police databases as "key individuals," which flagged the person as a threat to security who required targeted surveillance and control.[63]

The Chinese government also cracked down on journalists in Inner Mongolia covering the protests. *The Los Angeles Times* reported that one of its journalists was detained by police, and then expelled from Inner Mongolia while covering the protests.[64] The reporter was visiting a

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[56] Su, *supra* note 52.
[57] *Id.*
[58] Graceffo, *supra* note 53.
[59] Emily Feng, *Parents Keep Children Home As China Limits Mongolian Language In The Classroom*, NPR (Sept. 16, 2020), *available at* https://www.npr.org/2020/09/16/912623822/parents-keep-children-home-as-china-limits-mongolian-language-in-the-classroom (last visited Nov. 10, 2021).
[60] *Id.*
[61] Su, *supra* note 52.
[62] *Id.*
[63] *Id.*
[64] *US paper says reporter was held in China's Inner Mongolia*, AP NEWS (Sept. 4, 2021), *available at* https://apnews.com/article/ca-state-wire-international-news-business-asia-pacific-02719922d056023257c5508acd75 b287 (last visited Nov. 10, 2021).

Mongol school in Hohhot and was "surrounded by plainclothes men who put her into a police car."[65] Despite the journalist identifying herself as such, she was confined to a back room in a police station, interrogated by the authorities, and separated from her belongings.[66] During the approximately four-hour detention, she was forbidden from contacting the U.S. Embassy, assaulted, and battered when "one officer grabbed her throat with both hands and pushed her into a cell."[67]

When protests failed to subside, the police released lists of wanted protestors (using photos allegedly procured through security camera footage) and offered a reward for information about them.[68] Authorities also targeted users of the messaging app "WeChat" for dispersing "fake news" regarding the textbook requirement, and for organizing the spread of petitions.[69]

Similar surveillance tactics were also deployed in Xinjiang against the Uyghur community. There, the police set up checkpoints to search people's personal phones through the use of devices known as a "counterterrorism sword" or "anti-terrorism sword."[70] A counterterrorism sword allows law enforcement officials to plug a device into an individual's phone or computer and scan all the files.[71] Such devices are capable of finding all files, even if the individual had previously deleted them, and searching for 50,000 different "markers" of Islamic or political activity.[72] Currently there is no evidence of such

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[65] Su, *supra* note 52.
[66] *Id.*
[67] *Id.*
[68] Christian Shepherd & Emma Zhou, *Authorities quash Inner Mongolia protests*, FIN. TIMES (Sept. 10, 2020), *available at* https://www.ft.com/content/c035c3d7-0f96-4e23-b892-2666bc110e20 (last visited Nov. 15, 2021); *see also* Yael Grauer, *Revealed: Massive Chinese Police Database*, INTERCEPT (Jan. 29, 2021, 3:00 AM), *available at* https://theintercept.com/2021/01/29/china-uyghur-muslim-surveillance-police/ (last visited Nov. 15, 2021) (discussing the usage of a massive police database to surveil Uyghur Muslims in Xinjiang, a similar tactic that is now being used in Inner Mongolia.).
[69] Shepherd, *supra* note 66.
[70] Jeremy Scahill, *Intercepted with Jeremy Scahill: Inside China's Police State Tactics Against Muslims* [hereinafter *Intercepted*], INTERCEPT (Feb. 3, 2021), *available at* https://theintercept.com/2021/02/03/intercepted-china-uyghur-muslim-surveillance-police/ (last visited Nov. 14, 2021) (quoting Darren Byler, anthropologist at the University of Colorado at Boulder).
[71] *Id.*
[72] *Id.*

devices being used against Inner Mongolians. However, it is possible that the Chinese government could use, or is currently using, such tactics to quash any protests regarding in Inner Mongolia.

C. REACTIONS OF THE INTERNATIONAL COMMUNITY TO CHINA'S ACTIONS.

The international community has reacted to accusations of human rights abuses in China in varying ways. To hold China accountable, Uyghurs living in exile requested that the prosecutor of the International Criminal Court ("ICC") open an investigation into the treatment of Uyghurs in Xinjiang; but this request did not lead to any prosecutions or ICC action because China is not a State Party to the Rome Statute.[73]

1.Actions taken by individual states.

The United States responded to reports of human rights abuses in Xinjiang by passing the Uyghur Human Rights Policy Act of 2020, which condemns "gross human rights violations of ethnic Turkic Muslims in Xinjiang," and calls "for an end to arbitrary detention, torture, and harassment of these communities inside and outside China."[74] This Act seeks to rectify the situation in Xinjiang by directing the Secretary of State to "coordinate closely with the international community" to apply targeted sanctions and visa restrictions against individuals or entities responsible for the violations.[75]

In the waning days of the Trump administration, the State Department declared that the Chinese government was actively "committing genocide and crimes against humanity" in Xinjiang against the Uyghurs and "other Muslim ethnic minorities."[76] Secretary of State

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[73] *ICC will not open investigation into treatment of Uyghur Muslims in China*, ROYA NEWS (Dec. 15, 2020), *available at* https://en.royanews.tv/news/24180/ICC-will-not-open-investigation-into-treatment-of-Uyghur-Muslims-in-China (last visited Nov. 15, 2021); *see generally How the Court Works*, ICC, *available at* https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 15, 2021) (the Court can only exercise jurisdiction over a State Party "that has accepted the jurisdiction of the Court.").

[74] Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 648 Stat. 134.

[75] *Id.*

[76] Edward Wong & Chris Buckley, *U.S. Says China's Repression of Uyghurs Is 'Genocide'*, N.Y. TIMES (Jan. 19, 2021), *available at*

Mike Pompeo announced that the State Department had determined this via his Twitter account on the final full day of President Trump's presidency.[77]

In Canada, the House of Commons passed a unanimous motion declaring that China's treatment of the Uyghurs amounts to genocide.[78] The Dutch parliament became the first European country to declare the treatment of Uyghurs to be genocide when it passed a non-binding motion to that effect.[79] However, other states were less willing to declare China's treatment of the Uyghurs a genocide, with both Australia and Turkey rejecting such motions.[80]

Mongolia itself is unable to take a stand for the people of Inner Mongolia because of Mongolia's complete dependence on China.[81] However, individual Mongolians created a petition to the White House and held protests in Washington, D.C., and Tokyo.[82]

The international community will have
difficulties addressing China's alleged human rights abuses.

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https://www.nytimes.com/2021/01/19/us/politics/trump-china-xinjiang.html (last visited Nov. 15, 2021).

[77] Alex Ward, *US: China is committing genocide and crimes against humanity against Uyghur Muslims*, VOX (Jan. 19, 2021, 1:50 PM), *available at* https://www.vox.com/2021/1/19/22238962/china-genocide-Uyghur-muslims-xinjiang-biden-pompeo (last visited Nov. 15, 2021).

[78] *Canada's parliament declares China's treatment of Uyghurs 'genocide'*, BBC (Feb. 23, 2021), *available at* https://www.bbc.com/news/world-us-canada-56163220 (last visited Nov. 10, 2021).

[79] *Dutch parliament: China's treatment of Uyghurs is genocide*, REUTERS (Feb. 25, 2021), *available at* https://www.reuters.com/article/us-netherlands-china-Uyghurs/dutch-parliament-chinas-treatment-of-Uyghurs-is-genocide-idUSKBN2AP2CI (last visited Nov. 10, 2021).

[80] Paul Eckert, *Dismaying Uyghurs, Legislatures of Australia and Turkey Reject Motions on China Genocide Label*, RADIO FREE ASIA (Mar. 15, 2021), *available at* https://www.rfa.org/english/news/uyghur/turkey-australia-genocide-03152021185120.html (last visited Nov. 10, 2021).

[81] Antonio Graceffo, *Why critics are asking if Inner Mongolia is the next Tibet or Xinjiang*, INTELLINEWS (Feb. 25, 2021), *available at* https://www.intellinews.com/comment-why-critics-are-asking-if-inner-mongolia-is-the-next-tibet-or-xinjiang-203735/ (last visited Nov. 10, 2021).

[82] *Id.*

It will likely be difficult for P5 States to address the human rights abuses in both Xinjiang and Inner Mongolia by using tools traditionally used to address human rights violations—such as interventionist military operations and economic sanctions—against China.[83] China is a major world power and relied upon by many states for trade.[84] Efforts to halt China's human rights violations could lead to the state halting exports,[85] which would have devastating impacts on an already weak global supply chain. Additionally, the remaining four P5 States are all experiencing varying levels of domestic political turmoil,[86] and the body politic of

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[83] *See* Cissy Zhou, *US financial sanctions against China 'suicidal' for Washington, former Chongqing mayor Huang Qifan says*, S. CHINA MORNING POST (Oct. 12, 2020, 6:15 PM), *available at* https://www.scmp.com/economy/china-economy/article/3105141/us-financial-sanctions-against-china-suicidal-washington (last visited Nov. 10, 2021).

[84] *See Percent of world exports – Country rankings*, GLOBAL ECON., *available at* https://www.theglobaleconomy.com/rankings/share_world_exports/ (last visited Nov. 10, 2021) (in 2018, China's accounted for 10.86% of world exports, the most of any country); *see also* Tianlei Huang & Nicholas R. Lardy, *China goes from strength to strength in global trade*, PETERSON INST. FOR INT'L ECON. (Nov. 16, 2020, 10:30 AM), *available at* https://www.piie.com/blogs/china-economic-watch/china-goes-strength-strength-global-trade (last visited Nov. 10, 2021) (discussing that China's merchandise trade has recovered from the downturn caused by the COVID-19 pandemic quicker than the rest of the world, as demand for Chinese goods increases).

[85] *See* Helen Davidson, *China's trade halt with Lithuania over Taiwan ties sends warning to Europe*, GUARDIAN (Aug. 25, 2021), *available at* https://www.theguardian.com/world/2021/aug/26/chinas-trade-halt-with-lithuania-over-taiwan-ties-sends-warning-to-europe (last visited Jan. 21, 2022) ("China's use of trade as a weapon in diplomatic disputes appears to be now targeted at Lithuania . . . after the Baltic nation agreed to exchange diplomatic offices with Taiwan.").

[86] In France, the resurgence of the far-right National Rally (formerly the National Front) party, under the leadership of Marine Le Pen, has led to members of the French military penning an open letter to Emmanuel Macron's government accusing the government of "cowardice, deceit, perversion," and threatening that the county is heading for a civil war. *See* Kim Wilsher, *French soldiers accuse government of trying to 'silence' warnings of civil war*, GUARDIAN (May 10, 2021), *available at* https://www.theguardian.com/world/2021/may/10/french-soldiers-accuse-government-of-trying-to-silence-warnings-of-civil-war (last visited Nov. 10, 2021); In the United Kingdom, Brexit has created a tense situation in Northern Ireland with Unionists and Republicans clashing in the streets. *See* Zeeshan Aleem, *Northern Ireland is in the midst of its heaviest unrest in years. Here's why.*, Vox (Apr. 10, 2021), *available at* https://www.vox.com/2021/4/10/22377216/northern-ireland-belfast-riots-violence-

those P5 States may not support efforts to rectify human rights abuses in China.

D. CHINA'S REACTIONS TO ACCUSATIONS.

China responded to such accusations of genocide by telling the Human Rights Council that the accusations were "fabricated out of ignorance and prejudice."[87] China's Foreign Minister Wang Yi also stated that "[t]here never has been so-called genocide, forced labor or religious oppression in Xinjiang."[88]

III.CHINA'S HUMAN RIGHTS VIOLATIONS

China's actions in Inner Mongolia and Xinjiang are contrary to China's obligations under international human rights treaties that it has signed or ratified.

A. CHINA'S VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

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protests (last visited Dec. 21, 2021); In the United States, the Republican Party has been taken hostage by conspiracy theories that resulted in a violent insurrection at the Capitol. *See* Drew Harwell et al., *QAnon reshaped Trump's party and radicalized believers. The Capitol siege may just be the start.*, WASH. POST (Jan. 13, 2021, 11:00 AM), *available at* https://www.washingtonpost.com/technology/2021/01/13/qanon-capitol-siege-trump/ (last visited Dec. 21, 2021); In Russia, the military has assembled on the Ukrainian border and, at the time of this writing, seems poised to invade Ukraine in the winter of 2022. *See Putin Warns of 'Military-Technical' Response to Western 'Aggression'*, MOSCOW TIMES (Dec. 21, 2021), *available at* https://www.themoscowtimes.com/2021/12/21/putin-warns-of-military-technical-response-to-western-aggression-a75891 (last visited Dec. 21, 2021).

[87] Richard Bravo & Kitty Donaldson, *China Denies Uyghur Abuse Claims as International Pressure Grows*, BLOOMBERG (Feb. 22, 2021), *available at* https://www.bloomberg.com/news/articles/2021-02-22/china-denies-Uyghur-abuse-claims-as-international-pressure-grows (last visited Nov. 10, 2021).

[88] *Id.*

The International Covenant on Civil and Political Rights ("ICCPR") is a "foundational treaty" in the international human rights law system; protecting, among other things, individuals' "freedom of speech, assembly, and religion."[89] China has signed onto the ICCPR but has not ratified it.[90]

The Chinese government's actions in Xinjiang and Inner Mongolia are actively undermining the object and purpose of the ICCPR.[91] Even though Article 18 of the Vienna Convention on the Law of Treaties ("VCLT") mandates that China does not take any action that would defeat the object and purpose of the ICCPR, the Chinese government has disregarded that Article and decided that it need not observe the ICCPR's object and purpose. By removing the native Mongolian language from schools, and mandating children learn core subjects in Mandarin Chinese, the government seeks to crush the Mongolian culture out of existence inside China's borders. These actions contradict the object and purpose of the ICCPR.

Article 1 of the ICCPR clearly asserts that all peoples have the right to control their own lives as well as the right to freely "pursue their economic, social and cultural development."[92] The people of Inner Mongolia are being denied the right to control their own lives, and the lives of their children, as China seeks to exterminate their culture. By removing the Mongolian language from Inner Mongolian schools, China is abridging Inner Mongolian children's right to freely pursue their cultural development. While it may be important for Inner Mongolian children to learn Mandarin Chinese to be successful in predominately Mandarin speaking state; removing the Mongolian language from schools will likely lead to Inner Mongolian children being unable to effectively communicate within their communities.[93]

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[89] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[90] *Id.*

[91] Under Article 18 of the Vienna Convention on the Law of Treaties, a State, if it has signed, but has not yet ratified, is obligated to refrain from taking action that would "defeat the object and purpose of [the] treaty." *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 18, 1155 U.N.T.S. 331.

[92] ICCPR, *supra* note 88.

[93] *See The Importance of Culture, Language and Identity*, RACISM NO WAY (n.d.), *available at* https://racismnoway.com.au/about-racism/understanding-racism/the-importance-of-culture-language-and-identity/ (last visited Nov. 15, 2021); *see also* Alex Shashkevich, *The power of language: How words shape people, culture,*

The ICCPR was designed to protect the exact rights that are being denied to Inner Mongolians. Instead of abiding by the object and purpose of the ICCPR – and allowing Inner Mongolian children to freely pursue their cultural development – China is denying them that protected right by unilaterally deciding which culture the children will pursue.

B.CHINA'S VIOLATIONS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations Convention on the Rights of the Child ("CRC") was drafted to establish global standards "to ensure the protection, survival, and development of all children, without discrimination."[94] The treaty has been ratified by 194 countries, including China.[95]

During the early twentieth century, there was minimal protections afforded to children, who were frequently working in unsafe factory conditions alongside adults in industrialized nations.[96] The rights of children first came into focus in 1924 when the League of Nations adopted the Geneva Declaration on the Rights of the Child, which afforded children basic rights.[97] More than sixty years later, in 1989, the United Nations General Assembly adopted the CRC, which marked a watershed moment for international human rights, as it recognized the role of children as "social, economic, political, civil and cultural actors."[98]

In 1992, China ratified the CRC but entered a reservation as to the legal effect of Article 6, which requires states parties to "recognize that every child has the inherent right to life," and to ensure "to the maximum

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STAN. NEWS (Aug. 22, 2019), *available at* https://news.stanford.edu/2019/08/22/the-power-of-language-how-words-shape-people-culture/ (last visited Nov. 15, 2021).

[94] Hum. Rts. Watch, *25th Anniversary of the Convention on the Rights of the Child*, HRW (Nov. 17, 2014, 11:50 AM), *available at* https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child (last visited Nov. 15, 2021).

[95] The only countries to not ratify the CRC are Somalia, South Sudan, and the United States. *See id.*

[96] *History of child rights*, U.N. CHILDREN'S FUND (n.d.), *available at* https://www.unicef.org/child-rights-convention/history-child-rights (last visited Nov. 15, 2021).

[97] *Id.*

[98] *Id.*

extent possible the survival and development of the child."[99] However, China only entered a reservation to Article 6 as a "prerequisite that the Conventions accords with the provisions of Article 25 concerning family planning of the [Chinese] Constitution[100] ... and in conformity with the provisions of Article 2 of the Law of Minor Children[101]..."[102] By ratifying the CRC, China consented to be bound by the treaty and is expected to not derogate from the terms of the treaty. The actions taken by the Chinese in Inner Mongolia against school-aged children, however -- namely stripping them of their language within schools -- directly violates the CRC and amounts to a derogation of China's legal obligations under the CRC.

The CRC contains four principles that "contribute to a general attitude towards children and their rights," which are "based on the notion that children too, are equal as human beings."[103] These four principles are: (i) non-discrimination, (ii) best interests of the child, (iii) the right to survival and development, and (iv) the views of the child,[104] each of which will be addressed individually. By denying Inner Mongolian children's ability to be educated in a language they are familiar with, the

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[99] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (China's reservation states in full: "[T]he People's Republic of China shall fulfil its obligations provided by article 6 of the Convention to the extent that the Convention is consistent with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and with the provisions of article 2 of the Law of Minor Children of the People's Republic of China.").

[100] Xianfa, art. 25 (2004) (China) ("The State promotes family planning so that population growth may fits the plans for economic and social development.").

[101] *Law of the P.R.C. on the Protection of Minors, Art. II* (中华人民共和国未成年人保护法), China, *available at* https://www.chinalawtranslate.com/en/protection-of-minors-2020/ (last visited Nov. 14, 2021) (determining that a minor is any citizen below the age of eighteen).

[102] *Convention on the Rights of the Child (CRC)*, Hum. Rts. in China (n.d.), *available at* https://www.hrichina.org/en/convention-rights-child-crc#:~:text=At%20the%20time%20of%20its,and%20development%20of%20the%20child. (last visited Nov. 14, 2021).

[103] *Four principles of the Convention on the Rights of the Child*, U.N. CHILDREN'S FUND (June 24, 2019), *available at* https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child (last visited Nov. 14, 2021).

[104] *Id.*

Chinese government has violated all four principles that are central to the CRC.

I.Non-Discrimination.

The language policy adopted by China is discriminatory against Inner Mongolian children. Parties to the CRC are required to ensure the rights set forth in the treaty, regardless of factors such as the child's race, *language*, religion, political opinion, or *ethnic or social origin.*[105] The language policy is likely not harming Han Chinese children in Inner Mongolia who presumably speak Mandarin Chinese in their homes. The constant exposure to Mandarin Chinese at home and within their communities is likely to lead to an advantage in the classroom because Inner Mongolian children who speak Mongolian at home will have a harder time understanding the material being taught. By directing this policy solely towards Inner Mongolian children, China has discriminated against Inner Mongolian children and has failed to ensure the rights granted to Inner Mongolia under the CRC.

II. Best interests of the child.

Through its language policy, China has undermined the rights of Inner Mongolian children articulated in Article 8 of the CRC, which provides that states parties must "respect the right of the child to preserve his or her identity . . ."[106] China is, in essence, stripping a piece of the children's identity from them.[107] The damage caused by the policy will not be confined to the halls of Inner Mongolian schools. By not being exposed to their native language in school, where children spend most of their week, Inner Mongolian children will only have exposure to their native tongue while at home, making it harder for them to become proficient in the language and communicate with members of the Inner Mongolian community. This is violating the best interests of the child by

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[105] CRC, *supra* note 99, at art. 2.

[106] *Id.* at art. 8.

[107] *See* Kahar Zalmay, *Language and identity*, NEWS (Feb. 11, 2017), *available at* https://www.thenews.com.pk/ print/185439-Language-and-identity (last visited Nov. 14, 2021) ("Language is not simply an assortment of words but an entity that connects an individual to his family, identity, culture, music, beliefs, and wisdom. It is the carrier of history, traditions, customs and folklore from one generation to another. Without language, no culture can sustain its existence. Our language is actually our identity.").

making it harder for the child to communicate with others in the community and abridging the ability of the child to learn about their culture.

III. The right to survival and development.

It might be argued that mandating Inner Mongolian children be taught Mandarin Chinese is in Inner Mongolian children's best interest in terms of their survival and development. Because China predominately speaks Mandarin Chinese,[108] it makes sense that learning Mandarin Chinese would lead to better opportunities for Inner Mongolian children in Chinese society. However, taking away the opportunity for Inner Mongolian children to learn in their native language harms their ability to survive and develop in their community. As stated above, Inner Mongolian children would be inhibited from learning about their culture and communicate with members of the Inner Mongolian community if they are not learning in Mongolian or able to speak Mongolian fluently.

Not only is the loss of cultural identity directly harmful to Inner Mongolian children, but it can also indirectly harm their descendants. When a group within society experiences such a trauma, that trauma is often not isolated within the generation that experienced it first-hand and, instead, is often passed down to subsequent generations.[109] Such intergenerational trauma can directly impact Inner Mongolian children's right to survival and development, as intergenerational trauma can lead to, among other things, the neglect of future generations.[110] Therefore, China's language policy would not only directly harm current Inner

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[108] *See* Kiril Bolotnikov, *The Many Dialects of China*, ASIA SOC'Y (n.d.), *available at* https://asiasociety.org/china-learning-initiatives/many-dialects-china (last visited Nov. 14, 2021) (discussing the many dialects spoken in China and stating that Mandarin Chinese is the official language of China).

[109] *See* Melissa C. Kahane-Nissenbaum, *Exploring Intergenerational Transmission of Trauma in Third Generation Holocaust Survivors* (June 23, 2011) (Ph.D. dissertation, University of Pennsylvania) (discussing intergenerational trauma and its effects on the descendants of Holocaust survivors.).

[110] *See* William Aguiar & Regine Halseth, *Aboriginal Peoples and Historic Trauma: The process of intergenerational transmission*, NAT'L COLLABORATING CTR. FOR ABORIGINAL HEALTH (2015), *available at* https://www.ccnsa-nccah.ca/docs/context/RPT-HistoricTrauma-IntergenTransmission-Aguiar-Halseth-EN.pdf (last visited Jan. 21, 2022) (discussing the effects of intergenerational trauma on Aboriginal communities in Canada because of residential schools.).

Mongolian children but may also lead to the violation of future children's rights under the CRC.[111]

IV. The views of the child.

The language policy has not taken the views of the child into account. It has not considered a child's desire to be able to identify with their culture through language or their ability to be an active member in their community. The policy is not optional; children and their parents are not allowed to choose whether they are taught in Mandarin Chinese or Mongolian. Instead, the state, not the child or the child's parents, has decided what is the best path forward for the child.

IV.RECOMMENDATIONS FOR HOW TO EFFECTIVELY ADDRESS CHINA'S HUMAN RIGHTS VIOLATIONS IN INNER MONGOLIA, AND WHY "TRADITIONAL TOOLS" OF CONFRONTING HUMAN RIGHTS VIOLATIONS ARE INEFFECTIVE.

The "traditional tools" usually relied upon to address non-complying States, such as economic sanctions and military intervention, are unlikely to be effective when addressing China's human rights violations because of the importance of China in the global economy, its position as a permanent member on the Security Council, and its influence on other States. This section will convey two points: first, it will show how such traditional tools of addressing human rights violations are ineffective in addressing human rights violations in China; and second, it will provide alternative ways of addressing such violations.

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[111] Brent Bezo, *A Child's Rights Perspective on Intergenerational Trauma*, 2017 CAN. J. CHILD. RTS. 71 (2017); *see also* Tori DeAngelis, *The legacy of trauma*, AM. PSYCHOL. ASS'N (Feb. 2019), *available at* https://www.apa.org/monitor/2019/02/legacy-trauma (last visited Nov. 14, 2021) ("The investigators also observed indirect effects, such as how the genocide affected the second generation through changes including heightened poverty, greater family work burden and compromised parenting.").

A. OFTEN UTILIZED TOOLS IN CONFRONTING HUMAN RIGHTS VIOLATIONS ARE INEFFECTIVE IN ADDRESSING CHINA'S VIOLATIONS.

P5 States, particularly the United States, often utilize tools such as economic sanctions and military intervention are often utilized in confronting human rights violations.[112] Because of China's large role in the world and its economic and military power, such traditional tools of addressing human rights violations will most likely not be effective.

I.Economic Sanctions

Economic sanctions have been favored by states, particularly the United States,[113] in recent years. Such sanctions offer states a mechanism to coerce other states into compliance, without having to resort to conventional warfare.[114]

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[112] *See* Christopher Wall, *Human Rights and Economic Sanctions: the New Imperialism*, 22 FORDHAM INT'L L.J. 577 (1998) ("[The United States] uses . . . a limited range of economic sanctions to police human rights in other countries."); *see also* Noam Chomsky, *Humanitarian Intervention*, BOSTON REV. (Dec. 1993 – Jan. 1994), *available at* https://chomsky.info/199401__02/ (last visited Jan. 27, 2022) (discussing how states utilize human rights abuses in other states as a basis for imperialist intervention and arguing that this is rooted in the view of the state as a moral actor.).

[113] *Embargoed and Sanctioned Countries*, U. PITT. OFF. TRADE COMPLIANCE (n.d.), *available at* https://www.tradecompliance.pitt.edu/embargoed-and-sanctioned-countries (last visited Jan. 27, 2022) (listing all states that the United States has placed various types of economic sanctions upon.); *see also* Kathy Gilsinan, *A Boom Time for U.S. Sanctions*, ATLANTIC (May 3, 2019), *available at* https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625/ (last visited Jan. 27, 2022) ("The United States, as of this writing, has 7,967 sanctions in place.").

[114] Justin D. Stalls, *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 115, 116 (2003) ("Economic sanctions are generally considered a nonviolent form of coercion because they do not involve military warfare.").

Economic sanctions rely "on the expectation that economic punishment can overwhelm a state's commitment to pursue important policy goals."[115] In other words, economic sanctions are only beneficial if the sanctioning state believes that the sanctions will change the behavior of the sanctioned state. However, economic sanctions are not simply economic in nature – they also carry social and political implications – and therefore, can destabilize a society and further infringe on human rights, instead of curing such abuses.[116] Therefore, Professor Richard Wolff[117] argues that such economic sanctions can *never* work.[118] For example, sanctions levied against Russia did not halt its invasion of Ukraine, but did have the effect of destabilizing Russian society.[119] The

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[115] Robert A. Pope, *Why Economic Sanctions Do Not Work*, 22 INT'L SEC. 90, 93 (Fall 1997).

[116] *See* Stalls, *supra* note 112, at 118 ("Economic sanctions are not as harmless as they appear at first glance; they may involve the deprivation or infringement of human rights."); Adam Smith, *A High Price to Pay: The Costs of the U.S. Economic Sanctions Policy and the Need for Process Oriented Reform*, 4 UCLA J. INT'L L. & FOR. AFF. 325 (2000) (discussing how economic sanctions increase suffering of large populations within a sanctioned country and concluding that the practice of economic sanctions should be limited.); *see, e.g.*, Steve Ellner, *US Sanctions on Venezuela Are Deadly – and Facing Mass Resistance*, JACOBIN MAG. (Oct. 26, 2020), *available at* https://jacobinmag.com/2020/10/sanctions-venezuela-maduro-guaido-trump (last visited Nov. 15, 2021) (discussing the stiffening of economic sanctions on Venezuela by the Trump administration and the political consequences that have flowed from such action.); *see also* Dursun Peksen, *Socio-Economic and Political Consequences of Economic Sanctions for Target and Third-Party Countries*, OFF. U.N. HIGH COMM'R HUM. RTS. (n.d.), *available at* https://www.ohchr.org/Documents/Events/Seminars/CoercitiveMeasures/DursunPeksen.pdf (last visited Nov. 15, 2021) ("Economic sanctions fail between 65-95% of the time in achieving their intended goals.").

[117] Visiting Professor in the Julien J. Studley Graduate Programs in International Affairs at the New School, and Professor Emeritus of Economics at the University of Massachusetts, Amherst.

[118] *See* Democracy at Work, *Global Capitalism: March 2020-2021: Covid and the Crash*, YOUTUBE (Mar. 10, 2021), *available at* https://www.youtube.com/watch?v=GE6s9HK_F6o&ab_channel=DemocracyAtWork (last visited Nov. 15, 2021).

[119] *See* Bob Needham, *Financial sanctions against Russia will create wide-ranging impact*, UNIV. MICH. (Mar. 3, 2022), *available at* https://news.umich.edu/financial-sanctions-against-russia-will-create-wide-ranging-impact/ (last visited Mar. 4, 2022).

same noncompliance is likely – if not more likely – to happen in China if sanctions were levied against it.

The entire world is dependent on China for trade, relying on Chinese industry for cheap consumer goods.[120] Economic sanctions, or threats of economic sanctions, directed towards China may not have the desired outcome of curbing its actions in Inner Mongolia and Xinjiang. Instead, the Chinese government could portray the sanctions as another example of Western imperialism and American aggression, which could embolden the state to continue on with its path of human rights abuses.

Additionally, if sanctions were to be placed on China, or individual members of China's government, it is possible that China would retaliate with sanctions of its own.[121] If China were to levy sanctions of its own, and disrupt exports out of China, such action could lead to a worsening of an already intolerable global supply chain crisis. In 2020, China accounted for "more than 17 percent of the world's economy."[122] China is a dominant player in global trade, and its dominance was only strengthened by the impact of the COVID-19 pandemic.[123]

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[120] *See* Jacob Goldstein, *How Much Do We Buy From China?*, NPR (Aug. 10, 2011), *available at* https://www.npr.org/sections/money/2011/08/10/139388532/only-a-tiny-sliver-of-americans-personal-spending-goes-to-china (last visited Nov. 15, 2021) (discussing why it feels like almost everything Americans buy comes from China. Argues that Americans spend more money on American made goods, but because of the volume of cheap goods bought from China, it feels like Americans are constantly buying Chinese made goods.); *see also* Yasmeen Serhan & Kathy Gilsinan, *Can the West Actually Ditch China?*, ATLANTIC (Apr. 24, 2020), *available at* https://www.theatlantic.com/politics/archive/2020/04/us-britain-dependence-china-trade/610615/ (last visited Nov. 15, 2021) (discussing western nations' deep reliance on Chinese supply chains.).

[121] China has indeed retaliated against sanctions placed on it by the United States with sanctions of their own. On January 20, 2021, in response to sanctions placed on China by the US through the Uyghur Human Rights Policy Act, China placed sanctions on twenty-eight U.S. Citizens, including former Secretary of State Mike Pompeo. *See* Brian Wong, *The Future of China-US Sanctions Diplomacy*, DIPLOMAT (Jan. 29, 2021), *available at* https://thediplomat.com/2021/01/the-future-of-china-us-sanctions-diplomacy/ (last visited Mar. 14, 2021).

[122] *China's GDP makes up over 17% of the world economy in 2020: NBS*, GLOB. TIMES (Feb. 28, 2021), *available at* https://www.globaltimes.cn/page/202102/1216746.shtml (last visited Nov. 15, 2021) (China was the "sole economy" to record positive growth during 2020 and achieved "an increase of 2.3 percent in 2020 despite the impact of COVID-19.").

[123] *See* Tianlei Huang & Nicholas R. Lardy, *China goes from strength to strength*

China is rapidly becoming the world's most dominant economic power and placing economic sanctions on it for human rights abuses in Xinjiang and Inner Mongolia will only harm the States that sanction China. Economic sanctions levied should not be an option in addressing China's violations of international law; not because such sanctions will likely not hurt China, but because they could hurt the rest of the world which relies on China for the manufacture of goods. If China were to retaliate with sanctions of its own, it could further disrupt overburdened global supply chains which could lead to global shortages of goods, including medical equipment needed during a pandemic.[124] Once again, such a move would likely not have a negative impact on China, but could negatively impact billions of people around the world.

II. Military Intervention

Like economic sanctions, military intervention is another coercive tool in a state's toolbox when it comes to addressing human rights violations. Currently, the risk of an armed conflict between China and western powers, particularly the United States, is "higher than ever."[125] Of course, a military conflict between China and western powers should be avoided at all costs, as China is a nuclear power.

The United States has begun to supply states neighboring China with arms, including sending weapons systems to Taiwan, a region that considers itself independent but is seen as a rogue province by the Chinese.[126] In addition to supplying arms to American allies in the

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in global trade, PETERSON INST. INT'L ECON. (Nov. 16, 2020), *available at* https://www.piie.com/blogs/china-economic-watch/china-goes-strength-strength-global-trade (last visited Nov. 15, 2021).

[124] Serhan & Gilsinan, *supra* note 17 (China produces half the world's medical masks and is a "major source of pharmaceuticals and protective equipment.").

[125] Laura Zhou, *Risk of military conflict between US and China higher than ever, experts say*, S. CHINA MORNING POST (June 24, 2020), *available at* https://www.scmp.com/news/china/diplomacy/article/3090314/risk-military-conflict-between-us-and-china-higher-ever (last visited Nov. 14, 2021).

[126] *US approves $1.8bn weapons sale to Taiwan*, BBC (Oct. 22, 2020), *available at* https://www.bbc.com/news/world-asia-54641076 (last visited Nov. 14, 2021) (discussing the United States' supplying of arms to Taiwan, a region which considers itself a country but is considered a "renegade province" by China.); *see also* Wajahat Khan & Ken Moriyasu, *US arms sales in Indo-Pacific pick up as China tensions build*, NIKKEI ASIA (Aug. 21, 2020), *available at* https://asia.nikkei.com/Politics/International-relations/US-arms-sales-in-Indo-Pacific-pick-up-as-China-tensions-build (last visited Nov. 14, 2021).

region, the United States has also intensified its rhetoric towards China, seemingly bringing Cold War rhetoric back from the dead.[127]

Not only does China have a stockpile of 350 nuclear warheads,[128] but China also has one of the world's largest militaries,[129] including the world's largest naval forces.[130] A military conflict with China, either directly or through proxy, would likely not be confined to the chosen theater, and instead could spark a global conflict. In addition to the possible disaster that an armed conflict with China could bring about, it likely would not provide any relief to the Inner Mongolians or Uyghurs. When states are engaged in armed conflict, human rights infringements become more prevalent.[131] While humanitarian law restricts the actions of the parties engaged in armed conflict, and protects civilians,[132] it does not protect civilians from other consequences of armed conflict.

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[127] Berkley Sanders-Velez, *Cold War Rhetoric*, COLUM. POL. REV. (Mar. 31, 2018), *available at* http://www.cpreview.org/blog/2018/4/cold-war-rhetoric-china-and-the-us-today (last visited Nov. 14, 2021); *see also As CIA Ramps Up Anti-China Actions, Why Doesn't Congress Oppose Biden's "New Cold War"?*, DEMOCRACY NOW! (Oct. 18, 2021), *available at* https://www.democracynow.org/2021/10/18/china_taiwan_us_conflict_part_2 (last visited Nov. 14, 2021) ("CIA Director William Burns has described China as 'the most important geopolitical threat facing the United States.").

[128] Mike Yeo, *Report estimates Chinese nuclear stockpile at 350 warheads*, DEF. NEWS (Dec. 14, 2020), *available at* https://www.defensenews.com/global/asia-pacific/2020/12/14/report-estimates-chinese-nuclear-stockpile-at-350-warheads/#:~:text=These%20weapons%20include%20hypersonic%20missiles,2020%20report%20on%20China's%20military. (last visited Nov. 14, 2021).

[129] *See* David Lague, *How China is replacing America as Asia's military titan*, REUTERS (Apr. 23, 2019), *available at* https://www.reuters.com/investigates/special-report/china-army-xi/ (last visited Nov. 14, 2021) (asserting that the People's Liberation Army, China's military, contained an estimated two million soldiers.).

[130] John Grady, *Pentagon Report: China Now Has World's Largest Navy as Beijing Expands Military Influence*, USNI NEWS (Sept. 1, 2020), *available at* https://news.usni.org/2020/09/01/pentagon-report-china-now-has-worlds-largest-navy-as-beijing-expands-military-influence (last visited Nov. 14, 2021).

[131] *Human Rights and Armed Conflict*, ICELANDIC HUM. RTS. CTR. (n.d.), *available at* https://www.humanrights.is/ en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-armed-conflict (last visited Nov. 14, 2021); *see also* U.N. OFF. HIGH COMM'R HUM. RTS., INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT, U.N. Doc. HR/PUB/11/01, U.N. Sales No. E.11.XIV.3 (2011).

[132] *Id.*

If an armed conflict were to commence in China, it is likely that Inner Mongolians and Uyghurs could have their homes destroyed, farms leveled, and other important resources destroyed.

B.RECOMMENDATIONS FOR CONFRONTING CHINA'S VIOLATIONS

Any effort to address the human rights abuses occurring in Inner Mongolia and Xinjiang should be rooted in a love for the people of those regions, and not in a distain or distrust of the Chinese government. As global citizens, we should express solidarity with the people of Inner Mongolia and Xinjiang and offer aid in any way possible. While doing so, the Chinese world view must also be accounted for and not minimized.[133]

I.Offering refuge to Inner Mongolians and Uyghurs

Expressing solidarity with the people of Inner Mongolia and Xinjiang can take many forms. However, offering refuge to Uyghurs and Inner Mongolians would be a sign of solidarity that could have an immediate impact in relieving them of oppression. While European nations may be less willing to agree to such a remedy due to their current influx of refugees;[134] the United States has the ability, the mechanisms, and the resources to accommodate Uyghur and Inner Mongolian refugees.[135]

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[133] *See* MICHAEL BROOKS, AGAINST THE WEB: A COSMOPOLITAN ANSWER TO THE NEW RIGHT (Zer0 Books, ed., John Hunt Publishing 2020) (discussing the concept of cosmopolitan internationalism).

[134] *See* UNHCR, *Refugee Crisis in Europe*, U.N. OFF. HIGH COMM'R HUM. RTS. (n.d.), *available at* https://www.unrefugees.org/ emergencies/refugee-crisis-in-europe/ (last visited Nov. 9, 2021); *see also* Gareth Evans, *Europe's migrant crisis: The year that changed a continent*, BBC (Aug. 31, 2020), *available at* https://www.bbc.com/news/world-europe-53925209 (last visited Nov. 9, 2021).

[135] Olivia Enos & Hardin Lang, *The United States Should Give Fleeing Uyghurs a Home*, FOREIGN POL'Y (Feb. 12, 2021), *available at* https://foreignpolicy.com/2021/02/12/united-states-Uyghurs-persecution-china-refugees-resettlement/ (last visited Nov. 9, 2021) (arguing that the United States should grant Uyghurs "Priority 2" status in its refugee program by naming them a group "of special humanitarian concern").

Anti-immigration policies perpetuated under the Trump administration,[136] and xenophobic tendencies among segments of the American population,[137] have led to the slowing down of asylum-seeking processes.[138] However, the Biden administration can reverse those policies, work through xenophobic biases, and make it easier for Uyghurs and Inner Mongolians to apply and receive political asylum. An offer of political asylum to these affected groups would provide them with much needed relief and could positively impact the United States.

1. Offering political asylum and adopting a new Homestead Act

Rural areas of the United States have been devastated by neo-liberal policies,[139] trade agreements such as NAFTA,[140] and the takeover

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[136] James T. Areddy & Michelle Hackman, *China's Muslim Uyghurs Are Stuck in U.S. Immigration Limbo*, WALL ST. J. (Jul. 28, 2020), *available at* https://www.wsj.com/articles/chinas-muslim-Uyghurs-are-stuck-in-u-s-immigration-limbo-11595937603 (last visited Nov. 9, 2021).

[137] *See* Taylor McNeil, *The Long History of Xenophobia in America*, TUFTSNOW (Sept. 24, 2020), *available at* https://now.tufts.edu/articles/long-history-xenophobia-america (last visited Nov. 9, 2021).

[138] Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121 (2020); Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers*, 51 COLUM. HUM. RTS. L. REV. 1 (2019) (analyzing the Trump administration's breaches of international law through its policies and practices that penalize asylum-seekers, notably the policies' contradiction with the United States' obligations under the 1967 Refugee Protocol to the 1951 Refugee Convention.); Emily J. Johanson, *The Migrant Protection Protocols: A Death Knell for Asylum*, 11 U.C. IRVINE L. REV. 873 (2021); Kari Hong, *Weaponizing Misery: The 20-Year Attack on Asylum*, 22 LEWIS & CLARK L. REV. 541 (2018).

[139] *See* Marc Edelman, *How Capitalism Underdeveloped Rural America*, JACOBIN MAG. (Jan. 26, 2020), *available at* https://jacobinmag.com/2020/01/capitalism-underdeveloped-rural-america-trump-white-working-class (last visited Nov. 9, 2021) ("Since the turn to more cutthroat free-market policies in the 1980s, American capitalism has systematically underdeveloped rural and small-town regions of the United States. The 2008 crash poured gasoline on the fire. Mutual savings banks and credit unions, cooperatives, mom-and-pop businesses, local industries and newspapers, health and elder care facilities, schools, and libraries have all fallen victim to relentless austerity policies or private-equity raiders").

[140] Jeff Faux, *NAFTA's Impact on U.S. Workers*, ECON. POL'Y INST. (Dec. 9, 2013), *available at* https://www.epi.org/blog/naftas-impact-workers/ (last visited Nov. 9, 2021) ("[NAFTA] caused the loss of some 700,000 jobs as production moved to Mexico. Most of these losses came in California, Texas, Michigan, and other states where manufacturing is concentrated. To be sure, there were some job

of farmland by corporations and billionaires.[141] If the United States were to be willing to take in political asylum seekers from China, Congress could pass legislation, like the Homestead Act of 1862,[142] to utilize its eminent domain powers[143] to take vacant houses to utilize as housing for political asylum seekers.[144] This would not only allow Uyghurs and Inner Mongolians to escape persecution in China but could also lead to the revitalization of rural America through increased population, increased demand for work and goods, and a boost to local economies.

As of early 2019, there were nearly 1.5 million homes in the United States[145]Currently, those homes are not serving their purpose – to provide

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gains along the border in service and retail sectors resulting from increased trucking activity, but these gains are small in relation to the losses, and are in lower paying occupations The vast majority of workers who lost jobs from NAFTA suffered a permanent loss of income").

[141] *See* J.D. Scholten, *Washington Is Failing Rural America: We Need a Change*, AM. PROSPECT (Aug. 4, 2020), *available at* https://prospect.org/power/washington-is-failing-rural-america-we-need-a-change/ (last visited Nov. 9, 2021); *see also* Rebecca Heilweil, *The controversy over Bill Gates becoming the largest private farmland owner in the US*, VOX (June 11, 2021), *available at* https://www.vox.com/recode/22528659/bill-gates-largest-farmland-owner-cascade-investments (last visited Nov. 9, 2021) (discussing Bill and Melinda Gates' acquisition of more than 269,000 acres of farmland in the United States over the past ten years and the criticisms against them, such as worries over the concentration of land ownership).

[142] *See About the Homestead Act*, NAT'L PARK SERV. (n.d.), *available at* https://www.nps.gov/home/learn/historyculture/abouthomesteadactlaw.htm (last visited Nov. 9, 2021).

[143] *See* Elizabeth F. Gallagher, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1842 (2005) (noting that the U.S. Supreme Court has approved of two circumstances when eminent domain that results in private ownership of seized land satisfies the public use requirement, including "remedying a skewed housing market").

[144] While not within the scope of this article, the proposed solution of the government taking vacant homes through eminent domain for political asylum seekers should also consider the drastically large population of unhoused Americans, including unhoused military veterans. *See generally* Indigo Olivier, *The System That We Have to Respond to Homelessness Is Not One That Was Designed to Help People*, JACOBIN MAG. (Feb. 16, 2020), *available at* https://www.jacobinmag.com/2020/02/nithya-raman-los-angeles-city-council-candidate (last visited Nov. 9, 2021).

[145] *See About the Homestead Act*, Nat'l Park Serv. (n.d.), *available at* https://www.nps.gov/home/learn/historyculture/abouthomesteadactlaw.htm (last visited Nov. 9, 2021).

people with safe and reliable housing and protection from the elements. Not only would such legislation allow Inner Mongolians and Uyghurs to escape persecution and seek refuge in the United States, but it could also be of benefit to the United States. Numerous cities in America were socially and economically devastated when manufacturing jobs left metropolitan and rural areas, particularly in the Midwest region known as the Rust Belt.[146] Using such vacant homes to house political refugees from China would not only bring a steady population to cities and towns devastated by the loss of such jobs, but it would also bring jobs back to the region. An influx of political refugees would necessitate schooling for children, grocery stores, clothing stores, etc. This would create good paying jobs in a region of the United States that desperately needs it.

This has been done before. When faced with an explosion in the number of migrants seeking safety, Greek activists turned a deserted hotel into housing for nearly 400 refugees and migrants when Greece experienced an influx of refugees and migrants.[147] Unlike conventional refugee camps, the utilization of the deserted hotel led to refugees being integrated within society, instead of being isolated outside of the city with no access to social services, and out of sight of Greeks.[148] Unlike the project in Greece, the proposed solution would be managed by the federal government and its vast resources. By housing Chinese political refugees within already existing cities and towns, not only would vacant homes be utilized, but the stigma that often faces refugees and immigrants may be reduced. In other words, if political asylum seekers were placed into already existing communities, the "otherizing" effects of asylum can be significantly diminished because they will be viewed as members of that community.[149]

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[146] *See* Michael Collins, *The Abandonment of Small Cities in the Rust Belt*, INDUS. WK. (Oct. 10, 2019), *available at* https://www.industryweek.com/talent/article/22028380/the-abandonment-of-small-cities-in-the-rust-belt (last visited Nov. 18, 2021).

[147] Patrick Strickland, *Greek leftists turn deserted hotel into refugee homes*, AL JAZEERA (July 3, 2016), *available at* https://www.aljazeera.com/features/2016/7/3/greek-leftists-turn-deserted-hotel-into-refugee-homes (last visited Nov. 18, 2021).

[148] *Id.*

[149] *See generally* Tabitha A. Baker, *The othering of migrants has negative consequences for society at large*, LONDON SCH. ECON. & POL. SCI. (Aug. 19, 2020), *available at* https://blogs.lse.ac.uk/brexit/2020/08/19/the-othering-of-migrants-has-negative-consequences-for-society-at-large/ (last visited Jan. 27,

This suggestion is likely to be met with hostility in the United States. Immigration has been a heated topic in American political discourse for years. American government officials have argued against taking in immigrants out of the need to "protect finite resources,"[150] used immigrants as scapegoats,[151] and have deployed racist tropes against immigrants.[152] But America is a nation of immigrants, and this is not a question about allowing so-called "illegal" immigrants into the United States – it is a question of following international law and providing refuge to those who need it.

The United States, as well as the other P5 States, has a responsibility to provide refuge to such political refugees under the Protocol relating to the Status of Refugees.[153] While that Protocol does not require the kind of treatment described above, it does require that state parties provide refuge to individuals who are in fear of being persecuted for reasons including race or nationality.[154] While the United States does have a responsibility to provide refuge to Inner Mongolians and Uyghurs, if they seek it; the above recommendations could make such refuge beneficial to both parties. American politicians would have to make this clear to the American public. However, the political strategy of "selling" such a policy to the American people is beyond the scope of this Note.[155]

2022).

[150] Annie Lowrey, *Are Immigrants a Drain on Government Resources?*, ATLANTIC (Sept. 29, 2018), *available at* https://www.theatlantic.com/ideas/archive/2018/09/are-immigrants-drain-government-resources/571582/ (last visited Nov. 18, 2021) (quoting former DHS Secretary Kirstjen Nielsen) ("Those seeking to immigrate to the United States must show they can support themselves financially . . . [which would] promote immigrant self-sufficiency and protect finite resources by ensuring that they are not likely to become burdens on American taxpayers.").

[151] Eric Lach, *Trump's Dangerous Scapegoating of Immigrants at the State of the Union*, NEW YORKER (Feb. 5, 2019), *available at* https://www.newyorker.com/news/current/trumps-dangerous-scapegoating-of-immigrants-at-the-state-of-the-union (last visited Nov. 18, 2021).

[152] *See* Bruce Y. Lee, *Trump Once Again Calls Covid-19 Coronavirus The 'Kung Flu'*, FORBES (June 24, 2020), *available at* https://www.forbes.com/sites/brucelee/2020/06/24/trump-once-again-calls-covid-19-coronavirus-the-kung-flu/?sh=43e9fd001f59 (last visited Nov. 18, 2021).

[153] *See generally* Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267.

[154] *Id.* at art. 1.

[155] While the political strategy of achieving such a program is beyond the scope of this Note, recent actions taken against Russian oligarchs, and the political

II.Punishing corporations that utilize Uyghur forced labor

Multinational corporations ("MNCs") have been some of the largest beneficiaries of the new supply of forced labor in Xinjiang.[156] *MNCs have been able to exploit Uyghurs that are held within such concentration camps for extremely cheap – or free – labor.*[157] *Utilization of such forced labor has been particularly prevalent in the "technology, clothing and automotive sectors."*[158] *Thus far, MNCs have been largely unwilling to admit that human rights abuses are occurring in their production chains; however, even when it is admitted to, empathy for the plight of the Uyghurs is less than forthcoming.*[159]

In response, the United States House of Representatives passed the Uyghur Human Rights Policy Act of 2020[160] that would "ban goods made using forced labor by [Uyghurs] and other Muslim minority groups in China's Xinjiang region."[161] Congress found that numerous MNCs were

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strategies to justify seizure of oligarch assets, may be provide insight. *See, e.g.*, Juliana Kaplan et al., *Congress tees up a plan to seize Russian yachts and properties in the US – and sell them for Ukraine aid*, BUS. INSIDER (Mar. 3, 2022), *available at* https://www.businessinsider.com/congress-bill-seize-russian-yachts-sell-for-ukraine-aid-2022-3 (last visited Mar. 4, 2022).

[156] Vicky Xiuzhong Xu et al., *Uyghurs for sale: 'Re-education', forced labour and surveillance beyond Xinjiang*, AUSTL. STRATEGIC POL'Y INST. (Feb. 2020), *available at* https://www.aspi.org.au/report/uyghurs-sale (last visited Jan. 27, 2022) (identifying that Uyghurs are "working in factories that are in the supply chains of at least 82 well-known global brands . . .").

[157] *Id.*

[158] *Id.*

[159] Murtaza Hussain, *Contra a Billionaire Bro: Why We Should Care About China's Rights Violations in Xinjiang*, INTERCEPT (Jan. 18, 2022), *available at* https://theintercept.com/2022/01/18/uyghurs-china-chamath-palihapitiya-warriors/ (last visited Jan. 27, 2022) ("[Billionaire investor Chamath] Palihapitiya said he did not care about the Uyghur's predicament – and that this sentiment was broadly shared by elites who were simply unwilling to be as bold as him and just say it. 'Let's be honest, nobody cares about what's happening to the Uyghurs, OK?' he told his visibly surprised co-hose, Jason Calacanis, on their podcast over the weekend.").

[160] Uyghur Human Rights Policy Act of 2020 [hereinafter Uyghur Act], Pub. L. No. 116-145, 134 Stat. 648 (2020).

[161] *Major U.S. Corporations Oppose Bill Banning Goods Produced by Forced Labor in China*, DEMOCRACY NOW! (Dec. 1, 2020), *available at*

directly or indirectly relying on forced labor to produce goods in Xinjiang, which led MNCs to oppose the bill.[162] Even though the bill was met with corporate opposition, both chambers of Congress passed the legislation and it eventually became law.[163]

The Parliament of the United Kingdom has also proposed similar legislation.[164] In a report that recommended the UK government amend and strengthen the Modern Slavery Act 2015, MPs recommended the creation of whitelists and blacklists "of companies which do and do not meet their obligations to uphold human rights throughout their supply chains."[165] It has been suggested that financial penalties should be levied against companies that are found to be in violation of an updated Modern Slavery Act.[166]

The rest of the international community should respond in kind and place bans on goods made using forced labor by Uyghurs and, if such labor should be used in the future, Inner Mongolians. If the international community were to block MNCs from selling goods made by forced laborers, the MNCs would have an incentive to not use such labor. If such labor is not being used by MNCs, and MNCs are required to look elsewhere for labor, China may be forced to reverse course to prevent capital flight.

While similar to targeted sanctions, penalizing MNCs that utilize forced labor may have less severe consequences for the Chinese people. Economic sanctions fail at holding parties responsible because such sanctions are directed at states and individuals directly involved in human rights violations.[167] Those states and individuals are still able to do

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https://www.democracynow.org/2020/12/1/headlines/major_us_corporations_oppose_bill_banning_goods_produced_by_forced_labor_in_china (last visited Nov. 19, 2021).

[162] *Id.*

[163] *See* Uyghur Act, *supra* note 131.

[164] *Uyghur abuse: MPs criticise companies over China forced labour*, BBC (Mar. 17, 2021), *available at* https://www.bbc.com/news/business-56423366 (last visited Mar. 17, 2021).

[165] *Id.*

[166] *Id.*

[167] *See generally* Pape, *supra* note 112; Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159 (1987) (concluding that economic sanctions for human rights purposes have a forty percent success rate); Cassandra LaRae-Perez, *Economic Sanctions as a Use of Force: Re-Evaluating the Legality of Sanctions from an Effects-Based Perspective*,

business within the state they are operating in. If individual members of the Chinese government are sanctioned, they can continue to do business in China, one of the world's strongest economies,[168] and therefore such individuals may not feel any substantial effect. But if a MNC is banned from selling goods made with forced labor in certain markets, or has hefty financial penalties levied against it, utilizing such forced labor becomes less profitable than it would be if such ban were not implemented. Because MNCs are driven by a profit motive,[169] they may be forced to look elsewhere to produce goods, even if producing goods elsewhere costs more.

If MNCs are forced to look elsewhere for labor, China's use of forced labor in internment camps would diminish. China seeks to become the world's most powerful economy,[170] and foreign MNCs leaving, coupled with Chinese state- and privately-owned enterprises not being able to sell goods in foreign markets, would restrain the possibility of that goal being achieved. However, because China is already one of the world's most powerful economies, such capital flight may not deter

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20 B.U. INT'L L.J. 161, 162 (2002) ("Economic and trade sanctions have the potential to devastate a civilian population and to rock the economic and political stability of a developing state."); *see also* Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS INST. (June 1, 1998) ("Yet all too often sanctions turn out to be little more than expressions of U.S. preferences that hurt American economic interests without changing the target's behavior for the better.").

[168] *See generally* Gerry Shih, *China's economy is growing faster now than before the coronavirus pandemic*, WASH. POST (Jan. 18, 2021), *available at* https://www.washingtonpost.com/world/asia_pacific/china-economy-growth-coronavirus/2021/01/17/2138ef2c-5935-11eb-a849-6f9423a75ffd_story.html (last visited Oct. 14, 2021) ("Economic data published [January 18th] showed that China logged 2.3 percent growth for 2020, becoming the only major economy that grew during a year when the virus exacted a devastating global toll.").

[169] *See* Julia Kagan, *Profit Motive*, INVESTOPEDIA (Nov. 23, 2020), *available at* https://www.investopedia.com/ terms/p/profit-motive.asp (last visited Mar. 15, 2021) ("Profit motive can also be construed as the underlying reason why a taxpayer or company participates in business activities of any kind.").

[170] China seeks to become more competitive than it already is through a plan known as "Made in China 2025." This plan "seeks to boost China's economic competitiveness by advancing China's position in global manufacturing value chain, leapfrogging into emerging technologies, and reducing reliance on foreign firms." *See* KAREN M. SUTTER, CONG. RESEARCH SERV., IF10964, "MADE IN CHINA 2025" INDUSTRIAL POLICIES: ISSUES FOR CONGRESS (Aug. 11, 2020).

Chinese state- and privately-owned enterprises from utilizing forced labor.

V.REFORM THE UNITED NATIONS TO MAKE IT A DEMOCRATIC INSTITUTION.

The present method of selection by government appointment does not leave any real freedom to the appointee. Furthermore, selection by governments cannot give the peoples of the world the feeling of being fairly and proportionately represented. The moral authority of the UN would be considerably enhanced if the delegates were directly elected by the people. If the General Assembly were responsible to an electorate, they would have much more freedom to follow their consciences.[171]

In 1947, Albert Einstein detected a critical flaw in the construction of the United Nations: the undemocratic nature of the institution. The United Nations asserts that democracy is a core value of its mission.[172] But in reality, the current construction of the United Nations is

[171] Letter from Albert Einstein to the U.N. General Assembly (Oct. 1947), *available at* http://neutrino.aquaphoenix.com/un-esa/ws1997-letter-einstein.html (last visited Nov. 15, 2021).

[172] *Democracy*, U.N. (n.d.), *available at* https://www.un.org/en/sections/issues-depth/democracy/index.html (last visited Nov. 15, 2021) ("Democracy is a core value of the United Nations.").

undemocratic. This contradiction can be resolved through reforms to the various bodies of the United Nations, but specifically, the General Assembly.

I. The Security Council

The Security Council ("UNSC") is often pointed to as the reason for the undemocratic nature of the United Nations. There is good reason for this assertion, as the UNSC is the only body within the United Nations with the authority to issue legally binding resolutions and to back up such resolutions with sanctions and the use of force.[173] Because the UNSC is the only organ with power to issue legally binding resolutions, it is nearly impossible to address violations of international law, when committed by P5 States. Recently, the UNSC was unable to adopt a resolution condemning Russia's invasion of Ukraine because Russia is a permanent member of the UNSC, with veto powers, and Russia was chairing the meeting of the UNSC.

The undemocratic nature of the UNSC is further illustrated by the fact that it is firmly within the control of the P5 States – even though non-permanent members are rotated through the UNSC every two years.[174] The literature on UNSC reforms is vast, and thus this Note does not concern itself with reforms to the UNSC.[175]

Additionally, the UNSC has not expanded with the rest of the world. When the UN was established, there were only seventy-four countries in existence,[176] compared to the 195 countries that currently exist. The world has changed since the UN was created, yet no reforms to include newly established states as full members within the UNSC have come to fruition, further diminishing the UN's claim of democratic governance.[177]

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[173] *See, e.g.*, Ian Hurd, *Legitimacy, Power, and the Symbolic Life of the UN Security Council*, 8 GLOB. GOVERNANCE 35 (2002).

[174] Charter, *supra* note 11, at art. 23(2).

[175] *See, e.g.*, Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319 (2000).

[176] *See The World in 1945*, U.N. (n.d.), *available at* https://www.un.org/Depts/Cartographic/map/profile/world45.pdf (last visited Nov. 12, 2021).

[177] *See generally* Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 328 (2000); John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?*, 35 TEX. INT'L L.J. 129 (2000) (examining four categories have situations that have arisen that reflect the Security Council's

II. The General Assembly

Efforts to reform the UNSC, however, should not overshadow the need to also democratize the main deliberative organ of the United Nations, the General Assembly. Democratizing the General Assembly would allow individual citizens of each member state to be more involved in the international political process. By allowing citizens to become involved in the process of electing their representation in the United Nations, some of the feelings of mistrust towards the international order[178] might be dispelled, as citizens become more involved in, and learn about, the process of international governance.

If people are more willing to trust the United Nations and believe that it is a legitimate authority in the world, the United Nations would be in a better position to address human rights abuses. If people in a member state are more trusting of the United Nations and view it as a critical player in international politics, they might be more likely to put pressure on their domestic government to adopt human rights treaties, even if this is done with the selfish interest of protecting themselves from human rights abuses.

A.MODES OF DEMOCRATIZATION OF THE GENERAL ASSEMBLY

This note identifies two modes of democratization of the General Assembly. The first pathway is for each member state to pass domestic legislation to allow citizens to elect UN representatives. The second mode of democratization is adopting an amendment to the Charter that would require each member state to hold popular elections to determine who will represent the member state in the General Assembly.

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inability to fulfill its functions properly); Jessica Elbaz, *International Stalemate: The Need for a Structural Revamp of the U.N. Security Council*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 211 (2016); Bardo Fassbender, *All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council*, 7 MAX PLANCK Y.B. OF U.N. L. 183, 210-211 (2003) (discussing efforts to reform the Security Council's veto power).

[178] *See* Charles T. Call et al., *Is the UN a friend or foe?*, BROOKINGS INST. (Oct. 3, 2017), *available at* https://www.brookings.edu/blog/order-from-chaos/2017/10/03/is-the-un-a-friend-or-foe/ (last visited Nov. 12, 2021) (reviewing data from polling that suggests that the public have "middling to negative views" of the United Nations).

I.Individual Member States Passing Domestic Legislation

The Charter is silent on the mode of appointing representatives of individual member states to the General Assembly.[179] In fact, the composition of the General Assembly is only mentioned in two brief sentences of Article 9 of the Charter, asserting that all members of the United Nations are to be represented in the General Assembly and that each member can have no more than five representatives in the General Assembly.[180] This silence leaves the decision of how to appoint representatives to each individual member, so direct election of General Assembly representatives is a possibility.

The United States allows the President to appoint the United States' representative to the General Assembly[181] and for the Senate of the United States to confirm the representative.[182] In theory, the people of the United States indirectly choose the representative to the General Assembly by electing the President and their two Senators, but this presupposes that American citizens knowingly vote for a presidential candidate with the implication of who represents them in the United Nations in mind. This is unlikely; for example, in 2020 only forty-two percent of Americans stated that they followed national politics "very closely,"[183] let alone international politics. Additionally, the number of people reporting that they follow national politics "very closely" is likely exaggerated because 2020 was a presidential election year in the United States.

If the General Assembly representative were to be elected by the people of a member state, citizens would have the opportunity to research the candidates' positions on topics of global importance, including human

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[179] *See* Charter, *supra* note 11, at art. 9.

[180] *Id.*

[181] The United States names the General Assembly representative the Ambassador to the United Nations. *See* Brandon Baker, *The role of UN ambassador, explained*, PENN TODAY (Jul. 11, 2019), *available at* https://penntoday.upenn.edu/news/role-un-ambassador-explained (last visited Nov. 12, 2021).

[182] *See* John Hudson & Anne Gearan, *Senate confirms Biden's nominee for ambassador to United Nations*, WASH. POST (Feb. 23, 2021, 3:54 PM), *available at* https://www.washingtonpost.com/politics/senate-united-nations-biden-thomas-greenfield/2021/02/23/08bed6f4-7600-11eb-8115-9ad5e9c02117_story.html (last visited Nov. 12, 2021).

[183] Mohamad Younis, *In U.S., Attention to Politics Shows Typical Election Year Surge*, GALLUP (Sept. 23, 2020), *available at* https://news.gallup.com/poll/320738/attention-politics-shows-typical-election-year-surge.aspx (last visited Nov. 12, 2021).

rights. Citizens would then be more aware of who is representing them at the United Nations. While this, in theory, would work to boost citizen involvement in international politics, including matters concerning human rights, it is possible that citizens would continue to be disillusioned with current political systems, including international politics. However, the effort should still be undertaken because it creates the opportunity for citizen involvement in the United Nations, something that is lacking presently. Citizen involvement is a core tenet of democracy, and this form of popular election would allow for the democratization of the General Assembly.

II.Amendment to the Charter.

Article 108 of the Charter allows for amendments to be made to the Charter.[184] If an amendment proposing the addition of language that provides that General Assembly representatives are to be elected directly by citizens of each Member State, it would only require a vote of two-thirds of the members of the General Assembly.[185] However, this might not achieve the desired goal of democratization because General Assembly representatives have a desire to keep their seats in the General Assembly and would be politically motivated to vote against such an amendment. But the larger problem with using Article 108 to democratize the General Assembly is that all permanent members of the Security Council must vote in favor of the amendment.[186] Permanent members of the Security Council, including China, almost certainly would stifle such efforts at democratization because they would diminish their power in the international arena.

The oppression of Inner Mongolians and Uyghur Muslims by the Chinese government, which has stood in defiance of international human rights laws and norms, serves as the latest illustration of the need for democratization. The Inner Mongolians and Uyghurs are Chinese citizens yet have no representation advocating for them at the United Nations.

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[184] Charter, *supra* note 11.
[185] *Id.*
[186] *Id.*

VI.CONCLUSION.

China's actions in Inner Mongolia and Xinjiang show that China is committed to homogenizing China and limiting ethnic minorities' right to self-determination and their right to pursue their own culture. Through these actions and policies, China has violated international law, including the CRC, which China has ratified, and the ICCPR, to which China is a signatory, albeit without ratification.

At the time this note was written, the situation in Xinjiang differs from the situation in Inner Mongolia, as the human rights violations there are more egregious and therefore harder to leave unaddressed. However, the actions in Xinjiang may foretell the future for Inner Mongolians if the international community fails to act.

The international community finds itself in a difficult position when it comes to addressing China's alleged human rights violations. China is a major world power, both economically and militarily, making traditional remedies, such as economic sanctions and military intervention, ineffective. The response to China's human rights violations requires a nuanced and measured response, not a rush to armed conflict or sanctions.

The United Nations should be democratized if it wishes to address future human rights violations in an effective manner. By democratizing the United Nations, the body politic of the various member states will be brought into the fold, become more invested in international politics and jurisprudence, and demand that their member states protect their collective rights as humans.

These proffered solutions are of little help to the people of Inner Mongolia and Xinjiang, who are currently experiencing persecution and discrimination simply because they speak another language, practice a different religion, or profess cultural values that conflict with the dominant Han Chinese culture. But while we, as international citizens, work towards aiding the Inner Mongolians and Uyghurs in their plight; we can learn from the situation in China and improve our international legal system to be better equipped to confront such violations of humanity.

YOUR DATA AS A WEAPON: HOW TIKTOK CAPTURES A SECURITY CRISIS

Christopher Waters*

I. Introduction

In 1890, Samuel Warren and Louis Brandeis published a law review piece which many refer to as "The Right to be Let Alone," a title of intense relevance over one-hundred years later.[1] Privacy can act as the last form of control an individual has against social groups, companies, or governments. As suggested by a litany of acclaimed scholars, privacy is at the core of personal autonomy. Emphasizing this connection between privacy and autonomy, in *The Right of the People*, Justice Douglas stated, "much of this liberty of which we boast comes down to the right of privacy."[2] However, privacy is at risk of erosion due to a variety of causes. With the advent of the digital age in which individuals, corporations, and governments have unfettered communication and access to information, the degradation of this deeply inherent right has increased.

The globe has reached a period of unprecedented connectivity by nearly every measure. Trade, information-sharing, and espionage are all supercharged by the digital revolution. With the Internet, individual privacy hangs in the balance, and both individuals and states should be concerned. Personal data has become a product unto itself, much like how tangible products can be used as currency, tools, or weapons, so too can an individual's information.

This Note analyzes critical perspectives on data through an international security lens. First, it introduces basic organizations

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[1] Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[2] WILLIAM DOUGLAS, THE RIGHT OF THE PEOPLE 94-113 (1958).

and trends which handle personal data and cybersecurity concerns. Directly following, this Note discusses the associated international security concerns which are presented within a case study on TikTok. TikTok is a Chinese online application which is critiqued for its practices concerning personal data, yet it is currently exploding with global popularity. Furthermore, there is a discussion of existing government responses and international reactions to data privacy. Finally, this Note states that action is needed to protect personal data on a variety of harmful applications. It could be an international agreement, a cohesive response by the United States, or a restructuring of cyber-focused entities. This Note proposes that if not for moral, legal, or commercial reasons, the country should protect private data out of concern for its security.

II. EXISTING RESPONSES AND TRENDS

A. CURRENT ENTITIES AND FRAMEWORKS

Due to the rapid development of electronic devices and Internet access, the creation of a regulatory organization as well as responses from Washington D.C. and the international community became necessary. There is a decentralized network of entities, regarding internet and global application matters. This issue with internet data regulation might occur because of the web's disregard of clear lines between public and private spaces, conflict and peace, and unfettered connectivity with liberty erosion.[3]

Nevertheless, entities and agreements were created both in the United States and abroad to address issues in cyberspace. The U.S. has a network of roughly twenty agencies with missions dedicated to tackling cyber threats alongside a variety of private organizations.[4] Existing branches, such as the Federal Bureau of Investigations ("FBI"), Department of Homeland Security ("DHS"), and even the Federal Trade Commission ("FTC"), all have offices

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[3] *See* ROGER C. MOLANDER ET AL., STRATEGIC INFORMATION WARFARE: A NEW FACE OF WAR 19 (RAND Corporation ed., 1996).

[4] Michael Garcia & Mieke Eoyang, *A Roadmap For Tackling Cybercrime*, LAWFARE (Dec. 10, 2020), *available at* https://www.lawfareblog.com/road-map-tackling-cybercrime (last visited Nov. 9, 2021).

and entities for data security.[5] Yet another is the Cybersecurity and Infrastructure Security Agency ("CISA") which functions as the U.S.' risk advisor not only for the public but also the private sector.

Additionally, there is the United States Cyber Command which was established in 2009 but elevated to a Unified Combatant Command in 2018.[6] This entity functions to centralize cyberspace operations, resources, and strengthens Department of Defense ("DoD") cyberspace potential.[7] It does so through "dual hat authority," in which one individual would direct the National Security Agency through Title 50 authorities while also directing Cyber Command under Title 10 authorities.[8] This arrangement was made in the hopes of resolving conflicts between intelligence and military cyber operations while also allowing Cyber Command to mature as an organization.[9]

Although each agency has an individual and tailored mission, there is no clear federal framework establishing liability for compromises in cyberspace.[10] Moreover, few, if any, of these centers on individuals' privacy. This is not to say that a citizen's privacy is never considered. The Privacy and Civil Liberties Oversight Board was created to restrain wanton intelligence collection and to advise the executive branch on privacy concerns impacted by legislation and policies adopted in the fight again

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[5] Justine Brown, *5 Federal Agencies with a Role in Ensuring Enterprise Cybersecurity,* CIODIVE (Aug. 17, 2016), *available at* https://www.ciodive.com/news/5-federal-agencies-with-a-role-in-ensuring-enterprise-cybersecurity/424557/ (last visited Nov. 9, 2021).

[6] Statement by President Donald J. Trump on the Elevation of Cyber Command, OFF. OF THE PRESS SEC'Y (Aug. 18, 2017), *available at* https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-elevation-cyber-command/ (last visited Nov. 9, 2021).

[7] *Id.*

[8] Erica D. Borghard, *Time to End Dual Hat?*, COUNCIL ON FOREIGN REL. (Feb. 3, 2021), *available at* https://www.cfr.org/blog/time-end-dual-hat (last visited Nov. 9, 2021).

[9] *Id.*

[10] *See* LYLE J. MORRIS ET AL., GAINING COMPETITIVE ADVANTAGE IN THE GRAY ZONE 140-43 (RAND CORP., 2019).

terrorism.[11] Further, offices or individuals dedicated to advising on privacy are not uncommon. Look to CISA's Office of Privacy which reports to the Director of CISA and ensures compliance with existing privacy policies.[12] Indeed, efforts to ensure privacy protection have been made, but these are largely self-monitoring mechanisms and scarcely touch the private industry which is a source of major data privacy concerns.[13]

To complicate an already vast network of U.S. federal entities, there are also private organizations which act in a variety of capacities such as information sharing, security certifications, and research into security practices. Many of these organizations have international impact, such as the Information Systems Security Association ("ISSA"), a not-for-profit dedicated to providing and sharing knowledge on risks in cyberspace and raising security issues to the public.[14] Within the private realm also sits the Information Systems Audit and Control Association ("ISACA"), which educates professionals and their companies around the world on information security, privacy issues, and the benefits of information technology.[15] While these entities provide meaningful research and expertise to government bodies and private entities, they cannot by themselves enact enforceable laws on an international or even on a state level. That power is left to international governmental organizations.

Our last consideration of existing responses is through a purely international lens. International conflict, commerce, and diplomacy all create potential for data which international governmental organizations have accounted for in varying capacities. For example, Article XXI of the General Agreement on Tariffs and

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[11] *Privacy and Civil Liberties Oversight Board*, FED. REG., *available at* https://www.federalregister.gov/agencies/privacy-and-civil-liberties-oversight-board (last visited Nov. 9, 2021).

[12] *CISA Office of Privacy*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, *available at* https://www.cisa.gov/privacy (last visited Nov. 9, 2021).

[13] *See Id.*

[14] *Developing and Connecting Cybersecurity Leaders Globally*, INFO. SYS. SEC. ADMIN., *available at* https://www.issa.org/about-issa/ (last visited Oct. 19, 2021).

[15] *Purpose and Promise*, INFO. SYS. AUDIT & CONTROL ASS'N, *available at* https://www.isaca.org/why-isaca/about-us/purpose-and-strategy (last visited Nov. 9, 2021).

Trade ("GATT") contemplates a security exception, in which countries can refuse to furnish information they deem necessary to their security, a massive potential snag for information sharing in an interconnected world.[16] For many nations, the global supply chain, ever increasing in length and complexity, represents a variety of potential data breaches. In response, the Department of Commerce's National Institute of Standards and Technology ("NIST") has created a framework for all businesses to maintain better cyber practices.[17] While the tool is entirely voluntary, it provides corporations with guidance and information in managing privacy risks.

International trade and economic stability can be easily disrupted by cyberthreats or loss of data integrity – both of which can undermine countries' confidence in establishing complex trade deals and citizens' confidence in the international liberal order. This has real impact on global governance. A letter to the United Nations General Assembly ("UN") on the International Code of Conduct for Information Security in 2015 emphasized the importance of an untouched, non-leverageable global information chain.[18] This exemplifies how the issue of data security is growing on the global political stage. It is the opinion of many states that their sovereign power includes the capacity to act unilaterally in cyber and information contexts.

Within states' discussions on existing methods of handling data, the overarching theme is increasing governance or at least awareness of individuals' data rights rather than lackadaisical treatment. Whether it be in a bilateral agreement, a free trade agreement ("FTA"), an Organization for Economic Cooperation ("OECD") promulgation, or new drafts to the U.N. General

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[16] *Article XXI Security Exceptions*, WORLD TRADE ORG. (n.d.), *available at* https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf (last visited Nov. 9, 2021).

[17] *NIST Privacy Framework*, NAT'L INST. OF STANDARDS & TECH. (Jan. 16, 2020), *available at* https://www.nist.gov/privacy-0 (last visited Nov. 9, 2021).

[18] U.N. General Assembly, *Developments in the field of information and telecommunications in the context of information security*, U.N.G.A. (Jan. 9, 2015), *available at* https://digitallibrary.un.org/record/786846/files/A_69_723-EN.pdf (last visited Nov. 9, 2021).

Assembly, it appears that the discussion on private data's vulnerability is increasingly prevalent.

B. ESCALATING SECURITY CONCERNS

Given the lack of a cohesive response from the United States, and the largely fragmented approach adopted on the international stage, one would imagine potential misuse of personal data is not immense. Indeed, private data must be of little use to states acting in cyberspace given that only a few state governments have promulgated protections. Yet nothing could be further from reality, as this piece will demonstrate that there are a staggering number of political uses for personal data, and cyberspace has quickly become a playing field for the world's superpowers.

Simply look to the National Security Commission's Final Report on artificial intelligence in cyberspace, which establishes that our competitors use disinformation to sow discord, surveillance to maintain domestic control, and cyber theft to steal developing technologies.[19] Private data has implications in all these areas, furnishing useful information to adversaries on how to tailor their campaigns in cyberspace. Given this trend, the common idea of data needs readjusting.

First, it is best to reimagine data as a concrete resource with a variety of uses rather than mere statistics and measurements. It has particularized and diverse applications. A malicious actor could learn an individual's geographic location, relative age, occupation, education, political affiliation, and even their preferred brands simply by getting that individual to accept a friend request on Facebook. Then the actor could tailor what that individual views on that platform or even outsource that information to an entity with grander goals.

Few other instances could exemplify this perspective better than the Cambridge Analytica scandal. The analytics company publicly stated that it used demographic polling and microtargeting

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[19] Final Report on Artificial Intelligence, March 2021, NAT'L SEC. COMM'N, *available at* https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf (last visited Nov. 9, 2021).

to understand voters' internal driving behavior. But in reality, Cambridge Analytica built profiles on hundreds of millions of voters, then influenced their voting behavior using tailored disinformation.[20] To Western democratic governments this revealed how quickly electorates can be targeted and socially engineered by online entities using only their private data.

Cambridge Analytica represented a massive shift in how an individual's data can have value in a security context, even drawing a response from the U.S. government in the form of the Voter Privacy Act.[21] The act notes that data has dangerous potential in the political sphere: "[o]ne U.S. based search engine advertises its ability to track hundreds of categories of data about specific individuals including age, gender, occupation, income level, sexual orientation . . . religion . . . and support for social issues . . ."[22] This demographic data collected from that individual is then broadcasted or sold to other companies both domestic and foreign. Key here is the data's near limitless uses in the hands of a malicious actor, all without the individual's choice or knowledge. Indeed, personal data can be both a political commodity and a security risk when considering the implications in free elections, media consumption, and radicalization. The Act defines covered entities, personal information, and online targeting, then outlines how a voter can request to have their collected information proffered, erased, or protected from transfer.[23] Unfortunately, the Voter Privacy Act has yet to be codified as of January 2021.

However, this is a view of personal data's use in an open democracy, namely the United States. The treatment personal data receives in the security context changes between governments. Such treatment often reflects the norms of the given state; in the U.S. it is often collected for commercial purposes or with hopes to disrupt the electorate, whereas in China's personal data is surveilled for

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[20] Patrick Day, *Cambridge Analytica and Voter Privacy*, 4 GEO. L. TECH. REV. 583, 585-6 (2020).
[21] *Id.* at 590.
[22] Voter Privacy Act of 2019, S. 2398, 116 Cong. §2(3) (2019).
[23] *Id.* at §351-4.

domestic security concerns beyond what even a post-9/11 United States would consider permissible.

China's newest Cybersecurity and National Security Laws regulate data in its critical infrastructure sectors, defined broadly, but also demands that collected data be stored in mainland China.[24] While this raises concerns for trading partners, it also reflects the Chinese Communist Party's ("CCP") domination over personal information for the sake of state security. Further, with every passing year the CCP intensifies its cyber theft campaigns, and with the advent of artificial intelligence in cyberspace, their frequency and impact will skyrocket.[25] China has a known policy of exploiting intellectual property laws in the U.S. to close the gaps between our dual-use technologies and their own.[26]

Lastly, a norm under Chinese authority is censorship, culminating in what is known as the "Great Firewall." China's Cyberspace Administration broadly defines unacceptable content and will ban entire apps such as Facebook or language deemed harmful to the state.[27] The authoritarian CCP has reckoned with the risks personal data might pose to the regime from outside their borders as well as the risks it poses from any domestic dissenters. Thus far, we have a liberal democracy's slow response and an authoritarian's aggressive response to private data risks. With luck, Europe provides a moderate viewpoint.

Both the U.S. and China's privacy laws can be contrasted with how the European Union ("EU") champions individual privacy from a place of concern for both state security and respect for the individual. The main piece of legislation in the EU is the General Data Protection Regulation ("GDPR") which is designed to give

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[24] Chris Mirasola, *An Update on Chinese Cybersecurity and the WTO*, LAWFARE (March 2, 2018), *available at* https://www.lawfareblog.com/update-chinese-cybersecurity-and-wto (last visited Nov. 9, 2021).

[25] *Final Report on Artificial Intelligence*, NAT'L SEC. COMM'N (Mar. 2021), *available at* https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf (last visited Nov. 9, 2021).

[26] *Id.* at 12.

[27] David Bandurski, *A Brief Experiment in an Open Chinese Web*, BROOKINGS INST. (Nov. 12, 2020), *available at* https://www.brookings.edu/techstream/a-brief-experiment-in-a-more-open-chinese-web/ (last visited Nov. 9, 2021).

citizens more control on how their data is collected and used. It also bars the transfer of personal data outside the European Economic Area unless the third country's regulations are deemed adequate by the European Commission.[28] This treatment demonstrates the EU's attention to personal and consumer rights, both to be protected by the state in the absence of a global agreement. The European situation demonstrates faith in government regulation, adherence to the rights of the individual, and a reckoning with modern security issues.

C. TECHNICAL CONSIDERATIONS

Concluding this introduction, a discussion of basic practices in data collection and storage is warranted. As previously touched upon, personal data is an interest to both the state and private industry – it constitutes a potential security leverage or an insight into the behavior of citizens. To private companies, personal data is an insight into what consumers want, how quickly, and at what price they see as acceptable. While state governments have a stake in where that data is stored with multiple motivations: their own security, their competition against adversaries, and protecting their citizens' individual rights.

Our knowledge of other state practices is limited, but the National Security Agency ("NSA") in the U.S. gives insight into technical government practices. The PRISM program run by the NSA finds legal footing in several laws: Section 702 of the Foreign Intelligence Surveillance Act, the now restricted Section 215 of the Patriot Act, and guidance provided by Foreign Intelligence Surveillance Courts.[29] But restrictions the government faces change by method of collection, person, and type of data being collected. Nevertheless, for the collection of telephone and Internet metadata, at least one end of the data transfer must generally be outside the U.S.[30] How long this data can be stored also depends on its source, for example,

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[28] *UK: Understanding the Full Impact of Brexit on UK: Data Flows,* DLA PIPER (Sept. 23, 2019), *available at* https://blogs.dlapiper.com/privacymatters/uk-gdpr-brexit-flowchart/ (last visited Nov. 9, 2021).

[29] *National Security Agency Surveillance*, AM. C.L. UNION, *available at* https://www.aclu.org/issues/national-security/privacy-and-surveillance/nsa-surveillance (last visited Nov. 9, 2021).

[30] *Id.*

telephone metadata is small in terms of needed storage space but can be stored for five years.[31]

The NSA stores collected private data in a two billion dollar, one million square foot complex in Utah that can store data, break codes, and probe the dark web.[32] It centralizes collected data from NSA headquarters, overseas posts, and other telecom facilities in amounts beyond common parlance, such as the immense "yottabyte."[25] Clearly, the U.S. does have the capacity and budget to act.

For the private industry, storage of private data must comport with domestic laws both where it is stored and from whom it is collected. Companies have immense motivation to collect and store personal data when considering the commercial advantages of knowing search histories, locations, connections, wish lists, purchases, and more. Yet, private storage practices are not overly diverse, with more than half of the globe's cloud storage used by four corporations: Amazon, Microsoft, IBM, and Google.[26] Given the wealth and international scope of these Internet magnates, it is relatively easy for companies to duplicate user data onto a server thousands of miles from that user.[27] This has caused a surge in calls for data residency laws, which would compel companies to store data within national territory.[28] This is demonstrated in the European Union's cogent GDPR, or even China's Great Firewall mentioned earlier.

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[31] *What You Need to Know About the NSA's Surveillance Programs*, PRO PUBLICA (Aug. 5, 2013), *available at* https://www.propublica.org/article/nsa-data-collection-faq (last visited Nov. 9, 2021).

[32] James Bamford, *The NSA Is Building the Country's Biggest Spy Center (Watch What You Say)*, WIRED (Mar. 15, 2012), *available at* https://www.wired.com/2012/03/ff-nsadatacenter/ (last visited Nov. 9, 2021).

[25] *Id.* (A yottabyte is 10^{24} bytes of data. While the common gigabyte has one billion bytes of data, a yottabyte is one septillion bytes of data.)

[26] Rob Crossley, *Where in the world is my data and how secure is it?*, BBC (Aug. 9, 2016), *available at* https://www.bbc.com/news/business-36854292 (last visited Nov. 9, 2021).

[27] *Id.*

[28] Lothar Determann, *How data residency laws can harm privacy*, WORLD ECON. F. (Jun. 9, 2020), *available at* https://www.weforum.org/agenda/2020/06/where-data-is-stored-could-impact-privacy-commerce-and-even-national-security-here-s-why/ (last visited Nov. 9, 2021).

However, even data residency laws allow for international transfers if companies can meet the standards for adequate security. Even more, some suggest that government agencies have more to gain from data residency laws than individuals, and some treaties such as the Trans-Pacific Partnership Agreement specifically outlaw adopting data residency regulations.[29] This regional free trade agreement between the U.S. and eleven other countries requires participants to develop a legal framework on data that is compatible with the other participants – with the overarching goal of easy cross-border data transfers.[30] This is affirmed in Article 14.13 of the treaty which prevents member countries from requiring companies to store data within their territory.[31] The debate on local control versus an open international system continues; but given the hesitancy towards a global regulatory scheme local data residency laws and state driven private data regulation seems more likely.

After covering existing organizations and frameworks, the variety of applications private data has, and actual processes of storing data, we have a foundation moving forward. In sum, there are a variety of existing organizations and frameworks and a similar variety of applications for private data. Further, the U.S. is faced with increased pressure from allies to join the effort in privacy protection and competitors who view data as leverage.

From here this Note continues into dire security concerns exemplified in a case study, a more in-depth analysis of regulatory responses, concluding with possible options on how to protect personal data with respect to state security.

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[29] *Id.*

[30] *The Trans-Pacific Partnership's Take on Personal Data*, TAYLOR WESSING GLOB. DATA HUB, (Dec. 2015), *available at* https://globaldatahub.taylorwessing.com/article/the-trans-pacific-partnerships-take-on-personal-data (last visited Nov. 9, 2021).

[39] *Id.*

II. Security Threats Through Data: A Case Study

The previous section introduced the idea that an individual's data can be seemingly harmless, yet when harvested can be used maliciously by both companies and governments alike. Similarly, at first glance an app filled with gleeful young adults dancing and creating trends may seem like nothing more than the newest hit online platform. Indeed, individuals can simply create memes, participate in political discussions, reference pop culture, or dancing away on TikTok. Yet by nearly every measure this video sharing social app is simply staggering and, in some cases, not in a positive way.

Created by the Chinese company ByteDance in 2016, the TikTok has had a meteoric rise since 2019 with over two billion downloads worldwide.[32] Its popularity here in the U.S. is also alarming when broken down by demographics. By March 2021, roughly twenty-five percent of its American accounts were held by ten to nineteen year olds.[33] Indeed, as reported in *Business Insider*, many of the world's most popular TikTok "influencers" are as young as seventeen, and few are older than thirty.[34] This means that there are millions of impressionable users with unfettered access to a range of content; the most popular of which can be created by users just as young.

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[40] Brandon Doyle, *TikTok Statistics – Updated Sep 2021*, WALLAROO MEDIA (Sep. 27, 2021), *available at* https://wallaroomedia.com/blog/social-media/tiktok-statistics/#:~:text=Total%20App%20Downloads%20%E2%80%93%20The%20TikTok,Tower%200n%20April%2029%2C%202020 (last visited Nov. 9, 2021).

[41] J. Clement, *Distribution of TikTok Users in the United States as of March 2021, by age group*, STATISTA (Apr. 2021), *available at* https://www.statista.com/statistics/1095186/tiktok-us-users-age/ (last visited Nov. 9, 2021).

[42] *See* Paige Leskin & Palmer Haasch, *Charli D'Amelio has taken over as TikTok's biggest star. These are the Top 40 Most Popular Creators on the Viral Video App*, BUS. INSIDER (Dec. 24, 2020), *available at* https://www.businessinsider.com/tiktok-most-popular-stars-gen-z-influencers-social-media-app-2019-6 (last visited Nov. 9, 2021).

Without discussing the discourse on content and age, which merits a separate discussion in its own right, these numbers alone certainly create a security risk. The massively influential content creators themselves are likely unaware of how their personal data and accounts are being used, and their audiences – likely just as young or younger, also are unaware of how much of their information ByteDance collects, and what can be done with that information. The amount of both legal and technological literacy required to parse TikTok's user agreement and collection practices simply cannot be expected of anyone under the age of eighteen or even an adult user.

Against the backdrop of its sheer popularity, TikTok also collects users' data in staggering amounts, all emphasized when discussed in a national security context. American citizens can now act as sources of data for an adversary: an unaware statesperson who uses TikTok may be the target of cyber espionage, the lay user may act as a test-run for CCP talking points, or the CCP may simply compel ByteDance to furnish information from users in the military.

This scenario is not conjecture, in its Final Report on AI the National Security Commission stated outright, "Adversaries will combine widely available commercial data with data acquired illicitly . . . to track, manipulate, and coerce individuals."[35] The report goes on to say that the government must start viewing citizens' data as a national security asset as adversaries use it to map individuals and sociopolitical networks, predict behaviors, and illicit responses to online stimuli.[36] Indeed, TikTok can act as an excellent case study into how an individual's data can have broad implications in international security dilemmas.

A. JUDICIAL RESPONSE

Since the Cambridge Analytica Scandal, lawmakers and civil rights activists have placed big tech companies under increasing scrutiny, and ByteDance is no exception. The Chinese tech company owns

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[43] *Final Report on Artificial Intelligence* 47, NAT'L SEC. COMM'N ON ARTIFICIAL INTELLIGENCE (Mar. 2021), *available at* https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf (last visited Nov. 9, 2021).
[44] *Id.* at 50.

TikTok as well as the Chinese version of the app "Douyin," and in mid-2020 it faced several lawsuits alleging unfair data collection on an unprecedented level. In the U.S. District Court for the Northern District of California, Misty Hong, a student, sued the company for allegedly creating a dossier of her private information, which even included biometric data such as fingerprints and facial recognition.[37]

In the face of legal backlash, ByteDance has assured users it does not transfer any collected data to its servers in China[38] Hong's case has been consolidated into one class action lawsuit and an FTC investigation into whether ByteDance collected information on children under the age of thirteen, which would violate U.S. privacy law.[39] This legal activity propelled TikTok into national headlines and created demand for a legislative response on Capitol Hill, as several testimonies and a Department of Treasury Committee on Foreign Investment in the United States ("CFIUS") investigation would demonstrate.

B. CONGRESSIONAL RESPONSE

Indeed, as lawsuits began to form, the political branches began to take great interest in TikTok's collection activity. By June 2020, U.S. Senators began to request a Department of Justice ("DoJ") inquiry into ByteDance's collection processes, even going so far as to state that Chinese tech firms are notorious for operating under

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[45] Katie Paul, *TikTok Accused in California Lawsuit of Sending User Data to China*, REUTERS (Dec. 2, 2019), *available at* https://www.reuters.com/article/us-usa-tiktok-lawsuit/tiktok-accused-in-california-lawsuit-of-sending-user-data-to-china-idUSKBN1Y708Q (last visited Nov. 9, 2021).

[46] *Id.*

[47] William Reinsch, Jack Caporal, Patrick Samuell, Isabella Frymoyer, *TikTok is Running Out of Time: Understanding the CFIUS Decision and Its Implications*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 2, 2020), *available at* https://www.csis.org/analysis/tiktok-running-out-time-understanding-cfius-decision-and-its-implications (last visited Nov. 9, 2021).

draconian intelligence laws.[40] This culminated in a CFIUS investigation into ByteDance's ownership.[41]

CFIUS is an interagency group derived from Section 721 of the Defense Production Act of 1950, that reviews mergers, acquisitions, and foreign investments alleged to be a concern to national security.[42] Using the 2018 Foreign Investment Risk Review Modernization Act, the committee can, and did, determine that ByteDance's ownership and practices represented a threat to American security. The upshot of this decision by CFIUS was that that it gave the White House justification for a potential ban of the TikTok unless ownership of company was handed over to an American company.[43] There has been ample testimony and outcries from lawmakers in Congress. These outcries were shown through the "No TikTok on Government Devices Act", passed in August 2020.[44] Per the CFIUS recommendation, ByteDance is in negotiation to retain a minority stake in TikTok while releasing ownership to bidding U.S. companies; including Oracle, Walmart, and several venture capital firms.[45]

C. EXECUTIVE RESPONSE

These Congressional and CFIUS actions play out in the background of actions taken by the White House, which have mostly failed in

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[40] Khorrri Atkinson, *Sens. Demand DOJ Open Probe Into Zoom, TikTok China Ties*, LAW360 (Jul. 30, 2020), *available at* https://plus.lexis.com/document/?pdmfid=1530671&crid=90dfdbcf-077e-4b1c-9886-8194fe92d8f6&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A60GF-MG71- JGPY-X004-00000-00&pdcontentcomponentid=122080&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=hf4hk&earg=sr0&prid=00c0ed67-e38a-426c-afde-a455c0c5ca3e (last visited Nov. 9, 2021).

[41] Reinsch, *supra* note 47.

[42] Treas. Reg. § 721 (as amended in 2018).

[43] Reinsch, *supra* note 47.

[44] No TikTok on Government Devices Act, S. 3455, 116th Cong. (2020)

[45] Dan Primack, *TikTok Gets More Time, Again*, AXIOS (Dec. 5, 2020), https://www.axios.com/tiktok-bytedance-deadline-national-security-cfius-574ba5d0-cb46-4a1e-9f27-99354a12d6b9.html (last visited Nov. 9, 2021).

federal courts. In May 2020, President Donald Trump invoked his authority under International Emergency Economic Powers Act ("IEEPA"), declaring a national emergency concerning foreign technology companies threatening U.S. security.[46] In doing so, President Trump identified TikTok as a threat to the nation's security and ordered divestment in August 2020 through CFIUS and identification of prohibited transactions by the Secretary of Commerce. These directions were completed in August 2020 through Executive Order 13942.[47]

By late September 2020, the D.C. District Court issued a preliminary injunction on behalf of ByteDance. One month later in another case between angered TikTok users and the Trump Administration, the Eastern District Court of Pennsylvania issued another injunction on behalf of the plaintiffs. The court held that the IEEPA was violated by an attempt to regulate informational materials which would harm plaintiffs.[48] Indeed, from September to December of 2020 the Trump Administration's actions against TikTok have yielded poor results.

D. BYTEDANCE AND BEIJING

In the beginning of this section, the discussion was of a popular app that collected users' data. Why is such an app such a concern to U.S. lawmakers, the White House, and federal courts, when Facebook, Instagram, and Google often do the same? Assuredly, given the significant government response, one might consider what data is being collected that would merit such a response given that personal data is collected by a variety of other apps, companies, and even the NSA post-9/11.

However, the private data which TikTok collects from users is staggering even when compared to mainstream competitors such as Instagram, Facebook, or Twitter. A user's location, device information, cookies, even clipboard information – which could include passwords, are all accessible to ByteDance.[49] It is crucial to

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[46] TikTok, Inc. v. Trump, 507 F. Supp. 3d 92 (D.D.C. 2020).
[47] *Id.*
[48] Maryland v. Trump, 498 F. Supp. 3d 624 (E.D. Pa. 2020).
[49] *Id.*

distinguish TikTok's collection from other applications, such as Facebook and YouTube, whose practices are arguably reprehensible as well.

The distinction continues with ByteDance's aggressive and novel collection techniques. TikTok faced scrutiny for dodging a Google Android privacy layer by collecting individual device information in MAC addresses.[50] Even more, the app creates a new encryption with every update, meaning that anyone who attempted to see collection practices would be in a desperate rat race against a subsequent update. Despite user data being stored in Virginia and Singapore, CFIUS still determined that ByteDance's ownership of TikTok represented a security risk. The question then becomes how user data could be used against a nation's security.

It is also crucial to distinguish ByteDance's practices from Facebook's or Google's, with respect to the international adversarial context. While Facebook may collect and sell data to analytics firms for commercial purposes, ByteDance is largely acting under an acquiescent CCP; a tenuous relationship which could change rapidly. According to James Andrew Lewis with the Center for Strategic and International Studies, China has become a master of espionage, after building the world's largest authoritarian surveillance state against its own citizens, meaning anything that is Chinese owned and connected to the Internet has potential to become a security risk.[51]

This declaration is corroborated yet tempered by Samm Sacks's statement to Senator Sheldon Whitehouse when testifying on Chinese cyber practices, "[u]ltimately the Chinese government can compel companies to turn over their data, but this does not always happen."[52] Sacks, a Senior Fellow at Yale Law School's Paul Tsai

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[50] Kevin Poulsen, *TikTok Tracked User Data Using Tactic Banned by Google*, WALL ST. J. (Aug. 11, 2020), *available at* https://www.wsj.com/articles/tiktok-tracked-user-data-using-tactic-banned-by-google-11597176738 (last visited Nov. 9, 2021).

[51] James Andrew Lewis, *How Scary is TikTok?*, CTR. FOR STRATEGIC & INT'L STUD. (Jul. 14, 2020), *available at* https://www.csis.org/analysis/how-scary-tiktok (last visited Nov. 9, 2021).

[52] Samm Sacks, *Data Security and U.S.-China Tech Entanglement*, LAWFARE (April 2, 2020), *available at* https://www.lawfareblog.com/data-security-and-us-china-tech-entanglement (last visited Nov. 9, 2021).

China Center, argues that Chinese information security issues are too large and ethically ambiguous for individual companies to handle.[53] Data turnover is possible through China's 2017 Cybersecurity Law in Article 28, although experts warn it is incorrect to assume synonymity between Chinese firms and the CCP.[54] It is this murkiness and unpredictability within TikTok's massive collection and popularity that worries lawmakers.

U.S. lawmakers and security experts have started to better understand this context in which TikTok and ByteDance operate. Aside from worries that the CCP could compel ByteDance specifically to furnish collected data, it is undeniable that China as a single entity has increasingly used cyberspace as an advantageous space against the U.S., often targeting personal data. Since 2015, Xi Jinping and Beijing military leaders have increasingly centralized cyber warfare units, while also acknowledging the existence of both military and civilian cyber units.[55] Further, Chinese cyber tactics are particularized, distinguishing between economic espionage, political destabilization, and traditional clandestine intelligence operations.[56]

These aggressive reorganizations and vast networks have yielded immense successes for the CCP. Simply look to the cyberattacks on Pennsylvania State University, the University of Connecticut, and the University of Virginia in 2015 – all institutions hosting research facilities tied to the DoD.[57] In total, the TikTok scenario represents both a changing security landscape and an adversary who knows how to dominate cyberspace.

Unfortunately, even the meager negotiations for increased American ownership have fallen flat as of December 2020. CFIUS could still turn to the DoJ for enforcement of the order as no formal extension of the divestment negotiations has been awarded to ByteDance. Therefore, it seems likely that ByteDance will succeed in the judicial

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[53] *Id.*
[54] *Id.*
[55] Tremayne Gibson, *2015 a Pivotal Year for China's Cyber Armies,* DIPLOMAT (Dec. 17, 2015), *available at* https://thediplomat.com/2015/12/2015-a-pivotal-year-for-chinas-cyber-armies/ (last visited Nov. 9, 2021).
[56] *Id.*
[57] *Id.*

system but will be forced to divest after CFIUS negotiations conclude amicably or through the DoJ.

As previously mentioned, popular candidates for acquisition include Oracle and Walmart.[58] A preliminary deal stated that Oracle and Walmart would obtain a combined twenty percent stake in TikTok Global, details of which were expected to become public in 2021.[59] Under this deal, four of the five directors on TikTok Global's board would be American, and its headquarters would be located in the U.S.[60] Even further, Oracle would host all U.S. user data on its cloud system and, according to Walmart, the global company would pay $5 billion in new tax dollars to the U.S. Treasury.[61] These efforts are clearly a move to appease concerns of Chinese influence over the company, while allowing ByteDance itself to remain as close as necessary to Beijing. Unfortunately, as of March 2021, negotiations have halted.

However, even this diplomatic option created confusion and concern. At face value it appears that ByteDance could retain eighty percent of TikTok Global before the new entity goes public. Yet Ken Glueck, Oracle Vice President, stated that once TikTok Global shares are distributed Americans will be the majority owners. This ownership transition will occur because shares will be given directly to investors, and nearly forty percent of ByteDance is currently owned by U.S. venture capital firms.[62]

Yet this ownership option did not appease Republican lawmakers nor the White House, and it is unclear what specific

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[58] Alex Lawson, *Commerce Puts TikTok Restrictions on Hold*, LAW360 (Nov. 12, 2020), *available at* http://plus.lexis.com (last visited Nov. 9, 2021); *see also* John D. McKinnon, *TikTok Sale to Oracle, Walmart is Shelved as Biden Reviews Security*, WALL ST. J. (Feb. 10, 2021), *available at* https://www.wsj.com/articles/tiktok-sale-to-oracle-walmart-is-shelved-as-biden-reviews-security-11612958401 (last visited Nov. 9, 2021).

[59] Andrew Morse & Queenie Wong, *Judge Blocks TikTok Ban as Negotiations with U.S. Continue*, CNET (Dec. 7, 2020), *available at* https://www.cnet.com/news/tiktok-sale-deadline-elapses-as-negotiations-with-us-continue/ (last visited Nov. 9, 2021).

[60] *Id.*

[61] *Id.*

[62] *Id.*

technology would transfer to Oracle. Indeed, ByteDance in the past has demanded ownership of TikTok's algorithm, only allowing Oracle oversight of TikTok's source code. Algorithms in social media apps often run what users are prompted to view and engage with, what advertisements they see, and what content is likely to soar in popularity. For example, if a viewer on YouTube watches several cooking tutorials and subscribes to a home cooking channel, YouTube's algorithm would suggest popular cooking videos to that viewer and promote advertisements based on kitchen items or local grocery stores.

Whereas source codes are programming statements made by a programmer and saved in a file, the algorithm comprises the foundation of how an app will interact with the user.[63] With distinctions between ByteDance and venture firms, a new global entity's ownership, and what technologies will be run by U.S. providers, the tenuous deal is rife with pitfalls.

At the least, the TikTok dilemma exemplifies the need for more concrete legal protections on individual's data if not for their own privacy, for their nation's security. The U.S. is, by many measures, behind in what experts call "the grey zone": aggressive actions not rising to traditional definitions of conflict in cyber-activities. The unbridled popularity of social media platforms represents opportunities for adversaries to gather and use citizens' data against our largely open society. One could imagine social media apps as resource mines in the grey zone which our adversaries can, and have, tapped into.

III. Undeterred Data in a Bordered Globe

Given that data is clearly valuable in a security context, understanding how it is treated in the international political system is crucial to creating more cogent solutions for a more secure globe. In this section I explore the difficulties of data in the international

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[63] *Source and Object Code*, UNIV. WASH. OFF. RSCH. (2021), *available at* https://www.washington.edu/research/glossary/source-code-and-object-code (last visited Nov. 9, 2021).

sphere, return to discussed regional responses, and argue that the most cogent responses are state-specific and provide potential frameworks which Washington could adopt.

A. DIFFICULTIES

The first consideration is jurisdiction: if data is a product in commerce and a resource in national security, what entity controls or could control it? Unfortunately, as explored in Professors Kenneth Anderson and Jennifer Daskal's "The Un-Territoriality of Data," our current societal framework is simply not optimized for personal data.[64] The piece outlines how data travels in an arbitrary path disregarding property and borders at a pace which surpasses physical materials in international trade.[65] Further, data can be divided up and stored in potentially limitless ways across the globe. Personal data dissemination disregards our traditional framework of sovereignty and borders, so already one can see that crafting an international solution on data regulation is difficult.

Perhaps this explains why some experts in the field, such as Anderson and Daskal, warn against primary state access of data in the international system. Users lack control over what path data takes and as mentioned, the path is often arbitrary. This was stated in a case involving Microsoft in which experts warned that outcomes would be largely arbitrary if government access to data was location dependent.[66] Further, data divisibility, a common practice of dividing data across many servers, means that multistate storage has constantly been used to increase data's efficiency in an increasingly interconnected globe.[67]

A common solution some governments have taken is analogizing cross border data access to extraterritorial killings. The upshot is that the target's location controls, regardless of the operator of the weapon, such as in *Hernandez v. United States* or *United States v. Gorshkov*.[68] But the analogy is tenuous at best, as with data there is

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[64] Jennifer C. Daskal, *The Un-Territoriality of Data*, 125 YALE L. REV. 326 (2015).
[65] *Id.*
[66] *Id.* at 367.
[67] *Id.* at 368.
[68] Hernandez v. United States, 757 F.3d 249, 255 (5th Cir. 2014) (involving a scenario in which a border agent in Texas shot and killed a fifteen-year-old

no tangible or even noticeable exchange between states. Even more, the user's ability to access the data is unchanged, whether the user desires them to do so or not, the user would not likely notice if a government or business had access. It is this point which Professor Daskal emphasizes that where the data is being accessed and transported to controls, not the location of its storage.[69] Overall, data represents a stubborn problem for individual governments and, by extension, bilateral relationships.

B. INTERNATIONAL ATTEMPTS

An international consideration of data quickly becomes complex when state sovereignty, jurisdiction, data ownership, and the consent of the private individual are considered.[70] While some may scoff at how respected privacy might be on a global scale, privacy is enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which forms conversations leading to tangible reforms, such as the Organization for Economic Cooperation on Development's view on trans-border data flows.[71] However, it appears that some states and intergovernmental unions are taking the initiative. The current trend for developing international data privacy norms acknowledges a form of individual privacy rights from a humanitarian perspective, with unions such as the E.U. and international organizations increasingly stipulating informational privacy standards.[72]

Mexican), *rev'd en banc, rev'd per curium*, 785 F.3d 117 (5th Cir. 2014), *petition for cert. filed*, No. 15-118 (U.S. July 27, 2015); Rodriguez v. Swartz, No. 4:14-CV-02251 (D. Ariz. Jul. 9, 2015) (involving a scenario in which a border agent in Arizona shot and killed a sixteen-year-old Mexican), *see also* United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026 (W.D. Wash. May 23, 2001).

[69] Reinsch, *supra* note 47, at 373.

[70] *See* Kate Westmoreland, *The Global Corporate Citizen: Responding to International Law Enforcement Requests for Online User Data*, HARV. J. L. & TECH. JOLT DIG. (2015), *available at* https://perma.cc/MD44-SKRV (last visited Nov. 9, 2021).

[71] Javier Lopez Gonzalez, *Hitchhiker's Guide to Cross-Border Data Flows*, ORG. FOR ECON. CO-OPERATION & DEV. (June 3, 2019), *available at* https://www.oecd.org/trade/hitchhikers-guide-cross-border-data-flows/ (last visited Nov. 9, 2021).

[72] *See* Theodore J. Kobus et al., *2015 International Compendium of Data Privacy Laws* iv, BAKERHOSTETLER (2015), *available at* https://docplayer.net/1572007-

While this new legal norm slowly encourages even the most skeptical members of the international community to accept data privacy, unfortunately, it allows states to adopt exceptions in the name of national commercial competition. Further, the focus is on the rights of the individual against imposing corporations without recognizing how some bad actors actively target individual's data. It is therefore useful to observe how individual states have decided to address individual data protection, efforts which could act as a framework for hypothetical global agreements for Washington to build from.

i. Data Localization

The most user-protective system for handling data on an international scale is data localization. This method requires citizens' data to be collected, processed, and stored within those citizens' country before travelling across borders. The data cannot transcend borders before meeting local privacy standards and obtaining the individual's consent; which is often in the terms of agreement.[73]

The EU's GDPR is the cornerstone example of cogent data localization. Adopted in 2016, the EU desired to standardize data security laws across the union while also requiring individual consent, the anonymization of collected data, data breach notifications, and the regulation of data transfers across borders.[74] The GDPR applies to any company that even markets its goods or services to EU citizens, creating a global impact. Companies face intense penalties for non-compliance, issued by Supervisory Authorities who can also promulgate warnings, perform audits, order

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2015-international-compendium-of-data-privacy-laws.html (last visited Nov. 9, 2021).

[73] Courtney Bowman, Comment, *Data Localization: An Emerging Global Trend*, JURIST (Jan. 6, 2017), *available at* https://www.jurist.org/commentary/2017/01/courtney-bowman-data-localization/ (last visited Nov. 9, 2021).

[74] Juliana De Groot, *What is the General Data Protection Regulation? Understanding & Complying with GDPR Requirements in 2019*, DIG. GUARDIAN (Sept. 30, 2020), *available at* https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection (last visited Nov. 9, 2021).

data to be erased, or even block companies from transferring data across borders.[75] Indeed, the GDPR represents an extensive protectionist move which has engendered a variety of protection laws in other countries, some less stringent and others even more demanding.

ii. Lesser Protections Creating Discord

Some countries such as the U.S. offer fewer protectionist methods in the aim of expedited data transfers, often with commercial advantages in mind. The U.S. has no single federal law on user data privacy, and most develop through trade deals, such as the EU-US Privacy Shield of 2016.[76] Even this agreement has faced a litany of legal challenges within the EU from parties who still hold U.S. standards to be inadequate.

As these commercial conflicts begin to arise amongst security risks, individual U.S. states have begun to search for a solution which balances its economic goals with user privacy. These can range from comprehensively strong policies, such as California's Consumer Privacy Act of 2018 ("CCPA") to more niche bills such as Illinois' Geolocation Privacy Protection Act ("HB2785") which defines geolocation and requires private entities obtain user consent to collect it.[77] However, as of January 2021, HB2785 is *sine die*; like some thirty states, the Illinois legislature has yet to completely adopt its measures.[78]

Complicating this already fragmented response, some U.S. states have chosen to push forward breach notification laws, forcing

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[75] *Id.*

[76] Commission Implementing Decision 2016/1250 of July 12, 2016, of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU-U.S. Privacy Shield, 2016 O.J. (L 207/1).

[77] *2020 Consumer Data Privacy Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 17, 2021), *available at* https://www.ncsl.org/research/telecommunications-and-information-technology/2020-consumer-data-privacy-legislation637290470.aspx (last visited Nov. 9, 2021).

[78] H.B. 2785, 101st Gen. Assembly, Reg. Sess. (Ill. 2021).

compromised entities to notify consumers of cybersecurity breaches. Such laws are often focused on the financial or healthcare sectors.[79]

In addition to the vast variety of state frameworks, the U.S. Federal Trade Commission has jurisdiction over several commercial entities to protect individuals against unfair privacy or data security practices.[80] While this new legal norm slowly encourages even the most skeptical members of the international community to accept data privacy, unfortunately, it allows states to adopt exceptions in the name of national commercial competition. Further, the focus is on the rights of the individual against imposing corporations without recognizing how some bad actors actively target individual's data. It is therefore useful to observe how individual states have decided to address individual data protection, efforts which could act as a framework for hypothetical global agreements for Washington to build from.

iii. Authoritarian Protections

As previously discussed, the CCP has created a standard of individual data protection which simultaneously protects Chinese citizens from foreign companies harvesting their data. Chinese laws also bar any potential for state adversaries to do the same while also surveilling its citizenry to dystopian levels.

Although the Great Firewall has existed since 2000, and even faced occasional backlash with every passing year the CCP hands down another restriction on what is allowed onto Chinese citizens' devices.[81] This serves two purposes: not only blocking out information but creating a digital echo chamber for Party propaganda. Such was the case in 2013 with Document No. 9, a Party document outlining

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[79] Cynthia Brumfield, *12 New State Privacy and Security Laws Explained: Is Your Business* Ready, CSO (Dec. 28, 2020), *available at* https://www.csoonline.com/article/3429608/11-new-state-privacy-and-security-laws-explained-is-your-business-ready.html (last visited Nov. 9, 2021).

[80] *Data Protection Laws in the United States*, DLA PIPER (Jan. 28, 2021), *available at* https://www.dlapiperdataprotection.com/index.html?t=law&c=US (last visited Nov. 9, 2021).

[81] Yaqui Qang, *In China, the "Great Firewall" Is Changing a Generation*, HUM. RTS. WATCH (Sept. 1, 2020), https://www.hrw.org/news/2020/09/01/china-great-firewall-changing-generation (last visited Nov. 9, 2021).

"seven perils" which were to be cracked down on, namely free press, uncontrolled education, and the Internet.[82] Indeed, every possible information outlet is censored in some form. Politico researcher Yaqui Wang notes that with every generation the Great Firewall yields more success in the eyes of the CCP.[83] Each passing generation has seen fewer and fewer images, texts, or platforms beyond what the Party considers acceptable.[84]

Returning to personal data specifically, in November 2020, the Personal Information Protection Law ("PIPL") was passed, a universal law governing any entities operating in China who process personal data.[85] In reading the new layer of protection, some similarities between PIPL and the GDPR arise, such as how foreign companies must pass a security assessment even if the data is stored outside of China's borders.[86] Layering this new law on top of discussed surveillance and censorship practices, in addition to China's knack for intellectual property theft, the country has become a major force in cyberspace; often to the detriment of the U.S.[87] This level of influence does not just impact victims, however.

Startlingly, as the superpower continues to rise it has attempted to make its norms more acceptable. It is a desirable thought that any authoritarian model of individual data protection would be inapplicable to the U.S. and impossible on a global scale. Here, it would require rejection of political and legal doctrines intrinsic in American society. On an international level, it would require a unipolar system lead by a hegemonic China with the resources and political will to complete global censorship in the

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[82] *Id.*
[83] *Id.*
[84] *See* Wang, *supra* note 86.
[85] Thomas Zhang, *China's Personal Information Protection Law: Compliance Considerations from an IT Perspective*, CHINA-BRIEFING, (Dec. 11, 2020), https://www.china-briefing.com/news/data-privacy-china-personal-information-protection-law-it-compliance-considerations/#:~:text=China%20too%20released%20its%20draft,law%20on%20protecting%20personal%20information (last visited Nov. 9, 2021).
[86] *Id.*
[87] *Chinese Malicious Cyber Activity*, CYBERSECURITY & INFRASTRUCTURE AGENCY (n.d.), https://us-cert.cisa.gov/china (last visited Nov. 9, 2021).

name of protection. The idea seems to be the stuff of dystopian nightmares.

However, several authors with the Center for Security and Emerging Technology write that in the field of artificial intelligence ("AI") this very concept is playing out.[88] Russia and China have become major exporters of surveillance and censorship technology to hundreds of countries; and with those technologies dissent suppression and public opinion quashing are exported.[89] By giving these actors room to work in this area, the U.S. has de facto accepted the potential spread of authoritarian practices and by so many measures the situation in cyberspace is dire.

IV. Conclusion: An Unprepared Nation, an Insecure Battle, with at-risk Individuals

Returning to the first acknowledgment in this Note, the stage for interacting with other states is becoming increasingly digital. Data of all kinds is used by companies and state governments alike with revolutionizing tactics; be it commercial, diplomatic, or adversarial. Due to the United States' reliance on traditional intelligence and conflict measures, state led initiatives, and adherence to private industry responses, the country is especially unprepared in cyberspace's "gray zone": an area of conflict below traditional measures but certainly antagonistic.[90]

The use of the gray zone is not unheard of or even new in many contexts, such as geopolitics. Simply look to China's activities in the South China Sea: redrawing borders, sailing fleets, and crafting artificial islands in contested areas – all certainly not

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[88] *See generally*, ANDREW IMBRIE ET AL., CENTER FOR SECURITY AND EMERGING TECHNOLOGY, AGILE ALLIANCES (2020).

[89] *Authoritarians are Exporting Surveillance Tech, And With it Their Vision for the Internet*, COUNCIL ON FOREIGN REL. (Dec. 5, 2019), *available at* https://www.cfr.org/blog/authoritarians-are-exporting-surveillance-tech-and-it-their-vision-internet (last visited Nov. 9, 2021).

[90] *See* Lindsey R. Sheppard & Matthew Conklin, *Warning for the Gray Zone*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 13, 2019), *available at* https://www.csis.org/analysis/warning-gray-zone (last visited Nov. 9, 2021).

peaceful but not rising to the level of traditional conflict.[91] Or, perhaps more on point here, consider Russia's cyberactivity in European elections and Central European power grids, activities which undermine the very institutions democracies rely on, yet were not recognized as a threat until it was too late.[92] One can see that this gray zone is expanding in potential, and with an expanding reliance and use of cyberspace, individual data is being used in that gray zone.

The implications of private data in the national security context within this gray zone are concrete, the Senate Select Committee on Intelligence commissioned an investigation after the 2016 U.S. Presidential Election into how third parties accessed user's data collected by social media platforms.[93] Private data could be hacked, sold to third parties anywhere in the world, or acknowledged by an adversary's intelligence community and exploited; all likely without the individual knowing of their breach and potential manipulation.[94] Private data could be hacked, sold to third parties anywhere in the world, or acknowledged by an adversary's intelligence community and exploited; all likely without the individual knowing of their breach and potential manipulation.[95] This is not a foreign issue either; although the successes of Chinese tech companies like ByteDance or Huawei's 5g network expansions commonly make headlines, even U.S. headquartered companies like Equifax remain a potential Achilles' heel.[96]

Nonetheless, China's strides in AI and its insular technology policies have awoken lawmakers for good reasons. Beyond the real

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[91] LYLE J. MORRIS ET AL., GAINING COMPETITIVE ADVANTAGE IN THE GRAY ZONE xiii-37 (Rand Corp. 2019).
[92] *See id.* at 91.
[93] Carrie Cordero, *The National Security Imperative of Protecting User Data*, CTR. FOR A NEW AM. SEC. (Apr. 24, 2019), *available at* https://www.cnas.org/publications/commentary/the-national-security-imperative-of-protecting-user-data (last visited Nov. 9, 2021).
[94] *See id.*
[95] *Id.*
[96] Robert D. Williams, *To enhance data security, federal privacy legislation is a start*, BROOKINGS INST. (Dec. 1, 2020), *available at* https://www.brookings.edu/techstream/to-enhance-data-security-federal-privacy-legislation-is-just-a-start/ (last visited Nov. 9, 2021).

possibility of Beijing commandeering magnates such as ByteDance and all its collected data, its advancement in AI technologies is astounding with potential civilian and military applications.[97] AI is reliant on data collected in an algorithmic fashion but is limitless in application once well-developed. Thus, controlling how much data that algorithm receives is crucial in preventing that AI's development and adversarial uses. Simply put, a federal law protecting individual data here would limit the number of building blocks available to a Chinese AI program.

Professor Susan Aaronson confirms the trends and practices just discussed, arguing that the U.S. needs a comprehensive approach after years of negligence.[98] Alluding to breakthroughs in the gray zone, Aaronson points to the 2013 hack of Target, J.P. Morgan, and the U.S. Office of Personnel Management as the event when Washington was put on notice that data was an at-risk resource with an adversarial China.[99] With the explosion of social media since, Aaronson suggests that the U.S.' slow response is largely due to the fact that most social media and internet titans are American companies.[100]

The situation has changed, however, after years of consumer and capital build-up in an insulated domestic market, Chinese companies have the capacity to outpace U.S. ones, something less palatable to U.S. lawmakers than unregulated American titans. Aaronson concludes with an urge for comprehensive data protection reforms across the board, which would protect individuals, hold every data collecting entity accountable, and streamline data transfers with our allies.[101]

Writing for *Lawfare* from the Tsai China Center at Yale Law, Robert D. Williams affirms the need for an overhaul of how the U.S. allows private companies to treat individual data – both in the

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[97] *Id.*

[98] Susan Ariel Aaronson, *Why Personal Data is a National Security Issue*, BARRON'S (Aug. 12, 2020), *available at* https://www.barrons.com/articles/why-personal-data-is-a-national-security-issue-51597244422 (last visited Nov. 9, 2021).

[99] *Id.*

[100] *Id.*

[101] *Id.*

interests of the citizen and the security interests of the nation.[102] Williams quarrels with Samm Sacks's and Jennifer Daskal's call for developing set standards which address privacy and protection rather than "trying to clip the wings of rising entrants."[103] In 2019, Williams disagreed with Sacks's and Daskal's critique of Washington's reliance on CFIUS and case-by-case review of every foreign Internet entity, describing CFIUS as a "scalpel" rather than a defensive "sledgehammer."[104] Nonetheless, experts such as Aaronson, Sacks, Daskal, and now even Williams in 2020 have recognized the need for Washington to take the initiative and put down the scalpel.

Indeed, while it is unfortunate that it took a foreign tech company to revitalize the discussion of federal protections, adopting cohesive protections would tackle several key areas of concern: national security, international cohesion, and personal privacy. Clearly new legislation would aim at protecting private data through a national security lens, but a national standard would reduce compliance costs for existing U.S. companies, increase confidence in our allies such as the EU, and build protections against potential foreign adversaries, such as ByteDance to active adversaries like North Korea.[105]

Further, as Robert Williams notes, by adopting legislative policy based on standards and principles rather than executive orders carving out specific countries, we are protected from critiques of hypocrisy.[106] Again, consider how many American statesmen and thinktanks critique the CCP's practices of banning specific websites and platforms – even this piece acknowledged Beijing's sprawling censorship. Without proper legislation or divestment to American

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[102] Robert D. Williams, *Reflections on TikTok and Data Privacy as National Security*, LAWFARE (Nov. 19, 2019), *available at* https://www.lawfareblog.com/reflections-tiktok-and-data-privacy-national-security (last visited Nov. 9, 2021).

[103] *Id.*

[104] *Id.*

[105] Robert D. Williams, *To enhance data security, federal privacy legislation is a start*, BROOKINGS INST. (Dec. 1, 2020), *available at* https://www.brookings.edu/techstream/to-enhance-data-security-federal-privacy-legislation-is-just-a-start/ (last visited Nov. 9, 2021).

[106] *Id.*

firms the U.S. would, through executive orders, essentially be doing the same while cheering for market capitalism.[107] By acting through legislative policy, Washington could bolster data security while sending a signal of our adherence to liberal norms to our liberal democratic allies.

A. FORWARD

At the beginning, this Note touched on the humaneness of privacy. To many legal scholars privacy is crucial to autonomy, self-protection, and by extension, democratic society.[108] Personal privacy is not only enshrined in the U.S. Constitution but is found, perhaps even more concretely, in the United Nations Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966.[109] Indeed, privacy is a human right crucial in modern society and is deserving of protection in that measure alone.

Yet the digital age presents new spaces for conflict with new resources, as explored here, cyberspace and personal data. Even more, global ecommerce draws upon personal data as a new means of effective yet highly intrusive marketing. Therefore, states have been compelled to act and protect private data either from a place of concern for individual rights, state security, or perhaps a marriage of both. This is exemplified through the European Union's GDPR, which upholds individual privacy against intrusive companies and adversarial states, or through China's Personal Information Protection Law – alongside a variety of censorship laws which aim to maintain the CCP's security.

The U.S. is falling behind on a critical issue which impacts individual privacy and its own national security. Given that widespread censorship would be unpalatable in the minds of American lawmakers and citizens, Washington should strive for a personal data privacy law modeled after the European Union's GDPR which would hopefully compel private companies to be more

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[107] De Groot, *supra* note 82.

[108] Olmstead v. United States, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

[109] *What is Privacy*, PRIVACY INT'L (Oct. 23, 2017), *available at* https://privacyinternational.org/explainer/56/what-privacy (last visited Nov. 9, 2021).

open about their collection processes while also demanding that those companies store collected data within the U.S. Further, this would hopefully spark litigation against bad actors and the misuse of personal data.

What D.C. should do does not end there, however, as the existence of cyber espionage and massive entities such as ByteDance present a serious and continuing issue. Washington needs to reckon with the fact that cyberspace has become the new medium in which geopolitical struggles develop. Our adversaries certainly have: look to Russia's extensive use of data and cyberspace as a means of spreading disinformation and rattling faith in electoral processes with a regularity some experts consider replicative of wartime strategy.[110] Or look to China's variety of actions in cyberspace, from censorship to IP theft and data protection to espionage.[111] Indeed, the U.S. has been slow to accept that our adversaries use of cyberspace has reached aggressive levels, and needs a more centralized and assertive approach rather than the existing network of passive entities.[112]

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[110] Garret M. Graff, *A Guide to Russia's High Tech Toolbox for Subverting Democracy,* WIRED (Aug. 13, 2017), *available at* https://www.wired.com/story/a-guide-to-russias-high-tech-tool-box-for-subverting-us-democracy/ (last visited Nov. 9, 2021).

[111] Lyu Jinghua, *What Are China's Cyber Capabilities and Intentions,* CARNEGIE ENDOWMENT FOR INT'L PEACE, *available at* https://carnegieendowment.org/2019/04/01/what-are-china-s-cyber-capabilities-and-intentions-pub-78734 (last visited Nov. 9, 2021).

[112] Adrien Chorn and Monica Michiko Sato, *Maritime Grey Zone Tactics*, CTR FOR STRATEGIC AND INT'L STUD., *available at* https://www.csis.org/maritime-gray-zone-tactics-argument-reviewing-1951-us-philippines-mutual-defense-treaty (last visited Nov. 9, 2021).

THE GLOBAL PRISON CRISIS: WILL THE U.S. TAKE ACCOUNTABILITY AND LEAD IN REFORM?

Mazaher Kalia

ABSTRACT

Imagine being locked in a cell, with no proper food, no proper human interaction, having to work hard labor jobs with no pay, and being unable to care for your hygiene. Inhuman degrading treatments of prisoners are often justified globally because they keep "criminals" out of society. Places of detention such as prisons are the most vulnerable populations because the people in there are rarely thought of, and the issues they face in those detention centers are kept away from the outside world. Due to this, prison populations are at a risk of many ill forms of treatment. Their mistreatment is often justified through their criminal acts. However, crimes do not negate the fact that incarcerated individuals are human. Individuals who commit "crimes" are no less human than those who have not committed crimes and it is time that prisoners and their rights are both remembered and respected. This note recommends that the U.S. adopt and implement the Optional Protocol to the Convention against Torture as part of its program to address widely acknowledged problems with mass incarceration.

INTRODUCTION

The world's prison population holds over 11 million prisoners.[1] This is the highest level the global prison population has ever reached having increased between 2002 and 2020.[2] The United States historically and currently incarcerates a greater proportion of its population than any other country with over 2.1 million people in prison at a rate of 655 people per

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[1] Global Prison Trends 2020, PRISON INSIDER (June 18, 2020), *available at* https://www.prison-insider.com/en/articles/global-prison-trends-2020 (last visited March 20, 2021).

[2] *Id.*

100,000 of the national population.[3] The World Prison Population List by the International Center for Prison Studies, reports the prison rate for countries worldwide, majority of which have a rate below 150 per 100,000 of their population.[4] China prison population falls 4 million less than the United States making them the second highest prison populated country .[5] France was one of the country's with a rate below 150 with 61,102 thousand individuals imprisoned at a rate of 90 prisoners per 100,000.[6] Lastly, the United Kingdom's three distinct legal systems each have a rate of prisoners below 150 per 100,000.[7]

There are many factors that contribute to the rise in the global prison population including countries and territories: mandatory minimum sentencing, mandatory pre-trial detention, police practices, over criminalization of drugs, the use of private prisons for economic purposes, and often not weighted, political influences.[8] Such factors present themselves differently in each country and territory.[9]

However, globally the use of imprisonment tends to be justified by protecting society against crimes.[10] Imprisonment however has many negative consequences including difficulty in family formation, dissolution and decrease in social networks, harmful psychological effects, and an increased rate of return. Thus it is counterproductive in

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[3] *Id.*

[4] Michelle Ye Hee Le, Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country. THE WASHINGTON POST (July 7, 2015), *available at* https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/ (last visited March 20, 2021).

[5] *Supra* note 3.

[6] World Prison Brief Data: France, WPB, *available at* https://prisonstudies.org/country/france

[7] World Prison Brief Data: United Kingdom. WPB, *available at* https://www.prisonstudies.org/country/united-kingdom-england-wales (last visited March 20, 2021).

[8] Use & Over-use of Imprisonment Worldwide, PRISON INSIDER (March 23, 2017), *available at* https://www.prison-insider.com/en/articles/use-and-over-use-of-imprisonment-worldwide (last visited March 20, 2021); Overcrowding and Overuse of Imprisonment in the United States, ACLU (May 2015).

[9] Use & Over-use of Imprisonment Worldwide, PRISON INSIDER (March 23, 2017), *available at* https://www.prison-insider.com/en/articles/use-and-over-use-of-imprisonment-worldwide (last visited March 20, 2021);

[10] E4J University Module Series: Crime Prevention and Criminal Justice, Topic 1: Introducing the aims of punishment, imprisonment, and the concept of prison reform, UNODC, available at https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-6/key-issues/1--introducing-the-aims-of-punishment--imprisonment-and-the-concept-of-prison-reform.html (last visited Feb. 11, 2022).

protecting society against crimes.[11] Over using prisons have led to overcrowded prisons, that are not properly maintained or supervised resulting in inhuman treatment, and deviates from the goal of rehabilitation.[12] Because of this, the more imprisonment may not even help protect societies against crimes.[13] According to the Institute for Criminal Policy Research Global Report, more imprisonment, "limits the capacity of prison systems to deal effectively with the small minority of prisoners who pose serious risks to public safety, and indeed increases the risks posed by prisoners (to themselves as well as to others inside and outside prison walls)".[14]

Such prison conditions conflict with International Human Rights laws and other guidelines governing prisoners treatment that includes The International Covenant on Civil and Political Rights ("ICCPR), the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT"), the United Nations Standard Minimum Rules for the Treatment of Prisons ("SMRTP"), and the Optional Protocol to the Conventional against Torture ("OPCAT").[15] These instruments safeguard fundamental human rights including the ban of torture or cruel, inhuman or degrading treatment. In specific, it requires participating nations to create mechanisms to prevent torture from occurring in detention centers, police stations, and prisons and it permits international experts to inspect those same facilities.[16] Unlike many countries, the United States is extremely dependent on judicial decrees, that sometimes involve private monitoring disallowing the ability to be held accountable for prison abuses by the international community.[17] Numerous countries have ratified OPCAT to ensure compliance for prisoners' rights and in doing so have begun the process of reform.[18] The

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[11] *Id.*

[12] *Id.*

[13] *Supra* note 8.

[14] *Id.*

[15] Chapter 8 International Legal Standards for the protection of Persons Deprived of Their Liberty, U.N., *available at* https://www.un.org/ruleoflaw/files/training9chapter8en.pdf (last visited March 20, 2021).

[16] Preventing Torture Everywhere, NCRCAT, *available at* http://www.nrcat.org/storage/documents/opcat_video_discussion_guide.pdf (last visited March 20, 2021).

[17] Simon J. Penal monitoring in the United States: Lessons from the American experience and prospects for change. *Crime, Law and Social Change.* 2018;70(1):161-173. (last visited March 20, 2021).

[18] Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on Prevention of Torture, UNITED NATIONS HUMAN RIGHTS, *available at*

United States, as a world leading power that prides in its democracy and influence continued silence on regulating its prison population and incarceration rates is detrimental to what the nation stands for and thus regulation of OPCAT needs to be an important implementation.[19]

The failure of the United States to join with world leading powers France and UK in ratifying OPCAT and generally taking on international human rights legal obligations for prisoners' rights, limits its credibility and influence.[20] The focus of this note will be to establish why it is important for the United States to hold itself accountable in the regulation of prison reform. Part I will focus on birth of prison and the growth of mass incarceration in the United States. Part II will provide a summary of the body of international law that governs prisoner's treatment and discuss the United States failure to adopt the regime. Part III will discuss how and why restorative justice programs implemented in the United States can reduce prison populations and lead in shifting the worlds views by considering and implementing alternatives to prisons. Part IV will conclude that the United States prison practice behavior and attitude must change and without reform it is detrimental to the efforts the United States have taken in promoting democracy.

I. THE BIRTH OF PRISONS AND GROWTH OF MASS INCARCERATION IN THE U.S.

A NEW METHOD OF PUNISHMENT

Prisons were rarely used for criminal punishment.[21] The original purpose of jails was not to punish people but to simply hold them before

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https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/RecentSignaturesRatifications.aspx (last visited March 20, 2021).

[19] United States Ratification of International Human Rights Treaties, HRW (July 24, 2009), *available at* https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties (last visited March 20, 2021).

[20] Id.

[21] Harry Elmer Barners, Historical Origin of the prison System in America, 12 J.AM. INST. CRIM. L. & CRIMINOLOGY 35 (1921), *available at* https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1772&context=jclc (last visited March 21, 2021).

trial and for the dispensation of corporal punishment.[22] One could expect to be released at the following court session during a "goal delivery,"[23] the delivery or clearing of a goal of the prisoners confined therein, by trying them. [24] It was rare for anyone to remain in prison and those who did were usually political and religious offenders, and debtors.[25] Although punishment was not the original purpose to confine a person, it became the outcome of prisons in the 19th century.[26] According to Foucault's paradigm, the birth of prison as a form of punishment occurred between 1760 and 1840.[27] This period is referred to as the era of the Enlightenment and European/American revolutions, "when the rising middle class abolished public rituals of corporal punishment as incompatible with its new aspirations to build a modern liberal and industrial society".[28] Each country's history of punishment is distinctive from others and because they exhibit their own patterns of punishment today, a definitive global model of punishment has not emerged.[29]

The birth of prisons in the United States can help explain the how non-western countries adopted prisons for punishment.[30] The birth of the prisons is important because these beginnings help understand its relevancy to imprisonment histories of many countries around the world.[31]

INCREASING NUMBERS OVER TIME

In the late eighteenth century after the American Revolution theories of reform changed the way punishment was originally carried

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[22] History of Imprisonment, CRIME MUSEUM, *available at* https://www.crimemuseum.org/crime-library/famous-prisons-incarceration/history-of-imprisonment/ (last visited March 21, 2021).

[23] *Supra* note 12.

[24] The Law.com Dictionary, (2015*), available at* https://dictionary.thelaw.com/gaol-delivery/ (last visited March 21, 2021).

[25] *Supra* note 12.

[26] *Supra* note 13.

[27] Mary Gibson, Global Perspectives on the Birth of the Prison, THE AMERICAN HISTORICAL REVIEW (Oct. 2011), Vol. 116, No.4, pp1040-1063, *available at* https://www.jstor.org/stable/23307878 (last visited March 21, 2021).

[28] *Id.* at 1040.

[29] *Id.*

[30] *Id.*

[31] Youmans, Ariana, Effective Prison Management: An International Collaboration, (2013) The Corinthian: Vol. 14 , Article 2., *available at* https://kb.gcsu.edu/thecorinthian/vol14/iss1/2.

out.[32] Independence, and a new justice system providing both protection and rights for its citizens was the result of the revolution.[33] Although the first several decades following the Revolution were an experimental period in criminal justice[34], people in many parts of the world were seeking personal freedom and left their homes, immigrating to the United States.[35] Although people from many parts of the world were seeking personal freedom, most immigrants were from Germany, Ireland, and England, "the principle immigration before the Civil War".[36] During this time, incarceration rates rose leading to overcrowded goals, which led to decay and corruption.[37] Due to this, in the early nineteenth century, widespread construction of penitentiaries began.[38] At the time confinement was seen as the only other alternative for punishment because massive reforms of corporal punishment were ongoing.[39]

During the mid-19th century, the Civil War led to "the emancipation of millions of African-American slaves in the South".[40] Both African American families and immigrants arrived at American industrial cities looking for work.[41] During this time, the crime rate in America began to raise. In order to exert control, prisons were built to house inmates with the intentions to deter them from committing crimes.[42] In the South, prison population continued to rise as Black Prisoners quickly became a disproportionate number of the total prison population as they were targeted by law enforcement and given harsh

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[32] Mary Gibson, *supra* note 27 at 1044.

[33] The Early Years of American Law, *available at* https://law.jrank.org/pages/11900/Early-Years-American-Law.html (last visited March 21, 2021).

[34] *Id.*

[35] Immigration to the United States, 1851-1900, LIBRARY OF CONGRESS, *available at* https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/immigration-to-united-states-1851-1900/

[36] *Id.*

[37] 19th century prison reform recollection, CORNELL UNIVERSITY LIBRARY (2020), *available at* https://digital.library.cornell.edu/collections/prison-reform/ (last visited March 21, 2021).

[38] Talal Al-Khatib, Doing Time: A History of US Prisons, SEEKER (July 21, 2015), *available at* https://www.seeker.com/doing-time-a-history-of-us-prisons-1770031128.html.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

sentences.[43] Similar to today, inmates were forced to do hard labor, live in harsh conditions, and were stripped of their personal freedoms. Authors often referred to this punishment as "slavery by another name."[44]

Additionally, the world prison population increased dramatically between the years of 2000 and 2015.[45] This could be best understood by the global prison industrial complex, the interweaving of private business and government interests, known as the privatization of prisons.[46] During the 1990's, private prisons began to catch on during the 1990s, due to overcrowding in many countries including the United States, where private prison corporations housed inmates for a cost.[47] In the United Kingdom, the private finance initiative (PFI), a government procurement policy aimed at creating public-private partnerships, helped institutionalize private prisons having announced that prisons will be both built and ran by private companies.[48] Governments were and continue to be attracted to private prisons because of cost savings and motivated corporations interest in profit maximization and accumulation of capital.[49] Privately owned prison corporations began to see a rise in state and local governments interest with building and operating prison facilities, many of which entered into lengthy contracts. Since these contracts prevent prison capacity from being changed or reduced, they effectively block criminal justice and immigration policy changes. Private corrections companies are heavily invested in keeping more than two million Americans behind bars.[50]

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[43] Delaney, Subramanian, Shames Turner, American History, Race, and Prison, Vera Reimagining Prison Web Report, *available at* https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison (last visited Feb. 13, 2022).

[44] Convict Leasing, EJI, (Nov. 1, 2013), *available at* https://eji.org/news/history-racial-injustice-convict-leasing/.

[45] The Growth of Incarceration in the United States: Consequences for Health and Mental Health, NAP (2014), *available at* http://nap.edu/18613.

[46] Journal for the Study of Peace & Conflict, (2016), *available at* https://www.msf-crash.org/sites/default/files/2017-11/j16.pdf (last visited March 21, 2021).

[47] *Id.*

[48] *Id.*

[49] Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons, SENTENCING PROJECT (August 2, 2018), available at https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/#IV.%20Private%20Contractors%20and%20their%20Expanding%20Reach (last visited Feb. 13, 2022).

[50] Prison Conditions, EJI, *available at* https://eji.org/issues/prison-conditions/ (last visited March 21, 2021).

Problems of Inhumane Treatment

The occupancy rate of many prisons is recorded to have exceeded in more than 124 countries1. The effect of this is usually poor administration because of understaffing and allows prison monitoring protocols to be abused causing the individuals in such spaces to be more reluctant to abuse. In addition, assaults, uncontrolled violence subjected to higher rates of death in custody, gross mistreatment, a lack of healthcare provision and low rehabilitative opportunities occur due to the overuse of imprisonment.[51] Additionally, overcrowded prisons run a high risk of transmitting communicable diseases due to poor sanitary conditions. In reality prisons often do not meet basic human rights standards.[52] For example, the International Penal Reform reported that in the United States, corrupt prison officials often abusing their power, beat, stab, rape, and kill incarcerated people.[53] Inmates requiring special attention due to their disabilities, mental health, addiction treatment, and suicide prevention are often ignored and not given no treatment..[54] According to the American Civil Liberties Union and Human Rights Watch Report, Human Rights Violations in the United States, the United States is guilty of many human rights violations against prisoners.[55] These violations include overcrowding, lack of protection against violence creating fear for personal safety, issues pertaining to female prisoners, and disciplinary and confinement conditions in super maximum security (supermax) facilities.[56]

Harsh prison conditions, corruption, and correctional officers abuse of power run rampant with one another.[57] Both prison officials and state leaders tend not to be held accountable for corruption and abuse of power. Because of this, incarcerated people end up not receiving required

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[51] The Issue, PENAL REFORM, *available at* https://www.penalreform.org/issues/prison-conditions/issue/ (last visited March 21, 2021); Id. https://eji.org/issues/prison-conditions/

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Nan d. Miller, International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?, 26 CAL. W. INT'L L.J. 139, 140. (Fall, 1995).

[56] *Id.*

[57] *Supra* note 50.

protections.[58] Private non-profits have sought to increase accountability by investigating prison conditions and filing federal lawsuits and complaints seeking improvements. For example, the Equal Justice Initiative ("EJI") has brought attention to extreme sexual abuse issues at Tutwiler Prison for Women assisting in the start of a federal investigation.[59] Additionally, EJI recorded the sexual abuse faced by men at the hand of correctional officers and other officials in several Alabama prisons.[60]

EJI along with many prison reform programs alarm our communities about the psychological risk and other consequences from inhuman and degrading treatment in prisons.[61] Many prisoners experience panic, anxiety, rage, depression, hallucinations, and drug abuse.[62] A survey by the Bureau of Justice Statistics found that more than half of all inmates had some kind of mental health problem and inmates particularly in the United States suffer from more serious mental health problems such as schizophrenia.[63] The survey has also found that contagious diseases such as tuberculosis, sexually transmitted diseases such as HIV, and chronic diseases such as hypertension, asthma, and diabetes constitute a growing percentage of correctional health care needs.[64] Inmates face a variety of challenges that affect their ability to become productive members of society and it is time that the problems of inhuman treatment are addressed on a national level.[65]

Growing Recognition that the Prison System Needs Reform

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Torture, PHR, *available at* https://phr.org/issues/torture/ (last visited March 21, 2021).
[62] Incarceration Nation, APA (Oct. 2014), *available at* https://www.apa.org/monitor/2014/10/incarceration (last visited March 21, 2021).
[63] *Supra* Note 45.
[64] Int J Men's Health. 2013 Fall; 12(3): 213–227. doi: 10.3149/jmh.1203.213 (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4217308/)
[65] *Supra* note 62.

Currently the United States holds half of the worlds prison population.[66] The sad part of this realization is that, over a quarter of the world's prisoners held in detentions are not included in this calculation. This includes those held during the pre-sentence, and awaiting final sentence stages.[67] Over use of criminalization has become governments shield in ignoring social issues impacted by capitalism and globalization.[68] In the United States, criminal justice reform scholars, as well as attorneys, social workers and many more have spoken and continue to speak out about the needed change in the prison systems.[69] Scholars often highlight three main causes for the need to reform prisons—inhuman treatment, racial bias, and poor prison conditions' contribution to high rates of reincarceration for released prisoners.[70]

It is recognized that inhuman treatment and conditions for incarcerated individuals "render them less able to productively function and more likely to engage in criminogenic behaviors both inside and upon release from prison".[71] Some American prosecutors have been compelled to speak out against the current departments of corrections prison systems.[72] Additionally, the rise in incarceration rates has been recognized to disproportionately affect minority populations because of severe laws, the war on drugs, and racial bias in case processing.[73] According to the American Psychological Association reports, Black people are more likely to be incarcerated before trial, more likely to receive the death penalty, be arrested and charged with drug crimes, and have worse plea agreements that might otherwise have kept them out of prison.[74] Another growing concern that scholars and advocates speak out

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[66] Andrew Coyle et al.,Current Trends & Practices in the Use of Imprisonment, International Review of the Red Cross, Volume 98 Number 903 (December 1, 2016) pp. 761-781, (last visited March 21, 2021).

[67] *Id.*

[68] *Id.*

[69] America's Prison System is Flawed, PSU (March 4, 2019), *available at* https://sites.psu.edu/aspsy/2019/03/04/americas-prison-system-is-flawed/comment-page-1/ (last visited Feb. 13, 2022).

[70] *Id.*

[71] Lucy Lang, Prosecutors Need to Take the Lead in Reforming Prisons, THE ATLANTIC (Aug. 27, 2019), *available at* https://www.theatlantic.com/ideas/archive/2019/08/urgency-prison-reform-and-what-prosecutors-can-do-about-it/596884/ (last visited March 21, 2021).

[72] *Id.*

[73] Incarceration Nation, APA (Oct. 2014), *available at* https://www.apa.org/monitor/2014/10/incarceration (last visited March 21, 2021).

[74] *Id.*

about is the increased risk of incarceration.[75] Punishment should not do more harm than good, however in the United States most criminals released are often rearrested.[76] Each extra year in prison appears to raise the risk of reoffending and most studies show that an average 40% of people released from prison will likely reoffend.[77]

II. THE INTERNATIONAL PRISON REGIME

ABHORRENT PRACTICES MOTIVATING THE REGIME

By the end of the 1830's penitentiaries had taken hold into society allowing more and more states to replace various forms of physical punishment with imprisonment.[78] Penitentiaries inspired several ways of prison construction, culminating in the opening of the Pentonville penitentiary in 1842. The Pentonville Penitentiary is the internationally acclaimed model of the new disciplinary regime located in England.[79] The US plays a powerful role in non-western countries development because it actively influenced the international community to implement systemic incarceration and it presents the powerful role the United States plays in.[80] Prison construction was inspired and ultimately caught on because it was seen to be good for the economy because the inmates would work and produce goods far below the minimum wage.[81] The new parliamentary states did not guarantee the rights of humans, it instead dehumanized the lower classes in ways that manipulated their minds and body.".[82] According to Ignatieff, the "class dimension of the transition in

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[75] *Id.*

[76] Matt Clarke, Long-Term Recidivism Studies Show High Arrest Rates, PLN (May 3, 2019), *available at* https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/ (last visited Feb. 13, 2022).

[77] *Id.*

[78] Frank Dikotter, The Promise of Repentance: The Prison in Modern China, JSTOR (2007), *available at* https://www.jstor.org/stable/10.7591/j.ctv2n7n8d.13 (last visited March 21, 2021).

[79] *Id.*

[80] Mary Gibson, *Supra* note 27.

[81] *Supra* note 33.

[82] Mary Gibson, *Supra* note 71.

punishment was the state disciplining" the new and "increasingly radical working classes through massive building program of new prisons".[83]

Local practices and political structures accommodated European ideas and influence.[84] After 1920, the institutionalization and massive expansion of imprisonment became an important tool of domination by both the French and British.[85] The creation of prisons spread on to Africa where European colonies imposed prison systems on a massive scale after they secured control over people and territories.[86] Prisons were imposed as tools of social disorder by colonizers reflecting in a hierarchy system where rulers acquired political control.[87] According to Bernault, "economic motives were central to the prison project in many African colonies, where "prisoners provided a docile, cheap, and constantly available labor force for underpaid tasks, for private entrepreneurs and plantation owners as well as for the colonial administration".[88] The creation of prisons also spread to Middle Eastern countries where they were consolidated under French and British mandatory administration.[89] The creation of prisons eventually reached China, where the first prison was built in Beijing with a model based on Pentonville Prison, the first prison in England.[90] Even in countries like India, where the prison system was prevalent, they were still influenced by the European.[91] Eventually, imprisonment vastly increased and especially in the post-war period.[92]

The creation of prisons was seen as a tool to advance civilization appearing to introduce a democracy of punishment for all citizens.[93] Statesmen and experts in nonwestern countries learned the Western penal code by reading and translating criminological textbooks and journals, touring Western prisons, and hiring foreign consultants.[94] Representatives from non-Western nations discussed their adaptation of

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[83] *Id.*

[84] Anthony Gorman, Regulation, Reform & Resistance in the Middle Eastern Prison, JSTOR (2007), *available at* https://www.jstor.org/stable/10.7591/j.ctv2n7n8d.9 (last visited March 21, 2021).

[85] Mary Gibson, *Supra* note 27.

[86] The Shadow of Rule: Colonial Power and Modern Punishment in Africa, JSTOR (2007) pg. 55-94, *available at* https://www.jstor.org/stable/10.7591/j.ctv2n7n8d.8 (last visited March 21, 2021).

[87] *Id.*

[88] Mary Gibson, *Supra* note 27.

[89] Anthony Gorman, *Supra* note 75.

[90] *Id.*

[91] *Id.*

[92] Andrew Coyle et al., *Supra* note 59.

[93] Mary Gibson, *Supra* note 73.

[94] *Id.*

the Western penal code at the International Prison Congresses in Europe and the United States.[95] As you can see the nineteenth and early twentieth centuries saw the diffusion of the ideal of reforming prisons for punishment from Europe and the United States to the rest of the world through variety of means including: direct imposition by colonial administrations , indirect diplomatic pressure from imperialist powers, and active appropriation by modernizing nation-states.[96] Non-western rulers appropriated foreign penological theories reinventing them for their own purposes.[97]

BODY OF INTERNATIONAL LAW GOVERNING PRISONERS' TREATMENT

Cruel, inhuman or degrading treatment has been recognized by the international community publicly and officially "as among the most brutal and unacceptable assaults on human dignity".[98] Since the end of World War II, several bodies of international law was introduced to ensure the 1945 Charter of the United Nations entered to instill peace, economic efficiency, and democracy.[99] The Universal Declaration of Human Rights ("UDHR") chartered in 1948 states in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" which is restated in several human rights instruments.[100] The UDHR, provided a more secure anchor for international standard-setting on prison conditions providing a basis for specifying which conditions were unacceptable.[101] Although neither the U.N. Charter nor the Declaration are "legally binding in the sense that treaties or conventions bind parties under international law, it is generally accepted that the Universal Declaration of Human Rights has become part of customary international law as a result of subsequent state practice.[102]

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] OPCAT Manual on Preventing Torture, APT, available at https://www.apt.ch/sites/default/files/publications/opcat-manual-english-revised2010.pdf.
[99] *Supra* note 52.
[100] *Id.*
[101] Anthony Groman, *Supra* note 75.
[102] *Supra* note 74.

Customary international law arises from the general and consistent practices of legal obligation.[103] According to Friedman,

"It is a declaration of 'a common standard of achievement for all peoples and nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'."[104]

The Universal Declaration brough widespread attention to prison harsh experiences of torture and cruel, inhuman, and degrading punishment, which further began the process of protecting prison populations.[105]

There are two key international instruments of treaty status that contain important general principles applicable to prisoners' rights, the International Covenant on Civil and Political Rights ("ICCPR") and the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT").[106] Focusing on the ICCPR, Article 7 of the ICCPR provides that, "it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.[107] The prohibition in article 7 "is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[108] The ICCPR is a legally binding treaty to signatory countries and thus obligates such countries to implement its

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[103] David Weissbrodt and Cheryl Heilman, Defining Torture and Cruel, Inhuman, and Degrading Treatment, 29 LAW & INEQ. 343 (2011), *available at* https://scholarship.law.umn.edu/faculty_articles/366.

[104] Chapter 2c: Human Rights in UN Declarations & Resolutions, LEGAL ANSWERS, *available at* https://legalanswers.sl.nsw.gov.au/hot-topics-human-rights/human-rights-un-declarations-and-resolutions (last visited March 21, 2021).

[105] Louis-Philippe et al., Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards.

[106] Dirk Van Zyl Smit, Regulation of Prison Conditions, 39 CRIME & JUST. 503, 507 (2010).

[107] *Supra* note 15.

[108] *Id.*

provisions.[109] Signatory countries agreed to accept legislation similar to the rights in the ICCPR.[110] The ICCPR exerted its greatest impact at the national level.[111] The ICCPR has been adopted in some countries on the national level and others constitutionally.[112]

Now focusing on the CAT, it imposes specific obligation to prevent and enforce the prohibition against torture and cruel, inhuman, or degrading treatment.[113] Unlike other obligations, state parties who adopt the Convention against torture must ensure that "any statement which is established to have been made as a result of torture not be invoked as evidence in any proceedings.[114] Additionally, it provides that the prohibition against torture is a non-derogable obligation that can't be justified by a superior officer or public authority.[115] For those seeking a definition of torture, the CAT has been deemed the de facto "first port of call".[116] Torture is defined in as:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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[109] Construction and Application of International Covenant on Civil and Political Rights, 11 A.L.R. Fed. 2d 751, 2

[110] *Id.*

[111] International Covenant on Civil and Political Rights, UN (Dec. 16, 1966), *available at* https://legal.un.org/avl/ha/iccpr/iccpr.html (last visited March 21, 2021).

[112] *Id.*

[113] David Weissbrodt and Cheryl Heilman, *Supra* note 103.

[114] OHCHR art. 15

[115] Convention against torture as referenced in supra note 93; Chapter 2c: Human Rights in UN Declarations & Resolutions, LEGAL ANSWERS, *available at* https://legalanswers.sl.nsw.gov.au/hot-topics-human-rights/human-rights-un-declarations-and-resolutions (last visited March 21, 2021).

[116] *Supra* note 93

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.[117]

Additionally, the CAT prohibits cruel, in human, and degrading treatment.[118] Article 16 provides:

1. "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman, or degrading treatment or punishment."

2. "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."[119]

After the implementation of the ICCPR and CAT, the rise and trends in the worlds prison population has caused a global prison crisis in serious need of strategic responses.[120] Recognizing the global prison crisis, the General Assembly of the United Nations adopted the Optional Protocol to the Convention against Torture ("OPCAT") and pursuant to the provisions of the treaty the Subcommittee on Prevention of Torture and other Cruel Inhuman or Degrading Treatment or Punishment ("SPT") was established.[121] The OPCAT provides both legal obligations and mandatory regulations for prison practices, with the purpose to incorporate prison visits conducted by international and national bodies independent of prisons.[122] The SPT is a recently implemented treaty in the United Nations and tackles each issue of torture and ill treatment with

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[117] G.A. Res. 39/46, at 85 (Dec. 10, 1984).

[118] *Id.*

[119] *Id.* at art. 16.

[120] UNODC's Strategic Response to Global Prison Challenges, UN (Sept. 28, 2015), *available at* https://www.unodc.org/unodc/en/frontpage/2015/September/unodcs-strategic-response-to-global-prison-challenges.html (last visited March 21, 2021).

[121] *Supra* note 109.

[122] *Id.*; *See also* OPCAT

a forward way of looking and that it is true rehabilitation.[123] The ratification of OPCAT has been a slow process and as a result, non-governmental organizations ("NGO") have been created to work globally to promote criminal justice systems that uphold human rights for all.[124]

THE U.S. FAILURE TO IMPLEMENT THE INTERNATIONAL REGIME

The United States ratified the ICCPR and it became the "supreme law of the land" under the Supremacy Clause in the U.S. Constitution giving ratified treaty the status of federal law[125] however, such ratification and implementation did not seem to bind the U.S.[126] The federal courts have considered many cases that have construed or applied the ICCPR in which courts have held that a plaintiff lacked standing to sue for alleged violations.[127] Additionally, numerous cases have held that the ICCPR is not binding on the courts in the United States.[128] For example, in 2007, the Fifth Circuit Court of Appeals in the case *Roach v. Quarterman*, stated that the ICCPR is not U.S. Law.[129] One would think that a country priding in its democracy and influence would take all measures to protect its citizens, however following the U.S. ratification of ICCPR, it opted not to make the document self-executing within its domestic legal system, a measure that guarantees such rights to its citizens .[130] The U.S. instead set its own standard of guidance and that was to set the standard of cruel and unusual punishment that is prohibited by the Eighth Amendment.[131] According to Human Rights Watch and the ACLU, this reservation limits the protection provided to prisoners by Article 7 because than language of Article 7 is considered to be more expansive than its Eighth Amendment counterpart.[132] Additionally, it is stronger than the 8th

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[123] *Id.*; *See also* OPCAT.

[124] Human Rights Handbook, OHCHR (2016), *available at* https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf (last visited March 21, 2021).

[125] U.S. Const. art VI, § 2.

[126] Kristina Ash, *US Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, NORTHWESTERN UNIVERSITY JOURNAL OF INTERNATIONAL HUMAN RIGHTS, Volume 3 Spring 2005.

[127] *See Igartua v. U.S., Beazley v. Johnson*, U.S. v. Duarte Acero.

[128] *Id.*

[129] *Roach v. Quarterman*, 220 Fed. Appx. 270, 272, 2007 U.S. App. LEXIS 422.

[130] *Id.*

[131] Nan D. Miller, *Supra* note 51.

[132] *Id.*

amendments interpretation which requires a prisoner to demonstrate that prison officials acted with deliberate indifference in subjecting him to abusive conditions of confinement.[133]

The United States opted out of numerous provisions under the CAT but reserved the rigt to agree, which it has not yet changed since ratifying the CAT in 1994.[134] Similar to the ratification of the ICCPR, the United States Senate's recommendations and approval was "based on the reservation that the United States considered itself bound to Article 16 to the extent that such cruel, unusual, and inhuman treatment or punishment was prohibited" by the U.S. Constitution.[135] Stating that, "the purpose of the U.S. reservation to CAT Article 16 was to more clearly define types of treatment that were cruel, inhuman, or degrading."[136] However, this is difficult to believe because the United States interposed a reservation to instead define cruel, inhuman, or degrading treatment or punishment as the standard governed by the Fifth, Eighth, and, Fourteenth Amendments, though none of these amendments directly define what constitutes cruel and unusual punishment.[137] Instead, such amendments ensure people are treated fairly in the criminal process but not while in prison, which allows for human right abuses to occur with impunity in prisons.[138]

The interpretation of cruel, inhuman, degrading treatment or punishment of prisoners has long been an issue because it is usually not clearly defined and thus brings significant challenges to acknowledging ill treatment.[139] Although this is the case, the international regime offers more protection for the treatment of prisoners than the U.S. Constitution because the Constitution's standard requires an Eighth Amendment violation claim which is often difficult to meet.[140] In turn, the U.S. tolerates things that the international regime does not, making it much more difficult for prisoners to establish or even prevail in an Eighth Amendment violation claim.[141] In the U.S., challenging the conditions of imprisonment under the Eighth Amendment require, a showing that the

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[133] *Id.*

[134] CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (Jan. 19, 2010).

[135] *Id.* at 6.

[136] *Id.* at 12.

[137] Weissbrodt & Heilman, *supra* note 103.

[138] *Id.*

[139] Miller, *supra* note 119.

[140] *Id.*

[141] *Id.*

conditions, "either involve the wanton and unnecessary infliction of pain, that they are grossly disproportionate to the severity of the crime, or that they entail serious deprivation of basic human needs."[142] Such claim objectively looks to whether the conditions extremely deprives basic human needs and, and subjectively considers whether prison officials acted with the intent to deprive any basic needs referred to as deliberate indifference. A finding of deliberate indifference requires a showing that the defendant "knows of and disregards an excessive risk to inmate health or safety."[143]

In *Matthews v. Wiley*, Norman Matthews, an inmate at the United States Penitentiary, Administrative Maximum in Florence, Colorado, alleged violation of his Eighth Amendment rights "based on the conditions of [his] confinement."[144] Mr. Matthew alleged that the defendants had "subjected [him] to harsh and inhumane conditions of confinement and deprivation of the minimal civilized measures of life's necessities."[145] The plaintiff listed the conditions imposed on him including: "long-term and indefinite solitary confinement, noise, sleep deprivation, lack of proper medical and mental health care, lack of daily access to fresh air and sunlight, limited opportunity to communicate with others, severe restrictions on property rights, visits, telephone and movements, strip searches, reduced environmental stimuli, lack of vocational training and congregational religious services".[146] The court dismissed the case on grounds that Mr. Matthews did not allege that the prison officials imprisoned him with "deliberate indifference to a risk of harm".[147] In the U.S., the burden is on the prisoner to establish cruel, inhuman, or degrading treatment whereas in the international regime, the totality of conditions standard is often used. For instance, in *Soering v. United Kingdom*, the European Court of Human Rights (ECtHR) discovered a violation in Article 3 of the European Convention for Protection of Human Rights based on the exposure to the "death row phenomenon."[148] The ECtHR adopted the "totality of conditions" meaning the analysis of the court's decision is based on the situation in its entirety, , rather than any one factor.[149] The ECtHR utilizes a totality of conditions test in evaluating possible cruel, inhuman or degrading

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[142] *Matthews v. Wiley*, 744 F. Supp. 2d 1159, 1175 (D. Colo. 2010).
[143] *Id.* at 1176 (*quoting Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).
[144] *Id.* at 1166.
[145] *Id.* at 1175.
[146] *Id.*
[147] Matthews, *supra* note 142.
[148] Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).
[149] *Id.* at ¶ 102.

treatment, which enables the ECtHR to extend its evaluation to both physical conditions and psychological effects.[150]

Additionally, there is no clear definition of cruel, inhuman, or degrading treatment. OPCAT defines the deprivation of liberty and uses that to determine what constitutes cruel, inhuman degrading treatment or punishment of prisoners.[151] Recognizing this, the World Conference on Human Rights called for the adoption of OPCAT and firmly declared that efforts to expunge ill treatment be focused first on preventing the issues.[152] The United States should have been one of the first countries to sign and ratify OPCAT, however they have yet to sign OPCAT, let alone ratify it.[153] As mentioned earlier, the U.S. relies on judicial decrees, that sometimes involve private monitoring but that disallow the ability to be held accountable for prison abuses by the international community because litigation subject tends to be enforced by prison systems themselves.[154] Adopting OPCAT, alleviates the burdens of proving ill treatment in court, and directly holds the state accountable for current prison conditions.[155]

Other countries including France and the United Kingdom have ratified the OPCAT.[156] Such ratification has allowed them to begin reforming crime prevention policies and the overall prison system to

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[150] *Supra* note 129.

[151] OPCAT at art. 4(2) (defining "deprivation of liberty" as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."); *see also* Alice Edwards, *The Optional Protocol to the Convention against Torture and the Detention of Refugees*, 57 INT'L & COMP. L. Q. 789 (Oct. 2008).

[152] Optional Protocol, Treaty Series No. 21 (2006) at 3. *Available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj9uNDi8f31AhUekokEHfsGAmsQFnoECAYQAQ&url=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F273293%2F6913.pdf&usg=AOvVaw0yE3EYIKh2dTZ9paeTiRcR

[153] OPCAT Subcomm. on Prevention of Torture, *Recent Signatures and Ratifications*, OFF. HIGH COMM'R HUM. RTS. (n.d.), *available at* https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/RecentSignaturesRatifications.aspx (last visited Feb. 10, 2022).

[154] *See* Jonathan Simon, *Penal monitoring in the United States: lessons from the American experience and prospects for change*, 70 CRIME, L. & SOC. CHANGE 161 (2018).

[155] G.A. Res. 57/199, at 85 (June 22, 2006).

[156] *Supra* note 22.

conform with international human rights law.[157] Those prison practices include, rebuilding and structuring prisons that really promote the reintegration process through the use of smaller facilities that allow for individual inmate concentration, and changing penal law to reflect noncustodial alternatives to detention.[158] For example, France aims to move away from systemic incarceration and to better combat recidivism, a reform model that combats the effects of the overuse of prisons by focusing on reintegrating inmates into society rather than solely punishing them for the crime.[159]

Noncustodial alternatives to prison sentences along with restructuring facilities to include individual focus are good prison practices because they reduce re-offending rates more effectively than prison sentences.[160] Such positive prison practices have reduced the prison population and has lowered the re-offense rates.[161] In 2019, "an international review found that recidivism rates are typically lower for have served a community sentence, compared to that reported among people who had served prison time."[162] The U.S. should take the same efforts France is taking in order to lower its recidivism rates and overall protect prisoners right of rehabilitation.

III. WHY THE U.S. SHOULD MAKE ADOPTION AND IMPLEMENTATION OF THE INTERNATIONAL

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[157] Nick Hardwick & Rachel Murray, *Regularity of OPCAT visits by NPMs in Europe*, 25 AUSTL. J. HUM. RTS. 66 (2019).

[158] *Correctional reform in France: more prison places, less incarcerations*, JUST. TRENDS (Aug. 28, 2018), *available at* https://justice-trends.press/correctional-reform-in-france-more-prison-places-less-incarcerations/ (last visited Feb. 9, 2022).

[159] *Id.*

[160] *Key Facts*, PENAL REFORM INT'L (n.d.), *available at* https://www.penalreform.org/issues/alternatives-to-imprisonment/key-facts-2/ (last visited Feb. 9, 2022).

[161] Hardwick & Murray, *supra* note 140.

[162] *Key Facts*, *supra* note 143; *see also* Denis Yukhnenko et al., *Recidivism rates in individuals receiving community sentences: A systematic review*, 14 PLOS ONE 1 (2019); Denis Yukhnenko et al., *A systematic review of criminal recidivism rates worldwide: 3-year update*, WELLCOME OPEN RSCH. (Feb. 1, 2021), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6743246/pdf/wellcomeopenres-4-17992.pdf (last visited Feb. 10, 2022).

STANDARDS PART OF ITS REFORM EFFORT

THE REFORMS IMPLICATED BY THE TREATY REGIME WOULD MAKE THE U.S. BETTER

Transparency and accountability in prison practices have been linked to better prison conditions that directly protect prisoners' rights.[163] Scholars point out that prison oversight is critical to ensuring transparency, accountability, and safety in prisons.[164] This can be reached by effectively serving the following four distinguishing features of prison oversight. First, effective oversight involves a consistent schedule of inspections for every prison institution. Second, effective oversight involves external scrutiny, and the regulation and oversights of individuals without any connection to the prison institution. Third, effective oversight focuses on the prison conditions and how they impact prisoners. Fourth, effective oversight is advisory in in nature.[165] The United States prison oversight mechanisms are not effective practices to protecting prisoners' rights. In the U.S., prison oversight is conducted by federal courts, public agencies, and civilians through public agencies.[166] All three prison oversight mechanisms are linked to a lack of transparency and accountability in poor prison conditions.[167]

First, the issue with judicial intervention as prison oversight is that they do not prevent violations, they simply remedy them.[168] Thus, judicial intrusion is only to the extent of redressing the violation and not the oversight of preventing it from occurring. Although this seems to be a good remedy to hold institutions accountable, there are several huge

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[163] *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455 (2011).

[164] *See, e.g.*, Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 101, 103-6 (2010).

[165] Michele Deitch, *Effective Prison Oversight*, COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS (Feb. 8, 2006), *available at* http://www.davidshopeaz.org/resources/Effective_Prison_Oversight.pdf (last visited Feb. 9, 2022).

[166] See Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383 (2010).

[167] *Id.*

[168] *See* Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT'G REP. 236 (Apr. 2012).

obstacles to bringing these cases to court,[169] such as the burden of proof falling on the prisoner to establish poor prison practices.[170] Adopting the OPCAT alleviates the issues with judicial intervention because it focuses on domestic implementation to inhuman and degrading prison treatment and conditions.[171] Unlike judicial intervention, OPCAT is intended to be ongoing.[172] Adopting the OPCAT allows for places of detention to be opened up to the outside world through visits allowed for by independent monitoring mechanisms.[173] This places the burden of proving poor prison conditions on independent monitoring mechanisms instead of prisoners, which in return prevent violations from occurring.[174]

Second, the issue with public agencies as a prison oversight mechanism is that their ability to determine the scope of monitoring presents a conflict of interest for furthering the goals of effective monitoring.[175] For instance, public agencies often contract with private prisons and thus it limits prison monitoring to ensure compliance with contractual agreements.[176] Most contracts fail to contain stipulations discussing how prisoners are treated or the quality of conditions in the facility.[177] Additionally, public agencies are run by civilians which allow for data to be aggregated falsifying denials of treatment and services.[178]

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[169] *See Commission on Safety and Abuse in America's Prisons: Litigation as Oversight transcript* [hereinafter *Litigation as Oversight transcript*], VERA INST. OF JUST. (Feb. 9. 2006), *available at* https://storage.googleapis.com/vera-web-assets/inline-downloads/Hearing-4-litigation-as-oversight.pdf (last visited Feb. 9, 2022).

[170] *See* Mushlin & Deitch, *supra* note 164.

[171] Glob. F. on the OPCAT, *Preventing Torture, Upholding Dignity: From Pledges to Actions Outcome Report*, ASS'N PREVENTION OF TORTURE (2012), *available at* https://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/803_aptglobalforum_/803_aptglobalforum_en.pdf (last visited Feb. 8, 2022).

[172] *Litigation as Oversight transcript*, *supra* note 150.

[173] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter OPCAT], art. 4(1), Dec. 18, 2002, 2375 U.N.T.S. 237.

[174] *See* Mushlin & Deitch, *supra* note 164, at 122.

[175] *See, e.g.*, Douglas McDonald & Carl Patten, *Governments' Management of Private Prisons*, ABT ASSOCIATES INC. (Sept. 15, 2003), *available at* https://www.ojp.gov/pdffiles1/nij/grants/203968.pdf (last visited Feb. 8, 2022).

[176] *Id.*

[177] *Id.*

[178] *Supra* Note 50.

External scrutiny plays a key part in transparency and accountability.[179] Adopting the OPCAT would be effective in prison oversight because the OPCAT arranges unrestricted visits to places of detention that are not disclosed to the institutions, conducted by independent national and international monitoring bodies.[180] OPCAT requires the state to create or designate a detention monitoring body known as national preventive mechanisms (NPM).[181] This type of monitoring proactively examines operations from the prisoners' standpoint because it allows prison officials to receive feedback from a committee unfamiliar to the prison, helping avoid complacency. Additionally, the routine and regular inspection process ensures that this form of oversight applies equally to all correctional facilities. This type of external scrutiny helps reassure citizens that prison conditions are appropriate and consisted with constitutional and international requirements furthering the goals of public transparency.[182]

Adopting OPCAT will ensure positive work towards making prisons more transparent and accountable. Further, adopting OPCAT makes the United States better because it will help in truly implementing the ICCPR to international standards. Additionally, it gives credence to the U.S.'s commitments to good governance and human rights. Furthermore, it enhances the U.S. reputation as a moral and accountable state which in turn strengthens the U.S. position in the international treaty system.[183]

GIVING CREDENCE TO U.S. DEMOCRACY REFORM EFFORTS

The U.S. is a beacon of democracy. In American democracy, there were, and continue to be, hard-fought struggles to expand citizenship,

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[179] *See* Michele Deitch, *But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States*, 47 AM. J. CRIM. L. 207 (2020).

[180] OPCAT, *supra* note 156, at art. 1.

[181] *Id.* at art. 17; *see also* OSCE OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., THE FIGHT AGAINST TORTURE 32 (OSCE/ODIHR 2009), *available at* https://www.osce.org/files/f/documents/8/2/37968.pdf (last visited Feb. 8, 2022).

[182] Mushlin & Deitch, *supra* note 164, at 104-106.

[183] *National Conference on the Benefits and Challenges of Signing and Implementing OPCAT for Palestine*, GENEVA CTR. FOR SEC. SECTOR GOVERNANCE (Oct. 2015), *available at* https://www.dcaf.ch/sites/default/files/publications/documents/Rep_WP_OPCAT_EN.pdf (last visited Feb. 8, 2022).

civil rights, women rights, immigrants' rights, and the rights of the LGBTQIA+ community. The U.S. domestic cohesion underpins a strong, and generally principled, federal state that includes relatively uncontested institutional authority. Democrats from all around the world for many years viewed the U.S. as a source of inspiration.[184] However, in less than four years, U.S. influence and credibility on the world stage has been diminished under the Trump Administration.[185]

President Trump has damaged America's standing, influence, and power in the world by weakening the system of alliances and partnerships that took the U.S. many decades to construct.[186] During his time in office, President Trump "abandoned multiple treaties and agreements, undermined the credibility of U.S. defense guarantees, bullied and belittled allies . . . ,"[187] was indifferent to the rule of law,[188] and "left allies [abroad] wondering if they can count on the United States . . ."[189] In addition, Trump's impeachment trials,[190] failure to build an international alliance to fight against the COVID-19 pandemic,[191] response to Black Lives Matter protests, and refusal to concede as President and the resulting pro-Trump mob attack on the Capitol,[192] undermined the U.S.'s

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[184] Tyson Barker, *US Global Credibility and Capacity to Act After the Capitol Siege*, GER. COUNCIL ON FOREIGN REL. (Jan. 8, 2021), *available at* https://dgap.org/en/research/publications/us-global-credibility-and-capacity-act-after-capitol-siege (last visited Feb. 9, 2022).

[185] Justin Chapman, *Rhodes: U.S. is Losing Influence, Credibility on World Stage*, PAC. COUNCIL ON INT'L POL'Y (May 28, 2019), *available at* https://www.pacificcouncil.org/newsroom/rhodes-us-losing-influence-credibility-world-stage (last visited Feb. 9, 2022).

[186] *See* Richard Wike, *The Trump era has seen a decline in America's global reputation*, PEW RSCH. CTR. (Nov. 19, 2020), *available at* https://www.pewresearch.org/fact-tank/2020/11/19/the-trump-era-has-seen-a-decline-in-americas-global-reputation/ (last visited Feb. 9, 2022).

[187] Pete Buttigieg & Philip H. Gordon, *Present at the Destruction of U.S. Power and Influence*, FOREIGN POL'Y (July 14, 2020), *available at* https://foreignpolicy.com/2020/07/14/trump-biden-foreign-policy-alliances/ (last visited Feb. 9, 2022).

[188] Peter Beinart, *Trump's Indifference to the Constitution*, THE ATLANTIC (Oct. 10, 2016), *available at* https://www.theatlantic.com/politics/archive/2016/10/trump-constitution/503540/ (last visited Feb. 9, 2022).

[189] Buttigieg & Gordon, *supra* note 169.

[190] *See* Lucy Handley, *The US is the world's top 'soft' power – but Trump has damaged its reputation, survey says*, CNBC (Feb. 25, 2020), *available at* https://www.cnbc.com/2020/02/25/the-us-is-the-worlds-top-soft-power-but-trump-has-damaged-its-reputation.html (last visited Feb. 9, 2022).

[191] *See* Buttigieg & Gordon, *supra* note 169.

[192] Barker, *supra* note 166.

reputation, governance, and political stability.[193] Since the U.S views has global hegemonic power, and utilizes such power to enforce its will, or in other words, is in the business of intruding on sovereignty and asking other countries to fix particular issues, the new administration must convince the world that the United States can again act with real consistency.[194] It will be easier to get acceptance if the U.S. is ratifying, adopting, and implementing the treaties that it asks the rest of the world to sign-on to. Specifically, if the U.S. adopts OPCAT it will lead in the efforts of prison reform by renewing its commitment to the implementation of measures that can effectively protect persons deprived of their liberty.[195]

During President Joe Biden's 2020 presidential campaign, he "promised to end private prisons, cash bail, mandatory-minimum sentencing, and the death penalty."[196] He stated that "the U.S. could reduce its prison population by more than half."[197] As President, Biden has launched the Biden Plan for Strengthening America's Commitment to Justice stating that, "[t]o build safe and healthy communities, we need to rethink who were sending to jail, how we treat those in jail, and how we help them get the health care, education, jobs, and housing they need to successfully rejoin society after they serve time."[198] In addition, Biden signed a series of executive orders that focused on nondiscrimination policy, public housing, and prison reform.[199] More specifically, he signed an executive order that prohibits the U.S. Department of Justice from

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[193] *See* Handley, *supra* note 172.

[194] Danielle L. Lupton, Biden Has a Narrow Window to Restore U.S.Credibility, FOREIGN AFFAIRS (Feb. 8,2021), available at https://www.foreignaffairs.com/articles/united-states/2021-02-08/biden-has-narrow-window-restore-us-credibility (last visited Feb. 23, 2022).

[195] *OPCAT 10 years later: a renewed commitment to the prevention of torture*, INT'L DETENTION COAL. (June 22, 2016), *available at* https://idcoalition.org/news/opcat-10-years-later-a-renewed-commitment-to-the-prevention-of-torture/. (last visited Feb. 9, 2022).

[196] Marshall Project Staff, *What Biden's Win Means for the Future of Criminal Justice*, MARSHALL PROJECT (Nov. 8, 2020), *available at* https://www.themarshallproject.org/2020/11/08/what-biden-s-win-means-for-the-future-of-criminal-justice (last visited Feb. 9, 2022).

[197] *Id.*

[198] *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS (n.d.), *available at* https://joebiden.com/justice/ (last visited Feb. 9, 2022).

[199] *See* Maegan Vazquez, *'It's time to act': Biden moves to address racial inequity*, CNN (Jan. 26, 2021), *available at* https://www.cnn.com/2021/01/26/politics/executive-orders-equity-joe-biden/index.html (last visited Feb. 9, 2022).

entering into new, and from renewing contracts, with private prison companies.[200] In calling out U.S. actions, Biden stated that the U.S. "never fully lived up to the founding principles of this nation, to state the obvious, that all people are created equally and have a right to be treated equally throughout their lives."[201] By launching the Biden Plan, and signing ending contractual agreements with private prisons, Biden has not only begun the fight towards penal reform but has taken a step-in restoring U.S. credibility.[202]

IV. CONCLUSION

In conclusion, mass incarceration, the treatment of prisoners, and monitoring of prisons in the United States does not meet the standards articulated through international law, and thus it is important for the United States to hold itself accountable in the regulation of prison reform by adopting the OPCAT. Although, the United States adopted the ICCPR and CAT, it has not truly implemented the standards demanded by international law because the United States Senate recommendations to these treaties were dependent and limited to only treatment covered under the U.S. Constitution. Reserving cruel, inhuman, and degrading treatment to that prohibited under the U.S. Constitution does not fully protect the rights of prisoners because it allows the U.S. to define, on its own, what constitutes cruel, inhuman, and degrading treatment. Due to this, it is difficult for the international community to hold the U.S. accountable for prison abuses.

The United States' current prison monitoring is ineffective because it is focused on remedies for those who have been treated unjustly instead of directly focusing on the treatment of prisoners. Additionally, it is ineffective because it places the burden to establish an

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[200] *See* Ed Chung, *3 Under-the-Radar Executive Actions for the Biden Administration's Criminal Justice Reform Agenda*, CTR. FOR AM. PROGRESS (Feb. 11,2021), *available at* https://www.americanprogress.org/issues/criminal-justice/news/2021/02/11/495598/3-radar-executive-actions-biden-administrations-criminal-justice-reform-agenda/ (last visited Feb. 9, 2022).

[201] Remarks by President Biden at Signing of an Executive Order on Racial Equity, THE WHITE HOUSE (Jan. 26, 2021), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/ (last visited Feb. 13, 2022).

[202] Vazquez, *supra* note 181.

Eighth Amendment violation on the prisoners which result in most cases being dismissed. Adopting OPCAT will help the United States prison conditions because it requires adopting countries to both develop and implement reliable systems that prevent torture. Such mechanisms require a neutral independent body to efficiently oversee prison practices. The importance of having a neutral independent body is that it allows for more transparency and accountability, the key elements to positive prison practices. Adopting the OPCAT is of benefit to the U.S. because it focuses on the life and experience of prisoners and how prison conditions affect them, which in turn makes the transition to good prison practices possible. Lastly, adopting OPCAT gives credence to the United States' commitment to good governance and human rights. The current prison practices in the United States are detrimental to the efforts of rehabilitation and is counterproductive in protecting society against crimes. It is time the world's most vulnerable population is heard.

POWER DYNAMICS IN THE ASIA-PACIFIC:A GAME THEORETIC FRAMEWORK FOR ANALYZING INDIA-CHINA INTERNATIONAL TRADE RIVALRY

By Julien Chaisse, Debashis Chakraborty, and Oindrila Dey*

I. Introduction

The trade orientation and economic growth of the two Asian economic giants, namely China and India, have received the close attention of the researchers over the last two decades.[1] The two neighbors, characterized by a dynamic growth path, represent a vast market and accounts for a significant proportion of the world production.[2] It is recognized that the growth patterns of the two economies significantly influence global economic currents.[3] The literature on possible mutual cooperation between the two giants is, however, mixed. On one hand, it has been held that both the countries would be better off if they collaborate in several negotiating aspects of the multilateral

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[1] *See generally* Enrico Marelli & Marcello Signorelli, *China and India: Openness, Trade and Effects on Economic Growth*, 8 EUR. J. COMPAR. ECON. 129, 130 (2011).

[2] Swaran Singh, *China-India Bilateral Trade: Strong Fundamentals, Bright Future*, 62 CHINA PERSPECTIVES 1 (2005), *available at* https://journals.openedition.org/chinaperspectives/2853 (last visited Oct. 15, 2021).

[3] *See generally* T. N. Srinivasan, *China, India and the World Economy*, 41 ECON. & POL. WKLY. 3716 (2006).

forums, i.e., the World Trade Organization (WTO).[4] On the other hand, the growing outward orientation might make the two countries competitors, in turn overshadowing the potential welfare benefits arising from cooperation.[5]

Rich literature has emerged on the operational challenges related to the adverse balance of trade resulting from trade liberalization, particularly in the developing countries.[6] Recently, with increases in the number of industrial economies, an interesting dynamic in the trade balance pattern of countries has been witnessed.[7] The Sino-Indian bilateral trade relationship is no exception to this global trend. China and India have witnessed a growing volume of bilateral trade for the past four decades, but the gains from trade have been favorable towards China.[8] For instance, from 2001 to 2020, the trade deficit of India against China increased from – 0.90 USD billion to -39.79 USD billion respectively. [9] The growing bilateral trade deficit can be explained by the tough competition in the Chinese market from the ASEAN players and the specialization by the Chinese players in more value-added product segments vis-à-vis India.[10]

The Sino-India trade patterns may take yet another interesting turn in the post-COVID-19 pandemic period. With the recourse to export restrictions at times in response to the domestic supply-related

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[4] Julien Chaisse & Debashis Chakraborty, *Identifying Mutual Interest Areas at WTO: A Sino-Indian joint Perspective*, 41 CHINA REP. 267, 267-77 (2005).

[5] Betina Dimaranan, Elena Ianchovichina & Will Martin, *China, India, and the Future of the World Economy: Fierce Competition or Shared Growth?* (World Bank, Working Paper No. 4304).

[6] *See generally* Ashok Parikh, *Relationship Between Trade Liberalization, Growth, and Balance of Payments in Developing Countries: An Econometric Study*, 20 INT'L TRADE J. 429 (2006); *see also* IMF, *The Impact of Trade Liberalization on the Trade Balance in Developing Countries*, ECON. STUDY (June 2010)

[7] WORLD BANK, WORLD DEVELOPMENT REPORT 1987, 1-11 (1997).

[8] Singh, *supra* note 2, at 2.

[9] *Id.* at 3; PTI, *India's trade deficit widened with 25 major countries in 3 years*, ECON. TIMES (2019), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/indias-trade-deficit-widened-with-25-major-countries-in-3-years/articleshow/70060617.cms (last visited Nov. 8, 2021).

[10] Amitendu Palit & Shounkie Nawani, *India-China Trade: Explaining the Imbalance*, (Institute of South Asian Studies, National University of Singapore, Working Paper No, 95, Oct. 2009).

challenges, the trade balances of a country might get affected adversely.[11] In the aftermath of the recent China-India border skirmishes on line of actual control (LAC)[12], Indian exports to China rose, while imports from the dragon declined. As a result, the trade imbalance faced by India vis-à-vis China witnessed a decline to reach a five-year low level.[13] An inclination has been noticed in India to restrict the flow of Chinese imports, likely geared to restrict dumping, apart from the political concerns.[14] The recent slump in India's imports from China stands at -10.8% year-on-year basis.[15] As yet, there is a dearth of evidence suggesting that India's import dependence on China has been replaced by

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[11] *Notification No. 1/2015-2020,* GOVERNMENT OF INDIA MINISTRY OF COMMERCE & INDUSTRY (2021), *available at* https://content.dgft.gov.in/ (last visited Nov. 8, 2021).

[12] Vijay Gokhale, *The Road from Galwan: The Future of India-China Relations*, CARNEGIE INDIA (Mar. 10, 2021), available at https://carnegieendowment.org/files/Gokhale_Galwan.pdf (last visited Nov. 8, 2021).

[13] David Fickling, *The Most Troubling China-India Conflict Is Economic,* BLOOMBERG QUINT (June 19, 2020), *available at* https://www.bloombergquint.com/opinion/india-and-china-need-to-rebuild-economic-ties-to-stave-off-war (last visited Nov. 8, 2021); Ananth Krishnan, *India's trade with China falls in 2020, deficit at five-year low*, HINDU (Jan. 16, 2021), *available at* https://www.thehindu.com/business/Economy/indias-trade-with-china-falls-in-2020-deficit-at-five-year-low/article33581648.ece (last visited Nov. 8, 2021); *see also* Alyssa Ayres, *The China-India Border Dispute: What to Know*, COUNCIL ON FOREIGN REL. (June 18, 2020), *available at* https://www.cfr.org/in-brief/china-india-border-dispute-what-know (last visited Nov. 8, 2021) ("[t]he blanket calls to boycott Chinese products have gained some mass appeal in India, but the government may take further steps, such as increasing scrutiny on inbound investment from China, similar to the Committee on Foreign Investment in the United States (CFIUS) review process."); *see also* Julien Chaisse, *Demystifying Public Security Exception and Limitations on Capital Movement-- Hard Law, Soft Law and Sovereign Investments in the EU Internal Market*, 37(2) UNIV. OF PA. J. INT'L L. 583 (2015).

[14] Rajeev Jayaswal, *Ban on China imports: Possible Spike in Dumping a Concern*, HINDUSTAN TIMES (Aug. 11, 2020), *available at* https://www.hindustantimes.com/india-news/ban-on-china-imports-possible-spike-in-dumping-a-concern/story-OgNY7mG4eF3l9kWwHruExN.html (last visited Nov. 8, 2021).

[15] *See* Krishnan, *supra* note 14 ("India's imports from China accounted for $66.7 billion, declining by 10.8% year-on-year and the lowest figure since 2016.").

other countries or by increased domestic production.[16] Conversely, in the pharmaceutical sector the dependence of the Indian formulation segment on Chinese Active Pharmaceutical Ingredient (API) exports have come to the forefront. Whether 2020 should be considered as an exceptional year or mark the turning point from the existing pattern of Sino-Indian trade needs to withstand the test of time.

The 2019-20 period witnessed yet other dynamics in the Sino-Indian trade relationship. While most of the Asian countries are partnering each other with at least one 'deep' regional trade agreement (RTA), China and India are connected only through the provisions of Asia-Pacific Trade Agreement (erstwhile Bangkok Agreement), notified to WTO under Enabling Clause in 1976, which has only a limited trade coverage.[17] From 2013, the two countries became part of the Regional Comprehensive Economic Partnership (RCEP) negotiations, which was expected to integrate the key players in Asia-Pacific (Australia, New Zealand) with East (China, Japan and South Korea), Southeast (ten Association of Southeast Asian Nations member countries, i.e., ASEAN) and South (India) Asian regions. RCEP has often been dubbed as the 'ASEAN+6' arrangement, given ASEAN's bilateral preferential trade relationship with all other six partners. The formation of the trade bloc, with ASEAN at the core, has been recognized as a triumph of ASEAN's 'middle-power diplomacy'.[18] Interestingly, the keen interest of China in

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[16] *Trade With China: 'India Still Engaged, But Looking at Domestic Manufacturing*, WIRE (Jan. 30, 2021), *available at* https://thewire.in/trade/sanjay-chadha-india-china-trade-relations-fta-import (last visited Nov. 8, 2021); Biswajit Dhar & K. S. Chalapati Rao, *India's Economic Dependence on China*, INDIA FORUM (Aug. 7, 2020), *available at* https://www.theindiaforum.in/article/india-s-dependence-china (last visited Nov. 8, 2021).

[17] Sohee Gwag, *Asia-Pacific Trade Agreement, presented at the APTA workshop in Mongolia*, U.N. ECON. & SOC. COMM'N FOR ASIA & PAC. (Oct. 12, 2020), *available at* https://www.unescap.org/sites/default/files/1_%281%29_APTA_Sohee%2B%2B.pdf (last visited Nov. 8, 2021).

[18] Peter A. Petri & Michael Plummer, *RCEP: A new trade agreement that will shape global economics and politics*, BROOKINGS (Nov 16, 2020), *available at* https://www.brookings.edu/blog/order-from-chaos/2020/11/16/rcep-a-new-trade-agreement-that-will-shape-global-economics-and-politics/ (last visited Nov. 8, 2021).

early implementation of the trade bloc was long recognized.[19] India actively participated in the negotiations for seven years, but in November 2019 withdrew from the process citing economic interests and national priorities.[20] It has not rejoined the negotiations in 2020 at the time of clinching the RCEP deal, despite the invitations from other partners. From the reactions of the Indian External Affairs Minister Mr. S. Jaishankar, it is apparent that non-fulfillment of core concerns forced the country to part ways with RCEP.[21]

It may be ascertained that the direct effect of India's missed participation in RCEP is a further delay in an effective Sino-Indian trade agreement. India already has operational RTAs with ASEAN (Indo-ASEAN FTA, in force since 2010), South Korea (India-South Korea Comprehensive Economic Cooperation Partnership Agreement, in force since 2010), and Japan (India-Japan Comprehensive Economic Cooperation Partnership Agreement, in force since 2011). The negotiations to enter into RTAs with Australia and New Zealand had been initiated from 2011 and 2010 respectively. In the recent period, the negotiations involving RTAs with Australia[22] and New Zealand[23] have gathered momentum. An important policy consideration is whether this proximity with the majority of the RCEP countries might facilitate India's

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[19] Shintaro Hamanaka, *Trans-Pacific Partnership versus Regional Comprehensive Economic Partnership: Control of Membership and Agenda Setting* (Asian Development Bank, Working Paper No. 146, 2015).

[20] Press Release, Government of India, *India exploring trade agreements with USA & EU; FTAs with Japan, Korea & ASEAN being reviewed; No trade agreements in a hurry says Piyush Goyal* (Nov. 5, 2019), *available at* https://pib.gov.in/newsite/PrintRelease.aspx?relid=194281 (last visited Nov. 8, 2021).

[21] Elizabeth Roche, *India pulled out of RCEP as concerns not addressed: S Jaishankar*, LIVE MINT (Nov. 18, 2020), *available at* https://www.livemint.com/news/india/india-pulled-out-of-rcep-as-concerns-not-addressed-s-jaishankar-11605716882360.html (last visited Nov. 8, 2021).

[22] *India, Australia agree to conclude free trade agreement by 2022-end*, BUS. STANDARD (Sept. 30, 2021), *available at* https://www.business-standard.com/article/economy-policy/india-australia-agree-to-conclude-free-trade-agreement-by-2022-end-121093001426_1.html (last visited Nov. 8, 2021).

[23] *New Zealand for bilateral trade pact with India if New Delhi does not join RCEP*, ECON. TIMES (Feb. 27, 2020), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/new-zealand-for-bilateral-trade-pact-with-india-if-new-delhi-does-not-join-rcep/articleshow/74335299.cms?from=mdr! (last visited Nov. 8, 2021).

re-entry in the trade bloc in near future or the possible compliance hindrances may delay the process for a long time. The current analysis intends to explore this question in a game-theoretic framework. India's decision for severing ties with RCEP at the last stage has been explained by using a complete information static game and the possibility of rejoining in the future has been explored adopting a dynamic game-theoretic structure.

The article is arranged along the following lines. First, the RCEP negotiations and the Indian standpoints are briefly recounted. Second, the issues pertaining to the India-RCEP trade in general and the Sino-Indian trade in particular are noted. Third, the trade policy scenario for RCEP member countries is discussed. Fourth, the broad features of RCEP agreement that India might be concerned within the future are underlined. Fifth, based on the evidence emerging from legal context and past trade policy reflections, a game-theoretic model is proposed to explain India's possible participation in the RCEP forum in the future. Finally, based on the findings, certain policy conclusions are drawn.

II. RCEP: Past and the Present

Though classical trade theories (e.g., the Ricardian context) underline the efficiency gains resulting from free trade under the assumption of a neutral geopolitical environment and immobile capital, the complexities in the real world arising from dynamic geopolitical situation and presence of mobile technology impedes the process of specialization and comparative advantage benefits.[24] Rodrik (2016) mentions that free trade comes with a cost of eroded credibility of the government due to the increased competition faced by the domestic producers.[25] Therefore, the idea of free trade is beneficial only for those countries who are more focused externally than internally, i.e., emerge out as net exporters.

The economic spread of RCEP has often been underlined by its enormous coverage of approximately thirty percent of the global

[24] STEVE SURANOVIC, INTERNATIONAL TRADE: THEORY AND POLICY 62-65 (2010).
[25] *See* Dani Rodrik, *Premature deindustrialization*, 21 J. ECO. GROWTH 1, 1-33 (2016).

population and GDP, making it the largest RTA.[26] A mega bloc like RCEP, which includes economies with varied degrees of capital-intensity and labor-skill set, is expected to benefit the member countries by offering a barrier-free massive market for each other's products. The trade bloc only has one common set of rules of origin under which the commodities can qualify for tariff reduction with other members. This involves lesser procedural hazards and easy mobility of the goods.[27] With the increasing popularity of mega FTAs, it is seen that economically advanced countries of ASEAN have taken keen interest for participation in RCEP to gain deeper market access.[28]

However, the path traversed by RCEP while reaching the conclusion of negotiations has been a long and tumultuous one. A brief review of the RCEP negotiations from an Indian perspective would be important in understanding the country's subsequent pull-out from the bloc. As a number of 'deep' trade agreements involving the RCEP partners predates the bloc, right from the beginning the need for achieving free trade through complete elimination of tariffs was advocated. [29] So, it is interesting to note that shortly after joining the RCEP negotiations in 2013, India launched the 'Make-in-India' initiative in 2014, in order to consolidate the domestic industrial sector. It can be argued that launch of the initiative had been shaped by the rising manufacturing trade deficit

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[26] New Zealand Foreign Affairs and Trade, *Regional Comprehensive Economic Partnership*, *available at* https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/regional-comprehensive-economic-partnership-rcep/rcep-overview (last visited Nov. 7, 2021).

[27] James Pearson, *Explainer: What happens now the RCEP trade deal has been signed?*, REUTERS (Nov. 16, 2020), *available at* https://www.reuters.com/article/us-asean-summit-rcep-explainer-idCAKBN27W0WC (last visited Nov. 7, 2021); *Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP)*, 4TH RCEP SUMMIT (Nov. 15, 2020) *available at* https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1832612.shtml (last visited Nov. 7, 2021).

[28] Chien-Huei Wu, *ASEAN at the Crossroads: Trap and Track between CPTPP and RCEP*, 23 J. INT'L ECON. L. 97 (2020).

[29] *See Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, ASEAN SECRETARIAT (n.d.), *available at* https://asean.org/wp-content/uploads/2012/05/RCEP-Guiding-Principles-public-copy.pdf (last visited Nov. 5, 2021).

with China and other East and Southeast Asian RTA partner countries on one hand[30], and poor manufacturing sector growth on the other.[31] As India did not have an explicit FTA with China, rise in both direct and indirect imports became a concern for Indian industries.[32] The need for policy intervention particularly emerged in the post-2011 period, when it was observed that a number of Chinese entrepreneurs have established production units in Vietnam, and eventually scaled up exports from there for utilizing the preferential tariff route under India-ASEAN FTA.[33] Therefore Indian negotiators kept a close watch on the RCEP tariff proposals and the potential import repercussions right from the beginning.

During the RCEP negotiations, China initially agreed with India and South Korea for implementing relatively modest coverage for tariff cuts at RCEP.[34] However, after launch of the 'Make in China 2025' scheme in 2015, the dragon adopted a more aggressive standpoint on the question of tariff cuts in the bloc.[35] Faced with calls for deep tariff cuts from partners, India decided to tread cautiously. The adverse tariff reform consequences were perceived both in the agricultural (e.g.,

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[30] *See* Sudip Chaudhuri, *Manufacturing Trade Deficit and Industrial Policy in India*, 48 ECON. & POL. WKLY. 41, 42-48 (2013).

[31] *See How Modi Can Deliver on the Promise of 'Make in India'*, KNOWLEDGE AT WHARTON (Oct. 21, 2014), *available at* https://knowledge.wharton.upenn.edu/article/how-modi-can-deliver-on-make-in-india/ (last visited Nov. 5, 2021).

[32] See Samridhi Bimal, *Heavy Reliance on High-Value Chinese Imports Indicates We Need an 'Atmanirbhar Bharat' Review*, WIRE (Aug. 1, 2021), *available at* https://thewire.in/trade/chinese-imports-atmanirbhar-bharat-trade (last visited Dec. 2, 2021).

[33] Sudip Chaudhuri, *Import Liberalisation and Premature Deindustrialisation in India*, 50 ECON. & POL. WKLY. 60, 64 (2015).

[34] *See* Dilasha Seth, *India to resist tariff cuts at RCEP meeting*, ECON. TIMES (Feb. 9, 2015), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/india-to-resist-tariff-cuts-at-rcep-meeting/articleshow/46168592.cms (last visited Nov. 5, 2021).

[35] J. Wübbeke et al., *MADE IN CHINA 2025: The making of a high-tech superpower and consequences for industrial countries*, MERCATOR INST. FOR CHINA STUD. (2016), *available at* https://merics.org/sites/default/files/2020-04/Made%20in%20China%202025.pdf (last visited Nov. 5, 2021).

increased dairy imports from Australia and New Zealand)[36] and manufacturing (e.g., increased goods dumping in from China in presence of lower tariff) [37] sectors. Once it became evident that India may need to set duty-free tariffs on most of the RCEP imports, the country attempted to protect its domestic market through a three-tier reduction commitment proposal; by dint of which India intended to decrease tariffs on eighty percent of tariff lines with ASEAN; sixty-five percent of tariff lines with countries that already have an FTA with India, such as Japan and South Korea; and forty-two and a half percent of tariff lines with nations such as China, Australia, and New Zealand.[38]

The RCEP partners rejected this offer and forced India to re-submit a single tariff reform plan for all the members of the bloc.[39] The saving grace for India had been the promised flexibility in tariff reforms, "to protect its vulnerabilities with respect to certain members," which was likely to be used more frequently against China.[40] The continued urge on deep merchandise tariff cuts, coupled with slower progress on trade in services negotiations, an area where India enjoyed competitiveness and aggressive export interests, forced the country to re-think its RCEP future.[41]

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[36] Harish Damodaran, *Dairy industry opposes RCEP*, Indian express (July 25, 2019, 12:32 AM), *available at* https://indianexpress.com/article/india/dairy-industry-opposes-rcep-5849378/ (last visited Nov. 5, 2021).

[37] Kirtika Suneja, *India may cut duties on 80% of Chinese imports under RCEP*, ECON.TIMES (Sept. 28, 2019, 8:59 AM), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/india-may-cut-duties-on-80-of-chinese-imports-under-rcep/articleshow/71344526.cms (last visited Nov. 5, 2021).

[38] Akarsh Bhutani, *India's reluctance in joining the RCEP — A boon or a bane in the long-run?*, OBSERVER RES. FOUND. (Feb. 10, 2021), *available at* https://www.orfonline.org/expert-speak/india-reluctance-joining-rcep-boon-bane-long-run/ (last visited Nov. 5, 2021).

[39] Amiti Sen, *Time for India to exit RCEP trade pact*, HINDU BUS. LINE (Mar. 9, 2018), *available at* https://www.thehindubusinessline.com/opinion/time-for-india-to-exit-rcep-trade-pact/article22134775.ece1 (last visited Nov. 5, 2021).

[40] *See generally Id.*

[41] *See generally* Amiti Sen, *India may say no to RCEP pact if its demands on services, goods are not met*, HINDU BUS. LINE (Aug. 3, 2019), *available at* https://www.thehindubusinessline.com/economy/india-may-say-no-to-rcep-pact-if-its-demands-on-services-goods-are-not-met/article28804967.ece (last visited Nov. 7, 2021).

Among the non-economic drivers, the recent border stand-off with China during 2020 significantly lowered the incentive for India to coordinate with the dragon within RCEP forum.[42] Moreover, faced with the economic downturn in the aftermath of the pandemic, India chose to move ahead carefully on newer commitments with low-cost economies through preferential trade agreements. Accordingly, the country pulled out from RCEP negotiations in November 2019, proposed a review of the existing RTA commitments and weighed the possibility of entering RTAs with the EU and US.[43] Subsequently the country introduced the 'Atmanirbhar Bharat Abhiyan' (Self-Reliant India) scheme to consolidate the domestic economy.[44] In November 2020, RCEP finally decided to move ahead without India, though provisions to facilitate its possible future entry were deliberately kept. India subsequently expressed preference to engage 'Eastern' partners through bilateral Free Trade Agreements (FTAs) instead of RCEP, which can be interpreted as a policy doctrine to avoid RTA engagements with China.[45] It also expressed desire to resume FTA negotiations with the EU and US.[46] In principle, the 'Act East Policy' launched in 2014 made way for a tacit 'Act West Strategy' from 2019 onwards.

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[42] Lin Minwang, *India-US trade slump shows decoupling with China impractical*, GLOB. TIMES (July 7, 2020, 11:43 PM), *available at* https://www.globaltimes.cn/content/1193813.shtml (last visited Nov. 7, 2021) ("India remains firm on its decision not to join the Regional Comprehensive Economic Partnership (RCEP) due to the recent border dispute with China, and the country has chosen to stay out of all free trade agreements involving China.").

[43] *Press Release from Piyush Goyal*, PRESS INFO. BUREAU, GOV'T OF INDIA (Nov. 5, 2019) *available at* https://pib.gov.in/newsite/PrintRelease.aspx?relid=194281 (last visited Nov. 7, 2021).

[44] *Press Release from Shri Narendra Modi*, PRESS INFO. BUREAU, GOV'T OF INDIA (May 12, 2020) *available at* https://pib.gov.in/PressReleseDetail.aspx?PRID=1623391 (last visited Nov 7, 2021).

[45] Rajeev Jayaswal & Rezaul H Laskar, *India favours bilateral free trade agreements over China-led RCEP*, HINDUSTAN TIMES (Nov. 17, 2020), *available at* https://www.hindustantimes.com/india-news/india-favours-bilateral-free-trade-agreements-over-china-led-rcep/story-fpBmI5hxfIxZLubDLqsznL.html (last visited Nov. 7, 2021).

[46] IANS, *India set to resume talks on free trade agreements with EU, US*, BUS. STANDARD (Nov. 21, 2020), *available at* https://www.business-standard.com/article/economy-policy/india-set-to-resume-talks-on-free-trade-agreements-with-eu-us-120112100594_1.html (last visited Nov. 7, 2021).

III. India's Trade with RCEP and China: Emerging Issues

China supports essential and high technology imports and encourages major firms and investors around the globe to build their plans.[47] In the fields of products and services exports, infrastructure building, outbound investment, and so on, China is also speeding up its connections with other nations, particularly its neighbors. The growing prominence of China in trade agreements has led to fast development and dramatic economic growth that have made it a global target. In view of the FTA, the Chinese Government considers that the new platform provides for greater opening to other countries and quicker internal reforms. This is a more effective strategy for global integration and reinforcement of economic cooperation with other economies. However, China is confronted with both obstacles and possibilities. On one end, China's future growth might be jeopardized if left out of key regional trade deals like the Trans-Pacific Partnership (TPP). On the other end, China may use regional trade talks possibilities to create the new international trade norms from the very beginning. Regional trade talks are also crucial for China because it must open up further to promote domestic economic reform.[48]

India's push for creating special economic and trade linkages with the East and Southeast Asia started three decades back, with the launch of the 'Look East Policy' in 1991. The policy marked a transition, underling the importance of the region in India's new economic architecture.[49] The policy orientation marked yet another change from 2004 onwards. First, the coverage of India's perception of the 'East' widened, with inclusion of the Asia-Pacific on one hand, and increasing association with the ASEAN on the other. Second, the government acted

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[47] *See* Alessandro Nicita & Carlos Razo, *China: The Rise of a Trade Titan*, U.N. CONF. ON TRADE & DEV. (Apr. 27, 2021), *available at* https:/unctad.org/news/china-rise-trade-titan (last visited Nov. 7, 2021).

[48] *See* He F & Yang P, *China's Role in Asia's Free Trade Agreements*, WILEY ONLINE LIBR. (Mar. 16, 2015), *available at* https://onlinelibrary.wiley.com/doi/full/10.1002/app5.66 (last visited Nov. 7, 2021).

[49] Thongkholal Haokip, *India's Look East Policy: Its Evolution and Approach*, 18(2) SAS 239, 239-57 (2011).

beyond rhetoric through enhanced economic exchange, security cooperation,[50] and investment in physical connectivity.[51] The National Common Minimum Programme adopted by the Government of India (2004) marked this change clearly by noting, "India actively sought to engage with regional economic groupings such as ASEAN, Mekong - Ganga Cooperation, BIMSTEC ...".[52] The pace of India's economic integration considerably deepened after 2010. One of the driving motives behind the Indian decision to go for the 'East'-centric RTAs from 2010 onwards has been to promote exports to the partner countries, i.e., ASEAN, Japan, South Korea in general and expand the participation in Asian International Production Networks (IPNs) in particular.[53] Given the economic complementarities, the collaboration was anticipated to be beneficial for all the participating economies.[54] The launch of RCEP negotiations in 2013 was a continuation of this objective. India's announcement of the 'Act East Policy' in 2014, which envisaged a larger role for the country in the 'East', had been considered to be a culmination of this decade-long ongoing process.[55]

In this backdrop, the turnaround of the Indian perspective on partnership with the 'East' requires an interpretation through an economic prism. It has been argued that India's decision to pull-out from the RCEP negotiations has been due to gradually worsening trade deficits.[56] The current analysis attempts to observe the trade balance scenario for RCEP member countries with ASEAN, China, India, and rest of RCEP respectively, with the help of Table 1. The data for this purpose

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[50] It deserves mention that the Indian Navy wrote its 'Bluewater Doctrine' in 2004, which considered the Indian Ocean as the country's backyard. Subsequently, the 'Quadrilateral' initiative took shape in 2007, through which India partnered with Australia, Japan, and the US. *See* Sandy Gordon, *India's rise as an Asia–Pacific power: Rhetoric and reality*, ASPI: STRATEGIC INSIGHTS 58 (May 2012). The relevance of the 'Quad' has increased significantly in the post-Covid world.

[51] Haokip, *supra* note 45, at 239.

[52] United Progressive Alliance of India, *Report to the People* (2004-06).

[53] *See* Rahul Sen & Sadhana Srivastava, *Asia's international production networks: Will India be the next assembly centre?* (ARTNeT, Working Paper No. 118, 2012).

[54] Mukul G. Asher & Rahul Sen, *India-East Asia Integration: A Win-Win for Asia*, 40(36) ECON. & POL. WKLY 3932, 3932-3940 (2005).

[55] Amitendu Palit, *India's Act East Policy and Implications for Southeast Asia*, 2016 SE. ASIAN AFF. 81, 82.

[56] *See* Biswajit Dhar, *India's Withdrawal from the Regional Comprehensive Economic Partnership*, 54 ECON. & POL. WKLY 59, 59-65 (2019).

is drawn from the Trade Map database.[57] For obtaining a temporal perspective, the last two decades are divided in four periods. The 2001-05 period represents when India primarily depended on multilateral routes (i.e., WTO-led reforms) for trade promotion.[58] During the 2006-10 period, India slowly started gravitating towards participating in the RTAs for export promotion. Over the 2011-15 period, the RTA enthusiasm was at its peak through execution of several 'East-centric' RTAs, followed by the launch of RCEP negotiations in 2013 and 'Act East Policy' in 2014. Conversely, the 2016-20 period showed the build-up of tensions during RCEP negotiations, eventually leading to the decision to pull out.

If India's trade surplus with RCEP partners during 2016-20 (i.e., the period when RCEP negotiations matured and eventually concluded) can be considered a proxy of competitiveness and the realized gains from trade, then a few interesting observations on the country's evolving negotiating perspective emerge from Table 1. First, several developed (South Korea, Singapore) as well as developing (Brunei, Malaysia) countries experienced trade surpluses with both ASEAN and RCEP members. The export competitive advantages of these countries can be explained by "technological sophistication (e.g., capital-intensive manufacturing products) and resource intensity (e.g., primary and energy products)."[59] In addition, South Korea and Singapore have long invested in labor-intensive part of the industrial value chains in ASEAN, enabling them to concentrate on the downstream value-added segments.[60] The realized economic gains motivated the RCEP partner countries to push India for undertaking deeper reform commitments. This partly explains

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[57] *Trade Map Database*, INT'L TRADE CTR. (n.d.), *available at* https://www.trademap.org/Index.aspx (last visited Nov. 3, 2021).

[58] *See* Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO' Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9, 9-36 (2013).

[59] Biswajit Nag, et al., *India's Act East Policy: RCEP Negotiations and beyond* 10 (INDIAN INST. OF FOREIGN TRADE, Working Paper No. EC-21-01, 2021).

[60] Masahito Ambashi, *ASEAN as an FDI Attractor: Do Multinationals Look at ASEAN*, ECON. RES. INST. FOR ASEAN & E. ASIA, Policy Brief No. 2016-04 (Jan. 2017), *available at* https://www.eria.org/ERIA-PB-2016-04.pdf (last visited Dec. 3, 2021).

why these countries eventually agreed to conclude RCEP negotiations, even without India's participation.[61]

Second, China, Indonesia, and Thailand – three developing countries with strong manufacturing orientations – experienced trade surpluses against ASEAN but deficits with respect to RCEP. It is observed from the data that these three economies enjoy competitive advantages against ASEAN, but the same cannot be said about the RTA partners of ASEAN which are developed economies (e.g., Australia, New Zealand, South Korea). The differential performance can be explained by their specialization in relatively lower technology planes vis-à-vis the developed countries within RCEP, and the challenges associated with that type of specialization.[62] Nevertheless, the gains in the ASEAN market provided them a strong incentive to join the mega-bloc RCEP and engage India accordingly.[63]

Third, Australia witnessed a huge trade surplus against the RCEP, but deficit vis-à-vis ASEAN. This can be explained by the specialization pattern in Australia, where primary products, mineral fuels and agricultural commodities emerged as the major export categories.[64] India suffers from a huge trade deficit in bilateral trade with Australia, with growing import of energy products, a trend that is likely to continue in near future as well. The willingness of Australia to integrate India in the RCEP fold can be understood from this perspective.[65]

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[61] Sanjeev K. Ahuja, *Korea to sign RCEP pact with or without India*, ASIAN CMTY. NEWS (Feb. 2020), *available at* https://www.asiancommunitynews.com/exclusive-korea-to-sign-rcep-pact-with-or-without-india/ (last visited Nov. 7, 2021).

[62] Kiyoaki Aburaki, et al., *China's Competitiveness: Myths, Realities, and Lessons for the United States and Japan* (Jan. 29, 2013); *see* Bhaunupong Nidhiprabha, *The Rise and Fall of Thailand's Export-Oriented Industries,* 16 ASIAN ECON. PAPERS 128, 128-150 (2017); *see* Wim Naudé, *Why Indonesia Needs a More Innovative Industrial Policy*, 1 ASEAN J. OF ECON., MGMT. & ACCT. 48, 48-65 (2013).

[63] K. J. M. Varma, *China invites India back to RCEP, says it will work on resolving issues raised*, PRINT (Nov. 5, 2019, 5:29 PM), *available at* https://theprint.in/diplomacy/china-invites-india-back-to-rcep-says-it-will-work-on-resolving-issues-raised/316053/ (last visited Nov. 8, 2021).

[64] Jared Greenville, Andrew Duver & Mikayla Bruce, *Value Creating in Australia Through Agricultural Exports: Playing to Advantages*, 11 ABARES INSIGHTS 1, 2-3 (Dec. 15, 2020), *available at* https://apo.org.au/sites/default/files/resource-files/2020-12/apo-nid310348.pdf (last visited Jan. 18, 2022).

[65] *Australia urges India to join RCEP trade pact for stronger Asean*, BUS. STANDARD (Feb 26. 2020, 8:42 PM) *available at* https://www.business-

Fourth, several low-income (Cambodia, Lao PDR, Myanmar), middle-income (India, Philippines, Vietnam) and high-income (Japan, New Zealand) countries have experienced trade deficits against both ASEAN and RCEP. However, apart from India, all other countries have moved ahead with RCEP negotiations. In contrast to Indian experience, the negative trade balance did not deter the five ASEAN countries to join RCEP. The decision made by these countries can be explained by the deeper IPN participation within ASEAN, which set the ground for anticipated long-term trade and welfare gains within RCEP.[66] The Asian IPN integration drive can also explain Japan's urge to conclude RCEP negotiation, with or without India in the bloc. Given the rising labor cost at home, Japan has heavily invested across ASEAN manufacturing segments.[67] Therefore, seamless movement of goods from Australia to India under unified RCEP rules of origin (ROO) is very much in line with its long-term vision. In addition, Japan has emerged as a major investor to India over the last two decades, particularly after the launch of the 'Act East Policy'.[68] Hence, even after the Indian pull-out from RCEP, Japan was instrumental in keeping the door ajar for India in anticipation.[69]

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standard.com/article/pti-stories/australia-urges-india-to-join-rcep-trade-pact-for-stronger-asean-120022601400_1.html (last visited Nov. 8, 2021).

[66] Kornkarun Cheewatrakoolpong, Chayodom Sabhasri & Nath Bunditwattanawong, *Impact of the ASEAN Economic Community on ASEAN Production Networks*, ADBI (Tokyo: Asian Dev. Bank Inst., Working Paper No. 409, 2013), *available at* https://www.adb.org/sites/default/files/publication/156264/adbi-wp409.pdf (last visited Dec. 3, 2021).

[67] Koji Sako, *Japan's foreign direct investment trends in Asia*, MIZUHO ECON. OUTLOOK & ANALYSIS (Nov. 2, 2018), *available at* https://www.mizuho-ir.co.jp/publication/mhri/research/pdf/eo/MEA181218.pdf (last visited Nov. 8, 2021).

[68] Mridula Manjari Moitra Roy & Rupa Chanda, *The trends in FDI inflows from Japan to India*, INDIA JAPAN STUDY CTR. (Bengaluru: Indian Inst. of Mgmt., Working Paper No 001, 2019), *available at* https://www.iimb.ac.in/sites/default/files/inline-files/ijsc-fdi-report-2019.pdf (last visited Nov. 8, 2021).

[69] Dipanjan Roy Chaudhury, *Japan played a big role in RCEP keeping the door open for India*, ECON. TIMES, (Nov. 17, 2020, 7:52 AM) *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/japan-played-big-role-in-rcep-keeping-door-open-for-india/articleshow/79251487.cms (last visited Nov. 8, 2021).

Finally, as observed from the table, the trade balance for India deteriorated with respect to both ASEAN and RCEP over the last two decades. During 2016-2020, the country witnessed an average trade deficit with RCEP at USD 92.66 billion, followed by a deficit of USD 16.02 billion with ASEAN.[70] Probing the sharp trade deficit vis-à-vis the non-ASEAN RCEP partners, it is noted that India witnessed a trade surplus only with respect to New Zealand. However, even with respect to New Zealand, the threat perception over the dairy sector was strong.[71] India's trade deficit during 2016-2020 was highest against China, standing at USD -51.84 billion. Interestingly, barring Australia, China and New Zealand, India enjoyed an RTA relationship with all the other RCEP partners from 2010 onwards, while the trade agreement with Singapore dates back to 2005. The apparent anomaly and the rising trade deficit have been explained through argument according to which "India's free trade agreements are underutilized which is less than twenty-five percent. This is mostly due to a lack of information about FTAs, low margins of preference, delays and administrative expenses connected with rules of origin, and non-tariff measures."[72]

It has often been argued that the low utilization of the India-ASEAN rules of origin (ROOs) provisions is a function of existing trade hindrances. The continuation of the tariff and non-tariff barriers in the ASEAN market, even after the formation of the Indo-ASEAN FTA and the associated market access challenges, had been reiterated by India at times.[73] From an Indian perspective, the non-tariff measures (NTMs) on its exports in the ASEAN market are spread across categories, namely: SPS and TBT related issues, standard and technical

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[70] Author's own calculations based on Trade Map data, as reported in Table 1.

[71] Sanjeeb Mukherjee, *Explained: Why Indian dairy farmers oppose RCEP trade agreement*, BUS. STANDARD, *available at* https://www.business-standard.com/article/economy-policy/explained-why-indian-dairy-farmers-oppose-rcep-trade-agreement-119093001246_1.html (last visited Nov. 4, 2021).

[72] V. K. Saraswat, Prachi Priya & Aniruddha Ghosh, *A Note on Free Trade Agreements and their Costs*, NAT'L INST. FOR TRANSFORMING INDIA, *available at* https://www.niti.gov.in/writereaddata/files/document_publication/FTA-NITI-FINAL.pdf (last visited Nov. 4, 2021).

[73] H.A.C. Prasad, *Reviving and Accelerating India's Exports: Policy Issues and Suggestions*, (Dep't of Econ. Aff., Ministry of Fin., New Delhi, Working Paper No. I-2017-DEA, Jan. 2017).

regulations, procedural obstacles etc.[74] However, the institutional factors play an equally important role in explaining the poor performance of India in the ASEAN Market. A comparison of ASEAN-China and ASEAN-India FTA provisions reveals that while the former has strong provisions on Standards and conformance (TBT), corresponding features are omitted in the latter.[75]

The persistence of NTMs and relative unpreparedness of the Indian manufacturing sector in competing with the low-cost ASEAN and RCEP partners were identified during early days of the RCEP negotiations.[76] To reap the benefit of the massive FTA partner markets, India attempted to augment the level of competitiveness of the domestic manufacturers through the 'Make in India'(MII) Action Plan launched in 2014. The MII initiative aimed for a resurgent manufacturing sector by enhancing its contribution to twenty-five percent of GDP by 2020.[77] The government has introduced a series of supports for the selected manufacturing sectors with the help of fiscal and financial instruments as well as procurement

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[74] Prabir De, Durairaj Kumarasamy & Komal Biswal, *Non-Tariff Measures (NTMs): Evidence from ASEAN-India Trade*, NEW DELHI: RES. & INFO. SYS. FOR DEVELOPING COUNTRIES (2019).

[75] Debashis Chakraborty, Julien Chaisse & Xu Qian, *Is It Finally Time for India's Free Trade Agreements? The ASEAN "Present" and the RCEP "Future"*, 9 ASIAN L.J. INT'L L. 359-391 (2019) (discussing the standards and conformance between ASEAN-China and ASEAN-India).

[76] *Indian Manufacturing Industry: Technology, Status, and Prospects*, U.N INDUS. DEV. ORG. 5 (2009), *available at* https://www.unido.org/sites/default/files/2009-04/Indian_manufacturing_industry_technology_status_and_prospects_0.pdf (last visited Nov. 4, 2021); *Why is India not competitive in manufacturing cost? Analysis by Mahindra & Mahindra MD*, FIN. EXPRESS (June 26, 2020), *available at* https://www.financialexpress.com/industry/why-is-india-not-competitive-in-manufacturing-cost-analysis-by-mahindra-mahindra-md/2005467/ (last visited Nov. 4, 2021); Nilanjan Ghosh, *The RCEP talks and India's anxieties*, ORF ONLINE (July 18, 2020), *available at* https://www.orfonline.org/research/the-rcep-talks-and-indias-anxieties/ (last visited Dec. 3, 2021) ("it is a sad reflection on the Indian manufacturing that after almost three decades of economic reforms, Indian manufacturing is yet to mature to be competitive enough to face global competition in a level playing field.").

[77] *Strategy for New India @ 75*, NITI AAYOG (Nov. 2018), *available at* https://niti.gov.in/writereaddata/files/Strategy_for_New_India.pdf (last visited Nov. 4, 2021) (A glance through the World Development Indicators (World Bank) data reveals that the share of manufacturing value added (% of GDP) in India had been 15.06 and 13.64 percent in 2014 and 2019 respectively.).

policies.[78] However, the Make in India initiative has witnessed only modest success so far.[79]

The hard negotiating standpoint of India on the tariff question during 2013-2019 needs to be viewed in this wider context. To see the negotiations from a comparative perspective, the tariff profile of the RCEP members is presented in Table 2. The data for this purpose is drawn from the WITS database.[80] Apart from the trade-weighted average tariff, the average percentage of duty-free lines among the total number of traded lines (at HS 6-digit level) and average percentage of duty-free imports (of total imports) are also reported over 1991-00, 2001-10, 2011-19. While the first series shows the transition in aggregate trade barriers, the latter two indicate the effects on liberalization. In addition, for understanding the strategic policy space, the tariff rates on raw materials, intermediate inputs, consumer goods and capital goods are reported separately.

A couple of interesting observations emerge from the data reported in Table 2. First, the average tariff rates have come down for all countries across product categories, barring the exception of Singapore which embraced free trade long back. The continuous move towards reformed tariff regimes enabled the RCEP countries to enforce the deep tariff reform commitments under the bloc.

Second, the average tariff barriers in India had been relatively higher than RCEP partner countries across product categories, barring certain exceptions vis-à-vis Thailand and Vietnam. This existing tariff disparity and quest for meaningful market access forced RCEP to push India for deeper tariff cut commitments during negotiations. Conversely, India would have been forced to embrace a deeper tariff reform, given the higher base tariff rates. Moreover, India remained unhappy with the possible continuation of NTM provisions in the partner countries and the resulting loss in market access. The recent Indian push for a detailed

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[78] *Sectors*, MAKE IN INDIA, *available at* https://www.makeinindia.com/sectors (last visited Nov. 4, 2021).

[79] R Nagaraj, *Make in India: Why didn't the Lion Roar?*, INDIA F. (May 16, 2019), *available at* https://www.theindiaforum.in/article/make-india-why-didnt-lion-roar (last visited Nov. 4, 2021).

[80] *World Integrated Trade Solution Database*, WORLD BANK, *available at* https://wits.worldbank.org/ (last visited Nov. 4, 2021).

review of the ASEAN-India FTA provisions underlines this perspective.[81]

Third, generally all RCEP countries followed the practice of 'Tariff Escalation', i.e., setting the lowest tariff for raw materials, and incrementally higher tariff for intermediate products and consumer goods, in that order. The practice makes semi-finished products available to the local producers at lower price, while a higher tariff protection continues on the final products. The conscious adoption of a tariff escalation policy provides the domestic players a competitive edge, thereby making the effective rate of protection (ERP) higher than the corresponding nominal rate of protection (i.e., the actual tariff on the final products) in the sector. Ensuring ERP is an efficient instrument for protecting the domestic manufacturing sector, China being a case in point.[82] However in six countries, namely – Japan, South Korea, Laos, Myanmar, Philippines and Vietnam, it is observed that the average tariff on intermediate products is lower than tariff on raw materials. Nevertheless, as the tariff on raw materials is lower than the same on final products, the protection to the manufacturing segments through tariff escalation effect is observed there as well.[83]

Fourth, interestingly in the Indian case, the average duty on the intermediate products (10.22 percent) during 2011-19 period has been higher than the corresponding number on the final products (9.63 percent). This phenomenon in the trade literature is known as 'Inverted Duty Structure' (IDS). Under this framework, the producers of the intermediate goods receive relatively more protection than the final value-added segment. It is noted that under IDS, '..finished goods are taxed at lower rates than raw materials or intermediate products which discourage domestic value addition'.[84] Hence while the policy may

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[81] *India, ASEAN Agree to Review FTA Scope, Address Uneven Market Access*, THAI. BUS. (Feb. 23, 2021), *available at* https://www.thailand-business-news.com/india/82779-india-asean-agree-to-review-fta-scope-address-uneven-market-access.html (last visited Nov. 8, 2021).

[82] Bo Chen, Hong Ma & David S. Jacks, *Revisiting the Effective Rate of Protection in the Late Stages of Chinese Industrialisation*, 40(2) WORLD ECON. 424 (2017).

[83] Bui Trinh & K. Kobayashi, *Measuring the effective rate of protection in Vietnam's economy with emphasis on the manufacturing industry: An input-output approach*, 44 EUR. J. ECON. FIN., & ADMIN. SCI. (2012).

[84] H. A. C. Prasad, R. Sathish & Salam Shyamsunder Singh, *India's Merchandise Exports: Some Important Issues and Policy Suggestions*, Working Paper No. 3/2014-DEA (Dep't of Econ. Aff., Ministry of Fin, New Delhi, Aug. 2014).

protect the mid-segment players and upstream local SMEs, this effectively raises the input cost for the downstream producers of final goods, with consequent competitiveness implications for final exports. The presence[85] and possible adverse consequences[86] of the IDS in the Indian context has been widely discussed. It is argued that the continuation of IDS is against the spirit of 'Make-in-India' initiative[87], as this takes away the incentive for the leading global firms to set up final assembly units in the country.[88] These underlines one crucial dimension of the competitiveness-related challenges in India and explains the cautious approach adopted by Indian negotiators in the RCEP forum.

Finally, it is observed from the table that the percentage of duty-free tariff lines and value of duty-free imports in India are modest as compared to several RCEP partners. For instance, during 2011-19 only 8.65 percent of India's tariff lines in consumer goods (final products) were duty-free (zero tariff), while 7.18 percent of the value of imports entered the country through these product lines. The corresponding numbers for China were 21.97 percent and 21.59 percent respectively. This observation signifies India's relatively lower degree of trade openness, and in turn rationalizes RCEP's push for deeper tariff cuts in the country. It can be argued that given the trade and tariff profile, the sharp decline in the tariff rates in line with the deeper cuts as mandated by RCEP would have been in contrast with the MII strategy being followed by the country since 2014. This explains the reaction of the leading Indian players to the RCEP pull-out decision in November 2019.[89]

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[85] *FICCI Survey on Inverted Duty Structure in Indian Manufacturing Sector*, FED'N OF INDIAN CHAMBERS OF COM. & INDUS. (Oct. 2013), *available at* https://ficci.in/SEDocument/20272/REPORT-SURVEY-ON-INVERTED-DUTY-STRUCTURE-2013.pdf (last visited Nov. 8, 2021).

[86] Prasad et al., *supra* note 84.

[87] *Issue of Inverted Duty Structure*, AM. CHAMBER OF COM. IN INDIA (2015), *available at* http://amchamindia.com/wp-content/uploads/2015/04/Issue-of-Inverted-Duty-Structure.pdf (last visited Nov. 8, 2021).

[88] C. Veeramani & Anwesha Basu, *Fix Inverted Tariff Structures to boost industrial growth in India*, LIVE MINT (Jan. 27, 2021), *available at* https://www.livemint.com/budget/opinion/fix-inverted-tariff-structures-to-boost-industrial-growth-in-india-11611764193419.html (last visited Nov. 8, 2021).

[89] *Exporters, industry laud India's decision to pull out of RCEP*, HINDU (Nov. 5, 2019), *available at* https://www.thehindu.com/business/exporters-industry-laud-indias-decision-to-pull-out-of-rcep/article29891376.ece (last visited Nov. 8, 2021).

T1: Intra-RCEP Average Trade Balance Scenario

Reporter Country	Partner Country							
	With RCEP				With India			
	2001-05	2006-10	2011-15	2016-20	2001-05	2006-10	2011-15	2016-20
Australia	1.20	18.52	45.23	31.69	2.11	8.95	7.71	5.17
Brunei	3.42	7.47	7.20	3.09	0.30	1.32	0.42	0.41
Cambodia	-0.99	-2.12	-5.22	-10.21	-0.01	-0.04	-0.10	-0.08
China	-52.48	-100.01	-86.03	-42.82	-0.58	12.22	34.05	51.92
India	-6.88	-39.67	-74.45	-92.66	-	-	-	-
Indonesia	15.74	14.30	-2.36	-6.54	1.04	4.28	8.71	8.03
Japan	-11.36	-7.82	-59.96	-32.40	0.09	2.19	2.75	4.50
South Korea	-6.49	-4.82	50.43	52.31	1.27	3.18	6.05	8.77
Laos PDR	-	-0.01	-1.08	-0.34	-	-0.01	-0.01	0.09
Malaysia	4.10	15.03	20.61	13.12	1.69	3.71	4.89	2.49
Myanmar	-	0.42	-2.12	-4.25	-	0.80	0.84	-0.16
New Zealand	-2.07	-2.98	-0.29	-1.11	0.00	0.17	0.24	-0.04
Philippines	-4.92	-6.88	-7.16	-36.77	-0.26	-0.31	-0.56	-1.18
Singapore	8.70	30.13	60.02	45.08	1.59	4.06	1.88	4.36
Thailand	-6.16	-5.13	-9.06	-8.67	-0.15	1.07	2.26	2.25
Vietnam	-5.40	-20.76	-38.75	-48.52	-0.38	-1.12	-0.50	1.07

Reporter Country	Partner Country							
	With China				With ASEAN			
	2001-05	2006-10	2001-05	2006-10	2001-05	2006-10	2001-05	2006-10
Australia	-3.88	0.93	-3.88	0.93	-3.88	0.93	-3.88	0.93
Brunei	0.15	0.10	0.15	0.10	0.15	0.10	0.15	0.10
Cambodia	-0.26	-0.81	-0.26	-0.81	-0.26	-0.81	-0.26	-0.81

China	-	-	-	-	-	-	-	-
India	-1.60	-17.69	-1.60	-17.69	-1.60	-17.69	-1.60	-17.69
Indonesia	0.60	-1.60	0.60	-1.60	0.60	-1.60	0.60	-1.60
Japan	-23.14	-15.87	-23.14	-15.87	-23.14	-15.87	-23.14	-15.87
South Korea	13.58	26.41	13.58	26.41	13.58	26.41	13.58	26.41
Laos PDR	-	0.04	-	0.04	-	0.04	-	0.04
Malaysia	-1.44	-0.49	-1.44	-0.49	-1.44	-0.49	-1.44	-0.49
Myanmar	-	-0.70	-	-0.70	-	-0.70	-	-0.70
New Zealand	-0.92	-2.09	-0.92	-2.09	-0.92	-2.09	-0.92	-2.09
Philippines	0.14	0.57	0.14	0.57	0.14	0.57	0.14	0.57
Singapore	-1.29	-0.71	-1.29	-0.71	-1.29	-0.71	-1.29	-0.71
Thailand	-1.14	-2.34	-1.14	-2.34	-1.14	-2.34	-1.14	-2.34
Vietnam	-1.29	-9.61	-1.29	-9.61	-1.29	-9.61	-1.29	-9.61

T1: Intra-RCEP Average Trade Balance Scenario (USD Billions)

Source: Constructed by Authors from Trade Map data

Note: For Lao PDR and Vietnam, the last period's average has been computed for 2016-19 due to unavailability of 2020 data.

T2: Comparing Trade Policy Profile of RCEP Members[90]

Co.	Stage of Processing	Weighted Average Tariff	Percentage of Duty-Free Tariff Lines	Percentage of Duty-Free Imports

[90] *Trade Statistics by Country/Region*, WORLD INTEGRATED TRADE SOLUTION, *available at* https://wits.worldbank.org/countrystats.aspx?lang=en (last visited Nov. 8, 2021).

		1991-00	2001-10	2011-19	1991-00	2001-10	2011-19	1991-00	2001-10	2011-19
AU	Raw Materials	0.17	0.07	0.06	87.20	88.31	87.87	96.58	98.03	98.33
	Intermediate Goods	4.10	1.94	1.21	36.75	46.65	57.42	49.03	60.38	72.67
	Consumer Goods	8.44	4.67	1.97	23.06	35.26	43.39	17.79	37.22	56.56
	Capital Goods	4.54	2.25	1.25	34.77	49.35	55.87	37.91	53.84	68.91
BN	Raw Materials	0.02	0.01	0.00	98.94	97.54	99.39	99.70	99.79	99.96
	Intermediate Goods	0.60	0.19	0.04	90.84	90.16	96.40	95.66	97.78	99.38
	Consumer Goods	13.21	7.82	0.18	71.57	71.57	89.45	60.49	62.24	92.16
	Capital Goods	4.02	4.56	0.96	50.41	38.67	79.28	65.52	56.05	86.74
KH	Raw Materials	-	9.65	5.67	-	5.87	16.94	-	9.90	39.03
	Intermediate Goods	-	11.28	5.34	-	8.39	18.63	-	6.75	29.92
	Consumer Goods	-	14.58	10.32	-	10.66	14.21	-	11.95	18.62
	Capital Goods	-	13.17	11.28	-	3.92	12.47	-	6.79	12.32
CN	Raw Materials	18.42	5.14	1.12	9.80	26.82	41.43	21.28	68.07	86.40
	Intermediate Goods	21.43	6.98	3.46	0.60	6.52	20.38	0.52	10.08	36.60
	Consumer Goods	36.26	11.90	9.69	1.87	8.11	21.97	1.75	6.77	21.59
	Capital Goods	17.56	4.57	2.50	0.07	21.23	34.44	0.01	45.32	46.31
IN	Raw Materials	18.21	9.99	2.62	12.85	7.64	16.28	17.44	9.29	61.36
	Intermediate Goods	31.56	20.30	10.22	2.43	1.15	7.67	2.61	3.98	9.26
	Consumer Goods	22.28	20.35	9.63	1.43	2.22	8.65	31.30	3.20	7.18
	Capital Goods	24.71	12.43	4.86	3.23	10.47	18.02	7.18	20.39	36.64
ID	Raw Materials	3.82	1.19	1.02	24.35	37.25	46.53	29.58	71.76	77.94
	Intermediate Goods	8.33	4.19	2.34	13.55	25.10	39.19	27.66	39.09	64.85
	Consumer Goods	12.70	5.23	4.15	6.20	14.51	30.58	13.28	24.60	55.04
	Capital Goods	9.89	3.12	1.85	33.87	50.48	37.04	32.55	58.29	69.62

JP	Raw Materials	4.63	2.25	1.10	48.41	49.63	60.09	34.47	57.41	87.52
	Intermediate Goods	2.03	1.39	1.07	41.82	42.86	65.35	55.99	62.86	69.93
	Consumer Goods	3.79	3.19	2.36	34.18	35.30	85.38	52.33	58.29	70.12
	Capital Goods	0.02	0.00	0.00	99.03	99.10	99.16	99.35	99.87	99.87
KR	Raw Materials	18.14	17.26	10.61	2.08	9.80	37.13	0.35	11.83	32.41
	Intermediate Goods	7.00	5.22	4.19	1.26	10.78	41.91	3.29	25.54	44.69
	Consumer Goods	8.97	7.19	5.79	2.47	11.56	39.13	2.61	5.43	26.02
	Capital Goods	6.56	3.31	2.59	4.77	32.50	52.72	9.92	48.11	50.71
LA	Raw Materials	17.63	12.43	2.64	0.00	1.16	57.65	0.00	0.16	42.86
	Intermediate Goods	9.72	5.46	1.24	0.00	1.40	70.61	0.00	0.52	76.62
	Consumer Goods	15.53	13.93	2.19	0.00	0.68	60.38	0.00	0.19	66.82
	Capital Goods	16.27	9.87	1.24	0.00	0.08	57.56	0.00	0.14	86.62
MY	Raw Materials	2.02	1.25	1.37	72.07	88.30	86.53	69.25	61.27	60.94
	Intermediate Goods	6.46	6.32	4.60	47.19	65.96	71.26	47.06	64.69	66.31
	Consumer Goods	15.15	9.66	6.00	32.20	41.48	53.40	19.46	30.05	37.08
	Capital Goods	3.72	1.44	1.81	50.18	62.33	69.15	65.31	84.04	82.52
MM	Raw Materials	2.88	2.32	3.32	10.38	14.36	34.70	0.99	3.45	34.88
	Intermediate Goods	6.41	4.86	2.30	3.02	4.41	25.48	3.70	3.21	28.44
	Consumer Goods	3.95	2.94	5.69	2.12	3.15	17.53	0.10	0.34	15.32
	Capital Goods	2.02	1.89	1.66	4.05	5.45	20.26	1.10	3.15	27.20
NZ	Raw Materials	0.18	0.12	0.16	86.34	88.33	87.52	96.37	97.19	96.18
	Intermediate Goods	2.65	0.97	0.71	62.89	69.70	73.80	67.30	78.26	81.35
	Consumer Goods	7.65	4.01	2.50	36.73	43.66	51.63	28.46	39.64	48.86
	Capital Goods	4.14	1.83	1.21	45.29	53.70	58.64	50.46	58.41	65.76
PH	Raw Materials	9.69	4.58	3.63	1.27	10.25	37.16	0.64	1.21	62.93

	Intermediate Goods	11.75	3.95	1.41	0.22	9.11	37.22	1.64	13.23	62.74
	Consumer Goods	19.86	8.09	4.19	0.12	7.57	30.60	0.02	5.54	62.43
	Capital Goods	7.51	1.13	0.97	2.12	21.11	39.88	8.11	69.25	73.75
SG	Raw Materials	0.00	0.00	0.00	100.00	100.00	100.00	100.00	99.98	100.00
	Intermediate Goods	0.00	0.00	0.00	100.00	100.00	100.00	100.00	100.00	100.00
	Consumer Goods	0.00	0.00	0.00	99.35	99.70	99.76	93.88	99.89	94.62
	Capital Goods	0.00	0.00	0.00	100.00	100.00	100.00	100.00	100.00	100.00
Thailand	Raw Materials	21.35	1.26	0.78	6.62	18.98	40.76	24.30	81.44	92.39
	Intermediate Goods	23.39	4.44	3.52	2.31	14.77	36.52	3.02	25.67	61.07
	Consumer Goods	37.33	13.75	10.18	1.84	6.85	21.14	0.90	7.10	32.18
	Capital Goods	27.41	5.48	4.12	0.74	16.81	31.91	2.72	38.72	51.51
VN	Raw Materials	5.31	6.59	4.39	31.72	37.88	50.94	37.06	42.87	62.10
	Intermediate Goods	12.12	8.53	2.62	38.62	40.22	52.93	39.61	41.26	63.49
	Consumer Goods	33.47	16.35	6.44	35.72	11.89	28.51	2.19	3.17	29.58
	Capital Goods	10.66	7.09	1.25	60.59	44.44	53.79	53.43	49.50	72.59

Source: Constructed by Authors from WITS[91]

As 46.21 percent of India's aggregate trade deficit with RCEP partners can be explained by the country's deficits with China, India's trade relation with the Eastern neighbour deserves closer attention. China is the largest exporter by value (US$2.294 trillion) in the world (IMF data, 2018)[92] and India is among the top ten trading partners of China,

[91] *Id.* (For several countries, the data for all the years during 1991-00 and 2011-19 is not available from WITS. So, in these cases, the average tariff has been computed with the available years.).

[92] IMF Data, *Direction of Trade Statistics (DOTS): Exports of Goods, Top 5 Economies*, INT'L MONETARY FUND (2018), *available at* https://data.imf.org/?sk=9d6028d4-f14a-464c-a2f2-59b2cd424b85&sId=1514498232936 (last visited Nov. 8, 2021); *see China, the only major economy to have registered positive growth in foreign trade in goods in*

accounting for 3.1% of China's exports.[93] Although Chinese export to India has witnessed a downward trend in 2020, in December 2020 China recorded a surge in exports by 10.9%.[94] This marked a sharp U-turn for the world's second-largest economy, increasing exports to 6.7% with ASEAN and the EU.[95] Despite the pandemic situation and the trade war with the US, the China's export growth there remained strong at 7.9%.[96]

The WTO plays an pivotal role in facilitating trade negotiations and promoting free trade..[97] Due to the tariff reforms undertaken during the WTO accession process, the tariff barriers imposed by China on

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2020, XINHUA NET (Jan. 14, 2021), *available at* http://www.xinhuanet.com/english/2021-01/14/c_139668237.htm (last visited Nov. 8, 2021) ("China was 'the world's only major economy to have registered positive growth in foreign trade in goods,' said Li Kuiwen, spokesperson of the GAC".).

[93] *China Exports by Country*, TRADING ECON. (2019), *available at* https://tradingeconomics.com/china/exports-by-country (last visited Nov. 8, 2021) ("India Accounts for 74.92 billion U.S dollars or 3.1% of Chinese Exports by value".).

[94] *China's foreign trade hits record high in 2020 with trend-bucking growth*, XINHUA NET (Jan. 14, 2021), *available at* http://www.xinhuanet.com/english/2021-01/14/c_139666793.htm#:~:text=In%20December%20alone%2C%20exports%20surged,Kuiwen%20told%20a%20news%20conference (last visited Oct. 15, 2021) ("In December alone, exports surged by 10.9 percent year on year in yuan terms"); The State Council PRC, *China's foreign trade defies virus odds, ends 2020 on record highs*, XINHUA (Jan. 14, 2021), *available at* http://english.www.gov.cn/news/topnews/202101/14/content_WS5fffef12c6d0f72576943d42.html (last visited Oct. 15, 2021).

[95] Econ. & Com. Off., Mission of China to ASEAN, *ASEAN became China's largest trading partner in 2020*, COM. NEWS, *available at* http://asean2.mofcom.gov.cn/article/chinanews/202101/20210103031104.shtml (last visited Nov. 8, 2021) ("The growth rate (6.7%) is among the highest of China's major trading partners. Since January 2020, cumulative trade between China and ASEAN has maintained positive year-on-year growth, making it unique among China's top five trading partners"); Krishnan, *supra* note 15 ("[e]xports to ASEAN countries, China's largest trading partner last year with $684 billion in annual trade, were up 6.7%, while exports to the EU, China's second-largest trading partner, were also up 6.7%, with trade reaching $649 billion.").

[96] Krishnan, *supra* note 15 ("[d]espite the trade war with the U.S. and the pandemic, two-way trade was up 8.3% to $586 billion, with Chinese exports up 7.9% to reach a record $451 billion").

[97] Julien Chaisse, *Deconstructing the WTO conformity obligation: A theory of compliance as a process*, 38(1) FORDHAM J. INT'L L. 57, 57-98 (2015).

imports coming from India had been modest.[98] However, owing to strategic interventions, the instrument to augment the export prospect and restrict imports from accessing the domestic market has moved away from tariffs to non-tariff measures (NTMs).[99] NTMs can take various forms, e.g., import barriers, quality control, testing, labelling and certification requirements, anti-dumping, countervailing measures and export subsidies. In contrast to a tariff, these instruments work indirectly in controlling the domestic market's flooding with foreign goods by increasing the cost of imports.[100] NTMs can take various forms, e.g., import barriers; quality control; testing, labelling and certification requirements, anti-dumping, countervailing measures, and export subsidies. In contrast to a tariff, these instruments work indirectly in controlling the domestic market's flooding with foreign goods by increasing the cost of imports.[101] The NTMs are generally more restrictive in high- and middle-income countries, as low-income countries may substitute the costly NTM administration process by the relatively simpler tariff regime.[102] China and India, being advanced

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[98] Julien Chaisse & Jamieson Kirkwood, *One Stone, Two Birds: Can China Leverage WTO Accession to Build the BRI?*, 55(2) J. WORLD TRADE 287, 287-308 (2021); *see also* PHD Research Bureau, *India – China Trade Relationship: The Trade Giants of Past, Present and Future,* PHD CHAMBER OF COM. & INDUS., 12 (Jan. 2018), *available at* https://www.phdcci.in/wp-content/uploads/2018/11/India-China-Trade-Relationship_The-Trade-Giants-of-Past-Present-and-Future.pdf (last visited Nov. 8, 2021) ("For instance, when the average tariff imposed by China on global imports of dairy products was 10.79%, it was as low as 2% for India's imports").

[99] World Trade Org., *B. An economic perspective on the use of non-tariff measures,* WORLD TRADE REP. 67 (2012), *available at* https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2b_e.pdf (last visited Oct. 15, 2021); Robert W. Staiger, *Non-tariff Measures and the WTO*, Staff Working Paper ERSD-2012-01 (2012), *available at* https://www.wto.org/english/res_e/reser_e/ersd201201_e.pdf (last visited Oct. 15, 2021); Ana Fernandes, Hiau Looi Kee & Caglar Ozden, *Free trade now: A case for tariff reductions and non-tariff measures simplifications to fight COVID-19 (coronavirus)*, WORLD BANK BLOGS (May 11, 2020), https://blogs.worldbank.org/developmenttalk/free-trade-now-case-tariff-reductions-and-non-tariff-measures-simplifications-fight (last visited Oct. 15, 2021).

[100] *Id.*

[101] *Id.*

[102] U.N. CONFERENCE ON TRADE & DEV., NON-TARIFF MEASURES TO TRADE: ECONOMIC AND POLICY ISSUES FOR DEVELOPING COUNTRIES (2013).

developing countries, are recurrent users of these provisions. China imposes relatively higher number of NTMs vis-à-vis other countries of the region, and '. . . most (59.47%) are technical measures relating to technical specifications, quality requirements, and the ensuring of consumer safety, which is in line with or directly adopted from the ISO, IEC, and other recognized international standards agencies'.[103] On the other hand, in India SPS measures (around 50.04% of the total NTMs), TBT (36.24%) and export-related measures (10.5%) are among the major NTMs used.[104]

The existing literature notes that for a significant number of HS six-digit level products, India's import dependence on China is quite high, often crossing eighty percent of total imports.[105] Table 3 shows the deepening reach of China in India's import basket for a few select commodities. For several hi-tech (e.g., organic chemical, iron and steel, machinery and equipment, electrical machineries, vehicles etc.), medium-tech (apparel, plastic) as well as labor-intensive (cotton, footwear) product groups, China has created a dominance in India's import basket over the years. Moreover, a seeming decline in China's presence in Indian market for certain categories, as evident from Table 3, can be misleading. For instance, in Electrical machinery (HS 85) the share of China in Indian imports have declined from 56.4 percent to 41.5 percent over 2016 to 2020. However, over the same period the share of Hong Kong in India's imports of this category has increased from 2.7 percent to 16.7 percent. India's rising import demand from China for both final and intermediate

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[103] Mingcong Li & Miaojie Yu, *Non-Tariff Measures in China*, *in* NON-TARIFF MEASURES IN AUSTRALIA, CHINA, INDIA, JAPAN, NEW ZEALAND AND THE REPUBLIC OF KOREA: PRELIMINARY FINDINGS 23-34 (United Nations Conference on Trade and Development, 2020).

[104] Rael Sarmeen, *Non-Tariff Measures in India*, *in* NON-TARIFF MEASURES IN AUSTRALIA, CHINA, INDIA, JAPAN, NEW ZEALAND AND THE REPUBLIC OF KOREA: PRELIMINARY FINDINGS 35-43 (United Nations Conference on Trade and Development, 2020).

[105] Santosh Pai, *Deciphering India's Dependency on Chinese Imports*, ICS Analysis No. 120 (New Delhi: Institute of Chinese Studies, October 2020).

products is shaped by falling tariff barriers in India[106] as well as predatory pricing[107] by Chinese players.

Table 3: Importance of China in Select Indian Sectoral Imports[108]

[106] Org. for Econ. Co-operation & Dev., *Challenges and opportunities of India's enhanced participation in the global economy*, OECD ECON. SURVEYS: INDIA (2019), *available at* https://www.oecd-ilibrary.org/sites/04b94da4-en/index.html?itemId=/content/component/04b94da4-en (last visited Nov. 8, 2021).

[107] Priya Chacko, *India's economic dependence on China and Indo-Pacific integration*, PERTH USASIA CTR. (2020), *available at* https://perthusasia.edu.au/getattachment/Our-Work/India's-economic-dependence-on-China-and-Indo-Paci/PU-162-V3-India-Econ-WEB-Fx.pdf.aspx?lang=en-AU (last visited Oct. 15, 2021).

[108] *See* PHD Research Bureau, *supra* note 92; *Data Sources for all countries and territories*, TRADE MAP (n.d.), *available at* https://www.trademap.org/stDataSources.aspx?nvpm=1%7c%7c%7c%7c%7c%7c%7c%7c%7c%7c%7c%7c%7c2%7c%7c%7c%7c%7c1 (last visited Nov. 8, 2021).

Products	China's Average Share in Indian Imports (%)			
	2001-05	2006-10	2011-15	2016-20
Footwear	24.34	53.02	63.30	56.04
Electrical Machinery and Equipment	15.80	37.90	47.52	48.04
Apparel, Knitted or crocheted	19.58	36.32	45.04	43.88
Organic Chemical	20.54	30.58	32.68	39.46
Articles of Iron and Steel	7.56	33.30	33.82	34.84
Machinery and Equipment	8.28	21.62	30.16	33.28
Apparel, Not knitted or crocheted	18.72	26.50	27.36	25.40
Vehicles and Accessories	2.54	15.00	21.76	25.00
Misc. Chemical Products	4.92	12.80	17.12	21.90
Aluminum	6.50	13.48	17.86	19.44
Instruments, Medical, Surgical, Experimental	4.38	9.34	16.16	17.72
Plastic	4.42	11.92	14.04	17.52
Paper and Paperboard	2.02	13.38	13.88	16.68
Iron and Steel	2.06	14.18	15.74	13.70
Cotton	12.58	29.54	27.08	11.76
Inorganic Chemical	7.42	12.56	13.48	11.65
Pharmaceuticals	2.90	4.32	7.92	7.32

Table 4 focuses on the presence of China in India's export basket for a few commodities. It is clearly observed that the articles for which China accounts for a predominant share in India's export basket are either primary products (e.g., Ores, Slag and Ash; Salt, Sulfur, Stones), agricultural and food products (Animal or vegetable fats and oils, Cotton, Marine Products) or low-tech (Articles made of feathers) commodities. For the industrial product groups like copper, unwrought copper alloys and produce (HS 7403), i.e., an intermediate product group, dominate the Indian export basket. In other words, China and India have specialized in the high-value and low-to-mid-value segments, respectively, in their

bilateral trade flows.[109] While there exists considerable scope for India to enhance exports to China in several hi-tech commodity groups, the existing NTM's in China significantly impede its market access.[110]

Table 4: Importance of China in Select Indian Sectoral Exports[111]

Products	China's Average Share in Indian Exports (%)			
	2001-05	2006-10	2011-15	2016-20
Ores, Slag, Ash	60.66	85.02	72.86	77.40
Articles made of feathers	49.42	51.48	57.38	66.90
Animal or vegetable fats and oils	7.08	21.10	32.98	37.08
Copper Products	5.48	26.48	62.44	37.06
Salt, Sulphur, Stones	14.60	21.64	32.56	31.58
Cotton	4.80	21.68	35.84	18.06
Organic Chemical	8.20	7.92	7.84	13.54
Plastic	16.48	10.06	9.72	10.84
Marine Products	7.30	8.32	4.32	10.60
Iron and Steel	15.54	7.24	4.08	7.66
Tanning or dyeing extracts	3.18	4.64	3.94	7.10
Coffee, Tea, Spices	0.14	0.34	1.12	7.00
Instruments, Medical, Surgical, Experimental	5.32	5.52	6.00	5.26
Electrical Machinery and Equip.	1.32	2.02	2.88	4.92
Mineral Fuels	0.58	0.48	1.82	4.16
Machinery and Equipment	2.08	3.50	3.68	3.90
Misc. Chemical Products	2.94	3.70	3.90	3.26

Source: Computed by authors from Trade Map data

[109] *See* Kangkang Li, *China and India Trade Competition and Complementary: Analysis of the "Belt and Road" Background*, 9(7) MOD. ECON., 1213-1227 (2018).

[110] *See* Murali Kallummal, Prerna Manral & Salahuddin Ayyub, *Hidden Market Access Barriers in China: India's Exports in Electrical Machinery* (Apr. 14, 2020), *available at* https://ssrn.com/abstract=3575344 (last visited Nov. 8, 2021).

[111] *Id.*

While India has raised concerns over several NTMs used by China over the last two decades, the question of dumping by Chinese firms has been cited most frequently. The dragon has been the primary target of anti-dumping litigation from most of its trading partners.[112] There exists a wealth of literature providing empirical evidence of anti-dumping protectionism leading to trade diversion.[113] China attracts the highest anti-dumping investigation initiations globally since its WTO accession, given the 'Non-Market Economy' (NME) clause noted in Section 15 of the Protocol of Accession and the Treatment of China in Anti-Dumping Proceedings.[114] Since 2002, India has evolved as a major user of the AD duties on China, particularly taking recourse to the NME provision.[115] In addition, the use of countervailing measures and export subsidies poses threats for future trade relations among countries as the investigation is no more restricted among the trading firms of different countries (as in the case of AD duties). The measures relating to export /domestic subsidies and countervailing duties (hereinafter SCM) lead to a confrontation between the governments of the trading economies.[116] Therefore, countervailing initiations are measured steps and are used only when the reporting country is certain to put a measure on the import.[117]

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[112] *See* Daniel Drache & Yin Jiyuan, *Anti-Dumping Wars: An Empirical and Comparative Analysis of Unfair Trading Suits by China, India, Canada, the United States and the European Union, 1995-2011* (Nov. 29, 2013), *available at* https://ssrn.com/abstract=2361491 (last visited Nov. 7, 2021); *see also* Partrick A. Messerlin, *China in the World Trade Organization: Antidumping and Safeguards*, 18(1) WORLD BANK ECO. REV. 106 (2014).

[113] *See* Thomas J. Prusa, *On the spread and impact of anti-dumping*, 34(3) CAN. J. ECON. 591 (2001); *see also* Park Soochan, *The trade depressing and trade diversion effects of anti-dumping actions: The case of China*, 20(3) CHINA ECO. REV. 542 (2009); *see also* Paul Brenton, *Anti-dumping policies in the EU and trade diversion*, 17(3) EUR. J. POL. ECO. 593 (2001).

[114] *See* Messerlin, *supra* note 112, at 106.

[115] *See* James J. Nedumpara & Archana Subramanian, *China's Long March to Market Economy Status: Study of the Expiry of Section 15 of the Protocol of Accession and the Treatment of China in Anti-Dumping Proceedings, Discussion Paper No. 2*, NEW DELHI CTR. TRADE & INV. L. 1 (2018).

[116] Alan O. Sykes, *Subsidies and Countervailing Measures in* 2 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 84-106 (Springer, 2005).

[117] It is evident from the data, which shows that China has used anti-dumping duty initiation 8.2 times more than countervailing initiations. Interestingly, India records

India has highlighted the concerns over subsidized Chinese products consistently, which has been reiterated after RCEP pull-out decision as well.[118] It has been argued that, although there would be a controlled use of tariff barriers within the RCEP, there are no explicit regulations on the use of NTMs.[119]

The current analysis intends to judge the state of AD and SCM activism within RCEP with the help of Tables 5 and 6 respectively. In particular, the analysis attempts to analyze whether an 'echo effect' of AD protectionism, a trend widely observed in the global canvas, is prevailing here.[120] The arrangement of the tables is explained briefly. For instance, in Table 5 the horizontal rows represent the exporting countries getting affected by AD interventions, while the vertical columns indicate the importers (i.e., imposers of the AD interventions). The cumulative AD initiations over 1995-2020 are reported in the table, while the AD measures are presented in the parenthesis. As observed from Table 5, India initiates a total of 257 AD investigations against imports from China over this period, while on 190 occasions final measures are imposed. The corresponding AD interventions by China on Indian exports are eleven and ten respectively. The table reveals that similar to the global trend, a major proportion of Indian AD activism is targeted towards China.[121] It is noted that around twenty-four percent of

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a lower ratio of use of anti-dumping duty and countervailing initiation, standing 2.7 times.

[118] *India begins anti-subsidy probe on Chinese export of certain yarn*, FIN. EXPRESS (July 21, 2020), *available at* https://www.financialexpress.com/industry/india-begins-anti-subsidy-probe-on-chinese-export-of-certain-yarn/2030218/ (last visited Nov. 7, 2021).

[119] Prema-chandra Athukorala, *Book Reviews*, 56 BULL. INDONESIAN ECO. STUD. 363 (2020) (reviewing LILI YAN ING, MARTIN RICHARDSON, & SHUJIRO URATA, EAST ASIAN INTEGRATION: GOODS, SERVICES AND INVESTMENT, XV-264 (2019)); *see also* Julien Chaisse & Debashis Chakraborty, *Deconstructing Services and Investment Negotiations – A Case Study of India at WTO GATS and Investment Fora*, 14 J. WORLD INV. & TRADE 44, 44-78 (2013).

[120] Marc L. Busch & Krzysztof J. Pelc, *Law, politics, and the true cost of protectionism: the choice of trade remedies or binding overhang*, 13 WORLD TRADE REV. 39 (2014); Ning Meng, Chris Milner & Huasheng Song, *Differences in the determinants and targeting of anti-dumping: China and India compared*, 48 APPLIED ECON. 4083 (2016).

[121] Hylke Vandenbussche & Christian Viegelahn, *The Trade Impact of Indian Antidumping Measures against China: Evidence from Monthly Data*, 48 FOREIGN TRADE REV. 1, 1-21 (2013).

the Indian AD investigations and 26.46 percent of final AD duties are targeted against imports from China. In aggregate, RCEP accounts for 55.74 and 57.52 percent of India's global AD initiations and final measures respectively. However, China alone explains 43.05 and 46 percent of India's AD initiations and final measures against the RCEP countries respectively. So, India's 'dumping dread' from RCEP primarily originate from China.

Table 5 indicates a strong regional AD 'echo' pattern only for South Korea-China bilateral trade. The literature suggests that India demonstrates a strong AD protection 'echo' effect with developed countries like the EU and US.[122] However, in RCEP, only a weaker 'echo' effect involving India can be observed with respect to China and Indonesia.[123] It is observed from the table that India takes recourse to AD actions against both developing (e.g., China, Indonesia, Malaysia, Thailand) and developed (e.g., Japan, Singapore) countries.[124] However, the frequency of India's AD interventions on China, South Korea and Thailand are considerably higher than the corresponding AD activism undertaken by these partner countries on imports from India.[125] India's urge to protect the local industries from low-cost suppliers is evident from the analysis.[126]

Table 6 reports the countervailing initiations by the selected countries in the boxes, while the final measures are noted in the corresponding parenthesis. The 'echo' effect on SCM is found to be relatively weak in the RCEP context in general, as the evidence on AD-related retaliation among the countries is absent. A similar conclusion emerges for India as well. The lower incidence of SCM interventions by RCEP importers can be explained by the practical constraints in gathering conclusive evidence on disbursement of more than five percent *ad valorem* subsidization in

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[122] Debashis Chakraborty & Julien Chaisse, *Tightrope Walk Between Faith and Skepticism: India's "Contingency Plan" for Free Trade*, 15 ASIAN J. WTO & INT'L. HEALTH L. & POL. 91 (2020).

[123] The echo effects can be clearly observed from the anti-dumping actions imposed by the importing nations on exporter countries from the- World Trade Organization Anti-Dumping database. *Anti-dumping,* WORLD TRADE ORG. (n.d.), *available at* https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Nov. 8, 2021).

[124] *Id.*

[125] Aradhna Aggarwal, *Trade Effects of Anti-Dumping in India: Who Benefits?*, 25(1) INT'L TRADE J. 112, 120-1 (2011).

[126] *Id.*

the partner markets.[127] For instance, India has initiated nine investigations against China, but went for final measures only six times. However, the RCEP orientation in India's SCM activism is too strong. Of the twenty-eight SCM initiations made by India against the rest of the world, twenty-six are against the RCEP partners. Interestingly, all of the eleven final SCM measures by India are targeted against the RCEP countries. Table 6 further reveals that the Chinese shadow on Indian SCM canvas is quite strong. The SCM interventions on imports from China explains 34.62 and 54.55 percent of India's SCM initiations and final measures against the RCEP countries respectively. Conversely, the RCEP partners have not challenged the WTO-compatibility of India's export facilitating initiatives frequently, unlike the country's global experience in developed country quarters (e.g., in Canada, EU and US).[128]

Given the frequency of India's AD and SCM activisms in the RCEP context, it can be argued that the absence of a strong arrangement on use of contingency related NTMs within the bloc, in the presence of deep tariff cuts, would influence India's trade deficit more severely.[129] Comparing the AD and SCM interventions by India, an interesting observation emerges. The relatively lower conversion rate of the AD interventions against China is indicative of the fact that on many occasions India cannot conclusively prove occurrence of dumping from China or 'material injury' to the domestic players in the aftermath of importing the dumped consignment, or 'causal linkage' between the two.[130] On the other hand, the relatively lower incidence of SCM

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[127] *See* Chakraborty & Chaisse, *supra* note 122.

[128] Prabha Raghavan, *RCEP Agreement: Failure of dumping duties on China weighed on govt before pullback,* INDIAN EXPRESS (Nov. 8, 2019), *available at* https://indianexpress.com/article/business/economy/rcep-agreement-failure-of-dumping-duties-on-china-weighed-on-govt-before-pullback-6108942 (last visited Nov. 8, 2021). See also Chakraborty & Chaisse, *supra* note 122.

[130] Hugo Erken & Michael Every, *Why India is wise not to join RCEP*, ECON. REP. (Dec. 29, 2020), *available at* https://economics.rabobank.com/publications/2020/december/why-india-is-wise-not-to-join-rcep/ (last visited Nov. 8, 2021); Harivansh Chaturvedi & Anuj Sharma, *Why it is better to be in than out of RCEP*, HINDU BUS. LINE (Dec. 1, 2020), *available at* https://www.thehindubusinessline.com/opinion/why-it-is-better-to-be-in-than-out-of-rcep/article33223852.ece (last visited Nov. 8, 2021).

[130] Prabha Raghavan, *RCEP Agreement: Failure of dumping duties on China weighed on govt before pullback*, INDIAN EXPRESS (Nov. 8, 2019), *available at* https://indianexpress.com/article/business/economy/rcep-agreement-failure-of-

initiation, but higher conversion rate, underlines the difficulty in proving devolution of 'specific' subsidies to Chinese exporters on many occasions. The expectation of the continuation of dumping by the Chinese firms after adopting RCEP preferential duties and practical limitations of the SCM mechanism had been a major concern for India, which significantly influenced the pull-out decision in 2019.[131]

T5: RCEP Anti-Dumping Usage - Initiations and Final Measures

(01/01/95 - 31/12/20)[132]

dumping-duties-on-china-weighed-on-govt-before-pullback-6108942 (last visited Nov. 8, 2021).

[131] Subhayan Chakraborty, *India opts out of RCEP: Axe on Chinese imports, trade deal with US likely*, BUS. STANDARD (Nov. 6, 2019), *available at* https://www.business-standard.com/article/economy-policy/india-opts-out-of-rcep-axe-on-chinese-imports-trade-deal-with-us-likely-119110500040_1.html (last visited Nov. 8, 2021).

[132] *Technical Information on anti-dumping: Determination of dumping & Procedural requirements*, WORLD TRADE ORG., *available at*

Exp. Count.	Importer Country													
	Australia	**China**	**India**	**Indonesia**	**Japan**	**Korea, Republic of**	**Malaysia**	**New Zealand**	**Philippines**	**Singapore**	**Thailand**	**Viet Nam**	**Total**	**RCEP Total**
AU	-	2 (1)	5 (3)	4 (1)	1 (1)		2 (1)				1 (0)		**37 (17)**	15 (7)
KH													**1 (0)**	0 (0)
CN	64 (30)	-	257 (190)	32 (15)	6 (6)	34 (26)	16 (13)	12 (4)	3 (3)		28 (17)	10 (8)	**1478 (1069)**	462 (312)
IN	8 (1)	11 (10)	-	15 (9)		7 (5)	1 (0)				2 (1)	1 (0)	**252 (151)**	45 (26)
ID	27 (11)	6 (4)	47 (33)	-	1 (0)	9 (4)	16 (11)	8 (1)	2 (1)		6 (3)	3 (2)	**236 (145)**	125 (70)
JP	11 (8)	53 (43)	44 (32)	4 (2)		22 (18)	5 (2)		1 (0)		4 (2)		**234 (169)**	144 (107)
KR	40 (21)	42 (37)	80 (54)	19 (6)	4 (3)		18 (12)	9 (4)	2 (1)		15 (7)	3 (2)	**471 (301)**	232 (147)
LA													**1 (0)**	0 (0)
MY	23 (10)	9 (7)	45 (28)	13 (6)		7 (5)		6 (3)	2 (2)	0 (1)	2 (2)	4 (2)	**183 (102)**	113 (66)
NZ		1 (1)	2 (0)			1 (0)							**11 (4)**	4 (1)
PH	3 (3)		3 (1)	1 (1)			2 (1)	1 (0)					**19 (12)**	10 (6)
SG	8 (6)	9 (7)	33 (21)	5 (1)		4 (4)	2 (1)						**68 (43)**	61 (40)
TH	32 (16)	9 (9)	62 (39)	10 (6)		7 (4)	10 (6)	9 (5)	2 (0)			3 (1)	**250 (167)**	144 (86)
VN	11 (3)		19 (12)	4 (2)		2 (2)	9 (6)				6 (5)		**108 (69)**	51 (30)
Total	**369 (168)**	**292 (241)**	**1071 (718)**	**144 (65)**	**15 (14)**	**155 (102)**	**106 (64)**	**66 (25)**	**20 (13)**	**0 (2)**	**97 (60)**	**26 (16)**	**6300 (4071)**	
RCEP Total	227 (109)	142 (119)	597 (413)	107 (49)	12 (10)	93 (68)	81 (53)	45 (17)	12 (7)	0 (1)	65 (37)	25 (15)		

https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (last visited Nov. 8, 2021).

Table 6: RCEP Countervailing Usage Matrix – Initiations and Final Measures (01/01/1995 - 30/06/2020)[133]

Exporter Country		**Importer Country**						
	Australia	**China**	**India**	**Japan**	**New Zealand**	**Viet Nam**	**Total**	**RCEP Total**
Australia	-	2 (1)					**4** **(2)**	2 (1)
China	21 (11)	-	9 (6)		3 (0)		**189** **(129)**	33 (17)
India	1 (1)	2 (1)	-				**93** **(56)**	3 (2)
Indonesia	1 (0)		3 (1)				**28** **(13)**	4 (1)
Korea, Republic of			1 (0)	1 (1)			**32** **(15)**	2 (1)
Malaysia	1 (1)		6 (1)				**17** **(5)**	7 (2)
Philippines							**2** **(2)**	0 (0)
Thailand			3 (1)		1 (0)	1 (0)	**22** **(4)**	5 (1)
Viet Nam	5 (0)		4 (2)				**23** **(9)**	9 (2)
Total	**38** **(16)**	**17** **(10)**	**28** **(11)**	**1** **(1)**	**9** **(4)**	**1** **(0)**	**604** **(344)**	
RCEP Total	29 (13)	4 (2)	26 (11)	1 (1)	4 (0)	1 (0)		

Source: WTO Subsidies and Countervailing Gateway

[133] *Subsidies and countervailing measures*, WORLD TRADE ORG., *available at* https://www.wto.org/english/tratop_e/scm_e/scm_e.htm (last visited Nov. 8, 2021).

IV. The RCEP Future: Options for Indian Re-Entry?

In the context of India's trade balance scenario vis-à-vis RCEP partners, it is important to understand the practical challenges India might experience in the bloc at the time of re-entry.[134] Despite India's exit from the pact, the RCEP maintains that India can act as an observer in the activities of economic cooperation conducted by the signatory States and may take part in RCEP meetings at all times before its membership under the terms and circumstances to be unanimously agreed upon by all fifteen nations. Further, in view of its participation in discussions from 2012 and of its strategic importance as regional partner in the creation of deeper and expanding regional value chains, the Joint Leaders Declaration on RCEP said that India's membership to this agreement would be welcomed at any time.[135] Besides the inconsistency in agreement according to India, not joining RCEP might prove challenging to India as it could influence regional trade institutional policies that would define the future of the regional trade, even though in the near term it implied acceptance of some costs. As a member of the RCEP, India would have been equal to regional and global value networks and would have been offered the chance of strengthening economic growth through a stable trade system.

The economies of East Asia have been active even amid the worldwide waves of nationalism and protectionism and still believe in trade through preferential routes and engaging in mega-regional accords.[136] Therefore, it might be challenging for India since it might lose capital and its consumers could eventually pay more than they should, particularly since the Covid-19 outbreak poses unprecedented

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[134] *Regional Comprehensive Economic Partnership Agreement*, ASEAN SECRETARIAT (n.d.), *available at* https://rcepsec.org/legal-text/ (last visited Nov. 8, 2021).

[135] *RCEP Signatories Ready for Negotiations Once India Gives Written Request to Join Pact*, ECON. TIMES (Nov. 15, 2020), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/rcep-signatories-ready-for-negotiations-once-india-gives-written-request-to-join-pact/articleshow/79232482.cms?from=mdr (last visited Nov. 8, 2021).

[136] Akarsh Bhutani, *India's reluctance in joining the RCEP - A boon or a bane in the long-run?*, OBSERVER RES. FOUND. (Feb. 10, 2021), *available at* https://www.orfonline.org/expert-speak/india-reluctance-joining-rcep-boon-bane-long-run/ (last visited Nov. 8, 2021).

problems for global commerce, investment and supply chains.[137] The regional value chain among RCEP members is projected to be particularly close-knit, owing to the presence of strong manufacturing and supply linkages in the Northeastern and Southeast Asian nations. If India were to be included and trade and non-trades obstacles were further reduced, economic participation in the region would have been deeper – for the benefit of all members. Apart from the economic standpoint, the RCEP has political and geopolitical importance. India's goal to recruit international supply chains would also be affected, since Member States have a greater chance of establishing distinct value chains.

V. Re-Entry of India in RCEP? A Game-theoretic Analysis

As discussed in Section 2 earlier, given the rising trade deficits, both the extent of tariff reform and protection from NTMs[138] had been among the primary reasons behind the Indian decision to pull out from RCEP negotiations. This article therefore intends to contribute to the existing literature by analyzing the market access concerns behind the Indian decision on RCEP pull-out in a game-theoretic framework.

Use of game theory to understand international politics and trade is not new in literature and its application has widened over the past few

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[137] Hugo Erken & Michael Every, *Why India is wise not to join RCEP*, RABOBANK (Dec. 29, 2020), *available at* https://economics.rabobank.com/publications/2020/december/why-india-is-wise-not-to-join-rcep/#:~:text=A%20report%20by%20the%20Peterson,it%20were%20an%20RCEP%20participant (last visited Nov. 8, 2021).

[138] Hardeep Singh Puri, *India's Trade Policy Dilemma and the Role of Domestic Reform*, CARNEGIE INDIA (Feb. 16, 2017), *available at* https://carnegieindia.org/2017/02/16/india-s-trade-policy-dilemma-and-role-of-domestic-reform-pub-67946 (last visited Nov. 8, 2021); Deborah Elms & Kelly Phuong Tran, *RCEP Brings New Opportunities for Gradual Agricultural Reforms in India*, CTR. WTO STUDIES (Dec. 2014), *available at* https://www.researchgate.net/publication/270777767_RCEP_Brings_New_Opportunities_for_Gradual_Agricultural_Reforms_in_India (last visited Nov. 8, 2021); Devirupa Mitra & Anuj Srivas, *India Exits Asia's Mega Trade Pact, Decides Not to Join RCEP Agreement*, WIRE (Nov. 4, 2019), *available at* https://thewire.in/trade/india-decides-not-to-join-rcep-agreement-for-now (last visited Nov. 8, 2021).

decades.[139] Global trade is interdependent on the strategic actions taken by the trading nations and, hence, game theory fits well to analyze their optimal decision choices.[140] Game-theoretic framework helps in laying out the logic behind the decision outcome in a structured manner, which makes room for extensive use of this tool in understanding international legal architecture.[141] The current analysis is conducted in the following manner. First, we formalize a non-cooperative static game between India and other RCEP countries to explain why India did not join RCEP in the first place in 2020. Second, through a dynamic game-theoretic framework we explore what would be the possibilities of India joining RCEP in the near future.

As discussed in earlier sections, without explicit provisions for responding to the Indian concerns regarding coverage of tariff reforms and the use of NTMs, it will not be agreeable for a trade deficit economy like India to re-join RCEP. Since RCEP has not made any arrangements on limiting trade coverage and targets a modest benchmark for controlling NTMs, this can be a reason for not signing on for India.[142] To check whether refraining from joining RCEP was the optimal strategy for India, we first construct a simple static[143] game of complete information[144] with strategic interaction between India and the RCEP member countries. Though there had been rounds of negotiations for joining RCEP, we consider the situation in November of 2020, when India decided not to join RCEP.

In this game, the players, viz., India and other RCEP members have their own strategy profiles. India can either choose to *'enter'* the RCEP or *'not*

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[139] Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 25, 25–57 (1985).

[140] Milton Mueller & Peter Lovelock, *The WTO and China's ban on foreign investment in telecommunication services: a game-theoretic analysis*, 24 TELECOMM. POL'Y 731, 733 (2000).

[141] Hojjat Khodaeyfam & Alireza Arashpour, *Legal Framework of WTO from the Perspective of Game Theory in International Law*, 35 INT'L L. REV. 277 (2018).

[142] Rajaram Panda, *A Step Too Far: Why India Opted Out of RCEP*, GLOB. ASIA (2019), *available at* https://www.globalasia.org/v14no4/feature/a-step-too-far-why-india-opted-out-of-rcep_rajaram-panda (last visited Nov. 8, 2021) ("India did not get any credible assurance on market access and non-tariff barriers").

[143] The game is considered static, as the decision taken by India or by the RCEP member countries are taken at one time point, (i.e., November 2020, in this case).

[144] A scenario can be described by a complete information game when the strategy profile of all the players and their corresponding payoffs are known to every participant of the game.

enter', therefore the strategy profile for India will be $S_I = \{enter, not\ enter\}$. RCEP member countries may strategize to *'change the policy,'* taking an approach to ensure room for accommodating India's concerns over tariff reforms and lowering of NTMs, which might be favorable for India to join, or maintain status quo by choosing *'not change policy'*. Therefore, the strategy profile for RCEP member countries would be $S_R = \{change\ policy, not\ change\ policy\}$. But changing the policy has geopolitical implications among the member countries and exercising a regulation on NTMs is not an easy task given the complexities associated with it. These strategy profiles of both the players, i.e., S_I and S_R is known to both India and RCEP member countries. Since we proceed with a complete information model, then the corresponding payoffs should be known as well.

To derive the payoffs corresponding to the strategy profile, we need to account for the associated net benefits of the strategy. For RCEP member countries, if they choose to 'change policy,' such that it is feasible to incorporate necessary regulations harmonizing standards, it would lead to loss of control on trade through the use of NTMs. Therefore, it is not entirely costless. Let that cost be $C_R(>0)$. Also, as RCEP may agree to some of India's suggestions on tariff reforms, this may adversely affect the trade balance of the existing member countries if India chooses to join, denoted by $-t_B^R < 0$. Therefore, the total loss incurred by RCEP member countries, if they choose to 'change policy' and India enters, would be $(C_R + t_B^R)$. However, by 'changing the policy', the member countries can ensure the possibility of India signing the agreement and enable other RCEP members to gain easier access to the large market of 1.4 billion consumers. The revenue for the member countries, and, correspondingly, domestic economic vibrancy, would then increase by $\Delta\pi_R > 0$. But this gain is guaranteed only if India chooses to enter the RCEP, otherwise $\Delta\pi_R$ will be forgone even after choosing 'change policy' by RCEP member countries.

Now let us consider the payoff consequences for India's strategic actions. India has certain compelling political reasons for joining the RCEP. Being a signatory would have allowed India to shape the agreement in the future as well as gain market power benefits, leading to a perceived gain of say, $M > 0$.[145] If India signs with flexibility in tariff provisions

[145] John Whalley, *Why Do Countries Seek Regional Trade Agreements?, in* THE REGIONALIZATION OF THE WORLD ECONOMY 63, 84-86 (Jeffrey A. Frankel ed., 1998).

and change in RCEP NTM regulations, the rising revenue from RCEP markets would help in creating jobs and sustaining economic growth ($\Delta\pi_I$), which is a crucial consideration of the Indian policymakers at present.[146] Also, this action would help in improving India's trade balance (t_B^I). In addition, given the vibrant production dynamics within ASEAN in general and RCEP in particular, India can enjoy greater access to different global varieties in the domestic market (v_1).[147] Therefore, the gains from choosing to 'enter' with favorable trade policies can be denoted by: $(M + \Delta\pi_I + v_1 + t_B^I)$. Conversely, the opening up of the economy may adversely affect the domestic Small and Medium Enterprises (hereinafter 'SMEs') units, who are presently on a poorer technological plane.[148] The shrinking of the SME sector and the resulting employment repercussions may reduce the domestic demand by $-\delta_1$ (< 0). Now, India's decision to *'not enter'* is associated with a cost, as staying out of the deal isolates India, creating a loss of credibility. This reputational rupture limits its ability to influence the emerging trade architecture in the future, which can be denoted by $-M$. For instance, the Indian reluctance to embrace the TRIPS-Plus provisions and deep tariff cut proposals in the RCEP, and the subsequent pull-out, would only harden the stance of the EU and the US during their respective RTA negotiations with India. But if India does not join the RCEP, it protects the local SMEs from the competition and retains an increased share of the domestic demand which would be proportionately more than δ_1 and denoted by $\alpha\ \delta_1$, where $\alpha > 1$. But if there is no change in the RCEP set of policies and India signs in despite this, there will be a proportionate loss in demand denoted by $-\beta\delta_1$, where $\beta > 1$. Also, the trade balance would be adversely affected by $-t_B^I < 0$.

As noted earlier, the payoffs under different strategy spaces are known to both the players, making it a complete information game. We can summarize the payoffs in a normal form (tabular form) simultaneous to the move game in Table 7.

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[146] Sunitha Raju, Bibek Ray Chaudhuri & Mridula Savitri Mishra, *Trade liberalization and employment effects in Indian manufacturing: An empirical assessment* 4-13 (P'SHIP FOR ECON. POL'Y, Working Paper No. 2016-19).

[147] Connie Bayudan-Dacuycuy & Joseph Anthony Lim, *Export Sophistication, Export-Led Growth and Product Space: Evidence from Selected Asian Economies*, 52(1) J. ASIAN & AFR. STUD. (2014).

[148] *See generally* Subhadip Mukherjee & Rupa Chanda, *Trade Liberalization and Indian Manufacturing MSMEs: Role of Firm Characteristics and Channel of Liberalization*, 31 EUR. J. DEV. RSCH. 984 (Feb. 15, 2019).

Table 7: 2x2 Payoff matrix for Complete Information Static Game between India and RCEP Member Countries

	RCEP Member Countries		
		Change Policy	Keep Policy
India	Enter	$(\Delta\pi_I + v_1 + M + t_B^I - \delta_1)$, $(\Delta\pi_R - C_R - t_B^R)$	$(v_1 + M - \beta\delta_1 - t_B^I)$, $(\Delta\pi_R + t_B^R)$
	Not Enter	$(\alpha\,\delta_1 - v_1 - \mathrm{M})$, $(-C_R - \Delta\pi_R)$	$(-M - v_1)$, $(-\Delta\pi_R)$

In the payoff matrix, the two expressions in the parentheses of each cell represents the payoff of India and RCEP member countries respectively. To derive the optimal strategy for both India and RCEP members we need to find out the Pure Strategy Nash Equilibrium, i.e., given the strategy for one player the best strategy for the other. We can use the method of iterated elimination of dominated strategy to find the Nash equilibrium. A strategy which is never chosen in the presence of the other strategy is called the dominated strategy. To ensure that 'enter' is a dominated strategy, the payoff from choosing 'not enter' should at least be greater than or equal to the payoffs for choosing 'enter'. This indicates that the strategy 'enter' would always provide lower payoff compared to the payoff from a 'not enter' decision and, hence, would never be played. However, in this present game in Table 7, the comparison of payoff from 'enter' and 'not enter' is not straight forward.

It is common knowledge that India did not join RCEP, and cited the domestic economic considerations as the driver behind this decision during 2019-20.[149] If the 'not enter' decision emerges as the dominant strategy for India, we need to show that: $(\Delta\pi_I + v_1 + M + t_B^I - \delta_1) \leq (\alpha\,\delta_1 - v_1 - \mathrm{M})$ and $(M + v_1 - \beta\delta_1 - t_B^I) \leq (-M - v_1)$. To satisfy the first condition, α should be sufficiently large such that $\alpha > \alpha^*$, where $\alpha^* = \frac{\Delta\pi_I + 2(v_1+M) + t_B^I - 1}{\delta_1}$. Similarly, for the second condition to hold we need $\beta \geq \beta^*$, where $\beta^* = \frac{2(v_1+M) - t_B^I}{\delta_1}$. Therefore, India will choose '*not to enter*' the RCEP as the dominant strategy if $\alpha \geq \alpha^*$, where $\alpha^* = \frac{\Delta\pi_I + 2(v_1+M) + t_B^I - 1}{\delta_1}$ and $\beta \geq \beta^*$, where $\beta^* = \frac{2(v_1+M) - t_B^I}{\delta_1}$. These conditions

[149] *See* Government of India, *supra* note 40.

are sufficient to ensure that the payoffs from 'entering' RCEP are always lesser than those for 'not entering' the trade bloc.

For the other RCEP members, the strategy of 'not changing policy' is unconditionally superior to changing it as $(\Delta\pi_R - C_R - t_B^R) < (\Delta\pi_R + t_B^R)$ and $(-C_R - \Delta\pi_R) < (-\Delta\pi_R)$, (since $C_R > 0$). Noteworthy is the fact that if the cost of changing the policy is reduced to zero ($C_R = 0$), even then the strategy of 'not changing policy' is weakly dominated, i.e., when India chooses to 'enter' then the payoff from ' not change policy' is higher, whereas, RCEP members are indifferent between the two strategies when India refuses to join. The RCEP decision in 2020 for not changing the policy on coverage of tariff reforms and NTM regulations to make it favorable for India to join needs to be viewed in this light. For RCEP, the 'change policy' remains the dominated strategy and will never be chosen. By definition, in a complete information game, India will always know that RCEP members will never opt for the 'change policy' strategy. Therefore, given this information, India will decide upon their strategy which will result in the higher payoff. We find that India will, therefore, choose to enter the RCEP only if $\beta < \beta^*$. Put differently, if the loss in domestic demand is due to signing in is high, it is optimal for India to not join the RCEP, as witnessed in the real-world outcome. We can state this lesson formally in Proposition 1.

Proposition 1:

At the equilibrium, India will choose not to enter the RCEP if the loss in domestic demand due to signing in RCEP is sufficiently high such that if $\beta \geq \beta^*$, *where* $\beta^* = \frac{2(v_1+\bar{M})-t_B^I}{\delta_1}$. *Precisely, the dominant strategy nash equilibrium is (not enter, not change policy) if* $\beta \geq \beta^*$.

The underlying logic behind India's RCEP pull-out decision during 2019-20 is evident from the game-theoretic analysis. The key consideration therefore is whether joining RCEP in the long run will be beneficial for the country. We can also observe that $\frac{\partial\beta^*}{\partial\delta_1} \leq 0$ and $\frac{\partial\beta^*}{\partial t_B^I} \leq 0$, indicating that the condition for not entering RCEP is more stringent when there is an exogenous increase in domestic demand and if the trade balance of India is favorable. In other words, independent of the decision of joining RCEP, if the trade balance of India can be improved or the domestic demand is maintained high then the likelihood of India's entry in RCEP would increase.[150] On the other hand, $\frac{\partial\beta^*}{\partial M} \geq 0$ and $\frac{\partial\beta^*}{\partial v_1} \geq 0$, which

[150] It has been observed that India's GDP growth rate during 2019-20 stood at 4.2 percent, as compared to the corresponding figure of 6.1 percent during 2018-19.

indicates that the condition for joining RCEP is more rigid if global varieties in the domestic market increases and India gains a market power, even when not in RCEP.[151] We can state this formally in Proposition 2.

Proposition 2:

An exogenous increase in δ_1 (domestic demand) and t_B^I (improvement in trade balance for India) and an exogenous decrease in M (market power) and v_1 (varieties in market) can make it favorable for India to join RCEP.

Now the second crucial question is whether India will join back RCEP in the near future. As noted earlier, India has launched the 'Make in India' initiative in 2014, followed by the 'Atmanirbhar Bharat Abhiyan' (Self-reliant India) in 2020, with the objective of domestic industrial consolidation and growth. However, most of the products that India expects to specialize in the short run belong to low and mid-tech segments, with potential competition from China.[152] The competition from China is likely to remain strong in the wake of the 'Made in China

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The falling growth rate and worsening trade balance collectively exerted a downward pressure on domestic demand, which shaped India's RCEP pull-out decision. Navdeep Yadav, *These Indian states have seen the worst economic impact due to the COVID-19 pandemic*, BUS. INSIDER INDIA (May 29, 2020), *available at* https://www.businessinsider.in/policy/economy/news/these-indian-states-have-seen-the-worst-economic-impact-due-to-the-covid-19-pandemic/articleshow/75999085.cms (last visited Nov. 8, 2021); *see Consumer spending at 4-decade low; India risks rising poverty, malnutrition*, WEEK (Nov. 15, 2019), *available at* https://www.theweek.in/news/biz-tech/2019/11/15/consumer-spending-4-decade-low-india-risks-rising-poverty-malnutrition.html (last visited Nov. 8, 2021).

[151] The number of RCEP product varieties that could have entered Indian market in the post-block period are already entering through ASEAN, facilitated by setting up of Chinese production units in ASEAN. India's intent is to block such imports. Deepshikha Sikarwar & Gulveen Aulakh, *India may step up scrutiny of imports from Chinese cos in Asean countries*, ECON. TIMES (June 29, 2020), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/india-may-step-up-scrutiny-of-imports-from-chinese-cos-in-asean-countries/articleshow/76680552.cms (last visited Nov. 8, 2021).

[152] Rahul Anand, Kalpana Kochhar & Saurabh Mishra, *Make in India: Which Exports Can Drive the Next Wave of Growth?*, *in* WP/15/119 IMF, WORKING PAPER 27 (INT'L MONETARY FUND ed., May 2015).

2025' policy that the dragon launched in 2015, with a goal of enhancing long-term competitiveness in mid to hi-tech manufacturing segments. It is likely that the disbursement of subsidies would continue to play a crucial role in this strategy.[153]

India has been enjoying effective RTAs with all the RCEP members other than China, Australia, and New Zealand. Though RTA negotiations had been initiated with New Zealand since 2010, and a comprehensive strategic partnership has been initiated with Australia since June 2020, the strategic interaction between India and China plays a crucial role in India's long-term reconsideration of joining RCEP even after the policy changes are favorable.

In this backdrop, the current analysis intends to foresee the possible strategic choices for India on the RCEP question, given the Chinese orientation through a dynamic game. If RCEP accommodates India's concerns over tariff reforms and lowering of NTMs, then possibilities of dumping from China may be reduced; otherwise, China will continue with the WTO's incompatible policies. The following two cases can be considered:

CASE I: RCEP member countries reconsider India's concern over joining RCEP and changes the policy accordingly

Under this situation, India can consider entering the RCEP or staying out. Observing the actions taken by India, China can now decide whether to adopt WTO-compatible policies (WCP) or occasionally indulge in WTO incompatible policies (WNP). Therefore, we consider a two period dynamic game set-up where India makes the first move and decides whether to enter or not enter RCEP; India's action set being $A_I = \{enter, not\ enter\}$ and in the next period China decides upon its actions $A_C =$ $\{WTO\ compatable\ policy(WCP), WTO\ noncompatable\ policy\ (WNP)\}$. Figure 1 in the following provides the game in its extensive form (game tree).

The payoff of the players in the dynamic game are defined in the following manner. We observe that upon entry India enjoys rising

[153] James McBride & Andrew Chatzky, *Is 'Made in China 2025' a Threat to Global Trade?*, COUNCIL ON FOREIGN REL. (May 13, 2019), *available at* https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade (last visited Nov. 8, 2021).

revenues and employment effects from RCEP markets ($\Delta\pi_I$), access to more global varieties in the domestic market (v_1), higher market negotiation power (M) and improved trade balance (t_B^I) but suffers from the loss of domestic demand due to increased competition and negative effects of NTMs (δ_1). Conversely, China enjoys improved earnings and the associated advantages due to eased access to the Indian market ($\Delta\pi_C$). Also, if China continues to dump the products or use subsidies to provide local players a competitive edge, they will gain an additional amount of D.[154] However, as RCEP has accommodated for India's concern over tariff and NTM reforms, the gain of D comes with a cost of C_D. However, when China follows WTO compatible policies (i.e., no dumping or subsidization), the available varieties for India would be lower at $v_2 (< v_1)$ and the trade balance more favorable, denoted by γt_B^I, where $\gamma > 1$. It is observed from the payoffs that if the cost for not complying with WTO regulations and RCEP policy is not high, China will always get higher pay off by choosing WNP.

Figure 1: Extensive form representation of the dynamic game between India and China when RCEP members have adopted favorable policies of India to join.

On the other branch of the game tree, if India chooses to 'not enter' RCEP, China may still have the options of choosing between WCP and WNP. If India plays 'not enter' and China responds by opting for WNP, then Indian SMEs would be protected from competition and there would be a gain in domestic demand by $\alpha\ \delta_1$, where $\alpha > 1$. However, India will lose out on access to varieties ($-v_1$), the market power to negotiate ($-M$), and a portion of the increased domestic demand due to the adoption of WNP by China ($-\delta_1$). China, on the other hand, will not get the additional benefit ($-\Delta\pi_C$) which it could have gained if India entered into RCEP. By choosing WNP, China can still dump and gain (D) by

[154] The assumption is based on real world experience, as Indian Parliament recently noted that Chinese dumping in the solar panel sector alone has led to loss of 0.2 million jobs in the domestic market. *India lost 2 lakh jobs due to dumping of Chinese solar panels: Parliament Panel*, ECON. TIMES (July 27, 2018), *available at* https://energy.economictimes.indiatimes.com/news/renewable/india-lost-2-lakh-jobs-due-to-dumping-of-chinese-solar-panels-parliament-panel/65159015 (last visited Nov. 8, 2021).

paying no cost, as the revised trade reforms of RCEP are not applicable since India choose 'not enter'. If China plays WCP, then India will not lose the domestic market due to dumping and China's gain from such activities would be zero. The rest of the components in the payoff for both India and China are the same as in the previous static case.

Now, since this is a dynamic game of complete information, we can derive the best actions for India and China by solving for the Sub-game Perfect Nash Equilibrium (SPNE) using the method of backward induction. According to this method, we start solving the game from the last period. So, we first find out that is the best action for China when India opts to 'enter'. We find that $\Delta\pi_C - C_D + D > \Delta\pi_C$, when the cost of opting to use NTMs is low. With China being a global trade influencer, it is likely that the cost would be lower than the possible gain and, hence, China will choose WNP over WCP.[155] Similarly, when India decides not to enter RCEP, China's payoff from WNP is unambiguously higher than the corresponding WCP payoff. Therefore, we find that irrespective of actions chosen by India, it is best for China to play WNP. Now, knowing that China would choose WNP as the dominant strategy in its action set,[156] India will choose its optimal action in period 1. India will compare between $(\Delta\pi_I + v_1 + M + t_B^I - \delta_1)_I$ and $((\alpha - 1)\delta_1) - v_1 - M$. We find that if $\delta_1 \geq \delta_1^* = \frac{2(v_1+M)+\Delta\pi_I+t_B^I}{1+\alpha}$, then the optimal strategy for India is to 'not enter'. We can state this formally in Proposition 3.

Proposition 3:

If the domestic demand is sufficiently high such that $\delta_1 \geq \delta_1^* = \frac{2(v_1+M)+\Delta\pi_I+t_B^I}{1+\alpha}$*, then the Sub-game Perfect Nash Equilibrium will be (Not Enter, WNP) even when the RCEP members have accommodated the policies favorably for India.*

Case II: RCEP member countries do not consider India's concern over joining RCEP and change the policy accordingly.

Under this situation, the strategic interaction between India and China is more relevant and interesting. From Proposition 1 we have shown that the dominant strategy for RCEP member countries is to 'not change' the

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[155] *See generally* Romi Jain, *China's Compliance with the WTO: A Critical Examination*, 29 INDIAN J. ASIAN AFF. 57, 57-84 (2016).

[156] India's consistent use of contingency actions against Chinese exports, as observed from Table 5, is a case in point. *See* table 5, *supra*.

policy favorably for India. Thus, the outcome under this situation is closer to reality. The action set for both India and China are the same as before, but the corresponding payoffs are different. The game is described in the form of a game tree in Figure 2.

Figure 2: Extensive form representation of dynamic game between India and China when RCEP members have not adopted favorable policies for India to join.

The payoff of the players in this dynamic game are defined in the following manner. When India decides to 'enter' the RCEP and China chooses WNP, India gains in attaining global variety and market power to negotiate $(v_1 + M)$ but loses domestic market due to competition $(\beta\delta_1; \beta > 1)$. The use of WNP by China also adversely impacts the trade balance of India by γt_B^I, where $\gamma > 1$. Similarly, if China choose WCP, the gain for India remains the same $(v_1 + M)$ but the loss in trade balance is less as China does not adopt NTMs (e.g., dumping, subsidization). When India chooses to 'enter', it results in additional benefits and an improved trade balance for China $(\Delta\pi_C + t_B^C)$. In addition, China gains by D when WNP is chosen. Comparing the payoff of China in the last stage when India chooses to enter, we find that the dominant strategy for China is WNP. Therefore, we can fold back the game to observe that India will get $(v_1 + M - \gamma t_B^I - \beta\delta_1)$ when it chooses to 'enter'.

Now, if India does 'not enter' and China opts for WNP, India pays the cost of loss in variety in the market, power of future negotiation and increased competition leading to loss in domestic demand $(-v_1 - M - \delta_1)$. If China plays a fair game by going for WCP, then India does not face increased domestic competition due to use of NTMs by China. The rest of the components in the payoff are similar with the abovementioned scenario. For China, India's decision of not joining RCEP will lead to a loss in access to the Indian market $(-\Delta\pi_C)$. By choosing WNP, China gains an additional amount of D without any threat of paying penalty, as RCEP member countries have not opted for trade policies favorable to India. Even in this arm of the game, we find that it is a dominant strategy for China to choose WNP and, knowing this, India lands up with a payoff of $(-v_1 - M - \delta_1)$ when action 'not enter' is played. Therefore, to solve for the SPNE strategy for India, we need to compare the payoff $(v_1 +$

$M - \gamma t_B^l - \beta\delta_1$) with $(-v_1 - M - \delta_1)$. The finding can be formally stated in Proposition 4.

Proposition 4:

When RCEP member countries refuse to renegotiate with India with revised trade policies, the SPNE is (Not enter, WNP) if $\beta \geq \beta^{**} = \frac{2(v_1+M)-\gamma t_B^l+\delta_1}{\delta_1}$, *i.e., when loss in domestic demand is sufficiently high, India's optimal strategy is to 'not enter' RCEP.*

Interestingly, the statement for Proposition 1 and Proposition 4 are similar, identifying that the concern for joining RCEP is pinned down to the adverse effect on the domestic market due to fierce competition from the RCEP members, which includes China. However, we need to *compare* the conditions to anticipate whether, in the long term, the situation differs from today's outcome. Therefore, comparing β*and β**, we find that $\beta^{**} < \beta^{*}$ *if* $-\delta_1 > \delta_1{}^{**} = (1-\gamma)t_B^l$. The finding can be formally stated in Proposition 5.

Proposition 5

The condition for India not entering RCEP in the long run is less stringent if the loss in the domestic market is higher than the gains from improvement in trade balance.

VI. Indian Policy Path in Future

RCEP's economic expansion has often been highlighted by its extensive coverage of almost 30% of the world's population and GDP, making it the biggest RTA. The Member States are anticipated to benefit from such a mega-bloc, having constituents with varying degrees of capital-intensity and labor skill, by creating a barrier-free mass market for each other. The launch of RCEP negotiations in 2013 was a continuation of India's 'Look East Policy' for promoting East-Centric trade. However, India pulled out of the deal after being in negotiations for almost a decade, anticipating disruption for domestic industries and further deterioration in trade balance, particularly against China. Several

developed, as well as developing countries, joined RCEP as they experienced trade surpluses with either ASEAN or RCEP members or both (i.e., the anticipations for future benefits were backed by the current realized gains). Conversely, a number of low-income, middle-income, and high-income nations suffered from trade deficits with both ASEAN and the RCEP. However, all of them, with the exception of India, have pushed forward with RCEP talks despite the trade deficit. In light of the past experience, moreover, trade deficit was expected to worsen due to the perceived lack of a robust arrangement to tackle contingency related NTM's in the bloc in the aftermath of a substantial tariff reduction. India anticipated that dumping by the Chinese companies would continue even after implementing RCEP preferential tariffs, along with government support in the form of subsidies. With China adopting a relatively aggressive stance on tariff cuts after the launch of the 'Made in China 2025' scheme and, given the deepening geopolitical tensions with the dragon, India decided that it would prefer integration with Asian countries through bilateral FTAs rather than be a part of RCEP.

One of the crucial strategic trade policies China has followed thus far has been to ensure its market economy status through the RTA route.[157] This policy played a pivotal role in promoting the export engine of the dragon, as several WTO Members treated China as an NME in line with the allowed flexibility. It deserves mention that, while the NME status of China has lapsed on December 11, 2016, as per the agreed upon accession principles, both developed (e.g., EU, US) and developing (e.g., India) countries continue to treat China as an NME, citing absence of market forces in determining key prices therein. China has already challenged the EU[158] and US[159] procedure at the WTO and, in a retaliatory measure, declared the US energy and petrochemical sector as

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[157] *See* Yanlin Sun & John Whalley, *China's Anti-dumping Problems and Mitigation Through Regional Trade Agreements*, 70 CTR. FOR INT'L GOVERNANCE INITIATIVE PAPERS 1, 5-11 (2015).

[158] *See* Secretariat Dispute Settlement Summary, *European Union — Measures Related to Price Comparison Methodologies*, WTO Doc. DS516 (June 15, 2020), *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm (last visited Nov. 8, 2021).

[159] *See* Secretariat Dispute Settlement Summary, *United States — Measures Related to Price Comparison Methodologies*, WTO Doc. DS515 (Dec. 12, 2016), *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm (last visited Nov. 8, 2021).

an NME.[160] Now, India considers China as an NME even in the 2021 AD investigations.[161] Given the strong perception on continuing subsidization in China in the future, as well and non-availability of comparable market prices of several Chinese products, it is unlikely that the Indian authorities will yield to the Chinese pressure on withdrawing the NME treatment, which will surely intensify if India joins RCEP.

The current analysis evaluates India's RCEP pull-out decision and the possibilities of its re-entry in the bloc through a game-theoretic analysis. India's long-term decision to re-enter RCEP would crucially depend on the growth of domestic demand (and in turn, employment opportunities) and improvement in trade balance. Considering the strategic options of China, India, and RCEP, the following conclusion is reached: if RCEP takes account of India's concerns about tariff reform flexibility and lowering of the NTMs, threats from Chinese dumping may be limited. Otherwise, China will continue to implement WTO incompatible policies. In fact, adoption of the WTO-incompatible policies can be beneficial for China. It can be observed that taking recourse to WTO-incompatible instruments can emerge as a dominant strategy (i.e., a lucrative option) for China with the consequent ramifications for India. India's involvement and subsequent disentanglement in RCEP has been shaped by all of these considerations.

Despite the perceived inconsistency in the agreement, India's refusal to join RCEP may pose a challenge to its trade architecture, even if it means accepting certain costs in the short term. Upon joining RCEP, India will be able to access the regional and global value networks, with the opportunity to boost economic growth by being part of a vibrant trading system. Notably, even in the face of global waves of nationalism and protectionism, East Asian economies have remained committed to trade reforms by asserting their faith in preferential trade routes and

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[160] Zhiguo Yu & Sandeep Thomas Chandy, *The US is now a "Non-Market Economy" – Anti-Dumping Ruling by China*, INT'L ECON. L. & POL'Y BLOG (July 18, 2020), *available at* https://ielp.worldtradelaw.net/2020/07/the-us-is-now-a-non-market-economy-anti-dumping-ruling-by-china.html (last visited Nov. 8, 2021).

[161] Ministry of Commerce & Industry, *Initiation of anti-dumping investigation concerning imports of "Polyurethane Leather which includes any kind of textile coated one sided or both sided with Polyurethane" originating in or exported from China PR*, F.No. 6/55/2020 - DGTR, MINISTRY OF COM. & INDUS (Feb. 24, 2021), *available at* https://www.dgtr.gov.in/sites/default/files/initiation%20Notification%20-English%20%281%29.pdf (last visited Nov. 8, 2021).

participating in mega-regional agreements. The absence of India in the RCEP fold may disappoint the key investors to the country, such as Japan and South Korea, at least in the short run. Hence, India in the coming period might witness capital inflows below the anticipated level and its consumers could eventually pay more for importable goods than they should, particularly since the Covid-19 outbreak poses unprecedented problems for global commerce, investment, and supply chains.

It is important to realize that economic order is shifting in the current environment and nations are building multilateral arrangements that will define the destiny of Asian countries in the twenty-first century. Forging FTAs with trade partners may cause a transitory disruption effect across sectors posing a matter of grave concern for policymakers, but the opportunity to get integrated into a trading bloc could have paved the way for India to assume a larger role in the global context. However, integration with the West, particularly with the United States, is more beneficial to India's geopolitical interests, as most of the bilateral relationships between the two countries are primarily focusing on defense and security, rather than trade, where there is greater consensus among the two nations. Conversely, China, apart from being an economic issue, is much more of a defense and security concern to India. While the recent Doklam standoff affirmed that India can face a Chinese military threat with appropriate measures, it still does not have the economic and human capacity to face the economic challenges erected by the dragon. As a result, ensuring U.S. backing for India's economic development is just as vital as improving its defense capabilities.[162] Conversely, denying China access to the vast Indian market through preferential route sends a strong message. India's decision to push the RCEP joining decision to the distant corner of the table reflects this realpolitik as well.

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[162] Sanjaya Baru, *India and US: It's Still the Economy, stupid*, DECCAN CHRON. (Mar. 21, 2021), *available at* https://www.deccanchronicle.com/opinion/columnists/210321/sanjaya-baru-india-and-us-its-still-the-economy-stupid.html (last visited Nov. 8, 2021).

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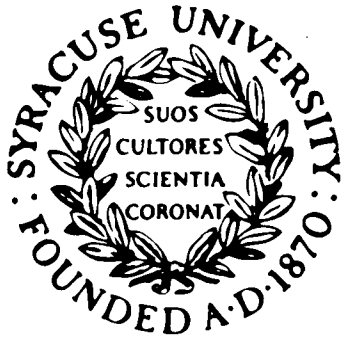

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INTELLECTUAL INFIDELITY: THE UNITED STATES, INTELLECTUAL PROPERTY LAW, AND THALER V. IANCU

Justin M. Lange

INTRODUCTION

The earliest origin of current patent law, and moreover intellectual property law itself, dates to the Venetian Patent Statute of 1474. "The statute provided that patents might be granted for 'any new and ingenious device, not previously made', provided it was useful."[1] We find here an underlying and recurrent theme that dates to the present day. Works must be new and original, not copied. Yet, we should also note that the earliest origin of patent law speaks nothing to the effect of inventors (or authors), and only speaks of the inventions (or works) themselves.

As time passes, societies and civilizations develop, and their laws evolve. Yet the underlying frameworks upon which changes and claimed improvements can be based upon cannot similarly change as time marches on. The underlying framework must remain the same.

Therefore, the framework of copyright and patent laws in the United States (U.S.) and the United Kingdom (U.K.) are dependent, at least to some extent, upon their predecessors in time, including the Venetian Statute of 1474. They must be, in part, based upon preexisting legal frameworks, and yet also impart changes to or include departures from those preexisting frameworks. Evaluating the American Constitution, specifically Article 1, Section 8, Clause 8, indicates this balance.[2] The underlying theme from previous law is clearly present, and yet the U.S. Constitution also shows a departure from its prior historical basis.[3] Evaluating the United Kingdom's intellectual property (IP) law framework indicates a similar balance.[4] The U.S. and U.K. frameworks, even from their earliest iterations, show a straddled stance, with a single foot in the past and with a step toward the future.

Yet even the improvements present in the U.S. and U.K. IP law frameworks are not fully protective of all developments and changes

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1. Joanna Kostylo, *Commentary on the Venetian Statute of 1474* (2008), *available at* http://www.copyrighthistory.org/cam/commentary/i_1474/i_1474_com_288200795317.htm l (last visited Mar. 20, 2021).

2. U.S. CONST. art. I, § 8, cl. 8 [hereinafter *Intellectual Property Clause*].

3. *See generally id.*

4. *See, e.g.*, the changes between the *Licensing of the Press Act of 1662*, 14 Car. II c. 33 (Eng.); and, *The Copyright, Designs and Patents Act of 1988*, c. 48 (Eng.).

since the creation of those prior laws. Both the U.S. and U.K. frameworks speak of "authors" and "inventors" as individuals.[5] Both frameworks inherently assume that human beings are those responsible for any creative invention or work of authorship.[6] This assumption in U.S. law thus extends IP law protections only to those inventions and works of authorship created by human beings.[7] U.K. law, meanwhile and despite this assumption, extends IP law protections to individuals, regardless of the de facto "author" or "inventor" of the work of authorship or invention.[8] In other words, while the United States only allows IP law protections to be extended to individuals who themselves created a work of authorship or invention, British law allows IP law protections to be extended to individuals who are responsible for the creation of an AI system which itself was subsequently responsible for the creation of a work of authorship or invention.[9]

The practice of U.S. law is thus in direct contrast to U.K. law, and its effect on subsequent extension of IP law protections has been shown to be clearly erroneous in recent decades. Technological innovation and developments have made it possible for machines and computers to mimic, and in some cases even themselves exhibit, the human qualities and characteristics necessary for creation.[10] Artificial Intelligence (AI) systems are particularly indicative of such advancements.[11] AI systems now have the otherwise requisite capabilities to create works of authorship or inventions which would otherwise qualify for U.S. IP law's coveted protections. While U.K. law reflects these technological advancements, U.S. law lags behind its counterpart across the pond.

Even further in favor of updating U.S. law, historical precedent dating back as far as the Venetian Statute of 1474 indicates that the public policy interests and incentives underlying the then-IP law framework were not dependent whatsoever on a human author or inventor

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5. *See, e.g.*, *Intellectual Property Clause*, *supra* note 2; *The Copyright, Designs and Patents Act of 1988*, *supra* note 4.

6. *Id.*

7. Thaler v. Iancu, 1:20-CV-00903 (E.D. Va. filed Sept. 2, 2021) [hereinafter Thaler v. Iancu].

8. The Copyright, Designs and Patents Act of 1988, *supra* note 4.

9. In the United States, *see, e.g.*, Copyright Act of 1976, 17 U.S.C. § 101; and, Patent Act of 1952, 35 U.S.C. § 100, 101. In the United Kingdom, *see, e.g.*, The Copyright, Designs and Patents Act of 1988, *supra* note 4, at ch. 1, § 9(3).

10. Jake Frankenfield, *Artificial Intelligence (AI)*, INVESTOPEDIA (Mar. 8, 2021), *available at* https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp#:~:text=Artificial%20intelligence%20is%20based%20on,include%20mimicking%20human%20cognitive%20activity (last visited Mar. 7, 2022).

11. *Thaler v. Iancu*, *supra* note 7.

requirement.[12] Instead, the underlying interest was that of providing incentive to inventors and authors for future creation and invention, all through the extension of legal protections.[13] This incentive, under the current U.S. framework, does not extend to creative works and inventions created by AI systems, or for that matter any non-human author or inventor.

It is therefore the argument of this Note that the current framework of copyright and patent law in the United States is simply imprudent. Its requirement of human authorship or creation for "works of authorship" or "inventions" is outdated and inconsistent with public policy interests and the incentives normally provided to authors and inventors under preexisting IP law. Revision to the U.S. framework, bringing it in line with the British legal framework and with the historical public policy interests and incentives long underlying IP law protections, is the appropriate path forward. The United States should spearhead a global approach, as has been shown with previous cohesive efforts in other areas (for example, the Berne Convention). *Thaler v. Iancu*, a recently decided case in the U.S. District Court for the Eastern District of Virginia currently pending appeal, provides the perfect opportunity for the U.S. to seize the moment, rise to the occasion, and begin a global march toward a smarter and more logical IP law framework.[14]

In *Thaler v. Iancu*, Mr. Stephen Thaler sued Mr. Andrei Iancu, in Mr. Iancu's position as under Secretary of Commerce for Intellectual Property and as Director of the United States Patent and Trademark Office under the Trump Administration.[15] Mr. Iancu has since left office, upon the transfer of power from the Trump Administration to the then-incoming Biden Administration.[16] However, the underlying facts behind this case remain the same, and are this: Mr. Thaler is the creator/inventor of an AI system known as "DABUS."[17] "DABUS" itself, through its own doing and using its AI capacities and abilities, created material and

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12. Kostylo, *supra* note 1.

13. *See, e.g.*, *Intellectual Property Clause*, *supra* note 2.

14. *Thaler v. Iancu*, *supra* note 7.

15. *Id.*

16. Scott Graham, *Andrei Iancu Formally Bids Farewell to USPTO*, LAW.COM (Jan. 19, 2021, 4:24 PM), *available at* https://www.law.com/nationallawjournal/2021/01/19/andrei-iancu-formally-bids-farewell-to-uspto/?slreturn=20210221181003#:~:text=U.S.%20Patent%20and%20Trademark%20Office%20Director%20Andrei%20Iancu%20has%20made,administration%20transitions%20to%20Joe%20Biden.&text=He%20then%20concluded%20from%20a,team%20in%20the%201936%20Olympics (last visited Mar. 4, 2022).

17. Thaler v. Iancu, *supra* note 7.

subject matter which was then submitted by Mr. Thaler to the U.S. Patent and Trademark Office (USPTO).[18] Importantly, "these applications named DABUS as the inventor and Plaintiff [Mr. Thaler] as the applicant and prospective owner of any granted patents."[19] As a result, "[d]efendants, in a final agency action, denied both patent applications on the basis that they failed to disclose a natural person who invented the subject matter of the applications."[20] It is thus argued by Mr. Thaler, and is the main issue in this lawsuit, that "[t]he Rejections create a novel substantive requirement for patentability that is contrary to existing law and at odds with the policy underlying the patent system."[21] Further, Mr. Thaler claims that "[d]efendants' position is anti-intellectual property and anti-business, and it puts American businesses at an international disadvantage compared to businesses in jurisdictions that will choose to grant patents on AI-generated inventions."[22]

Given the argument already set forth, this Note will proceed with further detail in three parts. Part I, entitled "The Current Framework: U.S. and U.K. Intellectual Property Law," shall be divided into three subsections. Subsection A will discuss the current framework and state of American and British copyright law. In doing so, we will examine relevant sections and provisions of the American *Copyright Act of 1976*, as well as the British *Copyright, Designs and Patents Act of 1988*. Subsection B will discuss, in similar fashion to Subsection A, the current framework and state of American and British patent law. In so doing, we will evaluate the American *Patent Act of 1952*, and again look to the catch-all British *Copyright, Designs and Patents Act of 1988*. Proceeding then to summarize our findings from subsections A and B, and drawing pertinent conclusions therefrom, Subsection C will seek to determine whether either U.S. or U.K. Intellectual Property law provides protection to the works of authorship or inventions created by AI systems.

Part II will then seek to answer what is perhaps the fundamental question belying this piece: should U.S. and U.K. law afford IP law protections to works of authorship and inventions created by AI systems? This question must be answered first without bias or partisanship. Rather, we must seek to initially answer it on a hypothetical basis, irrespective of whether the current legal frameworks already so provide. Within, this Note evaluates the strengths and weaknesses of both possible scenarios.

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

In concluding Part II, this Note will then return to the current state of affairs, as first discussed in Part I, Subsection C, above, to find that while both U.S. and U.K. law should provide IP law protections to works of authorship and inventions created by AI systems, only U.K. law currently does.

Given that U.S. law should, as is the opinion of this Note, align itself with the position of U.K. law with respect to this topic, Part III will provide recommendations for the U.S. moving forward. Part III will specifically highlight the opportunity provided by *Thaler v. Iancu*, a pending Federal appeal already generally discussed. Furthermore, Part III will also discuss the benefits of the U.S. taking a global approach to its own changes to its legal framework, and as a result will only enhance and reiterate the reasoning and logic behind making such changes to U.S. law.

PART I: THE CURRENT FRAMEWORK: U.S. AND U.K. INTELLECTUAL PROPERTY LAW

Allow us, then, to start at the beginning. As previously noted above, it is the argument and purpose of this Note to show that current U.S. IP law does not protect inventions or works of authorship created by AI systems, and in so doing demonstrate why and how such protection should be afforded. Let us first, however, give a full picture of current U.S. and U.K. IP law for works of authorship (via copyright law) and inventions (via patent law).

A. American and British Copyright Law

U.S. COPYRIGHT LAW

All American Intellectual Property law is premised on the Intellectual Property Clause of the U.S. Constitution (namely, Article 1, Section 8, Clause 8). The Intellectual Property Clause states that the Congress of the U.S. shall have the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[23]

Subsequent legislation has been since passed by the U.S. Congress, which is more directly applicable to copyright law and its extended protections. Currently, the relevant law is the *Copyright Act of 1976*. Among its multitude of provisions, the most relevant for our purposes is Section 102. Entitled "Subject matter of copyright: In general," it states

23. *Intellectual Property Clause*, *supra* note 2.

in relevant part that "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[24] Furthermore, it notes that:

"(a) [W]orks of authorship shall include the following categories: (1) literary works; (2) musical works, including any accompanying works; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."[25]

More succinctly, to qualify for copyright law protections, a human author must produce an "original work of authorship" which is to be "fixed in any tangible medium of expression," and which falls under at least one of the eight provided categories in Section 102(b).[26] The protections afforded by U.S. copyright law are more fully outlined in other sections within the *Copyright Act*, including Sections 106 and 107. It should be specifically noted, however, that there is no definition of "author" provided in Section 101 of the *Copyright Act of 1976*, which provides "Definitions."[27] Despite providing definitions for innumerable other terms, no definition of "author" is offered.[28]

So, then, how do we know that U.S. copyright law requires a human author? Well, relevant case law on the subject is determinative. In *Naruto v. Slater*, the 9th Circuit U.S. Court of Appeals sought to "determine whether a monkey may sue humans, corporations, and companies for damages and injunctive relief arising from claims of copyright infringement."[29] In finding against "Naruto" (the non-human, animal, monkey), the Court noted that "we conclude that this monkey—and all animals, since they are not human—lacks statutory standing under the Copyright Act."[30] For further discussion of why non-human authors are ineligible for copyright protection, look no further than *Kelley v. Chicago Park District*.[31] In *Kelley*, the 7th Circuit U.S. Court of Appeals was faced with a naturally growing garden, rather than an animal monkey

24. Copyright Act of 1976, *supra* note 9, at § 102(a).
25. *Id.*
26. *Id.* at § 102.
27. *Id.* at § 101.
28. *Id.*
29. Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).
30. *Id.*
31. Kelley v. Chicago Park District, 635 F.3d 290 (7th Cir. 2011).

as in *Naruto v. Slater*.[32] In ruling against finding copyright protection for the naturally growing garden, the 7th Circuit noted "[t]he real impediment to copyright here is not that Wildflower Works fails the test for originality (understood as 'not copied' and 'possessing some creativity'), but that a living garden lacks the kind of authorship and stable fixation normally required to support copyright."[33] The Court later stated "[a]uthors of copyrightable works must be human; works owing their form to the forces of nature cannot be copyrighted."[34] It is thus undoubtedly clear from these sources, and the aforementioned above, that U.S. copyright law requires human authorship for the extension of its protections.

U.K. COPYRIGHT LAW

In the United Kingdom, the relevant statute for copyright law and the protections offered by it is the *Copyright, Designs and Patents Act of 1988*.[35] Under Part I, Chapter I, Section 1, entitled "Copyright and copyright works", the statute states "(a) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—(a) original literary, dramatic, musical or artistic works, (b) sound recordings, films [or broadcasts], and (c) the typographical arrangement of published editions."[36] Subsequent sections provide for additional categories for the copyrighting of works, with Section 4, for example, providing for "Artistic works", and Section 7 providing for "Cable programmes".[37]

Furthermore, in Part I, Chapter I, Section 9, entitled "Authorship of work", the statute provides that:

"(1) In this Part 'author', in relation to a work, means the person who creates it...(3) In the case of a literary, dramatic, musical, or artistic work, which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."[38]

All protections granted through copyrighting a work of authorship are provided for in other areas throughout the Statute, including Part I, Chapter I, Section 2[39] and Part I, Chapter II (entitled "Rights of Copyright

32. *Id.* at 290.
33. *Id.* at 303.
34. *Id.*
35. The Copyright, Designs and Patents Act of 1988, *supra* note 4.
36. *Id.*, at ch. 1, § 1.
37. *Id.*, at ch. 1.
38. *Id.*, at ch. 1, § 9.
39. *Id.*, at ch. 1, § 2.

Owner").[40] Thus, as a direct result of the provision found in Part I, Chapter I, Section 9, subsection 3, U.K. law does not require human creation for the extension of IP law protections. Instead, the IP law protections extend to the human individual responsible for the creation of the AI or other computerized system or machine.[41] In other words, take the example found in *Thaler v. Iancu*, first discussed above.[42] Suppose that, instead of living in the United States, Mr. Thaler was a resident of the United Kingdom. Assume further the same set of facts, namely that Mr. Thaler created his "DABUS" AI system, which then created work otherwise protectable under IP law. Were this to be the case, and Mr. Thaler had created "DABUS" with its own subsequent creations thereafter, under U.K. law, these subsequent creations by "DABUS" would be protectable by Mr. Thaler, who would be assigned the honorary title of "author" or "inventor" of such creations.

B. American and British Patent Law

U.S. PATENT LAW

As noted above, all American Intellectual Property law is based within the bounds of the Intellectual Property Clause of the U.S. Constitution (Article 1, Section 8, Clause 8).[43] Again, it states that Congress shall have the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[44]

In the United States, more applicably to patent law, the relevant federal statute is the *Patent Act of 1952*.[45] Section 101 of the Patent Act, entitled "Inventions patentable", states that "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[46] Sections 102 and 103, entitled "Novelty" and "Non-obvious subject-matter", respectively, provide additional requirements and conditions for patentability.[47] In other words, in order for an invention to

40. The Copyright, Designs and Patents Act of 1988, *supra* note 4, at ch. 2.
41. *Id.*, at ch. 1, § 9(3).
42. *See, infra*, discussion of *Thaler v. Iancu*, *supra* note 7.
43. *Intellectual Property Clause*, *supra* note 2.
44. *Id.*
45. *Id.*
46. *Id.* § 101.
47. *Id.* § 102, 103.

be patentable in the United States, and thus eligible for the protections offered by American patent law, the invention must be novel, useful, and non-obvious.

Further, Section 100(f) of the Patent Act defines the term "inventor".[48] It states that "The term ... means the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention."[49]

U.K. PATENT LAW

In Great Britain, the relevant statute in the field of patent law is also the *Copyright, Designs, and Patents Act of 1988*.[50] Part V and Part VI, entitled "Patent Agents and Trademark Agents" and "Patents", respectively, are most applicable here. The United Kingdom's Intellectual Property Office (IPO) provides for a "statement of inventorship."[51] The IPO website notes that a "statement of inventorship" must be completed when the applying individual is not the inventor, is a member of a group or team of individuals responsible for the invention, or is applying on behalf of a company or business.[52] Patents Form 7, however, provides no space for an applicant to claim that they are applying for a patentable invention created by a being other than a human individual.[53] Instead, only the three possible exceptions noted above are provided for. However, this is not necessarily to say that U.K. patent law requires an inventor to be an individual human being or a group thereof. Instead, consider two distinct possibilities.

First, consider the effect upon which U.K. copyright law might have upon U.K. patent law. U.K copyright law explicitly allows and provides for non-human creation of a work of authorship. Would it not then be illogical and inconsistent for U.K. patent law to require human invention and disallow such invention by AI and other computer systems and machines?

Second, consider any relevant case law on the subject. In doing so, highlight for yourself the almost magical and miraculous fortune of

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48. *Id.* § 100(f).

49. *Id.*

50. The Copyright, Designs and Patents Act of 1988, *supra* note 4.

51. *Patenting your invention*, GOV.UK, *available at* https://www.gov.uk/patent-your-invention#:~:text=You%20can%20use%20a%20patent,can%20be%20made%20or%20used (last visited Mar. 4, 2022).

52. *Id.*

53. *Form 7*, U.K. INTELLECTUAL PROPERTY OFFICE, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711838/Form_7.pdf (last visited Mar. 4, 2022).

having the same individual apply for the same series of rights in multiple countries. In so doing, try to recognize and appreciate my own personal delight at this discovery. Mr. Stephen Thaler is truly a godsend to this Note, and I send him my sincerest thanks for the fortuitous luck he has provided. In *Thaler v. The Comptroller-General of Patents, Designs and Trademarks*, Mr. Thaler likewise submitted applications for patents in the U.K. for his "DABUS" AI system.[54] In finding for Mr. Thaler, the England and Wales High Court for Patents noted:

"It is common ground that DABUS is not a person, whether natural or legal. DABUS is not a legal person because (unlike corporations) it has not had conferred upon it legal personality by operation of law. It is not a natural person because it lacks those attributes that an entity must have in order to be recognized as a person in the absence of specific (statutory) legal intervention. It is, therefore, clear, that DABUS cannot make an application for a patent, whether by itself or jointly with another...As I have noted, in this case DABUS is not the applicant: Dr. Thaler is. The requirements of section 7(1) are, therefore, met."[55]

As such, given both the relevant case law and the predisposition against such a blaring contradiction within portions of a country's Intellectual Property laws, it is only logical to conclude that the United Kingdom does, in fact, allow inventions created by AI systems to be eligible for patent law protections.

C. Does the current U.S. and U.K. law afford protection to AI systems?

The previous section examined the current state and framework of American and British IP law, in the realms of copyrights and patents. Moving forward, we must in a conclusory fashion determine whether the American and British IP legal frameworks provide protection to inventions and works of authorship created by AI systems. In so determining, we must evaluate just how far the protections afforded by U.S. and U.K. law extend.

THE UNITED STATES OF AMERICA

The American IP legal framework was explored in some detail above. Here, however, we must conclude that U.S. IP law does not extend protections to works of authorship or inventions created by AI

54. *Thaler v. The Comptroller-General of Patents, Designs and Trade Marks* [2020] EWHC 2412 (Pat.) [hereinafter *Thaler v. Comptroller-General*].

55. *Id.*

systems. We can make so easy and clear a conclusion by returning to the law itself, and the interpretations of it made by several U.S. courts.

In the field of copyright law and the protections offered thereby, the *Copyright Act of 1976* is again the relevant statute. We thus re-examine American copyright law's requirements. First, there must be an original work of authorship.[56] Secondly, the work of authorship must be fixed in a tangible medium of expression.[57] Additionally, the work of authorship must fall under one of the eight categories listed in Section 102(b).[58] Lastly, while the Copyright Act itself provides no definition of its own for who is and who is not an "author", we can infer from multiple sources that a human individual (or individuals) is required. First, it would be difficult to imagine, and would indeed seem incredible, that American law would require human creation of inventions to merit protection, all the while allowing computers and AI systems to create works of authorship and affording them protection in contrast. Additionally, we can point to such case law as *Naruto v. Slater* and *Kelley v. Chicago Park District* for support of the proposition that copyright protections are only afforded to human individuals as a result of their own creations. We can thus unequivocally conclude that American copyright law does not extend the protections offered by it to works of authorship created by AI systems.

In the field of patent law and the protections offered thereby, the *Patent Act of 1952* is again the relevant statute. We, therefore, re-examine American patent law's requirements. Namely, the invention in question must be new, useful, and non-obvious.[59] Additionally, however, and in contrast to the *Copyright Act of 1976*, the statutory language of the *Patent Act of 1952* explicitly requires the inventor to be an individual human being or a group thereof.[60] For the purposes of American copyright law, we in part inferred this human-creator requirement to likewise apply, noting specifically that it would seem incredible for U.S. IP law to include such a jarring and distinct contradiction in such similar respects. Additionally, and especially for the purposes of this Note, we further have the recent case and pending appeal of *Thaler v. Iancu*, in which this human inventor requirement is directly at issue.[61] We can therefore unequivocally conclude, based upon the statutory language and

56. Copyright Act of 1976, *supra* note 9, at § 102.

57. *Id.*

58. *Id.*

59. Patent Act of 1952, *supra* note 9, at § 101, 102, 103.

60. *Id.* at § 100(f).

61. Thaler v. Iancu, *supra* note 7.

relevant case law, that U.S. patent law does not extend the protections offered by it to inventions created by AI systems.

THE UNITED KINGDOM

The results in the United Kingdom are in distinct contrast compared to those found in the United States. For both patents and copyrights, the relevant statute is again the *Copyright, Designs and Patents Act of 1988*.[62]

For copyright analysis, we turn to Part I, Chapter I, Section 9, which defines who can be classified as authors and states in relevant part:

"(1) In this Part 'author', in relation to a work, means the person who creates it...(3) In the case of a literary, dramatic, musical, or artistic work, which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."[63]

For the purposes of patent law analysis, we turn to Parts V and VI of the *Copyright, Designs and Patents Act of 1988*.[64] Parts V and VI do not include a definition of their own as "inventors", nor do they include an unequivocal statement of the human-creator requirement. Here, we can again (similarly to the relationship between U.S. Patent Law and Copyright Law, but differently in terms of specific context) infer that different laws passed by the same government would tend not to directly conflict with one another, especially in such similar fields. Furthermore, where one field of the law (for the U.S., patent, and for the U.K., copyright) so clearly defines and states either a human-creator requirement (in the case of the United States), or the lack thereof (in the case of the United Kingdom), we must infer that the same human-creator requirement (or lack thereof) applies to a similar field of law (for the U.S., copyright, and for the U.K., patent). Similarly, we can also turn to the case of *Thaler v. The Comptroller-General of Patents, Designs and Trademarks* for even further evidence, and indeed proof, of U.K. law's lack of a human creator or inventor requirement.[65] As seen in that case, where an AI system has created material of its own making which would otherwise be eligible for patent protection under U.K. law, the invention is indeed eligible for protection, and the creator of the AI system itself is the individual who receives the legal protections afforded by U.K. IP law.

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62. Copyright, Designs and Patents Act of 1988, *supra* note 4.

63. *Id.* at ch. 1, § 9.

64. *Id.* at Parts V and VI.

65. Thaler v. Comptroller-General, *supra* note 54.

Therefore, we can unequivocally conclude that U.K. patent law does not extend the protections offered by it to inventions created by AI systems.

We can thus, in summary, conclude that while American law offers no protection or eligibility to works of authorship or inventions created by AI systems, U.K. law stands in direct contrast by offering extending such protections.

PART II: SHOULD U.S. AND U.K. LAW AFFORD PROTECTION TO AI SYSTEMS?

Whether U.S. and U.K. law afford protection to creations of AI systems is an entirely different question than whether U.S. and U.K. law *should* afford protection to creations of AI systems. In other words, just because U.S. law does not afford protection to creations of AI systems, and just because U.K. law does afford such protection, does not necessarily mean that either U.S. or U.K. law takes the appropriate approach. In fact, upon further examination, we find that U.S. law takes an entirely imprudent approach, while U.K. law seems to strike an apt and advisable technique.

To reiterate again, and hopefully in lieu of sounding too much like a broken record, in the United States all intellectual property law is premised in the Intellectual Property Clause of the U.S. Constitution.[66] It states that the Congress of the United States shall have the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

It should be noted that there is no human-creator requirement to be found neither expressly stated nor implied included in the text of the Intellectual Property Clause of the Constitution. Instead, the clear public policy interest underlying the Intellectual Property Clause of the U.S. Constitution is that which *is* explicitly stated: namely, the government's interest in promoting creation and innovation via the extension of legal protections to authors and inventors. The government promotes creation and innovation among authors and inventors by giving them incentive to continue such creation and invention, specifically through the means of protecting and preventing infringement upon their already created or invented works.

We can look to the United Kingdom (U.K.) for perhaps the best evidence of this singular governmental interest in full force and effect.

66. Intellectual Property Clause, *supra* note 2.

The sole interest underlying the U.K.'s IP law framework of patent and copyright laws is the advancement and progress of the arts and sciences. This interest permeates throughout the *Copyright, Designs and Patents Act of 1988*.[67] Indeed, in the United Kingdom this interest stretches as far back as the *Statute of Anne*, passed in 1710, and some may even argue further to the *Licensing of the Press Act* of 1662.[68] It isn't mere coincidence that the formal title of the *Statute of Anne* is "[a]n Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned."[69] Indeed the preamble of the statute states "[f]or Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful books..."[70]

Thus, it must be said that, in direct contrast to our discussion of the United States, current U.K. IP law extends protections to works of authorship or inventions created by AI systems in consistency with the historic underlying interest of U.K. government in promoting innovation and creation.

Similarly, preventing the inventions and creations of AI systems from eligibility for copyright and patent protections is in direct contrast to the sole underlying interest present in the American Constitution's Intellectual Property Clause. How can it be said that the government is promoting the advancement and progress of the arts and sciences by preventing the creative works and inventions of AI systems from being eligible for copyright and patent protections? The only logical answer is that it cannot be so said. Preventing works of authorship and inventions created by AI systems from being eligible from copyright and patent protections provides no incentive for further progress and advancement of the arts and sciences. In fact, doing so actually inhibits and prevents such progress and advancement.

Indeed, there is no logical reason why such works of authorship and inventions should not be granted the same protections as those made by human creators. The works themselves are forced to meet the same set of requirements. All entities, human beings or otherwise, are made to play by the same set of rules under the applicable law(s). Works of authorship seeking copyright protection must be original, fixed in a tangible medium of expression, and fall under one of the eight categories

67. Copyright, Designs and Patents Act of 1988, *supra* note 4.

68. Statute of Anne 1710, 8 Ann. c. 21; Licensing of the Press Act of 1662, *supra* note 4.

69. Statute of Anne 1710, *supra* note 68.

70. *Id.*

provided in Section 102(b) of the Copyright Act.[71] That continues to be the case no matter if the author is a human being or an AI system. The same can be said for inventions and patent law. Every invention will still have to be novel, useful, and non-obvious. The law should not make arbitrary discriminations between authors or inventors, and single out one segment out for differential treatment, especially when there is otherwise no logical or important reason to do so.

So why, then, does U.S. IP law do exactly that? I, for one, have difficulty imagining a situation in which laws are enacted and enforced for no good reason or underlying interest. In fairness, the United States has occasional (and sometimes, not so occasional) difficulty in passing any law, regardless of the merits or reasons. So, there must be *some* reason why U.S. IP law takes the stance of refusing to extend protections to the works of authorship and inventions created by AI systems.

By referring to academic research and other thoughts offered on the topic, we can best determine and then evaluate the reasons why American IP law might not extend protections to the works of authorship and inventions created by AI systems. After reading and pondering a multitude of such sources, I find that there are three such reasons which are central and shared.

First among such reasons is this: some scholars and onlookers believe the works of authorship and inventions created by AI systems cannot be extended IP law protections, simply because they are insufficiently creative. As we can recall from our discussion of U.S. copyright and patent law, there are statutory requirements listed as to what does and does not qualify for eligibility. These scholars and observers posit that, in both the worlds of copyright and patent, AI systems are incapable of creating sufficiently original or creative works to qualify for eligibility of IP law's protections.

As Samuel Scholz notes in a recent article, "we can conclude that because patents and copyrights are only issued to products of human creativity, and autonomous AI derivative works are not an example of human creativity, that AI derivative works are not eligible for patent and copyright protection."[72] But why, in the opinion of these individuals, are AI systems incapable of demonstrating or possessing human creativity? In other words, what about "human" creativity distinguishes itself so significantly from "ordinary" creativity?

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71. The Copyright Act of 1976, *supra* note 9, at § 102.

72. Samuel Scholz, *A Siri-Ous Societal Issue: Should Autonomous Artificial Intelligence Receive Patent or Copyright Protection?*, 11(1) CYBARIS AN INTELL. PROP. L. REV. 81, 117 (2020).

The Scholz article referenced above gives three supposed reasons as to why the creative works of AI systems are unlikely to be deemed as possessing "human" creativity. First, Scholz claims that extending IP law protections to AI creations is likely to decrease public trust.[73] Second, Scholz advances the theory that extending IP law protections to AI creations is likely to increase legal uncertainty.[74] And, lastly, Scholz hypothesizes that extending IP law protections to AI creations "creates a possible defense to patent infringement through incorrect inventorship."[75]

Now, even at first glance, these "reasons" offered by Scholz in support of AI systems not possessing the capability for "human" creativity seem absurd and misplaced. What exactly does the public's trust have to do with a factual determination? In other words, the public's trust should have no impact on the simple factual analysis of whether an AI system can or cannot exhibit and possess the same levels of creativity as an ordinary human being. Likewise, the same concept can apply to the other two reasons offered. What exactly does legal uncertainty, or potential issues with patent infringement and defenses to it, have to do with a factual inquiry? Even Scholz himself seems to indicate this mismatching of an answer to question, noting "Although the definition of 'inventor' has yet to expand beyond human beings, it is possible for this to occur in the future, and we must consider the potential harm this may cause. Namely, expanding the definition of 'inventor' to include AI may decrease public trust, increase legal uncertainty, and create a possible defense to patent infringement through incorrect inventorship."[76] It is clear, even from a birds-eye view, that Scholz is either incapable or unwilling to offer actual and legitimate reasons for why AI systems cannot possess creative capabilities similar to, if not the same, as those found in individual human beings. As a result, the first reason offered as to why IP law protections cannot apply to creations of AI systems, namely that they lack human creativity, must be dismissed.

Next among such reasons is the claim that providing IP law protections to the creations of AI systems will result in no "net social benefit."[77] We can again look to the Scholz article for assistance in examining this theory.

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73. *Id.* at 111.
74. *Id.*
75. *Id.*
76. *Id.*
77. Scholz, *supra* note 71, at 117.

As Scholz claims, "Patent and copyright protection are only granted to transactions that present a net social benefit."[78] Scholz notes that, with respect to the "natural rights" justification for IP law protections, "we can conclude that because copyrights are only granted under a natural rights justification to natural people, and AI does not have the same rights as natural people or groups of people, that copyrights cannot be granted to AI under a natural rights justification."[79] This is a legitimately fair argument to make: under the natural rights theory, rights are only extended to natural people, and AI can never claim to be a natural person.

However, we know (and so, too, does Scholz) that in the United States the Constitution's Intellectual Property Clause grants IP law protections for a singular reason: the advancement and progress of society through promoting innovation and creation.[80] Scholz even accepts that this is the case, stating "The United States copyright system likely follows this justification, as the Third Circuit Court of Appeals stated, 'the purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development."[81] Scholz's statement, that "AI works can only receive copyright protection under the incentive theory if they present an expression with social value that provides a net social benefit", further holds true.[82] It is only when we come to evaluate Scholz's offered reasons as to why AI works do not, ultimately, provide a net social benefit that we again find fallacious logic and misplaced reasoning.

Scholz claims that "granting patent and copyright protection to autonomous AI derivative works may create three significant social costs: (1) a significant decrease in human employment, (2) an increase in legal uncertainty in the patent system, and (3) an increased burden on the USPTO." [83] Again, we can point to a mismatch in reasoning within Scholz's argument. The only incentive present in the Constitution's Intellectual Property Clause is the advancement of society via innovation and creation.[84]

Regarding the first offered reason, IP law has never considered the economic ramifications of protecting an otherwise protectable and

78. *Id.*
79. *Id.* at 121.
80. *Id.* at 89.
81. *Id.* at 121.
82. *Id.* at 123.
83. Scholz, *supra* note 72, at 126.
84. *Id.* at 89.

eligible creative work. If it did, it is likely that laptop computers, or televisions, would not be eligible for IP law protections. Did my purchase of a Lenovo Yoga 9 Series laptop last October not have a detrimental effect on the potential economic well-being of my local library? Did my purchase of a TCL flatscreen television when I moved into my apartment not have a detrimental effect on a multitude of businesses? Is my ability to watch the New York Rangers hockey game from the pleasure and comfort of my own living room not affecting the potential clientele of my local sports bar? Is my ability to tune in to CNN for a nightly news program not affecting the potential readership of the New York Times or a more local newspaper? Put in a slightly less personal, and more historical context, did Eli Whitney's invention of the cotton gin in 1793 not, at least immediately, result in a "significant decrease in human employment?"[85] The only logical answer to all these rhetorical questions is this: IP law does not consider economic ramifications. Innovation is almost always responsible for an immediate, and often short-term, reduction in human employment. Yet this fact has not, and should not, stop IP law from extending its protections to otherwise eligible works.

Next, we consider the next offered "social cost", namely "an increase in legal uncertainty in the patent system."[86] In doing so, and given Scholz's own reasoning, I think it best to evaluate this offered "social cost" at least in part with the last, namely the "increased burden on the USPTO" envisioned by Scholz.[87] For the former, Scholz notes:

[a]s AI computing power increases exponentially, the number of AI-related patents will also increase exponentially, and an exponential increase in the prior art will increase the likelihood of a patent application being rejected for anticipation or lack of inventive step. Even if a patent is issued, the owner must manage the increased risk of the patent being invalidated through post grant review, inter partes review, or litigation.[88]

Simply put, Scholz's concerns are totally legitimate. However, these concerns can be solved by less restrictive and burdensome means than a wholescale ban on extending IP law protections to the creations of AI systems.

What is more, the addition of further relevant case law will only add more clarification and certainty not less. If there are clear and drastic schisms in opinion and law among different U.S. Courts of Appeal, then the U.S. Supreme Court will intervene to once and for all clarify the topic

85. *Id.* at 126.

86. *Id.*

87. *Id.*

88. Scholz, *supra* note 72, at 129.

at hand. But this assumption that more applications for patents and copyrights will inherently lead to more court cases, and then somehow magically transform into more uncertainty, seems preposterous. In a common law country, such as the United States, more court decisions provide more clarity, not vice versa.

This brings us back, then, to Scholz's last "social cost," the burdensome impact that extending IP law protections to the creations of AI systems will have on the USPTO.[89] What Scholz has done here has provided within his own series of argument perhaps the best counterargument one can make. See, Scholz argues that extending IP law protections will have a deleterious effect on human employment.[90] Yet, then he also argues that the USPTO will be unduly burdened by the mass influx of applications? Then have the USPTO go hire some of those individuals, those who Scholz envisions joining the masses of the newly unemployed, to work for the USPTO and handle the incoming applications of the creative works of AI systems. What is more, Scholz even acknowledges this possibility, noting that "to counteract the issue of increasing the time needed to rule on a patent, the USPTO will need to hire additional examiners to review applications."[91] However, while Scholz claims these newly employed individuals "will create an additional cost on society," this can be disproven on two fronts.

First, we can see as a self-fulfilling prophecy that more applications mean more fees, which means more funding for the USPTO gathered from those fees, which means the ability to hire more people to work in the USPTO, resulting in the ability to process applications faster, which in turn leads to even more applications. It is a tautology!

Additionally, who is to say that the potentially slight increase that might be required in funding to the USPTO will necessarily outweigh the otherwise significant societal advancement and progress which would occur? Even further, the American Federal government almost exclusively spends its time, and its funds, trying to promote even the slightest gains in economic growth and societal progress. It is particularly hard to believe that Capitol Hill, or 1600 Pennsylvania Avenue for that matter, would be unwilling to make the down-payment in this case. As a result of these reasons, and those offered and explained above, the second reason as to why the creations of AI systems cannot be extended IP law protections, namely that they will provide no net social benefit, must be dismissed and disregarded.

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89. *Id.* at 126.

90. *Id.*

91. *Id.* at 130.

Third and last among such reasons as to why *not* to extend IP law protections to the creations of AI systems is this: there are perhaps better, more apt alternatives. For evidence of this argument, we can turn to one of many sources for further guidance and clarification. In *Artificial Stupidity*, Clark Asay raises the possibility of "Government AI" as a legitimate alternative to providing the creations of AI systems with IP law protections.[92] As Asay notes, "[o]ne of history's important lessons is that dramatic, far-reaching innovation often requires significant backing from state actors."[93] As he continues, "[t]he reason behind this is at least somewhat intuitive: 'truly radical innovation needs patient, long-term, committed finance. This type of finance is hard to find in the short-term in the private sector."[94] Asay concludes by noting that "[t]he lessons of history suggest that if we are to avoid enduring artificial stupidity and make real breakthroughs in achieving general AI, government backing is necessary, and preferably in large doses."[95]

Perhaps the best counterargument to be made to Asay's proposed alternative is in his next sentences:

[t]his does not mean that private sector entrepreneurs will have no role to play in achieving general AI—they certainly will, and undoubtedly will have much to contribute. But as the history of many significant innovations teaches, often their breakthroughs will only come on the shoulders of governmental involvement.[96]

This appears to indicate, less an appropriate *sole* strategy moving forward, so much as an appropriate *dual* strategy moving forward. In other words, using Asay's recommendations in conjunction with the position of this Note, we can kill two birds with one stone. If government wants to make significant investment in the AI space, that is perfect. Government funding will likely lead to better innovation and creation, and lead to it more quickly, all of which results in an even greater need than before for IP law protections to be extended to the creations of AI systems. In so saying, this approach is less an alternative in its own right, and more so a legitimate additional policy to be taken in conjunction with extending IP law's protections.

In sum, then, we have now examined three reasons as to why the United States might *not* want to extend IP law protections to the creations of AI systems. Thus, despite the seeming attractiveness of these reasons

92. Clark D. Asay, *Artificial Stupidity*, 61 WM. & MARY L. REV. 1187, 1252 (2020).
93. *Id.* at 1252-3
94. *Id.* at 1253.
95. *Id.* at 1255.
96. *Id.*

at first glance, our ability to dispel of them is rather simple and can be done with some ease. As a result, it is indeed the case that the reasons as to why *not* to extend IP law protections to works of authorship or inventions created by AI systems are few and far between, and when found, they cannot stand up to the tests of logic and common sense. In contrast, the reasons as to why IP law protections *should* be extended to works of authorship or inventions created by AI systems are simply more logical than those already discussed. We again find here, in support of the extension of IP law's protections, three shared and overarching reasons.

First, AI systems have legitimate and defined features and abilities which make them capable of producing identical work to an individual human being.[97] As Dr. Shlomit Yanisky Ravid and Xiaoqiong Liu offer:

"[w]e claim that there are eight crucial features of AI systems that create new challenges to intellectual property law . . . [they are:] [(1)] [c]reativity[; (2)] [u]npredictable [r]esults[; (3)] [i]ndependent, [a]utonomous [o]peration (t-autonomy)[; (4)] [r]ational [i]ntelligence[; (5)] [e]volving[; (6)] [c]apable of [l]earning, [c]ollecting, [a]ccessing, and [c]ommunicating with [o]utside [d]ata[; (7)] [e]fficieny and [a]ccuraty[; and (8)] '[f]ree [c]hoice' [g]oal [o]riented."[98]

As Ravid and Liu then note, "[w]e argue that, due to these features, AI systems are capable of independently developing inventions which, had they been created by humans, would be patentable (and able to be registered as patents)."[99] It appears from this that Ravid and Liu offer what is perhaps the best counterargument to Scholz's original issue with the extension of IP law protections. Namely, Scholz claims that AI systems lack the ability for human creativity and authorship.[100] In contrast, Ravid, and Liu claim, with significant evidence and support, that AI systems are in practice, and ultimately produce, identical to individual human beings.

Second, Russ Pearlman argues that the current position of U.S. law against extending IP law's protections to the creations of AI systems is "not based off statutory requirements but on assumptions about computer capabilities stemming from an analysis done in the mid-twentieth

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97. Shlomit Yanisky Ravid & Xiaoqiong Liu, *When Artificial Intelligence Systems Produce Inventions: An Alternative Model for Patent Law at the 3A Era*, 39 CARDOZO L. REV. 2215, 2224 (2018).

98. *Id.* at 2215-7.

99. *Id.*

100. Scholz, *supra* note 72.

century, almost [forty] years ago."[101] Pearlman later quotes from the Commission on New Technological Uses of Copyrighted Works (CONTU).[102] Pearlman later quotes from the Commission on New Technological Uses of Copyrighted Works (CONTU).[103] In 1978, CONTU determined that:

"[t]he computer, like a camera or a typewriter, is an inert instrument, capable of functioning only when activated either directly or indirectly by a human . . . [T]he computer affects the copyright status of a resultant work no more than the employment of a still or motion-picture camera, a tape recorder, or a typewriter."[104]

Regardless of the validity of Pearlman's claims, what is undoubtedly true is that there exists among many an ignorance about the current and rapidly advancing capabilities of AI systems. As Ravid and Liu argue, the development of AI systems has grown tremendously in recent years and decades, and AI systems are now capable of far greater and more sophisticated works than once before.[105]

Lastly, and perhaps most important, the fundamental interest underlying the extension of IP law's protections to the creations of AI systems is *incentive*. As Ryan Abbott argues, "Treating nonhumans as inventors would incentivize the creation of intellectual property by encouraging the development of creative computers."[106] Undoubtedly, this is true. For every reason above, extending IP law's protections is the appropriate approach forward.

PART III: MOVING FORWARD: RECOMMENDATIONS

In recent decades, the United States and its allies have increasingly taken a global approach to solving common legal issues and challenges affecting the global community. This approach can be seen through numerous iterations of international agreements, all of which seek to solve the legal challenge at hand and to bring the legal frameworks of the signatory parties into better and further cohesion. This can perhaps best

101. Russ Pearlman, *Recognizing Artificial Intelligence (AI) as Authors and Inventors Under U.S. Intellectual Property Law*, 24 RICH. J. L. & TECH. 1 (2018).

102. *Id.* at 16.

103. Id.

104. *Id.* at 26.

105. Ravid & Liu, *supra* note XXX.

106. Ryan Abbott, *I Think, Therefore I Invent: Creative Computers and the Future of Patent Law*, 57 B.C. L. REV. 1079, PIN (2016).

be illustrated by the changes made by the United States to its copyright framework under the Berne Convention.[107]

However, these international agreements (as was the case with the Berne Convention) often predate U.S. involvement.[108] In other words, numerous signatory parties had already adopted the provisions of the Berne Convention before the U.S. itself adopted its measures and became a signatory party.[109] Indeed, in the case of the Berne Convention, the United States was among the last to adopt its provisions.[110]

The present situation thus provides the United States with a wonderfully different opportunity: the chance to lead the way in the global community. The United States can individually act to cause change to its own legal framework in this space, rather than wait and react to the changes first made by allies and international partners. This very opportunity provides several avenues for the United States. First, by being the first to recommend widescale and global adaptation to the legal challenges raised by these technological advances, the U.S. can decide what to change about its own legal frameworks, how much to change about its own legal frameworks, and how (in practice) to change its own legal frameworks. In other words, being first to act within this space on a global scale provides the U.S. with far greater flexibility and choice than if the U.S. were to wait and play a reactionary role.

Further, acting first would reaffirm the oft-claimed American position as the leader of the free world, and as being the preeminent nation to which peers, allies, and foes alike look to for guidance and clarity. It is long past time for the United States to end even the appearance of its so-called "leading from behind" philosophy. American prestige and status around the world have been in decline for some time now and have only further been exasperated by recent events and developments.[111] By taking the lead once again on the global stage, by spearheading a coalition of nations moving toward a singular purpose of providing IP law protections to the creations of AI systems, the United States can begin (even if in some small part) to repair its image around the world.

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107. Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 828 U.N.T.S. 221.

108. *Id.*

109. *Id.*

110. *Id.*

111. *See generally* Max Pushkin, *Status and Responsibility: The Decline of American International Prestige in the Trump Era*, BROWN POL. REV. (May 30, 2020), *available at* https://brownpoliticalreview.org/2020/05/status-and-responsibility-the-decline-of-american-international-prestige-in-the-trump-era/ (last visited Jan. 25, 2022).

So, what should be changed about the current U.S. IP law framework? How do we do it? These are perhaps as important of questions as the question of whether to change at all itself.

In my view, the best approach would be to bring the U.S. IP law framework in line with that found in the United Kingdom. Namely, the United States should begin by amending by some means the Copyright Act and the Patent Act to provide the creations of AI systems with the protections offered under the current IP law framework. What is more, the new U.S. framework should take the stance of the current U.K. framework even further, in granting IP protections to the individual responsible for the creation of the AI system, not granting the protections to the AI system itself. In doing so, the United States would fulfill the incentives and reasons provided above as to why, in the first place, it should even change its IP law framework. Additionally, and as suggested first by Asay's *Artificial Stupidity*, the U.S. government should also provide funding for the advancement and progress of artificial intelligence in the private sector. Taking this dual approach, in conjunction rather than simply one or the other, provides a double incentive. The incentive is now being provided to the private sector for artificial intelligence advancements, both through federal funding as well as through the protection of any creative works or inventions by IP law. American government has shown a clear willingness in the past to grant federal funds in exchange for even modest economic growth and should choose to do so again here.

As for the second, the U.S. should take advantage of the opportunity provided to it in the upcoming appeal, *Thaler v. Iancu*. This opportunity is two-fold. First, the appeals court could decide that the reasoning behind the current U.S. IP law framework is misguided and imprudent, and in doing so choose to itself singlehandedly amend American law in the ways suggested above. Allow me to note, this is highly, highly unlikely. It is highly unlikely that a federal court will disregard existing law, legal precedent, administrative practice, and abundantly clear statutory language, in favor of its own thinking on the matter. What is instead more likely is the second of these two possible scenarios: namely, that sufficient public attention can be brought to the case, and that public sentiment will be in opposition to what is likely to be a subsequent court's affirmation of the decision against Mr. Thaler. As a result of this public sentiment, we can then hope for and seek legislative action by the U.S. Congress in furtherance of the policy changes outlined above.

Only when the U.S. has changed its own domestic policy with respect to IP law can the United States proceed to taking a more global approach to the issue at hand. Envisioning a situation where the U.S., in

close coordination with the United Kingdom, seeks to rally and persuade its closest allies and international partners to sign a global agreement along the lines of that seen in the Berne Convention, would be ideal.

This three-step process will not happen overnight. It will undoubtedly take time, effort, and significant persuasive skill to change the American legal stance. But the scale of this effort should not dissuade from the taking and claiming the appropriate approach. There can be no question of the merits of making such changes. Though outlined in some detail above, it suffices to say that current U.S. law is in direct contradiction with its foundational principles and interests in the realm of preventing the protection of works of authorship and inventions created by AI systems. Further, the pending Thaler appeal provides the U.S. with the perfect vehicle for first making changes to its own legal frameworks. If it chooses to do so, the United States can then begin to spearhead a global movement among its allies and international partners, all moving toward acceptance and protection of works of authorship and inventions created by AI systems.

LOST IN TRANSLATION: ABSENCE OF DOMESTIC IMPLEMENTATION OF INTERNATIONAL NORMS FOR THE INDIGENOUS PEOPLES OF THE UNITED STATES

Esther Kim[1]

Abstract

For centuries too long, the Indigenous Peoples of the United States ("Native Americans" or "Natives") experienced violent forms of treatment and were continuously subjected to oppressive and discriminatory policies that repetitively contradicted previously enacted treaties and promises made to the Natives. Throughout this nation's history, Native tribal lands were forcibly reduced and ultimately constrained onto specifically designated plots of unfamiliar grounds that were separated from the rest of the city's population. Members of the Native communities were discouraged from practicing traditional aspects of their culture within each subsequent generation, as this was considered a hindrance to forced assimilation strategies. Such actions culminated into deliberate inaction on the part of the U.S. federal government, as past governmental guarantees, that seemingly established better standards for relations with the Natives, proved to only hold relevance when it was profitable for the government.

Appeals for Native independence and rights went ignored, and federal policies prioritized economic initiatives at the cost of Native interests. The U.S. failed in pursuing necessary legislative changes in producing the required solutions for Native concerns and issues. In practice, the federal government has unjustly diminished Native rights and self-determination for the majority of the country's history, and still today, the unfortunate fact remains that there has not been significant change in the cause for recognizing the rights and liberation of the U.S.'s indigenous peoples.

Within this context, the United Nations Declaration on the Rights of the Indigenous Peoples ("UNDRIP" or "Declaration") was passed by the

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General Assembly in 2007.[2] This passing by an international body of representation served as a landmark moment in the advocacy for Indigenous Peoples in all parts of the world. For the first time, there existed an agreed upon advancement of the need for Indigenous recognition and protection, not only as domestic exercise, but as an international norm.[3] The Declaration consisted of collective rights and human rights, and it further highlighted a shared consensus among Indigenous Peoples from every nation of the essential need for a universal standard that identified fundamental Indigenous rights to which states could reference and follow, and perhaps allow their respective home policies to be influenced by.[4]

The U.S., however, was one out of four initial states to vote against the passage of the Declaration, and it was the last nation out of the four to eventually reverse its decision in 2010.[5] With its eventual endorsement during President Barack Obama's administration, came a revitalized hope in acknowledgement of the Natives as an official and asserted Peoples.[6] Aligned with this encouragement, however, was also the fear of passivity and indifference which were the responses to which Natives had become all too familiar with when it came to defending their overall wellbeing.[7] Therefore, the absence of domestic implementation of the UNDRIP provisions in the U.S. illustrates another form of disappointment in the nation's narrative of its current inadequate treatment of Native rights and Native policy. One of the more disturbing cases of this is demonstrated in the use and operation of domestic criminal law, as the bureaucratic exercise of criminal law on Native reservations create various avenues of allowing the federal government to turn a blind eye to the violent crimes that occur on tribal reservations. The universally recognized security that should be afforded to all Indigenous Peoples still remains an ideal for the Natives in the U.S., as the rights contained and advanced in the UNDRIP have yet to become common application in safeguarding Native welfare,

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2. *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS: DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, *available at* https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited Aug. 6, 2021).

3. *See id.*

4. *See id.*

5. *US Acts on UN Rights of Indigenous Peoples Declaration*, PINE TREE LEGAL AID (July 26, 2011), *available at* https://ptla.org/wabanaki/us-acts-un-rights-indigenous-peoples-declaration (last visited Aug. 6, 2021).

6. *VICTORY!: U.S. Endorses UN Declaration on the Rights of Indigenous Peoples*, CULTURAL SURVIVAL, available at https://www.culturalsurvival.org/news/victory-us-endorses-un-declaration-rights-indigenous-peoples (lasted visited Mar. 22, 2021).

7. *See id.*

health, safety, and resources.[8] On some given reservations, the crime rate can be five to seven-times higher than the national average, and the lands are filled with multiple accounts of horrendous homicides.[9] In the majority of federally-recognized Native reservations, the formal processes of undertaking an investigation into any particular case that transpires on tribal grounds are faced with a jurisdictional struggle and confusion, as it is left unclear whether the county and state or the tribal government has jurisdiction, or whether the matter is entirely in the hands of the federal agencies.[10] As a result, this has halted initiation into certain cases that take place on tribal reservations, and many investigations persist unsolved and unprosecuted.[11]

In comparison to the past with the present federal Indian policy, not much is different, and the similarities that are still commonplace present a harsh reality into the federal government's continuing lack of care in prioritizing fundamental Native rights that should have been legally sanctioned centuries ago. The most glaring example of this is in the domestic field of criminal law, as it is in this component of the country's legal organ in which exists the most blatant failures of executing justice for one of the nation's most vulnerable groups of individuals. More must be done on the part of the federal government to ensure that its original dedication to the UNDRIP is satisfied, and that the principles of the universal declaration act as a proper source for influencing domestic criminal legislation to shape what should be modern Native policies with legitimate protections and indemnified security. Until the federal government changes its course and undertakes measures towards rectifying its past and its once-defining discriminatory behavior towards Natives, fairness will be delayed and the administration of required justice for Native communities will amount to nothing more than yet another broken promise.

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8. *See Frequently Asked Questions About the UN Declaration on the Rights of Indigenous Peoples*, CULTURAL SURVIVAL, *available at* https://www.culturalsurvival.org/news/frequently-asked-questions-about-un-declaration-rights-indigenous-peoples (last visited. Aug. 6, 2021).

9. Timothy Williams, *Brutal Crimes Grip an Indian Reservation*, NY TIMES (Feb. 12, 2012), *available at* https://www.nytimes.com/2012/02/03/us/wind-river-indian-reservation-where-brutality-is-banal.html?smid=tw-nytimesnational&seid=auto (last visited Aug. 6, 2021).

10. Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, THE ATLANTIC (Feb. 22, 2013), *available at* https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/ (last visited Aug. 6, 2021).

11. *See id.*

INTRODUCTION

In the U.S., the Bureau of Indian Affairs ("BIA") of the U.S. Department of the Interior identifies 574 federally recognized American Indian and Alaska Native tribes and villages, and defines American Indian or Alaska Native person as "someone who has blood degree from and is recognized as such by a federally recognized tribe or village (as an enrolled tribal member) and/or the United States."[12] At present, there are approximately 2,907,272 individuals who identify as American Indian or Alaska Native affiliated with a federally recognized tribe in the U.S.[13] This number has increased steadily over the years, and there is an additional 2.9 million identifying as multiple races, including American Indian.[14] The Native population that identifies as solely Native American expanded 13% between the years of 2000 and 2018, while the number of individuals who identify as at least partially Native American increased 77%.[15] An estimated 30% of the 5.8 million Natives in the U.S. live on tribal reservations, where living conditions have been said to resemble the Third World, as Native residents lack the basic necessities of water and electricity.[16] There is an immense housing shortage issue, and around 30% of Native housing on reservations is overcrowded, as it is not uncommon for several generations of families to live together in a single home.[17] The unemployment rate for Natives is 6.6%, which is significantly higher than the national unemployment average of 3.9%.[18] This rate is also considerably higher for those Natives who reside on

12. *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR INDIAN AFFAIRS, https://www.bia.gov/frequently-asked-questions (last visited Aug. 6, 2021); *see also Tribal Population*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/tribal/tribes-organizations-health/tribes/state-population.html (last visited Aug. 6, 2021).

13. *Id.*

14. Andrew Soergel, *Where Most Native Americans Live*, US NEWS (Nov. 29, 2019), *available at* https://www.usnews.com/news/best-states/articles/2019-11-29/california-arizona-oklahoma-where-most-native-americans-live (last visited Aug. 6, 2021).

15. *Id.*

16. *Living Conditions*, NATIVE AMERICAN AID (2015), *available at* http://www.nativepartnership.org/site/PageServer?pagename=naa_livingconditions (last visited Aug. 6, 2021).

17. Patrice Kunesh, *Increasing Access to Affordable Housing in Indian Country*, SHELTERFORCE (Nov. 25, 2019), *available at* https://shelterforce.org/2019/11/25/increasing-access-to-affordable-housing-in-indian-country/ (last visited Aug. 6, 2021).

18. *American Indians and Alaska Natives in the U.S. labor force*, U.S. BUREAU OF LABOR STATISTICS (Nov. 2019), *available at* https://www.bls.gov/opub/mlr/2019/article/american-indians-and-alaska-natives-in-the-u-s-labor-force.htm (last visited Aug. 6, 2021).

reservations, as the unemployment rate on tribal reservations is estimated to be 11.6%.[19]

In observance of the federal crime data, the accessible information has long suggested that Native reservations have higher rates of violent crime than the national average, especially when it comes to violence against women. Approximately 46% of all Native American women have been said to have experienced some sort of physical abuse including rape, stalking, or domestic violence.[20] Native women are murdered at a disproportionate rate that is ten times higher than the national average when compared to other ethnicities, and homicide stands as the third leading cause of death for Indigenous women in the U.S.[21] The greater part of these crimes are committed by non-Natives on Native land, and the unclarity of jurisdictional lines allows the majority of these perpetrators to escape apprehension, which in turn, leaves the victims without an escape of their own from the trauma they are forced to endure in their deprivation of justice.[22] In 2017 alone, 5,646 Native women were reported missing in the U.S.[23] In the state of Montana, Native citizens consist of 6.8% of the state's population, yet between 2016 and 2018, they comprised 26% of the state's missing person's reports.[24] Such explicit numbers do not furnish anything close to a complete depiction, as there is not a reliable source that maintains a complete record of the number of Native women considered missing or murdered in a given year.[25] Researchers have discovered misclassifications of Native women under the racial categories of Hispanic or Asian, whereas thousands of

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19. *Id.*

20. *Native American Issues Today / Current Problems & Struggles 2020*, POWWOWS.COM (Sept. 7, 2019), *available at* https://www.powwows.com/issues-and-problems-facing-native-americans-today/ (last visited Aug. 6, 2021).

21. *Murdered & Missing Indigenous Women*, NATIVE WOMENS WILDERNESS, *available at* https://www.nativewomenswilderness.org/mmiw (last visited Aug. 6, 2021).

22. *See* Carolyn Smith-Morris, *Addressing the Epidemic of Missing & Murdered Indigenous Women and Girls*, CULTURAL SURVIVAL (Mar. 6, 2020), *available at* https://www.culturalsurvival.org/news/addressing-epidemic-missing-murdered-indigenous-women-and-girls (last visited Aug. 6, 2021).

23. Nick Martin, *The Connection Between Pipelines and Sexual Violence*, THE NEW REPUBLIC (Oct. 15, 2019), available at https://newrepublic.com/article/155367/connection-pipelines-sexual-violence (last visited. Aug. 6, 2021).

24. *Id.*

25. Jack Healy, *In Indian Country, a Crisis of Missing Women. And a New One When They're Found.*, NY TIMES (Dec. 25, 2019), *available at* https://www.nytimes.com/2019/12/25/us/native-women-girls-missing.html (last visited Aug. 6, 2021).

others had been excluded from the federal missing-persons database altogether.[26]

Moreover, the rate of aggravated assault among Native people is about twice the rate of the country as a whole.[27] Natives are also killed in police encounters at a higher rate than any other racial or ethnic group, and their deaths are less likely to garner public attention, which causes the Native American invisibility chronicle to become more solidified.[28] Here, the reported numbers of deaths from the data that is available likely do not capture all Native American deaths deriving from police encounters, due to people of mixed races and a relatively large homeless population that is "not on the grid."[29] Again, the limited jurisdiction of state and federal resources, in association with the insubstantial resources of the tribal governments and law enforcers, act as hurdles to the carrying out of any efficient investigation.[30]

With such shortfalls in investigating such crimes, local law enforcement have become discouraged and hesitant in undertaking new cases, which leads to the spiraling effect of U.S. attorneys declining to prosecute 37% of cases that happen in "Indian Country."[31] Of these cases that go unprosecuted, over a quarter are allegations of sexual assault against children and adults.[32] To validate their calculated nonintervention, federal attorneys oftentimes cite to the reason of a lack of evidence in 70% of the cases they had chosen to drop.[33] The U.S. Department of Justice's prosecution rate of crimes against Natives is viewed as a failure by several lawmakers, and as further confirmation of

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26. *Id.*

27. Mihir Zaveri, *Killing of 5 on Indian Reservation Underscores Challenge With Violent Crime*, NY TIMES (June 12, 2019), *available at* https://www.nytimes.com/2019/06/12/us/yakama-indian-reservation-killings.html (last visited Aug. 6, 2021).

28. Elise Hansen, *The forgotten minority in police shootings*, CNN (Nov. 13, 2017), *available at* https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html (last visited Aug. 6, 2021).

29. *Id.*

30. Martin, *supra* note 23.

31. *Id.*

32. Elena Saavedrea Buckley, *Feds fail to prosecute crimes in Indian Country*, HIGH COUNTRY NEWS (Nov. 29, 2018), *available at* https://www.hcn.org/articles/tribal-affairs-feds-fail-to-prosecute-crimes-in-indian-country (last visited Aug. 6, 2021).

33. *Id.*

the federal government allowing Native victims to "fall through the cracks of our justice system."[34]

Within the provisions as provided in UNDRIP, Indigenous Peoples should be given the freedom to enjoy fundamental fairness and equality, while also being given the formal admission of their differences and their desires to be respected as such.[35] The Declaration reaffirms the inherent freedom from any form of discrimination, and it perceives the concern of "colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."[36] It further emphasizes an "urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States," while coincidingly being assured that "control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions."[37] In accordance with UNDRIP's provisions, there exists an international guideline to which states should appropriately consult when coordinating their own domestic policies in the treatment of the state's Indigenous Peoples.

In the U.S., however, federal policies that address Native problems, especially in the criminal sector of domestic law, is predominantly deficient, and the legal practices that are in place fail in yielding effortful solutions to counter the foundational and historic causes of violent crimes that take place on Native reservations. There is purposeful neglect on the part of the government, and this inattention frustrates the exact duties the federal government holds in ensuring security to the nation's vulnerable indigenous populations as outlined in UNDRIP. The previous executions of discrimination continue to define the government's behavior towards Native groups, as it proceeds with the unchanged mindset of not focusing its policy motivations on administering genuine change on dire Native issues that remain, for the most part, invisible. The federal government's inaction in abiding by the UNDRIP has promote the systematic continuance of discrimination and disregard against Natives.

The federal government must prioritize Native issues in its consideration of enacting legislation that supplies tribal governments

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34. Mary Hudetz, *Federal report: Indian Country criminal prosecutions plateau*, THE ASSOCIATED PRESS (Nov. 21, 2018), *available at* https://apnews.com/article/f027ebe42d1d4bedb56994de78fc25e0 (last visited Aug. 6, 2021).

35. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) [hereinafter UNDRIP].

36. *Id.*

37. *Id.*

with required resources, while also aiming to organize and set distinct lines of jurisdiction so to as avoid future debates of whether tribal, state, or federal agencies possess the authority to initiate and pursue a criminal case that occurred on tribal lands. Such disputes have been the core reason for non-prosecution of violent perpetrators against Natives, and they have further triggered multiple delays in engaging in immediate proceedings of pursuing cases that could have ultimately led to some form of apprehension and remedy. This Note will consider the historical sources and events that developed and impacted current federal Native policies in addressing violent criminal activities against Natives, while also differentiating U.S. practices from the global incentives that various nations advanced for Indigenous Peoples in the passage of the UNDRIP. This note will also examine the types of violent crimes committed against certain groups of Natives, and the corresponding enforcement system that is unable to be properly utilized due to internal uncertainty and disagreements of who has jurisdictional control and the adequate resources.

Section II of this Note studies the history of the UNDRIP and the ventures that led to its eventual and extensive passage on the international sphere. Section III presents a historical overview of Native Reservations and tribal communities. Section IV discusses commissions of violent acts against Native populations, and how such acts reflect a modern yet still identical approach as to the historical acts that have been invariably perpetrated against Native Americans. Section V addresses the concern for the lack of investigations and subsequent prosecutions of violent crimes perpetrated on tribal lands. Section VI examines the question of jurisdiction, and how the ambiguous separations of distinctive authority create a confounding effect on miscommunication and subsequent delays, thus further prohibiting the achievement of needed justice. This Note concludes with considering possible solutions for future governmental policies that could better confront the issues of violence against Natives. In closing, the Note places heavy prominence on legislative enactments to be better aligned to the principles and commitments that are explicitly fostered within the UNDRIP. Only by doing so can the U.S. begin to rectify its past crimes and offenses towards Natives, and work towards nurturing a respectable and collaborative relationship for the future years to come.

HISTORY OF THE UN DECLARATION ON THE RIGHTS

OF INDIGENOUS PEOPLES

The UN Declaration on the Rights of Indigenous Peoples was the conclusion of a 25 years process of hard negotiations.[38] The efforts underlying the achievement of the Declaration originated from the studies conducted by José R. Martinez Cobo, who was appointed as Special Rapporteur of the Study of the Problem of Discrimination against Indigenous Populations.[39] His findings, titled the Cobo Report, which contained reviews of discrimination faced by indigenous peoples throughout the world.[40] The Report also relayed descriptions of the oppression, marginalization and exploitation suffered by indigenous peoples.[41] After its scrutiny of the Cobo Report and upon agreement of a final text for a draft of a potential declaration, the Working Group submitted a first draft of a declaration on the rights of indigenous peoples to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.[42] This initial draft was later approved in 1994 and then correspondingly sent to the UN Commission on Human Rights for further consideration and to commence a discussion.[43]

States, however, viewed the draft of the declaration with slight suspicion, and many expressed their hesitations with regard to some of the core provisions of the draft declaration, namely the right to self-determination of all Indigenous Peoples and the control over natural resources existing on indigenous traditional lands.[44] In 2006, internal shifts within the UN were generated, and one of the outcomes was the replacement of the U.N. Commission on Human Rights with the U.N. Human Rights Council.[45] At length, the UN Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples on June 29, 2006.[46] There formed, however, an initiative led by the state of Namibia, co-sponsored by a number of African countries, that resulted in the draft being amended to have the Assembly decide "to defer consideration and

38. *Celebrating 13 Years of the UN Declaration on the Rights of Indigenous Peoples*, CULTURAL SURVIVAL (Sept. 12, 2020), *available at* https://www.culturalsurvival.org/news/celebrating-13-years-un-declaration-rights-indigenous-peoples (last visited Aug. 6, 2021).

39. *Id.*

40. *Id.*

41. *Id.*

42. United Nations: Dep't of Economic and Social Affairs, *supra* note 2.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon."[47]

At long last, on September 13, 2007, the Declaration was adopted by a majority of 144 member states in favor, four states against, and 11 abstentions.[48] The four states initially voting against the Declaration were Australia, Canada, New Zealand and the U.S., conveying official explanations such as the Declaration going too far in giving Indigenous Peoples ownership of their traditional lands, veto rights over national legislation, and local management of resources.[49] The four states' own histories with their Indigenous populations may also have instigated an additional cause for their separate rejections. It was simple to see then that the basis for the opposing states to decide against the Declaration's approval was the apprehension of undermining their sovereignty of their own federal governments.[50] Nevertheless, Australia became the first to shift its position in support of the Declaration following an inner change in domestic government in 2009.[51] New Zealand was the next to follow in adopting the Declaration in 2010, accompanied by Canada later that same year.[52] To date, Canada has engaged in legitimate pursuits to formally implement the provisions of UNDRIP in consistency with Canadian domestic law.[53] Canada's federal Minister of Justice introduced Bill C-15 titled "An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples," which would require the federal government, in consultation and cooperation with Indigenous peoples, to "take all measures necessary to ensure the laws of Canada are consistent with UNDRIP, prepare and implement an action plan to achieve UNDRIP's objectives, and table an annual report on progress to align the laws of Canada and on the action plan."[54]

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47. United Nations: Dep't of Economic and Social Affairs, *supra* note 2.

48. *Id.*

49. Warren Hoge, *Indigenous Rights Declaration Approved*, NY TIMES (Sept. 14, 2007), *available at* https://www.nytimes.com/2007/09/14/world/14briefs-nations.html (last visited Aug. 6, 2021).

50. *See* Erin Hanson, *UN Declaration on the Rights of Indigenous Peoples*, INDIGENOUS FOUNDATIONS, *available at* https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/ (last visited Aug. 6, 2021).

51. Cultural Survival, *supra* note 38.

52. *Id.*

53. Sharon Singh, Radha Curpen, Bradley Gilmour & Sean Assié, *Canada: Federal Government Fulfills Promise To Introduce UNDRIP Legislation*, MONDAQ (Dec. 9, 2020), *available at* https://www.mondaq.com/canada/indigenous-peoples/1013842/federal-government-fulfills-promise-to-introduce-undrip-legislation (last visited Aug. 6, 2021).

54. *Id.*

This left the U.S. as the last state to reverse its opposing position on December 15, 2010.[55] Upon the announcement of the U.S.'s support of the UNDRIP, commentators quickly noted the lurking meaning behind the Administration's statements.[56] Many feared that there would no change, as this was another example of treaty promises made to someday be broken the moment the federal government placed precedence elsewhere.[57] Still, substantial exploits have been launched to aid and guide the steps towards implementation of the UNDRIP in the U.S.[58] Natives have also been involved in improved participations at a number of meetings of the world indigenous peoples that were held throughout 2015 and 2016.[59] Moreover in 2016, the UN passed a resolution that expanded Indigenous membership and representation at hearings, meetings, autonomy, and comprehensive responsiveness for the group.[60]

The Declaration, however, left open many questions as to its implementation into domestic policy. It also presented supplemental questions of its precise purpose, and whether its terms were meant to be implemented at all, or simply subsist as vague international standards to which differing states could then offer up their own varying interpretations whilst not realizing the full enactment of the Declaration's provisions. In the U.S, such inquiries raised greater doubt as to the role the Declaration held when faced against settled domestic law. The legal principles within the Declaration were adopted by the nation in its acceptance of the international influence it was sure to deliver, but the realistic operation of this effect exerting any consequence in determining federal Native policy prevails in heavy doubt. In assessing the lasting practices of federal treatment towards Natives, the U.S. has failed in legislating legitimate policies that position its central endeavors on correcting the historical wrongs so that past deeds do not determine present conventions, especially in the current domain of criminal law with respect to Natives.

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55. *Obama backs U.N. indigenous rights declaration*, REUTERS (Dec. 16, 2010), *available at* https://www.reuters.com/article/idUSTRE6BF3RF20101216 (last visited Aug. 6, 2021).

56. *See* PTLA, *supra* note 5.

57. *See id.*

58. *See* Kim Jerome Gottschalk, *United Nations and Indigenous Peoples*, NATIVE AMERICAN RIGHTS FUND, *available at* https://www.narf.org/cases/declaration-indigenous-rights-un/ (last visited Aug. 6, 2021).

59. *See id.*

60. *See id.*

HISTORICAL OVERVIEW OF NATIVE RESERVATIONS

Native tribal reservations were created by the federal government with the original intention to generate available expanses of land that the government possessed no legitimate stake in, nor held any justified legal rights of ownership in. Removal, however, of Natives from segments of attractive land, had to be met with a parallel solution that would result in relocation of thousands of Natives from their homelands. Therefore, the deprivation of the Natives of their historical lands, in the perspective of the federal government, was considered highly acceptable. This warped mentality would prove to be one of the most damaging moments of this nation's record.

Native reservations have and continue to hold a concentration of violence that initially was stirred by the enactment of unjustified federal policies. The Indian Removal Act signed in 1830 by President Andrew Jackson serves as the origin of government-sponsored Native relocation.[61] The Removal Act allowed the federal government to exchange Native land in the "cotton kingdom" east of the Mississippi for land in the west; the lands which would be referred to as the "Indian colonization zone."[62] Under the Removal Act, the relocation was legally required to be conducted fairly, voluntarily, and peacefully without the presence of any coercion upon the Native nations, but force was freely implemented against the Natives in order to vacate their generational lands for the incoming white settlers.[63]

Several northern tribes relocated peacefully and resettled in the western lands that were deemed to be too undesirable for white farmers.[64] A number of the southeastern tribes refused to depart from their cultivated lands to an unknown and strange land that existed as nothing more than a stated promise from the same individuals attempting to remove them to begin with.[65] The U.S. military threatened complete invasion of the lands, and the Native were bound in chains and marched out of the territories, with many succumbing to disease and sickness along the way.[66] In 1838, the Cherokee Natives were forced at bayonet points

61. *Trail of Tears*, HISTORY.COM (Nov. 9, 2009), *available at* https://www.history.com/topics/native-american-history/trail-of-tears (last visited Aug. 6, 2021).

62. *Id.*

63. *See id.*

64. *Indian Removal Act*, ENCYCLOPEDIA BRITANNICA, *available at* https://www.britannica.com/topic/Indian-Removal-Act (last visited Jan. 17, 2022).

65. *Trail of Tears*, *supra* note 61.

66. *Id.*

to march more than 1,200 miles to the government's resettled territories, journeying through what is forever marked as the Trail of Tears.[67] Despite the federal government's assurance that the Native's new lands would not be interfered with in any manner, the course of history revealed such expectations to be deceptions as the push towards white settlement in the west gathered haste federal support.

Settlers continued westward and the desire of more land instigated shades of the same past problems. In 1851, the Indian Appropriations Act was passed and devised the Indian reservation system that would last into the present days.[68] Congress provided funds to further transport Native tribes onto lands designated as farming reservations, but the frank purpose of such an Act was to retain a routinized control over the Native tribes.[69] Within the confines of these limited areas of space, Native tribes faced difficulty in attempting to keep alive their respective cultures and traditions.[70] The federal government paid no heed to the inherent differences and clashing relations of the various Native tribes, and oftentimes, feuding tribes were kept together.[71]

In 1887, the Dawes Act was enacted by President Grover Cleveland to sever the new tribal reservation lands.[72] Assimilation became the driving mechanism as the federal government encouraged Natives to partake in farming and agricultural practices, causing a division of tribal territories into individual plots.[73] Underlying the government's stated purpose, once again, was a program to confiscate over 90 million acres of tribal land from Natives, in order to then sell the lands to U.S. citizens.[74] Soon enough, assimilation strategies proved to be a failure even in the government's eyes. The Dawes Act became replaced with the Indian Reorganization Act in 1934 that aimed to restore Native culture and return the remainder of the lands to the tribes.[75] Through the Reorganization Act, the government initiated a shift in its purpose by stressing self-governance of tribes and the writing of their own

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67. *Id.*

68. *Indian Reservations*, HISTORY.COM (Dec. 8, 2017), *available at* https://www.history.com/topics/native-american-history/indian-reservations (last visited Jan. 17, 2022).

69. *Id.*

70. *Id.*

71. *Id.*

72. *The Dawes Act*, NATIONAL PARK SERVICE, *available at* https://www.nps.gov/articles/000/dawes-act.htm (last visited Jan. 17, 2022).

73. *Id.*

74. *Id.*

75. *Indian Reservations*, *supra* note 68.

constitutions.[76] In truth, however, the Reorganization Act only resurrected the previous relocation and reservation system that the government had in place, and this restoration of the past establishment is what constitutes the tribal reservations today.[77]

At present, the interior structure and federal characterization of Native tribal reservations exist under the Bureau of Indian Affairs ("BIA"), and the reservations are set up through intersections of arbitrary divisions across tribal boundaries.[78] Essentially, the Native tribes are compelled to remain dependent on the federal government through the endurance of the trust and trustee relationship that continues to define relations between the Natives and the government.[79] Congress, therefore, is the ultimate decisionmaker on determining the limits of tribal sovereignty, and the extent of the aid that is provided through federal policies.[80] The trust relationship has perpetuated extreme poverty on Native reservations, and it has kept their economic development relatively low in comparison to other demographic groups across the nation, as the legal ownership of all assets on Native reservations legally belong to the government.[81] The fundamental basis on which the trust relationship relies on is a wrongful and misconceived belief that tribes are unable to manage their own lands and affairs.[82] This is an extremely outdated and flawed mindset, notably when tribes have demonstrated time and time again their successful capabilities in managing their own resources and benefiting the members of their respective tribes without the oversight of the federal government.[83] Furthermore, Article 3 and

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76. *Id.*

77. *The reservation system*, KHAN ACADEMY, *available at* https://www.khanacademy.org/humanities/us-history/the-gilded-age/american-west/a/the-reservation-system (last visited Jan. 13, 2022).

78. Matthew Williams, *What life on a Native American reservation really looks like*, HUCK MAGAZINE (Sept. 12, 2016), *available at* https://www.huckmag.com/art-and-culture/photography-2/native-american-reservation-pine-ridge-photography/ (last visited Jan. 13, 2022).

79. *See Tribal Sovereignty*, PAUMA TRIBE, *available at* https://www.paumatriibe.com/government/tribal-sovereignty/ (last visited Jan. 14, 2022).

80. *See id.*

81. Shawn Regan, *5 Ways The Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014), *available at* https://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/?sh=2f2690c72c27 (last visited Jan. 14, 2022).

82. Shawn Regan, *Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development*, PERC (Feb. 18, 2014), *available at* https://www.perc.org/2014/02/18/unlocking-the-wealth-of-indian-nations-overcoming-obstacles-to-tribal-energy-development/ (last visited Jan. 14, 2022).

83. *Id.*

Article 4 of the UNDRIP provide specific provisions of the "right to self-determination," and the "right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[84] The contemporary domestic policies of the U.S. have yet to reflect both of these Articles, as bureaucratic limitations restrict tribal sovereignty on Native reservations, while simultaneously determining the areas in which tribal governments can direct their own policies without the involvement of the overarching federal government.

THE ISSUE OF VIOLENT CRIMES ON NATIVE RESERVATIONS

The cost of the existence of tribal reservations, however, has proven to be fatal for the Natives who reside on such reservations. Violence has prevailed as a constant condition on most Native reservations, and much of the modern acts resemble an almost identical source that has consistently induced violence against Natives; economic greed and unclarity of legal enforcement and penalties. The violent crimes that befall Native reservations are mostly hidden behind undecided jurisdictional lines, raising consecutive questions of who has the exact authority to do what at which moment in time.

Presently, with the draw of resources and benefits from the Native lands, novel issues have come to light regarding the crimes committed on reservations. The level of violence against Native women occurs at a disproportionate rate when compared to the national average of other ethnicities, and homicide stands as the third leading cause of death for Native women in the U.S., trailing behind only cancer and heart disease.[85] According to the Department of Justice, more than half of American Indian and Alaska Native women will experience sexual violence in their lifetimes.[86] The legal system provides more failures than resolutions, as

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84. UNDRIP, *supra* note 35, at § 3-4.

85. *Leading Causes of Death - Females - Non-Hispanic American Indian or Alaska Native - United States, 2016*, CDC (2016), available at https://www.cdc.gov/women/lcod/2016/nonhispanic-native/index.htm (last visited Jan. 14, 2022).

86. Maren Machles, Carrie Cochran, Angela M. Hill, and Suzette Brewer, *1 in 3 American Indian and Alaska Native women will be raped, but survivors rarely find justice on*

investigations into sexual assaults against Native women become hindered by the absence of much needed cooperation between tribes and federal governments.[87] For the few cases that do end up receiving a conviction in tribal court, federal law still holds the upper hand in preventing tribal courts from sentencing non-Native perpetrators to more than a single year.[88] Another component that is viewed as an epidemic is the growing number of disappearances of Native women. The unnerving accounts of missing and murdered Native American women and girls have sparked a movement to bring attention to the heinous acts that are committed the majority of times by non-Native individuals on Native land.[89] The core of the issue reverts back to the lack of communication between state, local, and tribal law enforcement, and agencies, with the consequences coming to bear on the victims themselves.

VIOLENCE AGAINST NATIVE WOMEN AND GIRLS

46% of Native women residing on tribal reservations are said to experience some form of physical abuse, sexual assault, stalking, or domestic violence in their lifetime.[90] In their entirety, 84% of Native women are said to have experienced some form of violence in their lifetime.[91] 34% of Native women in the U.S. are raped in their lifetimes, and 39% are victims of domestic violence.[92] Native women are said to experience violence at more than 10 times the national average, and due to the lack of communication and data sharing between the federal, state, county, municipal, and tribal levels of law enforcement, a series of hurdles must be faced when attempting to solve the criminal activities, obtain funding, and begin prevention efforts.[93] A blatant example of such a hurdle is illustrated through the National Crime Information Center's 2016 data, in which the Center received 5,712 reports of missing

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tribal lands, USA TODAY (Oct. 19, 2019), *available at* https://www.usatoday.com/story/news/nation/2019/10/18/native-american-women-sexual-assault-justice-issue-tribe-lands/3996873002/ (last visited Jan. 14, 2022).

87. *Id.*

88. *Id.*

89. *Murdered and Missing Indigenous Women, supra* note 21.

90. *Native American Issues Today | Current Problems & Struggles 2020, supra* note 20.

91. *Murdered and Missing Indigenous Women, supra* note 21.

92. *Violence Against Women*, NATIONAL CONGRESS OF AMERICAN INDIANS, *available at* https://www.ncai.org/policy-issues/tribal-governance/public-safety-and-justice/violence-against-women (last visited Jan. 14, 2022).

93. Chelsea Dennis, *US Commits to Track Violence against Indigenous Women*, NON-PROFIT QUARTERLY (Oct. 15, 2020), *available at* https://nonprofitquarterly.org/us-commits-to-track-violence-against-indigenous-women/ (last visited Jan. 14, 2022).

American Indian and Alaska Native women and girls, but only two percent of the identical cases had been logged with the Department of Justice's federal missing persons database.[94] The prevalence of sexual assault and rape have been, and remain, under-reported, and it is near impossible to dictate an exact approximation of the frequency of such violent acts.[95]

Violent sex offenders have continuously escaped punishment for their crimes perpetuated on tribal lands.[96] As observed by Grant Christensen, an Associate Justice for the Supreme Court of the Standing Rock Sioux Tribe, there is an apparent incentive on Native tribal lands for non-Native predators to specifically target Native women and girls with the knowledge that neither the given tribe nor the state can prosecute them, thus leaving only the federal courts and prosecutors that may be hours away in the city. Christensen recounted stories of individuals who enter a reservation and ask a woman whether they are Indian, and if she says no, these individuals will pass on a "potential target." [97] In contrast to other racial groups, Native American women are more likely to be sexually assaulted by people who are not Native American.[98] The majority of rapes and sexual assaults against other women were intra-racial, but the majority of victimizations against American Indian and Alaska Native women were more likely to be interracial.[99] Among Native women who are victims of sexual assault or rape, an average of 67% describe the offender as non-Native, and among Native women who are victims of assault, an average of 63% describe the offender as non-Native.[100]

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94. *Id.*

95. *Id.*

96. Renee Cooper, *Behind the grim statistics for sexual violence on reservations*, KXNET (Dec. 16, 2020), *available at* https://www.kxnet.com/news/local-news/being-raped-is-a-right-of-passage-behind-the-grim-statistics-for-native-american-women/ (last visited Jan. 16, 2022).

97. *Id.*

98. Garet Bleir & Anya Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, THE CENTER FOR PUBLIC INTEGRITY (Aug. 27, 2018), *available at* https://publicintegrity.org/politics/murdered-and-missing-native-american-women-challenge-police-and-courts/ (last visited Jan. 16, 2022).

99. *Police Insights Brief: Statistics on Violence Against Native Women*, NATIONAL CONGRESS OF AMERICAN INDIANS (Feb. 2013), *available at* https://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRPkCDjpFtxeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf (last visited Jan. 16, 2022).

100. *Id.*

As previously mentioned, cases documenting missing and murdered Indigenous women and girls have gone under-reported or unreported altogether.[101] This endures as a long-standing issue that is regrettably linked to inadequate resources, plain indifference, and a confusing jurisdictional maze.[102] Therefore, the statistics provided are conjectured estimates that are based on individual and independent studies and research projects undertaken by organization collaborations for gathering and condensing data.[103] One such report, the To' kee skuy' soo ney-wo-chek' (I Will See You Again In a Good Way) Year 1 Progress Report: MMIWG2 of Northern California, documents 2,306 missing Native American women and girls in the U.S., about 1,800 of whom were killed or vanished within the past 40 years.[104] According to the Progress Report, 60% of the cases are homicides and 31% involve girls 18 years old and younger.[105] Almost three-quarters of the cases consisted of victims who were living in the foster care system at the time they went missing.[106] To this day, the majority of these cases within the U.S., in addition to nearly 2,000 in Canada, remain unsolved.[107] The Urban Indian Health Institute (UIHI), a division of the Seattle Indian Health Board, undertook a study of assessing the number and type of cases of missing and murdered American Indian and Alaska Native women and girls in 71 urban cities in 29 states across the U.S.[108] UIHI found 506 unique cases of missing and murdered American Indian and Alaska Native women and girls in the selected 71 cities; 128 were missing persons cases, 280 were murder

101. Sharon Cohen, *#NotInvisible: Why are Native American Women vanishing?*, THE ASSOCIATED PRESS (Sept. 6, 2018), available at https://apnews.com/article/cb6efc4ec93e4e92900ec99ccbcb7e05 (last visited Jan. 16, 2022).

102. *Id.*

103. *See generally* Abby Abinanti, et. al., *A Year 1 Project Report on Missing and Murdered Indigenous Women, Girls, and Two Spirit People of Northern California*, (Jul. 2020) *available at* https://2a840442-f49a-45b0-b1a1-7531a7cd3d30.filesusr.com/ugd/6b33f7_a83c3e5d9fed4906b70413a985321ac4.pdf?index=true (last visited Jan. 16, 2022).

104. Erik Ortiz, *Lack of awareness, data hinders cases of missing and murdered Native American women, study finds*, NBC NEWS (July 30, 2020, 2:18 PM), *available at* https://www.nbcnews.com/news/us-news/lack-awareness-data-hinders-cases-missing-murdered-native-american-women-n1235233 (last visited Jan. 16, 2022).

105. *Id.*

106. *Id.*

107. *Id.*

108. *MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS: A snapshot of data from 71 urban cities in the United States*, URBAN INDIAN HEALTH INST., *available at* https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf (last visited Jan. 11, 2022).

cases, and 98 had an unknown status.[109] A case was flagged as "status unknown" when law enforcement was able to provide a number of total cases to a request for records, but did not specify how many of those cases were missing persons cases and how many were murdered persons cases.[110] Additionally, the "status unknown" classification was also applied to cases that had previously been listed on a missing persons database but had since been removed for undesignated reasons, and UIHI could not verify whether the women or girls had been safely located or had since then deceased.[111] The cities with the highest number of missing and murdered Indigenous women and girls cases were Seattle, Albuquerque, Anchorage, Tucson, Billings, Gallup, Tacoma, Omaha, Salt Lake City, and San Francisco.[112] In consideration of the disparaging absence of communication and cooperation between all levels of government, advocates have called for better tracking systems that extend across the national sphere to account for missing and murdered reports of Indigenous women and girls in every state.[113] Any and all currently publicized reports exist as estimates, and are likely to severely undercount the actual numbers of missing and murdered Indigenous women. To contend with this inadequacy, Native leaders have acknowledged that the data will never be 100 percent in terms of comprehensiveness, but that is "...what we need to strive for in order to protect our mothers, daughters, sisters, and aunties."[114]

With this understanding, it becomes an evident tragedy to witness the disregard of the federal government in attending to the terms of the UNDRIP. In reference to Article 22, the UNDRIP states that, "Particular attention shall be given to the rights and special needs of indigenous elders, women, youth, children, and persons with disabilities."[115] The Article continues to call forth states to "take measures...to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."[116] With the steady increase of unexplained violence and disappearances against Native women in the U.S., the ironic complementary of insufficient reporting and evidence-gathering is nothing short of an affront to the victims, their families, and their tribal communities.

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109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. Urban Health Institute, *supra* note 108.
114. *Id.*
115. UNDRIP, *supra* note 35, at § 22.
116. *Id.*

VIOLENCE IN CONNECTION WITH "MAN CAMPS" AND BORDERTOWNS

With the discovery and growth of oil and fracking industries on Native tribal reservations, tribal communities have been disrupted in devastating ways. Following an oil or gas boom, tens of thousands of transient workers come into temporary housing units labeled "man camps" that are set up on or near tribal lands.[117] The man camps are also described as "work-camp modular housing," and are constructed for well-paid, typically male laborers who oversee the building of pipelines that cut through rural tribal nation lands and Native communities.[118] Within a short period of time, these camps flow into small Native communities and consist of individuals who aim to cash in on high-paying fracking and pipeline jobs.[119] The dark side of the booms are demonstrated by the sudden climate of crime and impunity that these once-quiet communities are now forced to face in light of the massive energy development projects.[120]

There is a consistent pattern between the presence of man camps and oil/pipeline projects, with the increase of the presence of drugs, crimes, and violence against Native women.[121] To Native residents, there is an unequivocal connection between man camps and missing and murdered Native American women.[122] The unforeseen and uncontrolled increase in the booming industries on Native lands have precipitated more traffic of those individuals who are experiencing high cash inflow on vast expanses of rural lands, and several submitted reports have documented the connection between extreme resource extraction and violence against nearby Natives.[123] Multiple studies have shown that man camps bring

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117. Garet Bleir & Anya Zoledziowski, *The missing and murdered: 'We as Native women are hunted,'* INDIANZ (Aug. 27, 2018), *available at* https://www.indianz.com/News/2018/08/27/the-missing-and-murdered-we-as-native-wo.asp (last visited Jan. 11, 2022).

118. Martin, *supra* note 23.

119. Steve Bynum & Jerome McDonnell, *Rapes and Murders Of Indigenous Women At Oil And Fracking 'Man Camps'*, WBEZ CHICAGO (Mar. 13, 2018), *available at* https://www.wbez.org/stories/rapes-and-murders-of-indigenous-women-at-oil-and-fracking-man-camps/5e741ac4-a51d-4ab9-bebf-e54c8d1788ce (last visited Jan. 11, 2022).

120. *Id.*

121. Drew Novak, *Fear Next Door; The man camp connection,* NATIVE NEWS (2019), *available at* https://nativenews.jour.umt.edu/2019/fort-peck/ (last visited Jan. 11, 2022).

122. *Id.*

123. *Fossil Fuel Extraction Dangers: Native American and Women's Organizations Request UN Help on Sexual Violence*, INDIAN COUNTRY TODAY (May 12, 2015), *available at*

violence in places where it would not otherwise be, and the sudden presence of the camps in a given area rapidly increases the population and strains law enforcement and human services.[124] These attendant burdens in turn affect rural tribal areas where law enforcement already encounter a deficiency in its ability to provide services to extensive swaths of land.[125] The increase in population leads to a parallel increase in physical and sexual violence, assault, and sex trafficking in the affected communities.[126]

One significant example of the harmful consequences that result is illustrated by the effects that were confronted by the Fort Berthold Reservation in North Dakota and Montana at the time of the Bakken oil boom.[127] In the mid-2000's, North Dakota experienced a large oil boom that caused wells to spring up along the edges of the Fort Berthold Reservation, an area composed of prairie and rolling hills three times larger than the size of Los Angeles. [128] The Bakken region made up 200,000 square miles along the Montana-North Dakota state line, and the area is home to the Assiniboine and Sioux nations of the Fort Peck Indian Reservation in Montana, and the affiliated Mandan, Hidatsa and Arikara tribes who are collectively known as the MHA Nation.[129] Soon, the sight of derricks and tanks full of crude oil, pipes, gas flares, and semi-trucks were encompassing the once empty stretches of land.[130] The peak of the Bakken oil boom occurred in 2012, and oil and gas infrastructure in the Bakken area included domestic violence shelters and a new FBI office, in addition to the appointment of two new special prosecutors to handle crimes against women, and the launching of a human trafficking task

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https://indiancountrytoday.com/archive/native-american-and-women-s-organizations-request-un-help-on-sexual-violence-_srxHIWjqEmyrmz9OPMmZw (last visited Jan. 14, 2022).

124. *Violence from Extractive Industry 'Man Camps' Endangers Indigenous Women and Children*, UNIV. OF COLORADO, BOULDER: FIRST PEOPLES WORLDWIDE (Jan 29, 2020), *available at* https://www.colorado.edu/program/fpw/2020/01/29/violence-extractive-industry-man-camps-endangers-indigenous-women-and-children (last visited Jan. 14, 2022).

125. *Id.*

126. *Id.*

127. Valerie Volcovici, *Red tape chokes off drilling on Native American reservations*, REUTERS (Jan. 27, 2017), *available at* https://www.reuters.com/article/us-usa-trump-tribes-regulations-insight/red-tape-chokes-off-drilling-on-native-american-reservations-idUSKBN15B0E7 (last visited Jan. 14, 2022).

128. *Id.*

129. Bleir & Zoledziowski, *supra* note 98.

130. Alleen Brown, *A New Film Examines Sexual Violence as a Feature of the Bakken Oil Boom*, THE INTERCEPT (July 1, 2018, 11:30 AM), *available at* https://theintercept.com/2018/07/01/nuuca-bakken-oil-boom-sexual-violence/ (last visited Jan. 14, 2022).

force.[131] Attacks on Native women increased with the flood of transient oil workers, as interactions between the Natives and non-Native oil workers were considered by Native residents to be inevitable.[132] According to MHA Nation victim services workers, "It was the transient workers that were committing these crimes ... and with the arrival of all of these men, the rape victimization had tripled."[133]

In 2019, the U.S. Bureau of Justice Statistics concluded its study on violent crimes in the Bakken oil-producing regions of the two states, and found that from 2006 to 2012, the rate of violent victimization, particularly of aggravated assault, increased 70%, and violent victimization by strangers increased by 53% in the Bakken region.[134] Conversely, the study found that there was no corresponding increase in violent crime in the surrounding counties outside of the Bakken oil region, and instead, found that reports of violent victimizations in non-Bakken counties were down 8% during this boom period.[135]

Similar concerns arose once President Donald Trump made it a priority for his administration to issue permits for the highly disputed Keystone XL pipeline that would carry oil sands 1,200 miles from the Canadian province of Alberta down to the state of Nebraska.[136] The project was first proposed in 2008 and was estimated to conceivably cost $8 billion.[137] It had long been the cause of intense controversy involving economic development groups and environmental protectionist organizations.[138] The Obama administration rejected the project, but Trump revived it during his time in office.[139] Native tribes along the pipeline route had argued that burning oil sands would worsen climate change,[140] and that the pipeline could spill over into natural waterways and Native sacred lands, as the original Keystone Pipeline System had

131. *Id.*

132. Bleir & Zoledziowski, *supra* note 98.

133. *Id.*

134. University of Colorado, Boulder: First Peoples Worldwide, *supra* note 124.

135. *Id.*

136. *Keystone XL pipeline: Why is it so disputed?*, BBC NEWS (Jan. 21, 2021), *available at* https://www.bbc.com/news/world-us-canada-30103078 (last visited Jan. 14, 2022).

137. Matthew Brown, *Trump administration approves Keystone pipeline on U.S. land*, PBS NEWS HOUR (Jan. 22, 2020), *available at* https://www.pbs.org/newshour/nation/trump-administration-approves-keystone-pipeline-on-u-s-land (last visited Aug. 6, 2021).

138. *Id.*

139. *Id.*

140. Melissa Denchak, *What Is the Keystone XL Pipeline?*, NAT'L RES. DEF. COUNCIL (Jan. 21, 2021), *available at* https://www.nrdc.org/stories/what-keystone-pipeline (last visited Jan. 17, 2022).

leaked more than a dozen times in the past.[141] In 2018, the Native communities of the Fort Belknap of Montana and the Rosebud Sioux Tribe of South Dakota sued the Trump administration, quoting the administration's failure to adhere to historical treaty boundaries and bypassing environmental impact analyses.[142] The Keystone project presented other worries in addition to the economic and environmental impacts, as the oil and construction industries would have created thousands of temporary jobs in which the presence of thousands of transient workers would have likely resulted in an increase in violence in Native communities.[143] On January 20, 2021, however, President Biden signed an Executive Order revoking the Keystone XL pipeline permit previously issued by the Trump administration.[144] Environmental groups, both domestically and internationally, and Native activists applaud Biden's decision.[145] Tribal members viewed the pipeline as a threat to their drinking water sources and irrigation systems, and as an upfront to their ancestors' previous treaties that were entered into with the federal government.[146] Although Biden's decision is considered to be a step in the right direction, many recognize the necessary perseverance to continue making headway in the campaign for long-term solutions to safeguard the rights and protections of Native communities. Native advocates are continuing to urge Biden to shut down other controversial fossil fuel pipelines, including the Dakota Access pipeline ("DAPL"), which was arguably sanctioned without conducting legally required consultations with Native communities.[147] The Standing Rock Sioux

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141. *Id.*

142. Vanessa Romo, *Native American Tribes File Lawsuit Seeking to Invalidate Keystone XL Pipeline Permit*, NPR (Sept. 10, 2018), *available at* https://www.npr.org/2018/09/10/646523140/native-american-tribes-file-lawsuit-seeking-to-invalidate-keystone-xl-pipeline-p (last visited Jan. 17, 2022).

143. *See* Abaki Beck, *For Indigenous Women, More Pipelines Mean More Threats of Sexual Violence*, THE REVELATOR (Oct. 10, 2019), *available at* https://therevelator.org/fossil-fuel-indigenous-women/ (last visited Jan. 17, 2022).

144. *Tribes Respond to KXL Pipeline Termination*, NATIVE AM. RTS. FUND (Jan. 20, 2021), *available at* https://www.narf.org/keystone-xl/ (last visited Jan. 17, 2022).

145. *See* Rob Gillics, *Keystone XL pipeline halted as Biden revokes permit*, THE ASSOCIATED PRESS (Jan. 20, 2021), *available at* https://apnews.com/article/joe-biden-alberta-2fbcce48372f5c29c3ae6f6f93907a6d (last visited Jan. 17, 2022).

146. Nora Mabie, *Montana tribal members, fearing water contamination, relieved as Keystone XL pipeline blocked*, USA TODAY (Jan. 21, 2021), *available at* https://www.usatoday.com/story/news/nation/2021/01/21/montana-tribes-react-president-biden-blocks-keystone-xl-pipeline/6659608002/ (last visited Jan. 17, 2022).

147. Nina Lakhani, *'No more broken treaties': indigenous leaders urge Biden to shut down Dakota Access pipeline*, THE GUARDIAN (Jan. 21, 2021), *available at*

tribe of North Dakota rallied support for its campaign to stop the DAPL from being built on tribal lands, and as of now, the legal battles are still in progress in order to decide the fate of the roughly 470,000 barrels of crude oil that are currently being transported by pipeline.[148]

Likewise, the Line 3 pipelines portray another broken promise on the part of the federal government, as it also fails to honor the past treaties between the Ojibwe people and the U.S.[149] Located in Minnesota, Line 3 runs nearly 400 miles long and cuts across the Fond du Lac reservation.[150] Line 3 has also utilized monetary tactics towards the communities that run along the pipeline's route through donations, jobs, tax revenues, and money for local policing and local advertisements.[151] The difference in approaches is unnerving, as at Standing Rock, pipeline owners and law enforcement posed no hesitation in using rubber bullets, water cannons, and tear gas against protesters.[152] Enbridge, the Canadian energy transportation company heading the Line 3 pipelines project, seemingly accepts the notion that they cannot win over the hearts and minds of all the Native people, but according to Anton Treuer, professor of Ojibwe language at Bemidji State University in Minnesota, the company does not have to.[153] According to Professor Treuer, "if they can win over just enough to clear enough hurdles to get the next easement or next little contract or permit approved, they know they'll be able to get their work done."[154] Enbridge has further contracted private agreements for undisclosed sums and offered contracting, training and job opportunities

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https://www.theguardian.com/us-news/2021/jan/21/dakota-access-pipeline-joe-biden-indigenous-environment (last visited Jan. 17, 2022).

148. Nina Lakhani, *Dakota access pipeline: court strikes down permits in victory for Standing Rock Sioux*, THE GUARDIAN (Mar. 25, 2020), *available at* https://www.theguardian.com/us-news/2020/mar/25/dakota-access-pipeline-permits-court-standing-rock (last visited Jan. 17, 2022); *see also* David Blackmon, *First Keystone XL, Now Dakota Access: Pipeline Politics Swirl Around Biden*, FORBES (Feb. 10, 2021), *available at* https://www.forbes.com/sites/davidblackmon/2021/02/10/first-keystonexl-now-dakota-access-pipeline-politics-swirl-around-biden/?sh=404664b10c1a (last visited Jan. 17, 2022).

149. Sheila Regan, *'It's cultural genocide': inside the fight to stop a pipeline on tribal lands*, THE GUARDIAN (Feb. 19, 2021), *available at* https://www.theguardian.com/us-news/2021/feb/19/line-3-pipeline-ojibwe-tribal-lands (last visited Jan. 17, 2022).

150. Mary Annette Pember, *Enbridge Line 3 divides Indigenous lands, people*, INDIAN COUNTRY TODAY (Feb. 19, 2021), *available at* https://www.mprnews.org/story/2021/02/24/enbridge-line-3-divides-indigenous-lands-people (last visited Jan. 17, 2022).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

for Fond du Lac Band reservation members.[155] This in turn has left Native residents to question whether voicing their oppositions would thwart the distribution of the monthly per capita payment checks the Band makes in the amount of $400 using Enbridge funds, especially during a time when the pandemic has strained tribes and left them with severe inadequacies to attend to the economic shutdown.[156] Protesters have opposed Line 3, contending that the pipeline would pollute sensitive waterways and spill into wild rice and other ecosystems in the region.[157] This would present future threats to the Ojibwe traditional act of "making rice," which serves as a tangible expression of the Ojibwe relationship with the earth; "one of sustainability and commitment to ensuring resources are protected and available for future generations."[158] As well as the environmental and cultural impacts induced through repeated broken treaties, there is also the concern of rising violence perpetrated by the pipeline workers.

Multiple allegations of sexual assault and harassment have been attributed to Line 3 workers, and local businesses have increased calls and reports of sexual harassment since construction began in December.[159] In order to receive state permits, Enbridge was also required to create a public safety fund to cover costs associated with anti-human trafficking efforts in adjacent areas of construction and temporary residency.[160] Besides this and despite Enbridge's implementation of mandatory human trafficking and sexual harassment training programs, former pipeline workers revealed witnessing a rampant culture of misogyny and sexual harassment at Line 3 sites.[161] The trainings lack in ensuring substantive instruction, as each training is comprised of a single 20-minute video without a final agreement or test of acknowledgement of the information.[162] The programs act as awareness videos, easily passed over and casually disregarded by both workers and Enbridge management.[163]

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155. Pember, *supra* note 150.

156. *Id.*

157. *Id.*

158. *Id.*

159. Candice Bernd, *Exploiting More Than the Land: Sex Violence Linked to Enbridge Line 3 Pipeliners*, TRUTHOUT (Mar. 16, 2021), *available at* https://truthout.org/articles/exploiting-more-than-the-land-sex-violence-linked-to-enbridge-line-3-pipeliners/ (last visited Jan. 17, 2022).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

The connection between the extractive industries and violence against Native women and Native communities is not a novel recognition. In 2019, Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls released a 1,200-page report that condensed three years of community hearings, story gathering, and forensic research.[164] The report demonstrated a strong link between extraction zones on the missing and murdered women crisis in Canada, and it specifically explained rotational shift work, sexual harassment in the workplace, substance abuse, economic insecurity, and a large transient workforce as contributing to increased violence against Native women in communities near fossil fuel infrastructure.[165] A number of Native leaders, such as the Executive Director of the Sovereign Bodies Institute, Annita Lucchesi, have brought attention to the harmful culture that is manufactured by the conjured logic of upturning the natural waterways and lands that translates into an analogous pattern of abuse and violence.[166] As Lucchesi asserts, the thought process of such individuals is simple; "If you can use and abuse the water and land, you can use and abuse the people around you too."[167]

In evaluation of crimes against Natives in the context of extraction companies' expansions, the federal government evidently has aligned its policies alongside economic interests, and there remains considerable efforts to be initiated for violence against Indigenous peoples, especially Indigenous women, to be curtailed. Such federal actions are attached to the treatment of Native lands, and the allowance of industries to misuse traditional Native lands for a non-consented purpose is in direct opposition to the UNDRIP's commitments of states cooperating "in good faith before adopting and implementing legislative or administrative measure that may affect [Indigenous peoples]."[168] UNDRIP further emphasizes that Indigenous groups have the "right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."[169] With the growing threats posed by the construction of unnatural pipelines through the upheaval of traditional lands, environmental dangers increase and natural waterways are contaminated, as in direct contrast to the Natives' right of states taking "effective measures to ensure that no storage or disposal of hazardous

164. Beck, *supra* note 143.
165. *Id.*
166. *Id.*
167. *Id.*
168. UNDRIP, *supra* note 35, at § 19.
169. *Id.* at § 29(1).

materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."[170] Most notably, and perhaps most disturbingly, the UNDRIP seemingly foretold the perils that would emerge with industrial proposals and operations, as in Section 32(2), the UNDRIP called for states to obtain the Indigenous peoples' "free and informed consent prior to the approval of any project affecting their lands or territories."[171]

VIOLENCE IN POLICE ENCOUNTERS

Excessive police force against minority groups in the U.S. remains a core issue the federal government has failed to remedy on all fronts. The invisible narrative that Natives endure is further induced by the majority of their violent stories proceeding unnoticed. Statistically, Natives are killed in police encounters at a higher rate than any racial or ethnic group.[172] In a given group of every one million Natives, 2.9 have died annually from 1999 to 2015 due to "legal intervention," with the main cause of these deaths resulting from police shootings.[173] This reveals a mortality rate that is 12% higher in comparison to African-Americans, and three times that of whites.[174] In some instances, the investigations into cases of fatal use of police force have been ruled as justified, whereas the identical encounters portray a different story when caught on video of excessive or inappropriate use of force.[175]

A number of factors are attributed to the growing statistic of Native killings at the hands of law enforcement. The lack of mental health services for Natives has exacerbated the issue without concern for addressing the central cause, as nearly half of the Native victims had histories of mental illness.[176] There is also the historical and continued strained relationship between Natives and non-Native police officers, as the murky jurisdictional designations place a number of tribal reservations within the confines of non-tribal authorities.[177] Distraught individuals become particularly vulnerable when placed in tense

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170. *Id.* at § 29(2).

171. *Id.* at § 32(2).

172. Hansen, *supra* note 28.

173. *Id.*

174. *Id.*

175. *Id.*

176. Sarah Tory, *Police shootings of Native Americans spark a movement,* HIGH COUNTRY NEWS (May 22, 2017), *available at* https://www.hcn.org/articles/tribal-affairs-native-lives-matter-a-movement-emerges (last visited Jan. 17, 2022).

177. *Id.*

encounters with those who harbor certain prejudices. Treatment as second-class citizens by both police and public agencies highlights a shared experience of Natives with the entirety of minority communities in the U.S., and the discrimination experienced on reservations is reminiscent of historically documented events in which Natives are overcome with unnecessary and lethal force with no proper means of a justified counter and cure.

The frequency of police brutality against Natives is not a novel occurrence. Natives consider such violence to be an echo of what they have had to endure for centuries.[178] However, mainstream U.S. media does not report on the Native killings, and the actual number of Native deaths by law enforcement is likely much higher than what is able to be discovered by conducted studies.[179] The issue of underreporting is a hindrance, and it may be at times that Native deaths just go unrecorded altogether.[180] The remoteness of rural reservations and border towns are scarce in media coverage, and in the cases when media reports cover Native killings, they are often misidentified as another race.[181]

Native activists have led movements to call attention to the high rates of violence against Natives at the hands of law enforcement. They seek to hold the involved police accountable for their actions, despite whether the victim is Native or non-Native.[182] Activists also seek to spotlight the unrecognized Native deaths that are rarely covered by the media.[183] The activist campaigns and protests have been inspired by the recent Black Lives Matter movements that were aimed at emphasizing police brutality against vulnerable minority individuals, and the overall systematic racial injustice underlying the killings.[184]

The UNDRIP affords Indigenous peoples the "right to be free from any kind of discrimination."[185] This fundamental right should withhold a standing on its own, but the federal government has yet to implement

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178. *Id.*

179. *Id.*

180. *Id.*

181. Tory, *supra* note 176.

182. Stephanie Woodard, *The Police Killings No One Is Talking About*, IN THESE TIMES (Oct. 17, 2016), *available at* https://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html (last visited Jan. 15, 2022).

183. *Police Killings Against Native Americans Are Off the Charts and Off the Radar*, EQUAL JUSTICE INITIATIVE (Oct. 31, 2016), *available at* https://eji.org/news/native-americans-killed-by-police-at-highest-rate-in-country/ (last visited Jan. 15, 2022).

184. *Id.*

185. UNDRIP, *supra* note 35, at § 2.

this provision, along with other similar provisions, into domestic policy that goes to Native treatment. The UNDRIP further secures the "rights to life, physical and mental integrity, liberty and security of person."[186] In view of the past and current brutalities against Natives and Native communities, federal policies have been severely inadequate in their attempts to eradicate themselves from past inequities.

LACK OF INVESTIGATIONS AND REFUSALS OF PROSECUTIONS

Native women on tribal reservations are said to lack the most government protections from threats of violence made against them.[187] U.S. federal attorneys declined to prosecute nearly 52% of violent crimes that occurred in Native country, and 67% of the cases that were declined were sexual abuse related cases.[188] The Department of Justice reserves to itself the responsibility of prosecuting the most serious crimes that occur on Native tribal reservations.[189] The Department, however, has been responsible in filing charges for only half of the murder investigations from Native Country, and it declines generally two-thirds of all sexual assault cases that are sent by tribal law enforcement.[190]

In 2017 alone, the Department released a report that revealed the U.S. Attorney Offices had declined to prosecute 37% of Indian Country cases they deemed resolved within that same year, usually citing insufficient evidence.[191] The low rate of prosecutions have exuded a dangerous effect on tribal communities, as it amounts to a second-class system of justice that provokes law-breaking.[192] Without the necessary prosecutions, witnesses and victims are left without any sense of relief, as they have directly experienced the failings of the justice system for not delivering the proper resolutions. Family and communal tribal members are given no relief and no explanation as to the majority of disappearances or murders that occur on their own tribal lands, and the probability of novel crimes and criminal retaliation are heightened as the government's

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186. *Id.* at § 7.

187. NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 99.

188. *Id.*

189. Timothy Williams, *Higher Crimes, Fewer Charges on Indian Land*, NY TIMES (Feb. 20, 2012), *available at* https://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html (last visited Jan. 15, 2022).

190. Bleir & Zoledziowski, *supra* note 98.

191. *Id.*

192. Williams, *supra* note 189.

passivity towards Native crimes conveys an all too clear message: perpetrators will not face justice.

The explanation for the low number of prosecutions, as provided by federal prosecutors regularly, is that such cases lack admissible evidence.[193] Another reason for the low number of prosecutions can again be attributed to limited data collection and lack of clear protocols for authorities' handling of cases, which have in part hampered investigations, prosecutions, and strategic crime-fighting in Native American communities, according to Senator Tom Udall who serves as the vice chairman of the Senate Committee on Indian Affairs.[194] There are also a plethora of obstacles that exist in the federal management of Native cases. For major crimes like murder or child abuse, victims and witnesses have to travel long distances just to provide a testimony in federal court.[195] Federal investigators and prosecutors are also distinctly separated from tribal communities, as they are not based in Native reservations and therefore, are unable to foster meaningful relationships with the Native individuals they are meant to legally serve.[196] This causes a disconnect between those who should be the executioners of necessary justice, and those who are in need of that justice being efficiently and wholly administered, as both sides view the other as strangers who are unaware of the lives at stake.[197] Most disappointingly, there is a fundamental lack of care and awareness, and the tribal communities interpret the inactions of the federal government as a purposeful statement that nothing will be done for the crimes.[198] The acute frustration of some tribal members is understandable, and some have gone to sue the government for declining prosecutions and "sloppy police work."[199] Natives sense that the federal officers place the shame and blame on the individuals reported to be missing, as some have received formal responses that suggest that the missing person may soon show up as the individual was out drinking and, "probably took up with some man."[200] For other Native families, they have decided to take the matter into their own hands and have launched their own investigations and

193. *Id.*
194. Hudetz, *supra* note 34.
195. Buckley, *supra* note 32.
196. *Id.*
197. *Id.*
198. Williams, *supra* note 189.
199. *Id.*
200. Cohen, *supra* note 101.

search parties, and have since created their own missing persons posters as the government did not publish the case in their official database.[201]

Despite the initiation of programs and attempts to increase overall public safety and prosecutions on tribal lands, there have not been any significant changes in the recent years of the Department's prosecution record for Native Country crimes.[202] There is still no sense of urgency in closing cold cases, and there is no noticeable drive for federal investigators to present any sort of explanation or discovery in connection to such cases.[203] One solution to contend with the lack of prosecutions is to provide more funding and the resources necessary to support additional investigators, tribal courts, and forensic work in crime laboratories, which would all contribute to an increase in prosecutions.[204] In extension of this, U.S. attorneys should staff their national offices with special prosecutors that focus exclusively on crimes that are perpetrated in "Indian Country."[205] Another solution is to send the cases directly to tribal courts, which already is considerably more effective in representing the recognition of tribes' sovereignty and ability to handle cases locally.[206] Recently, tribal courts have increased their own prosecutions of non-Native offenders, but tribal prosecutors are still restricted due to jurisdictional constraints.[207] On top of that, any such solutions must begin with federal programs that specifically go to improving policing and prosecutions in tribal communities, and this must begin by initial awareness of the absent prosecutions and a push for legislation to change this.

THE ISSUE OF CRIMINAL JURISDICTION ON NATIVE RESERVATIONS

Tribal reservations possess an intricate jurisdictional scheme that is comprised of imprecise distinctions of authority. For decades and still today, Native tribes are confiscated of the right to arrest and prosecute non-Natives who commit crimes on Native land.[208] If the perpetrator is non-Native and the victim is Native, then a federally certified agent is the sole authority as the federal government has jurisdiction, rather than the

201. *Id.*
202. Hudetz, *supra* note 34.
203. Cohen, *supra* note 101.
204. Hudetz, *supra* note 34.
205. *Id.*
206. *Id.*
207. Buckley, *supra* note 32.
208. Crane-Murdoch, *supra* note 10.

state or tribal governments.[209] If the opposite was true and the perpetrator was Native and the victim was non-Native, then a tribal officer may make the arrest, but the case must go to federal court.[210] If both parties are Native tribal members, a U.S. attorney generally takes the case despite tribal courts having the authority to prosecute tribal members for crimes committed on reservations, as tribal courts still do not have the authority to execute sentences onto defendants that are more than three years in prison.[211] As expected, such jurisdictional entanglements compound the existing difficulties in prosecuting crimes committed on tribal reservations, further delaying the enactment of justice for the victims.[212]

On tribal reservations, the default authority would usually rest with tribal police and investigators from the BIA.[213] The FBI, however, investigates certain serious offenses, depending on whether the perpetrator or the victim were tribal members or not, and if there is sufficient evidence, the Department of Justice will have the authority to prosecute major felonies that occur on tribal lands.[214] Initially, the legal rules appear to be straightforward. A deeper view of jurisdictional practices on Native reservations reveals complications of overlapping authority and differing laws depending on the crime, whether it occurred on reservation lands, and whether a tribal member is the victim or perpetrator.[215] Essentially, such jurisdictional laws amount to non-Native criminals not being arrested or prosecuted by the correct authorities if they commit a crime against a Native on reservation land, which results in the lack of necessary prosecutions. In other words, if a non-Native individual commits murder or rape against a Native individual, the federal government will have jurisdiction instead of the tribe or state, and most of the time, the federal government will not decide the case immediately, and predominantly, it will decline to prosecute.[216]

Because of the jurisdictional perplexities, many reservations experience the crimes perpetrated against their communities as slipping through the "jurisdictional cracks."[217] Questions arise as to where a Native individual should go to file a report, or to which legal officer they

209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. Cohen, *supra* note 101.
214. *Id.*
215. *Id.*
216. Williams, *supra* note 189.
217. Crane-Murdoch, *supra* note 10.

should notify upon the occurrence of a crime.[218] It still stands that tribal law enforcement has no jurisdiction over transient workers that come on reservations to construct and maintain the numerous pipelines.[219] The non-Native individuals who reside in man camps do not fall within tribal jurisdictional authority, even when the camps are built on Indigenous lands.[220] This accentuates an alarming danger, especially in light of the massive increase in reports of sexual assaults against Native women perpetrated by the peak of oil production in the Bakken regions.[221] Without a clear defining demarcation of jurisdictions, the ability of such crimes to be prosecuted will be more greatly prohibited. Additionally, in the process of attempting to make sense of this ambiguous jurisdiction on reservations, the victims will be deprived of justice that much longer, as seemingly the majority of the authoritative forces are left doubtful as to whether they possess the jurisdictional authority to prosecute or not.

The Violence Against Women Act ("VAWA") permitted tribes to bring criminal charges against non-Native perpetrators in selected cases.[222] VAWA was last reauthorized in 2013, but it lapsed in 2018 due to Congress' failure to act against partisan disputes over other issues.[223] However, as of now, the House of Representatives voted to renew VAWA, thus approving its reauthorization.[224] Subsequently, the legislation will go to the Senate where its passage is expected.[225] Since VAWA first passed in 2013, tribal communities have experienced better collaboration with other governments in relation to certain crimes against women, like domestic violence.[226] The Act allows tribes to charge non-Natives for domestic violence against partners or spouses, and when

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218. Cohen, *supra* note 101.

219. Bleir & Zoledziowski, *supra* note 98.

220. *Id.*

221. *Id.*

222. *See* Felicia Fonseca, *Tribes see improvements, hurdles as they charge non-Natives*, THE ASSOCIATED PRESS (Apr. 2, 2018), *available at* https://www.businessinsider.com/ap-tribes-see-improvements-hurdles-as-they-charge-non-natives-2018-4 (last visited Jan. 14, 2022).

223. Susan Davis, *House Renews Violence Against Women Act, But Senate Hurdles Remain*, NPR (Mar. 17, 2021), *available at* https://www.npr.org/2021/03/17/977842441/house-renews-violence-against-women-act-but-senate-hurdles-remain (last visited Jan. 14, 2021).

224. Annie Karni, *House Passes Bill to Bolster Protections for Women Facing Violence*, NY TIMES (Mar. 9, 2022), *available at* https://www.nytimes.com/2022/03/09/us/politics/house-passes-violence-against-women-act.html (last visited Mar. 11, 2022).

225. *Id.*

226. Fonseca, *supra* note 222.

protection orders are violated.[227] The limitations, however, are that VAWA does not extend to violence against children or other family members, and it does not include crimes by non-Natives perpetrated against victims they do not know, or crimes by tribal members against non-Natives.[228] Additional limitations are that tribal authorities cannot charge property crimes, sexual misconduct, false imprisonment, threats, trafficking or stalking.[229] In the initial reauthorization legislation draft, Congress sought to address a number of these concerns and limitations.[230]

The issue of jurisdictional restrictions inhibits Native communities from exercising their right of complete autonomy and self-governance "in matters relating to their internal and local affairs."[231] Tribal authorities should be permitted to decide their methods of prosecutions to ensure that perpetrators who commit crimes on tribal lands, no matter if they are non-Native or Native, are faced with the proper sentence as determined in tribal courts. As stated in Article 5, Indigenous peoples should have the "right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions."[232] It would be a justified benefit for Native communities to be given this choice to determine their own respective legal resolutions, so that victims are not delayed or eventually deprived of their right to relief.

CONCLUSION

Indigenous peoples in the U.S. have persistently encountered broken treaties and forgotten promises from the federal government. Historical practices have bled into present contexts, and the policies once guaranteed towards Native treatment and Native betterment have become transformed into Native invisibility. The federal government continues in its lack of prioritization of Native rights, while further initiating economic interests that go to directly diminishing the little control withheld by tribal reservations and Native communities. Criminal law and criminal jurisdictional practices present a discriminatory mindset of dishonoring previous warranties of tribal interests and furthering the delay and enactment of justice for the vulnerable class of victims. As a nation, the U.S. must do better in converting the objectives carried forth

227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. UNDRIP, *supra* note 35, at § 4.
232. *Id.* at § 5.

in the UNDRIP to legislative policies that can be enforced domestically for the advancement of Native rights.

A primary purpose of the UNDRIP is to protect the welfare of Indigenous peoples' rights while working to establish minimum standards for the recognition, protection, and promotion of such rights.[233] It is meant to act as a framework for the survival and dignity of the world's Indigenous peoples.[234] Consequently, the UNDRIP's provisions are meant to ensure that the voices of the Indigenous Native populations are heard and that their calls for necessary change for their respective communities are perceived and translated into actual domestic policies with definite solutions. One such solution is to allow tribal communities to implement criminal justice policies in tribal courts and through tribal law enforcement. This would allow direct authority of tribal authorities to hear and try crimes that are perpetrated against the communities that they themselves are a member of. There is an increased anticipation of cooperation and direct relations that would benefit investigations and prosecutions. One other solution is for the federal government to increase necessary funding for tribal reservations to engage in initiating the needed prosecutions by providing additional tribal law enforcement personnel and investigatory aid. The federal government could also increase the attendance of tribal resources by working to set up helplines and shelters that provide structural protections for the individuals most vulnerable to being victims of assault, especially in times of growing industrial presence on Native reservations.

Despite the absence of UNDRIP in domestic U.S. policies, it is notable that the Indigenous Native populations of the U.S. have time and time again exhibited fortitude in overcoming their encountered adversities. The tenacity of Native communities in their efforts to not be a forgotten people is an inspiring and hopeful teaching, and it endorses a heartening promise towards what is to come. As the UNDRIP incorporates a standard to which all countries should hold as a minimum, the U.S. should heed the rights as stated in this international treaty, so that all individuals residing in the U.S., whether on tribal reservations or not, can hold themselves accountable to a higher standard than that which the U.S. has historically, and still currently, has in place.

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233. *United Nations Declaration on the Rights of Indigenous Peoples*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Sept. 13, 2007), *available at* https://www.ohchr.org/en/issues/ipeoples/pages/declaration.aspx (last visited Jan. 16, 2021).

234. *Id.*

PUTTING PROTECTIONIST REGULATIONS OUT TO PASTURE: HOW INTERNATIONAL REGIMES CAN IMPACT THE ENVIRONMENT

Alyssa Christian

INTRODUCTION

As if there were not enough decisions to make when grabbing their morning coffee, consumers are now offered choices of at least oat, almond, soy, or traditional milk. These options are everywhere, but do they all fall under the same family of "milk" beverages? It turns out that cows are a little jealous of their new cousins in grocery coolers, leading dairy farmers to want the non-cow milk disowned from the milk family. Others, like the oat, almond, soy, and coconut milk industries, see cows as the problem.

Cows are cute and have become a beloved part of society, but just as much as one might not want to be near them when they pass gas, the environment does not like it either.[1] Meaning, when any of the 250 million dairy cows in the world fart or burp, greenhouse gases are released and the Earth gets a little warmer.[2] Despite this, governments expend significant time and money to support the industry.[3] Consider how much dairy[4] is a part of everyday life. It is an after-school ice cream with your grandpop, the cheesy best friend to a ham sandwich, or a cookie's favorite drink, so of course it has been protected at all costs.[5] However, many think it is time to change that. Since the 1990's campaign of "Got Milk?," the average number of milk mustaches has continued to

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1. U.N. Food and Agric. Org. Animal Prod. and Health Div., *Greenhouse Gas Emissions from the Dairy Sector, A Life Cycle Assessment*, (hereinafter "Dairy LCA") (2010), *available at* http://www.fao.org/3/k7930e/k7930e00.pdf (last visited Feb. 4, 2022).

2. *Id.*; Caroline Grunewald, *Biden Has a Plan to Save American Dairy,* THE HILL, (Aug. 20, 2020) *available at* https://thehill.com/opinion/energy-environment/512948-biden-has-a-plan-to-save-americas-dairy-but-does-it-go-far-enough (last visited Feb. 4, 2022).

3. Chris Edwards, *Milk Madness*, CATO INST. TAX & BUDGET BULL. (July 2007), *available at* https://www.cato.org/sites/cato.org/files/pubs/pdf/tbb_0707_47.pdf#:~:text=The%20federal%20government%20has%20subsidized,dairy%20industry%20since%20the%201930s.&text=1%20The%20government%20spends%20billions,dairy%20programs%20increase%20milk%20prices (last visited Feb. 4, 2022).

4. For the sake of clarity, this Note will use "dairy" solely in reference to cow milk and cow milk products despite trends to include alternative milks under the umbrella of dairy.

5. *See* Food & Agric. *supra* note 1.

drastically diminish.[6] Today's market demand is not wholly cow milk but contains many alternatives like soy, almond, oat, rice, hemp, and coconut.[7] Environmental, health, and ethical preferences mirror that cow's milk is not as popular as it used to be.[8] Plus, dairy alternatives are growing in demand.[9] Modern advertisements promote vegan and cruelty free options over the traditional "Got Milk?" message.[10] What does this mean for the future of cows?

On one hand, there are society's favorite foods and the product of proud dairy farmers, and on the other hand, there are the somewhat healthier, environmentally more sustainable, and animal friendly options ready to step into dairy's shoes.[11] This tension can be seen in the United States as the "Milk Wars;"[12] the "Dairy Pride"[13] movement versus the

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6. *See* Kirk Kardashian, *The End of Got Milk?*, THE NEW YORKER (Feb. 28, 2014), *available at* https://www.newyorker.com/business/currency/the-end-of-got-milk (last visited Feb. 4, 2022); Danielle Wiener-Bronner, *America's Milk Industry is Struggling. Don't Blame Oat Milk*, CNN BUSINESS (Nov. 21, 2019), *available at* https://www.cnn.com/2019/11/21/business/milk-industry-dean-foods/index.html (last visited Feb. 4, 2022).

7. Nellie Bowles, *Got Milk? Or Was That Really a Plant Beverage?*, N.Y. TIMES (Aug. 31, 2018), *available at* https://nyti.ms/2MFlkMh (last visited Feb. 4, 2022).

8. Wiener-Bronner, *supra* note 6; *See Id.* at 30. The "Got Milk?" ad campaign was based on a deprivation strategy which would indicate that milk was the perfect and only complement to many foods. "Snapple on your Wheaties" or "Dunking your freshly baked tollhouse cookies in 7-Up" were examples of how milk was unable to be substituted. This strategy is now debunked as there are numerous alternatives in the plant industry.

9. Bowles, *supra* note 7.

10. *See* Ben Webster & Bronwen Lloyd, *Milk Can Be Branded Inhumane, Advertising Chiefs Tell Farmers After Vegan Campaign*, THE TIMES (July 26, 2017), *available at* https://www.thetimes.co.uk/article/milk-can-be-branded-inhumane-advertising-chiefs-tell-farmers-after-vegan-campaign-jwgblxmb7 (last visited Feb. 4, 2022); Jessica Wohl, *See Oatly Bring a 2014 Ad Banned In Sweden to the U.S. For its Super Bowl Debut,* ADAGE (Feb. 7, 2021), *available at* https://adage.com/article/special-report-super-bowl/see-oatly-bring-2014-ad-banned-sweden-us-its-super-bowl-debut/2312321 (last visited Feb. 4, 2022).

11. *See* Christina Troitino, *The Dairy Pride Act's Beef with Plant-Based Milk*, FORBES (Apr. 6, 2017), *available at* https://www.forbes.com/sites/christinatroitino/2017/04/06/the-dairy-pride-acts-beef-with-plant-based-milk/?sh=42c7844b454d (last visited Feb. 4, 2022).

12. Iselin Gambert, *Got Mylk: The Disruptive Possibilities of Plant Milk,* 84 BROOK. L. REV., 801, 802 (2019), *available at* https://brooklynworks.brooklaw.edu/blr/vol84/iss3/3 (last visited Feb. 4, 2022).

13. Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act, H.R. 778, 115th Cong. (2017). This bill attracted a lot of attention. Promoted as American, it narrowly got killed. Since then, there have been numerous attempts to revive the bill, lobby the FDA, and attack the "imitation products deceiving the American people."

"Let Dairy Die"[14] protests. Both sides are milking the issues, but for the environment's sake, the United Nation's Food and Agriculture Organization (FAO) must step in and change the international food standard's definition of milk to include plant-based alternatives.

THE PROMINENT SOCIAL ROLES OF DAIRY AND ITS SUBSTITUTES

As mentioned, the "Milk Wars" are becoming a highly contested debate. This note proposes a moderate approach between "letting dairy die" and allowing it to carry on business as usual. A middle ground is best because neither extreme fully satisfies the goals of international law.

Sustainable Development Goals Dilemma

The United Nations (U.N.) has 17 Sustainable Development Goals (SDGs) to promote economic and social development by 2030.[15] Current environmental trends jeopardize the recognition of these goals.[16] Specifically, the dairy industry and competing dairy alternative markets have a role in both hurting and helping a number of the SDGs.[17] The dairy industry and its agricultural practices increase the amount of nutritious foods accessible to many people, contributing to SDG 2: Zero Hunger.[18] However, current agricultural practices inadvertently contribute to global warming, thus, impeding the achievement of SDG 13: Climate Action.[19] Similarly, additional food sources support SDG 3: Good Health and Well Being.[20] The entire dairy industry does not support this goal; however, as high-fat dairy products, commonly dumped on low-income

14. Let Dairy Die rose to prominence during the 2020 election as numerous advocates, some topless, crashed the stages of several democratic nominees including Bernie Sanders, Elizabeth Warren, and most notably, Joe Biden whose wife Jill, was pictured aggressively pushing the protestors away from the future president. Maria Cramer, *What is 'Let Dairy Die," and Why is it All Over the Democratic Race?*, N.Y. TIMES (Mar. 4, 2020), *available at* https://www.nytimes.com/2020/03/04/us/politics/joe-biden-let-dairy-die.html (last visited Feb. 4, 2022).

15. G.A. Dec. 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development* (Oct. 21, 2015). (hereinafter "U.N. SDGs").

16. UNEP, *Making Peace with Nature*, at 87 (Feb. 2021), *available at* https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/34948/MPN.pdf (last visited Feb. 4, 2022).

17. Katarina Arvidsson et al., *Research on Environmental, Economic, and Social Sustainability in Dairy Farming: A Systemic Mapping of Current Literature*, SUSTAINABILITY (July 2020), at 1; U.N. SDGs, *supra* note 15

18. U.N. SDGs, *supra* note 15; David Tillman, et al., *Agricultural Sustainability and Intensive Production Practices*, 418 NATURE 671 (2002).

19. Tillman, *supra* note 18.

20. U.N. SDGs, *supra* note 15.

communities,[21] are linked to many preventable diseases.[22] This would frustrate SDG 3.

Additionally, writing international dietary guidelines based on dairy consumption frustrates SDG 10: Reduced Inequalities[23], as more than half of Earth's population cannot digest lactose properly after infancy.[24] The number of individuals who have trouble digesting lactose is growing and is significantly higher among people of color.[25] This practice of writing dietary guidelines based on dairy consumption contributes to what Andrea Freeman calls "food oppression."[26]

Despite the majority of the world's inability to properly digest lactose, obliterating the dairy industry would have a disastrous impact on SDG 8: Decent Work and Economic Growth.[27] Worldwide, there are an estimated one billion people supported by the dairy sector, relying on the industry for their livelihoods and the production of dairy for use in the economy.[28] There would be significant economic impact on dairy farmers, restaurant owners, and developing nations without milk, cheese, ice cream, butter, and other dairy products. With this in mind, SDG 15: Life on Land[29] would be jeopardized if current economic reliance precluded implementing sustainable practices to maintain future productivity and biodiversity.[30]

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21. Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 UC IRVINE L. REV. 1251, 1252 (2013).

22. Tillman, *supra* note 18; Gene Baur, *The Best Way to Help Dairy Farmers is to Get Them Out of Dairy Farming*, THE WASH. POST (Jun. 12, 2019), *available at* https://www.washingtonpost.com/opinions/2019/06/12/best-way-help-dairy-farmers-is-get-them-out-dairy-farming/ (last visited Feb. 7, 2022).

23. U.N. SDGs, *supra* note 15, at 14.

24. W. Steven Pray, *Lactose Intolerance: The Norm Among the World's People*, AM. J. OF PHARMACEUTICAL EDUC. 64 (2000), *available at* https://www.researchgate.net/profile/Walter-Pray/publication/237122817_Lactose_Intolerance_The_Norm_Among_the_World%27s_Peoples/links/540f11e30cf2df04e75a2194/Lactose-Intolerance-The-Norm-Among-the-Worlds-Peoples.pdf (last visited Mar. 22, 2022).

25. *Id.*; Medline Plus, NIH, *available at* https://medlineplus.gov/genetics/condition/lactose-intolerance/#frequency (last visited Feb. 7, 2022).

26. Freeman, *supra* note 21, at 1253.

27. U.N. SDGs, *supra* 15; Arvidsson et al., *supra* note 17.

28. *The Global Dairy Sector*, FOOD AND AGRIC. ORG. OF THE U.N., *available at* http://www.dairydeclaration.org/Portals/153/FAO-Global-Facts.pdf?v=1#:~:text=xviii%20With%20an%20estimated%20150,to%20one%20billion%20people%20worldwide (last visited Feb. 7, 2022).

29. U.N. SDGs, *supra* 15.

30. Arvidsson et al., *supra* note 17, at 2.

SDG 9: Industry, Innovation, & Infrastructure[31] brings the two sides together by not only recognizing the important industry and infrastructure in place with dairy but by also promoting innovation to make these systems more sustainable.[32] This note will propose one way the international framework can work to reconcile these goals. The proposal's necessity and impact will be explored by unpacking the destructive practices of dairy farming, the trends toward plant-based products, developing case law around the globe regarding labeling, and how international guidelines can create a more sustainable industry while promoting global food security and health by allowing plant-based and traditional dairy to compete.

DAIRY'S NEGATIVE IMPACT ON THE ENVIRONMENT

The largest threat posed by the dairy industry is environmental. Since humans cannot digest grass, the ability of cows to digest it contributes to the effective use of land Sustainable Development Goal.[33] However, to do this, cows process grass through enteric fermentation.[34] Their four-chamber stomachs allow the food to be re-digested with microbes that break down cud and release methane.[35] Cows mostly release this methane through belching.[36] Methane is one of the main Greenhouse Gases (GHGs) scientists attribute to climate change because of its heat-trapping qualities.[37] Therefore, it is necessary to determine how many millions of tons of gas the cow industry is responsible for in order to tackle climate change with appropriate measures.

A Life Cycle Assessment (LCA) follows the chain of what it takes to make a product.[38] The agriculture industry widely accepts this systemic analysis to determine the impact of livestock on the environment.[39] For dairy products, the analysis includes fertilizers, pesticides, and feed input's transportation to the farm, dairy processing, packaging costs, and

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31. U.N. SDGs, *supra* 15.

32. Arvidsson et al., *supra* note 17, at 1-2.

33. Arvidsson et al. *supra* note 17, at 2.

34. Deanne M. Camara Ferreira, *Global Warming and Agribusiness: Could Methane Gas from Dairy Cows Spark the Next California Gold Rush,* 15 WIDENER L. REV. 541 (2010).

35. Brad Plumer, *California Wants to Regulate Cow Belches. It's Less Weird Than it Sounds*, VOX (Oct. 2, 2016), *available at* https://www.vox.com/2016/9/27/13072714/california-methane-cow-belches (last visited Feb. 4, 2022).

36. *Id.*

37. *Id.*

38. Dairy LCA, *supra* note 2, at 9.

39. *Id.* at 16.

distribution effects.[40] The only aspects excluded in the LCA relate to final consumption after consumer purchase.[41] The LCA can be segmented, and the "cradle to farm-gate" segment tends to have the most significant impact on GHG emissions.[42]

In this segment, the FAO's LCA indicates about 6% of global GHG emissions are the result of livestock's belching and flatulence.[43] Besides belching, cow manure must decompose which also releases warming gases like carbon dioxide, nitrous oxide, and methane.[44] The FAO concludes that dairy cows are responsible for 19% of total GHG emissions.

Beyond the LCA's GHG emissions, other environmental concerns include water resource degradation, biodiversity, and erosion.[45] Cows do not like the hot weather and lose their appetites around 92 degrees Fahrenheit.[46] To keep them cool, farmers utilize air conditioning, impacting the environment further, and give them water.[47] Water is used to feed and wash cows as well as clean the dairies and employees and grow the crops for feed.[48]

Some proponents of the dairy industry claim that the environmental impacts of cows are blown out of proportion or do not exist at all.[49] This note does not argue whether global warming is real. While some studies have been discredited and it may be hard to measure the methane released from cows, it is well-understood that methane release occurs, and it contributes to global warming.[50]

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40. *Id.* at 9.

41. Dairy LCA, *supra* note 2, at 19.

42. *Id.* at 11.

43. *Id.*

44. DENIS HAYES & GAIL BOYER HAYES, COWED, THE HIDDEN IMPACT OF 93 MILLION COWS ON AMERICA'S HEALTH, ECONOMY, POLITICS, CULTURE, AND ENVIRONMENT 33-34 (2015).

45. Dairy LCA, *supra* note 2, at 13.

46. Hayes, *supra* note 44, at 36.

47. *Id.* at 36-37.

48. *Id.* at 36.

49. Frank M. Mitloehner, *Yes, Eating Meat Affects the Environment, But Cows Are Not Killing the Climate,* CONVERSATION, Oct. 25, 2018, *available at* https://theconversation.com/yes-eating-meat-affects-the-environment-but-cows-are-not-killing-the-climate-94968 (last visited Feb, 5 2022).

50. FAO, *Climate Change and The Global Dairy Cattle Sector*, GLOBAL AGENDA FOR SUSTAINABLE LIVESTOCK, at 7 (2019), *available at* https://www.fao.org/3/ca2929en/ca2929en.pdf (last visited Feb, 5 2022) [hereinafter "Climate Change and the Global Sector"].

Foods made from plants instead of animals, like alternative milk, are better for the environment and are gaining popularity.[51] Adversaries to the plant-based industry point out that there are environmental externalities from vegan options as well, such as almond milk production hurting bees and soy plants leading to adverse consequences to the land.[52] However, these effects are minimal compared to those produced in the dairy industry. Soy production's environmental impact is much less than that of cattle raising and milk production.[53] *Silk*, a popular dairy-alternative brand advertises that its soy, almond, and coconut milks use 80% less water than it would take to produce the same amount of cow milk.[54] The science is clear that dairy cows are part of the GHG emissions crisis.[55] The leading programs on climate change advocate for a reduction of traditional dairy consumption because plant-based is better for the environment.[56] Although there may not be a perfect solution at this time, action still must be taken.

DAIRY'S POSITIVE CONTRIBUTIONS TO THE ECONOMY

Despite dairy's flaws, if international law promoted the idea of totally ditching dairy, there would be too many stray cows on the loose along with numerous other side effects. Most significantly, SDG 8: Decent Work and Economic Growth would be substantially frustrated.[57] There are over 150 million hard-working dairy farmers who are an integral part of the global economy.[58] Additionally, farmhand positions

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51. Annette McGivney, *Almonds Are Out. Dairy is a Disaster. So What Milk Should We Drink?*, THE GUARDIAN (Jan. 29, 2020), *available at* https://www.theguardian.com/environment/2020/jan/28/what-plant-milk-should-i-drink-almond-killing-bees-aoe (last visited Mar. 22, 2022).

52. *Id.*

53. Courtney Grant & Andrea Hicks, *Comparative Life Cycle Assessment of Milk and Plant-Based Alternatives*, 35 ENVTL. ENGINEERING SCI., UNIV. OF WISCONSIN-MADISON (2018); McGivney, *supra* note 51.

54. Silk, *Our Story, 2013 Water Footprint Assessment*, *available at* https://silk.com/about-us/ (last visited Feb. 5, 2022).

55. *See* FAO, *supra* note 50.

56. UNEP, *supra* note 16, at 34.

57. U.N. SDGs, *supra* note 15.

58. Elizabeth Rembert, Megan Durisin, & Mike Dorning, *Dairy Farmers Worldwide Are on the Brink of Crisis*, BLOOMBERG (June 30, 2020), *available at* https://www.bloomberg.com/news/articles/2020-07-01/dairy-farmers-dumping-milk-worldwide-are-on-the-brink-of-crisis#:~:text=The%20sector%20accounts%20for%20about,according%20to%20the%20United%20Nations (last visited Feb. 5, 2022).

employ a large number of migrant workers.[59] Dairy products also serve as input commodities in other parts of the economy, creating millions of jobs.[60] Without dairy, many hospitality businesses would also suffer.[61] Since dairy is a prominent food source, losing it would cause food insecurity to rise as well, frustrating SDG 2: Zero Hunger.[62]

These considerations were included in the reasoning for this proposal in order to afford some protection .to dairy farmers and recognizes the essential role of dairy in many lifestyles and economies. However, these reasons do not negate the serious problems posed by dairy farming, and therefore, an inflexible approach, like banning traditional dairy's competition, does not make the future of dairy any brighter. These problems need to be tackled now to make the future of agriculture more sustainable.

THE EFFECTS ON PUBLIC HEALTH

Later, this note will discuss consumer confusion between plant and cow milk and why there is a debate about the use of the word "milk." For now, it is important to understand the differences and each product's role in public health.

NUTRITIONAL CONTENT

For many years, dairy was touted as building strong bones and providing a good source of calcium.[63] Although plant-based alternatives may contain less calcium per calorie, there is still a well-founded debate over which type of drink is healthier.[64] Many dairy alternatives are fortified which adds nutrition where it may be deficient in comparison to

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59. *See* Tim Craig, *Death of Farmworkers in Cow Manure Ponds Put Oversight of Dairy Farms into Question*, WASH. POST (Sept. 24, 2017), *available at* https://www.washingtonpost.com/national/deaths-of-farmworkers-in-cow-manure-ponds-put-oversight-of-dairy-farms-into-question/2017/09/24/da4f1bae-8813-11e7-961d-2f373b3977ee_story.html (last visited Feb. 5, 2022).

60. FAO, *The Global Dairy Sector: Facts 2019*, at 2, *available at* https://www.fil-idf.org/wp-content/uploads/2021/01/DDOR-Global-Dairy-Facts-2019.pdf (last visited Feb. 5, 2022).

61. *Id.*

62. *Id.*; FAO, *Climate Change and the Global Dairy Cattle Sector*, *supra* note 55, at 11.

63. Hayes, *supra* note 44, at 129.

64. *See* Christina Troitino, *The Dairy Pride Act's Beef With Plant-Based Milk*, FORBES (Apr. 6, 2017), *available at* https://www.forbes.com/sites/christinatroitino/2017/04/06/the-dairy-pride-acts-beef-with-plant-based-milk/?sh=42c7844b454d (last visited Feb. 5, 2022).

cow's milk.[65] Similar to chocolate milk containing less nutritional benefit compared to whole white milk, consumers will have to read labels to understand which products fit best in their diets.[66]

Additionally, the nutritional value of cow milk is under scrutiny.[67] One article explains that "you don't need milk, or large amounts of calcium, for bone integrity. In fact, the rate of fractures is highest in milk-drinking countries, and it turns out that the keys to bone strength are lifelong exercise and vitamin D."[68] With new studies showing overconsumption and less benefits, cow's milk cannot claim superiority. Despite the doubt around dairy, the industry insists that plant-based alternatives cannot use words like "milks," "cheese," or "yogurt" because they are nutritionally inadequate.

DIETARY GUIDELINES

As a result of clinging to outdated notions of cow milk's importance in human diets, most dietary guidelines require numerous servings of dairy per day. In 2019, Canadian Prime Minister, Justin Trudeau was under fire from the dairy sector because the Canadian Health Department updated guidelines eliminating a daily dose of dairy.[69] Trudeau was accused of pushing veganism and the liberal agenda.[70] However, this move was celebrated by dieticians because of lactose intolerance, allergies, and overconsumption.[71]

When discussing SDG 10: Reduced Inequalities, this article noted that the majority of people of color cannot properly digest lactose.[72] Due to genetic mutations likely caused by European famines, people of European descent are more likely able to digest lactose beyond infancy.[73] This means that minorities disproportionately cannot digest lactose.[74] In

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65. Carol Rees Parrish, *Moo-ove Over, Cow's Milk: The Rise of Plant-Based Dairy Alternatives*, 171 NUTRITION ISSUES IN GASTROENTEROLOGY 21 (2018).

66. *Id.* at 27.

67. Hayes, *supra* note 44, at 129-161.

68. Mark Bittman, *Got Milk? You Don't Need It*, N.Y. TIMES (July 7, 2012), *available at* https://opinionator.blogs.nytimes.com/2012/07/07/got-milk-you-dont-need-it/ (last visited Jan. 31, 2022).

69. *Why Justin Trudeau Is Fighting Over Milk*, BBC NEWS (Jul. 23, 2019), *available at* https://www.bbc.com/news/world-us-canada-49091439 (last visited Jan. 31, 2022).

70. *Id.*

71. *Id.*

72. Andrew Curry, *Archaeology: The Milk Revolution*, 500 NATURE 21 (2013); Freeman, *supra* note 21, at 1261-62.

73. Curry, *supra* note 72, at 21-22.

74. *See id.*

the United States, "as many as 50 million people are lactose intolerant, including 90 percent of all Asian-Americans and 75 percent of all African-Americans, Mexican-Americans and Jews".[75] This poses significant hardships as most dietary guidelines require multiple servings of dairy a day.[76] By failing to address this large population, the guidelines contribute to the systemic health problems for people of color.[77]

Although many people are lactose intolerant, there is evidence that many more struggle to digest dairy.[78] With the government's dairy promotional efforts,[79] many consumers do not realize that dairy is negatively contributing to their health, and they continue to consume it or ignore any discomfort because they do not know the cause, or dairy alternatives are not readily available.[80] Restrictive labeling also presents the dairy alternative markets with other significant hardships. By defining milk as "mammary secretion of lactating mammals,"[81] dairy-free alternatives are excluded from many government-sponsored programs like school lunches and welfare programs that specify food categories since they cannot be labeled in dairy's category. This makes nutritious foods for lactose intolerant individuals harder to access.[82] Plant-based products, then, do not get any revenue from governmental benefits Therefore, labeling laws that limit the scope of dairy are problematic to public health and hurt the dairy alternative sector.

To remedy this, some dietary guidelines include soymilk under the umbrella of dairy and provide the proper information on its nutritional value. The dairy industry continues to lobby that cow's milk is necessary to a healthy diet despite the widespread acceptance that this is no longer true, complicating the matter for those who do not consume dairy. International dietary guidelines need to reflect more diverse health standards by clarifying that plant-based alternatives are a part of the dairy family and can positively affect health.

The Rise of Plant-Based "Beverages"

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75. Bittman, *supra* note 68.

76. Freeman, *supra* note 26.

77. *Id.*

78. *See* Bittman, *supra* note 68.

79. In addition to federal assistance, cow's milk is incorporated into federal school lunch programs, and MilkPep has lobbied for nutritional education in schools hosted by the dairy industry, exposing children to a very one-sided ideology about milk from a young age.

80. Parrish, *supra* note 65.

81. Food and Agric. Org. of the U.N. & World Health Org., *Codex Alimentarius: Milk and Milk Products* (2011), *available at* http://www.fao.org/3/i2085e/i2085e00.pdf (last visited Mar. 22, 2022) [hereinafter Codex: Milk and Milk Products].

82. Freeman, *supra* note 26.

Subsidiary bodies in the U.N. are aware of traditional dairy's threat to the SDGs. In February 2021, the UNEP published a detailed guideline on how to address climate change, biodiversity, and pollution within the SDG framework.[83] In a section urging the transformation of food systems to be more equitable, efficient, and environmentally friendly, the blueprint considers how consumer norms and cultural practices can impact the SDGs:

Changing the dietary habits of consumers, particularly in developed countries, where consumption of energy- and water- intensive meat and dairy products is high, would reduce pressure on biodiversity and the climate system. These habits are a function of individual choices but are also influenced by advertising, food and agricultural subsidies and excess availability of cheap food that provides poor nutrition.[84]

The change in dietary habits is already occurring. As incomes in developed countries continue to rise, so will the popularity of plant-based products. By not receiving the same preferential treatment cow's milk receives with government assistance and favorable regulations, dairy alternatives face an uphill battle. Despite this hardship, there has been great success for soy, oat, rice, coconut, and almond milk.[85] The alternative dairy industry has been experiencing growth that is expected to continue.[86]

Dairy alternatives are substitutes for animal-based products like milk, cheese, and cream.[87] IBIS World's industry report on Soy and Almond Milk Production defines "plant milk" as a "beverage produced by soaking dry beans, nuts or seeds and grinding them with water."[88] The spike in demand is cited to "various factors such as growing consumer preference for a vegan diet and nutritional benefits offered by plant-based dairy alternatives."[89] The market is expected to be valued at $35.06 billion by the end of 2024.[90]

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83. UNEP, *supra* note 56.

84. *Id.* at 34.

85. Grand View Research, *Dairy Alternatives Market to Be Driven by Rising Number of Lactose Intolerance Cases Till 2024*

86. Claire O'Connor, *Soy & Almond Milk Production*, IBISWORLD, (June 2020)

87. *Id.* at 5.

88. *Id.* at 46.

89. *Global Dairy Alternatives Market (2020 to 2025)*, BUSINESSWIRE (July 20, 2020), *available at* https://www.businesswire.com/news/home/20200720005287/en/Global-Dairy-Alternatives-Market-2020-2025 (last visited Mar. 22, 2022).

90. Grand View, *supra* note 85.

Soy milk originally occupied the largest chunk of the sector.[91] However, almond milk has since overtaken soy for the lead.[92] Despite the array of dairy alternatives, the main competition to milk alternatives is cow's milk, rather than competition amongst themselves.[93] Dairy alternatives and cow's milk are not perfect substitutes due to health and moral concerns, but an increase in the price of one product increases the demand of the other.[94] Industry growth has been driven, and will likely to continue to be driven, by health as consumers are growing more concerned about "additives in traditional cow's milk, such as growth hormones and antibiotics."[95] Since some are uncomfortable with hormones and antibiotics, this touches back to why plant-based alternatives must be considered in dietary guidelines under the milk category.

With the rise in popularity of plant-based milks, there has been a simultaneous decrease in demand for cow milk.[96] As more and more coffee shops are offering plant-based milks for lattes,[97] dairy farmers are growing more and more concerned.[98] The most apparent attempt to knock the new market entrants down has been through lobbying for restrictive labeling.[99]

THE CURRENT LAWS THAT SPARK THE "MILK WARS"

The dying dairy industry and rising plant-based-milk-demand coupled with unclear guidance on health has caused a legal battle that is unmatched to any lunchroom food fight.

Branding: The Confusion Between Plants and Cows

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91. BUSINESSWIRE, *supra* note 89.

92. O'Connor, *supra* note 86, at 12.

93. *Id.* at 22.

94. *Id.*

95. *Id.* at 15.

96. *Id.*

97. Samantha Kubota & Chrissy Callahan, *Starbucks adds oat milk to the menu nationwide*, YAHOO! (Dec. 10, 2020), *available at* https://www.yahoo.com/lifestyle/starbucks-adds-oat-milk-menu-063216016.html (last visited Jan. 30, 2022); Mariana Fabian, *OPINION: Oat milk is becoming the new standard – and I've never been happier*, TECHNICIAN (Feb. 2, 2021), *available at* http://www.technicianonline.com/opinion/article_d4caa1e4-65c3-11eb-8a5f-0beceef91c02.html (last visited Jan. 30, 2022).

98. Marsha Mercer, *Stop Milking It, Dairy Farmers Tell Plant-Based Competitors*, PEW (Mar. 20, 2020), *available at* https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/02/stop-milking-it-dairy-farmers-tell-plant-based-competitors (last visited Jan. 30, 2022).

99. *Id.*

When you bring up branding and cows, one usually thinks of the practice of marking cattle with a hot iron. However, dairy farmers now have a different type of branding problem, that is, alternative milks sharing the brand they love, milk. Some fear that consumers will not know the difference between a cow and a plant product.

The proponents of restrictive labeling claim that plant-based products violate the "standard of identity" for milk.[100] A standard of identity requires that certain foods be made from specific components in order for it to be labeled as such.[101] The traditional rule is that foods be identified as their "common name" if there is one or the name prescribed by regulations.[102] This is to prevent consumer confusion by mislabeled food. By excluding plant-based alternatives from the definition of milk, consumers are supposed to be sheltered from being deceived into thinking cow's milk and plant-based milk are the same. The laws regarding labeling all call for milk's standard of identity to prevent consumer confusion. However, the issue of whether there is actual consumer confusion without these laws will be discussed below.

THE INTERNATIONAL LAW ON LABELING

The United Nations' Food and Agriculture Organization (FAO) is one of the oldest specialized agencies of the U.N. as it was established in the inaugural session of the U.N. in 1945.[103] Specialized agencies, like the FAO, are autonomous organizations funded by both voluntary and assessed contributions.[104] There are currently 194 FAO member states, and it is headquartered in Rome, Italy.[105] The FAO's mission includes to "[reduce] food insecurity and rural poverty," "ensur[e] an enabling policy and regulatory framework for food and agriculture," and to "[conserve] and [enhance] the natural resource base."[106] These goals are like many

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100. *See The Codex General Standard for the Use of Dairy Terms- Its nature, intent, and implications*, INT'L DAIRY FED'N, (Nov. 2020), *available at* file:///Users/alexistelga/Downloads/Bulletin-of-the-IDF-507_2020_The-Codex-General-Standard-for-the-Use-of-Dairy-Terms.CAT_-snusw3%20(2).pdf (last visited Jan. 31, 2022) [hereinafter IDF Bulletin].

101. *Id.*

102. *Id.*

103. *About FAO*, FOOD AND AGRIC. ORG. OF THE U.N., *available at* http://www.fao.org/about/en/ (last visited Feb. 1, 2022).

104. *FAO and the UN*, FOOD AND AGRIC. ORG. OF THE U.N., *available at* http://www.fao.org/about/fao-and-the-un/en/ (last visited Feb. 1, 2022).

105. About FAO, *supra* note 103.

106. *Overall strategic framework*, FOOD AND AGRIC. ORG. OF THE U.N., *available at* http://www.fao.org/3/x3551e/x3551e02.htm (last visited Feb. 1, 2022).

of the SDGs. Therefore, the actions of this autonomous agency do affect the goals of other U.N. bodies including the SDGs.

Global Administrative Law (GAL) refers to the increasing number of international agencies that have an impact on international and national laws.[107] GAL is a normative project that justifies the structure of global administrative regulations.[108] With the expansion of these international organizations that have power in global governance, there is a need to tackle normative projects from an international level instead of just domestically.[109]

The United Nation's Food and Agriculture Organization (FAO) is one of these international organizations that has developed a weighty authority in terms of regulations, but its rule-making processes should cause those affected to question the validity of such regulations.[110] Typically, international organizations get input from numerous committees, commissions, and experts when crafting regulations.[111] This embraces the propensity for the organization to gather the information it needs to hear rather than getting it from independent investigations, swaying the data.[112] When it comes to the global regulations regarding food standards, these input organizations include the World Health Organization, the Codex Alimentarius Commissions (CAC), and members of the FAO. Together, these bodies create the Codex Alimentarius (the Code).

The Code is the set of standards produced by the FAO in conjunction with the World Health Organization (WHO) to "protect the health of consumers and ensure fair practices in the food trade".[113] By reducing barriers to trade, the Code's goals include reducing hunger and poverty while helping farmers.[114] In order to draft these regulations which were originally suggestive and nonbinding, the FAO and WHO created the

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107. Edoardo Chiti, *Where does GAL find its legal grounding?*, 13 INT'L J. OF CONST. L. 486, 487 (2015).

108. *Id.* at 488.

109. Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319, 325 (2009).

110. Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 767 (2006).

111. Kingsbury, *supra* note 109, at 355.

112. *Id.*

113. Codex: Milk and Milk Products, *supra* note 81.

114. Food & Agric. Org. & World Health Org., *The Codex System: The Codex Alimentarius Commission and How It Works, in Understanding the International Food Trade*, *available at* http://www.fao.org/3/w9114e/W9114e06.htm (last visited Feb. 7, 2022) [hereinafter Codex and the International Food Trade].

CAC. The CAC is made up of representatives from 188 member countries, a European Union representative, plus heavy participation from non-state actors.[115]

The Code defines milk in its *General Standard for the Use of Dairy Terms (GSUDT)* in Section 2.1 as "the normal mammary secretion of milking animals."[116] This is the definition that Big Agriculture and proponents for the dairy industry, like the International Dairy Federation (IDF), are pushing for or have successfully lobbied for around the globe.[117] Section 4.2.1 specifies that "only a food complying with the definition in Section 2.1 may be named 'milk.'"[118] The Code does create exemptions by not applying the prohibition when "the exact nature of [the non 2.1 compliant product] is clear from traditional usage or when the name is clearly used to describe a characteristic quality of the non-milk product" in Section 4.6.2.[119] This does not clearly allow the use of the word milk for plant-based products, allows room for nations to add additional requirements for plant-based milks to meet, and is unevenly applied.

This definition skews the market in favor of traditional dairy products as dairy alternatives need to alter their names in different countries and worry about varying rules. Although, it seems that the dairy lobby has not reached to FAO to ban the use of the words *milk, cheese, yogurt*, etc. for all non-animal products, the IDF which works closely with the FAO has espoused that the definition should be narrower and reads the exemption to still prohibit plant products, resulting in ambiguity.[120]

The current CAC website describes international food standards as "voluntary."[121] However, the Sanitary and Phytosanitary (SPS) Agreement, passed during the Uruguay Round negotiations, gives

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115. Livermore, *supra* note 110, at 781; U.N. FAO, *About Codex Alimentarius*, *available at* http://www.fao.org/fao-who-codexalimentarius/about-codex/members/en/ (last visited Feb. 7, 2022).

116. JOINT FAO/WHO FOOD STANDARDS, CODEX ALIMENTARIUS: MILK AND MILK PRODUCTS 176 (2nd edition 2011) [hereinafter GSUDT].

117. International Dairy Federation, *The Codex General Standard for the Use of Dairy Terms- Its Nature, Intent, and Implications*, BULLETIN OF THE INT'L DAIRY FED'N, 507/2020 at 3 (Nov. 2020), *available at* https://www.fil-idf.org/wp-content/uploads/2020/11/IDF-Position-Paper-The-Codex-general-standard-for-the-use-of-dairy-terms-FINAL.pdf (last visited Feb. 7, 2022) [hereinafter IDF Bulletin].

118. GSUDT, *supra* note 116, at 177.

119. *Id.* at 178.

120. IDF Bulletin, *supra* note 117, at 3.

121. FAO, *supra* note 115.

international food standards weight.[122] A difficulty in international food trade is ensuring health standards do not fall below consumer expectations in another part of the world.[123] Evidently, food standards can also be a form of protectionism for domestic producers.[124] To prevent this, the SPS agreement allows governments to take only the sanitary and phytosanitary measures that are necessary to protect human health. With a goal of harmonizing member countries' regulations, the SPS agreement adopted the Codex Alimentarius Commission's standards.[125] Member countries are encouraged to use these standards but can set their own. If they set their own, they are only allowed to adopt higher standards if there are scientific justifications, the measures only apply to the extent needed to protect health and are not more trade-restrictive than necessary to protect health.[126]

INTERNATIONAL LAWS POTENTIAL INFLUENCE OVER US LAW

In the United States Congress, the "Dairy Pride Act" or "Defending Against Imitation and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act" was a 2017 attempt to enforce the standards of identity of milk and reduce the confusion around dairy alternatives.[127] This bill, introduced by Tammy Baldwin, along with other proposals to the FDA, sought to preclude the use of the words "milk" and "cheese" for products made from plants. If passed, plant-based products would need to be labeled as "soy beverage" or "oat-product."[128] The bill did not pass Congress, but has since been reintroduced, and Scott Gottlieb, the Trump Administration's FDA head, had expressed approval for proposals along those lines.[129] Although it is

122. Livermore, *supra* note 115, at 774.

123. Codex and the International Food Trade, *supra* note 114.

124. *Id.*

125. *Id.*

126. WTO Marrakesh Agreement, Art. 2.2 of the SPS Agreement

127. Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act, H.R. 778, 115th Cong. (2017).

128. Alexander Nieves, *Gottlieb: FDA to Crack Down on Labeling Nondairy Products as 'Milk'*, POLITICO, (July 17, 2018), *available at* https://www.politico.com/story/2018/07/17/almond-lactate-nondairy-milk-scott-gottlieb-725974 (last visited Feb. 9, 2022).

129. *Id.*

unclear whether the Biden administration will completely rebuke this proposal, it is likely.[130] President Biden has pledged to save the American dairy industry with a plan that does not attack the competing industries.[131] That being said, the Dairy Pride Act had significant bipartisan support.[132]

For now, since the Dairy Pride Act did not become law, grocery store shelves in the U.S. are filled with plant-based products using the words "milk," "cheese," and "yogurt." The current Food and Drug Administration regulations do not allow this on their face, but thanks to a wave of court rulings, animal and plant products are sharing the titles.

In *Ang v. Whitewave Foods Co.*, Plaintiffs alleged that the makers of Silk products, a popular brand of plant-based beverages, were misbranded because the FDA defines "milk" as "mammary secretions."[133] Since almonds, coconuts, etc. do not lactate, they should not be called "milk." However, the court decided as a matter of law that the FDA's definition only defines what milk is and does not define what milk cannot be.[134] Since the FDA has not said what a plant-based beverage is and "almond milk," "soymilk," etc. were the common names that "clearly convey the basic nature and content of the beverages while clearly distinguishing them from milk," the case was dismissed in favor of the plant-based beverages.[135]

Similarly, in *Gitson v. Trader Joe's Co.*, plaintiffs argued that soymilk did not fit into the standard of identity of milk.[136] The court explains that there was no reliance on the word "milk" for nutrition, so the claim for misbranded milk was dismissed.[137] This was also held in the Ninth Circuit in *Painter v. Blue Diamond*, holding that "the consumer could not plausibly allege that a reasonable consumer would be deceived into believing that the almond milk products were nutritionally equivalent to dairy milk based on their package labels and advertising."[138] If

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130. *See* Caroline Grunewald, *Biden Has a Plan to Save America's Dairy, but Does it go Far Enough?*, THE HILL, (Aug. 20, 2020), *available at* https://thehill.com/opinion/energy-environment/512948-biden-has-a-plan-to-save-americas-dairy-but-does-it-go-far-enough (last visited Mar. 22, 2022).

131. *Id.*

132. Troitino, *supra* note 11.

133. Ang v. Whitewave Foods Co., 2013 WL 6491353 (N.D. Cal. Dec. 13, 2013).

134. *Id.*

135. *Id.* at 12.

136. Gitson v. Trader Joe's Co., 2013 WL 5513711 (N.D. Cal. Oct. 4, 2013).

137. *Id.* Although it should be noted that Trader Joe's now brands its plant-based drinks as "beverages" not "milk." *See* Trader Joes, PRODUCTS, *Unsweetened Almond, Cashew & Macadamia Nut Beverage*, *available at* https://www.traderjoes.com/home/products/pdp/061942 (last visited Mar. 22, 2022).

138. Painter v. Blue Diamond Growers, 757 Fed. Appx. 517, 518 (9th Cir. 2018).

international law continues to allow room for stricter trade barriers with food standards regarding milk products, Congress might act to undo the progress plant-based companies have made in the industry.

INTERNATIONAL LAW'S INFLUENCE ON EU REGULATIONS

Similar to the Dairy Pride Act, European Union farmers led efforts to narrow milk's definition.[139] In 2017, the European Court of Justice granted dairy producers' requests to ban the terms "milk" and "butter" for plant-based beverages.[140] In October 2020, the European Parliament passed a proposal to further ban descriptions on non-dairy products.[141] This proposal does not even allow "cream imitation" or "yogurt-style."[142] Even stricter rules are being considered in Amendment 171 to EU Regulation 1308/2013 which would prohibit plant-based products from being compared to animal products at all.[143]

The European Union regulations do have some exemptions like the Code does, but the proposed amendment would wash these exemptions away.[144] This is why it is worth fighting over the word milk. Some proponents of the plant-based industry have argued it is unnecessary as the plant-based industry can still be disruptive by deliberately misspelling the word to be "malk," "myllk," or "M*lk."[145] However, the IDF has released documents interpreting the Code and considers these deliberate misspellings as an infraction on the rule.[146] So although these arguments are clever, ending the debate once and for all is necessary.

Since European food safety laws seek to harmonize regulations among the EU's member states, there is great deference to international law. If the FAO's definition of milk was broader, there is a higher likelihood that European regulations would reflect that.

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139. *EU Court Bans Dairy-Style Names for Soya and Tofu*, BBC NEWS (June 14, 2017), *available at* https://www.bbc.com/news/business-40274645 (last visited Mar. 22, 2022).

140. Case C-422/16, Verband Sozialer Wettbewerb evidence v, TofuTown.com GmbH, 2017 E.C.J.

141. Isabella Kwai, *E.U. Says Veggie Burgers Can Keep Their Name*, N.Y. TIMES (Oct. 23, 2020), *available at* https://www.nytimes.com/2020/10/23/world/europe/eu-plant-based-labeling.html (last visited Mar. 22, 2022).

142. *Id.*

143. Eur. Parl. Doc. (A8-0198/2019) at 172, *available at* https://www.europarl.europa.eu/doceo/document/A-8-2019-0198_EN.pdf (last visited Mar. 22, 2022).

144. *Id.*

145. Iselin Gambert, *Got Mylk: The Disruptive Possibilities of Plant Milk*, 84 BROOK. L. REV. 801 (2019) *available at* https://brooklynworks.brooklaw.edu/blr/vol84/iss3/3 (last visited Mar. 22, 2022).

146. IDF Bulletin, *supra* note 117, at 30.

A PROPOSAL TO ENCOURAGE COUNTRIES TO ESCHEW RESTRICTIVE LABELING

Under international law, countries are presumptively required to follow the code as a floor and not a ceiling for food standards. If the trade agreements required countries to allow plant-based milks to compete with the dairy industry, governments and the dairy industry would be prompted to consider environmental concerns consumer have. By deemphasizing dairy, there would also be a significant shift toward more sustainable options, thus decreasing cows' hoofprints on the environment.

EXPANDING THE DEFINITION OF "MILK"

If the United Nations is committed to each of the 17 Sustainable Development Goals equally, its member countries like the United States and bodies like United Nations Environment Programme (UNEP) need to direct the World Trade Organization (WTO) and FAO to change restrictive labeling laws. Specifically, it needs to settle the debate causing the "Milk Wars." For environmental, economic, and health reasons, the Code's definition in Section 2.1 should be more inclusive to help reach the goals set by the U.N. and its bodies. An inclusive supplemental definition would read something like "beverages derived from plants or nuts which provide a significant amount of nutrition and have the texture and quality that is associated with that of the public's perception of milk." The specifics of the nutritional requirements and perceptions can be reworded as necessary, but there is room to make a definition that differentiates between juices and dairy but includes plant-milk.

The modification of the definition of milk to eliminate exclusive reference to lactation or "mammary secretions" can have a broad reach on numerous SDGs. Confining the use of the words to animal products does not protect consumers. Instead, it hurts the environment by promoting a methane intensive industry, so countries and bodies committed to the climate goals should support the natural decline of dairy and the organic increase of dairy alternatives.

DEEMPHASIZING DAIRY

The statistics about current agricultural practices and the negative impacts on climate change indicate that dairy cannot continue to carry on business as usual if the global community wants to meet the 2030 SDGs. International law should seek opportunities to limit the harmful

externalities that come from the four-legged, spotted creatures across the globe.

A SHIFT TO MITIGATE HARMS

This proposition would likely find support from UN bodies, like the United Nations Environment Program (UNEP). As explained above, the UNEP is advocating for a gradual transition away from dairy because of its impact on climate change.[147] By making regulations more attractive to the plant-based industry, international law would be facilitating this shift.

The IBIS Plant Milk report continues to cite labeling and marketing regulations as potential issues for the industry. It directly states that "[the passing of the Dairy Pride Act] could have detrimental effects on the Soy and Almond Milk Production Industry."[148] Passing and enforcing laws that are detrimental to the more sustainable industry is not in line with the UNEP's guidelines.[149] There is an inverse relationship between dairy and dairy alternatives consumption, so restrictive labeling would not encourage less consumption of dairy products which is needed to reduce GHGs.

Beyond the environmental challenges, there are other disturbing aspects of the dairy industry that could be mitigated if regulations did not favor the entrenched industry. Milk is over-produced because of the false notions of its superiority and support from governments.[150] There are more than a billion pounds of cheese in storage in the United States due to overproduction.[151] The United States government tries to deal with this surplus in ways that contribute to systemic racism, like dumping low nutritional value products on African American and Latinx communities which perpetuates health problems.[152]

CONSUMER CONFUSION AS A FACADE FOR PROTECTIONISM

147. UNEP, *supra* note16.

148. O'Connor, *supra* note 88, at 43-44.

149. UNEP, *supra* note 16

150. Kelsey Gee & Julie Wernau, *A Cheese Glut is Overtaking America*, WALL ST. J. (May 17, 2016), *available at* https://www.wsj.com/articles/a-cheese-glut-is-overtaking-america-1463477403 (last visited Mar. 22, 2022).

151. *Id.*

152. Freeman, *supra* note 21.

The restrictions discussed on the use of the word "milk" are all under the guise of consumer protection.[153] Lobbyists for the dairy industry claim that using words like "milk," cheese, and yogurt for products that are not from cows appropriates the goodwill of dairy and misleads consumers.[154] These proponents of the regulations argue that consumers are being tricked and cite nutritional deficiencies in dairy alternatives as a harm.[155] However, there is no evidence of actual confusion.

Plant and Animals Can Share the Word "Milk."

The dairy farmers' fuss suggests that the word *milk* is theirs,[156] as if a trademark or a certified mark that is an indicator of source. They claim their animosity towards the dairy alternative industry is only because dairy alternatives rip consumers off. However, the dairy alternative market uses the word "milk" not the broad concept of it. Brands actually spend a lot of money to distance the alternative product from ordinary cow milk in an attempt to add value.[157] This extra value, whether it be nutritional, ethical, or aesthetic, is why consumers are willing to pay a premium for the product.[158] This difference will ensure that appropriate qualifiers, like "non-dairy" and "plant-based" will always be used.[159] These qualifiers are enough of a hoop for the alternative sector to jump through. Traditional cow's milk does not need to label that it is animal product, but perhaps it should if the industry is worried and believes that is where the value lies. In fact, the GSUDT provides for this in Section 4.1.2 by allowing the omission of the animal only if "the consumer would not be misled by [it.]"[160] If there was confusion as the dairy industry claims, labeling it as "cow milk" would be required.

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153. IDF Bulletin, *supra* note 117.

154. *Id.*

155. *Id.*

156. Bowles, *supra* note 7.

157. *See* O'Connor, *supra* note 88, at 15, 21, 24, 29. This report cites the marketing of the product's distinct ingredients is a success factor as well as growing popularity of soy and almond milk products directly to consumers' increased concerns regarding growth hormones and antibiotics in cow's milk as well as allergy, intolerance, and genetic disorders as driving dairy alternative's demand.

158. *Id.*

159. PBFA, *Plant Based Foods Association Tells FDA that Efforts Restrict "Milk" Labeling Would be Unnecessary, Costly, and Unconstitutional* (Jan. 28, 2019), *available at* https://www.plantbasedfoods.org/plant-based-foods-association-tells-fda-that-efforts-to-restrict-milk-labeling-would-be-unnecessary-costly-and-unconstitutional/ (last visited Mar. 22, 2022).

160. GSUDT, *supra* note 116.

In the Code's "Standard for Non-Fermented Soybean Products," the term "soybean beverage" is used instead of "soymilk."[161] However, the drafters found it necessary to include a footnote to clarify that the term "soymilk" is often used.[162] Suggesting, there would be confusion if just "soybean beverage" was used. Additionally, the beverage is described as a "milky liquid" numerous times.[163]

If the word "milky" is necessary to describe the beverage, then it seems appropriate to call it as such.

DAIRY COWS DO NOT OWN THE WORD MILK.

Dictionary entries for "dairy" contain secondary and tertiary definitions including plant-based products. The Oxford Dictionary's second definition reads "the white juice of certain plants."[164] As Gambert points out, Big Ag does not own the word milk.[165] She further explains that using only the first definition of an opaque white fluid produced by female mammals is a power move over the female reproductive system.[166] There has also been U.S. jurisprudence to suggest that it could be a free speech violation.[167] Again, confusion is unlikely since plant products are a recognized meaning of the word.

PLANT-BASED PRODUCTS ARE NOT PART OF A "NEW VEGAN/LIBERAL AGENDA."

The etymology of the word for lettuce indicates that it shares a root with the Latin word for milk because of the white substance obtained from the vegetable.[168] The Latin word for lettuce is "lactuca," and the

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161. Joint FAO/WHO Food Standards Programme, CXS 1-1985, *General Standard for the Labelling of Prepackaged Foods*, at 2, *available at* http://ww.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCXS%2B1-1985%252FCXS_001e.pdf (last visited Mar. 22, 2022).

162. *Id.*

163. GSUDT, *supra* note 116, at 2.2.1.1 and 2.2.1.2 and 2.2.1.3.

164. Benjamin Kemper, *Nut Milks are Milk, Says Almost Every Culture Across the Globe*, SMITHSONIAN (Aug. 15, 2018), *available at* https://www.smithsonianmag.com/history/nut-milks-are-milk-says-almost-every-culture-across-globe-180970008/ (last visited Feb. 5, 2022); *Dairy*, OXFORD ENGLISH DICTIONARY

165. Gambert, *supra* note 145, at 811-812.

166. *Id.*

167. Kathleen Justis, *Lactose's Intolerance: The Role of Manufacturers' Rights and Commercial Free Speech in Big Dairy's Fight to Restrict Use of the Term "Milk,"* 84 BROOK. L. REV. 999, 1010 (2019).

168. *Lettuce*, ONLINE ETYMOLOGY DICTIONARY, *available at* https://www.etymonline.com/word/lettuce#etymonline_v_6713 (last visited Feb. 5, 2022).

Latin word for milk is "lactis."[169] Additionally, the translation of milk from Latin includes "milky juice of plants."[170] The English word "lactate" clearly stems from the word "lactis." Therefore, the association of the white opaque liquids from plants and mammals' breasts is not new. Excluding plant-based products from using the word "milk" because plants do not lactate does not align with the words' origins and would not prevent confusion.

Plant-based milks appear in cookbooks from thousands of years ago, establishing that plant-based milk is nothing new.[171] "Soymilk" has been used for many years, so banning the use of the terms "milk" with soy products would be disruptive. Constant rebranding and convoluted descriptions of milk products would be more likely to confuse consumers than the continued use of "soymilk."

LABELING DOES NOT CHANGE WHAT PLANT-BASED BEVERAGES ARE CALLED.

The restrictive labeling rules in the European Union show that the dairy farmers' concerns are much ado about nothing, or as Simon Lester and Inu Manak explain, "[i]t's [n]o [u]se [c]rying [o]ver [s]pelt [m]ilk."[172] Regulations restricting the use of the word "milk" to animal products in Europe have shown that the label does not really matter.[173] Supermarkets still group the alternatives with cow milk, and retailers use the word milk on price tags and websites and buy search terms using the restricted words.[174] It is unclear whether consumers have stopped noticing the difference between cow milk and plant milk or if they just do not care, but either way, consumers and retailers will still consider dairy alternatives to be "milk," even if they cannot be labeled as such.[175]

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169. *Milk*, WHITAKER'S WORDS, *available at* http://archives.nd.edu/cgi-bin/wordz.pl?english=milk (last visited Feb. 5, 2022); *see also Lettuce*, WHITAKER'S WORDS, *available at* http://archives.nd.edu/cgi-bin/wordz.pl?english=lettuce (last visited Feb. 5, 2022).

170. *Id.*

171. Kemper, *supra* note 161.

172. Simon Lester & Inu Manak, *It's No Use Crying Over Spelt Milk*, CATO AT LIBERTY: CATO INST. (Nov. 19, 2018, 3:07 PM), *available at* https://www.cato.org/blog/its-no-use-crying-over-spelt-milk (last visited Feb. 6, 2022).

173. Tom Levitt, *Dairy wars: when a glass of milk is really a glass of m*lk*, THE GUARDIAN (July 23, 2017), *available at* https://www.theguardian.com/lifeandstyle/shortcuts/2017/jul/23/dairy-milk-court-animal-plant-nut (last visited Feb. 6, 2022).

174. *Id.*

175. *Id.*

On the other hand, companies with plant-based alternative products who are trying to break into the market are negatively affected by the bans.[176] The alternative industries are further kneecapped by the fight over the word "milk."[177] Supporters of the dairy industry constantly scrutinize these companies, forcing them to litigate the legitimacy of their brand names.[178] A finance report claims that "stringent regulations imposed on the manufacturing of dairy alternatives, as they are directly consumed by consumers, are expected to be the key threat to the industry's participants."[179] The regulations include labeling and the definition of milk which is hampering plant-based growth in the EU.[180]

Accepting the fact that plant-based products do need qualifiers like "soy," "almond," "plant-based," or "oat," the industry is trying to differentiate from traditional dairy.[181] The target markets have grown accustomed to calling their favorite thing to put in cereal "soymilk." Now, companies are stuck playing linguistic gymnastics to convey what the product is. Some of the results are laughable like "pulverized almond meat" or "liquidated almond mash,"[182] but it becomes a serious game to talk about plant-based *milk*, *butter*, and *cheese* without saying the forbidden words. Therefore, it would be more confusing for consumers to find their favorite plant-based milks be re-labeled as "soy beverages," "white plant juice," or "nut spreads."

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176. O'Connor, *supra* note 88; *see also* Annisa Leialohilani & Alie De Boer, *EU Food Legislation Impacts Innovation in the Area of Plant-Based Dairy Alternatives*, TRENDS IN FOOD SCI. & TECH. 104, 264 (2020).

177. *See generally id.* A key success factor to the dairy alternative industry is its ability to establish brand names. By going after their names, dairy is directly attacking its success.

178. *See* Ang v. Whitewave Foods Co., No. 13-CV-1953, 2013 WL 6492353, at *1 (Dist. Ct. N.D. Cal. 2013); Gitson v. Trader Joe's Co., No. 13–CV–01333, 2013 WL 5513711, at *1 (Dist. Ct. N.D. Cal. 2013); Painter v. Blue Diamond Growers, No. 17-55901, 757 F. App'x. 517, at *518, *519 (9th Cir. 2018).

179. Globe NewsWire, *Global Dairy Alternatives Market Outlook to 2024: Focus on Soy, Almond, and Rice Milk Opportunities*, YAHOO! (Aug. 2, 2019), *available at* https://www.yahoo.com/now/global-dairy-alternatives-market-outlook-091519619.html (last visited Feb. 7, 2022).

180. *See* Leialohilani, *supra* note 176.

181. PBFA, *supra* note 159.

182. Mayukh Sen, *What Could We Call Plant Milks That Aren't Actually Milk?*, FOOD52 (Mar. 3, 2017), *available at* https://food52.com/blog/18813-what-could-we-call-plant-milks-that-aren-t-actually-milk (last visited Jan. 31, 2022).

CONSUMERS DO NOT NEED TO BE TOLD WHAT MILK IS

There are many inconsistencies on grocery store shelves.[183] No one believes that gummy bears are made from bear meat. If the qualifier gummy negates the need for the standard of identity for meat, then why should the words "soy" or "almond" not negate the need for milk's standard of identity? The word "bear" describes what the candy looks like. Here, the beverage looks and feels like milk, so the using the word "milk" is fitting. It also seems contradictory that there is no butter in peanut butter, but the rules banning vegan spread from using the word do not apply to JIF.[184] The FDA and other regulatory bodies are acting like consumers are stupid.[185] Honey does not come from bears, but the bottle might indicate so. And like the so-called problem here, shoefly pie contains no flies. Animal crackers contain no animals. Riced cauliflower contains no rice. Yet, these items are not likely to get a name change or repackaging.

Consumers know that almonds do not lactate.[186] If consumers do not understand the differences between almonds and cows, this signals a problem that is much deeper than standards of identities. That is "Americans are basically agriculturally illiterate."[187] In the 1990s, the Department of Agriculture conducted a study that backed this claim up. At that time, only four out of five respondents knew that hamburgers were not made from pig.[188] This does not mean the dairy industry is correct about the need for labeling. For, in the dairy industry itself there are some

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183. *See* Ellie Krieger, *How Food Companies Use Packaging to Fool You into Thinking an Item is Healthful*, WASH. POST (Oct. 23, 2019), *available at* https://www.washingtonpost.com/lifestyle/wellness/how-food-companies-use-packaging-to-fool-you-into-thinking-an-item-is-healthful/2019/10/23/40304d84-e9d4-11e9-9c6d-436a0df4f31d_story.html (last visited Jan. 31, 2022).

184. *See* Umair Irfan, *"Fake Milk": Why the Dairy Industry is Boiling Over Plant-Based Milks*, VOX (Dec. 21, 2018), *available at* https://www.vox.com/2018/8/31/17760738/almond-milk-dairy-soy-oat-labeling-fda (last visited Jan. 31, 2022).

185. *See* Cheryl Leahy, *The FDA Should Protect Consumers, Not a Dying Dairy Industry*, TRUTHOUT (Mar. 14, 2019), *available at* https://truthout.org/articles/the-fda-should-protect-consumers-not-a-dying-dairy-industry/ (last visited Jan. 31, 2022).

186. Nieves, *supra* note 128. Former FDA Head, Scott Gottlieb, had enlightened the public numerous times by declaring "an almond doesn't lactate."

187. Caitlin Dewey, *The Surprising Number of American Adults Who Think Chocolate Milk Comes from Brown Cows*, WASH. POST (June 15, 2017), *available at* https://www.washingtonpost.com/news/wonk/wp/2017/06/15/seven-percent-of-americans-think-chocolate-milk-comes-from-brown-cows-and-thats-not-even-the-scary-part/ (last visited Jan. 31, 2022).

188. Robert H. Birkenholz, *Pilot Study of Agricultural Literacy* (Dec. 1993), *available at* https://files.eric.ed.gov/fulltext/ED369890.pdf (last visited Jan. 31, 2022).

incorrect notions. For example, seven percent of adult Americans supposedly believe chocolate milk comes from brown cows.[189]

On top of that, Cheryl Leahy explains that under the dairy lobby's own definition of "lacteal secretion of a healthy hooved mammal," a lot of cow milk would not pass muster.[190] Because of the conditions that cows are often raised in, they are not considered "healthy" as required by the standard of identity.[191] "Treated as mere milk-producing machines, they regularly suffer from a number of health problems, such as painful mastitis, skin and hoof infections, diarrhea, digestive diseases and lameness."[192] These moral concerns are reasons why many choose dairy free alternatives, but they also indicate that cows supplying the milk are not "healthy hooved mammals."[193]

Although many dairy farmers and marketing schemes like to depict happy cows, that concept is a little morphed.[194] Many animal advocate groups publish pictures and videos exposing the dairy industry's harmful practices.[195] Lactation is part of the female reproductive system and is not an inherent trait of cows, as many think.[196]

Milk production is the result of being repeatedly impregnated.[197] The semen is extracted from the bull using a variety of methods, all of which are too graphic for this Note.[198] The sperm is then separated to increase the likelihood of producing female calves.[199] Next, the cows are put onto a rack that is allegedly called by some farmers, "the rape rack," where the cows are artificially inseminated, again, by methods that are

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189. Dewey, *supra* note 187. ("Seven percent of all American adults believe that chocolate milk comes from brown cows, according to a nationally representative online survey commissioned by the Innovation Center of U.S. Dairy. If you do the math, that works out to 16.4 million misinformed, milk-drinking people.").

190. Leahy, *supra* note 185.

191. *Id.*

192. *Id.*

193. O'Connor, *supra* note 86.

194. Gregory Solman, *Deutsch's "Happy Cows" Keep CMAB Content,* ADWEEK (Aug. 18, 2003), *available at* https://www.adweek.com/brand-marketing/deutschs-happy-cows-keep-cmab-content-66475/ (last visited Jan. 31, 2022); *see Happy Cows? You Decide*, PETA, *available at* https://www.peta.org/features/unhappy-cows/ (last visited Jan. 22, 2022).

195. *See Exposing the Truth. Inspiring Change*, ANIMAL OUTLOOK, *available at* https://animaloutlook.org/ (last visited Jan. 31, 2022).

196. Mackenzie L. April, *Readying the Rape Rack: Feminism and the Exploitation of Non-Human Reproductive Systems*, DISSENTING VOICES 51, 58 (Aug. 9, 2019), *available at* http://hdl.handle.net/20.500.12648/2779 (last visited Jan. 31, 2022).

197. Hayes, *supra* note 44, at 287-289.

198. *Id.*

199. *Id.*

too graphic for this Note.[200] This process is not portrayed by the cartoon cows on the carton. When consumers see the label, they are misled into thinking they are supporting a good life for animals that must be milked.

THE "GOT MILK?" AD CAMPAIGN DESCRIBES PLANT-BASED MILKS TOO

If farmers ask why plant-based alternatives insist on associating their products with milk, the answer can be found by the California Milk Processor Board's logic for the infamous "Got Milk?" campaign.[201] The board's strategy was to emphasize certain situations that required milk, not soda.[202] The creative brief said "there are times when only milk will do, when milk is irreplaceable. Running out will lead to angst, anger, and general chaos."[203] This indirectly illustrates that dairy alternatives are "milk," because unlike Snapple and Coke, they can be used as a substitute for the product advertised.[204] Dairy alternatives have the same qualities that make cow's milk the perfect complement to cookies, peanut butter, coffee, and cereal, and, therefore, wish to be called "milk." This quality would not be portrayed by words like "juice."

3. Alignment with Anti-Protectionist and Sustainability Goals

The main protectionism concerns that brought the SPS agreement to fruition regarded countries favoring domestic markets over foreign trade.[205] Labeling was often a protectionist trade barrier that countries tried to disguise as a sanitary measure.[206] The SPS agreements requirements for higher standards seek to prevent this protectionism. Therefore, labeling laws that seek to prevent competition rather than prevent inferior food should be a clear violation.

The restrictive definition of milk is a labeling law that seeks to prevent competition. By prohibiting the use of the words "milk" or "cheese" with plant-based dairy alternatives, the FAO is allowing protectionism. Instead of protecting the domestic sellers, it protects the entire domestic dairy industry of that country against rising competitive markets. Proponents of a narrow definition will try to disguise this labeling law as a sanitary measure, claiming animal-based milks have

200. April, *supra* note 196; Hayes, *supra* note 44, at 288.

201. *See* Manning, *supra* note 8, at 39.

202. *Id.*

203. *Id.* at 40.

204. *Id.* at 30.

205. David Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT'L L. & POL. 865 (2000).

206. *Id.*

greater health benefits. However, even if it was clearly proven that cow's milk was more nutritional than plant-based alternatives, precluding the use of the word "milk" with qualifiers goes beyond the need to protect health, and other measures could be taken that do not restrict trade like requiring appropriate disclaimers.

Article 3.1 of the SPS Agreement encourages states to adopt measures based on international standards.[207] As mentioned, the Code, the FAO's international food standards does provide an exemption for non-milk that is clearly marked.[208] Although this exemption should just be part of the definition and its application is questionable, it shows that banning the use of the words on all non-animal products is not in line with international standards. Therefore, restrictive labeling should also be a violation of article 3.1.

This violation would be much clearer if the Code was revised to include plant-based alternatives in the definition, rather than being an exception to the prohibition. In addition to the SPS agreement, there is also the WTO's Technical Barriers to Trade (TBT) agreement.[209] The principle of this agreement is that a barrier to trade should only be used for legitimate objectives not to protect certain markets.[210]

In the 1990s, the WTO panel was faced with controversy over the European Union's ban on hormone treated meats.[211] It was well-known that these measures were based on European opinions and masked as sanitary and phytosanitary concerns.[212] The United States challenged this ban because of an estimated loss of over $200 million, claiming it violated GATT, SPS, TBT, and Agreement on Agriculture agreements.[213]

The WTO panel agreed with the United States that the ban violated the SPS agreement.[214] The European Union appealed this ruling and was given time to conduct a risk-assessment of the disputed hormone-treated meat.[215] Refusing to lift the ban, the United States put tariffs and trade

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207. Agreement on the Application of Sanitary and Phytosanitary Measures, GATT B.I.S.D., art. 3.1 (1995).

208. GSUDT, *supra* note 116, at 178.

209. Codex and the International Food Trade, *supra* note 114.

210. *Id.*

211. Lisa K. Seilheimer, *The SPS Agreements Applied: The WTO Hormone Beef Case*, 4 ENV'T.
L. 537 (1998).

212. *Id.*

213. *Id.*

214. Seilheimer, *supra* note 211.

215. *Id.*

sanctions on Europe.[216] In 2008, the WTO panel reversed its decision because of the scientific studies.[217]

Here, plant-based milk is not like hormone-treated meat. The health risks that are still questioned under the European Union studies were not merely about nutritional value.[218] Instead, the studies purported that the hormones were carcinogenic or could be carcinogenic.[219] The data regarding plant-based milk does not suggest that dairy alternatives put consumers at risk if consumed.[220] The risk would only be in comparison to other products that are healthier than the alternatives. If this is a risk that is scientifically justified for, then chocolate milk should not be allowed the title of "milk" as the added sugars negate the high protein.[221] Nevertheless, there is no inherent health risk.[222] Many dairy alternatives are fortified and will be properly labeled to show that.[223] Additionally, many dairy alternatives have health benefits that are superior to milk.[224] Therefore, this is an opportunity for anti-protectionist policies to embrace sustainability initiatives.

PROBLEMS WITH OTHER STRATEGIES

This note only explores the regulatory aspect of labeling dairy alternatives. As mentioned in the beginning, many activists would like to see dairy die, but there are currently far too many cows to put out to pasture. To promote all SDGs, the transition needs to be natural and gradual. In a free market global economy, people should have the choice. That is why this note promotes only letting some safeguards to the dairy industry down. With easier access to dairy-free alternatives, more people can afford to try and switch to plant-based products, thereby, decreasing the dairy industry's footprint.[225]

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216. *Id.*

217. Seilheimer, *supra* note 211.

218. *Id.*

219. *Id.*

220. Angelica Sousa & Katrin A. Kopf-Bolanz, *Nutritional Implications of Increasing Consumption of Non-Dairy Plant-Based Beverages Instead of Cow's Milk in Switzerland*, 5:4 J. ADV. DAIRY RES. 1, 6 (Nov. 29, 2017).

221. *Get the Facts: Types of Milk Explained*, MILK LIFE, *available at* https://gonnaneedmilk.com/articles/types-of-milk-explained (last visited Feb. 4, 2022).

222. Parrish, *supra* note 65.

223. *Id.*

224. Sanae Ferreira, *Going Nuts About Milk? Here's What You Need To Know About Plant-Based Milk Alternatives*, AM. SOC'Y FOR NUTRITION (Jan. 25. 2019), *available at* https://nutrition.org/going-nuts-about-milk-heres-what-you-need-to-know-about-plant-based-milk-alternatives/ (last visited Feb. 4, 2022).

225. UNEP, *supra* note 16.

Despite Innovations, It is Still Difficult to Control Methane.

There are numerous technologies that can substantially decrease the amount of methane that is released when cows and other livestock relieve gas.[226] Scientists have spent years developing cures for livestock's gas problem.[227] An Australian startup, Sea Forest, has been cultivating seaweed with bromoform to block the gut's methane-producing enzymes.[228] New Zealand dairy giant, Fonterra, is testing the effect on methane emissions.[229] Another study that is still awaiting publishing suggests that 0.5% seaweed diet has potential to reduce methane emissions by 80%.[230] Other alterations to feedstock include garlic, lemon grass, bovaer, and flaxseed.[231] A Penn State Dairy fed a cow oregano; this method cut methane emissions and boosted milk production essentially debunking any worries about negatively affecting supply.[232]

In addition to altering livestock's diets, there are efforts to capture the gas and use it as energy.[233] Countries like Argentina are experimenting with cow backpacks, accessories the cows can wear to trap the methane, and companies like Cargill are putting manure in domes to collect the gas.[234] Beyond the capture method, breeding strategies can influence the genetics that affect gaseousness.[235] Although much more research is required, there are promising efforts in the works that merit policy-makers' attentions to at least attempt to achieve climate goals.[236]

However, the dairy industry is justifiably reluctant to jump on these solutions due to the potential drawbacks.[237] The solutions that require the alteration of feedstock can be pricey and time consuming, but worst of all can alter the taste of milk.[238] Other methods do not affect taste but can skew the production of milk downward.[239] However, this problem can

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226. *See* Plumer, *supra* note 35.

227. Jon Emont, *Cows Make Climate Change Worse. Could Seaweed Help?* WALL STREET J. (Oct. 31, 2020, 10:00 AM), *available at* https://www.wsj.com/articles/cows-make-climate-change-worse-could-seaweed-help-11604152802 (last visited Feb. 4, 2022).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Hayes, *supra* note 44 at 35.

233. Plumer, *supra* note 35.

234. Plumer, *supra* note 35.

235. Plumer, *supra* note 35.

236. Plumer, *supra* note 35.

237. Emont, *supra* note 227.

238. Emont, *supra* note 227.

239. Emont, *supra* note 227.

be adjusted for with proper compensation by governments. Milk is already overproduced because of government guarantees to buy up surpluses.[240] If farmers were compensated to under produce instead, farmers would be more willing to try new things and break even, solving the methane and overproduction problems. This would require a multi-step approach by governments, likely proving to be more difficult.

Subsidy Reductions Proposals Are Usually Stuck Down.

It is important to note that many argue that the dairy alternative industry is not what is hurting the traditional dairy sector or encouraging environmental degradation.[241] Instead, it is the ineffective subsidies that allow dairy farmers to overproduce, or EPA regulations that make farms unprofitable.[242]

In New Zealand, agricultural subsidies were canceled, but this might be considered unfeasible in most nations.[243] Although this seemed like it would be devastating to New Zealand dairy farms, the dairy industry came back stronger in the long run.[244] Economists and activists now use New Zealand as an example they wish Europe, and the United States would follow. A New York Times article explains "[subsidies] generally encourage inefficient farmers to grow unprofitable crops far beyond what consumers actually need, secure in the knowledge that the government will help protect them from loss."[245] A New York Times article explains " [subsidies] generally encourage inefficient farmers to grow unprofitable crops far beyond what consumers actually need, secure in the knowledge that the government will help protect them from loss."[246] By cutting subsidies altogether, agriculture struggled at first, but it now relies on science to be more efficient.[247] The dairy farmers are also more

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240. FAO, Dairy Market Review, *Price and Policy Update*, July 2020. CB0408EN/1/07.20

241. Chase Purdy, *Plant-Based Milks Aren't the Reason US Dairies Are Struggling*, QUARTZ (Dec. 21, 2019), *available at* https://qz.com/1772981/dairy-farmers-arent-that-nervous-about-plant-based-milk/ (last visited Feb. 6, 2022); Danielle Wiener-Bronner, *America's Milk Industry is Struggling. Don't Blame Oat Milk*, CNN BUSINESS (Nov. 21, 2019), *available at* https://www.cnn.com/2019/11/21/business/milk-industry-dean-foods/index.html (last visited Feb. 6, 2022)

242. Julie Murphee, *EPA Permitting Could Be the Straw the Breaks the Dairy Cow's Back*, ARIZONA FARM BUREAU

243. Wayne Arnold, *Surviving Without Subsidies*, N.Y. TIMES (Aug. 2, 2007), *available at* https://www.nytimes.com/2007/08/02/business/worldbusiness/02farm.html (last visited Feb. 7, 2022).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

responsive to shifting demand and determine quantities of cow breeds based on that knowledge.[248]

Dairy programs in the United States cost taxpayers over $200 million annually.[249] Because of this economic intervention by the government, the United States butter prices are twice as much as in the rest of the world.[250] Cheese and dry milk prices are also higher.[251] There have been proposals to cut down government subsidies in the United States, but they usually do not make it out of committee.[252] The supply management prong of the program has also caused over production.[253] The debate over milk support programs is not new. Ronald Reagan set off the battle in the 1980s by not increasing the price support program.[254] An article from 1981, *The Great Dairy Wars Begin,* notes that the dairy lobby spent more than $1.2 million on candidates.[255] This number has only grown since then.

Other proponents have proposed government programs to transition struggling farms to more sustainable crops with higher demands.[256] As Gene Baur has claimed multiple times, "the best way to help dairy farmers is to get them out of dairy farming." [257] Dairy farms can transition to producing other food sources that have a better impact on environmental and consumer health.

Elmhurst Dairy was a multigenerational dairy farm in New York that was once booming.[258] When demand for dairy declined the farm faced

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248. *See Id.*

249. Laurel Kays, *The Steep Cost of US Dairy Programs,* AMERICANS FOR TAX REFORM, (Aug 14, 2012).

250. *Id.*

251. *Id.*

252. Cato Institute, *Reforming Federal Farm Policies*, TAX AND BUDGET BULLETIN, at 82, *available at* https://www.cato.org/tax-budget-bulletin/reforming-federal-farm-policies (last visited Mar. 22, 2022).

253. *See* Press Release, Congressman Bob Goodlatte and Congressman David Scott, *Goodlatte and Scott Statement on Dairy Amendment Vote* (May 15, 2013); *Price Fixing Milk*, IDFA (Oct. 16, 2013), *available at* https://www.idfa.org/news/price-fixing-milk (last visited Feb. 7, 2022).

254. Robert G. Kaiser, *The Great Dairy Wars Begin*, WASH. POST (Feb. 14, 1981), *available at* https://www.washingtonpost.com/archive/politics/1981/02/14/the-great-dairy-wars-begin/4d0f8124-f87f-4c0a-ace7-1b1201008d1d/ (last visited Feb. 7, 2022).

255. *Id.*

256. Baur, *supra* note 22.

257. Gene Baur, *America's Failing Dairy Farms*, N.Y. TIMES (May. 3, 2019), *available at* https://www.nytimes.com/2019/05/03/opinion/letters/dairy-farms-milk-overproduction.html (last visited Feb. 7, 2022); Baur, *supra* note 22.

258. *See* Lanna Garfield, *A Major Dairy Producer Collapsed—now It's Making Nut Milks and Business is Booming*, BUSINESS INSIDER (Apr. 22, 2017), *available at*

the economic hardships that many others are still feeling, Elmhurst decided to close and reinvest.[259] The family reopened its business, focusing on plant-based products instead of dairy.[260] Since then, Elmhurst has enjoyed much success and can be a model to revitalize the sector to match market trends. The CEO says, "it's about transforming with the times."[261] However, not all small farms have the capital to drop what they have done for generations and regroup.

Given the entrenched interests of dairy farmers in every state and country across the globe and the sheer magnitude of the subsidies and the planning need to transition, it would be very difficult for these ideas to gain enough traction and be implemented without causing more harm than good. This is why competition from the plant-based milk market would be a more effective solution at this time.

Conclusion

Dairy does not need to die to reduce the effects of GHGs. However, it cannot continue to bully its way to dominance. Plant and nut-based beverages may be called "fake milk," but the industry cannot call the environmental impacts of dairy "fake news." Consumers should be free to make the choice to consume or not consume dairy and animal products. Part of this choice requires giving brands access to the market.

In order to meet the Sustainable Development Goals by 2030, the United Nations must act to market plant-based products and make them available to those who want to buy them without interference from the dairy industry. This marketing should include the use of words commonly associated with the products like "milk" and "cheese." Both the environment and people with dietary restrictions benefit from looser standards in regulations.

Despite its flaws, dairy is here to stay. The entire planet is not quite ready to adopt a vegan lifestyle. There are some recipes that grandma would never dare make with milk from a nut or cheese made with soy, and there are far too many cows to let wander the countries. Allowing fair competition to the dairy industry is a great first step to making dairy more sustainable and providing the public with a fair choice.

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https://www.businessinsider.com/dairy-farm-nut-milks-elmhurst-2017-4 (last visited Feb. 7, 2022).

259. Elmhurst 1925, *Our Story*, *available at* https://elmhurst1925.com/pages/our-story (last visited Feb. 7, 2022).

260. Garfield, *supra* note 258.

261. *Id.*

PRIVATE INTERNATIONAL LAW: AN INTRODUCTION FROM AN AMERICAN PERSPECTIVE

David P. Stewart and Andrew Feinstein[1]

Students in U.S. law schools are seldom introduced to the field of "private international law" – unlike many of their foreign counterparts, for whom it is often a required course of study. Yet it is an increasingly relevant and important area of law, one that U.S. practitioners are likely to encounter in a surprisingly wide range of contexts. Without an appreciation of its breadth, substance, and techniques, they may well find themselves at a disadvantage in dealing with foreign lawyers well-versed in the subject. This article provides an overview of the field of private international law (or "PIL") broadly conceived – what it encompasses, where it is developed, the areas where it is likely to be relevant, and the mechanisms and techniques it offers for resolving problems. The aim is to equip practitioners and students alike with a basic appreciation of its scope, sources, and principles so they can function effectively in an increasingly transnational legal environment.

By way of introduction, imagine that you are counsel to a U.S. manufacturer that has discovered a new way to make its products more cheaply and efficiently by using materials or components found only in a foreign country. The client has asked you to make the necessary legal arrangements for buying, transporting, and paying for those materials. You are unfamiliar with the foreign legal system (to say nothing of its business, banking, or trade practices) but understand they are all quite different from those in the United States, so the supplier (and its counsel) will likely not have the same understanding of (or expectations for) the necessary legal arrangements, beginning with the sales contract and

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arrangements for transportation and payment. Are there any relevant international agreements or mechanisms for bridging these differences? Which country's rules, if any, might apply in the drafting process? Also, in the event of disputes regarding interpretation or performance of the contract, where (and how) might they be resolved and what law might apply? May the contracting parties decide those issues for themselves?

Or consider this: your client is a party to a divorce proceeding involving the negotiation of a joint custody agreement for the couple's minor children, with provisions for the payment of child support. The other parent is a citizen of, and has recently returned to, a foreign country. Both parents expect that the children will spend some time with each. If the court grants your client primary custody of either or both of the children, will the courts in the other country recognize and give effect to such an order? If the other party were to obtain a contrary order from those foreign courts, would the U.S. court be bound (or likely) to respect it? What if the other party fails to make agreed payments for child support? Are there any relevant international agreements?

Finally, suppose a U.S. company retains you to file suit against a foreign company over a dispute arising from a business transaction that occurred in the United States. Assuming for the moment that the relevant U.S. court would have jurisdiction over the dispute and the foreign company, how might you serve process on the foreign company in its own country? Would service by normal U.S. methods be effective or acceptable? What obstacles might you encounter in seeking discovery of relevant records and evidence from that defendant? Would it be possible to take the defendant's deposition in the foreign country? What if the defendant files a "counter-suit" in its courts? If you prevail in the U.S. litigation, would the judgment be enforceable in that country (or vice-versa)? Are there better alternatives to seeking a judicial resolution in domestic court?

As the world has become more interconnected, and cross-border activity more common, such questions arise with increasing frequency. Where and how they can be resolved lies at the heart of PIL. For many lawyers, particularly in civil law systems, the term "private international law" is often understood to refer rather narrowly to the application by domestic courts of their national "conflicts of law" principles to determine what law applies in the context of cross-border transactions between private parties.[2] In each of the examples above, therefore, the

2. We use the term "conflicts of law" to denote the problem faced by a court in determining which rules of law apply to a particular question when the issue has relevant connections to more than one legal system. It is typically a matter of the law of the forum. By

answers would be derived – at least in the first instance – from the law of the jurisdiction in which the disputes are presented for resolution.

A somewhat broader view includes (beyond the issues of applicable law) the rules of domestic law that determine, in cases with significant international connections, which court will have jurisdiction to address the dispute and where its eventual judgment might (or might not) be recognized and enforced. Those issues are complementary and commonly designated as "conflicts of jurisdiction." In the contemporary context, PIL also embraces efforts to *harmonize* substantive law norms in such "transnational" areas as commercial transactions and family law in order to minimize conflicts.

We take an even more expansive view of the scope of PIL. In our eyes, the field is better conceived as encompassing (in addition to conflicts of law, jurisdiction and enforcement of judgments, and substantive harmonization) both international "judicial assistance" in procedural matters and alternative methods of dispute settlement (such as arbitration, conciliation, and mediation) when used in the international context.

With this perspective, our intention is to introduce students and practitioners to the primary questions addressed by private international law, the international fora in which they are considered, and the main instruments that have been adopted to address them.[3] Our approach is both topographical (that is, intended to sketch the field in broad strokes) and practice-oriented (rather than doctrinal); the aim is to provide an introductory survey rather than a detailed analysis. It undoubtedly offers a distinctly American perspective – one that reflects common-law approaches and conceives of the field more broadly than many trained in civil law systems would embrace. We certainly do not claim to offer a comprehensive overview. However, we have included a number of references to non-U.S. (as well as scholarly) sources for more in-depth information.

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distinction, the term "choice of law" refers to the parties' exercise of "autonomy" in selecting which law should apply to the transaction in question (paradigmatically, in a commercial contract). The term "choice of court" refers to the parties' (typically contractual) agreement on a particular domestic court for the resolution of disputes arising from the transaction.

3. PIL is rarely taught as a discrete course in U.S. law schools. Courses in "conflicts of law" are common although typically focused on the particular U.S. context (where the main issue is the application of the law of differing U.S. states). A recent and somewhat broader treatment is provided in PETER HAY, PATRICK J. BORCHERS & RICHARD D. FREER, CONFLICT OF LAWS, PRIVATE INTERNATIONAL LAW, CASES AND MATERIALS (16th ed. 2021); *see also* GILLES CUNIBERTI, CONFLICT OF LAWS, A COMPARATIVE APPROACH: TEXT AND CASES (2nd ed. 2022).

After introducing the field in general terms, and the various international fora in which it is developed, we turn to some of the "core issues" that it engages, particularly conflicts of law, choice of forum, and dispute settlement mechanisms. We then discuss, in slightly greater detail, two areas of particular interest: international judicial assistance and international family law, after which we survey a broad (but hardly exhaustive) range of areas where PIL issues and instruments are implicated. Following a short overview of the particular challenges to U.S. participation in many of these projects posed by the structure of the U.S. legal system, we offer some concluding observations.

I. WHAT IS PRIVATE INTERNATIONAL LAW?

Despite its increasing relevance, PIL remains in some respects a loosely defined concept. At the most general level, the term covers legal issues arising between private parties in a transnational or cross-border context – that is, where one or more significant foreign elements[4] are present so that the law of more than one domestic (or national) legal system is implicated.[5] In this view, the main question for a court is "what law applies to this situation?" As suggested in our opening examples, whether the issue is one of substantive or procedural law, the first reference will be to the law of the jurisdiction deciding the issue.

It might be, of course, that the "conflicts" rules of that jurisdiction will direct the court to look to and apply a relevant foreign law.[6] It could also be the case that the parties to a private cross-border transaction have agreed on which law will govern; if so, the question would be whether their "choice of law" is valid and enforceable in the jurisdiction considering the dispute. Are there "mandatory rules" of domestic law that apply no matter what the private parties have agreed (or that prevent application of the rules they have chosen)? A separate but related inquiry concerns how the content and meaning of foreign law is determined and applied in the host jurisdiction.

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4. What a "significant foreign element" is may vary depending on the issue in question. It might be, for instance, that some of the relevant acts or consequences took place in different jurisdictions. Or, as another example, it might be where two parties are of different nationalities.

5. *See generally* CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW (Paul Torremans et al. eds., 15th ed. 2017); BLURRY BOUNDARIES OF PUBLIC AND PRIVATE INTERNATIONAL LAW: TOWARDS CONVERGENCE OR DIVERGENT STILL? (Poomintr Sooksripaisarnkit and Dharmita Prasad eds., 2022).

6. In some situations, the "conflicts" rules of the second jurisdiction may refer the court back to its own law, in a process known as "renvoi."

Obviously, this dimension of PIL is most likely to be encountered in the context of litigation in domestic courts. Other PIL issues that may arise in the course of transnational litigation include party autonomy to choose a particular forum for dispute resolution, the rules for cross-border service of process and discovery of evidence, and the enforcement of judgments rendered by foreign courts. Often those who see PIL from this perspective will pay particular attention to the various "international judicial assistance" agreements designed with these issues in mind (such as those involving service of legal process and obtaining evidence abroad, legalization of documents by use of an "apostille," and enforcement of judgments).[7] Closely related to this dimension are the various agreed mechanisms for international dispute settlement outside of litigation in domestic courts, including international mediation, conciliation and arbitration.

Another way of viewing the field of PIL is to look to the substantive rules that have been developed (regionally and at the international level) in specific areas, to reduce or eliminate the consequences of "conflicts." Examples of efforts to "harmonize" or "unify" the relevant rules can be found in the fields of cross-border commercial transactions, international family law, trans-border bankruptcy and (increasingly) e-commerce, cross-border data transfer and data protection, and privacy.

The field of PIL can also be approached by considering the agendas of the various international institutions dedicated to creating or refining relevant rules and instruments. These include (among others) the Hague Conference on Private International Law ("HCCH"), the UN Commission on International Trade Law ("UNCITRAL"), the International Institute for the Unification of Private Law ("UNIDROIT"), and various components or activities of such regional organizations as the European Union, the Organization of American States, the African Union, and the Asia Pacific Economic Cooperation (APEC).[8] In different areas and in different ways, these organizations work on creating harmonized rules, recommended principles, or model laws in order to facilitate private cross-border activity.

From this brief overview it should be evident that the substance of PIL is expressed in a variety of different legal instruments. It is of course

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7. For an overview of the issues arising under these instruments in litigation in domestic courts, *see* DAVID P. STEWART & DAVID W. BOWKER, RISTAU'S INTERNATIONAL JUDICIAL ASSISTANCE: A PRACTITIONER'S GUIDE TO INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION (2d ed. 2021).

8. Citations to the websites and documents of these organizations are provided *infra* where they are discussed in more detail.

found in domestic legislation. In jurisdictions grounded in the civil law tradition, the rules are most likely to be codified,[9] while in common law systems they are more often a matter of decisional law (that is, expressed as principles applied by courts) although some statutory incorporation is not uncommon. In either case, the first reference for lawyers involved in a cross-border transaction or dispute will be the law of their own jurisdictions to determine whether any mandatory requirements apply.[10]

While bilateral agreements between States on private international law issues are not unusual, the number of multilateral PIL treaties and conventions (both regional and global) continues to grow. Some may find it odd that treaties would be involved in articulating rules and procedures applicable to "private" transactions, since (as agreements between States) treaties are, by definition, a matter of *public* international law.[11] As cross-border issues grow in importance, however, regional, and international harmonization of the rules concerning private transactions and dispute settlement makes it easier for individuals and business entities to interact with each other across borders. At the same time, the progressive elaboration of PIL norms today often takes the form of so-called "soft law" norms and principles.[12]

For many academics, these disparate efforts and instruments occasion lively debate over the nature and fundamental objectives of PIL. What is the essential purpose of PIL? Is it to promote methodological

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9. *See, e.g.*, Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] Dec. 18, 1987, BBl 1988 I 5, (amended 2017) (Switz.); Loi du 16 juillet 2004 portant le Code de droit international privé [Law establishing the Code of Private International Law] Jul. 27, 2004, MONITEUR BELGE [M.B.] [OFFICIAL GAZETTE OF BELGIUM], July 27, 2004, 57344, as amended; Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun [MÖHUK] [Code on Private International and International Civil Procedure Law] Nov. 27, 2007, Act No. 5718 (Turk.).

10. For this reason, some commentators differentiate between "private international law" (referring to domestic law relevant to the particular cross-border transaction or dispute) and "international private law" (meaning applicable international treaties, principles, and practices). We find the distinction both uninformative and limiting.

11. As Alex Mills observed in THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 11 (2009), "private international law is best understood as 'public' in character, and . . . the appropriate perspective for its analysis is systemic." He noted that PIL was historically conceived as a part of an international system of natural law and re-conceptualized over time as autonomous national law, but should today be viewed as "a mutually constitutive international system of secondary norms, serving a public constitutional function." *Id.* at 309.

12. Agreements, declarations and other statements that are not legally binding are sometimes referred to as "soft law." *See generally* Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. OF LEGAL ANALYSIS 171 (2010).

clarity to domestic courts, in order to foster predictability in how similar cases are decided in different legal systems? To promote uniform and consistent results in different legal systems or to provide certainty to transacting parties and efficiency for litigants? To ensure fair and objective treatment or "just outcomes" (recognizing that what may be seen as justice in one system might not be seen that way in every system)? To promote communal values, to "unify" the law through harmonization and the eventual standardization of rules on a global basis, to achieve some form of "regulated transnationalism"?[13] Or to facilitate trade and commerce and thereby advance economic growth and prosperity? It is precisely this diversity of approaches and perspectives that makes the field dynamic.[14]

II. WHERE IS PRIVATE INTERNATIONAL LAW DEVELOPED?

In most instances, as noted *supra*, a practitioner's first resort (in looking for the PIL rules or principles applicable to a given issue or transaction) will necessarily be to the relevant domestic law on one's own jurisdiction. Many domestic systems have codified the relevant rules in discrete parts of their domestic laws.[15]

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13. "The evolution of private international law has always involved the reconciliation of the competing interests of internationalism, consistency and predictability, on the one hand, with those of national sovereignty and comity on the other." Justice Paul Le Gay Brereton, *Conclusion*, *in* COMMERCIAL ISSUES IN PRIVATE INTERNATIONAL LAW: A COMMON LAW PERSPECTIVE 326 (Michael Douglas, Vivienne Bath, Mary Keyes & Andrew Dickinson eds., 2019). Some describe the objective in even broader terms: for example, "to remove outdated and parochial obstacles to productive, positive global transnational activity, and to protect weaker parties and vital public interests, including common goods – and so to play its part in building a sustainable future for humanity and for the planet." Hans Van Loon, *The Global Horizon of Private International Law*, 380 RECUEIL DES COURS 108 (2015).

14. *See generally* PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019); Symeon C. Symeonides, *Private International Law: Idealism, Pragmatism, Eclecticism. General Course on Private International Law*, 384 RECUEIL DES COURS (2016).

15. Many country-specific analyses are available: *see, e.g.*, XIAOHONG LIU, ZHENGYI ZHANG, ET AL., CHINESE PRIVATE INTERNATIONAL LAW (2021); ADRIANA DREYZIN DE KLOR, PRIVATE INTERNATIONAL LAW IN ARGENTINA (2021); KAZUAKI NISJOKA, YUKO NISHITANI, ET AL., JAPANESE PRIVATE INTERNATIONAL LAW (2021); STELLINA JOLLY, SALONI KHANDERIA, ET AL., INDIAN PRIVATE INTERNATIONAL LAW (2021); STEPHANE-LAUREN TEXTIER, DROIT INTERNATIONAL PRIVÉ LEXIFICHE: RÈGLES GÉNÉRALES (2021); CHUKWUMA OKOLI, RICHARD OPPONG, ET AL., PRIVATE INTERNATIONAL LAW IN NIGERIA (2021). *See generally* A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW (Paul Beaumont & Jayne Holliday eds., 2022).

At the same time, it is important to understand that private international law also develops at the regional and global levels, in different fora and locations. One way of introducing the field is briefly to survey the main international bodies that contribute significantly to the development of PIL instruments.

A. The Hague Conference on Private International Law

One central venue for the development of private international law is the Hague Conference on Private International Law ("HCCH"). While its activities date back to 1893, in 1955 it became a permanent intergovernmental organization. Its mandate, as expressed in Article 1 of its Statute, is "to work for the progressive unification of the rules of private international law."[16] Its reach is increasingly global. The current HCCH membership includes 90 States and one "regional economic integration organization" (the European Union as an entity separate from its members); in addition, 65 non-member States are either signatories or contracting parties to at least one Hague convention.[17]

The Permanent Bureau is the main driver of the Conference's day-to-day activities. Its primary function is to organize and run plenary sessions, which occur every four years. Permanent Bureau staff perform research relevant to Conference activities, provide advice and training, and maintain contacts with experts, various organs within member States, and other international organizations.

While formal instruments such as conventions are drafted and adopted by States, the Permanent Bureau convokes and supports the negotiation of such instruments. All HCCH conventions are designed with the aim of achieving what the organization sees as its ultimate goal: "a world in which, despite the differences between legal systems, persons – individuals as well as companies – can enjoy a high degree of legal security."[18]

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16. Statute of the HCCH art. 1, Oct. 31, 1951, 220 U.N.T.S. 121; *see generally* A COMMITMENT TO PRIV. INT'L LAW (Permanent Bureau of the HCCH eds., 2013).

17. At the time of writing, El Salvador was the latest country to become a member of the HCCH, doing so on March 2, 2022. For the current list of parties, see *Status Table – Statute of the Hague Conference on Private International Law*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=29 (last visited Apr. 11, 2022). For the list of non-States Parties that have signed or ratified one of the HCCH's conventions, see *Other Connected Parties*, HCCH, *available at* https://www.hcch.net/en/states/other-connected-parties (last visited Apr. 11, 2022).

18. *See About HCCH*, HCCH, *available at* https://www.hcch.net/en/about (last visited Apr. 10, 2022).

Between 1951 and 2008, the Conference adopted 38 treaties; since then, two more have been added. The most-widely ratified Hague conventions involve legalization of foreign public documents through the use of "apostilles,"[19] the rules and methods for cross-border service of legal process,[20] and the mechanisms for obtaining evidence from abroad.[21] Most recently, the Conference adopted a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[22] Other important Hague instruments concern access to justice, international child abduction, intercountry adoption, conflicts of laws relating to the form of testamentary dispositions, enforcement of maintenance obligations, and reciprocal recognition of divorces.[23]

The HCCH is also working, inter alia, on instruments concerning the protection of international tourists and visitors, the cross-border recognition and enforcement of agreements in family matters involving children, the legal parentage of children and surrogacy, and the recognition and enforcement of foreign civil protection orders. Of particular relevance to the international litigating community is the recently undertaken project on the jurisdiction of domestic courts in transnational civil or commercial disputes.[24]

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19. *See* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189 [hereinafter "Apostille Convention"].

20. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter "Hague Service Convention"].

21. *See* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter "Hague Evidence Convention"].

22. *See* Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (last visited Apr. 10, 2022) (not yet entered into force) [hereinafter "Hague Judgments Convention"].

23. Typically, the entry in force of a convention is subject to a minimum number of parties; as a result, it is not unusual for conventions to enter into force some years after negotiations have been completed and the text agreed. *See generally HCCH Conventions: Signatures, Ratifications, Approvals and Accessions*, HCCH, *available at* https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf (last visited Apr. 10, 2022).

24. *See Jurisdiction Project*, HCCH, *available at* https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project (last visited Apr. 10, 2022). *Cf.* MILANA KARAYANIDI & PAUL BEAUMONT, RETHINKING JUDICIAL JURISDICTION IN PRIVATE INTERNATIONAL LAW: PARTY AUTONOMY, CATEGORICAL EQUALITY AND SOVEREIGNTY (2021).

B. The United Nations Commission on International Trade Law

The UN General Assembly ("UNGA") established the UN Commission on International Trade Law ("UNCITRAL") in 1966 for "the promotion of the progressive harmonization and unification of the law of international trade."[25] Since then, UNCITRAL has served as the core legal body within the United Nations in the field (broadly conceived). Half of its members are elected by the General Assembly every three years. At its seventy-sixth session, in December 2021, UNGA voted to increase UNCITRAL's membership from sixty to seventy countries; five of the new members were elected at that session, and the remaining five will be elected during UNGA's seventy-ninth session in 2025.[26]

UNCITRAL's main activity is to prepare (and promote the adoption and use of) legislative and non-legislative instruments related to key parts of commercial law. Its substantive focus has largely been on dispute resolution, international contract practices, transport, insolvency, e-commerce, international payments, secured transactions, procurement, and the sale of goods. While over time it has developed other instruments (such as model laws and legislative guides), some of its most important PIL instruments have been multilateral conventions in areas where a high degree of harmonization is required. Two widely adopted examples are the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[27] and the 1980 UN Convention on the International Sale of Goods ("CISG").[28]

The main areas of UNCITRAL's current focus are Micro, Small, and Medium Enterprises (Working Group I); Arbitration and Conciliation/Dispute Settlement (Working Group II); Investor-State Dispute Settlement Reform (Working Group III); Electronic Commerce (Working Group IV); and Insolvency Law (Working Group V).[29] Working Group VI's work on the Judicial Sale of Ships concluded in

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25. G.A. Res. 2205 (XXI), at art. I (Dec. 17, 1966). *See generally* UNICITRAL, *available at* www.uncitral.org (last visited May 25, 2021).

26. G.A. Res. 76/109 (Dec. 9, 2021). The ten new memberships are equally distributed among world regions: two each from African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States, and Western European and Other States.

27. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter "New York Convention"].

28. UN Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter "CISG"].

29. *Working Groups*, UNCITRAL, *available at* https://uncitral.un.org/en/working_groups (last visited Aug. 4, 2022).

February 2022, when it submitted a revised Draft Convention on the Judicial Sale of Ships to the UNCITRAL membership for consideration;[30] in November 2022, it will turn its attention to negotiable multimodal transport documents.[31]

At UNCITRAL's fifty-fifth session, which ended in July 2022, the body approved the Draft Convention on the Judicial Sale of Ships, sending the document to UNGA for consideration and recommending its adoption.[32] At the same session, UNCITRAL also adopted Working Group IV's Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services. [33]

In addition to its working groups and their activities, UNCITRAL also maintains the "Case Law on UNCITRAL Texts" ("CLOUT") system, which offers a database of relevant court decisions and arbitral awards from around the world.[34] The goal is to help a court in any given jurisdiction arrive at a uniform interpretation of an UNCITRAL instrument; if courts in different jurisdictions were to decide similar cases differently, the outcome would be less certainty for private parties. Most of the cases reported in CLOUT are related to the Convention on the International Sale of Goods and the Model Law on International Commercial Arbitration.

C. The International Institute for the Unification of Private Law

The International Institute for the Unification of Private Law ("UNIDROIT"), headquartered in Rome, is an independent intergovernmental institution devoted to studying the needs and methods for modernizing, harmonizing, and coordinating private law – particularly commercial law. Founded in 1926 as an auxiliary organ of

30. *See* U.N. Comm'n. On Int'l Trade L., Report of Working Group VI (Judicial Sale of Ships) on the work of its fortieth session (New York, 7–11 February 2022), ¶ 10, U.N. Doc A/CN.9/1095 (Feb. 12, 2022); U.N. Comm'n. On Int'l Trade L., Draft convention on the international effects of judicial sales of ships, U.N. Doc A/CN.9/1108 (Mar. 4, 2022).

31. *See Working Groups, supra* note 29.

32. Press Release, U.N. Comm'n. On Int'l Trade L., UN Commission on International Trade Law concludes 55th Session in New York, U.N. Press Release UNIS/L/333 (July 20, 2022).

33. *See id. See also* U.N. Comm'n. On Int'l Trade L., Report of Working Group IV (Electronic Commerce) on the work of its sixty-second session (Vienna, 22–26 November 2021), U.N. Doc A/CN.9/1087 (Dec. 23, 2021); U.N. Comm'n. On Int'l Trade L., Draft Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, U.N. Doc A/CN.9/1112 (Feb. 21, 2022).

34. *Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, *available at* https://uncitral.un.org/en/case_law (last visited Apr. 10, 2022).

the League of Nations, it was re-established in 1940 through a multilateral agreement (i.e. the UNIDROIT Statute), to which sixty-three States are currently party.[35]

Over the years, UNIDROIT has produced more than seventy studies and drafts, many of which have resulted in the adoption of conventions, model laws, principles, and legal and contractual guides on a range of subjects, including agency, capital markets, civil procedure, commercial contracts, contract farming, cultural property, factoring, franchising, international sales, international wills, leasing, reinsurance, secured transactions, and transport. Among its best known instruments are the Principles on International Commercial Contacts (2016), the Cape Town Convention on International Interests in Mobile Equipment (2001) (with separate protocols pertaining to aircraft equipment, rail equipment, space equipment, and mining, agricultural and construction equipment), the Convention on International Financial Leasing (1988), and the Convention Providing a Uniform Law on the Form of an International Will (1973).[36] In addition, UNIDROIT maintains one of the leading documentation centers on private law, holding more than 260,000 volumes from a wide array of countries.[37]

D. Regional Organizations

Regional entities have long played important roles in the development of PIL. In recent decades, the European Union ("EU") has adopted community-wide codifications of law on a variety of private law topics, including contracts, torts, family law, and insolvency as well as jurisdiction, choice of law, and judgments.[38] Because it is committed to

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35. UNIDROIT Statute Incorporating the Amendment to Article 6(1) Which Entered into Force on 26 March 1993, *available at* https://www.unidroit.org/english/presentation/statute.pdf (last visited Apr. 08, 2022) [hereinafter "UNIDROIT Statute"].

36. *See Instruments,* UNIDROIT, *available at* https://www.unidroit.org/instruments (last visited May 25, 2022).

37. *See Library,* UNIDROIT, *available at* https://www.unidroit.org/library (last visited May 25, 2022).

38. *See generally* MICHAEL BOGDAN & MARTA PERTEGÁS SENDER, CONCISE INTRODUCTION OF EU PRIVATE INTERNATIONAL LAW (4th ed. 2019); FELIX WILKE, A CONCEPTUAL ANALYSIS OF EUROPEAN PRIVATE INTERNATIONAL LAW (2019); HOW EUROPEAN IS EUROPEAN PRIVATE INTERNATIONAL LAW? (Jan von Hein, Eva-Maria Keininger & Giesela Rühl eds., 2019). *See also International Law,* EUROPEAN E-JUSTICE PORTAL, *available at* https://e-justice.europa.eu/content_international_law-10-en.do (last visited Apr. 8, 2022). *See also EUPILLAR (European Union Private International Law: Legal Application in Reality),* UNIV. OF ABERDEEN, *available at* https://www.abdn.ac.uk/law/research/eupillar/.ph (last visited Apr. 8, 2022).

achieving "freedom, security and justice without internal borders," the EU can enact binding rules that apply directly to member States (and their citizens) in their relations with each other. In practice, those rules also have considerable influence over activities and transactions affecting private parties outside the EU. The corpus (and influence) of EU private law instruments and initiatives is extensive and is often addressed as a separate course in European law schools.

Another important (but sometimes less widely appreciated) regional contributor to the development of private international law is the Organization of American States ("OAS").[39] While not aimed at the economic or political integration of its member States in the same way as the EU is, the OAS has nonetheless adopted many important PIL instruments over time, with the aim of standardizing rules in order to facilitate trade and promote dispute resolution within the hemisphere, beginning with the Bustamante Code in 1928.[40] More recently, it promulgated the 1979 Inter-American Convention on General Rules of Private International Law, the 1975 Inter-American Convention on International Commercial Arbitration, and the 1994 Convention on the Law Applicable to International Contracts.[41]

The OAS has also adopted several important non-binding instruments related to private international law. Two recent examples are (i) the Principles for Electronic Warehouse Receipts for Agricultural Products, intended to highlight the importance of pursuing legislative reform as a means of promoting economic development in the agricultural sector, with an eye to the possible elaboration of model legislation,[42] and (ii) the Model Law on the Simplified Corporation, aimed at encouraging States to enact legislation permitting an alternative to complicated formal requirements for incorporation, thereby fostering

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39. *See generally Department of International Law: Private International Law*, ORGANIZATION OF AMERICAN STATES [O.A.S.], *available at* http://www.oas.org/en/sla/dil/private_international_law.asp (last visited Apr. 9, 2022).

40. Convention on Private International Law, Feb. 20, 1928, O.A.S.T.S. No. 23 *available at* http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-31_Bustamente_Code.pdf (last visited May 25, 2022).

41. *See* Inter-American Convention on General Rules of Private International Law, May 8, 1979, O.A.S.T.S. No. 54; Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No. 78; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42. All three are available at www.oas.org/en/topics/treaties_agreements.asp (last visited Apr. 9, 2022).

42. Inter-American Juridical Report: Electronic Warehouse Receipts for Agricultural Products, CJI/doc. 505/16 rev. 2 (Sep. 27, 2016); *cf.* O.A.S. Gen. Ass. Res. on International Law, AG/RES. 2926 (XLVIII-O/18) (Jun. 5, 2018).

competitiveness and stimulating economic development.[43] In 2019, the OAS adopted a Guide on the Law Applicable to International Commercial Contracts in the Americas.[44]

In Africa, several regional bodies deal with private international law, either exclusively or as part of their broader mandates. The Organization for the Harmonization of African Business Law in Africa ("OHADA") works to "harmonize business law in Africa in order to guarantee legal and judicial security for investors and companies in its member States."[45] In 2015, OHADA created a Common Court of Justice and Arbitration ("CCJA"), based in Abidjan, Côte d'Ivoire, with three functions: judicial, advisory, and arbitration.[46] Other African entities address private international law in more limited ways. For example, the Southern African Development Community ("SADC") created a model Bilateral Investment Treaty in 2012. Although it is non-binding and aimed primarily at adoption by States, this treaty can serve to help resolve disputes over the rights and obligations of private international investors.[47] The Common Market for Eastern and Southern Africa ("COMESA") Treaty also includes provisions on private investment.[48]

The Asia-Pacific Economic Cooperation ("APEC") – a group of 21 member states formed in 1989 with the primary goal of promoting free trade and sustainable development in the Pacific Rim economies – has been active in a number of PIL areas, including cross-border privacy

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43. *See* O.A.S. Department of International Law, Model Law on the Simplified Corporation: Status of Reforms in the Region, OEA/Sec. Gnl DDI/doc. 3/21 rev. 1 (June 14, 2021), *available at* http://www.oas.org/en/sla/dil/docs/publication_Model_Law_on_the_Simplified_Corporation_Status_of_Reforms_in_the_Region_2021.pdf (last visited Apr. 9, 2022).

44. *Guide on the Law Applicable to International Commercial Contracts in the Americas*, O.A.S. (2019), *available at* http://www.oas.org/en/sla/dil/publications_Guide_Law_Applicable_International_Commercial_Contracts_Americas_2019.asp (last visited Apr. 9, 2022).

45. L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires [hereinafter "OHADA"]. *See General Overview*, OHADA, *available at* https://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview_(last visited Apr. 9, 2022).

46. *See CCJA at a Glance*, OHADA, *available at* https://www.ohada.org/en/ccja-at-a-glance/ (last visited Apr. 9, 2022). Reports of CCJA cases are available at http://biblio.ohada.org/pmb/opac_css/index.php (last visited Apr. 9, 2022) (in French only).

47. *See SADC Model Bilateral Investment Treaty Template with Commentary*, INT'L INST. FOR SUSTAINABLE DEVELOPMENT (Jul. 2012), *available at* https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (last visited Apr. 9, 2022).

48. *See* Treaty Establishing the Common Market for Eastern and Southern Africa, art. 158, Nov. 5, 1993, *available at* https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf.

issues, investment law, and on-line dispute resolution.[49] In East and Southeast Asia, scholars from 10 different countries recently created the Asian Principles of Private International Law ("APPIL"), a project aimed at harmonizing the region's PIL rules and principles.[50] Although APPIL activities remain "soft law" – nothing APPIL creates is binding on any State – its activities and instruments are persuasive and may function as models for various domestic jurisdictions.[51]

E. Other Contributors

Non-governmental organizations also contribute significantly to the articulation and development of PIL. For example, the International Chamber of Commerce ("ICC") characterizes itself as "the World Business Organization" and "the institutional representative of more than 45 million companies in over 100 countries."[52] Its mission is to promote trade and investment as vehicles for inclusive growth and prosperity. The ICC has had broad influence in a variety of areas, thanks in part to its rules for the Uniform Customs and Practice for Documentary Credits ("UCP 600"), standard terms for international commercial transactions ("Incoterms"), and rules for curtailing corruption.[53] It is perhaps best known for establishing the International Court of Arbitration in 1923; ICC arbitration remains one of the methods most frequently chosen by parties to international commercial transactions for resolving their disputes outside of national courts.[54]

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49. *See generally About APEC*, ASIA-PACIFIC ECONOMIC COOPERATION, *available at* https://www.apec.org/About-Us/About-APEC (last visited Apr. 11, 2022).

50. *See generally* Weizuo Chen and Gerald Goldstein, *The Asian Principles of Private International Law: objectives, contents, structure, and selected topics on choice of law*, 13 J. OF PRIV. INT'L L. 411 (2017); Uematsu Mao, *APPIL (Asian Principles of Private International Law) and its Perspective Regarding International Jurisdiction*, 37 RITSUMEIKAN L. REV. 35 (2019); CONVERGENCE AND DIVERGENCE OF PRIVATE LAW IN ASIA (Gary Low ed., 2022).

51. Chen & Goldstein, *supra* note 50, at 433.

52. *See generally* THE INTERNATIONAL CHAMBER OF COMMERCE, *available at* www.iccwbo.org (last visited Apr. 11, 2022). The International Chamber of Commerce is not to be confused with the other major international legal organization with the same acronym, the International Criminal Court.

53. *See generally id.* The most recent version of the UCP (UCP 600) was published in 2007, of INCOTERMS in 2020, and of the anti-corruption rules in 2011.

54. The ICC Rules of Arbitration were revised in 2021. *See generally Dispute Resolution Services,* INT'L CHAMBER OF COM., *available at* https://iccwbo.org/dispute-resolution-services (last visited Apr. 11, 2022); The American Arbitration Association's International Centre for Dispute Resolution similarly supports international commercial arbitrations. *See generally* INT'L CENTER FOR DISP. RESOL., *available at* www.icdr.org (last visited Apr. 11, 2022).

In many countries, private associations also play an active role in the PIL field broadly conceived. In the United States, for instance, they include the American Law Institute, the American Bar Association's Section of International Law, and the American Society of International Law. The Uniform Law Commission ("ULC") provides a forum in which practitioners, academics, and judges (acting as "commissioners") collaborate to develop uniform acts (model laws) for adoption at the state (rather than federal) level, such as the Uniform Commercial Code.[55] One point of coordination and dialogue from the U.S. perspective is provided by the Secretary of State's Advisory Committee on Private International Law ("ACPIL").[56]

III. CONFLICTS OF LAW, CHOICE OF FORUM, AND DISPUTE SETTLEMENT MECHANISMS

The foregoing survey illustrates the central role of conflicts of law issues in the field of private international law. The paradigmatic context is a commercial transaction between private parties where at least one of the parties is a "foreigner" and/or the transaction in question has some cross-border dimension, and litigation arising from the transaction has been filed in a domestic (national) court.[57] As long as the world community continues to consist primarily of independent (territorial) States with separate and differing systems of domestic law, methods will be needed for resolving the question of which rules and principles apply to disputes arising from events and transactions that occur in, or have a significant relationship to, more than one State.[58]

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55. *See generally* UNIFORM LAW COMM., *available at* www.uniformlaws.org (last visited Apr. 11, 2022). Among the ULC's PIL-related accomplishments are the Uniform Electronic Transactions Act, the Uniform Interstate Family Support Act, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Foreign-Country Money Judgments Recognition Act.

56. *See generally General Resources – Private International Law*, U.S. DEP'T OF STATE, *available at* www.state.gov/general-resources-private-international-law (last visited Apr. 11, 2022).

57. *See generally* TREVOR C. HARTLEY, INTERNATIONAL COMMERCIAL LITIGATION: TEXT, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW (3d ed. 2020); GEERT VAN CALSTER, EUROPEAN PRIVATE INTERNATIONAL LAW: COMMERCIAL LITIGATION IN THE EU (3d ed. 2021).

58. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 1 (AM. LAW INST. 1971). The ALI is currently considering a revision (to become the RESTATEMENT (THIRD) OF CONFLICT OF LAW). *See Restatement of the Law Third, Conflict of Laws*, AM. L. INST., *available at* https://ali.org/projects/show/conflict-laws/ (last visited June 6, 2022).

Of course, that "conflicts" question has both substantive and procedural dimensions. It arises when different legal systems (i) provide different substantive rules for deciding those questions and (ii) have different jurisdictional and/or procedural rules about where and how the disputes can be resolved. Accordingly, the issues might be resolved in different ways.

(a) One possible solution lies in the direction of harmonizing the *conflicts* rules. If different national courts look to the same "applicable law" rules in determining which law applies to similar transactions, then it should matter less where a given dispute is actually heard and decided. The parties in question will have a clear (or, at least, clearer) idea of the substantive rules under which their dispute is likely to be resolved.

Adopting standardized conflicts of law rules in specific areas of interaction lies at the heart of many PIL projects. Within the EU, for instance, harmonized conflict-of-law rules for both contractual and non-contractual obligations are provided in the Rome I and II Regulations.[59] In the OAS, the effort is reflected in the Mexico City Convention.[60] However, the undertaking has proven quite difficult in light of significant differences in national law, tradition, and culture.[61] It has accordingly motivated adoption of various "soft law" instruments, such as the 2015 Hague Principles on Choice of Law in International Commercial Contracts,[62] and the OAS Guide on the Law Applicable to International Commercial Contracts in the Americas.[63]

(b) Another possible solution is to harmonize the *substantive* law relating to a particular area or issue. Where the relevant rules in the concerned jurisdictions are the same – that is, where similar statutes have been adopted by their legislatures or if all the jurisdictions in question have agreed by treaty to apply the same substantive rules – the "conflicts" problems can be minimized if not eliminated. In theory, resolution of the

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59. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L177) 6 (EC) [hereinafter "Rome I"]; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199) 40 (EC) [hereinafter "Rome II"].

60. Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No. 78.

61. *See generally* SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014).

62. *Principles on Choice of Law in International Commercial Contracts*, HCCH (Mar. 19, 2015), *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=135 (last visited Apr. 11, 2022).

63. *See Guide on the Law Applicable to International Commercial Contracts in the Americas*, *supra* note 44.

parties' disagreement should be the same no matter which jurisdiction addresses it. This approach underlies the private international law efforts in such integrative contexts as the European Union. It is also reflected at the global level in several specific areas discussed in Parts V and VI of this paper, including cross-border commercial transactions, transnational issues in family law, and transportation of goods internationally.

(c) A different approach permits the parties to a given transaction to agree, between themselves, on the specific law or laws they want to apply to their transaction – in effect, to "privatize" the issue. This contractual *choice of law* approach is frequently characterized as founded on concepts of "freedom of contract" or "party autonomy." Where permitted, the courts in different countries will give effect to the parties' clearly expressed agreement on the governing law – unless it violates some fundamental norm of applicable domestic law, generally characterized as a matter of "public policy" (*ordre public*) or "mandatory norms" (*lois de police*), meaning that no derogation is permitted. (However, the meanings given to those terms, and the methods used to apply them, often differ from one country to another.) The point is that by clear agreement the parties have a reliable understanding about the law under which their dispute will be resolved, regardless of the forum.[64] Not all systems recognize the validity of such agreements to the same extent, however.

(d) Still another approach permits contracting parties to agree on a particular domestic court where their dispute will be resolved, to the exclusion of other available fora. Such contractual *choice of court* or *forum selection* clauses typically provide that disagreements arising under the contract must be submitted to a *specified domestic court* (such clauses may also specify the law to be applied by that court). The choice could be the domestic courts of one (or the other) of the parties to the contract (or dispute), or those of a third country. Whether the chosen court will be able to accept the dispute, however, is a question of the national law defining that court's jurisdiction, and that law typically cannot be overridden simply by the agreement of private parties. The 2005 Hague Convention on Choice of Court Agreements represents an effort to oblige the chosen domestic courts to respect the parties' choice (to the exclusion of other courts) and to give effect to the resulting judgments.[65]

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64. *See generally* CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (Daniel Girsberger, Thomas Kadner Graziano & Jan L. Neels eds., 2021).

65. Hague Convention on Choice of Court Agreements, June 30, 2005, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 (last visited Mar. 20,

(e) With the emergence of a variety of *international commercial courts*, the possibility now exists for contracting parties to agree to "internationalize" their dispute settlement mechanisms in even more ways.[66] Many of these courts are specialized bodies (or chambers) within domestic legal systems, while others are independent, but all seek to attract commercial disputes that would otherwise be submitted to domestic litigation or international commercial arbitration.[67]

(f) Alternatively, parties to international transactions may decide to preclude litigation altogether by agreeing that disputes under their contract must be submitted to *international commercial arbitration*. It is possible for them to agree to create their own free-standing or *ad hoc* tribunal, and for that purpose UNCITRAL has adopted a "comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship."[68] However, it is far more common today for contracting parties to choose "institutional" or "administered" arbitration, where an existing entity such as the International Chamber of Commerce,[69] the Permanent Court

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2022); *see generally* RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS (2008).

66. *See, e.g.*, the Singapore International Commercial Court ("SICC") and the China International Commercial Courts ("CICC"). For an overview, see Pamela Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020). *See also* Diego P. Fernández Arroyo & Makane Moïse Mbengue, *Public and Private International Law in International Courts and Tribunals: Evidence of An Inescapable Interaction*, 56 COLUM. J. TRANSNAT'L L. 797 (2018).

67. One organization working to advance the work of commercial courts is the Standing International Forum of Commercial Courts ("SIFoCC"). Formed in 2017, SIFoCC member courts share best practices, "work together to keep pace with rapid commercial change," "make a stronger contribution to the rule of law than they can separately," and help countries to "enhance their attractiveness to investors by offering effective means for resolving commercial disputes." *See generally* STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS, *available at* https://sifocc.org (last visited Aug. 5, 2022); *see also* GLOBAL PRIVATE INTERNATIONAL LAW: ADJUDICATION WITHOUT FRONTIERS, (Horatia Muir Watt, Lucia Bíziková, Agatha Brandão de Oliveira & Diego P. Fernández Arroyo eds., 2019).

68. *See UNCITRAL Arbitration Rules*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration (last visited Mar. 20, 2022).

69. *See 2021 Arbitration Rules*, INT'L CHAMBER OF COM., *available at* https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last visited Mar. 20, 2022).

of Arbitration,[70] or the London Court of International Arbitration[71] provides not only the rules but also administrative support and assistance for the arbitration. Some entities (such as the Stockholm Chamber of Commerce or the Singapore International Arbitration Centre) specialize on a regional basis.[72]

The attraction of international commercial arbitration has been strengthened by the widespread adherence of States to international agreements requiring their courts to give effect to such choices, inter alia by precluding domestic suits on the same issues and enforcing the resulting arbitral awards. Among these are the New York Convention[73] and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").[74]

(g) Where the issues arise out of contracts not between private parties but between States and foreign investors, they may be eligible for arbitration according to the provisions of specialized bilateral investment treaties ("BITs")[75] or under the rules of the International Center for the Settlement of Investment Disputes ("ICSID").[76]

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70. *See About Us*, PERMANENT COURT OF ARBITRATION, *available at* https://pca-cpa.org/en/about/ (last visited Mar. 20, 2022); *see also Arbitration*, PERMANENT COURT OF ARBITRATION, *available at* https://pca-cpa.org/en/services/arbitration-services/ (last visited Mar. 20, 2022).

71. General information about the LCIA is available at www.lcia.org (last visited Mar. 20, 2022).

72. General information about the Stockholm Chamber of Commerce Arbitration Institute is available at https://sccinstitute.com (last visited Mar. 20, 2022); information about the Singapore International Arbitration Centre ("SIAC") is available at www.siac.org.sg (last visited Mar. 20, 2022); information about the China International Economic and Trade Arbitration Commission ("CIETAC") is available at www.cietac.org (last visited Mar. 20, 2022).

73. New York Convention, *supra* note 27. It is implemented in U.S. law by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208.

74. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 [hereinafter "Panama Convention"]. It is implemented in U.S. law by 9 U.S.C. §§ 301-307). *See generally* GEORGE A. BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW (2017).

75. Many countries have negotiated BITs providing for the settlement of disputes between their investors and host States. *See, e.g.*, *Database of Bilateral Investment Treaties*, ICSID, https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties (last visited Mar. 20, 2022).

76. ICSID arbitration is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention") and specialized rules and regulations. *See* INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES (Apr. 2006) *available at* https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf; *see also generally* ICSID, *available at* https://icsid.worldbank.org (last visited Mar. 20, 2022).

(h) As an alternative to arbitration, *international mediation* of commercial disputes appears to be gaining in popularity, particularly with the adoption of the 2018 UN Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"),[77] which provides a legal framework for recognizing and enforcing international mediation agreements. Other relevant instruments include the EU Directive on Mediation[78] and UNCITRAL's 2018 Model Law on International Commercial Mediation.[79]

(i) Still another alternative is offered by recent developments in online dispute resolution ("ODR"), which may be especially useful for disputes arising out of cross-border, low-value e-commerce transactions. UNCITRAL's Technical Notes on Online Dispute Resolution describe the stages of an ODR proceeding, discussing such aspects as the appointment, powers, and functions of the neutral ODR administrator. The aim is to "foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings."[80] The EU has also established an ODR platform intended to "make online shopping safer and fairer through access to quality dispute resolution tools."[81]

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77. U.N. Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018, *available at* https://treaties.un.org/Pages/showDetails.aspx?objid=080000028054826c&clang=_en (last visited June 6, 2022) [hereinafter "Singapore Convention on Mediation"]. *See* Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private International Law Treaties*, 30 AM. REV. INT'L ARB. 265 (2019).

78. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) 3.

79. The Model Law is available at https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (last visited May 25, 2022).

80. UNCITRAL, TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION 1 (2017) *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf (last visited May 25, 2022); *see generally Online Dispute Resolution*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/onlinedispute (last visited Mar. 20, 2022).

81. Regulation No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), 2013 O.J. (L 165) 1 (EU). *See Online Dispute Resolution – about the ODR platform*, EUR. COMM'N, *available at* https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks (last visited Mar. 20, 2022).

IV. INTERNATIONAL JUDICIAL ASSISTANCE

Returning to the option of litigation in domestic courts, a main objective of the PIL effort has long been to reduce (if not eliminate) some of the procedural obstacles that parties may encounter when their dispute has transnational dimensions.[82] Here, we focus in particular on a set of conventions adopted by the Hague Conference in an effort to resolve such practical problems.

A. Service

Different legal systems have different standards, and rely on different methods, in their requirements for notifying a litigant's opposing party of the various stages and developments in the course of a domestic litigation – starting with notice that the proceeding has begun. The differences can be consequential. For example, U.S. students and practitioners are often surprised to learn that, in many foreign legal systems, "service of process" can only be made by a government official, not by a private party, even though it does not typically have the same fundamental role in "energizing" the court's jurisdiction over the parties and proceeding as in U.S. law. Nonetheless, failure to observe the applicable law and procedures of the foreign jurisdiction may well have significant adverse consequences for the proceeding and potential enforcement of any resulting judgment.

To help bridge these differences, the 1965 Hague Service Convention[83] creates an international framework for serving process outside of a home State. It applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad"[84] subject to some exceptions. As a matter of U.S. law, when the Service Convention does apply, it is both mandatory and exclusive; that is, service must be made through the channels it authorizes.[85]

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82. *See generally* Ronald A. Brand, *Private Law and Public Regulation in U.S. Courts*, *in* CILE STUDIES IN PRIVATE LAW, PRIVATE INTERNATIONAL LAW, AND JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP 115 (2005).

83. Hague Service Convention, *supra* note 20.

84. *Id.* at art. 1.

85. Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522 (1987). The Convention does not apply, however, where the address of the person being served is not known or where service does not cross borders, or in criminal, penal or administrative matters.

The "main channel" involves transmission through a "Central Authority" established by States Party (typically a government ministry), although States are permitted to authorize alternative authorities, including diplomatic or consular missions, judicial officers, the postal service, or any other method to which the two Contracting States have agreed.[86] The Convention requires the use of three model forms: a request, a certification, and a summary of the document to be served.[87] Under the Convention, a destination State may – but is not obliged to – recognize service through the "postal channel."[88] Recently, service by electronic means ("e-mail service") has proven controversial – more specifically, with regard to whether e-service can be considered one of the methods of service allowed under Article 10.[89]

The question of service was also addressed in the Principles of Transnational Civil Procedure adopted by the American Law Institute (ALI) and UNIDROIT in 2004,[90] and subsequently modified by the European Law Institute (ELI) and UNIDROIT in regard to "the particularities of specific legal systems."[91] The final text was adopted in 2020 and was published officially in 2021.[92]

Within the OAS, the Inter-American Convention on Letters Rogatory addresses "the performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas

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86. Hague Service Convention, *supra* note 20, at arts. 8-11, 18.

87. These forms, and guidelines for completing them, are available at https://www.hcch.net/en/publications-and-studies/details4/?pid=6560&dtid=65 (last visited Mar. 20, 2022).

88. *See Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions (20-23 May 2014)*, at ¶ 37, HCCH (2014), *available at* https://assets.hcch.net/upload/wop/2014/2014sc_concl_en.pdf (last visited Mar. 20, 2022).

89. Decisions by U.S. courts have reached differing conclusions. *See, e.g.*, Zanghi v. Ritella, No. 19 CIV. 5830 (NRB), 2020 WL 6946512 (S.D.N.Y. Nov. 25, 2020); Prem Sales, LLC v. Guangdong Chigo Heating & Ventilation Equip. Co., No. 5:20-CV-141-M-BQ, 2020 WL 6063452 (N.D. Tex. Oct. 14, 2020).

90. *See ALI / UNIDROIT Principles of Transnational Civil Procedure*, UNIDROIT, *available at* https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/ (last visited June 6, 2022).

91. *See ELI/UNIDROIT Rules – Overview*, UNIDROIT, *available at* https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/overview/ (last visited June 6, 2022).

92. ELI/UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE (Jan. 2021), *available at* https://www.unidroit.org/wp-content/uploads/2021/06/English-integral.pdf (last visited Feb. 14, 2022). The official print edition, released on Oct. 19, 2021, is available through Oxford University Press at https://global.oup.com/academic/product/eli—unidroit-model-european-rules-of-civil-procedure-9780198866589?cc=us&lang=en#.

abroad," provided that the acts are not "acts of compulsion."[93] Like the Hague Service Convention, it requires each Contracting Party to designate a central authority to ensure cooperation between jurisdictions but permits service by consular, diplomatic, and judicial channels. Within the EU, a specific regulation covers intra-community cross-border service.[94] It is similar to the aforementioned regimes: transmitting agencies are to be used for sending judicial or extrajudicial documents to be served from one Member State to another. Other avenues include consular or diplomatic channels, postal services, or direct service.

B. Evidence

Different legal systems have different rules for obtaining evidence in preparation for trial – both in terms of what can be sought, what must be disclosed, and how it is collected. American lawyers are often surprised to find that the kind of extensive party-directed pre-trial discovery typical in U.S. courts is impermissible in many foreign jurisdictions, especially civil law jurisdictions.

The purpose of the 1970 Hague Evidence Convention[95] is to help bridge these differences. It provides for "letters of request" sent to a designated authority in the requested State for execution in accordance with local law. Consular and diplomatic agents can also take evidence when local law permits. In recently celebrating the Convention's 50th anniversary, the Hague Conference highlighted the need for greater use of technology in justice systems around the world, in particular the need for "technology-neutral instruments" to "facilitate cooperation in cross-border dispute settlement," including in the "taking of evidence remotely by video-link, where appropriate and subject to domestic law requirements."[96]

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93. Inter-American Convention on Letters Rogatory, arts. 2a, 3, Jan. 30, 1975, O.A.S.T.S. No. 43; *see also* Additional Protocol to the Inter American Convention on Letters Rogatory, May 8, 1979, O.A.S.T.S. No. 56.

94. Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, 2007 O.J. (L 324) 79 (EC).

95. Hague Evidence Convention, *supra* note 21. The United States is a party.

96. *See HCCH a|Bridged: Innovation in Cross-Border Litigation and Civil Procedure Edition 2020* (Dec. 2, 2020), *available at* https://assets.hcch.net/docs/9bfe5d4a-355d-46ee-818a-b06410b83c60.pdf (last visited Feb. 14, 2022); *see also Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions*, *supra* note 88.

EU Regulation No. 1206/2001 allows courts in one Member-State jurisdiction to request information directly from other courts; member States designate central authorities but they are only meant to supply information to courts, to seek solutions to difficulties that may arise, and forwarding requests in "exceptional cases."[97] In the Americas, the Inter-American Convention on Taking Evidence Abroad (and its additional protocol) focus on the use of letters rogatory as the vehicle for gathering evidence in foreign jurisdictions.[98]

C. Apostilles

The purpose of the 1961 Hague Apostille Convention[99] is to simplify the process of "legalizing" public documents issued in one State so they can be given formal effect in another State. Such documents include birth, death, marriage and citizenship records, graduation diplomas, certificates of incorporation, patents, and judicial documents.[100] The Hague Apostille Section keeps a current list of authorities designated to issue apostilles in each State Party's jurisdiction.[101]

An electronic apostille program (the "e-APP") was launched in 2006. The e-APP (issued by one of the designated authorities in the document's State of origin) can be attached to an electronic document. An "e-register" is maintained for purposes of verifying the apostille.[102]

V. JUDGMENTS AND JURISDICTION

Different legal systems have different rules about when their courts can entertain different kinds of cases involving foreign or cross-border matters, as well as different criteria for giving effect to judgments issued

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97. *See, e.g.*, Council Regulation No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, arts. 1, 2, 17, 2001 O.J. (L 174) 1 (EC).

98. Inter-American Convention on Taking Evidence Abroad, Jan. 30, 1975, O.A.S.T.S. No. 44; Additional Protocol to the Inter-American Convention on Taking Evidence Abroad, May 24, 1984, O.A.S.T.S. No. 65.

99. *See* Apostille Convention, *supra* note 19.

100. In other words, documents from a court or tribunal, administrative documents, notarial acts, or official certificates. *See Outline – Hague Apostille Convention*, HCCH, *available at* https://assets.hcch.net/upload/outline12e.pdf (last visited Feb. 14, 2022) [hereinafter "Apostille Convention Outline"].

101. *See Authorities,* HCCH, *available at* https://www.hcch.net/en/instruments/conventions/authorities1/?cid=41 (last visited Feb. 14, 2022).

102. *See Implementation Chart of the e-App,* HCCH, *available at* https://assets.hcch.net/docs/b697a1f1-13be-47a0-ab7e-96fcb750ed29.pdf (last visited Feb. 14, 2022).

by foreign courts. These issues have long been at the core of private international law. In this area, much of the effort has been focused at the Hague Conference, which in 2005 adopted the Convention on Choice of Court Agreements, which requires the domestic courts of States party to give effect to the contracting parties' choice of domestic courts to resolve disputes arising from the relevant agreement and to give effect to the resulting judgments (subject to various conditions and requirements).[103]

A recent development of some significance was the adoption in 2019 of the Hague *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. This new treaty* aims at promoting the international "circulation" of such judgments by setting out specific criteria for recognition and enforcement (as well as agreed grounds for refusal) of final judgments issued by the courts of other States parties.[104] The aim is to provide some measure of predictability to the transacting parties (and to their counsel) as to whether and to what extent a judgment will be given effect in another jurisdiction. The central obligation of States parties is to recognize and enforce qualifying judgements without a substantive review of the merits of the underlying dispute. To be eligible, however, judgments must have been rendered by a jurisdiction that has a sufficient jurisdictional connection to the issue in question, and they must not involve specified exclusions such as rights *in rem*, defamation and privacy, intellectual property, antitrust or competition law, or transboundary pollution law.[105]

For several decades, the HCCH has been considering the question of trying to harmonize the "international" or cross-border jurisdiction of domestic courts in civil and commercial cases. Following the adoption of the 2005 Choice of Courts and 2019 Judgments Conventions, it established a Working Group to consider formulating rules for concurrent proceedings (parallel proceedings and related actions or claims) in

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103. *See* note 65, *supra*.

104. *See generally Judgments Section*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/specialized-sections/judgments (last visited June 6, 2022). As of June 6, 2022, six States (including the United States) had signed the Convention. *See Status Table*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last visited June 6, 2022).

105. *See generally* David P. Stewart, *The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 113 AM. J. INT'L L. 772 (2019); Louise Ellen Teitz, *Another Hague Judgments Convention? Bucking the Past to Provide for the Future*, 29 DUKE J. COMP. & INT'L L. 491 (2019); RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS (Linda Silberman and Franco Ferrari eds., 2017).

different national systems.[106] Given the significant variations in the jurisdictional rules of national courts around the world, and the fact that within the EU the question is formally regulated,[107] this effort faces significant challenges. Some progress has nonetheless been made: the Working Group's meetings in late 2021 and early 2022 included discussion of parallel proceedings, and the chair's 2022 report provided both a draft of provisions on parallel proceedings for future discussion and a flowchart outlining the basic structure of a possible future convention.[108]

VI. INTERNATIONAL FAMILY LAW

Marriages between individuals of different nationalities are increasingly common, and in consequence (regrettably) so are issues related to separation, divorce, and child custody and family support arrangements involving former partners living in different countries. The Hague Conference has been particularly active in the area of international family law, but it is not the only forum in which international family law is developed: the EU has standardized some of these relevant areas by regulation.

A. Divorce, Child Support, Family Maintenance and Parental

106. *See Legislative Work*, HCCH, *available at* https://www.hcch.net/en/projects/legislative-projects (last visited Feb. 13, 2022).

107. Council Regulation (EU) 44/2001 of Dec. 22, 2000, on jurisdiction and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1 (EC) [hereinafter "Brussels I Regulation"], was superseded by Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 O.J. (L 351) 1 (EU) ["Brussels I Recast" or "Brussels I Bis"]. Regulation 1215/2012 applies "only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015," and provides that Regulation 44/2001 "shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation." *See id.* at arts. 66 & 80. A chart comparing the provisions of these two regulations can be found in Annex III of Regulation 1215/2012. *See also* Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97 (2019); MARTA REQUEJO ISIDRO, BRUSSELS I BIS: A COMMENTARY (Elgar, 2022).

108. *See Report of the Working Group on Jurisdiction* (Mar. 2022), HCCH, at Annex I et seq., *available at* https://assets.hcch.net/docs/d05583b3-ec71-4a5b-829c-103a834173bf.pdf (last visited Aug. 5, 2022);

Responsibility

While the rules regarding marriage itself remain primarily a matter of domestic law (and are rarely regulated by international instruments), that is less true with respect to termination of the relationship and its consequences.

Within the EU, the Brussels IIa Recast Regulation[109] deals in part with jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility and establishes uniform jurisdictional rules for legal separation, divorce, and annulment. It requires Member States to designate a central authority to oversee the Regulation's application, including requests from other Member States for information on national laws and procedures or for judicial assistance.[110] The Rome III Regulation[111] provides for conflicts of law rules applicable to divorce and legal separation that recognize a role for the "autonomy" of parties, for instance by enabling couples from different countries to agree in advance which law would apply in the event of their divorce or legal separation (and, in the event the couple cannot agree, it provides a formula by which judges can decide which country's law applies). Similarly, child custody and family support arrangements involving former partners living in different countries within the EU are also standardized by regulation; the EU Maintenance Regulation,[112] for example, enumerates the rules for jurisdiction over such disputes.

The Hague Conference's 2007 *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance,* and its *Protocol on the Law Applicable to Maintenance Obligations,* are, like the EU Maintenance Regulation, intended to establish a workable system for the cross-border recovery of child support and other forms of family

109. Council Regulation (EC) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2019 O.J. (L 178) 1 (EU) [hereinafter "Brussels IIa Recast"].

110. *See id.* at preamble ¶¶ 72, 75-76, 78, 84-85; *id.* at arts. 76-80, 82, 86-87.

111. Council Regulation (EU) No. 1259/2010 of 20 December implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, 2010 O.J. (L 343) 10 (EU) [hereinafter "Rome III"].

112. Council Regulation (EU) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009 O.J. (L 7) 1 (EC) [hereinafter "EU Maintenance Regulation"].

maintenance.[113] This Convention requires States Parties to establish an efficient system for recognizing and enforcing maintenance decisions made in other Contracting States. The United States became a party to this Convention in 2016; it is given domestic effect by the 2008 Uniform Interstate Family Support Act ("UIFSA"), enacted in every state of the Union as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.[114] The EU is also now party to the 2007 Convention and its Protocol, and its application was taken into account in the EU Maintenance Regulation.[115]

The United States has signed but not ratified the 1996 Hague Convention on Jurisdiction, Applicable Law, Enforcement and Cooperation in Respect of Parental Responsibility and measures for the Protection of Children (the Child Protection Convention).[116] A large number of European States (but not the EU as a legal entity), as well as a number of South American countries, have adopted this convention.

The EU's regulations related to family law sometimes overlap with Hague Conventions on the same subject. For example, as noted above, the Brussels IIa Recast Regulation deals with jurisdiction, the recognition and enforcement of judgments in matrimonial matters as well as matters of parental responsibility, and it therefore sometimes covers the same

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113. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, and its Protocol on the Law Applicable to Maintenance Obligations, Nov. 23, 2007, both available in the "Child Support Section" at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support (last visited May 25, 2022). The EU is a Party to the Convention. *See Status Table*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=131 (last visited Feb. 13, 2022).

114. *Uniform Interstate Family Support Act*, https://www.uniformlaws.org/committees/community-home?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb (last visited Mar. 20, 2022). The last U.S. states to enact it did so in 2016. *See also International Child Support Enforcement*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/intl-child-support.html (last visited Mar. 20, 2022); *Office of Child Support Enforcement – International*, U.S. DEP'T OF HEALTH AND HUM. SERVS., www.acf.hhs.gov/css/partners/international (last visited Mar. 20, 2022). The United States has not ratified the 2007 Protocol.

115. *See* EU Maintenance Regulation, *supra* note 112. The conflicts of laws rules refer to those of the Protocol. *See id.* at art. 15. The Maintenance Regulation has separate sections on recognition and enforcement of decisions given in those countries that have adopted the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations and those countries that have not. *See id.* at ch. IV.

116. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, *available at* https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf (last visited May 25, 2022) [hereinafter "Child Protection Convention"].

ground as the Child Protection Convention. These intersections can, on occasion, make it somewhat more difficult to navigate the wide range of conflicts of jurisdiction, conflicts of law and recognition rules, as well as the identification of the national authorities in charge of the cooperation between administrative or judicial authorities related to those matters. The EU has (sometimes) addressed such overlaps: Brussels IIa Recast includes provisions that direct parties on how to tackle relationships with a number of other, related international instruments (should the need to do so arise).[117]

B. Parental Abduction

On occasion, a child may be wrongly removed from the "habitual environment" of the parent or other person to whom custody has been lawfully granted. When such an abduction crosses international boundaries, the legal issues can become complicated.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction is intended to deter the illegal removal of children (under 16 years of age) across borders, to ensure their prompt return, and to establish reciprocal mechanisms for enforcing custodial rights in Contracting States.[118] In this respect, the Abduction Convention not only contributes to the resolution of thousands of cases of abduction, but also acts as a deterrent to many other cases, with its clear message pointing out that abduction is harmful to the child, who has the right to contact both parents, and the effectiveness of its measure for the immediate return

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117. *See, e.g.*, Brussels IIa Recast, *supra* note 109, at ch. VIII. For example, Article 95 provides that Brussels IIa Recast takes precedence over the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors, and the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. Article 96 deals specifically with the relationship between Brussels IIa Recast and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Article 97 deals specifically with the relationship between Brussels IIa Recast and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

118. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (last visited Feb. 10, 2022). Note that the Brussels IIa Recast Regulation also deals with international child abduction. Its provisions complement the 1980 Hague Convention: Article 22, which provides that "Where a person, institution or other body alleging a breach of rights of custody applies, either directly or with the assistance of a Central Authority, to the court in a Member State for a decision on the basis of the 1980 Hague Convention ordering the return of a child under 16 years that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, Articles 23 to 29, and Chapter VI, of this Regulation shall apply and complement the 1980 Hague Convention." *See* Brussels IIa Recast, *supra* note 109, at ch. III.

of the child.[119] The Hague Conference maintains a regularly-updated database of relevant decisions from the various Contracting States and hosts an electronic case management tool that "identifies, stores, and disseminates information used to manage and monitor international child abduction and access cases."[120]

In the United States, the Abduction Convention is implemented by the International Child Abduction Remedies Act (ICARA).[121] The Office of Children's Issues in the U.S. Department of State's Bureau of Consular Affairs serves as the U.S. Central Authority.[122] According to recent analysis by the Hague Conference, the U.S. is making the most applications for return and receiving the most return applications.[123] Those figures clearly demonstrate the importance of these issues for American practitioners and students.

C. Intercountry Adoption

The Hague Conference has also addressed the growing practice of cross-border adoptions and the attendant difficulties. Its 1993 Convention on the Protection of Children and Co-operation in Respect of

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119. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381 (2008).

120. *See Child Abduction Section*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction (last visited Feb. 14, 2022); HCCH, ICHILD USER GUIDE 5 (2007), *available at* https://assets.hcch.net/docs/141934fc-83b7-4106-9ba6-5c3ea3ba6b85.pdf (last visited June 6, 2022). The International Child Abduction Database ("Incadat") is available at https://www.incadat.com/en (last visited May 25, 2022). *See generally* PETER MCELEAVY & AUDE FIORINI, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION (2nd ed. 2021).

121. *See* 22 U.S.C. § 9001 *et seq.* (2021). A substantial body of U.S. case law has emerged under this statute. *See, e.g.*, Monasky v. Taglieri, 140 U.S. 719 (2020).

122. *See* 22 U.S.C. § 9006; *see also* 22 C.F.R. 94.6. *See also International Parental Child Abduction*, U.S. DEP'T. OF STATE, *available at* https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction.html (last visited Feb. 12, 2021).

123. NIGEL LOWE & VICTORIA STEPHENS, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2015 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2017) at ¶ 29 ("Combining both incoming and outgoing applications the [Central Authority of the] United States of America (USA) handled the greatest number with 597 applications . . ."), *available at* https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf_(last visited Feb. 12, 2022).

Intercountry Adoption[124] is aimed at protecting children (and their families) against the risks of illegal, irregular, premature, or ill-prepared adoptions abroad. Each Contracting Party must establish a central authority to deal with cross-border child adoption issues and ensure that Convention procedures are followed. If an adoption is made in accordance with the procedures outlined in the Convention, all other Contracting Parties must recognize the adoption "by operation of law."[125]

In U.S. law, the Convention applies to all adoptions by U.S. citizens habitually resident in the United States of children habitually resident in any other country that is a party. It is implemented by the federal Intercountry Adoption Act of 2000 ("IAA").[126] Only federally accredited adoption service providers may offer certain key adoption services for Convention adoptions. The Office of Children's Services in the U.S. Department of State serves as the U.S. Central Authority.[127]

D. Other Initiatives

Within the HCCH, work continues in other family law areas. For instance, an Experts Group on cross-border recognition and enforcement of agreements in family matters involving children published its latest findings in 2020, focused inter alia on the use of mediation to resolve conflicts related to parental agreements.[128] The group found that "in order for such amicable solutions to be effective, they must be in a form that allows their recognition and enforcement in States other than the State where the agreement was reached,"[129] which suggests that a binding instrument dealing with these issues would be a useful innovation. The Conference has also undertaken projects on parentage and surrogacy and on cohabitation outside of marriage, addressing the challenges when

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124. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=69 (last visited Feb. 11, 2022), [hereinafter "Hague Adoption Convention"].

125. *Id.* at art. 23.

126. *See* Pub. L No. 106-279 (Oct. 6, 2000), codified at 42 U.S.C.A. §§ 14901 *et seq.* (2021).

127. *See Intercountry Adoption*, U.S. DEP'T OF STATE, *available at* https://travel.state.gov/content/travel/en/Intercountry-Adoption.html/ (last visited Feb. 11, 2022).

128. *See, e.g., Overview of the findings of the Experts' Group on cross-border recognition and enforcement of agreements in family matters involving children in relation to the development of a normative instrument*, HCCH (March 2020), *available at* https://assets.hcch.net/docs/3cd99dea-d087-4999-8016-57f738854e90.pdf (last visited Feb. 11, 2022).

129. *Id.* at ¶ 12.

unmarried couples "become subject to a foreign legal system that does not necessarily recognize their status in relation to one another, or in relation to third parties, such as adopted children."[130]

E. Other Regional Efforts

Within the OAS, several family law-related instruments have been adopted, including the Inter-American Convention on Support Obligations,[131] the Inter-American Convention on the International Return of Children,[132] the Inter-American Convention on the Conflict of Laws Concerning the Adoption of Minors,[133] and the Inter-American Convention on International Traffic in Minors.[134] These instruments operate in much the same way as the Hague Conventions and the Brussels II regulations, by providing obligations and mechanisms for cooperation among designated central authorities in each Contracting Party.

F. Wills, Trusts, and Estates

Another focus of harmonization efforts is testamentary succession and administration of estates. In 1973, for instance, UNIDROIT proposed a Convention Providing for a Uniform Law on the Form of an International Will.[135] To date, it has entered into force for 13 States;[136]

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130. *See, e.g.*, *Report of the Experts' Group on the Parentage / Surrogacy Project (meeting from 12 to 16 October 2020)* (Mar. 2021), HCCH, at Annex I, *available at* https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf (last visited Feb. 11, 2022); *Update on the Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage, Including Registered Partnerships* (Mar. 2015), HCCH, at ¶ 1, *available at* https://assets.hcch.net/upload/wop/gap2015pd05en.pdf (last visited Feb. 11, 2022).

131. Inter-American Convention on Support Obligations, July 15, 1989, O.A.S.T.S. No. 71.

132. Inter-American Convention on the International Return of Children, July 15, 1989, O.A.S.T.S. No. 70.

133. Inter-American Convention on the Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, O.A.S.T.S. No. 62.

134. Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, O.A.S.T.S. No. 79.

135. Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, *available at* https://www.unidroit.org/instruments/international-will (last visited Apr. 4, 2022).

136. *See id.* at art. XIV (the Convention permits States with "two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills [. . .] to declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time."). Canada made such a declaration; accordingly, although UNIDROIT counts Canada in the thirteen States for whom the Convention has entered into force, it has only entered into force

the United States signed in 1973 but a proposed uniform implementing statute has not gained significant support.[137]

Similarly, in 1985, the HCCH proposed a *Convention on the Law Applicable to Trusts and on their Recognition,*[138] intended to address the complications arising from the fact that such instruments, while well-known in common law countries, are generally not recognized or embraced in civil law systems.[139] A proposed Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons,[140] adopted in 1989, has failed to gain support, even though it is increasingly common for the estates of decedents to include personal, investment, or business assets in more than one national jurisdiction (and thus subject to differing national laws) and despite the fact that the Convention is addressed primarily to the choice of law rules applicable to succession rather than the disposition of substantive assets.[141]

VII. OTHER SUBSTANTIVE ISSUES AND INSTRUMENTS

We mention here only a few of the many efforts to standardize or harmonize the rules of law in other substantive areas relevant to private cross-border transactions.

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for nine of Canada's thirteen provinces and territories. *See Status - Convention Providing a Uniform Law on the Form of an International Will*, UNIDROIT, *available at* https://www.unidroit.org/instruments/international-will/status/ (last visited Apr. 4, 2022).

137. *See Status - Convention Providing a Uniform Law on the Form of an International Will*, *supra* note 136; *Uniform Wills Recognition Act 1977*, UNIFORM L. COMM., *available at* https://www.uniformlaws.org/committees/community-home?communitykey=e0a2332d-5263-4fab-880f-1607fc5affba&tab=groupdetails (last visited Apr. 4, 2022).

138. Convention on the Law Applicable to Trusts and on their Recognition, July 1, 1985, *available at* https://assets.hcch.net/docs/8618ed48-e52f-4d5c-93c1-56d58a610cf5.pdf (last visited Apr. 4, 2022).

139. *See* ALFRED E. VON OVERBECK, EXPLANATORY REPORT ¶ 12 (Permanent Bureau of the HCCH trans., 1985), *available at* https://assets.hcch.net/docs/ec6fb7e0-deda-417f-9743-9d8af6e9e79b.pdf (last visited Mar. 20, 2022).

140. Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989, *available at* https://assets.hcch.net/docs/5af01fa4-c81f-4e99-b214-64421135069f.pdf (last visited Jun. 6, 2022) (not yet in force).

141. *See* DONOVAN W.M. WATERS, EXPLANATORY REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO SUCCESSION TO THE ESTATES OF DECEASED PERSONS 21 (Permanent Bureau of the HCCH ed., 1989), *available at* https://assets.hcch.net/docs/7bfd5915-bf1b-4f9f-9b93-61f979bf8e61.pdf (last visited Apr. 4, 2022).

A. Commercial Law

Differences in national laws and procedures governing commercial transactions have long posed impediments to cross-border trade, giving rise to efforts at harmonization. Indeed, many trace PIL's conceptual origins to the emergence of a standardized *lex mercatoria* or "merchant law" in Europe during the Middle Ages.[142] Harmonization of the relevant rules, or at least the removal of obstacles to smooth transactions and dispute settlement, remains an important objective.

The task is more easily described than accomplished. Differences in approach to economic (as well as political) issues in legal systems around the world pose obstacles to harmonization. In many countries, the national legislature has adopted a single, comprehensive national code (consider, for example, the commercial codes of Germany,[143] France[144] and Turkey[145]) while in others, the approach is less centralized. In the United States, for example, much of the substantive commercial law remains a matter of state law, with a relatively limited role for the federal government, and it is accordingly found in both judicial decisions (common law) and statutes.[146]

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142. *See, e.g.*, Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133, 1134-35 (2000) ("A *lex mercatoria* with universal purport, which Maitland called the "'private international law' of the Middle Ages,' developed after the Dark Ages, when trade and commerce once again brought together merchants from many parts. The rules that governed their transactions were not purely local in nature. Nor, however, were they derived from the other supranational systems of the times, the revived *ius civile* elaborated by law teachers in Upper Italy and the Catholic Church's canon law. Rather, the emerging law merchant, which amounted to a 'rebirth of the old *jus gentium* of the Mediterranean,' had to develop institutions, such as negotiable instruments, for which these legal systems offered no counterpart to deal with the exigencies of commercial transactions that did not respect territorial boundaries.").

143. *See* HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE] (GER.), BGBI., Federal Law Gazette, *available at* https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p0018

144. *See* CODE DE COMMERCE [COMMERCIAL CODE] (Fr.), *available at* https://www.legifrance.gouv.fr/codes/id/LEGITEXT000005634379/ (last visited Apr. 4, 2022)

145. *See* TÜRK TICARET KANUNU [TURKISH COMMERCIAL CODE], Kanun Numarası 6102, *available at* https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6102.pdf (last visited Apr. 7, 2022).

146. Efforts to harmonize certain aspects of the law in the United States have been undertaken through the Uniform Commercial Code, a privately promulgated model law instrument intended to conform aspects of state law. While adopted in all fifty U.S. states, it has been modified by state legislatures in various ways and consequently is not precisely "uniform." Neither is it a complete "code."

One obvious risk for parties involved in international trade and commercial transactions is confusion over the meaning of terms commonly used in the relevant contracts. In a purely domestic context, geographical proximity, local knowledge, and common approaches make it relatively easy for the parties to assess the risks of doing business with each other and, therefore, to agree on the terms of the transaction. In the cross-border context (much like the hypothetical at the beginning of this article), the task is more complicated: with little (perhaps no) understanding of the foreign country's laws or practices, contracting parties may not be sure they understand the terms of the transaction in the same way or that each will be able to comply accordingly.

To illustrate the variety of international approaches in this broad substantive area, we begin by noting three very different approaches.[147]

(i) Incoterms

The first involves "soft law" efforts to define the "international commercial terms" typically used in transnational contracts for the sale of goods. The first set of "Incoterms," adopted in 1936 by the International Chamber of Commerce, aimed to minimize misunderstandings about basic elements of the transactions in question. While non-binding, they were quickly embraced and have been frequently updated and are still widely used. The latest revision (effective January 1, 2020) contains eleven definitions, defining how and when parties bear the costs and risks of shipping and delivery.[148]

In the same vein, other trade associations have created standard forms for international shipping. In the freight forwarding industry, for example, standardized documents created by the International Federation of Freight Forwarders Associations are widely used.[149]

(ii) The U.N. Convention on Contracts for the International Sale of Goods

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147. *See generally* CHRISTIAN TWIGG-FLESNER, FOUNDATIONS OF INTERNATIONAL COMMERCIAL LAW (2021); *see also* UNCITRAL, HCCH & UNIDROIT: LEGAL GUIDE TO UNIFORM INSTRUMENTS IN THE AREA OF INTERNATIONAL COMMERCIAL CONTRACTS, WITH A FOCUS ON SALES 27, 44, 77, U.N. SALES NO. E.21.V.3 (2021), *available at* https://assets.hcch.net/docs/0571d8ca-8b56-41a2-8443-4fe93e306c17.pdf (last visited Apr. 11, 2022).

148. *See Introduction to Incoterms 2020*, INT'L CHAMBER OF COM., *available at* https://file-eu.clickdimensions.com/iccwboorg-avxnt/files/723e_inco2020_eng_intro.pdf?m=6/3/2020%202:01:57%20PM&_cldee=eFPP5X_7GzH1unpbpP3vANlg5-peFwGEoSL8Y0U2FBqTtv—-pCNQkItK9FRGPqJ&recipientid=contact-0ddf912cc1b9ec11983f000d3ab54bee (last visited Apr. 11, 2022).

149. *See Who We Are*, INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS ASSOCIATIONS, *available at* https://fiata.org/who-we-are.html (last visited Apr. 20, 2022).

A different approach entails codification of substantive rules by multilateral treaty, of which the 1980 UN Convention on Contracts for the International Sale of Goods ("CISG") is a good example.[150] The CISG applies to contracts for the sale of goods when the contracting parties have places of business in different States and when (i) both places of business are in Contracting States or (ii) the choice of law in the relevant jurisdiction leads to the law of a Contracting State.[151] Party autonomy and contractual freedom are key components of the Convention: if parties wish to derogate from its rules or exclude them entirely from their sales contract, they may do so. However, the Convention has limited substantive scope: it applies only to the sale of goods (subject to certain exclusions[152]) and deals only with the *formation* of the contract (and *not* with the validity of the contract, the contract's effect, or liability related to the contract).

The Convention was negotiated under the auspices of UNCITRAL, which, as noted *supra*, maintains the CLOUT database of relevant decisional interpretations.[153] This repository can be a valuable reference for practitioners and judges alike.

(iii) The Rome I Regulation

At the regional level, where the goal is the creation of an integrated economic system, substantive harmonization of commercial law can be the priority. Within the European Union, for example, the Rome I Regulation accepts the parties' freedom to choose the law applicable to their contractual relationship in civil and commercial matters subject to mandatory choice of law rules for contractual obligations.[154]

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150. CISG, *supra* note 28; for a list of contracting States, *see also generally Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited Apr. 11, 2022).

151. CISG Art. 95 allows States Party to declare they will apply the CISG only when both parties are resident in Contracting States.

152. Exclusions include sales of goods bought for personal, family, or household use; auction sales; sales that occur by authority of law; sales of stocks, shares, investment securities, negotiable instruments or money; sales of ships, vessels, hovercraft or aircraft; and sales of electricity.

153. *See* CLOUT, *supra* note 34.

154. Rome I, *supra* note 59 (art. 5 deals specifically with contracts of carriage, addresses choice of law, and provides rules for the carriage of passengers); *see infra* p. 45 for more in-depth discussion of art. 5's limitations on party autonomy.

B. Cross-Border Payments

In the cross-border context, a seller may be unable easily to vet a foreign buyer's ability or willingness to pay, particularly if the two have had no prior dealings. In the event of non-payment, the seller may find it difficult to get access to the buyer's assets. For that reason, payment obligations in international transactions are frequently set out in documentary letters of credit or guarantees. Different legal frameworks provide globally applicable rules for different types of documentary transactions when they occur across borders.

For example, the Uniform Customs and Practice for Documentary Credits ("UCP") provides a set of rules to supplement the governing law of a letter of credit transaction.[155] More recently the ICC has adopted supplementary rules to address the electronic presentation of documents, reflecting its expectation that "traditional trade instruments will, over time, inexorably move towards a mixed ecosystem of paper and digital, and, ultimately, to electronic records alone."[156] The ICC has also developed the Uniform Rules for Demand Guarantees ("URDG") to foster standard international banking practices for demand guarantee-issuing banks.[157]

Under standby letters of credit, the issuer agrees to make payment to the beneficiary if the principal defaults on the relevant undertaking, but the agreement is independent of the underlying contract. The Institute of International Banking Law & Practice developed the International Standby Practices specifically for this type of arrangement.[158] *The UN Convention on Independent Guarantees and Stand-by Letters of Credit* applies to both independent guarantees and stand-by letters of credit but has not yet been widely adopted.[159]

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155. For a summary of the most recent version (UCP 600), adopted in 2007, see *UCP 600 (Uniform Customs & Practice for Documentary Credits) - What does UCP 600 mean?*, TRADE FIN. GLOB., *available at* https://www.tradefinanceglobal.com/letters-of-credit/ucp-600/ (last visited Apr. 11, 2022).

156. *See* David Meynell, *Introduction to UCP Version 2.0, in* INT'L CHAMBER OF COM., eUCP VERSION 2.0, (May 2019), *available at* https://iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf (last visited Apr. 11, 2022).

157. *See, e.g.*, Raymond Cox & Niamh Cleary, *URDG 758*, THOMPSON REUTERS PRAC. L. (last detailed review and updating in Dec. 2018), *available at* _https://tmsnrt.rs/2Oc84Al (last visited Apr. 20, 2022).

158. *See ISP 98*, INST. OF INT'L BANKING L. & PRAC., *available at* https://iiblp.org/isp98/ (last visited Apr. 11, 2022).

159. UN Convention on Independent Guarantees and Stand-by Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163; *see also* Filip de Ly, *The UN Convention on Independent*

C. Transportation of Goods

The cross-border carriage of goods can occur by road, rail, air, sea, or some combination thereof ("multimodal transport"). A variety of instruments, both regional and global, have been developed to standardize the relevant arrangements. Within the EU, for instance, Article 5 of the Rome I Regulation deals specifically with choice of law in contracts of carriage; it places limits on party autonomy, for example, by restricting the parties who *do* wish to choose by limiting their available options to the country where (a) the passenger has his habitual residence, (b) the carrier has his habitual residence, (c) the carrier has his place of central administration, (d) the place of departure is situated, or (e) the place of destination is situated.[160]

Road. A number of instruments address the carriage of goods by road, including the 1956 UN Convention on the Contract for the International Carriage of Goods by Road ("CMR"), which applies to "every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties."[161] A similar convention exists (but has not yet entered into force) within the OAS: the Inter-American Convention on Contracts or the International Carriage of Goods by Road.[162]

Rail. A separate treaty establishes rules applicable to contracts for the carriage of goods by rail between member States. Like the CRM, the 1980 Convention Concerning International Carriage by Rail ("COTIF") allows for party autonomy.[163] It has been ratified mostly by European,

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Guarantees and Stand-by Letters of Credit, 33 THE INT'L LAW. 832 (1999); *see also* U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, S. Treaty Doc. No. 114-9 (2d Sess. 2016) (in the United States, this treaty was submitted to the U.S. Senate February 10, 2016, for advice and consent to ratification).

160. Rome I, *supra* note 59, at art. 5(2).

161. Convention on the Contract for the International Carriage of Goods by Road art. 1, May 19, 1956, 399 U.N.T.S. 189. Most (although not all) of the CMR's 58 contracting parties are European or Central Asian nations.

162. Inter-American Convention on Contracts for the International Carriage of Goods by Road, Jul. 15, 1989, O.A.S.T.S. No. 72.

163. *See* Convention Concerning International Carriage by Rail app. B art. 1, May 9, 1980, *amended* June 3, 1999, *available at* http://otif.org/fileadmin/new/3-Reference-Text/3A-COTIF99/05_Appendix_B.pdf (last visited Apr. 10, 2022)).

African, and Near Eastern States.[164] The Convention's governing body also oversees the Regulation concerning the International Carriage of Dangerous Goods by Rail ("RID"), which the EU has incorporated through Directive 2008/68/EC.[165]

Water. Some 90% of world trade goes by sea,[166] so it is unsurprising that maritime transportation of goods has long been governed by international agreements,[167] most recently the 2008 UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea ("the Rotterdam Rules").[168] That convention establishes uniform liability rules for contracts between shippers and carriers for the international carriage of goods by sea and the obligations of the carrier and the shipper, transport documents and electronic transport records, limits of liability, and provisions regarding the time for suit to be filed, jurisdiction, and arbitration.[169] A separate agreement applies to contracts of carriage by inland waterways.[170]

Air. Anyone who has traveled internationally by air should be familiar with the Montreal Convention, a widely ratified treaty that establishes a liability regime for passengers accidentally injured or killed in the course of a flight, as well as for delay, loss, or damage to baggage and air cargo.[171]

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164. For a current list of States Party, see *Status of the Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980*, INTERGOVERNMENTAL ORG. FOR INT'L CARRIAGE BY RAIL, *available at* http://otif.org/fileadmin/new/3-Reference-Text/3A-COTIF99/Status_Protocol%201999_e_as%20at_01-05-2019.pdf (last visited June 6, 2022).

165. *See* Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods, 2008 O.J. (L 260) 13 (EC).

166. *See Explaining Shipping.* INT'L CHAMBER OF SHIPPING, *available at* https://www.ics-shipping.org/explaining/ (last visited Apr. 10, 2022); *see generally* United Nations Conference on Trade and Development, *Review of Maritime Transport 2019*, U.N. Doc UNCTAD/RMT/2019/Corr.1 (Jan. 31, 2020).

167. Such as the Hague Rules (1924), the Hague-Visby Rules (1968), and the Hamburg Rules (1978).

168. *See* Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf (last visited Apr. 10, 2022).

169. *Id.*

170. The Budapest Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway, Oct. 3, 2000, *available at* http://www.unece.org/fileadmin/DAM/trans/main/sc3/cmniconf/cmnidoc/finalconf02e.pdf (last visited May 25, 2022).

171. *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, *available at*

D. E-Commerce, the Internet, and the Digital Economy

The rapid emergence of electronic methods for transacting business ("e-commerce") has posed significant challenges for private international law. UNCITRAL's Working Group IV has been a focal point for the development of agreed international rules regarding the digital economy. Among the instruments it has adopted are Model Laws on Electronic Commerce (1996), Electronic Signatures (2001), and Electronic Transferable Records (2017),[172] as well as the UN Convention on Electronic Communications in International Contracts (2005).[173] In 2019, UNCITRAL approved the publication of "Notes on the Main Issues of Cloud Computing Contracts," while continuing work on a new instrument on the use and cross border recognition of electronic identity management services ("IdM services") and authentication services ("trust services").

Other recent regulations on a regional level have addressed e-commerce issues, for example the European Union's General Data Protection Regulation ("GDPR").[174]

E. Mobile Equipment

Large-scale mobile equipment – such as aircraft, railroad rolling stock, satellites, construction vehicles, and other large machines – is costly to build, use and maintain; it is therefore often leased rather than purchased outright. It is also designed to move and, not infrequently, crosses national borders. Differences in how domestic legal systems approach rights dealing with secured transactions, title, and leasing agreements create significant uncertainties and make access to financing more difficult and more expensive, particularly in developing

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https://www.iata.org/contentassets/fb1137ff561a4819a2d38f3db7308758/mc99-full-text.pdf (last visited Apr. 10, 2022) [hereinafter "Montreal Convention"].

172. *See generally* Working Group IV: Electronic Commerce, UNCITRAL, *available at* https://uncitral.un.org/en/working_groups/4/electronic_commerce (last visited Apr. 10, 2022); *see also* Electronic Commerce, UNCITRAL, *available at* https://uncitral.un.org/en/texts/ecommerce (last visited Apr. 10, 2022).

173. *See* Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3. The Convention was submitted to the U.S. Senate on February 10, 2016. *See* S. Treaty Doc. No. 114-5.

174. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter "GDPR"]. For one approach to the issues, *see* DAN JERKER SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (2021).

countries.[175] The owner or lessor may not be confident that its security interest in the equipment will be respected in the new jurisdiction, or whether the rights and remedies that came with a security interest obtained in the original jurisdiction were transferred "as is" to the new jurisdiction when the property in question moved across borders.[176]

UNIDROIT's 2001 Cape Town Convention on International Interests in Mobile Equipment[177] was designed to address the challenges inherent in obtaining secure, enforceable rights for this type of high-value, moveable property. The Convention, which entered into force in 2006, creates an international interest that all contracting States must recognize, consisting of "(1) the ability to repossess or sell or lease the equipment in case of default; and (2) the holding of a transparent finance priority in the equipment."[178] To provide notice of security interests, it also provides for an electronic register.[179] The Convention itself has been described as a "broad umbrella provision that provides the general principles"[180] since it is given specific (sectoral) application by four additional protocols, addressing in turn aircraft equipment, railway rolling stock, space assets, and mining, agricultural, and construction equipment.[181]

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175. *See* Roy Goode, *The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing*, 7 UNIFORM L. REV. 3 (2002), *available at* https://www.unidroit.org/english/publications/review/articles/2002-1-goode-e.pdf (last visited Apr. 10, 2022).

176. *See* Sandeep Gopalan, *Securing Mobile Assets: The Cape Town Convention and Its Aircraft Protocol*, 29 N.C. J. INT'L L. & COM. REG. 59, 61-63 (2003).

177. *See* UNIDROIT, Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, *available at* https://www.unidroit.org/instruments/security-interests/cape-town-convention (last visited Apr. 10, 2022).

178. Sean D. Murphy (ed.), *Cape Town Convention on Financing of High-Value, Mobile Equipment*, 98 AM. J. INT'L L. 852, 853 (2004).

179. The register is online at https://www.internationalregistry.aero/ir-web/ (last visited Mar. 20, 2022).

180. *See* Gopalan, *supra* note 176, at 69-70.

181. Protocol on the Matters Specific to Aircraft Equipment, Nov. 16, 2001; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Feb. 23, 2007; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, Mar. 9, 2012; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural, and Construction Equipment, Nov. 22, 2019 [hereinafter "MAC Protocol"]. The texts of these protocols are available at https://www.unidroit.org/instruments/security-interests/. The United States signed the MAC Protocol in 2019.

F. Financial Securities

In today's computerized securities markets, transactions typically occur in large volumes and at great speed, frequently across national borders. Because different legal systems have different ways of classifying the rights that come with such transfers, uniform rules regarding the perfection, priority, and other effects of transfers became important. The 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary[182] was "designed to apply in relation to all securities held with an intermediary, independent of how the rights resulting from a credit of securities to a securities account are classified by any legal system."[183] It has been described as a "pure conflict of laws convention [that] does not impose any changes on existing or future substantive law."[184] It applies to any situation involving intermediary-held instruments or assets that are financial in nature, apart from cash, and it creates a uniform conflict of laws regime establishing a primary rule for determining the law applicable to those securities, fallback rules in the event that the applicable law is not determined by the primary rule, and factors to be disregarded in determining the applicable law.[185]

UNIDROIT has also adopted an instrument focused on financial securities: the Convention on Substantive Rules for Intermediated Securities.[186] The stated goal of that instrument is "to promote internal soundness and cross-border system compatibility by providing the basic legal framework for the modern intermediated securities holding

182. Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, Jul. 5, 2006, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=72 (last visited Mar. 20, 2022) [hereinafter "Hague Securities Convention"]. The United States ratified the Convention in 2016. *See* S. Treaty Doc. No. 112-6.

183. ROY GOODE, HIDEKI KANDA & KARL KREUZER, HAGUE SECURITIES CONVENTION – EXPLANATORY REPORT 11 (2nd ed. 2017), *available at* https://assets.hcch.net/docs/d1513ec4-0c72-483b-8706-85d2719c11c5.pdf (last visited Apr. 10, 2022).

184. *Id.* at 21.

185. Hague Securities Convention, *supra* note 182 at arts. 4-6.

186. Convention on Substantive Rules for Intermediated Securities, Oct. 9, 2009, *available at* https://www.unidroit.org/instruments/capital-markets/geneva-convention (last visited Mar. 20, 2022). The Convention is not yet in force. *See Status of the UNIDROIT Convention on Substantive Rules for Intermediated Securities,* UNIDROIT, *available at* https://www.unidroit.org/instruments/capital-markets/geneva-convention/status/ (last visited Apr. 10, 2022).

system."[187] It describes, among other things, the rights of a securities account holder, the legal framework for acquisition and disposition of securities, priority among competing interests, loss sharing in case of insolvency of the intermediary, and obligations and liability of intermediaries.[188]

G. Cross-Border Insolvency

Cross-border insolvencies present similarly difficult challenges given substantive and procedural differences in national law. UNCITRAL's Working Group V has adopted a number of insolvency-focused instruments, including the 1997 Model Law on Cross-Border Insolvency, designed to "assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency."[189] It focuses on several PIL elements in foreign proceedings, cooperation among the courts of States where a debtor's assets are located, and coordination of concurrent proceedings. To date, legislation based on this model law has been adopted in 53 jurisdictions, including the United States.[190]

In 2018, Working Group V adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, aimed at creating a "harmonized procedure for recognition and enforcement of insolvency-related judgments."[191] In early 2021, UNCITRAL published a Digest of

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187. *Background to the 2009 Geneva Convention*, UNIDROIT, *available at* https://www.unidroit.org/instruments/capital-markets/geneva-convention/overview/ (last visited Apr. 10, 2022).

188. *See* Convention on Substantive Rules for Intermediated Securities, *supra* note 186, at ch. 2 and arts. 11-13, 19, 26, and 28.

189. *See* UNCITRAL's Model Law on Cross-Border Insolvency (1997) and its Guide to Enactment and Interpretation (2013), *available at* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last visited Apr. 10, 2022).

190. *See Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Mar. 20, 2022). In 2015, for example, OHADA (which includes 17 Member States) adopted the Acte uniforme portant organisation des procédures collectives d'apurement du passif, the text of which is available (in French) at https://www.droit-afrique.com/uploads/OHADA-Acte-uniforme-2015-Procedures-collectives.pdf. The United States adopted legislation based on the model in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (2005 Act), codified in Chapter 15 of the U.S. Bankruptcy Code.

191. *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)*, UNCITRAL, *available at*

Case Law on the Model Law for Cross Border Insolvency, which examines how the model law has been applied in jurisdictions that have adopted it.[192] The Working Group has also drafted a Model Law on Enterprise Group Insolvency, whose purpose is "to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group."[193]

Additional examples of harmonized insolvency law include EU Regulation 2015/848,[194] which is directly applicable in all EU member States (except Denmark) and requires mandatory recognition of other EU States' insolvency proceedings.[195] It also requires the establishment of insolvency registers, in which the information concerning insolvency proceedings is "published as soon as possible after the opening of such proceedings,"[196] and addresses applicable law and jurisdiction, primary and secondary insolvency proceedings, insolvency proceedings for two or more members of a group of companies, and data protection for parties involved.

Outside of the intergovernmental organizations that have worked on cross-border insolvency, there are other, judicially driven efforts to encourage coordination and cooperation in cross-border insolvencies and restructurings. For example, judges from a number of jurisdictions around the world formed the Judicial Insolvency Network ("JIN") in 2016. JIN "serves as a platform for sustained and continuous engagement for the furtherance of [...] judicial thought leadership, best practices, and communication and cooperation."[197] The network issued the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, whose "overarching aim [...] is the preservation of

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https://uncitral.un.org/en/texts/insolvency/modellaw/mlij (last visited Apr. 11, 2022); *see also UNCITRAL Legislative Guide on Insolvency Law* (rev. ed. 2019), UNCITRAL, *available at* https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law (last visited Apr. 11, 2022).

192. *See* UN COMMISSION ON INTERNATIONAL TRADE LAW, DIGEST OF CASE LAW ON THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (2021), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf (last visited Apr. 11, 2022).

193. UN COMMISSION ON INTERNATIONAL TRADE LAW, MODEL LAW ON ENTERPRISE GROUP INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.20.V.3 (2020).

194. Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, 2015 O.J. (L 141) 19 (EU).

195. *See id.* at preamble ¶ 65 and arts. 19-20.

196. *Id.* at arts. 24-27.

197. *See About Us*, JUDICIAL INSOLVENCY NETWORK, *available at* https://jin-global.org/about-us.html (last visited Aug. 4, 2022).

enterprise value and the reduction of legal costs."[198] The Guidelines have been adopted by sixteen courts and / or jurisdictions around the world.[199]

H. Consumer Protection

Harmonization of domestic consumer protection laws has begun to receive serious attention in recent years, partly because of the efforts of the International Consumer Protection and Enforcement Network ("ICPEN").[200] In 2015, the UN General Assembly adopted a revision of its UN Guidelines for Consumer Protection,[201] which provide a comprehensive overview of what consumer protection legislation should cover, including institutional enforcement and systems of redress. The 2015 revision includes sections on privacy, e-commerce, and financial services, added "as an explicit response to the irruption of the digital economy and to the recent financial crisis."[202] Additional sections address, among others, disputes, and redress; the energy, public utilities, and tourism sectors; and international cooperation.

For its part, the EU has adopted a robust legal and regulatory framework for protecting consumers.[203] Expressed primarily through directives establishing "minimum harmonization levels," this enforcement framework is designed to protect consumers and provide for mutual assistance between member State enforcement authorities when

198. *See JIN Guidelines*, JUDICIAL INSOLVENCY NETWORK, *available at* https://jin-global.org/jin-guidelines.html#list-1 (last visited Aug. 4, 2022).

199. *See id.* The courts and / or jurisdictions that have adopted these Guidelines are the United States Bankruptcy Court for the District of Delaware, the Supreme Court of Singapore, the United States Bankruptcy Court for the Southern District of New York, the Supreme Court of Bermuda, the Chancery Division of England & Wales, the Eastern Caribbean Supreme Court, the Supreme Court of New South Wales, the United States Bankruptcy Court for the Southern District of Florida, the Seoul Bankruptcy Court, the Grand Court of the Cayman Islands, the United States Bankruptcy Court for the Southern District of Texas, the Commercial List of Users' Committee of the Superior Court of Justice – Ontario (Commercial List), the District Court Midden-Nederland (the Netherlands), the Federal Court of Australia, the Supreme Court of British Columbia, and Brazil.

200. *See generally What We Do*, INT'L CONSUMER PROTECTION AND ENFORCEMENT NETWORK, *available at* https://icpen.org/what-we-do (last visited Apr. 11, 2022).

201. *See United Nations Guidelines for Consumer Protection*, UNCTAD, *available at* https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-on-consumer-protection (last visited Apr. 11, 2022).

202. *Id.*

203. *See generally* JANA VALANT, CONSUMER PROTECTION IN THE EU: POLICY OVERVIEW 5 (2015), *available at* https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf (last visited Apr. 11, 2022).

one requests information from others regarding actual or potential intra-EU consumer protection violations.[204]

Of particular importance is the aforementioned EU General Data Protection Regulation ("GDPR"), which has been described as the "toughest privacy and security law in the world."[205] It applies broadly to any organization, whether or not EU-based, that targets or collects data on people in the EU, and it covers data collection and protection rules, accountability and compliance rules, data security, data processing rules, and privacy. Different types of penalties can be applied to violators, depending on the type of violation committed, and they can be substantial.[206]

For its part, the OAS has dedicated efforts toward harmonizing consumer protection law through the seventh Inter-American Specialized Conference on Private International Law ("CIDIP VII").[207] Within this process, three proposals were made to advance consumer protection as a way of facilitating cross-border trade in goods and services while lowering transaction costs for consumers: Brazil has advocated a draft convention to address choice of law, Canada has proposed draft model laws on jurisdiction and choice-of-law rules, and the United States has submitted a draft Legislative Guide on Consumer Dispute Settlement and Redress. The proposals represent different approaches to resolving the issues. The Brazilian draft treaty would validate party choice-of-law determinations only where the chosen law is the "most favorable to the consumer." One difficulty with this approach, however, is in establishing the criteria by which that determination can be made with some measure of consistency and objectivity. Would it mean the law with longer filing periods, or the law allowing less costly consumer proceedings or higher

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204. Commission Regulation 2006/2004 of Oct. 27, 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws, art. 6, 2004 O.J (L364) 1 (EC).

205. GDPR, *supra* note 174. *See also What is GDPR, The EU's new data protection law?*, GDPR.EU, *available at* https://gdpr.eu/what-is-gdpr/ (last visited Apr. 20, 2022).

206. GDPR, *supra* note 174, at arts. 83-84. Administrative fines, for example, vary from up to €10 million or 2% of the violator's global annual revenue (whichever is higher), to up to €20 million or 4% of global annual revenue (whichever is higher).

207. For an overview of CIDIP VII, see *Department of International Law, instruments by conference – CIDIP VII*, O.A.S., *available at* http://www.oas.org/en/sla/dil/private_international_law_conferences_Cidip_VII.asp (last visited Apr. 11, 2022). For a history of the CIDIP process more generally, *see Department of International Law – the History of the CIDIP Process*, O.A.S., *available at* http://www.oas.org/en/sla/dil/private_international_law_history_cidip_process.asp (last visited Apr. 11, 2022).

potential damage awards? Attempts to clarify these issues and explore possible alternatives are ongoing.

The U.S. proposal suggests three "model laws" for possible adoption by OAS member States: one for an agreed procedure for resolving "small claims" in cross-border consumer contracts, a second on government redress mechanisms including authority for domestic consumer protection authorities to cooperate with their foreign counterparts in cross-border disputes and enforcement of judgments, and a third for adoption of model rules for electronic arbitration of cross-border consumer claims. The United States has expressed the view that resolving cross-border consumer claims through traditional court mechanisms is too expensive and not practical, given the small value of most consumer complaints, and the U.S. proposals therefore focus on alternate effective redress. To be successful, however, such an approach would depend on rapid, effective, and consistent adoption of the model law, rules, and mechanisms in the domestic laws of a substantial number of countries in the hemisphere – obviously, a more arduous path than ratification of a single convention.

The OAS has also developed a proposed (and important) Inter-American Model Law on Access to Public Information for consideration by member States.[208]

I. Non-Contractual Obligations

Although not strictly within our working definition of PIL, we cannot conclude without noting efforts to deal with many of the same issues in the field of non-contractual obligations (generally, what a U.S. lawyer would think of as tort law). Within the EU, the Rome II Regulation aims at harmonizing the rules for determining the law applicable when the issues arise in civil and commercial matters.[209]

The basic principle is *lex loci delicti comissi*. Thus, article 4 of the Regulation provides that, as a general rule,

the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage

208. *Model Law on Access to Public Information*, O.A.S., *available at* http://www.oas.org/en/sla/dil/access_to_information_model_law.asp (last visited Apr. 11, 2022).

209. *See* Rome II, *supra* note 59, at arts. 1-2.

occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[210]

The doctrine of "close connections" also applies where it is "clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country" other than the country that should normally apply under the general rule or its immediate exception; the law of the country with those close connections thus applies.[211]

The same overall approach is reflected in the 1971 Hague Convention on the Law Applicable to Traffic Accidents[212] and the 1973 Hague Convention on the Law Applicable to Products Liability (the latter addresses choice of law in cross-border cases where liability arises due to defective products).[213] Finding an approach to cross-border civil liability for environmental damage has been on the agenda of the Hague Conference since 1993, and in 2010 the Permanent Bureau invited the Council on General Affairs and Policy of the Conference to revisit the question.[214]

VII. PARTICULAR CHALLENGES FOR THE U.S. LEGAL SYSTEM

Most PIL issues arise from the fact that different national legal systems around the world address (and resolve) similar problems in different ways. For the United States, two particular facts complicate its engagement with PIL in the international context: (1) the federal structure

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210. *Id.* at art. 4(1). Under art. 4(2), "where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."

211. *Id.* at art. 4(3). The "national override" is found in Article 16, which provides that the Regulation shall not restrict the application of a forum's mandatory rules, irrespective of the law applicable to the non-contractual obligation.

212. Convention on the Law Applicable to Traffic Accidents, May 4, 1971, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=81 (last visited Mar. 20, 2022).

213. Convention on the Law Applicable to Products Liability, Oct. 2, 1973, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=84 (last visited Mar. 20, 2022). For a list of contracting parties, see *Status Table – Convention of 2 October 1973 on the Law Applicable to Products Liability*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=84 (last visited Mar. 20, 2022).

214. *See* Christophe Bernasconi, *Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?*, 12 HAGUE Y.B. OF INT'L L. 1 (2000); *Should the Hague Conference Revisit the Scope and Nature of Possible Work in the Field of Civil Liability for Environmental Damage?*, HCCH, *available at* https://assets.hcch.net/upload/wop/genaff2010pd12e.pdf (last visited June 6, 2022).

of its government, in which the authority of the central government is limited and many PIL issues fall within the competence of the constituent states, and (2) the hybrid nature of its legal system, in which some PIL issues are matters of common law rather than statute.

The United States is not, of course, the only country with a federal system, but it does have more subnational components with substantial independent legislative authority than any other.[215] Under the U.S. Constitution, the federal government has limited (delegated) authority to enact substantive law; each of the constituent States retains authority that has not been granted to the federal government. The judicial system is similarly bifurcated: the jurisdiction of the federal courts is circumscribed, and each state (and territory) maintains its own system of courts. The relationship between the two is complicated: in some areas relevant to PIL, a case may be properly pursued in the federal courts, but state law will apply, while in others the reverse is true: the state courts may be empowered to hear the case but must decide it under federal law.

In both federal and state courts, the "law" is a mixture of legislation (duly enacted statutes) and common law (judicial decisions governed by the principle of *stare decisis*). Some areas are substantially codified, others much less so. For instance, the United States lacks a comprehensive national commercial code.[216] The law of contracts is generally a matter of common law, although some areas have been standardized through adoption of a "uniform law" by the states. Similarly, there are no uniform "conflicts of law" rules of general applicability at the national level: while some states have enacted some relevant provisions, this area remains largely a matter of common (decisional) law.[217] Recognition and enforcement of foreign judgments remains (mostly) a matter of state law, although with a fairly high degree of uniformity due to adoption of uniform laws; foreign judgments are not

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215. On the challenges of federalism generally, see Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT'L L. 369 (2010). For background on the U.S. approach to PIL, see Peter Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, 249 RECUEIL DES COURS 9 (1994), *available at* http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041102607_01 (last visited Mar. 20, 2022).

216. *See generally Commercial Law Research Guide – Uniform Commercial Code*, GEO. L., *available at* https://guides.ll.georgetown.edu/commerciallaw/ucc (last visited Apr. 8, 2022). The Uniform Commercial Code, a product of two private entities (the Uniform Law Commission and the American Law Institute), has not been adopted uniformly in every U.S. jurisdiction; neither is it truly comprehensive.

217. The American Law Institute is currently pursuing a third "RESTATEMENT OF THE LAW" in this area.

entitled to the constitutionally-mandated "full faith and credit" as accorded to those of sister "states" of the Union.

Some areas fall primarily within federal competence, for example bankruptcy and intellectual property. Not a few are governed by both federal and state law, such as privacy, data protection, and e-commerce, to mention only three. Others, such as family law, remain primarily matters of state law.

In a few discrete areas, harmonization occurs at the federal level by virtue of the jurisdictional reach of the federal courts. For instance, most transnational cases involving civil and commercial matters are brought in federal (as opposed to state) courts; in consequence, articulation of the rules regarding the interpretation and application of foreign law in the U.S. legal system largely occurs at the federal level. The same is largely true with respect to issues of international judicial assistance (through application, for example, of the Hague Service and Evidence Conventions).

One important point is often unnoticed or misunderstood by non-U.S. lawyers: to the extent that the international community addresses PIL issues by treaty or convention, U.S. ratification may raise "federalism" issues. Under Art. VI cl. 2 of the U.S. Constitution, duly ratified treaties become part of the "supreme Law of the Land," displacing contrary state law. Thus, ratification of PIL treaties inescapably "federalizes" the issues – even in areas that have traditionally been the subject of state law. For example, while family law remains primarily within state competence, U.S. adherence to various Hague Conventions has required the federal government to assume an important role that it might otherwise not have had.

The significance of this fact is often overlooked. Wholly apart from the substance, U.S. ratification of PIL treaties can be challenging since states may not welcome federal "intrusion" into areas traditionally falling within state competence. At the same time, the federal government must be confident that the United States is capable of complying fully with its international obligations. In some cases, creative solutions must be found to these mutually valid but sometimes competing concerns.[218]

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218. *See generally* Paul R. Dubinsky, *Private Law Treaties and Federalism: Can the United States Lead?* 54 TEX. INT'L L. J. 39 (2018); Charlotte Ku, William H. Henning, David P. Stewart & Paul F. Diehl, *Even Some International Law Is Local: Implementation of Treaties through Subnational Mechanisms*, 60 VA. J. INT'L L. 101 (2019).

VIII. CONCLUSION

Some may conclude from this survey that private international law cannot properly be considered a cohesive "field" of law (either substantive or procedural) and is best understood more as a collection of disparate (if related) problems arising in the broad context of cross-border transactions, together with an array of tools, methods or principles for resolving those problems.[219] To some extent, such a criticism is valid – even if it could be made of other areas of contemporary concern (for example, is "privacy" a cohesive field?). In any event, it may well be one reason that PIL is rarely taught as a discrete course in U.S. law schools. Even if accurate, that view does not diminish the growing relevance and importance of the field.

As we hope this survey has demonstrated, international practitioners and students alike must be alert not only to the particular problems that can arise in the "transnational" or "cross-border" context but also to the variety of relevant mechanisms and approaches – including both the increasing efforts at substantive harmonization and the expanding architecture of engagement and procedural cooperation – that PIL offers for their resolution.[220] Acquainting students and practitioners to the breadth and complexity of (and developments in) the field is the main reason for this article.[221]

In the end, of course, the objective of the PIL project broadly considered – the ultimate purpose or justification for the wide-ranging efforts described above – must be to promote justice, efficiency, and

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219. *See* John Linarelli, *Toward A Political Theory for Private International Law*, 26 DUKE J. COMP. & INT'L L. 299 (2016); Alex Mills, *The Identities of Private International Law: Lessons from the U.S. and EU Revolutions*, 23 DUKE J. COMP. & INT'L L. 445, 474 (2013) (Alex Mills has described PIL as "a form of 'secondary law' (in H.L.A. Hart's sense) which serves the international, federal or regional function of ordering the distribution of regulatory authority between legal orders, accepting and reinforcing their pluralism.").

220. Verónica Ruiz Abou-Nigm emphasizes the term "cosmopolitan integration." She writes: "The raison d'être of private international law is the plurality of international orders; dealing with this plurality is the quintessential function of private international law." *See* Verónica Ruiz Abou-Nigm, *Bridging and Balancing: Diversity and Integration in Private International Law*, *in* DIVERSITY AND INTEGRATION IN PRIVATE INTERNATIONAL LAW 362, 386 (Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela eds., 2019).

221. Several sources can be helpful for those interested in monitoring PIL developments online, including: "Conflict of Laws .net: Views and News in Private International Law" at https://conflictoflaws.net; "Letters Blogatory: the blog of international judicial assistance," at https://lettersblogatory.com/; the European Association of Private International Law at https://eapil.org; and the European Group of Private International Law at https://gedip-egpil.eu/en/.

economic growth and development around the world.[222] Those are the standards by which the efforts described above, in all the different venues, must ultimately be judged.

222. *See* David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607 (2011). For a recent examination of how private international law can contribute to international development, see THE PRIVATE SIDE OF TRANSFORMING OUR WORLD - UN SUSTAINABLE DEVELOPMENT GOALS 2030 AND THE ROLE OF PRIVATE INTERNATIONAL LAW (Ralf Michaels, Verónica Ruiz Abou-Nigm & *Hans van Loon* eds., 2021).

A PRECAUTIONARY, PREVENTATIVE FRAMEWORK FOR OUTER SPACE RESOURCES: APPLYING THE ANTARCTIC TREATY SYSTEM'S MADRID PROTOCOL TO THE UNREGULATED FRONTIER OF "NEWSPACE"

Nelson Falkenburg

INTRODUCTION

Imagine you step out of the Martian research station at dawn and take in the view. The morning is bitter cold, as it always is, and the thin atmosphere is thick with smog. Nearby, mineral waste is piled in gigantic heaps next to deep craters – officials say the community's water may be polluted from leaching. Across the horizon, which is eerily flat, you can see into the expanse of space, and rising in the distance, the pale sun – its light barely reaching the Martian surface. As a SpaceCorp Cargo ship, ferrying precious minerals to Titan, readies for blastoff at the launch site, you ask yourself a question that has been on your mind lately – how did we, humanity, get here? How did we arrive at a point where the Martian atmosphere, surface, and resources are all polluted? You wonder if it was inevitable, or if it could have turned out differently.

We are at a pivotal point in our exploration and exploitation of outer space. Private space companies are proliferating, with states enacting unilateral legislation to encourage growth. This approach is leading to a regulatory "race to the bottom," with the effect of an unclear and under-regulated approach to space resource exploration and use. The lack of clarity and competition for space resources, in turn, could quickly spiral into conflict. Considering this trajectory, states must pivot to a multilateral approach to regulating space resource exploration and use. As a corollary to the Outer Space Treaty ("OST"), the Antarctic Treaty System's Madrid Protocol offers the best principles and framework for an approach to space resources that is precautionary, de-escalates potential conflict in space, and prevents damage to the extraterrestrial environment.

This paper is organized in a series of parts, each one building on the next, to arrive at a proposal for a precautionary, preventative approach to outer space resource exploration and use. Part I will provide the context of our current state, with a discussion of the emergence of NewSpace and the need for a "spatial fix" for capitalist growth, followed by relevant articles of the Outer Space Treaty, and concluding with potential extraterrestrial environmental impacts of space resource exploration and

use. Part II will discuss the international impact of unilateral space resource policymaking, the ensuing regulatory "race to the bottom," and the increasing potential for conflict. Part III will discuss an alternative, multilateral framework for space resource use based on the preventive and precautionary approach of the Antarctic Treaty's Madrid Protocol, including potential challenges to such a framework. The topics of sovereignty and resource-sharing between states are critical issues related to this topic but are beyond the scope of this paper and therefore will not be considered.

PART I – NEWSPACE AND THE IMPLICATIONS FOR EXTRATERRESTRIAL ENVIRONMENTAL IMPACTS

NEWSPACE AND THE "SPATIAL FIX"

Humankind has entered a new era in outer space exploration – "NewSpace." Also known as "New Space," these terms refer to the emergence of private entities directly operating in outer space and the increasing commercialization of the outer space sector.[1] In May of 2012, SpaceX launched its first rocket, Cargo Dragon, to ferry supplies to the International Space Station ("ISS") on behalf of NASA, ushering in the era of NewSpace.[2] Private firms in the space industry are nothing new, as Boeing, Lockheed Martin, and Airbus have acted as contractors for decades to build rocket components or satellites. But in the last decade, the role of private companies has shifted, as they are now directly operating in outer space with their own rockets and systems.

Since the first SpaceX launch, and the general success of reusable rocketry it exemplified, the private space sector is booming. According to news reports, the private space sector is a multi-billion-dollar industry.[3] Some articles claim the riches of outer space are significant enough that

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1. . *See* Steve Simon, *A cause for concern: Developing regulatory competitions in NewSpace*, 187 ACTA ASTRONAUTICA 212, 212-13 (2021).

2. . Elizabeth Howell, *SpaceX's Dragon: First Private Spacecraft to Reach Space Station*, SPACE.COM (Aug. 10, 2020), *available at* https://www.space.com/18852-spacex-dragon.html (last visited Mar. 25, 2022).

3. . *See* Michael Sheetz, *Investment in space companies put at record $8.9 Billion in 2020 despite Covid*, CNBC (Jan. 25, 2021), *available at* https://www.cnbc.com/2021/01/25/investing-in-space-companies-hits-record-8point9-billion-in-2020-report.html (last visited Mar. 25, 2022).

a single asteroid could make everyone on Earth a billionaire,[4] signaling the vast amounts of wealth in space resources, while grossly misunderstanding the realities of markets and wealth generation. Led most visibly by a trio of billionaires, Elon Musk (SpaceX), Jeff Bezos (Blue Origin), and Richard Branson (Virgin Galactic), NewSpace has exploded onto the scene with high-profile space tourism missions. Blue Origin launched Star Trek star William Shatner into orbit on one of its rockets,[5] and SpaceX sent four civilians into space and filmed a Netflix documentary.[6] Beyond space tourism, private companies are expanding into satellite constellations and space stations. SpaceX's "Starlink" constellation will eventually include 42,000 satellites,[7] and Blue Origin recently announced its plan to build a space business park in outer space called the "Orbital Reef," a private-sector equivalent of the ISS.[8]

Despite the recent growth in the space sector, private companies are still heavily reliant on state funding. A particularly noteworthy example is NASA's choice of SpaceX for a $2.9 billion contract to design and develop a lunar lander for the Artemis missions. Following the contract award, Blue Origin filed a lawsuit against NASA alleging the award was unfairly granted, an argument the federal court recently rejected.[9] NASA's Commercial Lunar Payload Services (CLPS) Program has provided a much-needed boost for several established companies and

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4. . *See* Joao Piexe, *The golden asteroid that could make everyone on Earth a billionaire*, MINING.COM (June 26, 2019), *available at* https://www.mining.com/web/the-golden-asteroid-that-could-make-everyone-on-earth-a-billionaire/ (last visited Mar. 25, 2022).

5. . Joe Hernandez, *William Shatner boldly went into space for real. Here's what he saw*, NPR (Oct. 13, 2021), *available at* https://www.npr.org/2021/10/13/1045377132/william-shatner-star-trek-captain-kirk-blue-origin-space-flight (last visited Mar. 25, 2022).

6. . Rebecca Heilweil, *Streaming space tourism is the new reality TV*, VOX MEDIA, LLC (Aug. 4, 2021), *available at* http://www.vox.com/recode/22610315/netflix-spacex-streaming-space-tourism (last visited Mar. 25, 2022).

7. . Keith Cooper, *Astronomers Raise Concerns over SpaceX's Starlink*, 33 PHYSICS WORLD 10, 10 (2020).

8. . *Blue Origin and Sierra Space Developing Commercial Space Station*, BLUE ORIGIN (Oct. 25, 2021), *available at* https://www.blueorigin.com/news/orbital-reef-commercial-space-station (last visited Mar. 25, 2022).

9. . Joey Roulette, *Blue Origin Loses Legal Fight Over SpaceX's NASA Moon Contract*, N.Y. TIMES (Nov. 4, 2021), *available at* https://www.nytimes.com/2021/11/04/science/blue-origin-nasa-spacex-moon-contract.html (last visited Mar. 22, 2022).

start-ups in the space mining sector.[10] NASA has selected 14 companies for contracts under CLPS, including Blue Origin and SpaceX, but also smaller startups like Moon Express, Deep Space Systems, and Firefly Aerospace. The goal is to develop technologies that will deliver payloads for NASA and land on the Moon's surface under the Artemis missions.[11]

The emergence of NewSpace, led by billionaires, is a predictable next step in capitalism's evolutionary development. Private companies launching into outer space are seeking what Marxist economic geographer David Harvey calls a "spatial fix" to capitalism.[12] Harvey defines the spatial fix "to describe capitalism's insatiable drive to resolve its inner crisis tendencies by geographical expansion and geographical restructuring."[13] The concept posits that capitalism reaches physical and geographic limits to growth, which require a "spatial fix" to capitalize on a new market and generate wealth.[14] The colonization of the Global South and the rise of the internet and social media are both examples of the "spatial fix." Now, as private companies have overexploited the resources of Earth in pursuit of ever-increasing profits, and the "externalities" of climate change – drought, heat waves, fires, and increasingly devastating storms – are coming home to roost, private

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10. . *See generally* Chabeli Carrazana, *Layoffs and Stalled Projects Plagued Space Start-up Moon Express, Then NASA Stepped In*, ORLANDO SENTINEL (Dec. 9, 2018), *available at* https://www.orlandosentinel.com/space/os-bz-moon-express-update-20181114-story.html (last visited Mar. 22, 2022); Brian Dunbar, *Commercial Lunar Payload Services Overview*, NASA (Nov. 18, 2019), *available at* http://www.nasa.gov/content/commercial-lunar-payload-services-overview (last visited Mar. 22, 2022) (noting that "NASA's Commercial Lunar Payload Services (CLPS) initiative allows rapid acquisition of lunar delivery services from American companies for payloads that advance capabilities for science, exploration or commercial development of the Moon.").

11. . Carrazana, *supra* note 10; Dunbar, *supra* note 10.

12. . Victor L. Shammas & Tomas B. Holen, *One giant leap for capitalistkind: private enterprise in outer space*, 10 PALGRAVE COMM. 1, 1-9 (2019).

13. . DAVID HARVEY, GLOBALIZATION AND THE 'SPATIAL FIX, 24, (geographische revue ed., 2001) (using the term "fix" to refer to the way a person with a drug addiction requires a "fix," meaning any relief is temporary.).

14. . *Id.* at 25–26 ("The primary result of these enquiries was to show that (a) capitalism could not survive without being geographically expansionary (and perpetually seeking out 'spatial fixes' for its problems), (b) that major innovations in transport and communication technologies were necessary conditions for that expansion to occur (hence the emphasis in capitalism's evolution on technologies that facilitated speed up and the progressive diminution of spatial barriers to movement of commodities, people, information and ideas over space) . . . .").

companies must look elsewhere for profits, beyond our globe. Jeff Bezos, at the unveiling of Blue Origin's lunar lander concept, posited a future where people live on Earth and extract resources from other planets saying, "[t]he reason we go to space, in my view, is to save the Earth."[15] In other words, NewSpace companies are finding their "spatial fix" in outer space.

THE OUTER SPACE TREATY

The current legal framework for regulating private industry's expansion into outer space is the "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies," also known as the "Outer Space Treaty," or simply the "OST."[16] The OST is a constitutional treaty that articulates a series of principles for the governance of outer space. These principles are borrowed in large part from the Antarctic Treaty System, which was negotiated in 1959, shortly before parties met to begin drafting the OST.[17] The relationship between the two treaties will be discussed in more detail in Part III and will form the basis for a new proposal to regulate outer space resource exploration and use. Initiated shortly after the launch of the Soviet satellite Sputnik, the OST was negotiated during the Space Race between the USSR and the United States.[18]

The UN General Assembly adopted the OST in 1966 and it opened for signature in 1967, prior to the US landing astronauts on the Moon.[19] Following adoption of the OST, the UN General Assembly adopted four other clarifying agreements regarding the Moon,[20] liability,[21] astronaut

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15. . Eric Lutz, *Jeff Bezos Wants to Move Industry Offworld to 'Save the Earth,'* VANITY FAIR (June 7, 2019), *available at* https://www.vanityfair.com/news/2019/06/jeff-bezos-wants-to-move-industry-to-space-to-save-the-earth (last visited Mar. 22, 2022).

16. . Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

17. . Paul G. Dembling & Daniel M. Arons, *The Evolution of the Outer Space Treaty,* 33 J. AIR L. & COM. 419, 422–23 (1967).

18. . *See Space Race Timeline,* ROYAL MUSEUMS GREENWICH, *available at* https://www.rmg.co.uk/stories/topics/space-race-timeline (last visited Mar. 23, 2022).

19. . Outer Space Treaty, *supra* note 16.

20. . Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, *opened for signature* Dec. 18, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Treaty].

21. . *See* Convention on the International Liability for Damage Caused by Space Objects, *opened for signature* Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Space Liability Treaty].

rescue,[22] and the registration of objects.[23] All four agreements, apart from the Moon Agreement, achieved widespread adoption. For the purposes of this analysis, however, we will focus solely on the OST. Several provisions of the OST are related to outer space resource use and exploration, as well as extraterrestrial environmental impacts.

Private companies seeking a spatial fix in outer space find both enabling and constraining language in the OST. Article I of the OST enables private companies and Articles II, VI, VII, and IX constrain them. Article I states that celestial bodies "shall be free for exploration and use by all states without discrimination of any kind."[24] Alternatively, Article II states that "[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[25] Like most terms in the OST, "exploration" and "use" go undefined, leaving open a wide range of possible interpretations. Several states, in what some scholars consider contravention of Article II of the OST, are going beyond authorizing legislation and developing legal frameworks to allow for private company resource exploration and use under Article I of the OST. By employing the least restrictive reading of OST Article II, the United States is leading this regulatory "race to the bottom" through a series of unilateral domestic laws and executive orders. This concept will be further explored in Part II.

Articles VI and VII constrain private actors by placing them under the authority of the launching state and including liability provisions.[26] Article VI places the responsibility of non-governmental actors in outer space under the launching and authorizing state, including a requirement for authorization and supervision by a state party to the treaty.[27]

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22. . *See* Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, *opened for signature* Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter Rescue Treaty].

23. . *See* Convention on Registration of Objects Launched into Outer Space, *opened for signature* Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration of Objects Treaty].

24. . Outer Space Treaty, *supra* note 16, art. I.

25. . *Id.* at art. II.

26. . *Id.* at arts. VI, VII.

27. . *Id.* at art. VI ("State Parties to the Treaty shall bear international responsibility for national activities in outer space, . . . whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The

Article VII expands upon the principle that states bear responsibility for private actors, providing that those states are liable for damage caused by space objects, while including a provision on space debris.[28]

The authorizing and launching state bears responsibility for non-governmental actors in outer space. The launching state is determined not by the location of a private company's headquarters (which would be challenging in our increasingly globalized world), but by the physical location, or territory, from which a rocket is launched.[29] Given the two constraining principles in Articles VI and VII, states have enacted authorizing laws for commercial entities to launch in their territories with some states including regulations regarding space debris and environmental impacts.[30]

A final relevant article regarding resource extraction and use is Article IX of the OST which is specific to contamination of the Earth and celestial objects.[31] While some consider this an entry point for the regulation of extraterrestrial environmental impacts, it is too narrowly

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activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorizing and continuing supervision by the appropriate State Party to the Treaty.").

28. . *Id.* at Art. VII. ("Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.").

29. . *Id.* at Art. VII.

30. . *See* Annette Froehlich & Vincent Seffinga, *Comparative Analysis of National Space Legislation*, *in* NAT'L SPACE LEGIS.: A COMPAR. & EVALUATIVE ANALYSIS 173-77 (Annette Froehlich & Vincent Seffinga, eds., 2018). (Discussing differing approaches by states towards protection and mitigation of the Earth environment. For example, Australia, France and Belgium require licensees conduct environmental impact assessments or an adequate environmental plan. Several states also set out specific requirements related to space debris mitigation. Finally, states include requirements to limit contamination of celestial bodies. Other extraterrestrial environmental impacts – pollution, waste management, emissions, etc. have only been considered by France in their EIA process.).

31. . Outer Space Treaty, *supra* note 16, at Art. IX. (Article IX states that treaty signatories shall "pursue studies of [the Moon and other celestial bodies] . . . so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose.").

constructed on biological contamination, anthropocentric framing, and Earth-centric language to achieve this goal.[32]

The OST delineates a series of enabling and constraining articles for outer space resource exploration and use. Unfortunately, the articles are either silent or vague regarding extraterrestrial environmental impacts, leaving open a wide range of possible interpretations for states to exploit. In the next section, we will explore the current and potential impacts of NewSpace on the extraterrestrial environment.

EXTRATERRESTRIAL ENVIRONMENTAL IMPACTS

The expansion of NewSpace into outer space brings new challenges and new externalities.[33] The exploration and use of outer space will result in increasing amounts of space debris in orbit and the potential for contamination of celestial bodies – two space environment impacts the OST and consequent agreements attempt to address with limited success.[34] Regarding space debris, the concern is the "Kessler Syndrome"; debris colliding in orbit, causing a chain reaction of collision and debris, until the orbit is no longer usable.[35] The potential for

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32. . *See* William R. Kramer, *Extraterrestrial environmental impact assessments - A foreseeable prerequisite for wise decisions regarding outer space exploration, research and development*, 30 SPACE POL'Y 215, 217 (2014). *See also* PHILLIPE SANDS, PRINCIPLES OF INT'L ENV'T LAW 383 (1995). ("Moreover, studies and exploration of outer space must avoid 'the harmful contamination and adverse changes in the environment of the earth resulting from the introduction of extraterritorial matter.' Parties are also under an obligation to undertake 'appropriate international consultations' before proceeding with activities or experiments which may cause 'potentially harmful interference' with activities of other state parties. It is evident that the approach of Article IX is directed towards the protection of human beings, rather than the protection of the environment as an end in itself.").

33. . Kramer *supra* note 32, at 218. ("While the environmental effects of our extraterrestrial actions may still be relatively insignificant, their cumulative impact will predictably increase with the number and scope of future missions."); *see also* Cheney, et. al., *Planetary Protection in the NewSpace Era: Science and Governance*, 7 FRONT. ASTRON. SPACE SCI. 1, 1 (Nov. 3, 2020).

34. . Cheney *supra* note 33, at 2. (Regarding planetary protection, "Planetary protection is perhaps more important as ever as the number of actors and the diversity of their activities increase (sic). Private and non-governmental space activities present a particular challenge given the status of the COSPAR Planetary Protection Policy in international law and the motivations and intentions of some of these new actors."). *Id.* at 6. (regarding debris "Increased lunar activities could replicate Earth's "space debris problem" around the Moon (and later Mars)").

35. . Judy Corbett, *Micrometeoroids and Orbital Debris (MMOD)*, NASA (Sep. 17, 2015), *available at* http://www.nasa.gov/centers/wstf/site_tour/remote_hypervelocity_test_laboratory/micromet

contamination of celestial bodies, or the introduction of extraterrestrial contaminants to Earth, is also a concern. Introducing organisms from Earth to celestial bodies could damage any potential life already existing there, irrevocably undermining the search for life.[36] These concerns have resulted in the creation of planetary protection principles through the Committee on Space Research (COSPAR).[37] Beyond space debris and contamination of celestial bodies is another space environment concern that is not widely discussed in the literature – extraterrestrial environmental impacts.[38]

The speculative scenario in the introduction attempts to imagine what a future person on Mars may experience in terms of extraterrestrial environmental impacts. Eventually, private companies will have developed the technology to mine minerals and resources (such as helium and water) on asteroids, the Moon, and Mars.[39] Some companies

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eoroid_and_orbital_debris.html (last visited Mar. 27, 2022); *see also* Shannon Bugos, *Russian ASAT Test Creates Massive Debris*, ARMS CONTROL ASS'N (Dec. 2021), *available at* https://www.armscontrol.org/act/2021-12/news/russian-asat-test-creates-massive-debris (last visited Mar. 27, 2022). (On November 15, 2021, Russia conducted an anti-satellite missile test that succeeded in destroying one of its satellites. The test created a field of over 1,500 pieces of trackable space debris and resulted in the astronauts on the ISS sheltering in escape pods.).

36. . *See generally* Kramer, *supra* note 32; *see also* Cheney, *supra* note 33.

37. . COSPAR Panel on Planetary Protection, *COSPAR Policy on Planetary Protection,* COMM. ON SPACE RSCH. (Jun. 3, 2021), *available at* https://cosparhq.cnes.fr/assets/uploads/2021/07/PPPolicy_2021_3-June.pdf (last visited Mar. 28, 2022); *see also* Gerhard Kminek ET. AL., *COSPAR's Planetary Protection Policy,* A CONSENSUS STUDY REP. OF THE NAT'L ACAD. OF SCI., ENG'G, MED. (2017) *available at* https://cosparhq.cnes.fr/assets/uploads/2019/12/PPPolicyDecember-2017.pdf (last visited Mar. 28, 2022); J.D. Rummel, et al., *Ethical Considerations for Planetary Protection in Space Exploration: A Workshop*, 12 ASTROBIOLOGY 1017, 1017-23 (2012).

38. . Stephen Eric Mustow, *Environmental Impact Assessment (EIA) Screening and Scoping of Extraterrestrial Exploration and Development Projects*, 36 IMPACT ASSESSMENT AND PROJECT APPRAISAL 467, 467-78 (2018) ("Other environmental issues have been given far less attention, including for example potential contamination by radioactive material which is often used within spacecraft and landers, atmospheric emissions and protection of environmental landscape features and historical/scientific or other resources of interest to humans." (internal citations omitted)).

39. . *See* Elliott Reavan, *The United States Commercial Space Launch Competitiveness Act: The Creation of Private Space Property Rights and the Omission of the Right to Freedom from Harmful Interference*, 94 WASH. U. L. REV. 238 (2016); *see also* Sarah Coffey, *Establishing a Legal Framework for Property Rights to Natural Resources in Outer Space*, 41 CASE W. RES. J. INT'L L. 119, 120 (2009) ("The moon, Mars, and other celestial bodies contain resources that are scarce or non-existent on Earth and which could have immense value. One example is helium-3, a substance common on the moon but exceedingly

envision this as *in situ* use to support human outposts on celestial objects, others foresee using the Moon and Mars as fuel stations to further explore the solar system, while others imagine exporting minerals back to Earth from celestial objects.[40] Inevitably, the prospecting, mining, and use of these resources will have an impact on the extraterrestrial environment. Some of the impact will be found in the form of pollution of water sources, soil, and the atmosphere, physical disturbance of the land, geologic features, cultural heritage sites, and human health and biodiversity impacts to extraterrestrial life.[41] A common response to these impacts is that celestial bodies – including the Moon and Mars – are "just rocks."[42] The "just rocks" argument posits that since there is currently no life on these objects, we should not artificially limit the exploration or exploitation of them. This argument seems to misunderstand two crucial pieces of information; first, there is no life *that we know of,* [43] and, second, there may be (and likely will be) human life on these celestial objects at some point in the future.

It is critical and necessary that we consider all the potential environmental impacts of space exploration and use. Impacts include space debris, pollution of orbits, contamination of celestial bodies, and other extraterrestrial environmental impacts. When considering extraterrestrial environmental impacts, it is important to bear in mind that the ecosystems of celestial objects are incredibly fragile, the resources on celestial objects are finite, there are currently more unknowns than knowns regarding resource extraction, and that resource extraction will impact future human use of celestial bodies as well as the resources contained therein.[44] It is also important to keep in mind the current state

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scarce on Earth. Helium-3 has better potential for providing clean, efficient energy than any other source currently known on Earth.").

40. . Reavan, *supra* note 39, at 233; *see generally* Kramer, *supra* note 32.

41. . *See* Mustow, *supra* note 38, at 471 (includes a table of potential extraterrestrial environmental impacts by topic area).

42. . *See generally* Leigh Phillips, *We Don't Need Elon Musk to Explore the Solar System*, JACOBIN MAGAZINE (May 8, 2021), *available at* https://jacobinmag.com/2021/05/elon-musk-space-exploration-mars-colonization (last visited Mar. 27, 2022).

43. . *See generally* Kramer, *supra* note 32; *see also* Cheney, *supra* note 32; Rummel, *supra* note 37, at 1019 ("both subgroups responded in the affirmative to the question of whether we should conduct solar system exploration in ways that minimize or eliminate other possible negative effects on celestial bodies (beyond prevention of biological contamination.").

44. . *See* Kramer, *supra* note 32, at 216; *see also* Mustow, *supra* note 38, at 471.

of outer space resource regulation and use as we turn to the next section: unilateral lawmaking and the regulatory "race to the bottom." NewSpace is bringing forth a new era of space exploration and exploitation with only the OST's ambiguous principles to constrain potential extraterrestrial impacts. As we will see in the next section, states are taking advantage of this approach but to their own detriment in the long run.

PART II - UNILATERAL US SPACE RESOURCES LAW AND POLICY

THE US SPACE ACT

On November 25, 2015, Congress passed, and President Barack Obama signed, the "US Commercial Space Launch Competitiveness Act" ("US Space Act").[45] On November 25, 2015 Congress passed, and President Barack Obama signed, the "US Commercial Space Launch Competitiveness Act" ("US Space Act").[46] The preamble of the law provides insight into Congress's considerations for the need of such legislation, stating that the act is necessary to "facilitate a pro-growth environment for the developing commercial space industry by encouraging private sector investment and creating more stable and predictable regulatory conditions, and for other purposes."[47]

Most importantly for this Article, the US Space Act unilaterally grants access to space resources for US citizens and companies in Title IV "Space Resource Exploration and Utilization."[48] Through the addition of this Section, the US provides a domestic legal framework for US citizens and private companies to explore, use, and sell outer space resources. This text exploits the ambiguities of Articles I and II of the OST and is an attempt by the US to thread the needle of space law by allowing the use of space resources by private companies, while attempting to not contravene the principles of the OST.[49]

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45. . U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, 129 Stat. 704 (2015) [hereinafter USCSLC].

46. . U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, 129 Stat. 704 (2015) [hereinafter USCSLC].

47. . *Id.*

48. . *Id.* at §51302.

49. . *Id.* at §51303. (A United States Citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the

The US doubled-down on its deregulated approach to outer space resource use through the signing of Executive Order 13914 ("EO 13914"), entitled: "Encouraging International Support for the Recovery and Use of Space Resources."[50] Issued by President Donald Trump on April 6, 2020, and still in force under President Joe Biden's administration, EO 13914 states that "Americans should have the right to engage in commercial exploration, recovery, and use of resources in outer space, consistent with applicable law."[51] This language in EO 13914 can be seen as further supporting and justifying the US Space Act.

While scholars and states differ in their interpretations of whether or how much the US Space Act and EO 13914 align with or depart from the OST,[52] the greater concern is the forum in which it was established, and the precedence it sets internationally.[53] In its condemnation of this approach, Russia has been particularly vocal, calling the US Space Act "manifestations of total disrespect for international law and order,"[54] referring to the trend in unilateral space resources policy - making as "fraught with serious risks for international cooperation and understanding," and calling upon the international community "to make a collective effort to prevent outer space, including the Moon and other celestial bodies, from becoming an arena for international discord and

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asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States.).

50. . *See* Exec. Order No. 13914, 85 Fed. Reg. 70,20381 (Apr. 6, 2020).

51. . *Id.* at § 1.

52. . *See generally* Fabio Tronchetti & Hao Liu, *The White House Executive Order on the Recovery and Use of Space Resources: Pushing the Boundaries of International Space Law?*, 57 SPACE POL'Y 1 (Sept. 13, 2021); *see also* Steven Freeland & Annie Handmer, *Giant leap for corporations? The Trump administration wants to mine resources in space, but is it legal?*, CONVERSATION (Apr. 20, 2020), *available at* https://theconversation.com/giant-leap-for-corporations-the-trump-administration-wants-to-mine-resources-in-space-but-is-it-legal-136395 (last visited Mar. 28, 2022).

53. . *See* Reavan, *supra* note 39. ("Some commentators suggest that the impact of passing the US Commercial Space Launch Competitiveness Act (USCSLC) will not be on international law, but rather on international politics. It is also reasonable to suggest that the USCSLC could trigger mirroring legislation in other space-faring nations, which could create heated competition, controversy, and possibly chaos.").

54. . Almudena Azcárate Ortega, *Artemis Accords: A Step Toward International Cooperation or Further Competition?*, LAWFARE (Dec. 15, 2020), *available at* https://www.lawfareblog.com/artemis-accords-step-toward-international-cooperation-or-further-competition (last visited Mar. 28, 2022).

conflict."[55] The US Space Act was the first domestic law to carve out specific outer space resource exploration and use allowances for private companies, but it was not the last Since its passage, Luxembourg (2017),[56] the United Arab Emirates (2019),[57] and Japan (2021)[58] have all established domestic law allowing private companies to exploit outer space resources. This trend is a regulatory "race to the bottom" with countries competing to establish the most permissive frameworks for outer space resource use to encourage private companies to authorize under their domestic frameworks and launch from their soil.[59] In this way, states may capitalize on the NewSpace era and the desire for a spatial fix to capitalism. Additionally, states are positioning themselves to be greater players in the space domain, strengthening themselves economically and militarily, while ignoring potential extraterrestrial environmental impacts.

THE REGULATORY "RACE TO THE BOTTOM": SHORT-TERM GAINS, LONG-TERM CONFLICT

The regulatory "race to the bottom" will provide short-term benefits to states like the US, Luxembourg, the UAE, and Japan, as they realize financial gains from their relationships with private companies and

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55. . *Comment by the Information and Press Department on the US President's Executive Order on Encouraging International Support for the Recovery and Use of Space Resources*, MINISTRY FOREIGN AFFS. RUSS. FED'N (Apr. 7, 2020), *available at* https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4096701 (last visited Feb. 1, 2022).

56. . Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace [Law of 20 July 2017 on the Exploration and Use of Space Resources], JOURNAL OFFICIEL DU GRAND-DUCE DE LUXEMBOURG [OFFICIAL GAZZETTE OF THE GRAND DUCHY OF LUXEMBOURG], No. 674, July 28, 2017 (Lux.); *See also* Froehlich & Seffinga, *Alternative Law: Luxembourg's National Space Law*, in NATIONAL SPACE LEGISLATION, STUDIES IN SPACE POLICY, (Vol. 15) (Feb. 17, 2018).

57. . Federal Law No. 12 of 2019, On the Regulation of the Space Sector, 669 – 2019 (Dec. 19, 2019), at 111 (UAE).

58. . Act on Promotion of Business Activities Related to the Exploration and Development of Space Resources, Act No. 83, (Dec. 23, 2021) (Jpn.)

59. . Simon, *supra* note 1, at 213. ("Instead of promoting variations in regulations that create efficiencies to attract different market participants, a race to the bottom ideology believes regulatory competition pressures regulators to lower their standards to attract and keep market participants in their jurisdiction. As a result, a back-and-forth swing of lowering regulatory standards is created between jurisdictions, keeping governments captive to a cycle of continual regulatory softening. In the end, the entire market is left in a worse position — a macro net-loss.").

bolster their positions in outer space.[60] As this race continues, other states may adopt exploration and use policies that further diverge from the OST, eventually establishing a new regime of customary international law. In the short run, states adopting permissive regulatory regimes will reap the benefits of private company exploration and use of outer space, but the repercussions for long-term governance of outer space are potentially dire.[61] Short-sighted approaches to outer space resource use through domestic law will likely lead to over-exploitation of outer space resources and conflict in outer space. Outer space resources are not infinite, and their unregulated or under-regulated use will result in competition between states.[62] Competition between states, without clear rules or guidelines for resource exploration and use, will increase opportunities for conflict in space, which would be catastrophic both for states active in outer space and fledgling private companies.[63] Geopolitical conflicts on Earth may also exacerbate or contribute to conflicts in space.

Conflict in outer space will emerge from competition over space resources and unclear regulatory policies. While space is infinite, with billions upon billions of stars, galaxies, and other celestial objects, the potentially exploitable resources near the Earth are not.[64] The Moon, Mars, and near-Earth asteroids are finite objects with finite resources. Currently, outer space resource exploration and use is constrained by technology, scientific knowledge, and distance. This will not be the case for much longer, as technology improves and scientific knowledge advances, shrinking the distances. Given this finitude of resources, there

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60. . *Id.* ("Regulatory competition occurs when states compete with one another in their capacity as regulators to attract people, resources, and entities into their jurisdictional authority. Through securing a diverse pool of talent and interests, states realize increased economic activity. This in turn decreases unemployment, lowers social welfare costs, and raises tax revenues. Given the economic and technological potency the NewSpace industry could input into an economy, there is considerable appeal in attracting NewSpace entrepreneurs for states." (Internal footnote citations omitted).

61. . *Id.*

62. . Hope M Babcock, *The Public Trust Doctrine, Outer Space, and the Global Commons: Time to Call Home ET*, 69(2) SYRACUSE L. REV. 191, 240 (2019). ("Unless the development of outer space resources is regulated, too many entities vying for the same resource could lead not only to congestion and rivalrous behavior, but also to accidents and serious conflict—the conditions the space treaties are intended to avoid.")

63. . Simon, *supra* note 1, at 220. ("Military action in the face of conflicting interests over a vital and limited resource is a familiar scenario as is further destruction of the environment as collateral damage in such a confrontation.").

64. . *See generally* Mustow, *supra* note 38.

will be competition on celestial bodies for energy from sunlight, water, and minerals.[65] Since private companies and states are investing significant sums in resource extraction, they will jockey for the best sites on celestial bodies to exploit resources.

The conflicts that arise between actors in a commons like outer space, and the governance of the commons, is an oft-debated subject in the literature.[66] The most widely-cited theory in this domain is Garrett Hardin's "Tragedy of the Commons," which assumes actors will overexploit a common resource if left to their own devices.[67] Hardin recommends enclosure and privatization of the commons as a policy solution to ensure this tragedy does not occur.[68] In response, Nobel prize-winning economist Elinor Ostrom's theory on collective action and common pool resources, provides a more nuanced framework. Dispensing with the one-size-fits-all approaches of centralization or privatization, Ostrom theorizes an approach focused on collective action of the group to address the specific needs of the common pool resource.[69] While Hardin and Ostrom fundamentally disagree about the best mechanism to govern resources within a commons, they both agree that without some governance, conflicts would necessarily arise.[70] Examples of conflicts over under-regulated common pool resources on Earth can be found in fisheries, grazing, and water management.[71] Furthermore, research shows that after conflicts have developed, cooperative management of a resource can serve to reduce natural resources conflicts through "environmental peacebuilding."[72] Finally, research shows that competition for natural resources can drive conflict and that the conflict

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65. . Babcock, *supra* note 61, at 240.

66. . *See generally id.*

67. . Garrett Hardin, *The Tragedy of the Commons: The Population Problem Has No Technical Solution; It Requires a Fundamental Extension in Morality*, 162 SCI. 1243, 1243–8 (1968).

68. . *Id.*

69. . Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (James E. Alt, et al. eds, 1990).

70. . *Id.* at 90 (For example, Ostrom includes conflict-resolution as one of her eight design principles for long-enduring common pool resource (CPR) institutions); *see also* Hardin, *supra* note 66, at 1244 ("[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons").

71. . *See* Ostrom, *supra* note 68 (exploring each CPR in detail).

72. . Blake Ratner et al., *Addressing Conflict through Collective Action in Natural Resource Management*, 11(2) INT'L J. OF THE COMMONS, 877 (2017); INTERNATIONAL UNION FOR CONSERVATION OF NATURE, CONFLICT AND CONSERVATION (1st ed, 2021).

causes follow-on impacts to the environment.[73] In an under-regulated environment like outer space, with private companies operating under different exploitation frameworks and regimes, and competing with one another for finite sites to exploit resources, the opportunities for dispute and conflict increase significantly.

Additionally, the geopolitical situation on Earth is likely to increase the chances of conflict in outer space. Powerful space actors, such as Russia and China, are bolstering their state and private space programs. China is building its own space station – Tiangong – as the ISS is set to be decommissioned.[74] Russia recently demonstrated anti-satellite rocket capabilities, which created a debris field endangering astronauts on the ISS.[75] Together, Russia and China have entered into a memorandum of understanding to build a lunar base, a direct challenge to the US's Artemis program.[76] Relations between Russia, China, and the US are fraught on Earth, where the regulations around resource extraction and conflict are clearer. As these countries expand into space resource use, and geopolitical tensions are projected into the arena of space, the chances and potential for conflict continues to grow.

Since the rules of engagement for such conflicts in outer space are unclear, the outcomes could be catastrophic (see discussions regarding the Woomera and Milamos manuals).[77] States that are the most active in outer space, such as the US, China, and Russia, will have the most to lose

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73. . INTERNATIONAL UNION FOR CONSERVATION OF NATURE, *supra* note 71.

74. . Eleanor Lutz, *A Tour of China's Tiangong Space Station*, N.Y. TIMES (Sept. 22, 2021), *available at* https://www.nytimes.com/interactive/2021/science/tiangong-space-station.html (last visited Mar. 24, 2022); Stephen McDonell, *China Launches First Module of New Space Station*, BBC NEWS (Apr. 29, 2021) *available at* https://www.bbc.com/news/world-asia-china-56924370 (last visited Mar. 24, 2022).

75. . *See* Bugos, *supra* note 35.

76. . Nathaniel Rome, *A Chinese-Russian Moon Base? Not So Fast.*, FOREIGN POLICY, *available at* https://foreignpolicy.com/2021/10/17/moon-base-china-russia-lunar-space-nasa/ (last visited Mar. 24, 2022). (The two countries have released a road map, which includes a total of 14 missions, culminating with a manned lunar base. Rome debates whether that is in fact achievable, or mere posturing).

77. . *See generally* Cassandra Steer, *The Woomera Manual: Legitimising or Limiting Space Warfare?*, in MILITARY SPACE ETHICS, Howgate Publishing (2021)(forthcoming); *The Woomera Manual*, *available at* https://law.adelaide.edu.au/woomera/about (last visited Mar. 24, 2022); *Manual on International Law Applicable to Military Uses of Outer Space*, *available at* https://www.mcgill.ca/milamos/ (last visited Mar. 24, 2022).

from such a conflict.[78] These states could find their space programs and private industries devastated by a conflict, while other countries with small space programs or space industries will be relatively unaffected — except for the geopolitical outfall as the conflict extends onto Earth. Similarly, private companies in outer space will have the most to lose from conflicts that arise. Private companies rely on stability and predictability to maintain the investments of their shareholders. Conflicts in space between states would create chaos and significantly impact a nascent industry.

Put another way, private companies and the current hegemonic space powers also have the most to gain from clear regulations and a conflict-free operating environment in outer space. As described above, the current unilateral, state-by-state approach to exploration and use of space resources will not effectively achieve this environment. Rather, it will likely lead to a scramble for finite resources and conflict, destabilizing industry, and research in outer space. Bearing this in mind, it is imperative that States shift from the status quo, unilateral regulatory "race to the bottom" and towards a precautionary, preventative approach to space resources use, developed in a multilateral setting.

PART III – A PRECAUTIONARY, PREVENTATIVE APPROACH

THE ANTARCTIC TREATY SYSTEM'S MADRID PROTOCOL

In order to avoid extraterrestrial environmental impacts and prevent conflicts arising from the regulatory "race to the bottom," which is symptomatic of unilateral policy and lawmaking, states must shift to a precautionary, preventative approach to space resource exploration and use developed in a multilateral forum. A regulatory framework that fits this approach is the Antarctic Treaty System's Madrid Protocol.

The Antarctic Treaty[79] and the OST are close corollaries as the Antarctic Treaty was used as one of the foundational texts for the OST.[80] On September 22, 1960 President Eisenhower proposed to the UN

78. . Presentation by Steven Freeland, November 3, 2021 (on file with author).

79. . Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

80. . *Outer Space Treaty*, U.S. DEPT. OF STATE, *available at* https://2009-2017.state.gov/t/isn/5181.htm#:~:text=of%20all%20mankind.-,Outer%20space%2C%20including%20the%20moon%20and%20other%20celestial%20bodies%2C%20shall,all%20areas%20of%20celestial%20bodies (last visited Mar. 24, 2022).

General Assembly that the principles of the Antarctic Treaty be applied to outer space.[81] According to Dembling and Arons' contemporary account, the OST was clearly based on the Antarctic Treaty: "An obvious precedent for an international convention governing activities in outer space and on celestial bodies is the Treaty concerning Antarctica."[82]

According to Dembling and Arons' contemporary account, the OST was clearly based on the Antarctic Treaty: "An obvious precedent for an international convention governing activities in outer space and on celestial bodies is the Treaty concerning Antarctica."[83] Articles I through IV of the Antarctic Treaty provide that the Antarctic shall be used for peaceful purposes, allowing freedom of scientific investigation and cooperation, enabling the exchange of scientific information and personnel, and the prohibition of additional claims of sovereignty.[84] These articles in the Antarctic Treaty are the basis for Articles I, II, IV, XI, and XII in the Outer Space Treaty.[85] At the height of the Cold War, the adoption of the two treaties deescalated tensions in their respective domains by centering peaceful, scientific uses and prohibiting new sovereign claims.[86] Considering their histories and similarities, and considering the need to update the OST with a framework to regulate space resource exploration and use, perhaps it is time to again look to the Antarctic Treaty for guidance in outer space. Since its adoption, the Antarctic Treaty has been augmented by a protocol – the Protocol on Environmental Protection to the Antarctic Treaty ("the Madrid Protocol").[87] By applying the Madrid Protocol to outer space, we will arrive at a precautionary, preventative approach to outer space resource exploration and use.

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81. . *Id.*

82. . Dembling & Arons, *supra* note 17, at 423.

83. . Dembling & Arons, *supra* note 17 at 423.

84. . *Id.*

85. . *Id.*

86. . Jeffrey D. Myhre, *Origins of the Antarctic Treaty, 1948-1959*, in THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW, AND DIPLOMACY, at 23 (1986); Steven Freeland and Anja Nakarada Pecujlic, *How Do You Like Your Regulation - Hard or Soft? The Antarctic Treaty and the Outer Space Treaty Compared*, 30(1) NAT'L L. SCH. OF INDIA REV. 1, 16 (2017).

87. . . Protocol on Environmental Protection to the Antarctic Treaty, Special Consultative Meeting, 27th Sess., ATSCM/2/3/2, 30 I.L.M. 1455 (1991) [hereinafter Protocol].

It is important to note that the Madrid Protocol was not developed in a vacuum and did not emerge on the international stage without a catalyzing event. To fully understand the Madrid Protocol, some historical context is required. The Antarctic Treaty System (ATS), as originally drafted in 1959, was more concerned with de-escalation and demilitarization of the region than with environmental protection (an oversight also replicated in the OST).[88] However, the ATS did include a provision in Article IX(f) for consultative parties to meet and discuss issues relating to "the preservation and the conservation of living resources" of the Antarctic.[89] Within this framework, consultative parties met and adopted three increasingly protective measures for the Antarctic treaty area from 1964 to 1982.[90] Then, in 1988, the consultative parties developed the "Convention for the Regulation of Antarctic Mineral Resource Activities."[91] At the time, there were no known mineral deposits in the Antarctic, let alone cost-effective means of accessing potential minerals.[92] Nevertheless, consultative parties established a robust regime to govern the prospecting and mining of resources in the Antarctic, which at the time was "the most comprehensive environmental protection for the continent."[93] After six years of painstaking deliberation, the Convention opened for signature on November 25, 1988, but it was never signed or ratified due to an environmental catastrophe.[94] Four minutes after midnight on March 24, 1989, the *Exxon Valdez* struck Bligh Reef in Alaska's Prince William Sound with 53 million gallons of

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88. . Evan Bloom, *The History, Vision Behind and Impact of the Protocol on Environmental Protection to the Antarctic Treaty*, U.S. DEPARTMENT OF STATE (May 30, 2016), *available at* https://2009-2017.state.gov/e/oes/rls/remarks/2016/258286.htm (last visited January 22, 2022).

89. . S.K.N. Blay, *New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol*, 86 AM. J. OF INT'L LAW 2, 379 (1992).

90. . *Id.* (The three measures include one agreement and two conventions: "The Agreed measures for the Conservation of Antarctic Fauna and Flora," "The Convention for the Conservation of Antarctic Seals," and "The Convention for the Conservation of Antarctic Marine Living Resources.").

91. . CHRISTOPHER A. CAREY, THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS 161 (Arnfinn Jørgensen-Dahl & Willy Østreng, eds., 1st ed. 1991).

92. . Bloom, *supra* note 88.

93. . Blay, *supra* note 89, at 382. (CRAMR included: a Commission for oversight of mineral operations and to review proposals, a required Environmental Impact Statement for operators, liability provisions, the ability to restrict and/or prohibit mining in certain areas, and more.).

94. . *Id.* at 378.

crude oil on board.[95] The ATS consultative parties pivoted and, under the leadership of Australia and France, developed the Protocol on Environmental Protection to the Antarctic Treaty, which would eventually become known as the Madrid Protocol.[96]

The Madrid Protocol was drafted in relatively short order and adopted at the 1991 consultative meeting in Madrid.[97] The Protocol entered into force in 1998[98] and established a comprehensive approach to environmental protection of the Antarctic, by creating an "'environmental code,' covering all human activities on the continent."[99] The Madrid Protocol requires state parties "commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems, and designates Antarctica as a natural reserve devoted to peace and science."[100] The keystone of the preservation of the Antarctic is a ban on all mineral exploration and use, found in Article 7 of the Protocol.[101] However, the Protocol does provide a mechanism and

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95. . *Exxon Valdez Oil Spill*, HISTORY (Mar. 23, 2021), *available at* https://www.history.com/topics/1980s/exxon-valdez-oil-spill (last visited Mar. 20, 2022). ("The oil spill was the worst in US history (until the Deepwater Horizon spill in 2010), resulting in the contamination of 1,300 miles of coastline and the deaths of an estimated 250,000 sea birds, 3,000 otters, 300 seals, 250 bald eagles, and 22 killer whales.).

96. . Bloom, *supra* note 88. (Bloom, the Director of the Bureau of Oceans and International Environmental Scientific Affairs at the US Office of Polar Affairs, had the following remarks regarding the Madrid Protocol at a 25th anniversary event for the protocol in 2016:

"The Antarctic Treaty Parties made a wise decision when they decided to negotiate and ultimately adopt the Environmental Protocol. This took an act of political courage, requiring the abandonment of an approach that had been under negotiation for years, namely the establishment of a regulatory regime related to mining, in favor of taking a quite different direction. My government had initially supported the prior approach under the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA). But the daring – perhaps heroic – decision by leaders of countries like Australia and France, we must admit, led to something better. With the benefit of hindsight, the wisdom of that change of course is now quite evident.").

97. . Blay, *supra* note 89, at 387.

98. . *Summary Information*, CENTRE FOR INT'L LAW AT NAT'L UNIV. OF SINGAPORE, *available at* https://cil.nus.edu.sg/databasecil/1991-protocol-on-environmental-protection-to-the-antarctic-treaty/ (last visited Mar. 20, 2022). (Under a similar timeline, the OST should have been augmented with a space resources exploration and use framework in 1999, with ratification taking place by 2006. It is long overdue.).

99. . Blay, *supra* note 89, at 385.

100. . Protocol, *supra* note 87, at Art. 2.

101. . Protocol, *supra* note 87, at Art. 7 ("Any activity relating to mineral resources, other than scientific research, shall be prohibited.).

pathway to begin mineral exploration and use at a future date. The Madrid Protocol includes a provision allowing for amendment based on unanimous agreement by parties, and in 2048 (fifty years after the treaty entered into force) any state party to the treaty may request review or modification of the Protocol.[102] If a state party intends to modify Article 7 of the protocol related to the prohibition on Antarctic mineral resource activities, a legal regime for Antarctic mineral resource extraction and use must be adopted.[103] Through these mechanisms, state parties to the Antarctic Treaty System have established the Antarctic as a natural preserve for a minimum of 50 years. Additionally, state parties have banned mineral resource extraction in the Antarctic for a minimum of 50 years and until there is an agreed-upon legal regime in place.

One should not reduce the Madrid Protocol to a simple ban on Antarctic mining – it is far more comprehensive. The Protocol also includes environmental principles, creates a Committee of Environmental Protection to advise consultative parties of environmental impacts, and requires prior environmental assessment of all proposed activities that take place in the treaty area.[104] Article 3 of the Madrid Protocol lays out a series of environmental principles.[105] In support of the principles, Article 8 of the Madrid Protocol requires an environmental impact assessment of any activities in the Antarctic Treaty area.[106] Through these principles and mechanisms, we find a framework in the Madrid Protocol that centers environmental protection, takes a preventative and precautionary approach to environmental impacts, and still provides a mechanism for future resource exploration and use.

Since the ATS served as a basis for the drafting of the OST, might the Madrid Protocol also serve as a basis for a space resources exploration

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102. . *Id.* at Art. 25, Sec. 2 (a request for review or modification after 50 years must be approved by three quarters of the consultative parties).

103. . *Id.* at Art. 25, Sec. 5(a) ("With respect to Article 7, the prohibition on Antarctic mineral resource activities contained therein shall continue unless there is in force a binding legal regime on Antarctic mineral resource activities that includes an agreed means for determining whether, and, if so, under which conditions, any such activities would be acceptable.").

104. . Blay, *supra* note 87 at 382.

105. . Protocol, *supra* note 85 at Art. 3, Sec. 2(a) ("activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent on associated ecosystems").

106. . *Id.* at Art. 8 (The EIA includes "scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area . . . including associated logistic support activities.").

and use framework? If we were to apply the principles and building blocks of the Madrid Protocol to space, what would be lost and what would be gained? A Madrid Protocol in space would permit a pathway for eventual resource exploration and use. In the meantime, a Madrid Protocol for the OST would allow for scientific exploration, space tourism, satellite launches, and visits to the Moon and celestial bodies, with the added layer of protection of an environmental impact assessment. A Madrid Protocol in space would take a preventative and precautionary approach to extraterrestrial environmental impacts. Relatedly, it would help deescalate outer space with a framework that centers protection, rather than competition. Finally, a Madrid Protocol for the OST would allow states with fledgling space sectors the time and opportunity to grow their space industries to compete with established space powers. The benefits of adopting a space resources framework that mirrors the Madrid Protocol are many.

Applying the Madrid Protocol to outer space is not the only option for a space resources framework, although it is likely the most precautionary and protective of the extraterrestrial environment. States may instead prefer an approach that is more permissive of space resource extraction. Since we have not had an equivalent *Exxon Valdez* disaster in space, it may be more palatable to adopt an approach more aligned with the Madrid Protocol's predecessor –CRAMRA. One such space resources framework under consideration has been proposed by the Hague Space Resources Working Group ("the Hague Working Group"). The Hague Working Group, which was established in 2016, defines its objective as follows: "to assess the need for a governance framework on space resources and to lay the groundwork for such framework (sic)."[107] In order to achieve its mission, the Working Group met over the course of two years and, using a consensus-based approach, developed a set of "building blocks" related to space resource exploration and use to inform a future governance framework for states and international organizations.[108] Accordingly, the Hague Working Group has submitted the Building Blocks to the UNCOPUOS space resources working group

107. . *The Hague International Space Resources Governance Working Group*, UNIVERSITEIT LEIDEN, *available at* https://www.universiteitleiden.nl/en/law/institute-of-public-law/institute-of-air-space-law/the-hague-space-resources-governance-working-group (last visited Mar. 26, 2022) [hereinafter Hague Working Group].

108. . Chelsey Davis & Mark J. Sundahl, *The Hague Working Group on Space Resources: Creating the Legal Building Blocks for a New Industry*, 30 THE AIR & SPACE LAW. (2017).

for consideration and incorporation into the eventual space resources exploration and use framework.[109] Ultimately, the Hague Building Blocks fall short in several respects. First, the language in the Building Blocks regarding risk and damage to the environment, while potentially useful upon close reading, is too vague a formulation for a future framework and relies, perhaps to its detriment, on the Moon Agreement.[110] Second, in removing the language of the "precautionary approach" the Building Blocks rely on the less effective and more reactive environmental framework of "avoidance and mitigation."[111] In this way, the Building Blocks represent a CRAMRA-like approach to outer space resource exploration and use. Ultimately, the UNCOPUOS working group will decide upon a final framework and in terms of extraterrestrial environmental protection, the Hague Building Blocks do not go far enough.

UNCOPUOS – THE APPROPRIATE FORUM FOR A FRAMEWORK

A multilateral forum is required to develop a space resources framework. As discussed in Part II, the unilateral approach leads to a regulatory "race to the bottom" and the eventual formation of customary international law that benefits some countries above others. The multilateral forum must also be international for all states to participate. Additionally, the forum must include and consider the widest range of possible interests. Otherwise, it would be possible to reach an agreement on a framework while ignoring the concerns of less powerful states. Finally, the multilateral forum should have significant experience drafting similar frameworks. Considering these requirements, there is only one body with the experience, mission, and membership to effectively draft a multilateral framework for space resources to include extraterrestrial environmental impacts: the United Nations Committee on Peaceful Uses of Space (UNCOPUOS). UNCOPUOS is an international

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109. . Hague Int'l Space Res. Governance Working Grp., *Building Blocks for the Development of an International Framework on Space Resource Use* (Nov. 12, 2019), *available at* https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/lucht—en-ruimterecht/space-resources/bb-thissrwg—cover.pdf (last visited Mar. 28, 2022).

110. . BUILDING BLOCKS FOR THE DEVELOPMENT OF AN INTERNATIONAL FRAMEWORK FOR THE GOVERNANCE OF SPACE RESOURCE ACTIVITIES – A COMMENTARY 63 (Bittencourt Neto et al., eds., 2020).

111. . *Id.* at 64.

body and one of the UN's largest committees, including 95 member states and 43 observer organizations.[112] Furthermore, UNCOPUOS is a consensus-based organization, relying on member states to arrive at agreed-upon language for an agreement to be adopted (but not requiring a vote).[113] UNCOPUOS is also the original drafting body of the OST, as well as the other four follow on agreements.[114] Finally, UNCOPUOS drafted the non-binding Long-Term Sustainability Guidelines, which were adopted in June 2019 and serve as a natural precursor to the drafting of a space resources framework.[115]

UNCOPUOS has already taken the first steps towards drafting a space resources framework. In 2021, UNCOPUOS established a space resources working group under the Legal Subcommittee.[116] Chaired by Ambassador Andrzej Misztal of Poland and Vice-Chaired by Professor Steven Freeland of Australia, the space resources working group has established a mandate, scope of work, and is currently developing a 5-year plan.[117] The mandate of the working group is fivefold: to collect information regarding exploration and use of space resources; to develop recommended principles and practices (if appropriate) for space exploration and use activities; to study existing legal frameworks, taking into consideration the OST and other UN treaties; to assess benefits of additional governance instruments; and to identify areas for further work of the committee, including "models, rules and/or norms, for activities in the exploration, exploitation, and utilization of space resources."[118] Furthermore, the working group mandate states that it shall take "into

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112. . *Committee on the Peaceful Uses of Outer Space*, U.N. OFF. FOR OUTER SPACE AFFAIRS, *available at* https://www.unoosa.org/oosa/en/ourwork/copuos/index.html (last visited Jan. 29, 2022) [hereinafter COPUOS].

113. . Freeland & Pecujlic, *supra* note 84 at 21.

114. . COPUOS, *supra* note 110.

115. . *Long-Term Sustainability of Outer Space Activities*, U.N. OFF. FOR OUTER SPACE AFFAIRS, *available at* https://www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html (last visited Mar. 28, 2022).

116. . COPUOS, *Working Group on Space Resources*, UNITED NATIONS, *available at* https://www.unoosa.org/oosa/en/ourwork/copuos/lsc/space-resources/index.html (last visited Mar. 25, 2022).

117. . Antonio Salmeri, *#SpaceWatchGL Interviews: Ambassador Misztal and Professor Freeland on UNCOPUOS Working Group on Space Resources*, SPACEWATCH GLOBAL, *available at* https://spacewatch.global/2021/09/spacewatchgl-interviews-ambassador-misztal-and-professor-freeland-on-uncopuos-working-group-on-space-resources/ (last visited Mar. 25, 2022).

118. . COPUOS Working Group, *supra* note 114.

account inputs from permanent observers and non-governmental stakeholders such as academia, civil society, technical experts . . ." [119] The aforementioned Madrid Protocol and the Hague Building Blocks represent two such inputs.

CHALLENGES AND CONCLUSION

The UNCOPUOS space resources working group faces a difficult path to arrive at a space resources exploration and use framework. As stated above, the group requires consensus to agree on a framework and state parties will enter the negotiations with drastically different perspectives. A resource framework as precautionary as the Madrid Protocol will face a particularly difficult path to adoption. The challenges arrayed against the Madrid Protocol applied to outer space are many but can be summarized as follows: the existence of an alternative body of practice, perceived stifling of enterprise, lack of a catalyst, and global geopolitics. Some bright spots, or opportunities for a precautionary, preventative approach in outer space, include the following: a subtle shift towards multilateralism in outer space, a body of international environmental law, and general agreement about the benefits of the Madrid Protocol for the Antarctic.

A proposal for space resource exploration and use that would apply the Madrid Protocol to outer space will meet several challenges. First, there is a body of practice and domestic law which runs counter to the Protocol. As mentioned in Part II, a few states have adopted measures to explore and use space resources. It is important to note that this can in no way be considered customary international law at this point. The number of states with such frameworks can still be counted on one hand and all the laws were adopted within the last six years. However, it is likely more states will adopt similar approaches in the near future and overcoming an established body of practice can be difficult.[120] Second, the Madrid Protocol will be perceived as stifling enterprise. If the Protocol is applied to outer space, it is sure to negatively impact the value of space mining and space tourism companies. Some will argue that, since these are young, burgeoning companies, they need cultivation and should not be hampered by such stringent regulations. But are these companies truly so small, or are they primarily projects for billionaires to expand into space, or opportunities for venture capitalists to place big

119. . *Id.*

120. . *See* Simon, *supra* note 1.

bets? And, for the small companies, as they grow will they be more willing to accept regulation, or will they instead lobby against it? I presume the latter. Additionally, today's space companies rely heavily on state investment and so cannot pretend to be at the whim of market forces. And finally, if a company is permitted to mine a planet and causes some extraterrestrial harm, to whom will they be held accountable? The potential for catastrophe brings me to my third challenge for the Madrid Protocol – the lack of a catalyst. Fortunately, we have not had a disaster akin to the *Exxon Valdez* in outer space. The absence of a disaster is due to our limited activities in space up to this point, and luck. On the issue of space debris, we are getting increasingly close to the Kessler Syndrome, which is visible as astronauts on the ISS are required to shelter in escape capsules with increasing frequency.[121] For contamination, we have had several near misses[122] – imagine if we polluted a planet's life with our own?– imagine if we polluted a planet's life with our own? And it is not hard to imagine a hypothetical, like that described in the introduction or above, by Reinstein: a company polluting a very limited water source on a celestial object, making the entire planet unfit for humans. The final challenge is one that all potential space resource frameworks face – global geopolitics. In order to arrive at consensus, the United States, Russia, and China will have to agree, along with other spacefaring and developing countries. Considering the relational challenges between these states on Earth this will be no simple feat.

Despite these challenges, there are also reasons to be optimistic that UNCOPUOS could adopt a precautionary, preventative approach to space resource exploration and use. First, despite the unilateral lawmaking by states, there is also a recent trend towards multilateralism. The Artemis Accords, spearheaded by the United States (and furthering US hegemony in space), may be viewed as one example of this

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121. . Rebecca Heilweil, *The Space Debris Problem is Getting Dangerous,* VOX (Nov. 16, 2021, 2:45 PM), *available at* https://www.vox.com/recode/2021/11/16/22785425/international-space-station-russia-missle-test-debris (last visited Mar. 25, 2022).

122. . *See* Cheney, *supra* note 33 at 5. (In February 2019, an Israeli spacecraft crashed into the Moon's surface. In August 2019, the mission commander revealed the payload included tardigrades, which are some of the most resilient known life forms. "The lack of disclosure of the existence of the tardigrades casts doubt upon the compliance of the Beresheet mission to the planetary protection guidelines.").

multilateralism.[123] The Accords state, "The Signatories intend to use their experience under the Accords to contribute to multilateral efforts to further develop international practices and rules applicable to the extraction and utilization of space resources, including through ongoing efforts at the COPUOS."[124] This sentiment is an effective entry point into international collaboration on the topic of space resources and use. The second cause for optimism is the increasing international awareness regarding environmental issues, accompanied by a growing body of international environmental law.[125] The OST and ATS were developed prior to scientific findings regarding impacts from DDT, ozone-depleting chemicals, carbon and methane emissions, and acid mine drainage. Since then, the international community has adopted the Stockholm Convention to ban DDT, the Vienna Convention for the protection of the ozone layer, the Madrid Protocol itself, the Rio Declaration on Environment and Development, the Convention on Biological Diversity, the UN Framework Convention on Climate Change, the Kyoto Protocol, Paris Agreement, and follow-on accords to address carbon and methane emissions.[126] The international trend towards sustainability and environmental preservation bodes well for applying the Madrid Protocol to outer space. A final cause for optimism is the fact that the Madrid Protocol is widely heralded as a success.[127] Since its adoption over 25 years ago, it has achieved the goals of preserving the Antarctic environment while encouraging scientific investigation.[128] Additionally, it has served a secondary goal of continuing to de-escalate Antarctic tensions by removing any incentive towards competition via resource extraction.[129]

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123. . *See Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of The Moon, Mars, Comets, and Asteroids for Peaceful Purposes*, (Oct. 13, 2020), *available at* https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf (last visited Jan. 31, 2022). (The Artemis Accords were opened for signature with international partners on October 13, 2020. Currently, 11 countries are signatories to the Accords, including: New Zealand, Republic of Korea, Australia, Canada, Italy, Japan, Luxembourg, the United Kingdom, the United Arab Emirates, Ukraine, and the United States.).

124. . *Id.* at § 10.

125. . PHILLIPE SANDS ET. AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW xxi (2d ed. 2003)

126. . *Id.* at l.

127. . *See* Bloom, *supra* note 86.

128. . *Id.*

129. . *Id.*

The challenges facing the application of the Madrid Protocol to outer space are many: a growing body of practice, the perception of stifled enterprise, the lack of a catalyst, and global geopolitics. Gaining the acceptance of this framework through UNCOPUOS' consensus-based process will not be easy. And yet the challenges all have sound rebuttals and there is also cause for optimism: trends towards multilateralism, increasing environmental awareness and international action, and the success of the Madrid Protocol for the ATS.

Now is the time to adopt a preventative, precautionary approach to outer space resource exploration and use. Private companies are proliferating in outer space through a NewSpace regime in order to achieve a "spatial fix" to capitalism. In response, states are adopting unilateral legislation and policy positions. This approach is leading to a regulatory "race to the bottom," with the effect of an unclear and under-regulated approach to space resources exploration and use. The lack of clarity and competition for space resources, in turn, could quickly spiral into conflict. Considering this trajectory, states must pivot to a multilateral approach to regulating space resource exploration and use. The UNCOPUOS space resources working group provides the ideal venue to create a framework for outer space resources. As a corollary to the OST, the Madrid Protocol offers the best principles and framework for an approach to space resources that is precautionary, deescalates potential conflict in space, and prevents damage to the extraterrestrial environment.

It is a new day on Mars. Imagine you step out of the research station at dawn and take in the view. Across the horizon, which is eerily flat, you can see into the expanse of space and, rising in the distance, the pale sun – its light barely reaching the Martian surface. The morning is still bitter cold, that will never change, but this time the thin Martian atmosphere is crystal clear. The community mining site is carefully managed with minimal disturbance to the surface and no leachate. At the transport depot, a SpaceCorp Cargo ship, ferrying precious minerals to Titan, is cleared for blastoff after rigorous inspection and compliance protocols. As it hurtles into space, you cannot help but find yourself wondering – how did we, humanity, get here?