

Women and Children: Deconstructing a Paradigm

by Nadine Puechguirbal

When do women gain from being treated as 'mother,' 'dependents,' or 'vulnerable,' and when from being seen as autonomous individuals?

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INTRODUCTION

Women and children are the main victims of modern warfare, and they account for an estimated 80 percent of refugees and displaced persons worldwide.² Women and children bear the brunt of armed conflicts when they lose protection, shelter, access to food, and medical care. Wars also upset gender roles and increase the responsibilities and exposure of women when they have to strive to feed their children and extended families in the absence of the male breadwinner. In the existing literature on the subject of conflict and post-conflict situations, women are often associated with children. In international instruments, UN resolutions or documentations, women are always part of the vulnerable groups together with old people, children and the handicapped; they are always dependent on a family unit or a male individual, either father, brother or husband. It is as if women did not have an identity of their own. It is as if they could not play an accepted and recognized role in society when they are not associated with children.

A new category of human beings is produced, called "women-and-children," with children just being an extension of women's own body and soul. This way of thinking perpetuates the stereotypes of women as caring and nurturing mothers, locked in the private realm, unable to cross boundaries and move to the public arena, where men are designing policies, taking decisions and running the world. In the framework of changes brought about by armed conflicts, this article will challenge the paradigm that associates women with children; it will demonstrate that it prevents women from being seen as active agents of change for peace, or actors of their own lives, thus limiting their participation in the reconstruction or rehabilitation of societies.

Because women are caught in productive, reproductive and community works, they have less time available for participating in development programmes or capacity-building training that can lead to their empowerment. And all over the world, women

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are excluded from decision-making processes, peace talks, or important international gatherings that define new societies on the remains of war. Post-war situations very often mean for women the return to the status quo ante bellum, to alienating traditions that define them in their role as a good mother and a good wife, irrespective of the new responsibilities they may have taken during armed conflicts. As Meintjes, Pillay and Turshen write, “The historical record confirms that societies neither defend the spaces women create during struggle nor acknowledge the ingenious ways in which women bear new and additional responsibilities.”³

WOMEN-AND-CHILDREN: LOOKING FOR LANGUAGE IN INTERNATIONAL RELATIONS

Women’s political activity has been generally restricted to the grassroots level within a community or a movement far away from the centers of power dominated by men. Until challenged by feminist perspectives, international relations had always been defined according to the masculine norm of reference, built up on gender hierarchies and on the binary visions of ‘private sphere versus public’ and ‘nature versus culture’ that have excluded women from power circles and decision making levels. In international relations literature dealing with armed conflicts, what is at stake is the definition of men (the protectors) versus women (the protected) who have little control over their own protection. As Ann Tickner writes, “while men have been associated with defending the state and advancing its international interests as soldiers as diplomats, women have typically been engaged in the *ordering* and *comforting* roles both in the domestic sphere, as mothers and basic needs providers, and in the caring professions, as teachers, nurses, and social workers.”⁴

The paradigm that associates women with children prevents women from being seen as active agents of change for peace.

Following a massive mobilization of women from all walks of life, the UN Security Council passed resolution 1325 on October 31, 2000, thus paving the way for a new definition of the position of women in conflict and post-conflict situations. For the first time in the UN history, the Security Council turned its attention to the issue of women in wars not only as victims but mainly as agents and actors in conflict prevention, conflict resolution and peace building. It also acknowledged the need to support women’s peace initiatives as well as their involvement in peace processes, and called for an increase in the representation of women at decision-making levels. Resolution 1325 has been called a landmark resolution because it represents a great step forward in acknowledging the active contribution of women in peace and security issues; thus, it gives them a role they never had before in international relations. Indeed, in most of the resolutions adopted by either the UN General Assembly or the Security Council, women have often been seen as hopeless

civilians, always associated with children, who suffer from the consequences of wars. As Sara Poehlman and Felicity Hill write, “women are seen as victims that need to be protected and helped, instead of participants in their own protection or in the struggles for peace, self-determination, national liberation, and independence.”⁵ One example of such a language can be found in General Assembly Resolution 2200A, on the protection of Women and Children in Emergency and Armed Conflict from December 16, 1966, which reads: “expressing its deep concern over the sufferings of *women and children* belonging to the civilian population... who are too often victims of inhuman acts.”⁶ A pattern can be clearly identified in the language used by the UN to talk about the situations of women that is closer to victimization than empowerment. Even today, after years of increased awareness and mobilization of women, the language has not fundamentally changed, thus perpetuating the stereotypes that prevent women from becoming more visible and assertive in the public arena.

In October 2003, the UN Office of the Special Advisor on Gender Issues and Advancement of Women (OSAGI) conducted an analysis of 264 reports by the Secretary-General to the Security Council from January 2000 to September 2003. The analysis shows that although 17.8 percent of the reports make several references to gender concerns, 15.2 percent make little reference and 67 percent make no or only one mention of gender issues or women. As highlighted in the OSAGI study, “the vast majority of reports citing gender concerns mention the impact of the conflict on women and girls, primarily as victims of conflict—not as potential dynamic actors in reconciliation, peace building or post-conflict reconstruction.”⁷

Of course, there has been some improvement in the language used in the different documents from the UN since the adoption of resolution 1325. For example, resolution 1325 is now integrated into the language pertaining to women, peace and security, like in resolution 1493 for the peacekeeping mission in the Democratic Republic of the Congo. In resolution 1493 indeed, the Security Council “reaffirms the importance of a gender perspective in peacekeeping operations in accordance with resolution 1325 (2000)...”⁸ Despite this, stereotypes about women resurface, and the category *women-and-children* takes over as illustrated in resolution 1470 on the peacekeeping mission in Sierra Leone. In resolution 1470, the Security Council “encourages the Government of Sierra Leone to pay special attention to the needs of *women and children* affected by war...”⁹ Another example can be found in resolution 1379 on Children and Armed Conflict, as follows: the Security Council expresses its intention, where appropriate, to call upon the parties to a conflict to make special arrangements to meet the protection and assistance requirements of *women, children*, and other vulnerable groups...¹⁰

If we take a closer look at how news is reported about humanitarian action all over the world and pay attention to language, we can take up the same thread again. As reported by the Integrated Regional Information Network (IRIN) on February 10, 2004, in an article about the humanitarian assistance provided by the European Community, “the aid would also be used to reduce mortality and morbidity among

the refugees, internally displaced people (IDPs), returnees, *women and children*.”¹¹ In another article one can read, “the refugees, mostly *women, children* and the elderly, have spread widely in pockets in Chad...”¹² Or, “in addition, the civilian population, especially *women and children* [...] continues to be subjected to serious and systematic human rights violations...”¹³

This line of analysis could continue and provide more examples following this identified pattern. The argument of this article does not diminish the importance of protection issues for women and for children in times of war; it rather stresses the need for a revision of the language that would encompass women’s coping strategies with violence and hardship conditions, document their lives in conflict and post-conflict situations, and highlight what actions they are taking in the field of protection to better target our international involvement. This approach would enable women to move from the status of victims to that of actors.

Women can have access to resources, but if they do not have control over these resources, they remain dependent.

The problem with the traditional approach is that often the reality on the ground is not clearly understood because of a lack of gender-disaggregated data. Most humanitarian agencies report about people, groups, populations, and communities as if they were the same entities with the same needs, irrespective of the gender dimensions of each society. For example, we read in the Consolidated Appeal Process (CAP) for Liberia in 2004 that “80 percent of Liberians live below the poverty line; and 35 percent are undernourished.”¹⁴ This data does not tell us what groups are affected the most among these people, and what strategy and resources will reach them. In the same document, we read that “only 25 percent of people have access to safe water. A vast majority of people are illiterate.” If these statistics were broken down by gender and age, we could better target the humanitarian assistance according to the needs of the different groups. (Are women more illiterate than men? What does it tell us about this particular group? Do girls go to school? If not, what are the obstacles and how can they be tackled?) Without a clear picture of the reality in the field, and with broad categories of beneficiaries like *women-and-children*, it is difficult to devise a clear strategy of humanitarian assistance that would use local resources and empower the recipients. The result is that women are often disempowered and marginalized in the delivery of international assistance; and, one wonders why their situation as refugee, single head of household or widow keeps deteriorating in spite of all the help they can get. They end up being over assisted instead of being empowered. Women can have access to resources, but if they do not have control over these resources, they remain dependent on a male relative or a community that may deprive them of their rights.

WOMEN-AND-CHILDREN: LOOKING FOR A PATTERN IN HISTORY

From all over the world, history tells us that the ordeal of a woman starts when she becomes dependent on a family entity and is subservient to the patriarchal rule that prevents her from escaping her fate and asserting her rights as a free and independent individual. As Rosalind Miles writes, "...a woman who is not locked into that chain of command between her husband and his children is a dangerous threat to the stability of the society, and to herself."¹⁵ The anthropologist Nicole-Claude Mathieu further explains that by focusing too much on the mother as "lieu psycho-biologique" (psycho-biological entity) for the child, one forgets to define the woman as a social subject: she is only thought of as an object rather than the subject of maternity.¹⁶

Furthermore, the writer Elizabeth Badinter shows that the patriarchal system, which enforces the binary vision of a strict sexual division of labor and imposes the rule and power of the "father," starts in the West with the Athenian democracy in the fifth century B.C.¹⁷ Although this ideology will be weakened by the evolution of mentalities, revolutions, wars, and the development of a feminist consciousness, it has left scars in today's societies that often prevent women from getting out of traditional roles and being recognized as independent individuals in the public sphere. Carole Pateman writes, "as capitalism and its specific form of sexual as well as class division of labour developed, however, wives were pushed into a few, low-status areas of employment or kept out of economic life altogether, relegated to their 'natural,' dependent, place in the private, familial sphere."¹⁸

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Of course, women are a heterogeneous group with different needs and expectations and they are divided by class, race, age, religion, and background. However, they all share one common identity: as women, they are always identified as mothers. As Adrienne Rich writes, "it is as if the suffering of the mother, the primary identification of woman as the mother—were so necessary to the emotional grounding of human society that the mitigation, or removal, of that suffering that identification, must be fought at every level, including the level of refusing to question it at all."¹⁹ A woman who has not given birth is not a real woman, and she is often stigmatized if she stays single without children.

According to the popular beliefs in pre-colonial Rwanda, single women were considered dangerous spirits (*muzimu*), in the same way as the deceased without descendants or people who died far away from their families and were refused burial.²⁰ As a comparison, during the Middle-Ages in Europe, the woman was the

property of her husband and her father, only protected by law in her capacity as a mother. As underlined by Simone de Beauvoir, “the murder of a pregnant woman costs four times more than the murder of a free man; a woman who has shown that she could be pregnant is worth three times more than a free man; but she loses her value when she becomes sterile.”²¹

In Somalia, two parties in conflict use a form of negotiation that is called the *dayeh* (blood money); the *dayeh* for a woman is half the *dayeh* for a man. However, if a pregnant woman is killed, or if her fetus dies, then the *dayeh* for the fetus is equivalent to the *dayeh* of a male adult.²² In addition, we often talk of the involvement of Somali women in conflict resolution by stressing the fact that women are exchanged between enemy tribes as a way of sealing a peace accord. Once again, the woman is seen in her role of mother exclusively since this exchange will translate into a happy ending when she gives birth, as illustrated in the Somali saying: “*meel xiniijir lagu bururiyay xab baa lagu bururiya*”²³ (a baby should be born in the spot where blood has been spilt). Here again, we see a pattern taking shape in many societies that define the woman as a minor who is dependent of the good will of her clan, family, husband or father and can not enjoy an autonomous life. It seems that the history of the living conditions of women sheds light on this pattern of dependence as Simone de Beauvoir explains: “since the oppression of woman has its roots in the need to perpetuate family and maintain intact the patrimony, whenever she leaves the family entity, she also loses this absolute dependency.”²⁴

During armed conflicts, the gap in gender roles deepens and women are defined according to the most conservative norms of the society.

Not only are women primarily defined as mothers, but they only get legitimacy if they have children within the structure of the family entity, always sanctioned by marriage. For example, in the traditional society in Rwanda, a girl becomes a burden for her family if she becomes pregnant (unmarried mother), a widow or when she was repudiated. The family used to call such a girl an “*Indushyi*,” which means a “hopeless and miserable” girl. A small cabin was built for her close to the property of her parents, and she had to fend for herself to make a living.²⁵ The family entity has been defined as the “natural” norm of the society; and, according to the expression used by Carole Pateman, “the family is paradigmatically private.”²⁶ It has even been enshrined in international instruments like the Universal Declaration of Human Rights (1948) which, in its article 16, point 3, states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”²⁷ *Family* at that time was certainly defined as the nuclear heterosexual family without much room for interpretation. Even today, in many countries, family remains the so-called natural entity of the society grounded on the traditional sexual division of labor.

We have seen that Rwanda has revised its Constitution and mainstreamed gender issues throughout its text; but here again Article 27 refers to the family as the natural entity of the Rwandese society. We understand that Rwandese women had to fight hard to remove the discriminatory elements against women that existed in the Constitution; they have used international instruments, including the Universal Declaration, to ground their claims for a more egalitarian society. One may further question the language of the Universal Declaration of Human Rights which, in article 1, states that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of *brotherhood*.”²⁸ The word “brotherhood” does not reflect the perspectives of women and girls who remain invisible individuals with rights.

CHALLENGING THE CATEGORY *WOMEN-AND-CHILDREN*

One of the main problems in associating women and children in international relations is that it feeds the nationalist discourse that defines women mainly as the cultural bearers of a society. When the interpenetration between people and nation becomes stronger, relations between women and men are essentialized and defined according to what is a “natural” role or duty for a group or the other. In times of war, women are reminded that they are the keepers of the home, traditionally and biologically, and that they have to transmit to their offspring the values of their culture; the men, traditionally and biologically, are responsible for protecting women and children, as well as the *motherland*, thus highlighting the commonly agreed definition of masculinity that is prone to violence and aggressiveness. Elizabeth Ferris reports that in Serbia in the 1990s, women were manipulated by the nationalist propaganda to support the war efforts. She gives the example of a politician who was haranguing women about giving birth to a son who would serve for the nation. She writes further that another politician had said that for each male combatant who fell on the battlefield during the war against Slovenia in June 1991, it was the duty of Serbian women to give birth to 100 more boys.²⁹

During armed conflicts, the gap in gender roles deepens and women are defined according to the most conservative norms of the society, mainly as mother and wife of the male heroes. She loses her own space and identity to take over the identity of a society that is shattered by the war; thus, she becomes dependent on the ultra-nationalist politics of a militarized society that makes her a symbol of purity and a tool for the ideological reconquest of traditional values and norms. Gender roles become very polarized while the concept of masculinity and its complementary object femininity are overemphasized. As Cynthia Enloe writes, “militarized masculinity is a model of masculinity that is especially likely to be imagined as requiring a feminine complement that excludes women from full and assertive participation in postwar public life.”³⁰

Gender markers in wars are so strictly reinforced that women are particularly exposed to sexual violence: “women’s bodies constitute the battlefield where men

communicate their rage to other men.”³¹ We remember the armed conflicts in Bosnia and Rwanda where rape was used as a weapon of war, not only to humiliate women but also reach the men of another ethnic group and deliver the message that they were unable to protect their women. As Jennifer Turpin writes, “because women are viewed as symbols of the family, and the family as the basis of society, the humiliation for women of giving birth to the enemy’s children symbolizes the destruction of the community.”³² Therefore, the use of a language that defines women first and foremost in their reproductive role participates in making them more vulnerable and somehow jeopardizes their lives by anchoring a conservative vision of gender roles in the mind of the people. During the genocide in Rwanda in 1994, women were raped, abducted to serve as sexual slaves, maimed and/or killed. According to the anthropologist Christopher Taylor, it is impossible to apprehend the Rwandan genocide without understanding the link between gender roles and power within a militarized society. He explains that, already in the 1980s, a brutal campaign had been launched in Rwanda against single urban women in the framework of reforms aimed at fighting against loose morals; the main targets were young women living in urban areas who were going around with Europeans or were wearing fancy clothes. They were very often humiliated by soldiers in the middle of the street and some of them were even locked in reformatories located in rural areas. Most of these women were very beautiful Tutsi. The most lasting consequence of this repression was to instill into Rwandese minds that single Tutsi women were all prostitutes, thus unleashing a great violence against them that culminated during the genocide in 1994.³³

Women’s resort to violence should be seen not as an exception but rather as a way to survive in extreme circumstances.

In a related development, the *women-and-children* approach prevents us from giving women an alternative gender role or an “agency,” if chosen to build the framework of an identity that is not defined in subordination to male power. Women have participated in wars as combatants and committed acts of violence. Talking about the involvement of women in the genocide in Rwanda, Carolyn Nordstrom writes, “there is a shared concept across cultures that women don’t do this kind of thing... society doesn’t yet have a way to talk about it, because it violates all our concepts of what women are.”³⁴ This position reinforces the dichotomy of gender roles by excluding women from the public arena where war is conducted and post-war negotiations take place. As Ann Tickner underlines it, “but if the implication of this view [that women are first and foremost caring and nurturing mothers] was that women were disqualified from participating in the corrupt world of political and economic power by virtue of their moral superiority, the result could only be the perpetuation of male dominance.”³⁵ This is echoed by Judy El-Bushra when she

writes that women's resort to violence should be seen not as an exception but rather as a way to survive in extreme circumstances, thus blurring strict and static definitions of gender identities.³⁶

Even mothers can become violent as illustrated by Ruth Roach Pierson in the case of Nicaragua. She explains how the involvement of women in the Sandinist movement had its roots in the way they were perceived in the society both as mothers and victims. The Nicaraguan women first got involved in the Sandinist movement because, as mothers, they couldn't stand watching their children being killed by the Somoza's regime. Then, they took up arms to fight against their own vulnerability linked to rape that was systematically used by Somoza's National Guard. After the civil war, those women continued the fight against the machismo that was deeply rooted in the Nicaraguan society.³⁷

Unless women's presence is imposed by the international community, they are not invited to participate in peace talks, and their concerns and priorities are not taken into consideration.

In a militarized environment where concepts of masculinity and femininity are so loaded, it becomes very uneasy to promote peace through a "motherist" movement or what is called the philosophy of "maternal thinking." As Cynthia Cockburn observes, "identifications as mothers can enlist generous feelings of care and love that powerfully contradict violence. But it skirts dangerously close to patriarchal definitions of women's role and can be co-opted by nationalisms propagating that very ideology."³⁸ This approach is echoed by Joshua Goldstein who stresses that women are not more peaceful than men simply because they are women. By continuing to emphasizing their role as nurturers and caretakers, we reinforce the stereotypes that prevail during wars. Joshua Goldstein explains that by feminizing the peace, women activists often endorse the soldier's masculinity.³⁹

The contribution to peace building by committed women's peace groups throughout the world is undeniable. However, because they are associated with the private realm, the activities they carry out for peace are only seen as an extension of their domestic chores and not taken seriously. As Michael Fleshman writes in the context of Africa, "[...] the contributions of women peacemakers in Africa, from Somalia to South Africa, have gone largely unnoticed. Dismissed by governments and rebel movements who consider making war and peace to be men's work—and often relegated to the role of "victims" by well-intentioned diplomats and aid agencies—women have had to fight their own battles for a seat at the peace table."⁴⁰

Indeed, women may have been very active in the promotion of peace at the grassroots level, very often they fall short of reaching the official negotiations table in peace processes. Actually, unless their presence is imposed by the international

community, they are not invited to participate in peace talks, and their concerns and priorities are not taken into consideration when decisions are made about the post-conflict reconstruction of their own society.

The writer Adrienne Rich doesn't believe that women's peace groups promoting "maternity" in their antimilitarist work can help have an impact on society in the long run. As she writes, "I do not see the mother with her child as either more morally credible or more morally capable than any other woman. A child can be used as a symbolic credential, a sentimental object, a badge of self-righteousness. I question the implicit belief that only "mothers" with "children of their own" have a real stake in the future of humanity."⁴¹ We need to start dissociating women from children to break the vicious circle of the essentialism theory and deconstruct gender roles so that women are seen as active individuals who can enjoy independent choices over their own life. Finally, we will agree with Ann Tickner when she cautions, "many contemporary feminists see dangers in the continuation of these essentializing myths that can only result in the perpetuation of women's subordination and reinforce dualisms that serve to make men more powerful. The association of femininity with peace lends support to an idealized masculinity that depends on constructing women as passive victims in need of protection."⁴²

CONCLUSION

This paper is provocative on purpose with the aim of thinking outside the box. We acknowledge that a lot of progress has been made in recent years to reinforce the protection of women, children and other groups that may be particularly exposed to the cruelty of wars. International laws have been passed, people have mobilized, rape has been finally recognized as a war crime and a crime against humanity, and women have taken the lead in promoting their own protection needs, but impunity still prevails. As Charlotte Lindsey from the International Committee of the Red Cross writes, "if women have to bear so many of the tragic effects of armed conflict, it is not primarily because of any shortcomings in the rules protecting them, but because those rules are not observed."⁴³

Maybe we could suggest that women would be better protected if they were seen as autonomous actors in charge of their own lives, thus being in a position of asserting their own rights and fighting back. Maybe we should start with deconstructing gender roles in post-conflict situations and challenging the static definition of masculinity and femininity, thus redefining power relations and addressing gender inequality. Women should be seen as dynamic actors beyond the limited borders of a biological destiny. As Chris Dolan writes, "if anything, given that the coming of peace will be associated with opportunities for civilian men to reclaim their masculinity, we should not be surprised to find ostensibly empowered women pushed back into the kitchen within a very short period. Interventions that hope to secure women's emancipation must also ensure that men have alternative sources of domestic and political power and credibility beyond a position as husband and father."⁴⁴

Because we look often at women's issues in isolation from men, we undermine the importance of power relations that have an impact on the definition of gender roles. If we look at the relations between men and women through gender lenses, we understand that gender roles are socially constructed and can change over time within cultures. That's why it would be better to change language and talk about gender perspectives instead of using fossilized categories like *women-and-children* in order to have a better picture of the social and political flux within societies. We have to stop thinking of women as defined according to a "biological fate" (anatomy as destiny), as Simone de Beauvoir would say, as well as being socially apprehended according to what they are (passive) and not to what they do (active). As Elizabeth Badinter writes, "by associating woman with maternal capacity, one defines her according to what she is and not to what she wants to be. On the contrary, there is no symmetrical definition for man who is always apprehended according to what he does and not to what he is. Resorting to biology affects only women."⁴⁵

Notes

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² Progress of the World's Women 2002. Vol. 1, Women War Peace, The Independent Experts' Assessment by Elisabeth Rehn & Ellen Johnson Sirleaf, UNIFEM, p. 21.

³ S. Meintjes, A. Pillay and M. Turshen (Eds.), "There is no aftermath for women," in *The Aftermath: Women in Post-Conflict Transformation*, Zed Books, London & New York, 2001, p. 8.

⁴ A. Tickner, *Gender in International Relations*, Feminist perspectives on Achieving Global Security, Columbia University Press, New York, 1992, p. 28.

⁵ S. Poehlman and F. Hill, "Women and Peace in the United Nations," *New Routes, A Journal of Peace Research and Action*, *Life & Peace Institute*, Vol. 6, number 3, 2001, p. 2.

⁶ Resolution 2200A on the protection of Women and Children in Emergency and Armed Conflict from 16 December 1966. Emphasis ours.

⁷ Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), *An analysis of the gender content of Secretary-General's reports to the Security Council, January 2000-September 2003*, United Nations, October 2003, p. 1.

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¹⁶ N-C. Mathieu, *L'anatomie politique : Catégorisations et idéologies du sexe*, Côté-femmes éditions, Paris, 1991, p. 65.

¹⁷ E. Badinter, *Fausse route*, Odile Jacob, Paris, avril 2003, p. 101.

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- ¹⁹ A. Rich, *Of Woman Born, Motherhood as experience and institution*, Norton & Company, New York, London, 1986, p. 30.
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Gifting Dependency: The Effects of Donations on Women and *Ayni* in Bolivian Mining Communities

by Natalie Kimball

INTRODUCTION

Faith-based reciprocity, or *ayni*, forms an integral part of the culture of Bolivian mining communities. *Ayni* regulates the relationships that women in these communities share with their work, their neighbors, their friends, and with the deities they pay tribute. This reciprocity has its root in Quechua and Aymara religious and cultural beliefs but it can also be found in the local brand of Catholicism, which contains aspects of these indigenous cosmologies.

For the past several years, the United States government and the Programa Mundial de Alimentos (PMA) have donated thousands of metric tons of foodstuffs to Bolivia, mostly destined for women and children. Aid from the United States began in 1955 and from the PMA in 1964 and reached its peak in 1987 with 273,764.5 metric tons of food from both groups, including dairy products, a variety of grains, salt, sugar, and canned meats.¹ Since the early 1990s, food donations from all sources have been on a steady decline, and Bolivia is now near losing its designation as a priority country for nutritional aid. Although the Bolivian government welcomed these donations during their heyday and only once refused an offer of assistance,² several studies arose in the late 1980s and early 1990s documenting the unintended effects that this aid has had on its mostly female recipients. These were most notably a sense of dependence on foods and assistance from outside the country and a subsequent change in the eating habits of these women.³ To remedy these ills, groups of women who accepted donated foodstuffs in partnership with women's and community-based organizations undertook productive projects to return the recipients to social actors rather than passive beneficiaries of aid. These efforts were largely successful in establishing stable local sources of food and restoring productive capacity to the people.

As in many poor countries, in Bolivia there are literally hundreds of different institutions that are dedicated to raising people's quality of life through projects in various areas from education to small loans or microfinance. Some of these institutions give out free materials to their students or even work in partnership with existing food aid programs, making donations of food to those who attend classes.

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This practice, though smaller in scale than the food donations of previous years and coupled with educational courses, reinforces patterns of dependency among the woman recipients, discourages the practice of *ayni*, and makes more difficult the work of those institutions that do operate within a framework of *ayni*. This is occurring for three reasons. First, the recipients are accepting things that they are not expected to return or reciprocate later, even when they are financially able to do so. Also, these institutions are encouraging and operating within a structure of gifting that is foreign to the local communities and in which everything necessary for the classes is brought in from outside. Finally, in some cases institutions are explicitly using gifting as an incentive to attend class.

Faith-based reciprocity, or *ayni*, forms an integral part of the culture of Bolivian mining communities.

This paper will begin with a discussion of the practice, roots, and philosophy of *ayni* in Bolivian mining communities, with a focus on how women use *ayni* to relate to one another and to the world in which they live. The second section will outline the history and current state of food donations to Bolivia and will also examine assertions that these donations have created dependency among women recipients. This section will also deal with a few of the productive projects that were adopted by women's organizations to attempt to free recipients from this dependency. The body of the paper will look in depth at two institutions that are currently working in mining centers that are gifting educational materials and one of which is donating food through the PMA. One of these groups is an investment company from Bolivia called Cumbre del Sajama S.A. that buys mining cooperatives and teaches classes to cooperative members on conservation of the natural environment, civic education, and citizen participation. The other group is a non-profit, evangelical Protestant organization called Alfalit International that has its base in Miami, Florida, and conducts classes in literacy, math, and science, and that is also beginning to teach traditional medicine. I will attempt to show that despite the differences in the goals and structure of these two institutions, their practice of gifting materials reinforces dependency and discourages the use of *ayni* among their students and complicates the work of non-gifting organizations in the communities in which they work.

THE ROOTS OF *AYNI* AND ITS MANIFESTATIONS IN EVERYDAY

Until recently, few workers in Bolivian mines were born in the communities where they work; they almost all came from the *campo*, or surrounding countryside, in villages of Quechua or Aymara origin. When these workers and their families move to the larger, more dynamic mining centers, they bring their religious and cultural beliefs with them, which mix with those of the local community. The principle of *ayni* is one that finds its origin in rural areas.

The mining community depends on traditions inherited from the rural ayllus, or kin-defined local groups that were the basis of the pre-Hispanic Quechua culture, for accumulating capital or mobilizing assistance. These include the ayni [sic], or reciprocal exchange.... The ayni implies a sense of interest payment, since the person who lends money, goods, or services receives them twofold when they are returned.⁴

Any person who accepts help or material goods from another in a mining district is expected to repay that when the borrower so requests. Such acceptance indicates that the two individuals have entered into a contract of *ayni* that is not complete until the debt is repaid, sometimes as late as fifty years later. If a person fails to keep their end of the bargain, they will never be invited into another *ayni* contract by anyone who is aware of the previous failure and their social relationship with their lender will also be broken.⁵ Two people who are unrelated by blood that enter into a contract of *ayni* through lending assistance begin a relationship of social kinship that becomes solidified upon completion of the contract. Simply by being born, however, children also hold *ayni* contracts with their parents, which they are expected to repay when they are adults in the form of financial and emotional support. Relationships of reciprocity between blood relatives often move back and forth throughout their lives as they exchange assistance several times. Thus, children expect to be rewarded with inheritance for accompanying and helping their parents in their old age. One ex-miner I spoke with in the city of Potosí insisted that his life would have no meaning without the sacrifice that he had made for his children and the promise that this would pay off when they had reached adulthood.

This practice of food donations reinforces patterns of dependency among the woman recipients, discourages the practice of *ayni*, and makes more difficult the work of those institutions that do operate within a framework of *ayni*.

Women who are employed in the mining industry also use *ayni* to request assistance from deities in revealing the location of minerals and ensuring productivity. On specific days of the year, *palliris*—the women who work outdoors on the slag piles selecting mineral from loose rocks—will perform *ch'allas*, or blessings, of their work areas. With colored scraps of paper, candies, coca leaves, and pure alcohol, the *palliris* decorate the areas where they work in honor of the *Pachamama*, or female earth spirit, in hopes that she will reveal bits of mineral in the stones they break apart with hammers. If a *palliri* is having difficulty finding mineral in the rocks she is working, others will often suppose that she has not performed the *ch'alla* sufficiently, and that the *Pachamama* is angry. Accidents that occur on the slag piles, such as avalanches, are also attributed to the *Pachamama* and her dissatisfaction with the workers for their failure to compensate her adequately. Thus, the *ch'alla* operates as a sort of payment that the *palliris* extend to the *Pachamama* in exchange

for security and productivity in their work.

Alongside the pre-Columbian beliefs that miners hold in the *Pachamama* and other Andean deities, are Catholic beliefs that are also sometimes regulated by contracts of *ayni*. Most members of mining communities identify themselves as Catholic despite the contradictions that their faith in indigenous deities would seemingly present. People engage in reciprocal exchange with the Catholic god and saints through their participation in local festivals such as the *Carnaval* of Oruro, which requires a great expense of money, time, and energy. Thousands of people dance in *Carnaval* as a way of showing their devotion to the *Virgen del Socavón*, or the Virgin of the Mineshaft, patron saint of the miners of Oruro.⁶ The route that the dancers follow begins near the outskirts of the city and stretches four kilometers to the *Iglesia del Socavón*, or Church of the Mineshaft, where the participants enter and pass in front of an image of the Virgin on their knees to thank her for allowing them to arrive there unharmed. Cecilia Molina, a woman who has danced for fourteen years in the *Carnaval* of Oruro, explained to me what happens when the dancers enter the church at the end of the route.

There the priest is waiting for you to come in, recite the prayers, and you have to pass in front of the Virgin on your knees to thank her...for having allowed to arrive there without any problem, because...if something happens to you during the dance it's because you have not danced out of devotion for the Virgin...so the Virgin has not allowed you to finish....But if you arrive very well, then she has accepted you, she wants you to dance, she wants you to participate.⁷

Similar to the *ch'alla*, the dance is a form of payment that participants offer up to the Virgin in exchange for her blessing and acceptance.

Some institutions that have emerged in mining centers to educate the people who live there have attempted to continue the tradition of reciprocal exchange in the methodology they employ in their classes and in their organizational structure. For the past twenty-five years, the secular, non-governmental organization Centro de Promoción Minera (CEPROMIN) has been teaching classes in literacy, traditional medicine, industrial security, and gender relations in various mining communities. In these classes, when a product such as a medicinal balm is developed, every member of the course contributes both materials and time to its creation. The students then sell these products in their communities and keep the proceeds for their own families. Upon completion of the classes, some of the students are trained as teachers to pass on the information they have learned to others at CEPROMIN's offices in the mining districts where they live as paid employees of the organization. In each of the communities where they have offices, CEPROMIN also maintains a library for public use and a health post for the men, women, and children who work in the mines. Because of the historical dependence of Bolivia and its citizens on more developed countries for economic, nutritional, and technical aid, CEPROMIN finds it especially important that its members acquire at least a basic level of education and financial independence. This objective is being sought through the

commercialization of products, the utilization of home health remedies, and literacy training, all of which are facilitated by members of the students' own communities.

Some institutions that have emerged in mining centers to educate the people who live there have attempted to continue the tradition of reciprocal exchange in the methodology they employ in their classes and in their organizational structure.

The presence of institutions that gift materials to their students in mining districts undermines the work of CEPROMIN and organizations like it that work within a structure of *ayni* while simultaneously reinforcing patterns of dependency among women in these communities. By making donations of food and materials to their students that they are not expected to reciprocate later, these institutions encourage a structure of gifting and discourage the continued use of *ayni* in mining districts. Because of the recent nature of this phenomenon and its small scale, few if any works have been written to document it, unlike the effects of the food donations that occurred in previous years. However, like the food donations, gifting materials to people in Bolivian mining communities, works against the local cultural principle of reciprocal exchange and contributes to the dependency of these individuals on outside sources of sustenance.

THE CASE OF FOOD DONATIONS

Although sales of food for credit from the United States of America to Bolivia began as early as the 1930s, food donations from that country did not begin to arrive until 1955, twelve years after the passage of Public Law 480 (PL-480) in the U.S. in 1943. There are three titles of the food aid law PL-480, which have directed different amounts and types of food assistance to Bolivia at different periods. Title I of the legislation is a continuation of the food sales on credit system from previous years; the only product it issues is wheat and has only been active in 1984-1985 and 1992-2000, although this title is still in effect today and could potentially extend further donations to Bolivia. The wheat and wheat flour sold on credit terms through Title I of PL-480 is purchased at very low interest rates that can be repaid as late as thirty years later. The recipients of the Title II donations, which have been issued every year since 1955 and vary from milk and cheese to vegetable oil, wheat, rice, salt, and sugar, are non-governmental organizations that later pass the food on to individuals through their various programs. Title III aid—which was exclusively wheat since its inception in 1978, except during 1983 and 1984, when rice was also included—was imported by the U.S. Agency for International Development (USAID) in Bolivia which later distributed it to other institutions to sell. The funds generated from these sales could only be used on development projects that would theoretically benefit the host country. Title III donations were discontinued after 1994.⁸

The majority of the remainder of food aid to Bolivia has come from the Programa Mundial de Alimentos (PMA), which in 1964 began sending assistance to the country through the United Nations, of which the donating states were members. This program still works with Bolivia, though since the early 1990s the donations have steadily declined. The PMA sends the widest variety of products of all the donating organizations, including items such as tea, canned meats and fish, soup, noodles, and quinoa. Aid from this program is received by the Bolivian government through their Oficina Nacional de Asistencia Alimentaria (OFINAAL), which cooperates with several other institutions to distribute the goods to families.⁹

Not only have food donations negatively affected local eating habits, they have also made Bolivia dependent on wheat from abroad.

Prior to 1978, the amount of food donations arriving in Bolivia from all sources was small and the annual growth rate was negligible; only during a few years did the quantity surpass 9,000 metric tons. Between 1978 and 1992, however, huge amounts of aid arrived yearly, most notably from the United States, whose portion of the total hovered around 88 percent. From 1977 to 1978 alone, food assistance grew by nearly 80,000 metric tons. Contrary to what might be expected, the growth in food aid over this period and the annual variations in quantities sent—which sometimes were extreme—had less to do with necessity in Bolivia than with availability and surplus in the donating countries.

These variations... in the volume of the donations over the course of the years do not obey internal factors such as natural disasters or reductions in the national agricultural production, rather they obey the external availability of food that the donors have and which countries they designate as priorities, thus the recent and massive support being shown toward Eastern Europe.¹⁰

In addition to how much was sent, *what* was sent was also the decision of the donating countries, not of the recipients. For this reason, the largest amount by far of any food item sent between the years 1955 and 1992 was wheat, and 80 percent of the total donations were some kind of grain. Especially between 1980 and 1992, various industrialized countries had accumulated surplus wheat, and to protect their own farmers from price fluctuations much of this was donated, imported, or sold on credit to developing countries. In 1984 and 1985 alone, nearly 150,000 metric tons of wheat was sold to Bolivia on credit through Title I of PL-480. During the same period that these donations were sent, Bolivia produced over 50,000 metric tons yearly of wheat for domestic consumption.¹¹ This amount increased by three times in the next five years due to credits that the USAID put toward the production of wheat in the Santa Cruz department, and donations and imports of wheat and wheat flour did not decline. The result of these massive amounts of wheat and wheat products in Bolivia, in one author's words, is that Bolivia has become "... a country addicted to wheat with a higher consumption per capita than any other product."¹²

Lower income individuals consume most of these wheat products in the form of noodles and bread, which are foods that succeed only in filling the stomach and have very little nutritional value. Thus, not only have food donations negatively affected local eating habits, they have also made Bolivia dependent on wheat from abroad and on credits to foster the local production of wheat in order to support these altered eating habits.

Perhaps the most bizarre example of what foods donor countries have decided to send is the dehydrated products distributed in the Bolivian cities of La Paz and Potosí during the early 1990s that were leftover foodstuffs intended for United States soldiers during the Gulf War. It was the first time that Bolivians had seen produced dehydrated foods such as freeze-dried ice cream.¹³ This odd choice of food aid brings to mind the stories of Pop Tarts and peanut butter that were dropped on the Afghan countryside following the U.S. invasion of 2002. It would seem that donors put very little thought into Bolivia's nutritional needs both in terms of how much they send and what items, let alone any possible cultural responses to the phenomenon of gifting. In fact, the current debate surrounding nutritional assistance to Bolivia deals with genetically modified foods that the United States is sending that have failed that country's Food and Drug Administration (FDA) tests for consumption of the domestic population.

Who food donors target within a developing country as potential aid recipients makes a bit more sense. Food donation projects around the world have targeted women and children for a number of reasons. In areas of high poverty and malnourishment, women and children are usually disproportionately affected as a result of cultural norms that dictate that food should be provided first for grown men before other people within a family. Also, it has often been argued that women hold more control over food within their families than over money and thus prefer to be given food. In some cases men will try to prevent their wives from participating in donation programs where cash is involved, thus cutting off the family from assistance.¹⁴ Donating food is seen as a means to avoid these issues. Evidently, however, directing food donation to women, while it has sometimes increased nutritional levels among them and their children, has also created issues of dependency that call into question the real benefit of these programs when they fail to include productive potential.

Food is not a better way to reach women. It's a way to involve women in the short term, but not necessarily to benefit them. Unless you make it possible for women to grow or buy their own food, food aid can further marginalize them—for example by cutting them off from other resources. In Bolivia, since Mothers' Clubs were receiving food aid, their need for cash resources was overlooked.¹⁵

The existence of organizations that distribute free goods serves as a disincentive to invest in the production of a local, more stable source of sustenance. Unless women recipients of donated foodstuffs can be involved in the production process while they are receiving rations, it is likely that they will become dependent on these charities and be willing to make compromises for them to continue. For example, in

exchange for the donated foodstuffs, several mothers' clubs, which were usually organized by political parties, illegally required that recipients vote for the candidates that they endorsed.¹⁶

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In the most important years of the food donation period, several projects were created to try to minimize the dependency-causing aspects of this practice, some of which were more successful than others. One of these was called Alimentos por Trabajo, or Food for Work, and included aid from both the PMA and from Title II of the PL-480. Only people with four or more dependents were eligible, and usually the workers were women, because men were more likely to have steady employment outside the home. Food for Work jobs varied from street cleaning and road maintenance to tree planting, and the food rations included wheat, vegetable oil, canned meat, beans, iodized salt, and rice. Women generally worked between eight to ten hours a day and were accompanied by their children at the work sites. Aside from the food, participants in this program did not receive any compensation. Unfortunately, rather than providing temporary employment for an out of work sector of the population, the Food for Work program attracted people from rural areas to the cities, which created more instability.

Many of the women recipients [of donated food] come from the countryside in search of work but in the cities they do not find it. There are only programs of Food for Work and the manner in which the different agencies distribute the food is very prejudicial; there are 'food for work' programs, and communal activities without a perspective on integral development for the workers, and the political parties abuse this situation of dependency.¹⁷

Internal migrants from the *campo* who entered Food for Work jobs were even more vulnerable than those from the cities, because they could not count on a wide support system when the temporary jobs ended.

The most successful projects undertaken to decrease the negative effects of dependency in these women's lives were initiated by groups of these women themselves in partnership with neighborhood associations and women's rights organizations. A few of the distributing institutions of Title II PL-480 aid such as Caritas International and Catholic Relief Services also undertook projects of this type using their own funds with groups of women recipients. These projects involved the construction and maintenance of vegetable gardens and the development of artisan products such as weavings that the participants later sold in local markets for profit. Most of the projects were financed either with donations or quotas that the women paid toward the upkeep of the work spaces or gardens and for materials. The organizations that

worked with these groups of women also provided education in the administration, organization, and technical aspects of these projects. Many of the participants had not been involved in classes of this sort since primary school, which several of them had not had the opportunity to finish. The effects that these projects had upon the participants were gleaned from surveys distributed by the cooperating organizations and designed by the Centro de Información y Desarrollo de la Mujer (CIDEM), a third-party group that undertook the evaluation of many food donation programs.

With respect to changes [that have occurred] in the woman [participant], it must be mentioned that the projects seem to have provoked a greater desire to excel as an individual, and for training and education. Another consequence of the introduction of productive projects has been the generation of responsibility, self-valorization, and valorization on the part of the family.¹⁸

While it is simply untrue to say that humanitarian aid always creates issues of dependency in its beneficiaries, it is important to keep these problems in mind when designing food assistance programs.

Very often, gifting items to people in need creates as many problems as it intends to solve because this practice is almost always temporary and does not provide long-term solutions to poverty.

Very often, gifting items to people in need creates as many problems as it intends to solve because this practice is almost always temporary and does not provide long-term solutions to poverty. Such programs should also take into account the local customs regarding gifts and exchange. The tradition of *ayni* in Bolivia makes donations more problematic because they interfere with societal obligations of reciprocity, discouraging the continued use of *ayni* in addition to reinforcing patterns of dependency that are already present in much of underdeveloped Latin America. Through the introduction of productive projects among groups of women recipients of donated food, the aid was able to continue to provide a nutritional supplement to families while minimizing the negative effects of gifting. The recent arrival of institutions in mining communities that gift materials to their students is troubling because it mirrors the negative aspects of food distribution programs without offering productive solutions. This practice is helping to maintain destructive patterns of dependence among women participants as it weakens the work of those groups that are educating community members within a framework of *ayni*.

EDUCATIONAL INSTITUTIONS: GIFTING DEPENDENCY

The two institutions that I have chosen to examine in relation to the practice of gifting are Alfalit International, a non-profit evangelical Protestant organization from the U.S., and Cumbre del Sajama S.A., a Bolivian investment company in mining

that also teaches classes. Although the structure, goals, and class themes of these institutions are quite different from one another, they both gift educational materials to their students, and one of these groups also collaborates with a food aid program.

Alfalit International was founded in 1975 as a non-profit organization in Miami, Florida, but adult literacy pioneer Dr. Frank Laubach developed its teaching methodology much earlier in 1943. This organization has been present in Bolivia for the past twenty years but is just recently extending its work from the cities into the smaller mining centers around the country. Alfalit is a well-established literacy organization; it was granted the UNESCO First Prize for World Literacy for its work in Peru in 1983. Through literacy classes, Alfalit hopes to educate others about its faith and convert those interested to Protestantism. In addition to literacy, Alfalit also teaches math and science for basic readers and has recently begun to offer courses in traditional medicine. The largest portion of its financing comes from USAID. Alfalit's regional coordinator in La Paz, René Choque, told me that he believes that it is due to USAID's funding that the organization has recently grown to more than 20,000 students in Bolivia; probably 90 percent of these are women. The classes are organized into levels that last three months each; classes meet for three hours a day, two days a week. Alfalit representatives generally go door to door to find students, but they also make presentations about their classes and philosophy to existing literacy groups at other organizations such as CEPROMIN.

It is due to the mutual expectation and indeed obligation of reciprocity that *ayni* has been present so long in Bolivian communities and up until recently, regulated even the most basic exchanges among their members.

Cumbre del Sajama S.A. is an investment company that buys cooperative mines from their owners in mining centers around the country and carries out technical studies in mining, geology, and energy sources. It also teaches educational courses at cooperative mines in the areas of civic education, citizen participation, and environmental management. Cumbre del Sajama was formed in 1997 and has its only office in the neighborhood of Obrajes in La Paz. The company sends teams to different mining centers to give courses in rooms made available by the cooperative involved. In order to advertise its courses, Cumbre del Sajama generally approaches mining cooperatives directly at their offices at the mines themselves. The general manager of Sajama, Ana María Aranibar, told me that because the company approaches cooperatives directly and because of the types of courses they teach, there are usually more male students than female. The women meet apart from the men and tend to be concentrated in the classes dealing with civic education/citizen participation.

Although Alfalit International and Cumbre del Sajama S.A. have very different backgrounds, class themes, and goals, both institutions gift materials to their respective

students. One of the reasons that this practice discourages the use of *ayni* and contributes to dependency in mining communities is because when Alfalit and Sajama donate these materials, they neither expect nor require their students to return them later or reciprocate with a different gift, even when these women are financially able to do so. It is due to the mutual expectation and indeed obligation of reciprocity that *ayni* has been present so long in Bolivian communities and up until recently, regulated even the most basic exchanges among their members. The fact that this exchange is essentially a social obligation between individuals can be seen in the ostracism a person suffers if he or she does not complete the contract of *ayni*. Now that these institutions hand out materials and specify that they need not be returned later, the expectation and obligation of *ayni* are overridden and the students become accustomed to receiving no-strings-attached gifts. The fact that these gifts are generally small, inexpensive items is significant because if these gifts were costly or abundant, the women students (who are all low income) could not even imagine being financially able to reciprocate, even years later. Because these are small donations, however, it would be logical for the students to reciprocate—they in fact would probably do so if these were exchanges between themselves rather than between an institution and individual. Since they are not requested to contribute materials or money to Alfalit or Sajama in exchange for the free classes and books, the practice of *ayni* is not used.

Alfalit International develops its own materials for use in its classes that are based on Dr. Frank Laubach's literacy training methodology. These materials include books in reading comprehension, writing practice, mathematics, and natural sciences. Apart from these, Alfalit also hands out blank notebooks to its students for completion of homework and exercises. Each class that Alfalit teaches lasts for three months and meets two days a week for three hours each day, and comprises reading, writing, math, and science. All of the classes are taught in Spanish. After three months, if a student passes the final exam, she goes on to the next level, which will last another three months. Each student is given an average of four books and one notebook every three months if she progresses normally through the levels. Each of the books that Alfalit uses has around thirty pages and probably would not be worth more than \$3.00. if bought in La Paz, the largest city in highland Bolivia. The notebook would cost closer to \$1.50. Although many women students are reluctant to spend money on their own education when they have to invest in that of their children, two different Alfalit students told me that they would still be able to come to classes if they had to buy their own notebooks, and another told me directly that, "...it is not necessary that they always give us materials, you know."¹⁹ Salomé Limachi, a woman who lives in the mining district of Atocha and works with the literacy department of CEPROMIN, told me that people's traditional sense of obligation to a contract of *ayni* is lost when they are given something that they are not expected to reciprocate.

[Gifting things] influences, I mean, I always say that it, it gets us people accustomed to receiving, right? Before, it was different. Every time that you...gave me something,

*I had to reciprocate...it was that way, but not anymore. Right? So, that, that reciprocity, it's like it's being lost, you know?*²⁰

Because students are becoming accustomed to receiving gifts from these institutions, they no longer feel the personal obligation to reciprocate that the use of *ayni* normally would dictate in exchanges of gifts or services.

Gifting materials serves as a way to introduce the company to cooperative members and create trust between the two.

According to its general manager Ana María Aranibar, Cumbre del Sajama S.A. is the only company in Bolivia that gives classes as well as engages in income-producing activities. These classes are shorter term than those of Alfalit and are in the areas of civic education/citizen participation and environmental management. These classes are taught in Spanish and in the indigenous languages Aymara and Quechua by professionals (Bachelor of Arts or Sciences degree holders or higher), who live in La Paz and travel to mining centers for the duration of the classes. Sajama's class methodology is described in its company profile as, "[based] on popular education, utilizing techniques and group dynamics that allow a direct relationship and an easy access to different groups in the communities."²¹ The module on civic education/citizen participation lasts for ten hours total, two hours a day for five days. Three books, about fifteen pages each, come with the course. The class on environmental management lasts for seventy-eight hours total, and it is divided into forty hours of theory and thirty-eight hours of practical application on some project in the community. This course also comes with three books, each with about twenty pages. These materials are essentially workbooks, with information in Spanish and blank spaces for students to write in answers to questions that are listed.

Like Alfalit, Cumbre del Sajama neither expects nor requires its students to return or reciprocate the materials that it gives out in its classes. In fact, according to one engineer I spoke with, gifting materials serves as a way to introduce the company to cooperative members and create trust between the two in the event that Sajama later becomes interested in buying the cooperativized mine. Thus, it is to Sajama's advantage to gift materials to its students. Since the individuals who teach the institution's courses do not live in the mining centers where they work, rather in La Paz, they also are less likely to form intimate relationships with their students that might otherwise obligate them to engage in contracts of *ayni*.

The way these institutions work also reinforces dependency and discourages the use of *ayni* among their students because they both operate within a structure of gifting in which everything necessary for classes is brought in from outside the communities, even in some cases from outside the country. This foreignness reinforces the assumption that reciprocity will not be necessary, since the assistance or gift is coming from outside *ayni's* sphere of influence. In addition, because Bolivia has for so many years received large-scale assistance such as food donations and

monetary loans from outside the country, the fact that these smaller gifts are also foreign further discourages local individuals from seeing these donations as subject to the obligations of *ayni*.

Alfalit brings in chalkboards, benches, paper, pencils, and other materials that might be needed into the spaces where they teach classes, which often are people's homes. I spoke with one student in Potosí in whose house Alfalit gave classes for five years in the late 1990s who insisted that the benches and chalkboards that the organization brought into her house for the courses were from Ireland and had been donated by Irish people who worked with the organization.

Eh...what is that place called? Ah, some gringos [white foreigners] came. They also brought us notebooks, everything. Ireland. Well, it was from there, that help. Yes, from there they have helped us, five years ago... Yes, all of the benches, just like that they brought us, chalkboards, there was always everything [that was needed].²²

Because people associate such foreign assistance from industrialized countries with larger-scale forms of aid such as International Monetary Fund loans and food donations, the simple fact that this student believed that these materials were from as far away as Ireland discourages her personal sense of obligation to reciprocity. The source of these benches and chalkboards also places this donation into a pattern of north-south gifting upon which Bolivia has depended to one degree or another for several years.

Foreignness reinforces the assumption that reciprocity will not be necessary, since the assistance or gift is coming from outside *ayni's* sphere of influence.

As was mentioned earlier, Cumbre del Sajama brings in not only materials for its courses in mining centers, but also personnel. General Manager Ana María Aranibar told me that, “[t]he professors [of the Sajama classes]...are professionals in the field. They live in La Paz and they travel and stay in the mining districts. They stay [there] until they finish their module.”²³ *Ayni*, as I explained in the first section of this paper, is a cultural phenomenon native to indigenous communities on the Bolivian *altiplano*; it is not often used in La Paz or other large cities in the country. Since the professors that work with Sajama live in La Paz, it is unlikely that they as individuals use *ayni* in their own lives much less encourage this system among their students. Similar to the materials brought in from Ireland for Alfalit classes, when Sajama's professors come in to communities for a week or two to impart knowledge and then leave, it reinforces the feeling that these isolated areas are dependent upon larger, more dynamic cities and countries for material and intellectual sustenance. This dependency begins to feel natural to people who live in these mining districts who learn to see opportunity and abundance as possible only outside of their own communities. At a children's talent show that I attended in the

mining center of Siglo XX, one boy who was probably ten years old recited a poem that encouraged other young people to study so that they wouldn't have to be miners and live in Siglo XX like their parents had.

Another way that *ayni* is discouraged by donations is through the practice of incentive gifting, in which an institute specifically uses gifting to encourage individuals to attend its classes or events. With incentive gifting, an individual already knows about the donations before coming for the first time to a class; indeed, he or she comes to receive the gift. Not only does this practice erode *ayni* by encouraging people to accept gifts, but the fact that it functions so well also serves as evidence of this same erosion—if people expected to have to return something later, it would not be a true incentive to come and get the gift. This practice basically advertises to potential recipients that this is to be a no-strings-attached, non-*ayni* gift.

Once word gets around in mining centers about the presence of institutions that give out materials and food, that knowledge itself becomes an incentive for people who are unfamiliar with the classes to go to them.

Alfalit engages in incentive gifting through its involvement with the Programa Mundial de Alimentos. In addition to giving out books, pencils, and notebooks, Alfalit also works with the PMA in some of its districts, such as Atocha in the south of Bolivia. There, for each day of Alfalit class that a person attends, he or she receives noodles, rice, sardines, wheat flour, and oil. This has led people who are even high school graduates (and can therefore probably read and write) to make the instructors believe that they are indeed illiterate and attend these classes because of the food incentive. This is logical because of the extreme poverty in many of these mining centers. Salomé Limachi, who lives and works in Atocha, told me that she thinks the simple act of bringing in food from foreign countries creates dependency in the communities that accept it.

It creates dependency...just bringing other foods that come in from another country in my opinion is dependency. Because if they did not give it to us, we would look for a way to produce our own foods. Because we as Bolivians, everything that is ours such as quinoa, all of that, our natural products we don't eat because they give us [food]...from somewhere else, isn't that right?"²⁴

The food assistance that is given to participants of Alfalit acts as an incentive and brings people to these classes whether they can already read and write or not. Incentive gifting discourages the use of *ayni* because, like giving out books and notebooks, it advertises the fact that individuals are not expected to reciprocate with assistance or materials at a later time.

Once word gets around in mining centers about the presence of institutions that give out materials and food, that knowledge itself becomes an incentive for people who are unfamiliar with the classes to go to them. I spoke with one woman

in Potosí who used to teach classes in sewing and cooking for a “mothers’ club” that was sponsored by a political party. In exchange for food donations and gifts of sewing materials, the women attending these classes were supposed to vote for the party’s candidate.

I think that [the gifts] must benefit [the people] because it's a help, a notebook helps your son do his homework, a kilo of sugar helps you give your children tea for at least two days, so it helps them a lot. It's not bad, but the people become shameless, they don't have any delicacy at all, they go to one [political] party, receive one thing, go to another party and receive another thing, and go to another par... like that, now. Last year I wasn't working anymore with UCS [Unidad Cívica Solidariad, a political party] and I said to the moms, 'but compañeras, how can this be?' From every party they went receiving [things], right? One thing and another thing and at the end, we don't even give them our votes.²²⁵

Because of the poverty of these communities, the food or notebook that an institution gives out for many people becomes the reason to attend class, show up for a meeting, or even vote for a candidate; the institution’s original goal can be lost. One woman who teaches classes for Cumbre del Sajama in the district of Atocha told me that oftentimes after the first class in which the company distributes books, some students do not come back to finish the course. It seemed evident to this teacher that her students knew about the books that Sajama was offering and came specifically because of this incentive.

In its work CEPROMIN consistently requires that in exchange for the classes that it gives for free, students must contribute money or materials toward the development of foods or medicinal products such as soy drinks and lotions.

The effects of Sajama and Alfalit’s work in the district of Atocha is particularly noticeable because the town is quite small in comparison to other mining areas in the country, and because neither institution has been there for more than eighteen months. The organization CEPROMIN, however, has been in Atocha since the early 1990s and the recent arrival of Alfalit and Sajama has negatively affected its work. Salomé Limachi was born in Atocha and has lived there for all of her life. For the past three years Salomé has worked as the regional coordinator of CEPROMIN’s literacy program, and has seen the changes that have occurred in her students since Sajama and Alfalit have arrived and begun to distribute materials and food through the PMA. In its work CEPROMIN consistently requires that in exchange for the classes that it gives for free, students must contribute money or materials toward the development of foods or medicinal products such as soy drinks and lotions. Salomé told me that when she first began working with CEPROMIN, she never had difficulty collecting these contributions from her students. Now that some of her students

have visited Alfalit and Sajama classes, however, Salomé has encountered resistance to her requests for contributions.

We have seen that yes, in some way, [gifting materials] is hurtful... Always people go for something, but they want to receive and receive, but later they do not want to contribute... at least with the responsibility that their involvement in some project might entail, you know?... And there are some projects for example that give out a snack and all, and now they only come for that... This solidarity is disappearing, that for us was very important. And now it's not. [Things] have individualized, they have personalized, everyone wants something only for themselves. And well, the rest doesn't matter to us anymore.²⁶

In addition to her difficulty in collecting contributions from her students, Salomé has also lost many students to Alfalit and Sajama as more and more of the women have gone to those institutions for the incentive of notebooks and food.

In order to positively contribute to the education of women in mining communities, traditional cultural principles such as *ayni* and historical issues of dependence that are exacerbated by donations must both be considered in the design and implementation of training programs.

Juana Choque, a literacy teacher for CEPROMIN in the district of Potosí, also told me that she has lost students to Alfalit and to Sajama because of the materials they gift. She also explained to me why CEPROMIN chooses not to engage in the practice of gifting, and instead requests contributions from its students.

It's that the participants leave, they desert... to these, to these places [Alfalit and Sajama]... uh... CEPROMIN doesn't give out books, we don't have a book which the women can study, they don't have maybe a notebook in which to practice calligraphy, they don't have one. So, at most we have given them a notebook, which we have sold them anyway—why have we sold it to them? So that they learn the value of it, because there are times when we give something, it's like... if we give it to them as a gift, sometimes they throw it away: 'they gave this to me,' like that. Even I sometimes have done this. I realize that sometimes I have been given something and I throw it away, but when you buy it with money, you know how to appreciate it, it's that, you know.²⁷

The presence of Alfalit International and Cumbre del Sajama S.A. in areas where CEPROMIN also works has made it more difficult for the organization to successfully reinforce the practice of *ayni* in its methodology because of the competition that it faces with these other two institutions. One of CEPROMIN's current students in Potosí who took classes from Alfalit in the early 1990s asked me at the end of our interview if I, as a white foreigner, was interested in reopening Alfalit classes in her area, and to please "...let [her] know if it's going to open, because [she] really need[s] the bit of help from the brothers (Alfalit's representatives are called 'brothers' and 'sisters').²⁸

Institutions gift materials for a variety of reasons. René Choque of Alfalit explained to me that they give out books to their students because they teach according to a unique methodology and therefore need to develop and distribute their own materials. Other groups may feel that women in mining communities cannot afford to pay for their own materials, and others still may use gifts as a way to draw more students into their classes. Institutions often need to secure a stable student base as well in order to meet quotas set by funding organizations. *Ayni* has regulated the exchange of goods and services in Bolivian mining centers for hundreds of years and has assured a unique mutuality among its people. Organizations such as CEPROMIN that operate within this framework gain trust in the community and help to encourage the use of *ayni* by reflecting its principles in their work. Institutions such as Alfalit International, a U.S. non-profit, and Cumbre del Sajama S.A., a young Bolivian investment company, are new to mining areas and perhaps unfamiliar with *ayni* and its importance to these communities. These groups' use of gifting mirrors the larger-scale patterns of food donation programs and encourages dependency and a loss of reciprocal exchange among the recipients. Local cultural phenomenon, such as *ayni*, need to be taken into account by institutions hoping to work in communities with which they are unfamiliar. When they are not taken into account, these groups' operations may unwittingly transform existing structures, as Alfalit and Sajama's work is doing in mining centers.

CONCLUSION

Bolivia is the poorest country in South America and has depended for years on industrialized countries for various types of assistance. Large-scale food donations to the country have increased the nutritional levels of the mostly women and children recipients, but they have also created and reinforced historical patterns of dependency in both Bolivia and individual beneficiaries. These donations also clash with the local cultural tradition of *ayni*, in which the recipient must return gifts of goods or services to the donor at a later time. The recent arrival of educational institutions that gift materials to their women students in mining centers is troubling because it mirrors the larger-scale food donations to the country and is similarly reinforcing dependency and discouraging the use of *ayni* in recipients. These organizations are new to mining areas and to indigenous communities and are unfamiliar with the principle of *ayni* and with the effects that their practice of gifting has on this phenomenon. Local cultural phenomenon such as *ayni* must be taken into account by institutions that hope to have a positive effect upon people in mining communities. Other organizations such as CEPROMIN whose staff and methodology are from mining centers are familiar with the practice of *ayni* and employ its principles in its work. The competition that gifting institutions such as Alfalit and Sajama present to groups like CEPROMIN serves as an obstacle to the effective training of women in these communities from a place of reciprocity. In order to positively contribute to the education of women in mining communities, traditional cultural principles such

as *ayni* and historical issues of dependence that are exacerbated by donations must both be considered in the design and implementation of training programs.

Notes

¹ Julio Prudencio Bohrt, *La Ayuda Alimentaria en Bolivia* (La Paz: Servicio Holandés de Cooperación al Desarrollo, 1993), p. 14.

² The Bolivian government declined a donation of vegetable oil from the US in 1989 because of concerns that it would interfere with the price of domestically produced oil. Prudencio Bohrt, *La Ayuda Alimentaria*, p. 14.

³ Julio Prudencio and Monica Velasco, *Mujeres y Alimentos Donados* (La Paz: CERES, 1987); Verónica Flores B., ed., *Memoria: Desarrollo de la Lechería* (La Paz: CIDEM, 1995); The Mayatech Corporation, *Gender and Food Aid* (Silver Spring, Md.: The Mayatech Corporation for Office for Women in Development, Bureau for Program and Policy Coordination, U.S. Agency for International Development, 1991); Tony Terpstra, *Memoria: Producción de Alimentos Nacionales P.A.N.* (La Paz: CIDEM, 1995), and idem, *Donaciones Alimentarias y Seguridad Alimentaria* (La Paz: CIDEM, 1994).

⁴ June Nash, *We Eat the Mines and the Mines Eat Us* (New York: Columbia University Press, 1993), pp. 110-111.

⁵ *Ibid.*, p. 113.

⁶ Not all of the dancers in Carnival participate out of religious devotion; just as many take part in the festival simply to dance and enjoy themselves.

⁷ Original in Spanish. "Ahí te está esperando el padre para que tú entres, rezas las oraciones y tienes que pasar ante la Virgen de rodillas para agradecerle...por haberte permitido llegar hasta allí sin ningún problema, porque...si te pasa algo en el baile es que no has bailado en devoción por la Virgen...entonces la Virgen no ha permitido que tú termines...Pero si llegas muy bien, entonces que ella te ha aceptado, ella quiere que bailes, ella quiere que tú participes." Translation by author. Cecilia Molina, interview by author, tape recording, La Paz, Bolivia, 27 January 2003.

⁸ Julio Prudencio Bohrt, *La Situación Actual de las Donaciones de Alimentos en Bolivia* [paper on-line] (La Paz: 2002, accessed 18 July 2003); available from http://www.cebem.com/redes/redesma/boletin/bol_2003/bol_25/donaciones_alimentarias.pdf; Prudencio Bohrt, *La Ayuda Alimentaria*, pp. 9-32; Prudencio and Velasco, *Mujeres y Alimentos Donados*, pp. 103-104, and The Mayatech Corporation, pp. vi, 1. Titles I and III of PL-480 were significantly altered after 1990 with the passage of the Agricultural Development and Trade Act, however these changes will not be taken into account as the majority of the aid was granted before this date.

⁹ Prudencio Bohrt, *La Ayuda Alimentaria*, pp. 14-23.

¹⁰ Original in Spanish. "Estas variaciones...en el volumen de las donaciones en el transcurso de los diversos años no obedece a factores de índole interno como desastres naturales o caídas de la producción agropecuaria nacional, sino a la disponibilidad externa de alimentos que tengan los donantes y a los países prioritarios que ellos designen, como es el reciente y masivo apoyo a los países de Europa del Este." Translation by author. Prudencio Bort, *La Ayuda Alimentaria*, p. 12. It must be noted that the increase in donations during the years 1983, 1984, and 1986 was indeed due to natural disasters in Bolivia; during that period, the country was alternately affected by harsh floods and droughts.

¹¹ Prudencio and Velasco, *Mujeres y Alimentos Donados*, pp. 100-101, and Terpstra, *Donaciones Alimentarias*, p. 38.

¹² Original in Spanish. "un país adicto al trigo con un consumo per capita más elevado de cualquier otro producto." Translation by author. Prudencio Bohrt, *La Situación Actual*.

¹³ Prudencio Bohrt, *La Ayuda Alimentaria*, pp. 15-19.

¹⁴ The Mayatech Foundation, pp. 4-5, 15-16, and Terpstra, *Donaciones Alimentarias*, pp. 6-7.

¹⁵ Quoted in The Mayatech Foundation, p. 4.

¹⁶ Juana Choque, interview by author, tape recording, Potosí, Bolivia, 7 July 2003.

¹⁷ Original in Spanish. "Muchas de las mujeres receptoras [de alimentos donados] vienen del campo en búsqueda de trabajo pero en las ciudades no lo encuentran. Solamente existen programas de Alimentos por Trabajo y la manera en que las diferentes agencias distribuyen los alimentos es muy perjudicial; hay programas "alimentos por trabajo", y acciones comunales sin perspectivas de desarrollo integral para los(as) trabajadores(as), y donde los partidos políticos abusan de esta situación de dependencia." Translation by

author. CIDEM, ed., *Memoria: Alimentos por Trabajo* (La Paz: Subsecretaría de Asuntos de Género, 1995), p. 16.

¹⁸ Original in Spanish. “En lo que respecta a los cambios en la mujer [participante], hay que señalar que los proyectos parecen haber provocado mayores deseos de superación, capacitación y educación. Otra consecuencia de la implantación de proyectos productivos ha sido la generación de la responsabilidad, auto-valoración y valoración por parte de la familia.” Translation by author. Rossana Barragan, *Memoria del Encuentro Nacional Sobre Proyectos Productivos con Mujeres Receptoras de Alimentos* (La Paz: CIDEM, 1989), p. 18.

¹⁹ Original in Spanish. “[N]o es necesario que nos den materiales siempre, ps.” Translation by author. Paulina Vilcamarca, interview by author, tape recording, Potosí, Bolivia, 26 August 2003.

²⁰ Original in Spanish. “[Regalar cosas] influye, o sea, yo siempre digo de que nos, nos malacostumbra a la gente, ¿no? Antes, era diferente. Siempre que tú...me dabas algo, yo tenía que retribuirte...era éso, pero ahora no. ¿No? Entonces, esa, esa retribución, como que, está perdiéndose, ¿no?” Translation by author. Salomé Limachi, interview by author, tape recording, Atocha, Bolivia, 31 July 2003.

²¹ Original in Spanish. “[Basada] en la educación popular utilizando técnicas y dinámicas de grupo que permiten un relacionamiento directo y un fácil acceso a los diferentes grupos en las comunidades.” Translation by author. “Cumbre del Sajama S.A.: Inversiones y Proyectos,” company profile, personal gift from Cumbre del Sajama S.A. General Manager Ana María Aranibar, La Paz, Bolivia, July 2003.

²² Original in Spanish. “Eh...¿qué se llama ese lugar? Ah, unos gringuitos venían. Esos nos traían también cuadernos, todo. Irlanda. De allí era ps, esa ayuda. Sí, de allí nos han ayudado ps, hace cinco años...Sí, todos los bancos, así todos traíanos, pizarrones, todo siempre había” Translation by author. Vilcamarca, Interview.

²³ Original in Spanish. “[L]os profesores [de las clases de Sajama]...son profesionales del área. Viven en La Paz y viajan y se quedan en los distritos mineros. Se quedan hasta terminar su modulo. Translation by author.” Ana María Aranibar, email correspondence, 11 October 2003.

²⁴ Original in Spanish. “Crea dependencia...el sólo traer otros alimentos en que ingresan de otro país para mí es dependencia. Porque si no nos darían, nosotros buscaríamos la forma de cómo se produce o producir nuestros propios alimentos. Porque nosotros como bolivianos, todo lo nuestro que es la quinua, todo eso, nuestros productos naturales no consumimos porque nos dan...de otro lado, ¿no es cierto?” Translation by author. Limachi, Interview, 2003.

²⁵ Original in Spanish. “[Y]o pienso que le debe beneficiar [a la gente los regalos] porque es una ayuda, un cuaderno le ayuda a tu hijo para que haga su tarea, un kilo de azúcar le ayuda para que por lo menos le de unos dos días a sus hijos para tomar té, entonces les ayuda bastante. No es malo pero la gente se vuelve sinvergüenza, no tiene nada de delicadeza porque se va a un partido, recibe una cosa, se a otro partido recibe otra cosa y se va a otro par... así ahora. Yo el año pasado ya no estaba trabajando en la UCS y he comentado con las mamás, pero compañeras como es eso ¿no?...[D]e cada partido han ido recibiendo ¿no? una cosa y otra cosa y al final de cuentas no le vamos a dar nuestros votos.” Translation by author. Choque, Interview, 2003.

²⁶ Original in Spanish. “[H]emos observado que sí, de alguna manera, perjudica [el regalar materiales]...Siempre la gente va por algo, pero quieren recibir y recibir, pero después no quieren aportar...por lo menos con el compromiso que puede tener algún proyecto de parte de ellas, ¿no?...Y hay algunos proyectos por ejemplo que dan refrigerion y todo eso, y ahora sólo vienen por éso....Está disminuyendo esta solidaridad, que para nosotros era muy importante. Y ahora no. Se ha individualizado...se ha personalizado, todos queremos para nosotros nomás. Y bueno, el resto ya no nos interesa.” Translation by author. Limachi, Interview.

²⁷ Original in Spanish. “[E]s que las participantes se van, desertan...a esas, a esos lugares...eh... CEPROMIN no da libros, no tenemos un libro en el cual ellas puedan repasar, no tienen tal vez un cuadernillo en el cual practiquen caligrafía, no tienen. Entonces, a lo mucho les hemos dado un cuaderno el cual les hemos vendido eso también, ¿para qué les hemos vendido?, para que aprendan a valorar, porque hay veces le damos una cosa es como si eh...le damos de regalo, a veces lo botan: ‘me han regalado,’ así. Yo misma alguna vez he hecho eso. Yo me doy cuenta de que alguna vez me han regalado y lo boto, pero cuando compras con dinero, sabes valorarlo, es éso ¿no?” Translation by author. Choque, Interview.

²⁸ Original in Spanish. “[A]víse[le] si va abrir, porque realmente [ella] necesit[a] la ayudita de los hermanos.” Translation by author. Vilcamarca, Interview.

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Obstacles within the International Community: The Exercise of Afghan Women's Agency for Peace in Post-Conflict Reconstruction

by Stephanie W. Hampton

Ultimately... women must be involved in the peace process not only because they suffer disproportionately, or because they have previously been excluded, but because their contribution to the world is invaluable.

—Felicity Hall and Mikele Aboitiz¹

Under the Taliban's draconian interpretation of Shari'a law, Afghan women were forced from public life and publicly executed for minor infractions. Yet, in just over two years since the Taliban fell, the women of Afghanistan have entered the political arena and successfully pressed for specific language in the Afghan constitution enshrining women's rights as human rights. From being the most oppressed women in the world to enjoying the promise of more seats in Parliament than many Western nations, Afghan women have clearly made gigantic strides in their quest for peace and security. Their remarkable progress, however, is overshadowed by the current unstable security situation in Afghanistan and the lack of international political and military assistance which are needed to consolidate the successes that the Afghan women have realized.

How has this seemingly rapid transformation of Afghan women occurred? The answer may partially lie in the concept of development as freedom put forth by Amartya Sen in his 1999 book, *Development as Freedom*.² He proffers a new paradigm which includes not only GDP data, but human development factors, such as Infant Mortality Rates (IMR) and literacy rates, to determine a nation's level of development in terms of sustainable development. In his view, people are not simply human capital to be considered only as one part of three in an economic equation for development, but people—liberated from 'unfreedoms' such as poverty and illiteracy—who can build capacity through their own agency as the Afghan women have done. Agency is expressed in this case by the unhampered exercise of individual effort for betterment of self and community in an interconnecting, empowering, and reciprocal network of personal, political, civil, social, and economic freedoms. In elucidating this socially valuative approach to development, Sen argues that individual reasoned agency and freedom (or more specifically, the absence of unfreedoms which restrain individual agency) work synergistically to foster and complement an array of freedoms, which in turn benefits the family, the community, and the nation.³

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Individual freedom is quintessentially a social product, and there is a two-way relation between (1) social arrangements to expand individual freedoms and (2) the use of individual freedoms not only to improve the respective lives but also to make the social arrangements more appropriate and effective.⁴

War is waged on the bodies of the women and children who are the primary victims of war. Owing no allegiance to a formal state, warlords—not bound by international law—commit atrocities upon these vulnerable populations with impunity, creating whole new categories of egregious war crimes. Political and military strategies pursue the methodical destruction of an entire culture’s economic, governmental, and social infrastructure by targeting women as the vessels of a culture, the nurturers of the family, community, and nation. Systematic gender violence through forced pregnancy, slavery and sexual violence seek the extinction of an entire culture — supported at the highest level of military command.⁵

Women and children experience war and war’s aftermath differently than men and are disproportionately harmed by war

Women and children experience war and war’s aftermath differently than men and are disproportionately harmed by war. In direct contrast with World War II where civilian casualties were approximately 65 percent,⁶ civilians are now being targeted as a weapon of war so that approximately 80 to 90 percent of casualties are civilian, and 80 to 90 percent of these are women and girls. Out of the thirty-five million refugees and displaced persons in the world, 80 percent are women and girls.⁷ In any war, the women and children always lose.

In the aftermath of war, it is often women- and children-led families who constitute the majority in post-conflict nations such as Afghanistan, where approximately 54 to 60 percent of the population is female.⁸ Under extreme conditions of deprivation of the basic necessities of life and the constant threat of violence, it is often left to women to gather any remaining family and seek safety, sustenance, and shelter. When the family is secured, women’s attention turns outward to the community where they organize themselves to provide schooling, medical care, and support groups for traumatized persons. In Afghanistan, where women’s community and political involvement was forbidden and even their physical movements curtailed, women often went underground at great risk to themselves, during periods of conflict or repression, as Kofi Annan has said of such women in post conflict situations, to “maintain the social fabric...replace destroyed social services and tend to the sick and wounded. As a result, *women are the prime advocates of peace.*”⁹ Women also have the greatest motivation to seek peace, for they have the most to lose, and the least to gain, by war. As such major stakeholders in war, they deserve an opportunity to contribute towards the construction of a sustainable peace.

Women have always been on the frontlines in post-conflict situations. Out of the necessity borne of the huge demographic shift that war brings, women shoulder

decision-making responsibilities and roles formerly gendered as male and, in the temporary vacuum of leadership in formal government, build capacity within themselves to carve out new gender roles based on their abilities and skills, often gained through dire necessity. These changes result in greater self-confidence and a self-motivated desire for greater political participation and power through the organizations they create, supporting Sen's observation that freedoms foster other freedoms. Consequent to these gender role changes and the paucity of authority, the post-conflict period remains the best window of opportunity to effect changes in the political, economic, and social climate of the country. When the fabric of society is rent, it can be rewoven in a new way. One of the tools used to remake a society is gender mainstreaming. Mandated under Security Council Resolution 1325, gender mainstreaming is a perspective designed to integrate women's and girl's needs, experiences, and special requirements into the mainstream effort as an integral part, not simply as isolated "women's" programs that may be underfunded, understaffed, and forgotten to rebuild society.

The gendered roles which apply to men, women, girls, and boys determine individual status which then determines how household, and reconstruction, benefits are apportioned.

What does it mean to mainstream gender? What do we mean when we talk of gender? Why is gender mainstreaming a valuable tool in the success of reconstruction in the post-conflict arena? Gender is the "socially constructed rather than biologically determined roles of men and women as well as the relationships between men and women in a given society at a specific time and place."¹⁰ The gendered roles which apply to men, women, girls, and boys determine individual status which then determines how household, and reconstruction, benefits are apportioned. Gender mainstreaming was defined by the United Nations Economic and Social Council (ECOSOC) in 1997 as:

The process of assessing the implications for women and men of any planned action... in any areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of the policies and programmes in all political, economic, and societal spheres so that women and men benefit equally and inequality is not perpetuated.¹¹

The goal of gender mainstreaming is not simply be the insertion of gendered language into documents or the mandating of gender advisory units without funding and staffing, but the "transformation of unequal social and institutional structures into equal and just structures for both women and men."¹² The inclusion of gender advisors who are well versed in assessment tools to determine how war differentially affects gender roles and risks improves the delivery of humanitarian aid and informs reconstruction efforts. To achieve this degree of improvement, it is necessary that

these gender advisors are not tokens but are funded, staffed and included in high-level decision making.

Gender analysis uses a variety of methods to understand the relationships between the two sexes: Their respective access to and decision-making power over family, community, and international resources; and their respective activities and the relative valuation of those activities. These analyses, done by a gender advisor in a post-conflict region, can provide insight into how organizations may best distribute humanitarian aid, provide appropriate levels and different kinds of security for all groups, and support local efforts to free women's agency from constraints to allow their active participation in reconstruction.

Women's agency is exercised by the Afghan women who, though denied a public role by the Taliban, organized themselves privately to serve the community both within and outside Afghanistan.¹³ When the Taliban fell, the Afghan women came to the fore and, by so doing, ensured their inclusion in the peace process as well as a quick start for schools, medical facilities, and psychosocial counseling for war crime victims. Afghan women (and the men who support them) have managed to assist Afghan refugees in the communities of Peshawar, Islamabad, Rawalpindi, and Quetta, Pakistan. These populations were not served by the United Nations High Commissioner for Refugees (UNHCR) before the fall of the Taliban.¹⁴

Afghan women's remarkable success offers a dramatic real-world example of the potential of women's agency.

Capacity building for Afghan women, in terms of political and organizational skills has allowed them to take advantage of the post-conflict period, has not occurred in a vacuum. Horrified with the oppression suffered by the Afghan women under the Taliban, international organizations (including The European Women's Lobby, Equality Now, V-Day, The Center for Strategic Initiatives of Women, The Feminist Majority, the Secretary-General's Gender Advisor, and UNIFEM) lobbied for the rights of Afghan women on the international and national scene and provided Afghan women's organizations with financial, logistical and educational assistance. The early involvement of the United Nations and international women's organizations in Afghanistan to support women's capacity building provided the setting and tools to enable Afghan women to take advantage of the narrow window of opportunity that exists in the immediate post-conflict setting to remake the society for all. Provided with resources and training, the Afghan women remain decision makers in the process. The fifty-five Afghan women who gathered for the Afghan Women Leader's Summit in December of 2001 in Brussels, Belgium, were truly representative of Afghan women of all ethnicities. At this summit, they adopted the Brussels Declaration—the Afghan Women's Bill of Rights, which they presented to President Hamid Karzai prior to the *lirga joya*. This summit demonstrated the ability of Afghan women's organizations, which routinely cross ethnic, religious, and political boundaries that are often impenetrable obstacles for men's organizations, to engage

in cooperative efforts for the good of the people. Afghan women's remarkable success offers a dramatic real-world example of the potential of women's agency.

The efficacy of women's agency to effect improvement in the human condition can be seen in a 1995 Indian study which offered statistical evidence of two factors—literacy and gainful employment—as having the greatest beneficial impact on the Child Mortality Rate (CMR).¹⁵ This study examines interstate differences in fertility rates, CMR, and female disadvantage in child survival and the possible effects of various factors upon these human development indicators.¹⁶

The effect of female literacy alone on child mortality was found to be “extraordinarily large” — far exceeding the influence of any other factor.¹⁷ Employment of the mother was also substantially linked with a decrease in CMR, for both sexes. Conversely, men's literacy or general poverty reduction efforts were shown to be comparatively ineffective in reducing CMR.¹⁸

Free agency is crucial to consolidate and maintain the freedoms necessary for representative government.

Imperative for the free exercise of women's agency, both female literacy and participation in the labor force are factors that elevate the status of women by removing the unfreedoms of illiteracy and lack of control over household income. The social values of education for literacy and numeracy as well as the ability to earn an independent wage have the benefit of raising the status of women, not only in the household hierarchy but in the community as well. In areas where women's agency is allowed space, all human development indicators rise.¹⁹ In Sen's paradigm of measuring sustainable development, by human development indicators in addition to standard economic indicators, the free exercise of women's agency can be seen to enhance both indicators. This unfettered exercise drives an increase in social well-being that can be seen directly enhancing people's ability to help themselves. Free agency is crucial to consolidate and maintain the freedoms necessary for representative government. If Afghanistan is to develop into a sustainable democracy, the Afghan women must be fully involved because their contribution is essential to the process of reconstruction.

A growing global recognition of this imperative need to empower women's agency to promote sustainable peace and security is seen in the unanimous adoption of Security Council Resolution 1325 which acknowledges —the inextricable link between women's involvement in the peace process and sustainable peace and security:

*Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.*²⁰

This resolution calls for gender mainstreaming throughout peacekeeping missions and the inclusion of women and women's concerns in these efforts. Yet, obstacles to gender mainstreaming are erected at all levels, by all participants and stakeholders in post-conflict reconstruction. The overwhelming feminization of casualties and war crime victims, lack of appropriate levels and kinds of post-conflict security, gender-based political and legal disenfranchisement, and a lack of gender mainstreaming in international agencies and local organizations present formidable obstacles. These unfreedoms in Sen's paradigm, affect women and girls who seek a share of the economic, political, and social opportunities and resources offered by international post-conflict reconstruction efforts. The most daunting obstacle to Afghan women now remains what UN Secretary-General Kofi Annan terms the "deeply troubling" security situation in Afghanistan, a concern shared by those in key positions.

The departing United Nations Envoy to Afghanistan, Lakhdar Brahimi, identified security as the key issue for Afghanistan in remarks he made on January 28, 2004. While praising Afghanistan's newly ratified constitution, he cautioned that "lawlessness" could derail the country's progress toward an independent democratic government. He reports that of the 100,000 Afghan fighters owing allegiance to warlords, only 2,700 have relinquished their weapons while the Afghan army remains well below its goal of 10,000 troops.²¹ Approximately 5,000 peacekeepers provide security in Kabul and its immediate environs, leaving the countryside (where eighty-five percent of Afghan women live)²² to the control of various warlords.²³ United Nations Deputy Secretary-General Louise Fréchette, speaking at the sixth Institute for Defense Studies and Analysis Asian Security Conference on January 27, 2004, compared Afghanistan's woefully inadequate 5,000 troops with the 30,000 peacekeeping troops stationed in tiny Kosovo.²⁴ Peacekeeping mission resources would appear to be unequally distributed between those nations requiring assistance.

Envoy Brahimi candidly stated that the international community had refused to furnish more peacekeepers for Afghanistan.²⁵ On the same day that Envoy Brahimi spoke, the United States general in charge of NATO forces, Marine General James Jones, said that the allies' success in Afghanistan depended on NATO providing enough resources. NATO is increasing its Provincial Reconstruction Teams (PRTs) from four to fifteen and will be deploying them in select cities by mid-February.²⁶ The mission of the PRTs, each team consisting of between forty to sixty military and civilian personnel, is to build relationships with the local populations to foster reconstruction and provide security. The eleven new PRT units are slated to be deployed in southern and eastern Afghanistan²⁷ which is the most densely populated region and currently the most unstable.²⁸

The July 2003 Human Rights Watch (HRW) report on security in southeast Afghanistan, "Killing You is a Very Easy Thing For Us," characterizes this southeastern region as controlled by United States-supported warlords where armed robbery, extortion, and kidnappings occur regularly and are perpetrated by warlord militia, police, and intelligence agents.²⁹ In this region there are regular attacks on media and political actors.³⁰ Afghan women and girls in the provinces are living under the

same repression which existed during Taliban rule and are suffering frequent sexual violence which is rarely reported for fear of reprisal.³¹

The new phenomenon of small teams of civil aid workers being deployed in such unsecured areas as southeastern Afghanistan appears to be increasing, perhaps due to the long-term needs of a people who still live under the rule of the gun. In support of security, the OECD nations are sending far fewer troops while the developing nations are sending more, representing a radical shift in the makeup of peacekeeping forces.³² Coupled with a generalized decline in total troop disbursement to peacekeeping forces, the lack of international efforts to improve support for these efforts, compromises the security of post-conflict states. If the timetable for Afghanistan elections is honored and security is still lacking in the provinces, democratic efforts could become compromised. Time must be allowed for the process to go forward if only on technical grounds. Registration of voters has been delayed and, to date, only 600,000 out of Afghanistan's ten million voters have become registered.³³ Measures still need to be taken to assure security in the provinces for the voting process to be truly representative.

Without security, there can be no progress towards remaking their society.

Adding her voice to those who are calling for increased security in the Afghanistan provinces, Sima Wali, the Director of the Refugee Women in Development (RefWID) organization recently returned from Afghanistan. She cites security as the Afghan women's number one priority for reconstruction.³⁴ Without security, there can be no progress towards remaking their society. Calling security a "precursor to reconstruction," Wali asserts that "women need to feel safe and secure to participate in the political process, [for] young girls to go to school, and [for] the Ministry of Women's Affairs [to effect] building and staffing of the women's centers in the provinces."³⁵ The ability for Afghan women to contribute to reconstruction centers on security.

NATO has taken over the running of the International Security Assistance Force (ISAF) in Afghanistan in order to provide continuity for security. This organization has no form of gender advisor office or a gender mainstreaming strategy³⁶ and, from reports on the ground, maintains no "consultation with local and international women's groups"³⁷ as expressly called for in SC Resolution 1325:

*Expresses its willingness to ensure that Security Council missions take into account gender considerations and the rights of women, including through consultation with local and international women's groups.*³⁸

The ISAF forces, however, are viewed by the Afghan public as being legitimate and professional in comparison to the interim government's police force, a loose collection of Mujahideen and ex-government soldiers who are alleged to have committed human rights abuses. Despite this efforts by local women to address gender issues by establishing networks with the Ministry of Women and improving

security are progressing.³⁹ The status, security, and support of vulnerable populations under combat and immediate post-combat conditions should inform and guide any international security effort. Therefore, understanding how war is gendered is the first step in providing meaningful security.

The proof of the efficacy of a gender-sensitive approach that promotes women's agency for reconstruction can be seen in its past successes. Mr. Jean-Marie Guehenno, United Nations Under-Secretary General for Peacekeeping Operations, in his statement to the Security Council in October 2003, reports on the progress of gender mainstreaming in the Division for Peace-Keeping Operations (DPKO). Citing progress with gender mainstreaming in the multidimensional peacekeeping operations in Timor-Leste, Afghanistan, Kosovo, the Democratic Republic of the Congo, and Sierra Leone, Mr. Guehenno credits much of the successes in peacekeeping operations to the integration of full-time gender advisors.⁴⁰ When organizations have not adopted gender equality as an explicit strategy and as an integral part of planning and management, reconstruction may suffer due to a lack of basic indicators and the absence of data on status and needs, disaggregated by sex, which can lead to inefficient decision making.

The great agency that women exercise in their post-conflict nations to rebuild a society belies the few resources they legally own.

Under the pervasive threat of gender violence and assassination, women still miraculously step forward to serve their people and country. On September 20, 2003, Akila al-Hashimi, a member of Iraq's newly established Governing Council, was assassinated by religious extremists who objected to women in public life. Accompanied by two security guards and her brother, she was shot dead in her car.⁴¹ Malalai Joya, one of 100 women delegates to the 500-member Loya Jirga in Afghanistan, denounced the inclusion of the warlord jihads in the assembly, noting that they should be tried for crimes against the Afghan people. Surrounded by death threats shouted in the assembly, delegate Joya was taken to an undisclosed location for safekeeping by the United Nations.⁴² Sima Wali, the outspoken director of RefWID, states that she was "singled out" by extremists and placed on "hit lists" because of her advocacy for women's human rights issues and the inclusion of women in the reconstruction of Afghanistan.⁴³ The recognition of the greater risk run by women who enter public life in dangerously conservative states, such as Afghanistan, needs to be reflected in concrete security measures for these brave individuals and their families. The great risk of assassination for Afghan President Hamid Karzai is acknowledged and great care is taken for his security. A similar acknowledgement and provision of, security needs for women who are politically active in post conflict situations needs to be made an integral part of any multidimensional peacekeeping operation.

The great agency that women exercise in their post-conflict nations to rebuild a society belies the few resources they legally own. Widows and women whose husbands disappear without a trace are especially hampered by legal obstacles which result in a loss of resources for rebuilding. Women whose husbands have disappeared may have to wait years before becoming eligible for remarriage. Land inheritance laws may forbid women or children to inherit land in patriarchal societies, but at the same time allow land to pass into the hands of the husband's relatives. In a society such as Afghanistan under Taliban rule, women may find themselves as the head of the household and dispossessed just at the time they most need shelter, which under Article 17 of the Universal Declaration of Human Rights is considered a violation of human rights.⁴⁴

By ratifying CEDAW, the United States would demonstrate to the world its international commitment to women's rights.

Women's and children's human rights are protected by international law through the Geneva Conventions of 1949 and the Additional Protocols of 1977, the Refugee Convention of 1951 and the Protocol of 1967, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 and the Optional Protocol of 1999, and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols of May 25, 2000, and the Rome Statute of the International Criminal Court. The purpose of CEDAW is to abolish discrimination by gender bias in political, economic, and social arenas and is one of the most universally signed and ratified conventions in the over fifty-year history of the United Nations. Afghanistan signed the CEDAW on August 14, 1980 and acceded to it on March 5, 2003.⁴⁵ The United States is one of less than 10 percent of nations (and the only OECD country) which has failed to ratify CEDAW in the twenty years that have passed since signing it in 1980.⁴⁶ The United States position is important to Afghan women because of the lead role the United States plays in post-conflict reconstruction in Afghanistan. In the words of April Palmerlee, Senior Coordinator for International Women's Issues for the Bush administration, "the United States and President Bush are seriously committed to ensuring that respect for women and human rights for women are secured around the world."⁴⁷ This strong commitment to the universal value of gender equity could be most advantageously advanced by the timely ratification of this important human rights document. By ratifying CEDAW, the United States would demonstrate to the world its international commitment to women's rights. In a letter to the United States State Department, Dr. Sima Samar, President of the Afghan Human Rights Commission and the former Afghanistan Minister of Women's Affairs, addresses the importance Afghan women attach to this international display of confidence in women's equality and agency:

*I cannot overstate to you how important it will be for me and other Afghan women if you do take this step. We will then be able to tell our countrymen that the United States, where women already have full legal rights, has just seen the need to ratify this treaty. This treaty will then truly be the international measure of the rights that any country should guarantee to its women.*⁴⁸

The international community needs to keep promises made to the Afghan women to support their status in society, their role in peacemaking and reconstruction, and to provide the security necessary for the process of developing a representative government. The reluctance on the part of the international community to provide the peacekeeping forces and resources essential to Afghanistan's reconstruction, combined with the failure of organizations active in this process to seek a gender- and human rights-based perspective, will restrict the exercise of Afghan women's agency for democratic change in Afghanistan. Ultimately, the success and lasting maintenance of any development effort lies in the motivation of the local people. In Afghanistan, the women are highly motivated to make life better for all Afghan people, making their contribution invaluable.

Notes

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²⁸ Human Rights Watch, Killing You is a Very Easy Thing For Us: Human Rights Abuses in Southeast Afghanistan, Vol. 15, No. 05 (C) – July 2003, pg. 10.

²⁹ Human Rights Watch, Killing You is a Very Easy Thing For Us: Human Rights Abuses in Southeast Afghanistan, Vol. 15, No. 05 (C) – July 2003, pg. 10.

³⁰ Human Rights Watch, Killing You is a Very Easy Thing For Us: Human Rights Abuses in Southeast Afghanistan, Vol. 15, No. 05 (C) – July 2003, Afghan editor, Kabul, March 29, 2003, pg. 3. An unnamed Kabul editor was quoted as saying that he had been threatened by armed gunmen at his home and office for a political cartoon he published. He said the armed men told him "Look, killing you is a very easy thing for us. Look: we have thirty bullets in our clips. I can shoot all of these thirty bullets into your chest right now, and there is no one who can stop us."

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National Symbolism in Constructions of Gender: Transformed Symbols in Post-Conflict States

by Karima Omar

Because the nation has symbolically figured as a family—and as such has acquired a patriarchal hierarchy within which members are assigned distinct roles in accordance with their gender—as in the patriarchal family, for the nation to sustain itself it needs both masculinity and femininity. For without masculinity femininity cannot exist, and without these twin constructions the nation as we know it would not exist either.

—Anne McClintock, “No Longer in a Future Heaven”

INTRODUCTION

According to Anne McClintock, an academic pioneer in the emerging field of nationalism and gender studies, established theories of nationalism, which often oppose each other, have consistently failed to include gender as a relevant component of the nation.¹ Based on recent feminist interpretations that explore the intersection of gender and nation in nationalism, conceptualizations of nation-ness are gendered, personifying the national landscape with the traits of both woman and man. For instance, national mythologies that feminize the fertile land as the nurturing wife and mother lend legitimacy to the masculine ideal of the warrior protector who guards the nation against those who try to defile it. At the same time, modern references to the “fatherland” and the “motherland” are not alien to the discourse of nationalism and to the ethnocrats who attempt to manipulate it.²

As opposed to traditional interpretations of nationalism that hinge exclusively on the impetus of print capitalism in promulgating nationalism, feminist nationalist theories move beyond and attribute nationalism’s relevance to its inherent symbolism. The expression of nationalism manifests in physical symbols such as national anthems, flags, and costumes.³ In many cases, these symbols take on gendered roles, such as Lady Liberty or Rosie the Riveter, in the case of the United States. By viewing nationalism and its rhetoric through the lens of symbolism, it becomes apparent that nationalism is inherently a gendered experience.

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It is necessary to focus on gender when examining nationalism, especially in current cases of nationalist conflict, since women and children are more frequently the victims of nationalist struggles. Contemporary case studies illustrate that women have also taken up arms, becoming active participants in conflict. Whether a participant or a victim of the nationalist struggle, these wars are militarized and therefore conceptualized in male terms, leading to a tendency to further ignore the issue of women in nationalist discourses. Women are and have been active, yet invisible, participants in national revolutionary struggles as suggested by conflicts in El Salvador, Nicaragua, Libya, Eritrea, Vietnam, and Yugoslavia. In order to encourage the participation of women in nationalist struggles, the nationalist rhetoric of ethnocrats manipulates national female symbols and links women's concerns with the national agenda in an attempt to mobilize both sexes to arms. In the midst of conflict and with nationalism at its height, women are empowered as a means of furthering the cause, yet once liberation is achieved, the importance of women and women's issues diminishes. One would expect the socio-political status of women in post-conflict states to improve relative to that of wartime; however, the opposite scenario has become the norm in which women are once again subordinate members of society.

[W]omen, once active combatants in national revolutionary movements, are pushed aside because their elevated status during times of conflict does not conform to the traditional gender roles that consistently reemerge after nationalist wars.

This study focuses on the process whereby women, once active combatants in national revolutionary movements, are pushed aside because their elevated status during times of conflict does not conform to the traditional gender roles that consistently reemerge after nationalist wars. Four established reasons why women are disempowered after liberation include: 1) the nation's need to keep women in the home and out of the workforce so male veterans can seek jobs; 2) economic priorities that stress modernization over social welfare; 3) political systems that view women's active participation in national affairs as a temporary expedient; and 4) families and communities that turn to the past for a comforting, nostalgic view of life.⁴ The following discussion, however, offers a fifth reason as to why women are neglected in postwar revolutionary societies. Gendered national symbols, previously manipulated during the struggle to empower women to become active combatants, are transformed in the post-conflict state to reconstruct traditional gender roles and resurrect pre-existing gender stratification structures, which results in a collective dismissal of women and women's issues in society. In other words, the resumption of normalcy in post-conflict states reinstates traditional gender roles that subordinate women through an onslaught of gendered symbol systems emanating from society.

While the temporarily suspended patriarchy empowers women during war, post-conflict society on the other hand is unable to uphold wartime gender roles.

The research examines two nation-states, Vietnam and Nicaragua, which in the past fifty to sixty years have experienced national liberation/revolutionary movements in which women had a participatory role. I have chosen to study Vietnam and Nicaragua because each country emerges from similar Marxist beginnings that allow for an almost uniform approach to revolution. Moreover, each case exhibits similar gender stratification before and after armed struggle. It is important to establish that revolutions in both countries were nationalist as opposed to strictly Marxist. Despite the large Marxist influence of the Sandinista guerillas, the main purpose of their struggle was to oppose the U.S.-sponsored capitalist and corrupt Somoza "dynasty" that was placed in power during the American occupation of the 1930s, against the will of the general populace.⁵ The same holds true for Vietnam. Hundreds of years of colonialism in Vietnam under the Chinese and later the French, followed abruptly by the U.S. military campaign, led many Vietnamese to associate the armed guerilla struggle against the United States as a fight against another foreign colonizer. This subsequent violent nationalism was cloaked and presented within the context of Marxism, the antithesis of Western values and beliefs. The following case studies will further examine Nicaraguan and Vietnamese nationalism as it relates to women, beginning with a historical analysis of the nationalist conflict and the various uses of gendered national symbols that shaped gender roles.

VIETNAM

The case of Vietnam reveals a national culture, derived from a unique historical experience, which honors both the image of the nurturing mother who instills the virtues of the nation within the home and of the warrior princess who takes up arms against the unruly invaders.⁶ Though Confucian maternal imagery, laden with female subordination, served to define the roles of Vietnamese women strictly within the domestic sphere, Vietnamese women had for centuries fought against foreign aggressors, beginning with the Chinese in 43 C.E., and later the French and Americans, creating a legacy of women warriors entrenched in the Vietnamese psyche of national culture. In Hanoi today, several national monuments are dedicated to this dual role of women. A commemorative statue located in the center of Hanoi depicting a Vietnamese woman with a child in one arm and a rifle in the other pays tribute to the sacrifices that Vietnamese women have made for the nation, both as mothers and warriors.⁷

During the Vietnam War, 1.5 million Vietnamese women once again took up arms against a new enemy, the United States, and fought in both the National Liberation Front and the North Vietnamese Army. Carefully crafted Communist propaganda, evident in so called "emulation campaigns," encouraged an end to traditional Chinese Confucian notions of female subservience in order to generate a mass military mobilization of men and women against the common enemy. To this

end, the Communist Party in the North facilitated the equalization of gender relations in all aspects of life. According to Goodkind, women in the North gained unprecedented autonomy and power at the local and national level throughout the war as a result of the migration of men to the front lines and the socialists' educational policies.⁸ Women's empowerment grew and sustained itself over the course of the war, yet declined steadily during the "post-liberation" period following 1975. Goodkind further noted that despite the gender inequities that exist today as a result of this decline in women's empowerment, advances toward equality have been erased mostly.⁹ The following analysis will examine the intersections of gender and nationalism in Vietnam before, during, and after conflict.

Women's empowerment grew and sustained itself over the course of the war, yet declined steadily during the "post-liberation" period following 1975.

Historical Context

Before the firm establishment of Chinese Confucianism in Vietnam, indigenous family customs, codified in written law in the fifteenth century, were based largely on the traditions of bilateral kinship and the right of inheritance for women, allowing for the development of a relatively balanced system of gender relations.¹⁰ During the Chinese invasion, women took up arms not only to defend their land, but also to defend a culture that had exalted them.¹¹ Heroic women warriors immortalized and celebrated in indigenous Vietnamese legend include the famed Trung Sisters that fought the Chinese in a fierce battle around 40 C.E. A legendary story of this time period is one of a female Trung commander by the name of Phung Thi Chinh, who gave birth during battle only to immediately resume fighting with her infant over her shoulder.¹² Other notable female warriors that have become symbols of Vietnamese nationalism include Lady Trieu and Bui Thi Xuan.

Once Chinese Confucianism had overtaken the indigenous Vietnamese culture, the high status women once held began to wane. Since then, Chinese Confucianism has heavily shaped Vietnam, injecting it with a moral and legal framework that bound women to the home.¹³ This system was promulgated in the Three Submissions: 1) at home, a girl is subject to her father; 2) a married woman is subject to her husband; and 3) when the husband dies, his widow is to care for her eldest son.¹⁴ The Four Virtues also dictated the personal character of Vietnamese women within the Confucian ideals of proper speech, good conduct, solemnity, and tolerance.¹⁵ These gendered conceptualizations of Confucianism, which permeated Vietnamese culture at this time, shaped gender roles for hundreds of years and became symbols of the Vietnamese feminine ideal.

During periods of armed insurrection, however, indigenous legends of women warriors would be evoked to inspire women to take up the nationalist cause. This manipulation of gendered national symbols would temporarily suspend traditional

Confucian gender stratification. During the war against the French, Ho Chi Minh, leader of the anti-imperialist nationalists, set women's equality high on his agenda, leading many women to join the nationalist struggle. According to a special issue of *Vietnamese Studies*, their heroic feats revived a legacy of fighting women, inspiring a host of modern-day Trung queens and reminding their fellow male cadres of their true Vietnamese history and identity within the context of an already fierce nationalist revival.¹⁶

Vietnamese Women's Empowerment

During the Vietnam war, propaganda that intended to attract even more "latter day Trung Queens" was formalized by the efforts of the North Vietnamese-sponsored Women's Liberation Association that worked out of South Vietnam. The Women's Liberation Association was given the task of mobilizing women in the South to have more women on the fighting lines, while at the same time encouraging them to take up more social and political responsibilities at the village level. To this end, members of the Women's Liberation Association began emulation campaigns that primarily publicized the courage and heroism of female fighters to develop a sense of camaraderie and morale among rural women. Images of fighting Vietnamese heroines of past centuries, like Ut Tich and Nguyen Dinh, were reincarnated to appeal to these women on a very personal level.¹⁷ Emulation campaigns extolled the virtues of the good warrior, resulting in the emergence of a new behavioral code. The "Three Readinesses" served to reprioritize the lives of women, preparing them to fully assume all the responsibilities associated with farm production, sending their sons and husbands to war, and fighting when the time came.¹⁸ In essence, the Three Preparednesses had replaced the Three Submissions. Now women were neither subject to the father, husband, or son, but to the needs of the nationalist cause, which brought women out of their traditional domestic roles to the public role of farming and fighting. The sudden change in women's roles demonstrated the intentional manipulation of gendered symbols to support the nationalist struggle.

Images of fighting Vietnamese heroines of past centuries ...were reincarnated to appeal to these women on a very personal level.

New codes of conduct disseminated by the Communist Party included the Three Postponements, which eliminated the traditional maternal images delegated to women before the war. The Three Postponements first included the postponement of love. If this was too difficult to avoid, then the postponement of marriage was strongly recommended. And finally, if neither love nor marriage could be delayed, then the possibility of having children was to be postponed at all costs.¹⁹ During this time, Ho Chi Minh introduced what was called the "New Way of Life," or *Doi Song Moi*. Under this New Way of Life, the traditional "gallantry" men expressed toward women became forbidden. Women and men were to receive exactly the same

treatment. If, for example, a man were to give his seat to a woman on a bus, a woman was to reply, “*doi song moi*, please” or “stop your imperialist gallantry.”²⁰ These measures were intended to severely restrict any deviation from the gender equalizing dictums of the state. Propaganda literature further supplemented the mass mobilization efforts of the Party. So called “Art for Society” was to shape what the modern woman ought to be and what she must do.”²¹ Chu Van’s *The Perfume of the Areca Palm*, a notable propaganda literary piece, “argued that traditional views despising female inability were wrong and advocated that women’s status in the family should be upgraded.”²²

These efforts were legally sanctioned by the North Vietnamese government during the war against the French and Americans. The first constitution of North Vietnam, otherwise known as the Democratic Republic of Vietnam, was officially introduced in 1949. It specifically made reference to women, advocating the equality of the sexes, and stipulated provisions for equal pay and paid maternity leave.²³ In 1959, a Marriage and Family Law sought to revamp the practice of marriage in order to guard women against prostitution, arranged marriages, and other traditional “denigrating” customs.²⁴ These laws intended to render the old “feudal” bourgeoisie traditions obsolete and emancipate women. Furthermore, these laws were designed to force women into the working and fighting force in order to accelerate the industrialization of the North and the defeat of the enemy in the South.

For many, these laws had met their objectives. Between 1958 and 1962, the number of forced marriages decreased by 60 percent in one northern province, signaling a significant change in traditional notions of women and marriage.²⁵ This change was not only brought about by state legislation, but also by state run propaganda that manipulated national symbols in art, politics, and daily life with “*Doi Song Moi*” and other codes of conduct. Yet, not everyone within the party circle was satisfied with the results, which were viewed as “insufficient” in the context of an increasingly bloody war with the Americans. The central government addressed these insufficiencies with strict legislation that introduced Resolution 153, a job quota requiring women to comprise as much as 35 percent of all jobs.²⁶

Women’s empowerment during the war improved steadily from the mid 1960s until the early 1980s. About 1.5 million Vietnamese women fought in both the North and the South, and around 10 percent of villages had a female president. In 1974, approximately 3,000 women held local administrative positions in village committees nationally and women’s representation was at a record 32 percent in the National Assembly. In terms of jobs, many of the women were employed in healthcare, education, and production, and women eventually came to comprise over 35 percent of the general workforce by the end of the war.²⁷

Women’s Disempowerment

Women served with heroic distinction in both the North and the South. Some women even held leadership positions, such as Mme. Nguyen Thi Dinh, deputy commander of the National Liberation Front, who published her personal memoirs on the war in 1968. However, there is little known about the 1.5 million Vietnamese

female guerillas and North Vietnamese army combatants who were not remembered by an autobiography. Even among many Vietnamese, the physical and military hardships of enlisted female combatants in the North are rarely publicly acknowledged.²⁸ In the post-war decline of women's status in contemporary Vietnam, the government's version of the sacrifices made by women warriors mirrored this same pattern, thereby deleting the participation of 1.5 million women in the war. Brief official accounts of women's service in the war focus on the emotional aspects surrounding their contributions to the war effort, emphasizing their dedication and nationalist zeal, while offering little or no mention of their military successes. As a result, the position of women within the general war narrative has become subordinate to that of men, reflecting the greater societal relegation of women to the domestic sphere following the war.²⁹

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This new auxiliary role for women in post-war Vietnam was supported even by the Communist Party's Women's Union, once a key organization within the party structure that promoted women's emancipation and empowerment. In 1982, the government's "New Culture Family" campaign to initiate a return to traditional family values with an emphasis on the duties of motherhood was communicated to the public in the Women's Union's official magazine.³⁰ The "Glorious Daughters of the Revolution" extolled the maternal responsibilities of women and suggested a welcome return to traditional gender roles. The apparent ideological shift within the Women's Union demonstrated the irony of the situation, in which an organization once dedicated to the empowerment of women was now relegating them back into the home to resume domestic life for the sake of national reconstruction.³¹ Ensuring the strength of future generations of Vietnamese is the new role for women in post-war Vietnam, who are now symbolically positioned once again as biological producers and caregivers subservient to men.

The decline of women's empowerment progressed steadily throughout the fifteen years that followed the war's end. Despite the nominal pronouncements of equality, outlined once again in the 1980 Reunification Constitution, the number of women in positions of influence soon began to decline. At the village level, the amount of women in leadership positions fell consistently after the war from 3,000 in 1974 to 1,400 in 1976 and down to 800 by 1979. The same trend was also evident at the national level, as the number of female representatives in the National Assembly was at 32 percent in 1971 and continually declined to 27 percent in 1976, 22 percent in 1981, and 18 percent in 1987 and 1992.³² Soon after, severe gender stratification was observed in levels of educational attainment and non-administrative occupations. As men returned home from the war, many women were forced out of managerial

positions. Many of the women that remained in the workforce occupied the bulk of lower-end jobs, comprising 70 to 80 percent of the agricultural labor force and 46 percent of all industrial laborers in 1986.³³

What is even more telling is the lack of enforcement required to uphold the Marriage Law of 1959, as the levels of female human trafficking for prostitution increased annually at alarming rates. Furthermore, the government has been lax to enforce the 1949 constitutional mandate to give women equal pay. According to a Country Report on Human Rights Practices for 1995:

While there is no legal discrimination, women face deeply ingrained social discrimination. Despite extensive provisions in the Constitution, in legislation, and in regulations that mandate equal treatment, and although some women occupy high government posts, in general few women are able to compete effectively for high government posts. The government has not enforced the constitutional provision that women and men must receive equal pay for equal work.³⁴

Women's disempowerment is reinforced daily by Vietnamese popular culture, which is both sponsored and censored by the current socialist government. Whether it is television, literature, or daily news publications, the prevailing culture places women first and foremost as mothers, whose ultimate duty is to bear sons to its nation.³⁵ Currently, 1.4 million women in Vietnam are widows or unmarried without children as a result of the war, rendering them poverty-stricken since they are without male financial support. Women veterans, who had returned to village life physically and emotionally scarred by the war, were in many cases considered unable to marry. In effect, these women were considered deviants, moving away from reinstated post-war ideals of womanhood. Additionally, the possibility of improving the situation for these women is limited by the restrictions of credit agencies that preclude them from issuing loans to women without a male cosigner.³⁶ Thus, these women lack the financial resources to help lift them from poverty.

The apparent ideological shift within the Women's Union demonstrated the irony of the situation, in which an organization once dedicated to the empowerment of women was now relegating them back into the home to resume domestic life for the sake of national reconstruction.

In discussing the effects of popular culture in reestablishing gendered national symbols in post-war Vietnam that exalt the passive maternal woman, it is important to take note of a recent cultural trend depicted in Vietnamese television. *The Last Survivor of the Jungle of Laughter* was a popular sex-charged life drama of episodes based around the wartime experiences of five girls in a desolate jungle.³⁷ Instead of focusing on the refined fighting skills of the women warriors, themes of romance, lesbianism, and sexuality permeated the television series, in effect dismissing the learned skills of most female fighters. *The Last Survivor of the Jungle of Laughter*

attempts to minimize the contributions and sacrifices of women in the war. It is a classic example of the manipulation of a venerated national symbol—the female warrior at war—presented as a sex-obsessed adolescent in the post-war context. This demonstrates the collective disempowerment of women on the societal level and illustrates the transformed meaning of a gendered national symbol in the post-conflict state.

A post-war literary piece that is indifferent to women's role in the Vietnamese War is the short story by Nguyen Huy Thiep, a well-respected Vietnamese author. His piece entitled *The General Retires* "is a literary milestone in Vietnamese culture in the sense that it confronts the Vietnam today with the Vietnam of yesteryear by creatively building upon the warped metaphor of the Retired General."³⁸ The story's main character, a retired female combatant, is a greedy old woman who uses aborted fetuses she picks up from a local hospital to feed the dogs she later sells for money.³⁹ This scathing portrayal of a female veteran is a testament to the social discrimination against women inherent in the general post-war society and culture. This symbol of woman presented by Thiep is a far cry from "latter day Trung Queens" that were models of emulation during the war effort.

Vietnamese society never eliminated traditional notions of gender, but in fact carefully hid them away for the duration of the war.

While a marked disempowerment of women in Vietnam had occurred in the fifteen years following the war, the Women's Union attempted to reverse this once it had become clear that women were becoming less visible at the political level. In 1986, shortly after the introduction of market socialism, the Women's Union succeeded in prompting the government to consult them and other female representatives in the National Assembly on all legislation relating to women.⁴⁰ Moreover, in 1994, the Central Committee of the Communist Party introduced an affirmative action plan at the behest of the firm lobbying the Women's Union to increase the number of women in public service and managerial positions. The plan soon led to the election of the first female member of the Politburo in 1996 and an increase to 27 percent of women in the National Assembly in 2002.⁴¹

Despite significant improvements over the past ten years in establishing a sense of formal equality on the political front, substantive equality is harder to come by in a Vietnam where an increase in patrilocal residence, prostitution, violence against women, and the feminization of agriculture are part of a reemerging male-oriented society laden with contradictions. Today's most recent government propaganda is a telling indication of the gender relations that exist in the new market-oriented Vietnam. It illustrates the country's key contributors to the economy: the male professional, the male technical worker, the male serving in the armed forces, and the peasant woman in the field.

What this analysis concludes is that despite the manipulation of national symbols that dictated different gender roles at various times, Vietnamese society never eliminated traditional notions of gender, but in fact carefully hid them away for the duration of the war.⁴² This manipulation of symbol systems was a tactical means to a specific objective—national liberation. The temporary empowerment of women became a way to facilitate the objective more efficiently. Despite attempts to level the differences between the sexes in legislation and in Communist propaganda that portrayed vivid national symbolism during the war, these strides no longer serve the purposes of the national cause of economic development and reconstruction in post-conflict Vietnam. The new national cause of post-war Vietnam for women is to repopulate Vietnam with many sons. Therefore, in the absence of war and of an immediate need for half of the population to take up arms and industrialize the country, a swift return to traditional pre-war Confucianism was signaled. In effect, Vietnamese nationalism reconfigured itself within the patriarchal structure from which it was derived.

Unlike the Vietnam case...Nicaraguan women witnessed a gradual, yet significant decline that occurred over the first and only decade of rule under the FSLN.

NICARAGUA

The Nicaragua case, while exhibiting similar symbolic patterns as observed in Vietnam, follows a slightly divergent path. The Nicaraguan case does not follow the same clear-cut time cycle seen in the Vietnam case of women's empowerment during the struggle and disempowerment in reconstruction. Sandinista women of the Frente Sandinista de Liberación (FSLN), fighting during the revolution against the Somoza regime over a period of eighteen years, experienced new freedoms during the war that continued several years after the war's end in 1979, reaching an "emancipatory peak" in 1982 that soon spiraled downward. This downward spiral was due in part to the FSLN's alienation of women and women's issues over the years following the fall of the Somoza dictatorship. The FSLN government not only became increasingly unpopular among those concerned with the women's movement early in the 1980s, but the contra war and economic austerity programs initiated by the party contributed to the general public's dissatisfaction with the FSLN in post-revolution Nicaragua, which led to its defeat at the polls in 1990.

Unlike the Vietnam case, in which women saw an immediate increase in gender inequality and a declining sense of empowerment, Nicaraguan women witnessed a gradual, yet significant decline that occurred over the first and only decade of rule under the FSLN. The following discussion will focus on the change in national symbol systems between the revolutionary period and the post-conflict/liberation period.

Nicaraguan Women's Empowerment

Before the armed struggle against the Somoza regime, Nicaraguan culture was characterized by both machismo and "marianismo," which dictated the gender roles of society. Heavily entrenched machismo attitudes in Latin America require men to prove their masculinity to society by fathering many children. At the same time, machista culture does not tend to admonish its men for abandoning the families. This socially acceptable behavior has today become an outgrowth of the agricultural economy, which for centuries has relied primarily upon the seasonal migration of farm workers.⁴³ The persistence of the machista culture over the years served to objectify women and render them subservient to men within the overall context of Catholicism. On the other hand, images of Nicaraguan women were deeply influenced by "marianismo." According to Francie Chassen-Lopez, social constructs of motherhood in Nicaragua and other Latin American countries are overwhelmingly associated with images of the all-forgiving, self-sacrificing, peace-loving Virgin Mother Mary.⁴⁴

Beginning in the early to mid 1960s, the FSLN encouraged Nicaraguan women to shed this image of "marianismo" for "combative motherhood"⁴⁵ and to participate in the armed revolutionary struggle. During the eighteen years of revolutionary struggle, women comprised 30 percent of those mobilized by the FSLN guerillas.⁴⁶ According to Babb, the Nicaraguan Revolution coincided with the popular worldwide women's movement that was occurring in the latter part of the 1960s and 1970s, which may have in fact served to draw many women into the ranks of the Sandinistas since it too advocated equal rights for women.⁴⁷ This dramatic shift of women's roles, facilitated and engineered by the FSLN to achieve a mass mobilization of Nicaraguan guerilla fighters, led to an increase in women's political involvement.

These new roles, being relatively different from traditional gender roles, were empowering for many women. Yet...in actuality women were unable to exercise any form of self-determination.

The FSLN Manifesto of 1969 explicitly includes the emancipation of women as part of the party program to liberate all Nicaraguans. Section VII of the Manifesto proclaims the end to all traditions that have favored men over women, advocating the equality of the sexes in all spheres of society.⁴⁸ Official FSLN ideology symbolically viewed underground women revolutionary fighters as "compañeras," on the same level as men. Though women never gained high leadership positions in the FSLN directorate, there were in fact four female secretariats within four influential workers' unions.⁴⁹

Despite the claims and policies of the FSLN propaganda machine, the majority of women provided a largely supplementary role in the war. Women mostly worked in communications, revolutionary education, and medical care while a significant

minority participated in the actual armed struggle. These new roles, being relatively different from traditional gender roles, were empowering for many women. Yet, Montenegro, ex-Sandinista feminist, maintains that in actuality women were unable to exercise any form of self-determination.

Of the fighting women who made up 30 percent of the mobilized guerilla force, there is little known since the few existing personal accounts, often found in the form of poetry or song, focus specifically on women's heroism and offer no real insight into the rigors of daily military life. In honor of the unknown feats of countless Nicaraguan women fighting a guerilla war, the FSLN's designated women's organization was named after the first woman to have been killed in combat, Luisa Amanda Espinosa, creating the Nicaraguan Women's Association, "Luisa Amanda Espinosa" or AMNLAE. This symbolic gesture on the part of the FSLN party suggests an attempt on their part to glorify the fighting character of the "new" Nicaraguan woman. This new association between women and war deviated away from traditional notions of "marianismo" that characterized the spiritually sanctioned role of women, thereby creating a space for women's empowerment and a new sense of motherhood or "combative motherhood."⁵⁰ Glorified images of "combative motherhood" that carried into the post-war years were produced and proliferated by the FSLN government. One popular image appeared throughout the country depicting a woman holding an AK-47 and a baby while happily smiling into the distance.⁵¹

Post-war Nicaragua in 1979, under the firm control of the FSLN, saw more women than ever before becoming involved in the reconstruction process.

Post-war Nicaragua in 1979, under the firm control of the FSLN, saw more women than ever before becoming involved in the reconstruction process. AMNLAE, especially, worked diligently with the FSLN directorate to draft legislation that legally stipulated the equality of men and women. One of the first laws drafted by the FSLN government in 1979 was the Provisional Media Law that regulated "revolutionary media" in order to prevent the objectification and exploitation of women in the media. After all, the FSLN was fully aware of the capabilities of media in influencing public opinion after having launched its own series of successful communication campaigns using graffiti, mosaics, newsletters, and fliers, prompting party leaders to strictly control media content during the reconstruction period.⁵² In addition, two more important laws were passed that attempted to dictate post-war gender relations. The Law Regulating Relations between Mothers, Fathers, and Children granted equal rights to both parents over their children⁵³ in an effort to erase remnants of machismo within the family structure. Furthermore, the 1982 Law of Nurturing was passed that "obliged men to contribute to their children's upkeep and to do their share of the household tasks, designed [specifically] to strengthen nuclear [family] bonds."⁵⁴

National art in the form of colorful wall murals decorated cityscapes, depicting and honoring the “new” spirit of Nicaraguan fighting women; the “new” woman was made popular in the early 1980’s as the FSLN commissioned various artists to portray these venerated national symbols. In 1980, *The Literacy Crusade* illustrated the spirit of new activism growing out of the traditional roles of women by juxtaposing a caring mother and a literacy crusade *brigadista* surrounded by a beautiful landscape.⁵⁵ Another mural that followed a similar theme, entitled the *Brigade of Italian and Nicaraguan Painters Constructing the New Woman*, depicted Nicaraguan women in different roles such as militia women, farmers, and mothers, while the accompanying text hails, “in constructing a new country, we forge a new woman.”⁵⁶ Nicaraguan government-sponsored cinema also presented new national gender symbols in the 1987 domestically produced feature film, *Mujeres de La Frontera* (Mothers of the Front), which “depicted strong, independent, and resourceful women confronting age-old stereotypes and the sexism of their husbands and other menfolk.”⁵⁷ With the “emancipatory peak” generated by various state-funded propaganda extolling the virtuous “new” woman, women themselves were making empowering strides in daily life. At the local grassroots level, women attained representative positions on government boards, participated in the land reform process, gained employment in non-traditional sectors, and benefited from government-sponsored day care centers and family planning classes.⁵⁸

The situation however began to change as the FSLN became significantly disinterested in women’s issues beginning in the mid 1980s.

Women’s Disempowerment

The situation however began to change as the FSLN became significantly disinterested in women’s issues beginning in the mid 1980s. This, coupled with the contra war and a worsening economic situation in the country, made women’s issues the last priority. Ironically, at this time, the FSLN refused the calls of Sandinista women who rallied for the right to be mobilized for active duty to fight against the growing menace of the contra rebels, signaling perhaps a reemergence of pre-revolutionary machismo within the government machinery itself. After AMNLAE was unable to influence the party’s stance on the draft, the organization’s supposed autonomy within the FSLN ranks was seriously questioned as its founding party heads forced AMNLAE to provide support instead to the mothers of the male soldiers fighting against the contras. As a result, the women’s organization became increasingly detached from the preexisting women’s movement and submitted no legislative proposals to the FSLN from that point on.⁵⁹

The decline in women’s influence and political and social empowerment marked a decline in women’s role in the public arena. There was an observed increase in

violence against women in the late 1980s, as the revolutionary steam was losing its heat. A study conducted by an independent research group found that 44 percent of women between the ages of twenty-five to thirty-four had experienced physical violence. Simultaneously, FSLN Media Laws prohibiting the exploitation of women in the media became obsolete, as domestic content requirements for television were ignored with 70 percent of Nicaraguan TV and 90 percent of accessible films imported from the United States, Spain, and Brazil.⁶⁰ In the midst of a growing resurgence of machismo, the growing popularity of beauty contests, once illegal in post-war Nicaragua, signified a move away from the legally and politically sanctioned egalitarian gender system. The lack of will to enforce legislation the FSLN itself had created and the subsequent reestablishment of machismo culture on a societal level indicated the power that gendered symbol systems had in reshaping gender roles in the post-revolutionary nationalist setting.

Two notorious events in Nicaragua during the last years of the FSLN confirmed that the “new” woman had been conveniently and effectively forgotten in post-war Nicaragua. The first incident reflects the government’s lack of will to enforce the Provisional Media Law that was a crucial feature of the FSLN platform for women’s empowerment. In 1988, the magazine *Semena Comica* reprinted a photograph taken from an American pornographic magazine showing a woman shaving with the attached caption reading “women get ready! It looks like International Woman’s Day will be celebrated.”⁶¹ The FSLN responded by reprimanding the weekly magazine with a short six-week suspension. Soon after, the magazine quickly resumed its satirical and sexually charged portrayal of women without further censorship on part of the government. As a result of this and many other incidents, the government’s commitment to enforcing the media law that intended to protect women was seriously questioned.⁶²

The second incident was the handling of the 1988 “Dira Case,” which heralded yet another break with the image of the “new” woman. Dira, a woman on trial for the murder of her husband’s mistress, was the object of intense misogynistic criticism that reflected a complete transformation from earlier socially accepted notions of heroic self-sacrificing women, which was held together by government propaganda machinery. The machista lens through which the story was reported branded Dira as an insanely villainous woman that deserved punishment. The lack of public will to critically comment upon the biased portrayal of Dira was indicative of a society’s passive return to the social norms associated with machismo.⁶³

Clearly, women’s empowerment within the society experienced a decline in post-conflict Nicaragua as a result of increasingly negative symbolic portrayals of women sanctioned by the FSLN, a party once dedicated to women’s empowerment. According to Connell, the Sandinistas began a movement they ultimately attempted to reverse.⁶⁴ Climactic nationalism during the revolutionary conflict affected the relative emancipation and empowerment of women by suspending traditional gender roles and supporting new ones that vindicated the nationalist cause. From 1979 to

1990, post-conflict Nicaragua gradually witnessed a reconfiguration of previous gender stratification levels once the strategic objectives of the nationalist cause had been achieved.

The electoral defeat of the FSLN in the beginning of the 1990s ushered in an even more unfavorable political environment for women with the election of conservative female president Chamorro, a devout anti-feminist Catholic and an embodiment of traditional “marianismo.” Despite the cessation of civil war, which came into effect at the beginning of her presidency, government cuts in programs relating to women, such as basic health care and day care, weakened the women’s cause even further and led to severe dissatisfaction. A sense of discontent swept the growing number of unhappy women, especially the large number of female ex-soldiers. It culminated in the Frente Nora Astorga incident wherein a group of 500 women, which included trained ex-soldiers, lawyers, and secretaries, took the northern capital of Ocotal hostage, overtaking the city hall, the police station, and all communication posts in 1992.⁶⁵ The military expertise of the women and the reluctance of the police to use brutal force led to a week of serious negotiations with the government. The women’s group walked away from Ocotal having secured 165 building lots and a number of sewing machines from the government, yet most importantly, the Chamorro administration made a promise to open a constructive dialogue with women taking into account all their social concerns.⁶⁶

[W]omen’s empowerment within the society experienced a decline in post-conflict Nicaragua as a result of increasingly negative symbolic portrayals of women sanctioned by the FSLN, a party once dedicated to women’s empowerment.

In response to Frente Nora Astorga, Chamorro helped to establish a new government body for women that would replace AMNLAE, now associated with the defeated FSLN. The new Institute for Research on Women revived a weakened women’s movement by uniting NGOs, collectives, neighborhood groups, and specialized clinics. While this collective effort succeeded in amending some laws, in particular making violence against women a punishable crime, a formal sense of growing equality overshadowed the substantive inequalities that still existed within a society that was more concerned with material demands. A brief reprieve was soon followed by a complete reversal in the small gains women had made when conservative reactionary president Aleman was elected. His refusal to acknowledge discrimination against women and begin a meaningful dialogue with important women’s groups has signaled a return to a situation similar to before the Sandinista war. Most symbolically, the Aleman administration effectively replaced the newly established Institute for Research on Women with the Ministry of the Family; the ministry’s mission is to restore the traditional family and it has been described as an organization that serves to reconfigure the role of women as domesticated dutiful mothers.⁶⁷

CONCLUSION

The malleability of nationalism and nationalist values that dictate the codes of society is evident in the Nicaragua and Vietnam case studies. While nationalism changes over time and appears in various forms, the case studies suggest that established nationalism, in the absence of a national crisis, is a gendered experience often reserved for men, creating a situation that is not conducive to promoting women's empowerment. Climactic nationalism, which surfaces during nationalist revolutionary wars, temporarily suspends traditional gender roles to achieve national objectives on a massive scale. Unlike the case of the United States and Europe, wherein women's political and economic activism following WWII was relatively sustainable,⁶⁸ women's participation in the war effort does not always provide a permanent reversal of traditional gender roles at war's end. Instead, women are manipulated as instrumental tools in meeting the immediate tactical goals of war, unaware that their future leaders are unable to fulfill their stated promises of equality to them. The case of Nicaragua and Vietnam illustrate that during the post-conflict period, women and women's issues are formally acknowledged to a limited degree at the government level; in reality, however, these pronouncements rarely affect substantive equality, as cultural factors from the pre-war era come into play and as the limited resources of developing countries' governments reduce their ability to legally enforce equality. Therefore, it is important for women to understand the distinction between formal and substantive equality in order to be more equipped to demand substantive changes.

[W]omen's participation in the war effort does not always provide a permanent reversal of traditional gender roles at war's end.

If, however, women are not included in the fight for national liberation, will women serve to become even more invisible and irrelevant in the post-conflict state? What can women do then? It is important that women's action groups understand this distinction between substantive and formal equality and push for both at a democratic level, specifically after war. Women comprise almost half of any given nation and should therefore be a significant constituency to any national agenda—democratic or undemocratic. Most importantly, women and women's interest groups need to understand the importance of time. Reconstruction in war torn nation-states does not suggest that addressing gender inequities should come later or that development issues are more pressing to the nation. Women must be an integral part of an inclusive model of development that acknowledges women's ability to contribute fairly to economic growth at all levels, not only in positions that are limited to factory assembly lines. As the first indication of a decline in women's rights will automatically lead to a further decrease, women's issues should be immediately addressed. Women's groups need to take advantage of the potential for

change in post-war societies before the reconfiguration of traditional gender roles becomes overwhelmingly solidified, making it difficult to affect cultural customs and beliefs.

Women's groups need to take advantage of the potential for change in post-war societies before the reconfiguration of traditional gender roles becomes overwhelmingly solidified, making it difficult to affect cultural customs and beliefs.

Furthermore, governments in transition from war to peace should carry out consistent practices in order to create legitimacy. Wavering policies is unhealthy for any government. The FSLN is a prime example of a party that has failed to secure reelection due to the diverging policies it simultaneously supported. Moreover, it is in the political interest of governments to continue to uphold the importance of women's issues, thereby eliminating the potential social costs associated with women who are the objects of sexual abuse, violence, abandonment, prostitution, and severe discrimination. In addition, gendered national symbols should offer different models of gender roles. Gender roles, like nationalism, are not static constructs, but constantly changing. Gender symbols should therefore reflect this and illustrate that there are different gender roles to emulate for diverse national purposes. And lastly, the application of positive discrimination policies⁶⁹ that adhere to political and managerial quotas can serve to mitigate the cultural effects of reemerging patriarchal tendencies that discriminate against women. As the cases demonstrated, the power of gendered national symbols should not be underestimated and be viewed, therefore, as a useful tool in reconstruction.

Nationalism is a phenomenon that affects the daily lives of men and women during and after conflict. It is a powerful social and political force that needs to be conceptualized in cross-gender terms. Otherwise, it will consistently render women as invisible players in the national project, as unexamined national symbols reinforce their marginalization. In other words, "if nationalism is not transformed by an analysis of gender power, the nation-state will remain a repository of male hopes, male aspirations, and male privilege."⁷⁰

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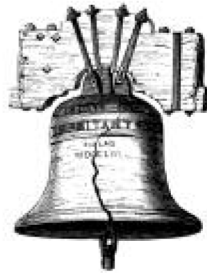
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Of Words and Wars: The Security Council's Hard Life Among the Great Powers

by Ian Hurd

In assessing the damage done to the UN by the Iraq-U.S. war, many commentators have found reason to conclude that the episode represents the final, fatal blow to a long-suffering institution. Michael Glennon recently concluded that the UN Security Council has finally “fallen victim to geopolitical forces too strong to withstand,”¹ and no less a light than Richard Perle calls it the “parting irony” of Hussein’s reign that “he will take the UN down with him.”² The ruins of the Iraqi regime symbolize for Perle “the intellectual wreckage of the liberal conceit of safety through international law.” Far from lamenting this development, these writers celebrate it—“the world will be better off for it” says Charles Krauthammer—as the beginning of a new “realism” in American foreign policy, a moment comparable to E.H. Carr’s decisive critique of liberal idealism at the end of the Second World War.³

Today’s argument, repeated in newspapers by columnists and off-the-record by U.S. officials, goes like this: since the UN represented “a grand attempt to subject the use of force to the rule of law,”⁴ the opposition in the UN to the American attack on Iraq stands as evidence that this does not work. More generally, the American unipolar moment means a shift in international power “toward a configuration that [is] simply incompatible with the way the UN was meant to function.”⁵ Therefore, according to Charles Krauthammer, continuing to look for policy guidance from the “corrupt, perverse, institutional relic” that is the UN is a strategic and moral mistake.⁶

This analysis is wrong. It is based on a fundamental misunderstanding of the nature of the Security Council, one that sees the Council in moralistic and legal terms rather than in realistic political terms, and it leads to a wrong policy conclusion. Ironically, Perle and others who would dismiss the UN as powerless, share with the progressive idealists an over-inflated sense of the Council’s power, purpose, and ambition in the world. Both criticize the Council for failing to act—either for failing to support or failing to prevent the war. Getting the Council wrong in this way is extremely significant, since it means these writers also get wrong their analysis of the future of American power. A more realistic assessment of the origins and function of the Council is crucial for making sensible policy in the new age of American dominance—the budding American unipolar hegemony will be stronger if built on a foundation that includes the Security Council.

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Greater realism in assessing the UN would recognize that the Security Council is at its heart a political pact among the Great Powers, the five permanent members of the Council, to keep the peace among themselves. The Council, born in the laborious diplomacy of Dumbarton Oaks, Yalta, and San Francisco, enshrines the principle that the more powerful states should manage the international system on behalf of the rest, and it institutionalizes this principle in the device of the veto. This is neither a system for emancipating the less powerful states, nor one that requires that the Great Powers subject themselves to collective decisions about international security. Both the liberal and conservative critics perpetuate the myth that it is the Council's job to rein in the Great Powers. Far from Glennon's imagined "legalist institution" in opposition to "geopolitical forces," the Council comes from a realistic political compromise among the powerful.⁷

To see this, one must return briefly to the basic document setting out the Council's powers: the UN Charter. It is here that both the substantive, legal authority of the Council and the procedural mechanism of the veto by which that power is limited are spelled out. Taking these two together, one sees the "problem" the founders of the UN saw themselves as addressing—avoiding conflict *among* the Great Powers. The founders of the Council were not looking to protect the weak from the adventures of the strong or to impede the strong in their periodic fits of imperialism.

THE SECURITY COUNCIL'S AUTHORITY AND PROCEDURE

The legal authority of the Council in the international system is impressively broad. As the central location in the UN for international security, the Council may intervene in the domestic affairs of states when these are thought to pose a threat to international peace and security. Under Article 42 of the Charter, the Council can decide to take any action "by air, sea, or land forces as may be necessary" to "restore international peace and security." This permissive language allows the Council to ignore the restraining clause in Article 2 (Section 7) that says that the UN cannot "intervene in matters which are essentially within the domestic jurisdiction of any state." Once the Council decides that a state poses a threat to international peace, it has full freedom to intervene in that state. There is no opening for judicial or other review.

However, this authority is limited by the important procedural mechanism of the veto. Each of the Great Powers has the power to block any intervention that it feels goes against its interests. Article 27 gives each member of the Council one vote, but says that decisions on substantive matters require nine in favor "including the concurring votes of the permanent members." The veto was crucial for the Great Powers at the San Francisco conference in 1945, where the Charter was drafted: without it, they made clear, there would be no UN at all. The Great Powers presented this as protecting the less powerful states from future great-power wars; the British delegate at San Francisco suggested, apparently seriously, that the Council

“represented one of the most remarkable advances in all human history.”⁸ The real payoff, though, is of course that the Great Powers can cut off action against themselves or their allies.

The inaction implied by the veto guarantees that the Council will be paralyzed at precisely those moments of the greatest tension between the Great Powers.

The fact that the veto works negatively, in permitting the Great Powers to kill resolutions with which they disagree, means that the Council is biased in the direction of inaction. But inaction, as the UN founders knew, can be very useful. The inaction implied by the veto guarantees that the Council will be paralyzed at precisely those moments of the greatest tension between the Great Powers. When one finds oneself standing in a minefield, sometimes the best way to avoid a catastrophic misstep is to not step at all. When the Great Powers disagree, the Council will not be able to act, and the drafters of the UN Charter believed that in such cases, it should *not* act since to act would be to invite disaster for the whole organization. The veto is the convenient institutional mechanism by which the Council gets out of the way when the Great Powers clash. This is not a “flaw” in the design of the Council—this is the *sine qua non* of the Council. Thus, far from putting forward “imaginary truths that transcend politics”⁹ as Glennon claims, this system is a sensitive political compromise to manage the competing interests of the Great Powers and also to maintain some opening for a useful international organization.

The Council was intended to manage how the strong could dominate the weak—not for the benefit of the weak, but rather to avoid the strong stepping on each other’s toes. It does not prohibit the intervention of the Great Powers upon other states; in fact it *encourages* intervention as long as the Great Powers can all be brought to agree on it. In cases where the Great Powers disagree, the members of the Council have never been so deluded as to believe that their job was to stop the unilateral action of a fellow member. Further, there was no expectation at San Francisco that the Council’s contribution to world order was to regulate the foreign adventures of the Great Powers.

Nothing has changed in the subsequent sixty years to alter these limits on the Council’s authority. The system of Great-Power management established in 1945 remains the central logic of the UN security system today. This is clear from the mixed history of UN adventures in peacekeeping and peace building. When the Great Powers agreed on interventions in the 1990s, the Council empowered the UN to intervene quite dramatically in places like Cambodia, East Timor, and Latin America—but these same conflicts were allowed for years to fester while the Great Powers quarreled their way through the cold war. While some would like to see the Council increase its influence over the Great Powers, the terms of the Charter make this very difficult and amendment of it on this point is nigh inconceivable.

POWER AND LEGITIMACY AT THE COUNCIL

In this more realistic assessment of the purposes of the Council, one finds a more modest set of goals and powers for the Council than some critics imagine. However, this does not mean one can dismiss the council as entirely inconsequential—the lowering of expectations does not mean abandoning them altogether. The Council does have some power over strong states, even over the United States, and this comes in the shape of the “audience effect.”

Many countries believe that the Council carries legitimacy in the area of international peace and security. They alter their behavior based on the results of Council deliberations. This belief in legitimacy may be the product of misguided idealism about the nature of the Council of the type criticized by Perle and Krauthammer, or of a genuine commitment to the principles of multilateralism and consensus, but its origin matters less than the fact that many governments take the Council seriously and adjust their foreign policies accordingly. Over Iraq, had the mythic “second resolution” come to pass, it is not difficult to imagine middle-of-the-road countries falling in line behind it—including some, like Turkey, that could have made a significant contribution to the war.

Faith in the legitimacy of the Council is more prevalent in the less powerful states than in the Great Powers, and in general the normative component of the UN is carried more by the less powerful than by the hegemonic. It is the less powerful states that perceive Council decisions as conferring legitimacy on outcomes, and it is therefore these countries that press for the rule-of-law in international affairs. But even the more powerful states have good self-interested reasons for recognizing the power that this legitimacy represents. These beliefs are extremely important, even for states that may not hold them, since they are a useful device in understanding (and manipulating) the behavior of the less powerful states.

What matters in either case is that many governments take seriously the Council and adjust their foreign policies accordingly.

In such an environment, a wise American foreign policy must take this sentiment into account, even if U.S. policymakers themselves do not share the belief in Council legitimacy. The costs to the Great Powers of acting unilaterally are raised to the extent that other countries react negatively to the United States’ bypassing of the Council. This effect is seen when the Great Powers seek Council approval to legitimize their actions. When the Council does not grant its approval, the option of unilateralism certainly remains viable and is often taken. This is arguably what happened in the U.S.-Iraq case, as well as in the NATO-Kosovo case. At such moments, the political costs to unilateralism are raised, but no realistic observer of international politics should be surprised that Great Powers continue to intervene in world affairs. Certainly the drafters of the Charter would not be surprised.

Understanding the power of the Council to legitimize policies is the key to understanding the great American need for the UN in U.S. foreign policy, especially as the United States embarks on a new age of imperialism.

When the Council does not grant its approval, the option of unilateralism certainly remains viable and is often taken.

THE COUNCIL'S CONTRIBUTION TO THE U.S.-IRAQ COMPLEX

The conservative and liberal critics of the Council disagree on a lot, but they agree on the basic contention that the Council demonstrated its irrelevance by its failure to act over Iraq. Inaction, both say, violated the fundamental Charter obligation of the Council to “maintain or restore international peace and security” and, given the high stakes of the crisis, showed that when most needed, it cannot be relied upon. But to dismiss the Council for failing to be more active in the Iraq crisis is to imagine a straw-man version of the Council, pumped up on idealist and legalist steroids. It misses the point of the real purposes of the Council. Admittedly, the real objectives of the Council are more modest than the critics suggest and it might be a cause for complaint, but it is by these standards that the Council's contribution should be judged. A more realistic assessment of the Council's purpose reveals that its contribution was not negligible, even if it was less than both what the conservatives are afraid of and what the progressives aspire to.

On Iraq, the veto worked as intended—it provided an escape route, honorable or otherwise, for the Council in a situation where Great Powers were irreconcilably at odds. Even within the constraints of this basic inaction, the Council managed to contribute in three small ways to its general goals of maintaining international peace and stability. Each of the three ways is small relative to the stakes of the crisis, but each raises the political costs of unilateralism. Given the chasm that opened up between veto-holding states, this is the most that could be expected of the Council.

First, the Council has sufficient legitimacy in international politics that Washington found it advantageous to seek Council approval for the operation. This produced the first round of diplomatic maneuvering and reopened the debate over how to deal with Saddam Hussein in the fall of 2002. It also forced the United States to justify its position, particularly on weapons of mass destruction, and it now finds itself trying to live up to its public claims.

Second, many third-party countries, such as Canada and Turkey, looked to the Council to signal whether it was appropriate to support the mission. When the Council failed to approve the military solution to the Iraq problem, these countries (and a wide swath of public opinion) chose to stay on the sidelines. Had the Council acted differently, it is likely that many countries and publics would have acted differently also, and both the military and diplomatic challenges faced by the United States would have been lessened.

Third, the Council, by refusing to approve the operation, accomplished both of its (realistic but more modest) goals when Great Powers disagree: it reinforced the legal principles of the Charter on the use of force, and it slightly raised the political costs of unilateralism for the hegemon. This is the most that the Council can do relative to a Great Power.

On Iraq, the veto worked as intended—it provided an escape route, honorable or otherwise, for the Council in a situation where Great Powers were irreconcilably at odds.

It cannot be seriously claimed that the UN Security Council is a failure as an institution unless it effectively restrains the Great Powers from their military adventures, nor that Great Power disagreement in the Council chamber signals its irrelevance. This position is untenable because it misunderstands the basic structure of the Council and the political compromise that brought it into being. When the strong disagree on how to organize the system, then the Council, by virtue of the veto, wisely steps aside.

THE FUTURE OF U.S. FOREIGN POLICY

Seeing the Council in this light is important because it affects how American foreign policymakers assess U.S. interests in world politics. The liberal critics of the Council are right that it has neither the legal nor the military capacity to block American unilateralism; yet, they are mistaken that it is therefore wise to ignore it. Blocking American action is beside the point. What matters is how the UN affects the political calculations of the United States pursuing its preferred policies, and in most cases, it can affect the costs and benefits faced by American foreign policymakers. When the United States mobilize the legitimacy of the Council behind its interests, it becomes easier to win the support of third-parties, and the United States gains leverage in deflecting criticism. This may in reality be an illusion, as the conservative critics note, but as long as it is an illusion that *works*, then it is worth investing in. The value of legitimacy for American policies will rise, not fall, in the coming years if unipolar hegemony indeed emerges as the guiding principle of U.S. foreign policy. Hegemony, as is known from past experience, is more efficient and less costly when supported by both brute force and legitimacy.

As for the future of the UN, this more realistic reading of the Council suggests a great deal more continuity with the past than the critics are willing to admit. When the Great Powers agree, the Council can be empowered to work constructively to “restore international peace and security,” as it did on occasion in the 1990s. When they disagree, the Council will certainly sit idle, as it did through the cold war, sidelined by disagreements over the very questions that matter most. A period of energetic American military hegemony will not necessarily result in the obsolescence of the Security Council, since there is no incentive for other permanent

members to oppose the United States on *every* issue. Thus, there will be moments of Great Power consensus alongside moments of deadlock, and the Council will from time to time be found by the United States to be a useful venue. All in all, the future looks to be very similar to the past.

Notes

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³ Charles Krauthammer, "UN RIP," *Washington Post*, Jan. 31, 2003

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The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk

by Lawrence A. Kogan

INTRODUCTION—THE DEBATE SURROUNDING THE USE OF SCIENCE TO
ASSESS AND MANAGE PUBLIC RISKS TO HUMAN HEALTH AND THE ENVIRONMENT

The role of science in government assessment and management of public risks has increasingly become the subject of a heated transatlantic political debate that is likely rooted, in part, in the “deepening global economic integration”¹ and the continuing expansion and ascendancy of the EU on the world economic stage. While the contours of this debate appear bilateral in nature, however, the issues are truly international in scope, with potential legal, economic, and social ramifications for all WTO member governments and industries, including those of developing countries.²

The EU and the United States hold divergent views toward the usefulness of science as a tool to understand and address the uncertainties surrounding risks to human health and safety and the environment posed by the activities engaged in and the innovations produced by modern life. In both the United States and the EU, government regulators have had to address increasing public concerns about the safety of food, health and environmental hazards associated with chemical emissions, and chemical residues generated by products. More recently, regulators have had to consider growing public concern over the possible impact of climate change (global warming) on the environment and human health.³ In many respects, public reaction to the manner in which regulators have responded (or not responded) to analogous popular concerns in the past has prompted regulators to be more sensitive to public perceptions of risks of possible harm in the future, no matter the realities. The problem is that such a practice may trigger other potential risks that may be even greater than the risks perceived.⁴ It is thus arguable that the once substantive debate over the role of science in assessing and managing possible risks is gradually being controlled by policymakers.

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In the case of the United States and the EU, these disparate public views toward the role of science in risk assessment and risk management have resulted in divergent regulatory approaches. It is, furthermore, arguable, that these relative views are shaped, at least in part, by distinct underlying social, economic, and political values, reflecting different societal fears and thresholds for risk and “quality of life” notions.⁵ These societal norms or cultural preferences, which have been transposed at the national and regional levels through the establishment of institutional legal frameworks (legislation and regulations) and commercial adoption of less formal technical product and safety standards, have increasingly come into conflict at the level of international trade. As reported in a recent *National Journal* article:

International commerce once comprised mainly of value-free economic transactions involving largely interchangeable commodities and manufactured products. Now, it increasingly involves trade in goods and services that are often laden with ‘ideological content,’ according to a [November 2003] European Union discussion paper, ‘The Emergence of Collective Preferences in International Trade’...In other words, Americans would argue that the trade in genetically modified foods, for example, should be affected only by the scientific facts, whereas Europeans would argue that the whole idea of such modifications makes them queasy...It is perceived threats to such collective preferences that drive much of the anti-globalization movement today. Indeed, the greatest challenge facing the international trade policy community in the years ahead, predicted E.U. Trade Commissioner Pascal Lamy in a March 5 speech in Brussels, may be ‘how we can organize market-opening in such a way as to uphold the varying collective preferences of different societies.’⁶

This author posits that, in some cases, these preferences may rise to the level of trade protectionism—namely through the promulgation of disguised health and safety and environmental regulatory barriers to market access.⁷

In general, the prevailing view within Europe is to take a “better safe than sorry” or precautionary approach to managing a growing number of possible but uncertain health and environmental hazards. This regulatory mindset or philosophy, known more formally within Europe as the Precautionary Principle,⁸ dismisses the need to identify an ascertainable and measurable risk of particular harm or to establish a specific causal link between suspect products, processes or substances and any damage that might ultimately result there from. Instead of focusing on specific empirical exposure data and statistical analyses, government regulators charged with addressing significant public risks (risk managers) focus *a priori* on the inherently dangerous characteristics or intrinsic properties of a general group of products and substances. These characteristics are collectively identified and set forth pursuant to carefully defined “risk profiles,” which are essentially classifications of similar “risk types.”⁹

Conventional risk assessment serves only a minimal function within this type of precaution-based regulatory system, given the widespread belief that risk assessment, as an empirical process, reflects only the current state of limited human scientific knowledge—it cannot account for the uncertainties surrounding most human activities. Hence, when the possibility for significant irreversible harm is great, a

lack of scientific certainty as to cause and effect, likelihood of occurrence or timing, or of actual evidence of harm, does not preclude EU regulators from taking precautionary measures to prevent the harm from materializing in the first place. It has been argued that Europe's resort to the precautionary principle reflects an institutional and cultural aversion to risk.¹⁰ Whether or not this is true, it imposes on industry (foreign as well as domestic) a considerable legal and commercial burden of demonstrating that a product or substance is safe or harmless, which is tantamount to the imposition of a negative burden of proof or a zero risk threshold.

The EU Commission believes strongly in the need to use a precautionary approach to achieve a "high level of health and environmental protection."¹¹ Its goal has been to establish such an approach as a formal precautionary principle within an international legal framework that governs the assessment and management of global risks to the environment and human health and to establish it as a WTO treaty norm and as a norm of customary international law. According to European proponents of this philosophy, although there is "some divergence in the terminology used (principle or approach or measure) in the various international conventions and agreements [it] is of no legal significance."¹²

The EU Commission believes strongly in the need to use a precautionary approach to achieve a "high level of health and environmental protection."

Within the United States, the prevailing regulatory view, with certain limited exceptions, is to identify and evaluate health and environmental risks in an ad hoc manner¹³ depending on the type of risks faced and the groups potentially affected. It is common practice to then address risks on the basis of their probability of occurrence and the likelihood that they may inflict serious actual harm. These factors are determined, in large part, from the results of an empirically driven and objective science-based risk assessment that is performed with respect to a particular product or substance (not process). The risk assessment identifies the nature and significance of the particular risks, the magnitude and severity of known and/or uncertain potential harms, the degree and certainty of human exposure to such harms and the vulnerability of the various groups (populations) so exposed.¹⁴ Where there are profound uncertainties as to any of these factors, estimates and assumptions (safety factors)¹⁵ are employed that incorporate an appropriate degree of precaution.

Depending on the results of the risk assessment and the judgment of risk managers, precaution may again be employed through the selection of a suitable risk management framework. Finally, certain regulatory proposals, prior to publication, are then subject to another level of review, namely an economic cost/benefit analysis (an equity-balancing test) aimed to determine whether the chosen approach "maximizes net-benefits, including potential economic, environmental, public health and safety and other advantages."¹⁶ Under certain statutes, "the level of precaution is reflected [yet again] in the forgone economic benefit from the [substance]

or product and/or high cost of control from decisions to ban or limit its use relative to the health benefits gained.¹⁷ The U.S. risk-based regulatory system does not recognize the existence of a formal precautionary principle.¹⁸ Consistent with WTO jurisprudence, although the United States acknowledges that governments may lawfully employ precautionary measures under certain limited provisional conditions, it does not consider the precautionary principle to be either a WTO treaty norm or a general norm of customary international law.

The U.S. risk-based regulatory system does not recognize the existence of a formal precautionary principle.

These divergent¹⁹ views form the basis of a political, legal, economic, and social debate toward the definition and role of science in WTO treaty law and within public international law, generally, that will have significant implications for international trade. In particular, it will determine the extent to which governments must balance their need to assess and manage public risks to human health and safety and the environment with their need to help facilitate international trade flows. This paper aims to highlight how this debate is being shaped by the evolution of the precautionary principle, a European-based social and environmental norm being promoted by the EU Commission in international fora, the debated status of the precautionary principle within public international law, and its impact on international trade.

THE NATURE AND CONTEXT OF GLOBAL HEALTH AND ENVIRONMENTAL CONCERNS

The recent discovery, this past December, of the first documented case of mad cow disease in the United States caused many people to question the safety of U.S. beef and the reliability of the U.S. beef inspection system. These concerns were largely based on what was perceived to be the inadequate response of European governments to a more pronounced “mad cow” crisis that had swept Europe during the 1980s.²⁰ Such thinking was understandable in light of other reports about beef safety issued by the European Commission and consumer and environmental groups. Such reports have highlighted the potential but uncertain risks posed to our endocrine systems by the synthetic hormones injected into cows to enhance growth and milk production.²¹ They have also discussed the potential but uncertain risks posed to our immune systems by the antibiotics administered in cattle feed rather than therapeutically to maintain a herd’s health and to enhance livestock growth.²² There was no mention, however, that the science underlying these reports was less than conclusive or that the findings were the subject of debate within the scientific community.²³ Even if one were inclined to give up beef consumption to avoid these risks, one would still encounter different potential health risks related to other foods, such as chicken and seafood.²⁴

There are also the potential but uncertain future benefits and risks to human health and the environment associated with new food processing techniques, such as genetic engineering (biotechnology).²⁵ These new techniques are being used to grow heartier, insect-resistant wheat, corn, soy, and produce that do not require the volume of pesticides currently in use to protect against disease and infestation. Also, the use of such techniques has resulted in more bountiful harvests that could, along with the technology, be exported abroad in the course of international commerce or as a component of international food aid administered to nations stricken by endemic food shortages. However, as the technology of agricultural biotechnology rapidly expands, concerns about its safety and effects on the surrounding environment have become commonplace in Europe and have been exaggerated by civil society to induce consumer fear. Although scientists (risk assessors) at both the USDA/FDA and the European Commission, Directorate General for Health and Consumer Safety have determined that there is no known risk to human health posed by genetically modified foods,²⁶ national policymakers (risk managers) from these governments have embraced different approaches toward regulating them. It is fair to conclude that, in the case of Europe, scientists, influenced by policymakers and civil society, seem to be more concerned about the uncertain risks that they have not yet identified and are unaware of than those risks which they can effectively manage.²⁷

Divergent views on the definition and role of science in WTO treaty law will have significant implications for international trade.

We also encounter in our daily lives risks posed by non-food items. During the past decade, numerous reports have theorized about how many of the everyday non-food products we use contain or are produced with potentially harmful chemicals from which residues may be absorbed by human tissue during usage. Such products include children's toys, computers, electrical and electronic equipment, brominated flame retardants, clothing, and cosmetics.²⁸ Reports have also indicated that traces of some of the more specialized chemicals that are produced or used as intermediates in industrial processes have been found in and thought to pose unknown risks to the local, regional, and global ecosystems within which rare animal and plant species reside.²⁹ In addition, it is alleged that when products containing toxic substances are disposed of in landfills, such substances leak into the soil and underground aquifers.³⁰ What is not discussed is that the scientific findings underlying these reports are less than conclusive. And, given the lack of international consensus concerning the nature and extent of such unknown risks from a scientific standpoint, national policymakers from the United States and the EU, in light of divergent public perceptions, have pursued different approaches toward assessing and managing them.

ASSESSING AND MANAGING HEALTH AND ENVIRONMENTAL RISKS

Risk Analysis

Although empirical uncertainties remain with respect to the identification and evaluation of the various risks noted above, scientists continue to expand their knowledge and understanding of them. They do so by engaging in a formal internationally recognized multi-step process known as risk analysis.

[T]he development of a formal risk analysis provides a conceptual and transparent framework for evaluating the public health benefits associated with the selection of various policy options. The risk analysis paradigm includes three elements—risk assessment, risk management and risk communication—and allows regulatory officials to focus finite resources on those hazards that pose the greatest risk to public health.³¹

In general, an objective risk assessment is first performed and scientists apply what they do know about the impact of specific products and substances on human health and the environment from actual data gathered from the field or calculated statistical extrapolations, rather than from any administrative presumption of hazard.

National policymakers then rely upon these tentative but evolving scientific assessments to devise optimal strategies that can help to manage those risks in both the short and long term. The management of risks is part science and part political decision-making. It is therefore often based on a balancing of the social, economic, and environmental costs and benefits associated with each of the alternative strategies considered and each of the constituencies potentially affected. For this reason, the process of risk management should be a participatory and transparent one that takes into account and reflects the views of multiple stakeholders.³² However, in reality, this is not always the case.

When national or regional policymakers determine that the potential health or environmental risks posed by particular products, substances or activities necessitate action, they usually decide to develop a legal framework to manage and communicate those risks in a manner acceptable to society. The type of approach selected—formal regulation and/or informal product standardization—depends on the relative values assigned by policymakers to each of the factors noted above and each society's relative perceptions of and thresholds for risk. It also depends, in part, on how the general public responds to the regulators' communication³³ of the risk assessment findings and the strategies they have chosen to manage them. While the draft risk analysis guidelines of the Codex Alimentarius Commission state that "precaution is an inherent element of risk analysis,"³⁴ it is employed differently by the United States and the EU.

Both the United States and the EU, to various degrees, strive to prevent emerging health and environmental risks before they can arise. Yet, they both recognize it is not always possible to identify and quantify such risks in advance. A cause and effect relationship linking the source of a potential hazard (product, substance or activity) and the harm that it *may* later produce often cannot be established. Even "when

exposure to environmental hazards causes immediate and obvious harm, scientific uncertainty about cause and effect relationships is minimal.³⁵ And, in other cases where a cause and effect relationship has been tentatively established, it is sometimes difficult to estimate or predict the magnitude and severity of the consequences that might flow there from.³⁶ In light of these unknowables, many commentators have argued that advanced and preventive measures must be taken.

During the past ten years, the EU and its member states have formally adopted a precaution-based approach to risk analysis that focuses mostly on actions that can be taken *before* an emerging risk of perceived rather than actual magnitude and severity can be conclusively identified or quantified. Such an approach prefers not merely to address (contain, manage or eliminate) extant health and environmental risks, namely those that have already been identified or have caused noticeable and perhaps even serious harm. Reflecting a “better safe than sorry” philosophy or ethos, the approach adopted within Europe has emphasized the limitations of human knowledge and has focused on the uncertainties surrounding scientific prediction.³⁷

The EU Commission has increasingly employed precaution when assessing and managing what it perceives to be possible future significant public risks, even though the draft Codex risk analysis guidelines state that “*there should be a functional separation of risk assessment and risk management*” (emphasis added).³⁸ This separation is intended “to ensure the scientific integrity of the risk assessment, to avoid confusion over the functions to be performed by risk assessors and risk managers, and to reduce any conflict of interest.”³⁹ In the process, the EU has sought to rework the current international paradigm for risk analysis, and consequently, to redefine the prevailing U.S. and international legal framework adopted by the WTO that focuses on the role of empirical science (the “knowables”) in conducting “risk assessments.” At the most fundamental level, how the United States and the EU respectively view the role of science in the process of risk analysis can be understood as reflecting a core philosophical difference over whether a glass filled with water halfway is either half full or half empty (positivism vs. negativism).

*Risk Assessment*⁴⁰

According to the United States Department of Agriculture, risk assessment is defined as

*[A] scientifically based process of evaluating hazards and the likelihood of exposure to those hazards and then estimating the resulting public health impact. It provides a scientific framework for understanding the impact of a wide variety of variables... Risk assessments may be qualitative, semi-quantitative, or quantitative. Qualitative assessments usually identify a high, medium, or low level of risk. Semi-quantitative assessments may be used to prioritize risks in relation to one another. Quantitative assessments are often used to identify and evaluate food safety control points or estimate the benefits of various intervention strategies. (emphasis added)*⁴¹

In general, a risk assessment looks at several key issues. First, it considers those factors that give rise to a public health risk. Second, it considers the likelihood that

such harm will occur. Third, it considers the amount of harm (adverse health effects) that could occur. Fourth, it considers the amount of harm that can be reduced through the use of intervention strategies.⁴² The final phase of a risk assessment is referred to as “risk characterization.” At this stage, “all of the information gathered during the risk assessment process is integrated to show who is at greatest risk, which variables contribute most to the risk (e.g., food borne illness), and which intervention strategies would lead to the greatest reduction of risk.”⁴³

The USDA definition of risk assessment is similar to that articulated by the Codex Alimentarius Commission.⁴⁴ While the Codex definition of “a risk assessment requires that information be organized in specific ways, it does not [however] require any specific scientific evaluation methods.”⁴⁵ Rather, the steps of risk assessment may be applied differently depending on the type of products being evaluated.

The Codex definition of risk assessment requires that uncertainties

having an impact on the risk assessment should be explicitly considered at each step in the risk assessment and documented in a transparent manner. Expression of the uncertainty or variability in risk estimates may be qualitative or quantitative, but should be quantified to the extent that is scientifically achievable... The report of the risk assessment should indicate any... uncertainties and their impact on the risk assessment... The responsibility for resolving the impact of uncertainty on the risk management decision lies with the risk manager, not the risk assessors. (emphasis added)⁴⁶

In at least once case (e.g., chemical risk assessment), the U.S. government has determined that the type of scientific risk assessment traditionally conducted may need to be revised to take into account other factors from evolving science.

[I]t may be necessary to move beyond single exposure pathways or single chemical assessments and to explore the accumulation of risk... Aggregate exposure assessment involves the analysis of multiple pathways and routes of exposure such as food, drinking water, ambient and indoor air for a single agent or stressor. Cumulative risk looks at how multiple agents or stressors with a common mode of action interact to pose risk to health or the environment.⁴⁷

The United States Environmental Protection Agency, for example, in seeking to reduce uncertainties in the information used for environmental decision-making, has gone beyond focusing on chemical-specific impacts. It recently unveiled a proposed framework to facilitate development of methods to assess or control the effects of chemical mixtures and general stressors on human health and ecosystems,⁴⁸ taking into account chemical exposures that occur cumulatively⁴⁹ and simultaneously.⁵⁰

The EPA’s proposed framework, as well, is consistent with the Codex guidelines, which provide that

Risk assessments should be based on realistic exposure scenarios, with consideration of different situations being defined by risk assessment policy. They should include

consideration of susceptible and high-risk populations groups... [C]umulative and/or combined adverse health effects should be taken into account in carrying out risk assessment, where relevant. (emphasis added)⁵¹

The U.S. and Codex definition of what a science-based risk assessment entails is currently consistent with WTO law, as has been interpreted by the WTO dispute panels and the Appellate Body. The relevant WTO risk assessment jurisprudence is briefly discussed later in this paper. Notwithstanding these WTO rulings and the definition draft adopted by Codex, however, the EU Commission has found that the process of scientific risk assessment as so defined has failed to adequately address scientific uncertainties. In a report recently adopted by the Commission's Scientific Steering Committee in April 2003,⁵² the Commission proposed to enlarge the scope of scientific risk assessment, with respect to new risks⁵³ similar to those described above, so that it takes into account quality of life considerations.⁵⁴ According to the report, quality of life considerations such as risk perception help ensure human "well being," whether or not the risks are real.⁵⁵

The EU Commission has found that the process of scientific risk assessment as so defined has failed to adequately address scientific uncertainties.

The differences in how the United States and the EU have each defined and implemented "risk assessment" are real (i.e., it is more than just semantics), as is the likelihood that they will increasingly give rise to barriers to international trade if they are not resolved. A joint program initiated by the Organization for Economic Cooperation and Development (OECD) and the International Program on Chemical Safety (IPCS) has endeavored to resolve these differences through dialogue, with the ultimate objective of harmonizing the generic terms used in the process of chemical risk assessment. However, based on the findings of a recently released report, resolution is not likely to come easily anytime in the near future.⁵⁶

Risk Management

The risk management phase involves using all of the information gathered during the [risk] assessment to evaluate policy options. Risk managers consider the results of the risk assessment in the context of other policy considerations such as cost, feasibility, and the social impact of implementing certain policies. This phase identifies, selects, and implements measures that can be applied to reduce the risk identified during the assessment.⁵⁷

According to the draft Codex risk analysis guidelines,

risk management should follow a structured approach including preliminary risk management activities,⁵⁸ assessment of risk management options, monitoring and review of the decision taken. [Risk management] decisions should be based on risk assessment, and taking into account, where appropriate, other legitimate factors

relevant for the health protection of consumers and for the promotion of fair practices in food trade... (emphasis added)⁵⁹

As interpreted by the U.S. government, this means that, “When considering the role of precaution *in risk management*, it is appropriate for policy makers and the public to inquire about the degree of precaution embedded in the risk assessment. If precaution is taken to an extreme, it can be very harmful to technological innovation” (emphasis added).⁶⁰ In other words, “the proper degree of precaution to be *exercised in risk management* cannot be determined unless risk managers understand the degree of precaution that scientists have already embedded in the risk assessment” (emphasis added)⁶¹ through the use of safety margins or uncertainty factors to characterize a “plausible” upper bound.⁶²

By contrast, the EU Commission argues that precaution should be applied separately by risk assessors *and* by risk managers.

Precaution should be applied both by the scientists completing the risk assessment, on the basis of science policy guidelines, and by the regulatory authorities themselves who have to draw the necessary implications. *Both risk assessors and risk managers attribute to any given time different subjective values to available scientific data, the risks, and the nature of possible adverse effects. Precaution applied by scientists in a risk assessment does not, therefore, eliminate the need for risk managers to apply precaution to the same agent, activity, or process when taking regulatory action. Risk assessors’ technical precaution (when developing hypotheses, modeling and interpreting evidence and data) is, therefore, distinguishable from the risk managers’ regulatory precaution (when taking normative regulatory action). This proposition is forcefully denied by the United States internationally, basically for reasons of economic competition, trade policy consideration, and general litigation and negotiation tactics.* (emphasis added)⁶³

They reason that this is necessary because “one of the functions performed by the precautionary principle is to put constraints on how regulators act under uncertainty. This entails both *ex ante* and *ex post* control of measures taken to regulate risk.”⁶⁴

A key issue of contention between the United States and the EU apparently concerns the role and scope of “preliminary risk management activities” in the risk analysis process, as defined by the Codex risk analysis guidelines.⁶⁵ Among the activities included, the “establishment of a risk profile” and the “ranking of the hazard for risk assessment and risk management priority” appear to constitute the major sticking points. While the U.S. government restricts its consideration of these activities to the risk management stage only, the EU Commission considers those activities as applicable to *both* the risk assessment *and* the risk management stages.

Many within the EU debate the role served by classical risk analysis as well as the limited usefulness of current risk assessment procedures in directing regulatory decision-making. Such advocates have questioned these conventions on several grounds. First, they question “whether technical risk estimates [really] represent ‘objective’ probabilities of harm or reflect only conventions of an elite group of professional risk assessors that may claim no more degree of validity or universality

than competing estimates of stakeholder groups or the lay public.”⁶⁶ Second, they question the role of the public in determining thresholds for risk. “Since it is the people... that are affected by the potential harm of technologies or other risk-inducing activities,” these advocates argue that “it should be the [public’s] prerogative to determine the level of risk that [its members] judge tolerable for themselves and their community.”⁶⁷ In other words, they propose that individual consumer/citizen risk perceptions (fear factor) should be considered as integral to the process of evaluating *and* managing risks.

Third, these advocates question the manner in which the professional risk community has traditionally assessed scientific uncertainty. They claim that this term “implies a portfolio of different aspects [or components] that are often neglected or amalgamated in risk analysis”⁶⁸ but which should, as a matter of prudence, be analytically distinguished. In this regard, one EU legal commentator has defined scientific uncertainty to exist “when there is no adequate theoretical or empirical basis for assigning possibilities to a possible set of outcomes.”⁶⁹ He notes further that, “In the strict sense, even if there is relatively high confidence about the possible set of outcomes, there is no basis to confidently assign probabilities to these outcomes.”⁷⁰ In his estimation, “uncertainty... [may arise] due to the novelty of the substance or activity concerned or because of complexity or variability in its context.”⁷¹

Many within the EU debate the role served by classical risk analysis as well as the limited usefulness of current risk assessment procedures in directing regulatory decision-making.

Fourth, those calling for a new risk analysis paradigm question the conventional methods or frameworks chosen to address uncertainties and manage risks. In a world facing more risks and uncertainties than any one society can handle at the same time,⁷² these proponents complain that current “risk reduction policies have been designed [only] in proportion to the severity of the potential effects [and that] [s]everity has been operationalized [merely] as a linear combination of magnitude of harm and probability of occurrence.”⁷³ They refer to this approach as a “risk-based” management strategy because it “relies on numerical assessments of probabilities and potential damages.”⁷⁴ Considering the different types of uncertainties, they recommend new management strategies that make “the social system more adaptive to surprises, and at the same time, allow only those human activities or interventions that can be managed even in extreme situations (regardless of the probability of such extremes to occur).”⁷⁵ They refer to this type of approach as a precaution-based management strategy, “implying the prudent handling of uncertain or highly vulnerable situations.”⁷⁶

Fifth, advocates of a new risk analysis paradigm question how better to incorporate fair and open procedures for promoting public deliberation of common and divergent public values and preferences into *both* the risk assessment *and* risk

management processes.⁷⁷ While the United States and the EU agree that such a procedure is indispensable to managing public risks, however, the EU does not wish for such an open and inclusive process to vest industry with the ability to work against precaution. This concern may relate to what Brussels perceives as the U.S. business lobby's successful exploitation of the U.S. Administrative Procedures Act (APA), which generally provides stakeholders and the public with the opportunity to comment prior to the government's adoption of a federal regulation.⁷⁸ Many EU regulators believe that U.S. industry has skillfully utilized the APA process to ensure that U.S. regulators conduct an economic cost-benefit analysis,⁷⁹ which serves to protect U.S. industry interests against the possible adoption of stringent economically significant precaution-based regulations.^{80,81} According to one EU legal commentator, "[c]ost-benefit analysis and other influences can lead to undue delays in precautionary action and further losses."⁸²

THE PRECAUTIONARY APPROACH/PRECAUTIONARY PRINCIPLE AS A NEW INTERNATIONAL LEGAL AND REGULATORY STANDARD

Proponents of the precaution-based management strategy or precautionary approach who have sought to establish a more formal precautionary principle⁸³ find fault with the public policy of quantifiable risk embraced within the United States.⁸⁴ They explain that the concept of "risk is actuarial in spirit" and the ability to insure oneself against a particular kind of risk is acutely dependent upon the availability of relevant actuarial data.⁸⁵ When extended to "environmental decision-making, the concept of risk retains the connotation of something that can be defined and quantified, and hence managed."⁸⁶ The problem, as proponents see it, however, is

that the language of risk [simplifies] most human-environment interactions as harmless or positively beneficial. Risk is thought to be the exception, not the rule, in human engagements with nature. [It is believed that risk] is something that one can guard against without upsetting underlying philosophies of development, consumption or resource use.⁸⁷

To the contrary, these advocates emphasize how a precautionary approach/precautionary principle "requires a different kind of science."⁸⁸ Unlike the concept of risk, it displays a greater sensitivity to scientific uncertainty,⁸⁹ human ignorance,⁹⁰ and public perceptions.⁹¹ This approach requires that policymakers take preventive action in all cases to avoid significant possible harm to the environment and human health, even in the absence of any causal link or proof of likelihood of occurrence. In other words, it imposes a broad, affirmative, forward-looking, legally binding "duty of care" upon policymakers not to permit, and upon individual economic actors not to engage in, activities currently that may potentially trigger unascertainable but serious risks of harm in the future.⁹² According to at least one commentator, this amounts to a "duty of positive obligation that would require decision-makers to be fully informed about the possible consequences of environmental change" (emphasis added).⁹³

As explained by another commentator,

The principle states in brief that damage to the environment should be avoided in advance, implementing a duty of care on the part of policymakers. As with risk, the principle emphasizes prevention rather than cure. But precaution seems to urge something more than mere prevention. It demands heightened caution in the face of uncertainty, to the point of favoring inaction when the consequences of action are too unclear. And unlike risk, which invites calculated action, precaution implies a greater need for judgment and, where necessary, restraint. (emphasis added)⁹⁴

In essence, “a precautionary approach asks how much harm can be avoided rather than asking how much is acceptable.”⁹⁵ Other commentators view the concept of precaution as going beyond science.

[Precaution] is not simply the prevention of manifest or predicted results that have been scientifically proven. Rather, the precautionary principle goes beyond the notion of prevention in the sense that it insists that policymakers move to anticipate problems before they arise or before scientific proof of harm is established. (emphasis added)⁹⁶

This has been interpreted to mean that an economic actor would be deemed to have not satisfied its duty of care “even if best practice and appropriate regulatory rules [were] followed.”⁹⁷ Although European industry had, for a time, persuaded regulators in many Community member states to allow a “strategy of ‘best available techniques *not entailing excessive costs*’ (BATNEEC)...[this] cost justification element [has] steadily [been] restricted. If the technology is available, or can be developed in a reasonable time, [the current prevailing view is that] it should be deployed.”^{98, 99}

Furthermore, the precautionary principle shifts the regulatory burden of proof, consisting of both the burden of producing evidence and the burden of persuasion,¹⁰⁰ from the government concerned about the possible occurrence of a serious harm to the manufacturer or operator whose activity may potentially give rise to it. “Precaution means, in effect...that one is guilty until proven innocent when tampering with the environment in manifestly risky ways.”¹⁰¹ In other words,

the many industrial and technological products, substances or processes (additives, contaminants, medicinal products, veterinary drugs and growth promoters, GMOs, etc.)...[that require regulatory pre-approval before gaining access to EU markets]...are generally deemed to be dangerous unless and until the interested manufacturer carries out the necessary scientific work and demonstrates to the satisfaction of the authorities [their] safety or lack of harm [harmlessness].¹⁰²

In addition, the standard of proof imposed by regulators in regard to such products or substances under European Commission law requires the manufacturer to “demonstrate safety ‘adequately or sufficiently,’ which is comparable to the ‘proof beyond reasonable doubt’ standard applied in common law jurisdictions,”¹⁰³ such as the United States, in *criminal* cases.

In the event certain industry actors fail to satisfy this affirmative duty of care—to exercise due diligence—and that failure subsequently causes significant damage

to the environment, that actor can be subject under the new EU polluter's pay principle¹⁰⁴ liability directive to strict legal liability for such environmental damage.¹⁰⁵ "Businesses primarily affected are those involved in traditionally polluting activities, such as plants releasing heavy metals into water or into the air, installations producing dangerous chemicals, landfill sites, and incineration plants."¹⁰⁶

The new paradigm envisioned by the EU Commission and other proponents of the precautionary principle has been developed into a legal policy framework. That framework is intended to serve as a general model of precautionary risk regulation and to provide guidance to European policymakers seeking to implement the precautionary principle.

[T]he thematic network PrecauPri [is] aimed at devising a policy framework for the application of the Precautionary Principle which provides guidance to European policymakers with respect to European and international risk governance. In a fruitful cooperation of social scientists specialized in risk and uncertainty issues, natural scientists specialized in chemical risks, and a legal scholar with special expertise in risk regulation the project team developed a general model for the implementation of precaution in European risk regulation. The model is understood as a strategic response to the most prominent challenge of risk reduction and management for the protection of human health and the environment which accompanies the European integration process." (emphasis in original)¹⁰⁷

Among the milestones this project claims to have achieved, "it defines the precautionary principle as a general principle employed in the [pre-risk assessment] screening of threats for properties of seriousness or uncertainty in order to determine their subsequent treatment in regulatory appraisal and management."¹⁰⁸ In addition, it "identifies Precautionary Appraisal as a specific approach to appraisal, adopted in cases where screening has identified a lack of scientific certainty."¹⁰⁹ Furthermore, it defines and concretizes scientific uncertainty as one of four key challenges dealing with contemporary threats; the other major issues are identified as seriousness, complexity and socio-political ambiguity."¹¹⁰

The seriousness with which the EU Commission and environmental groups view their efforts to establish the precautionary principle as an absolute international legal standard in multiple fora, notwithstanding the objections of other WTO member governments, should be neither underestimated nor doubted. In fact, a leading precautionary principle advocate, who also serves as a part-time adviser to the Commission, has recently set forth Europe's thinking on this matter.

The EU is attempting to establish a radical new approach to science and technology based on the principle of sustainable development and global stewardship of the Earth's environment. . . . The precautionary principle is designed to allow government authorities to respond preemptively, as well as after damage is inflicted, with a lower threshold of scientific certainty than has been the rule of thumb in the past. 'Scientific Certainty' has been tempered by the notion of 'reasonable grounds for concern.' The precautionary principle gives government the flexibility to respond to events in real time, so that potential adverse impacts can be forestalled or reduced while the suspected

causes of harm are being evaluated. At the heart of the precautionary principle is a radical divergence in the way Europe has come to perceive risks compared to the U.S. In Europe, intellectuals are increasingly debating the question of the great shift from a risk-taking age to a risk-prevention era... The EU hopes that by integrating the precautionary principle into international treaties and multilateral agreements, it will become the unchallenged standard by which governments oversee and regulate science and technology.¹¹¹

According to these advocates, “[the] precautionary principle is deeply at odds with the traditional Enlightenment idea about science.”¹¹² That model entails risk taking and is enshrined within the WTO agreements and within the principles established by international bodies such as the Codex Alimentarius.

HISTORICAL ORIGINS OF THE PRECAUTIONARY PRINCIPLE AND ITS EVOLUTION IN INTERNATIONAL ENVIRONMENTAL LAW

The origins of the precautionary principle can be traced back to the German *vorsorgeprinzip*, which means literally “forecaring principle” or simply “care.” It is one of five fundamental principles recognized in German law as constituting the basis for environmental policy.¹¹³ It is related to the German clean air environmental policies of the 1970s that called for *vorsorge* or prior care, foresight, and forward planning to prevent harmful effects of pollution.¹¹⁴ The German *vorsorgeprinzip* introduced

a distinction between human activity with dangers of catastrophic consequences (nuclear apocalypse was then high on the list) and which must be prevented at all costs (Gefahrenvorsorge) and human activity with potentially harmful consequences (Risikovorsorge), in which case, preventive measures should be investigated and taken in case of sufficiently high risk of sufficient harm.¹¹⁵

In other words,

[A] difference [was] made between human behavior which causes dangers on the one hand or risks on the other hand. When dangers are at stake, the government is to prevent these by all means (Gefahrenvorsorge). If there is only a risk of effects occurring, the possibilities of risk prevention have to be investigated and if the risk is high enough, preventive measures can be ordered (Risikovorsorge). (emphasis added)¹¹⁶

Germany introduced the concept of precaution at the international level during a series of conferences on the protection of the North Sea held at Bremen (1984), London (1987), the Hague (1990) and Esbjerg (1995).¹¹⁷ By the second of such conferences, the term precautionary approach appeared as a decision approach that may require “action to control inputs of the ‘most harmful substances (...) even before a causal link has been established by absolutely clear scientific evidence.’”¹¹⁸ By 1990, this same approach was referred to as the precautionary principle.” And by the fourth conference, the Esbjerg Declaration was adopted, recommending that the precautionary principle also be applied where fisheries management policies are concerned.¹¹⁹

The most widely recognized expression of the precautionary principle is contained in Principle 15 of the Rio Declaration on Environment and Development, as adopted at the United Nations Conference on the Environment and Development (otherwise known as the Earth Summit) convened in Rio de Janeiro during 1992.

It provides that

in order to protect the environment, the precautionary approach shall be widely applied by all States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹²⁰

Some commentators and governments have interpreted this to mean that a precautionary approach is called for even if there is no guarantee that adoption of a given measure would prevent serious environmental harm. They believe that

scientific certainty often comes too late to design effective legal and policy responses for preventing potential environmental threats. Most environmental issues involve complex analyses of scientific, technical, and economic factors. [There is] rarely anything approximating perfect knowledge when lawmakers are asked to make decisions whether to respond to a specific threat.¹²¹

Plainly stated, although we may lack scientific certainty about the magnitude or nature of an environmental threat, we should err on the side of caution.

European legal authorities argue that the precautionary principle has become a norm in regional environmental law within the EU.

According to some commentators, the U.S. government recognized the legal difference between the concepts precautionary approach and precautionary principle early on and endeavored at the Earth Summit to forge a compromise between them. The then and current prevalent U.S. view is that the lack of clear scientific evidence of a causal relationship between human behavior and the greenhouse effect does not justify taking expensive measures.¹²²

Today, European legal authorities argue that the precautionary principle has become a norm in regional environmental law within the EU. This is reflected within a document entitled *Communication on the Precautionary Principle* prepared by the European Commission.¹²³ The precautionary principle, for example, has received European endorsement in various treaties, including the Maastricht Treaty forming the EU¹²⁴ and the 1992 United Nations Economic Commission on Europe Helsinki Convention on the protection and use of transboundary watercourses and international lakes.¹²⁵ At least one commentator has noted that the definition of the precautionary principle employed by the Helsinki Convention is broader in scope than that employed by the Rio Declaration, “as it does not limit itself to serious or irreversible damage.”¹²⁶

The precautionary principle was incorporated into an international action plan at the 1996 international conference “Codifying Rio Principles in National Legislation.” At the conference, a formal declaration was crafted—known as “The Hague Declaration on Principles of Environmental Law”—which included the precautionary principle as one of the Rio Declaration principles that needed to be incorporated into national and international legal systems.¹²⁷

An explicit way to reflect the principles as such in law is through codification of the principles themselves... The substantive principles which are to be incorporated both into national law systems and policies, include but are not limited to the following principles... the precautionary principle (Principle 15)... Individual states bear the main responsibility for the incorporation of the principles into their own national legal systems, bearing in mind their own legal, cultural and political structure. However, regional cooperation is strongly encouraged. (emphasis added)¹²⁸

The precautionary principle/precautionary approach, furthermore, is directly or indirectly referenced in at least six multilateral environmental agreements.

1. *The United Nations Framework Convention on Climate Change and the Kyoto Protocol.* This convention is to be implemented by the Kyoto Protocol, which has not yet entered into force. The Kyoto Protocol states in its preamble that it is to be “guided by Article 3 of the Convention.”¹²⁹ Article 3.3 of the Convention provides that “the Parties should take *precautionary measures* to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects” (emphasis added).¹³⁰

2. *The Cartagena Protocol on Biosafety and the United Nations Convention on Biological Diversity.* Perhaps, the broadest and most detailed expression of the precautionary principle is contained within the Cartagena Protocol on Biosafety,¹³¹ which is intended to implement Article 8(g) of the Convention on Biological Diversity.¹³² The Protocol recently entered into force during September 2003. The Protocol refers to the *precautionary approach* within several of its provisions. The Preamble states: “Reaffirming the *precautionary approach* contained in Principle 15 of the Rio Declaration on Environment and Development...”¹³³ Article 1 states, “In accordance with the *precautionary approach* contained in Principle 15 of the Rio Declaration...”¹³⁴

Article 10(6) speaks to the issues of inadequate knowledge and causation that are emphasized by the German *vorsorgeprinzip*. It states that

Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question... in order to minimize such potential adverse effects.¹³⁵

3. *The Stockholm Convention on Persistent Organic Pollutants (POPs).* The POPs Treaty, which will enter into force on May 17, 2004,¹³⁶ contains various references to

precaution. Its Preamble states, "...Acknowledging that *precaution* underlies the concerns of all Parties and is embedded within this Convention..."¹³⁷ Article 1, setting forth the Convention's objective, provides, "mindful of the *precautionary approach* as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants."¹³⁸

Article 8, entitled, "Listing of Chemicals in Annexes A, B and C" provides generally that "...the Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide in a *precautionary manner* whether to list the chemical and specify its related control measures..."¹³⁹

4. *The Rotterdam Convention on Prior Informed Consent Procedure.* The Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals and Pesticides in International Trade (the 'PIC Procedure') entered into force on February 24, 2004.¹⁴⁰ It requires Treaty Parties to exchange

*scientific, technical, economic and legal information concerning the chemicals [covered by] the Convention... [particularly]... information on domestic regulatory actions that substantially restrict one or more uses of [such] chemicals...[and]...on precautionary measures, including hazard classification, the nature of the risk and the relevant safety advice.*¹⁴¹ *Export notifications shall contain...information on precautionary measures to reduce exposure to and emission of the chemical...* (emphasis added)¹⁴²

5. *The Montreal Protocol on Substances that Deplete the Ozone Layer.* The Montreal Protocol implements the Vienna Convention for the Protection of the Ozone Layer. The Preamble states,

Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge... taking into account technical and economic considerations... Noting the precautionary measures for controlling emissions of certain chloroflourocarbons (CFCs) that have already been taken at national and regional levels... (emphasis added)¹⁴³

6. *The United Nations Convention on International Trade in Endangered Species.* It has also been argued by certain governments, primarily the EU and its member states, that the precautionary principle is enshrined within The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES regulates the protection of over 30,000 plant and animal species depending on their biological status and the impact that international trade may have upon them. This argument is based on a resolution adopted outside of the text of the Convention by the Conference Of the Parties (COP) at its 9th meeting during November 1994. Although only a guidance document, the resolution is intended to provide a process for determining the status of species to be included within either of the Convention's Appendices. Consistent with the Kyoto and Montreal Protocols, the POPs Treaty

and the PIC Procedure, the resolution's language refers to the *precautionary measures* that must be taken. In this case, the precautionary measures referred to are those that determine, based on "sufficient available data," which species satisfy the Convention's criteria in order to be listed within either of the Appendices.¹⁴⁴

THE RELATIONSHIP BETWEEN INTERNATIONAL ENVIRONMENTAL LAW AND INTERNATIONAL TRADE LAW—THE WTO AGREEMENTS DO NOT GENERALLY PERMIT THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE

At the November 2001 Ministerial meeting that launched the Doha Round of Trade Negotiations, it was acknowledged that

*[The WTO rules] do not prevent [members] from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels they consider appropriate, subject [however] to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.*¹⁴⁵

In the spirit of multilateral cooperation it was agreed that trade and environmental issues would be formally discussed as part of the current round of negotiations. The stated objectives were to negotiate and clarify the relationship between WTO rules and existing trade obligations specified within multilateral environmental agreements and to set up procedures for regular information exchanges between MEA secretariats and the relevant WTO committees.¹⁴⁶

In addition, the Preamble to the WTO Agreements states "the WTO is intended to promote the optimal use of the world's resources in accordance with the object of sustainable development, seeking to both protect and preserve the environment and to enhance the means for doing so."¹⁴⁷

There are at least two WTO Agreements, however, that were specifically designed to prevent countries from enacting technical regulations and/or standards that constitute unnecessary obstacles to trade. Technical regulations and standards relating to food and plant-based products are covered by the Sanitary and Phytosanitary (SPS) Agreement. All other non-food and non-plant-related technical regulations and standards are covered by the Technical Barriers to Trade (TBT) Agreement. Measures that cannot be classified as either a technical regulation or a standard are otherwise covered by the provisions of the GATT.¹⁴⁸ The SPS and TBT Agreements generally recognize that standards and regulations can be utilized as disguised non-tariff barriers to trade. They generally premise national (or regional) regulatory action upon relevant international science-based standards formulated through consensus by widely recognized international standards bodies, or in their absence, upon substantially equivalent national science-based standards developed by other WTO members.

In the event international or substantially equivalent national standards do not exist, the SPS Agreement requires governments to conduct an objective risk analysis that must include a science-based risk assessment of a particular product or substance in light of a specifically identified and ascertainable risk in order to justify their regulatory actions.¹⁴⁹

Theoretical uncertainty should not be assessed. The existence of unknown and uncertain elements does not justify a departure from the risk assessment requirement. In addition, the risk to be evaluated in a risk assessment under SPS Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist—the actual potential adverse effects on human health in the real world where people live and work and die... If a measure is not based on a ‘risk assessment,’ it can be presumed not to be based either on ‘scientific principles’ or to be maintained without ‘sufficient scientific evidence.’ (emphasis added)¹⁵⁰

Likewise, the TBT Agreement requires national (or regional) legislatures and/or administrative agencies to base their regulatory actions upon relevant objective performance-oriented standards developed by recognized international standards bodies.¹⁵¹

The TBT Agreement requires that WTO member states shall ensure that national and/or regional technical regulations and standards (voluntary and mandatory) are not prepared, adopted or applied with a view to create unnecessary obstacles to international trade.¹⁵² In the context of technical regulations, this requirement means that any new regulatory requirements imposed shall not be more trade-restrictive than necessary to fulfill a legitimate state objective, taking into account the risks non-fulfillment would create.¹⁵³ In other words, health and environment-related measures must always be proportional to the objectives sought and they must always reflect the least trade restrictive alternative available.¹⁵⁴ Examples of legitimate state objectives include the protection of human health and safety, animal and plant life or health and the environment.¹⁵⁵ When assessing such risks, WTO members shall consider of relevance “...inter alia available *scientific and technical information* or intended end-uses of products.”¹⁵⁶

Similarly, the SPS Agreement requires WTO members “when establishing or maintaining sanitary or phytosanitary protection, to ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of...protection, taking into account technical and economic feasibility.”¹⁵⁷ And they must ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles, and is not maintained without sufficient scientific evidence, *except* as provided in Art. 5.7.¹⁵⁸

SPS Article 5.7 is the only WTO provision that has been interpreted as providing WTO Members with the right to apply the precautionary principle. It generally permits WTO Members to take precautionary measures when they do not possess sufficient evidence of a product’s safety. WTO Members, however, must satisfy certain tests to invoke this provisional safeguard.

WTO case law has determined that a WTO Member must demonstrate that: 1) The provision is imposed in respect of a situation where relevant scientific evidence is insufficient; 2) The provision is adopted on the basis of available pertinent information; 3) The Member affirmatively seeks to obtain the additional information necessary for a more objective assessment of risk; AND 4) The Member reviews the measure within a reasonable period of time. . . Whenever one or more of these four conditions is not met, the measure will be found to be inconsistent with the SPS Agreement. (emphasis added)¹⁵⁹

Even if a WTO member is able to satisfy these requirements, it must be remembered that the safeguard provided by Article 5.7 has been considered by the WTO Appellate Body in the *EC Hormones*¹⁶⁰ case to be only a *limited, permissible application of the precautionary principle*. “The precautionary principle (other than as that expressed in Article 5.7 on provisional measures) does not override the obligation to base SPS measures on a risk assessment.”¹⁶¹

The Appellate Body, in this case, ruled against the EU. It held that the EU measures banning the use of six growth-promoting hormones, which effectively blocked U.S. hormone-injected beef product exports, lacked a scientific justification. In other words, such measures were not based on scientific evidence of a health risk and no scientific risk assessment had been performed. Because the EU has continued to maintain the ban in opposition to the 1998 WTO ruling, the United States has continued to impose 100 percent retaliatory tariffs on \$116 million of EU agricultural products (as has Canada) from mostly France, Germany, Italy, and Denmark, countries deemed the biggest supporters of the ban.

Health and environment-related measures must always be proportional to the objectives sought and they must always reflect the least trade restrictive alternative available.

In December 2002, the EU permanently banned the use of oestradiol-17-B, a growth-promoting hormone widely used in the United States, which was determined by the U.S. Food and Drug Administration to pose no health risk to consumers. The EU has since presented the results of new studies that it says are based on scientific evidence showing that the six hormones pose a significant risk to public health.¹⁶² The U.S. and Canadian governments have continued to reject these results as not presenting any new scientific evidence to support the EU ban. During October 2003, the EU reported that it had amended its ban,¹⁶³ “in a way that should satisfy both the complainants (the United States and Canada) and the WTO,”¹⁶⁴ and that therefore, “the United States and Canada should lift their trade sanctions against the EU.”¹⁶⁵ The EU has refused to lift its amended ban, insisting that it “was now fully backed up by scientific evidence proving the risks and dangers of the hormones that are widely used in North American beef production.”¹⁶⁶ EU Commission Pascal Lamy even hinted that “the EU would have to seek another WTO ruling in the case.”¹⁶⁷

THE IMPLICATIONS OF THE PRECAUTIONARY PRINCIPLE FOR INTERNATIONAL TRADE

The implications of the precautionary principle for international trade are extremely significant. The debate in which the EU and the United States are engaged focuses on whether a WTO member's use of the precautionary principle can be consistent with its WTO obligations. That debate has focused, in particular, on concerns about the impact (arguably a "chilling effect") that such a principle could have on the marketability of future and emerging technologies developed in the United States and their potential use throughout the world. However, the economic and social advancement of developing countries is also arguably at stake.¹⁶⁸ Apparently, the United States and a number of developing countries are concerned that some WTO members may employ the precautionary principle surreptitiously, under the guise of health and environmental protection, in order to protect ailing or lagging domestic industries.

One need only look at the EU's moratorium and proposed regulations on genetically modified foods (GMOs) to see how the application by government policymakers of the precautionary principle can affect international trade. Since 1998, at least seven EU member states have imposed a de facto moratorium, the effect of which has been to block EU market access to all exports of GMO products that originated from the United States. GMO exports from Canada, Mexico, and Argentina, which are also producers of GMOs, have also been blocked by the moratorium.¹⁶⁹ In fact, the negative EU attitude towards GMOs generally has encouraged a global anti-GMO movement and jeopardized the establishment of GMO research and development programs and the domestic sale of GMO products within Brazil and many African and Asian developing countries.¹⁷⁰ Although the EU signaled to the United States during 2003 that it was prepared to lift the moratorium, which it technically did on May 19, 2004,¹⁷¹ the U.S. government has insisted that the complaint it had filed against the moratorium at the WTO last year¹⁷² would go forward.¹⁷³ "The approval of a single product is not evidence that applications are moving routinely through the approval process in an objective, predictable manner based on science and EU law rather than political factors."¹⁷⁴

In addition, the United States has adopted such a tough negotiating position because the EU had previously conditioned the lifting of the GMO moratorium upon the enactment of regional traceability and labeling regulations. According to the Commission, the labeling rules, in particular, were meant to afford European consumers the choice of whether or not to buy the GMO corn. The rules would "provide consumers with the information they need to make up their own mind... The labeling rules would require that "[a]ny frozen or canned biotech corn sold in stores would have to be labeled as such under 'state of the art' rules that took effect last month."¹⁷⁵ They will also require retailers to place labels on displays and in advertising used in connection with such products. The EU's GMO regulations, which are to be harmonized throughout the EU, are also based on the precautionary principle.¹⁷⁶

They are intended to implement EU member state obligations assumed under the Cartagena Protocol on Biosafety that recently came into force during September 2003.¹⁷⁷ Other than the Biosafety Protocol, there are no consensus-based international standards upon which the EU relied. The regulations will apply to all food and feed products intended for human and animal consumption that contain, consist of (except for adventitious amounts) or are produced from (even if there are no detectable traces of) GMOs. The EU has imposed these measures even though the EU Commissioner for Health and Consumer Safety has said that, “we have various prestigious scientific institutions that have said that GM foods do not cause any harm to consumers. There is no evidence that this food is any more unsafe than conventional foods.”¹⁷⁸

The United States has argued that these measures violate the WTO Agreements for several reasons.¹⁷⁹ One of the main U.S. objections to the moratorium has been that it was not based on an objective scientific risk assessment identifying an ascertainable risk of harm to human health or safety. A major U.S. objection to the labeling regulations has been that they discriminate against otherwise “like” products on the basis of process and production methods rather than on the basis of product characteristics, performance criteria or end-uses. Furthermore, the United States has alleged that these requirements violate the sovereignty of other WTO members by dictating the methods by which their food industries should manufacture and process their products. Moreover, the United States has argued that other less burdensome and trade-restrictive measures could have been selected.

The United States and a number of developing countries are concerned that some WTO members may employ the precautionary principle, under the guise of health and environmental protection, in order to protect ailing or lagging domestic industries.

Another prime example of how the precautionary principle has been applied by WTO members is the proposed EU regulation on chemical substances known as the Registration, Evaluation and Authorization of Chemicals (REACH).¹⁸⁰ As in the case of GMOs, the EU-proposed regulation is not premised on any consensus-based international standard or equivalent national standard. However, unlike in the case of the EU GMO legislation, there is no multilateral environmental agreement, and hence, no international legal obligation that the EU REACH regulation is implementing.

The proposed REACH regulation imposes on foreign exporters a broad legal duty of care satisfaction that requires adherence to an extensive and rigorous substance authorization process. That process places the burden of proving the safety or harmlessness of substances and products upon manufacturers/exporters. It obliges them to prepare detailed information dossiers and to meet rigorous testing

requirements as a condition precedent to granting market access to high volume chemical substances and to certain finished products containing them, with some exceptions. In addition, the regulations require technical information sharing by all producers, intermediaries, and distributors along a product's vertical supply chain as well as product labeling for consumer use.¹⁸¹

According to the EU, "the aims of the proposed regulation...are to increase the protection of human health and the environment [within the EU region] from exposure to chemicals while at the same time to maintain and enhance the competitiveness and innovative capability of the EU chemicals industry."¹⁸² However, a review of the regulation will reveal that it is truly *global in scope*, affecting practically all industry sectors and corresponding supply chains. A revision to the proposed REACH regulation was issued during October 2003, and is currently before the Parliament for a final reading.¹⁸³ Yet, a review of the public comments received from entities and governments of other WTO members, especially those of Asian and Latin American developing countries, reveals that they consider REACH not only as a threat to their social and economic progress, but also as a disguised technical barrier to trade.¹⁸⁴

A review of the REACH regulation will reveal that it is truly global in scope, affecting practically all industry sectors and corresponding supply chains.

Indeed, U.S. objections to these proposed regulations have focused on the lack of a scientific risk assessment for all of the 30,000 or so chemicals subject to the regulation. Such a risk assessment would have identified which chemicals pose the most immediate and serious risks to human health and the environment. In addition, the United States has generally argued that the regulations impose a disproportionately expensive and onerously time-consuming administrative burden on foreign (U.S.) companies, especially small and medium-sized enterprises, which comprise much of the global chemical industry. Furthermore, the United States has argued that the regulation is extra-territorial in nature and discriminates against exports of otherwise like finished products based on how they are produced rather than on how they perform or are used. Moreover, the United States and other WTO members have argued that the EU could have selected a less burdensome and trade-restrictive alternative to protect legitimate state interests.¹⁸⁵

The precautionary principle has also been applied within the EU to define the notions of life cycle management and take back that underlie the EU Green Paper on Integrated Product Policy (IPP). The IPP reflects an extension of the concepts of producer responsibility and product stewardship that have been integrated into the EU Directive on End-of-Life Vehicles (ELV), the Directive on Waste from Electrical and Electronic Equipment (WEEE), the Directive on Restrictions on the Use of Hazardous Substances (RoHS), and the Proposed Framework Directive on Eco-

Design for Energy-using Products (EuP).¹⁸⁶ Each of these directives imposes upon industry the affirmative duty to design products from inception with the goal of not harming the environment.

The problem with these initiatives is that they reflect the formalization of precaution into an absolute principle (i.e., as an international standard), the objective of which is to eliminate almost all risk from everyday economic life, which simply is not possible. To the extent that Europe's application of the precautionary principle, which minimizes the importance of classical risk assessment, impairs humankind's ability to innovate in the short and long term, it is clearly not desirable.

APPLYING THE PRECAUTIONARY PRINCIPLE IN WTO DISPUTE RESOLUTION

According to the WTO Appellate Body in the *EC-Hormones* case:

*the [precautionary] principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less clear... We note that... the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.*¹⁸⁷

Consequently, if a WTO member relies on an interpretation of the precautionary principle that is broader than that called for by SPS Article 5.7, it will likely be operating beyond the bounds of WTO treaty law. In such instance, it will need to establish that the precautionary principle is a principle of customary international law and that such law should be substantively applied or otherwise considered by a WTO panel to resolve a WTO dispute.

To establish the precautionary principle as a norm of customary international law, it must be shown that the texts of the SPS and TBT Agreements reflect the intent and obligation of WTO members to adopt the precautionary principle as a WTO treaty norm.

In general, international customary law consists of the regular practices and rules that member states follow. These practices and rules become rules of international law when they satisfy two conditions. First, member state practice must demonstrate that states engage in acts consistently within their borders and with other member states, as reflected by court decisions, legislation, and diplomatic practice. Second, state practice must rise to the level of *opinio juris*. In other words, state practice must demonstrate that such acts are accepted as law. Something more than actual practice based on morality, habit or convenience is needed—states must be acting out of obligation; they must be acting because they believe that they must follow a rule.¹⁸⁸

Therefore, in order to establish the precautionary principle as a norm of customary international law, it must be shown that the texts of the SPS and TBT Agreements (as multilateral treaties) reflect the intent and obligation of WTO members to adopt the precautionary principle as a WTO treaty norm. Alternatively, it must be demonstrated that WTO members' understanding of the WTO treaty texts has evolved enough to accommodate the precautionary principle, *and* that WTO members have actually adopted the precautionary principle as a matter of state regulatory and/or standards practice and custom in other fora (e.g., pursuant to the terms of a multilateral environmental treaty or as a matter of public international law).¹⁸⁹

Even if a member state, through its multiple practices, was able to establish the precautionary principle as a norm of customary international law (i.e., as a non-WTO treaty norm), its ability to incorporate that norm within the SPS and TBT Agreements remains uncertain. There continues to be significant disagreement about the relationship between WTO law and non-WTO sources of international law that is not likely to be resolved in the immediate future. The issue, in a nutshell, is if WTO dispute resolution panels, when resolving WTO claims, are permitted to apply other sources of law than WTO substantive law. One school of thought argues that notwithstanding the fact that the WTO is a part of a much broader system of public international law, "[t]he WTO legal system [by its specific terms] does not countenance the possibility of directly applicable norms...norms that apply by their own terms, rather than by virtue of their incorporation by reference in the WTO legal system...from outside the WTO system."¹⁹⁰ Another school of thought argues that "both the WTO treaty and WTO dispute settlement are integral parts of public international law at large. They are not 'closed' or 'self-contained' regimes: they were created in the wider context of general international law, as well as other treaties...and continue to exist in that context."¹⁹¹ Consequently, it is argued that a WTO tribunal may take them into account when deciding a WTO dispute.

CONCLUSION

The role of science in government assessment and management of public health and environmental risks has increasingly become the subject of a heated transatlantic political debate. Numerous concerns have arisen during the past fifteen years regarding food safety, chemicals management, waste disposal, industrial pollutants and climate change. The EU and the United States hold divergent views toward the usefulness of science as a tool to understand and address the uncertainties surrounding these risks, and their relationship to the activities engaged in and the innovations produced by modern economic life. Although the contours of this debate appear bilateral in nature, the issues being discussed are international in scope. Consequently, their resolution is likely to have a profound legal, social, and economic impact on all WTO member governments and industries, including those of developing countries.

The prevailing view within Europe is to take a "better safe than sorry" or precautionary approach to assessing and managing a growing number of possible

but uncertain health and environmental hazards. According to this view, conventional scientific risk assessment should serve only a minimal function. There is a widespread belief that risk assessment, as an empirical process, reflects only the current state of limited human scientific knowledge—it cannot account for the uncertainties surrounding most human activities. As a result, it is argued that risk managers should focus instead on evaluating and addressing systemic hazards posed by products' inherently dangerous characteristics categorized into risk profiles. Accordingly, where the possibility for significant irreversible harm is great, a lack of scientific certainty as to cause and effect, likelihood of occurrence or timing, or of actual evidence of harm, regulators should not be precluded from taking precautionary measures to prevent the harm from materializing in the first place. EU regulators argue that their aversion to risk is necessary to ensure a high level of health and environmental protection, even if it imposes a considerable legal, economic, and social burden on industry (foreign as well as domestic) and developing country governments.

The issue is if WTO dispute resolution panels, when resolving WTO claims, are permitted to apply other sources of law than WTO substantive law.

The prevailing U.S. regulatory view and practice, with certain limited exceptions, is to identify and evaluate health and environmental risks on a case-by-case basis, depending on their probability of occurrence and the likelihood that they may inflict serious actual harm. This is accomplished by means of an empirically driven and objective "science-based" risk assessment that is performed with respect to a particular product or substance (not process). The risk assessment identifies the nature and significance of the particular risk, the magnitude and severity of known and/or uncertain potential harm, the degree and certainty of human exposure to such harm, and the vulnerability of the various groups so exposed. Where there are profound uncertainties as to any of these factors, estimates and assumptions (safety factors) are employed that incorporate an appropriate degree of precaution. Additional margins of safety are also employed, if necessary, at the risk management stage through the selection of suitable frameworks. In most cases, health and environmental regulations are then subject to an economic cost/benefit analysis to determine whether the chosen approach "maximizes net social, economic and environmental benefits."

The EU believes that it is necessary to establish its precautionary approach as a formal *precautionary principle*, to be incorporated within an international legal framework that governs the assessment and management of global public risks to human health and the environment. The history and evolution of the precautionary approach/ precautionary principle reflects that it is derived from German notions of prevention and precaution and that its use was subsequently expanded throughout Europe following the creation of the EU to address a growing number of regional environmental concerns. The precautionary approach/precautionary principle was

also introduced at the Rio Summit on Sustainable Development and memorialized within a number of international declarations. And it was incorporated within several multilateral environmental treaties, few of which, however, have been in force for more than a year and implemented by treaty parties.

The legal and academic debate in which the EU and United States are engaged in focuses largely on the relationship between these declarations and international environmental treaties and the WTO agreements. The EU and like-minded advocates have argued that the precautionary principle has risen to the level of a customary international legal norm, as expressed within such treaties and declarations and that it has been ruled a provisional WTO treaty norm. Accordingly, a WTO tribunal must substantively consider the precautionary principle when deciding a WTO dispute. To the contrary, the United States acknowledges that the WTO has narrowly ruled that governments may lawfully employ precautionary measures under certain limited provisional conditions, as set forth within the SPS Agreement. It does not, however, recognize the existence of a formal precautionary principle either as a substantive WTO treaty norm or a customary international legal norm. Consequently, the US and like-minded advocates have argued that a WTO tribunal may not consider it when deciding a WTO dispute.

A cynic might argue that, stripped to its essence, this debate is primarily about global economic competition. At one level, the EU and United States seek to determine the extent to which they may each legally impose domestic (or regional) health and safety and environmental legislation, having extra-territorial effects without seriously impeding or otherwise distorting international trade flows. This determination is intended to ensure market access for their respective goods and services. At a seemingly more fundamental ideological and political level, however, they each endeavor to define the role of “sound science” through the imposition of cultural preferences in making this determination. Unfortunately, it seems that what each may have forgotten in this global struggle to secure the commanding heights is the social and economic welfare of the developing members of the WTO.

Notes

¹ See: Bruce Stokes, “New Trade Barriers: National Preferences,” *National Journal*, April 24, 2004.

² See: Lawrence Kogan, “‘Enlightened’ Environmentalism or Disguised Protectionism? Assessing the Impact of EU Precaution-based Standards on Developing Countries,” for the National Foreign Trade Council (April 2004), available online at http://www.nftc.org/default/white%20paper/riskreg3study404_2_Final.pdf.

³ A growing number of reports have alleged that carbon dioxide and methane have accumulated in concentrations high enough to trap heat within the global upper atmosphere. In addition, these reports argue that such greenhouse gases *could* potentially raise the Earth’s surface temperature enough to cause noticeable climate change; this *could* result in raised sea levels and threaten coastline communities or adversely affect sensitive ecosystems and geographies, thereby placing irreplaceable natural resources at risk. As a result, there are concerns about how climate change precipitated by these emissions *could* potentially affect global agriculture and the water supplies necessary to sustain it, given the possibility that higher global temperatures *could* promote the conversion of arable land into deserts. While forest cover provides a primary and natural source of absorption (as a natural sink) for these greenhouse gases, environmentalists argue that this natural resource, a rich source of biodiversity, is being depleted by economic activities such as timber concessions and illegal logging. Although science has yet to identify

conclusively the extent of natural causes of global warming or the precise impacts of global warming, it has increasingly pointed to a relationship between anthropomorphic activity, increased greenhouse gas concentrations and 'real' global warming. See: "U.S. Climate Action Report 2002," Federal Register Notice, Vol. 66, No. 221, pp. 57456-57 (Nov. 14, 2001) [FR Doc. 01-28736]; "Third National Communication of the United States of America under the United Nations Framework Convention on Climate Change, Chapter 6: Impacts and Adaptation; Appendix D, Climate Change Science: An Analysis of Some Key Questions," available online at <http://www.epa.gov/globalwarming/publications/car/>.

⁴ In the terminology of risk regulation, this phenomenon is referred to as a 'risk-risk scenario.' "Policy-makers face a serious dilemma. If they design policies according to the risk perceptions of lay people, they actually may tolerate more real sacrifices in terms of lives lost or human suffering than necessary. If they follow only the advice of the professional experts, they may lose public support or even sympathy." See: Ortwin Renn, "Risks and Society," Presentation made at the Directorate General, Health and Consumer Protection, International Conference: "Risk Analysis and Its Role in the European Union," Brussels (July 18-19, 2000), available online at http://europa.eu.int/comm/food/risk/session1_1_en.pdf, <http://www.konsumentensamverkan.se/evenemang/brysselriskprogram.html>.

⁵ According to Theofanis Christoforou, Legal Adviser, to the European Commission, "There are many reasons and factors that explain the current divergence in the regulatory approach of the two systems. They range from social, economic, legal, scientific, cultural, ethical, tradition, political, and regulatory policy choices. They all interact and play an important role, although the relevance of one or the other of these factors may be different depending on the circumstances of each case. Two factors, however, appear to play a predominant role: the European's desire to achieve and maintain a high level of health and environmental protection, on the one hand, and the Americans' greater reliance on economic cost-benefit and market-oriented values, on the other. The application of precaution has also played a role in addressing the European's risk adversity. *Discussing the precautionary principle, therefore, helps underscore the fundamentally divergent understandings in the two systems of what science is and its role in risk assessment and risk regulation...*[This may help explain]...the constant claim by the United States that many European regulatory measures lack scientific basis and constitute disguised protectionism (e.g., meat hormones, recombinant bovine somatotropin [rBST], GMOs, etc.) (emphasis added). Theofanis Christoforou, "The Precautionary Principle in European Community Law and Science," Chap. 16, Joel A. Tickner, ed., in *Precaution: Environmental Science and Preventive Public Policy*, p. 245.

⁶ "...[A]s tariffs and other border barriers melt away, trade disputes are increasingly driven by the incompatibility of societal preferences. Current international fights over hormones in beef, for example, or animal-welfare rules...are not generated just by old-fashioned protectionism. They reflect national differences in tastes and proclivities—the economic choices made by citizens in disparate societies." Bruce Stokes, "New Trade Barriers: National Preferences," p. 1. See, also: Samuel Loewenberg, "The Chemical Industry's European Reaction," *National Journal*, July 12, 2003. "This article quoted EU Environment Commissioner Margot Wallstrom as saying during a April 2003 trip to Washington, 'I was told this week that the environment is not a 'door opener' in Washington...It clearly is a 'door opener' in Europe.' The article's author noted that "the conflict over the [proposed EU] chemicals legislation ['REACH'] goes deeper than the usual arguments over dollars and cents. The root cause is the EU's use of the precautionary principle." *Id.*, p. 2263.

⁷ See: Lawrence Kogan, "Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers," for the National Foreign Trade Council, Washington Legal Foundation Critical Legal Issues Working Paper Series No. 118 (Sept. 2003), available online at <http://www.wlf.org/upload/kogan.pdf>. "The most recent of three workshops previously organized during 2002 by the German Marshall Fund's US-European Biotechnology Initiative to discuss US and EU views toward biotechnology explains a great deal about EU reliance upon the precautionary principle. An interpretative summary of this dialogue prepared by a European is very revealing. "As one European said, 'There is a difference in what we want our countries to look like, not only with food but will all that goes with it.'...This 'way of life' statement echoed similar thoughts...one European said, 'GM food has evolved, not out of one or two big events such as growth hormones or 'mad cow' disease, but for many reasons that traverse the interdisciplinary spectrum of politics, science, economics, culture and social ethics.'" *Id.*, p. 4, fn 11, citing Peter Pringle, "The US-European Biotechnology Initiative, Workshop 3: Segregation, Traceability and Labeling of GM Crops—An Interpretative Summary of a Transatlantic Conversation About Biotechnology and Agriculture," The German Marshall Fund of the United States (April 29, 2002). "...[T]he EU and the US are striving to define WTO law so that it best reflects their respective national/regional interests...[Arguably] [t]he EU's application of the precautionary principle...aims to preserve long-held European social and political values (i.e., the European 'way of life') rather than protect against known and

identifiable health and environmental hazards...” Id., pp. 65–66.

⁸ See: Commission of the European Communities, “Communication from the Commission on the Precautionary Principle” COM (2000) (Feb. 2, 2000) (the ‘Communication’). Following its issuance by the European Commission, this Communication “was distributed to international organizations as well as the European Parliament and Council. The objective was to contribute to the international debate about how regulatory officials should make risk-related decisions when faced with scientific uncertainty about suspected hazards.” John Graham and Susan Hsia, “Europe’s Precautionary Principle: Promise and Pitfalls,” pp. 371–372. John Graham has observed how the Commission, within its Communication, has artfully situated the precautionary principle as “part of an orderly process of risk analysis, including objective scientific evaluation, risk assessment, risk management and risk communication.” John Graham and Susan Hsia, “Europe’s Precautionary Principle: Promise and Pitfalls,” p. 386. Notwithstanding this observation, however, it is arguable that the precautionary principle *employed* by the EU Commission is not the same precautionary principle *articulated* by the Commission in its Communication.

⁹ See: Ortwin Renn and Andreas Klinke, “A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based and Discourse-Based Strategies,” (Fall 2002). “Our main thesis in this paper will be to offer a new *classification of risk types* and management strategies that promise scientific accuracy, a reflection of social diversity, and political feasibility...[While]...a huge number of risk classes can be deducted theoretically...*risks with one or several extreme qualities need special attention*...[O]ur exercise produced six different risk clusters...In order to evaluate risks and set risk reduction priorities we propose a procedure *assigning risk potentials to one of the six risk prototypes* of the classification...The essential objective of *the proposed risk classification* is to derive effective, efficient and politically and legally feasible strategies and measures for risk reduction and mitigation.” (emphasis added). Id., pp.3, 17, 21 and 25. In the case of chemical substances, for example, the EU Commission has argued in support of its proposed chemicals regulation known as ‘REACH’ (Registration, Evaluation Authorization of Chemicals) that “there is a general lack of knowledge about the properties and the uses of existing substances. The risk assessment process is slow and resource-intensive and does not allow the system to work efficiently and effectively.” “Strategy for a Future Chemicals Policy” (‘the EU Chemicals White Paper’), COM (2001) 88 Final, at p. 6. One U.S. law firm has sized this up as follows: “The White Paper proposes that the most stringent data collection and regulatory review requirements, namely those for ‘authorization’ of chemicals giving rise to ‘very high concern’—will be triggered for all chemicals with certain characteristics. Substances ‘with certain [assessed] hazardous properties’ such as category 1 and 2 carcinogens, mutagens or reprotoxins and persistent organic pollutants, will only be authorized for specific uses for which they are demonstrated to be ‘safe.’” Legal Opinion of Crowell & Moring, examining certain international trade aspects of the proposal contained in the ‘White Paper,’ ‘Strategy for a Future Chemicals Policy’ (Nov. 7, 2002), at p. 6, cited in Lawrence Kogan, “Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science,” for the National Foreign Trade Council, at pp. 88–89, fns 400–402, available online at: <http://www.nftc.org/default/white%20paper/TR2%20final.pdf>.

¹⁰ It is the opinion of at least one commentator that such risk aversion is likely due to the “[s]harp demographic differences [between the US and the EU]...European electorates are aging much faster than America’s, making Europeans generally more risk-averse.” Rachel Thompson, “Transatlantic Business in an Era of Crisis and Change,” available online at http://www.apcouk.com/pc/news_content.asp?ID=43.

¹¹ According to John Graham, the Commission’s failure to set forth a definition of either the precautionary principle or the ‘high’ level of protection it engenders implies that these concepts may “be understood by way of cultural familiarity.” Thus it would seem that risk managers could easily manipulate their use of the precautionary principle to reflect public preferences and sentiments. John Graham and Susan Hsia, “Europe’s Precautionary Principle: Promise and Pitfalls,” p. 380.

¹² Theofanis Christoforou, “The Precautionary Principle in European Community Law and Science,” at p. 243. See, also: P. Sandin, “Dimensions of the Precautionary Principle, Human and Ecological Risk Assessment,” 5(5), 889–907, identifying “19 formulations of the [precautionary] principle in different international treaties and academic writings,” cited in John Graham and Susan Hsia, “Europe’s Precautionary Principle: Promise and Pitfalls,” p. 379. According to John Graham, “Although there are some shared aspects to these formulations, it is also apparent that these formulations have important differences...[In particular, there are] two rather different definitions, the more modest one agreed by international negotiators as the Rio convention, and a more aggressive one, the Wingspread Statement, agreed to by a selected group of scientists and activists. Note for example, the word ‘cost-effective’ appears in the Rio [Convention] version but not in the Wingspread version. Rio says uncertainty does not justify inaction while Wingspread suggests that uncertainty requires action. Note further that the Rio definition is a restraint on policy dialogue while the Wingspread version establishes conditions that require policy restrictions. Wingspread covers all ‘threats’ of harm while Rio covers only those threats that are ‘serious’

or 'irreversible.' " Id., pp. 379–380.

¹³ "Even within US environmental law, which does not contain explicit references to the precautionary principle, there are important elements of precaution in specific environmental statutes and important judicial decisions [citing *Reserve Mining Co. v. US EPA* (Dist. Ct. 1976) and *Ethyl Corp. v. US EPA* (Ct. App. 1976)]...Yet, there are also some aspects of US law (e.g., the regulation of existing chemicals under the Toxic Substances Control Act) that have been interpreted by EPA and the courts in a non-precautionary manner (Wagner, 2000). John Graham and Susan Hsia, "Europe's Precautionary Principle: Promise and Pitfalls," pp. 374–375.

¹⁴ As explained by John Graham, "The Bush Administration believes that science should have a strong role in setting risk-management priorities. Even in the relatively simple case of health risks, sound science is critical. First, there is the hazard question: What is the degree of certainty that any hazard exists?...Second, if the hazard exists, a probability assessment is required to distinguish a significant risk from a negligible one...Third, the number of people exposed to a hazard needs to be considered because population exposures contribute to the public health significance of the hazard. Fourth, the severity of the health effect is relevant...Although these basic scientific questions have been framed for health risks, it is feasible to frame a related set of questions for other types of risks, such as threats to natural resources and global ecology." John Graham, "The Role of Precaution in Risk Assessment and Management: An American's View," pp. 2–4.

¹⁵ John Graham has noted that, "When analysts assess risks, they may introduce conservative assumptions or safety factors into the analysis to account for unknowns. These protective practices may be intended to establish an upper bound on the true but unknown risk. In the US, the technical community is now trying to bring more valid data into the risk assessment process." John Graham, "The Role of Precaution in Risk Assessment and Management: An American's View," remarks prepared for the January 11-12, 2002 conference on *The Europe, Precaution and Risk Management: A Comparative Case Study Analysis of the Management of Risk in a Complex World*, pp. 1–2, available online at <http://www.useu.be/RiskManagement/Jan1102GrahamUSRiskManagementPrecPrin.html>.

¹⁶ See: "Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA), Part I, Report to Congress on the Costs and Benefits of Federal Regulations, Chapter III, "U.S. Approaches to Management of Emerging Risks," pp. 51–62, p. 58.

¹⁷ "Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," p. 58. "Thus the Federal Regulatory framework of the United States is designed to be a responsive, consultative, science-based system, operating synergistically within multiple layers of checks and balances involving social norms, market forces, liability law, voluntary standards, and Federal, State and local regulation with executive, legislative and judicial oversight." Id., p. 53.

¹⁸ "...[T]he US government supports precautionary approaches to risk management but we do not recognize any universal precautionary principle. We consider it to be a mythical concept, perhaps like a unicorn." John Graham, "The Role of Precaution in Risk Assessment and Management: An American's View," p. 2.

¹⁹ See: "Margot Wallstrom, "The EU and US Approaches to Environment Policy: Are We Converging or Diverging?" Speech delivered at the European Institute (April 25, 2002), available online at <http://www.eurunion.org/news/speeches/2002/020425Eimw.htm>.

²⁰ "On December 23, 2003, the U.S. Department of Agriculture (USDA) announced a presumptive diagnosis of bovine spongiform encephalopathy (BSE, or "mad cow" disease) in an adult Holstein cow from Washington State. The diagnosis was confirmed by an international reference laboratory in Weybridge, England, on December 25. Preliminary trace-back based on an ear-tag identification number suggests that the BSE-infected cow was imported into the United States from Canada in August 2001... Since 1996, evidence has been increasing for a causal relationship between ongoing outbreaks in Europe of a disease in cattle, called bovine spongiform encephalopathy (BSE, or "mad cow disease"), and a disease in humans, called variant Creutzfeldt-Jakob disease (vCJD). Both disorders are invariably fatal brain diseases with unusually long incubation periods measured in years, and are caused by an unconventional transmissible agent" (emphasis added). See: CDC National Center for Infectious Diseases, BSE and CJD Information and Resources, available online at <http://www.cdc.gov/ncidod/diseases/cjd/cjd.htm>. "Dr. Kenneth Petersen, an Agriculture Department veterinarian said the meat was safe. "The recalled meat represents essentially zero risk to consumers"...He stressed, though, that the parts most likely to carry the infection—the brain, spinal cord and lower intestine—were removed before the meat from the infected

cow was cut and processed for human consumption ...[and were apparently used for animal feed.]...[Petersen] said investigators have now determined that some of the meat from the cow slaughtered Dec. 9 went to Alaska, Hawaii, Idaho, Montana and Guam. Earlier, officials had said most of the meat went to Washington and Oregon, with lesser amounts to California and Nevada, for distribution to consumers. *Although federal officials maintain the food supply is safe, they have recalled as a precaution an estimated 10,000 pounds of meat from the infected cow and from 19 other cows all slaughtered Dec. 9 at Vern's Moses Lake Meat Co., in Moses Lake, Washington...*In Britain, 143 people died of [mad cow disease] after an outbreak of mad cow in the 1980s. Despite assurances that meat is safe, Japan, the top importer of American beef, and more than two dozen countries have blocked U.S. beef imports... U.S. beef industry officials estimated this week that they've lost 90 percent of their export market" (emphasis added). "Meat 'Safe'; Recall Widened," CBS/AP (Dec. 28, 2003), available online at <http://www.cbsnews.com/stories/2003/12/23/national/main590039.shtml>. The facts reveal that the cow diagnosed as BSE-infected was a 'downer' (i.e., nonambulatory disabled) dairy cow that was too sick or injured to stand or walk unassisted. "In the United States, the feeding of rendered cattle products to other cattle has been prohibited since 1997, and the importation of cattle and cattle products from countries with BSE or considered to be at high risk for BSE has been prohibited since 1989...On December 30, USDA announced additional safeguards to further minimize the risk for human exposure to BSE in the United States. Beginning immediately, FSIS has prohibited the use of 'downer' cattle for food for human consumption. Through its emergency rule-making powers, FSIS will take additional actions that will become effective on their publication." See: "Bovine Spongiform Encephalopathy in a Dairy Cow—Washington State, 2003," MMWR, January 9, 2004 / 52(53): 1280-1285, available online at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5253a2.htm>. "The United States has formally notified its trading partners that U.S. beef is safe to eat, a principal step toward negotiations to lift bans they imposed because of mad cow disease... summarizing what it has done to protect beef safety and search for other cases of mad cow..." *This information demonstrates that any remaining trade restrictions against U.S. beef and beef products can be lifted without compromising safety*...said Ron DeHaven...the Agriculture Department's chief veterinarian." See: "U.S. Pressures Partners Over Beef Ban—USDA Insists Meat is Safe, Urges Resumption of Trade," The Associated Press (March 26, 2004), available online at <http://msnbc.msn.com/id/4611358/>.

²¹ Since 1988, the EU has implemented a total ban to use any hormone growth promoters in livestock production. The EU has argued that six hormones—oestradiol-17-beta, progesterone, testosterone, zeranone, trenbolone, and melengestrol acetate—may potentially cause cancer in humans. In the United States, to the contrary, use of five of these hormones is legally permitted (17 beta-estradiol, testosterone, progesterone, trenbolone and zeranone).

²² Since 1997, the EU has banned five animal growth-promoting antibiotics administered in cattle feed on the basis of the precautionary principle. They include avoparcin, bacitracin, spiramycin, tylosin, and virginiamycin. Instead it has advocated therapeutic administration of antibiotics to individual heads of cattle to treat specific infections. During July 2003, the European Parliament and Council adopted a new regulation that "will strengthen the EU's rules on the safety of animal feed and complete the EU ban on the use of antibiotics as growth promoters...Banning the use of antibiotics as growth promoters in feed is also vital to efforts to combat anti-microbial resistance. The Regulation will come into force later this year..." See: "Council and Parliament Prohibit Antibiotics as Growth Promoters: Commissioner Byrne Welcomes Adoption of Regulation on Feed Additives," EU Institutions Press Releases, IP/03/1058 (July 22, 2003). During October 2003, "the US Food and Drug Administration (FDA) announced a new review procedure designed to curb the use of animal antibiotics that may pose a risk to human health...Many countries, researchers and some in Congress have argued that the practice aggravates the problem of antibiotic-resistant bacteria and the practice should be halted...The European Union has stopped the use of many animal antibiotics for growth promotion...*U.S. law forces [the agency] to look at products individually. 'We think it is far better to look at the real risk...instead of just disallowing a category of uses,'* said Lester Crawford, deputy FDA commissioner...In its reviews, the agency will assess several different factors in deciding the risks to humans. One will be the likelihood that the drug could promote resistant bacteria in the animals that take it. The second major factor is the likelihood that humans would ingest the resistant bacteria. The third would weigh the chances that the exposure of people to the bacteria would have an effect on human health..." (emphasis added). See: Anna Wilde Mathews, "FDA Announces Policy Designed To Curb Animal-Antibiotics Use," *Wall Street Journal*, Oct. 24, 2003, p. A6.

²³ A discussion relating to how the United States continues to dispute 'scientific' data produced by the EU in support of its beef hormones ban is set forth in a later section of this paper. Several European studies have been prepared on this subject. See: Rainer W. Stephany, "Hormones in Meat: Different Approaches

in the EU and in the USA,” National Institute of Public Health and the Environment, The Netherlands, APMIS 109 (Suppl. 103): S357-64 (2001), wherein the author explains that “the differences in approach and attitude towards the ‘hormone problem’ in the different parts of the world in the last decade resulted in conflicts between the EU and amongst others the USA.” Id., p. 357.

See: Rainer W. Stephany, “Hormone Residue Testing: An Update in Research and Approaches,” National Institute of Public Health and the Environment, The Netherlands (Oct. 2001); R.W. Stephany, “Hormones in Meat? Are Only Natural?” Laboratory for Residue Analysis (ARO), National Institute of Public Health and the Environment (RIVM), the Netherlands, wherein, the author concludes that, “[T]here is no such thing as hormone-free meat and...the meat of animals which have been treated with anabolics in an expert and controlled manner contains hardly any more hormones than are found naturally. *Under these conditions there is no risk to the consumer*” (emphasis added). According to two recent scientific reports, the EU ban on growth-promoting antibiotics in animal feed may have given rise to a ‘risk/risk scenario’ wherein there is now more risk posed to human health and animal welfare because of threat of increased antibiotic resistance than before the bans were instituted.

See: Mark Casell, Christian Friis, Enric Marco, et al., “The European Ban on Growth-Promoting Antibiotics and Emerging Consequences for Human and Animal Health,” *Journal of Antimicrobial Chemotherapy* (July 2003) 52, pp. 159–161. “Experience in Sweden had already shown that the bans might have adverse consequences for animal health and welfare, and economic consequences [from reduced animal production] for farmers. There were also suggestions that human health is unlikely to benefit and that it might even be adversely affected...The driving forces behind these bans were consumer and political opinion, and a scientific concern that resistance in selected animals might be transmitted to humans to the detriment of their health...The efforts and expenditure involved in the imposition of the ban would have been better spent on achieving rational antibiotic use in humans and animals, and on much greater efforts to understand the complex epidemiology of resistant pathogens and resistance genes, as well as adequate risk assessments of both the ban, the ‘precaution,’ in parallel with the ‘threat,’ i.e., the continued use of growth promoters” (emphasis added). Id., pp. 159 and 160–61.

See: Ian Phillips, Mark Casewell, Tony Cox, et al., “Does the Use of Antibiotics in Food Animals Pose a Risk to Human Health? A Critical View of Published Data,” *Journal of Antimicrobial Chemotherapy* (Sept. 2003). “Essentially antibiotics are used if they are known to be effective for their indicated purpose. They must cure or prevent infection, or in the case of growth promotion, must have a significant effect on food conversion parameters, and thereby improve the economic return to the animal producer, and they should not harm the animal...Almost every case made for or against antibiotics used in animals is complicated by the use of the same antibiotics in humans, which are equally able to give rise to resistance...What has not happened in 50 years of antibiotic use in animals and man seems unlikely to happen at a rapid rate now. *The banning of any antibiotic usage in animals based on the ‘precautionary principle’ in the absence of a full quantitative risk assessment is likely to be wasted at best and even harmful, both to animal and to human health*” (emphasis added). Id., at p. 17.

²⁴ There is the risk of contracting salmonella poisoning from undercooked chickens and eggs or low pathogenic avian influenza and the risk posed by the use of low-concentration chlorine in chicken processing as an anti-microbial treatment to address these risks. See: Lawrence Kogan, “Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science,” for the National Foreign Trade Council, (May 2003), pp. 11–12. In addition, there are health risks posed by the practices of aquaculture (‘farm raised’ fish) that is itself an alternative chosen in response to unsustainable fisheries practices that have resulted in the depletion of the world’s oceans. These risks include exposure to agricultural pesticide run-off, as well as, the use of organic fertilizers (organic wastes) and inorganic fertilizers containing trace metals, antibiotics, and genetic breeding techniques to promote fish growth and production rates. See: John E. Bardach and Michael T. Santerre, “Organic Residues in Aquaculture,” East-West Resource Systems Institute, United Nations University Press, available online at <http://www.unu.edu/unupress/unupbooks/80434e/80434E0g.htm>; “FDA’s Seafood HACCP Program: Mid-Course Correction,” U.S. Food and Drug Administration Center for Food Safety and Applied Nutrition, Office of Seafood (Feb. 13, 2001), available online at <http://www.cfsan.fda.gov/~comm/shaccp1.html>; “FDA Increases Sampling of Imported Shrimp and Crayfish (Crawfish),” U.S. Food and Drug Administration FDA News Release (P02-20) (June 14, 2002), available online at <http://www.fda.gov/bbs/topics/NEWS/2002/NEW00815.html>; “Increased Testing for Antibiotic Residues on Imports From Thailand, Vietnam and Myanmar,” European Commission, DG Health and Consumer Protection, Press Release IP/02/436 (Mar. 19, 2002), available online at http://foodhaccp.com/msgboard.mv?parm_func=showmsg+parm_msgnum=1002212; Somporn Thapanachai, “New Barriers Springing Up,” *Bangkok Post* (2003), available online at <http://www.bangkokpost.net/yearend2002/barriers.html>; “Indian Scientists Boost Growth Rate of Fish,” *BioScience News and Advocate*, The Life

Sciences Network (Dec. 6, 2003), available online at <http://lifesciencesnetwork.com/news-detail.asp?newsID=4694>. And, there is also the risk of contracting mercury poisoning from consuming too much of certain types of wild fish (fresh and saltwater) and shellfish. See: "FDA and EPA Announce the Revised Consumer Advisory on Methylmercury in Fish," U.S. Department of Health and Human Services and U.S. Environmental Protection Agency, News Release PO4-33 (Mar. 19, 2004), available online at <http://www.fda.gov/bbs/topics/news/2004/NEW01038.html>. In each of these cases, scientists within the international community have assessed the health risks associated with such products, though they often have come to different conclusions regarding the extent of the risks and how to manage them. In some cases, zero-tolerance requirements that are higher than international standards have been imposed.

²⁵ According to the World Health Organization, there are three main potential risks surrounding GMOs that are being currently debated, namely, "[their tendencies to provoke allergic reaction (allergenicity), gene transfer and outcrossing...]" For a discussion of these risks, See: Lawrence Kogan, "Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science," pp. 34–35, fn 146.

²⁶ See, e.g.,: "Biotechnology and U.S. Agricultural Trade, Questions and Answers," FASOnline, available online at <http://www.fas.usda.gov/itp/biotech/Q&As.html>; Tobias Buck, "Brussels Warns EU on Modified Crops, European Commission Governments Told to End Foot-Dragging on Approving Products But U.S. Attacked for Threat of WTO Challenge," *Financial Times* (Feb. 4, 2003), cited in: Lawrence Kogan, "Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science," at p. 33.

²⁷ See: Lawrence Kogan, "Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science," pp. 24–42.

²⁸ See: Lawrence Kogan, "Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science," at pp. 68–70 discussing the potential but scientifically unverified concerns about the health impact of brominated flame retardants used in fire extinguishers and plastic appliances such as TVs; at p. 71 concerning the failure of the EU to conduct risk assessments on dishwasher detergents and other household products (e.g., surface and sanitary cleaning agents) that contain active chlorine compounds; at pp. 106–111, discussing the amended EU Cosmetics Directive and fn 495, which discussed scientific tests conducted by the Cosmetic Ingredient Review Panel verifying the safety of phthalates used in cosmetics. See: "Panel Reaffirms Phthalates in Cosmetics Are 'Safe For Use,'" Phthalate Information Center, American Chemistry Council (Nov. 19, 2002), available online at <http://www.americanchemistry.com>. The Cosmetics Directive, which was approved by the European Parliament in January 2003, "bans two commonly used cosmetics ingredients that are reproductive toxins according to EU law—dibutyl phthalate (DBP) and di-2-ethylhexyl phthalate (DEHP). Nearly 70 percent of nail polishes tested contained high levels of DBP, and many popular deodorants, perfumes, hair mousses and hair sprays contained DBP, DEHP or other types of phthalates..." See: Stacy Malkan, "Progress on Phthalates," *Multinational Monitor* (May 8, 2003), available online at <http://www.alternet.org/story.html?StoryID=15858>. During 2000, the EU temporarily banned and proposed a permanent ban on the use of six phthalates (toxic softeners) in children's teething toys that the Commission believed to be carcinogens, notwithstanding industry's claims that the Commission lacked scientific evidence proving it posed a human health risk. Medical devices and food packaging also contain phthalates. At the urging of environmental groups such as Greenpeace, the Commission subsequently required toys containing phthalates to be accompanied by a 'warning' label. See: "Phthalates Ban," (Feb. 1, 2000), available online at <http://www.chemical-industry.org.uk/news/news.php3/talkingpoints/6/112>. See, also: "Toys and Baby Care Items," Phthalates Information Centre Europe, (2003), available online at <http://www.phthalates.com/index.asp?page=21>.

²⁹ These reports highlight how some natural or synthetic chemicals, namely those which have been identified as persistent organic pollutants ('POPs'), have traveled, accumulated, and persisted in remote locations such as the North Pole, far from where they were initially emitted. The production and use of POPs has been addressed within the text of the Stockholm Convention on Persistent Organic Pollutants (the 'POPs Treaty'), a multilateral environmental agreement that will enter into force as of May 17, 2004. The import and export of POPs is governed by the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the 'PIC Procedure'), a multilateral environmental agreement that entered into force on February 24, 2004. See: Lawrence Kogan, "Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers," at p. 56–57, fn 164; Lawrence Kogan, "'Enlightened' Environmentalism or Disguised Protectionism? Assessing the Impact of EU Precaution-based Standards on Developing Countries," for the National Foreign Trade Council (April 2004), pp. 18–20 and 24, fns 69 and 73.

³⁰ See: Lawrence Kogan, "Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science," pp. 66-82, discussing the EU Directives on Waste from Electrical and Electronic Equipment ('WEEE'), Restrictions on Use of Hazardous Substances ('RoHS'), End-Use-Equipment ('EuE') and End-Of-Life Vehicles ('ELV'), and the EU Green Paper on Integrated Product Policy.

³¹ "Risk Analysis," Food Safety and Inspection Service, United States Department of Agriculture, Backgrounders/Key Facts (July 2003), p. 1, available online at <http://www.fsis.usda.gov/OA/background/riskanal.htm>. European risk scholars agree that "risk analysis has become a routine procedure in assessing, evaluating, and managing harm to humans and the environment." However they debate the legitimate role of risk analysis for regulatory decision-making. See: Ortwin Renn and Andreas Klinke, "A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based and Discourse-Based Strategies," p. 3. The Codex definition of risk analysis is similar. "The risk analysis should follow a structured approach comprising three distinct but closely linked components of risk analysis (risk assessment, risk management and risk communication) as defined by the Codex Alimentarius Commission, each component being integral to the overall risk analysis." Par. 5, Draft Working Principles For Risk Analysis For Application in the Framework of the Codex Alimentarius (At Step 8 of the Procedure), Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, Twenty-sixth Session, FAO Headquarters, Rome, Italy (June 30-July 7, 2003).

³² According to Mr. Graham, "...[T]here appears to be some agreement that the precautionary principle applies primarily to decision-making *at the risk management level*, as stated in the EC Communication... Placing precaution in the hands of policy-makers lays the groundwork for democratic control of the degree of precaution exercised *in risk management*. After all, it is accountable public officials, not scientists, who should—at least in democratic societies—make the final value judgments about what degree of precaution is appropriate for a particular technology or policy setting" (emphasis added). John Graham and Susan Hsia, "Europe's Precautionary Principle: Promise and Pitfalls," p. 378. However, Mr. Graham notes that, "When considering the role of *precaution in risk management*, it is appropriate for policy-makers and the public to inquire about the degree of *precaution embedded in the risk assessment*. If precaution is taken to an extreme, it can be very harmful to technological innovation" (emphasis added). John Graham, "The Role of Precaution in Risk Assessment and Management: An American's View," p. 4.

³³ "Risk communication not only refers to communicating the results of the risk analysis to the general public, but also to the ongoing communication among risk assessors, managers, scientists, regulators, and various stakeholders during the entire process. Risk assessors and managers must communicate in order to ensure that all affected parties fully understand the process of and information generated by the risk analysis." "Risk Analysis," Food Safety and Inspection Service, United States Department of Agriculture, Backgrounders/Key Facts.

³⁴ "Many sources of uncertainty exist in the process of risk assessment and risk management of food related hazards to human health. The degree of uncertainty and variability in the available scientific information should be explicitly considered in the risk analysis. Where there is sufficient scientific evidence to allow Codex to proceed to elaborate a standard or related text, the assumptions used for the risk assessment and the risk management options selected should reflect the degree of uncertainty and the characteristics of the hazard." Par. 11, Draft Working Principles For Risk Analysis For Application in the Framework of the Codex Alimentarius (At Step 8 of the Procedure), Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission.

³⁵ See: Ted Schettler, Katherine Barrett, Carolyn Raffensperger, "The Precautionary Principle: Protecting Public Health and the Environment," Science and Environmental Health Network (2002), available online at <http://www.protectingourhealth.org/corethemes/precaution/2002-1125schettlerprecautionary.htm>. "...[A] considerable amount of consistent evidence is necessary to establish factual "proof" of a cause and effect relationship. Traditionally, in a study of the relationship between two variables, a correlation is said to be statistically significant only if the results show the two to be linked, independent of other factors, with greater than 95% likelihood that the results of the study truly depict the real world. But correlation does not establish causation. In epidemiology, a series of additional criteria...are usually added before causation can be claimed... include not only establishment of a statistically significant correlation between two variables, but also require that the causal variable precede the effect, a dose-response relationship, elimination of sources of bias and confounding, coherence with other studies, and understanding of a plausible biological mechanism...When exposure to environmental hazards causes immediate and obvious harm, scientific uncertainty about cause and effect relationships is minimal. However, under other circumstances, scientific uncertainty increases dramatically and is often difficult to resolve. Conditions with long latency periods between a hazardous exposure and the appearance of an adverse health outcome are difficult to study." Id.

³⁶ “There is a subset of possible risks in daily life that are subject to substantial scientific uncertainty, often on all four of the [following] questions that I mentioned...[See: fn 14, supra]...but that, for one reason or another, trigger significant public concern. Under these circumstances, what is the appropriate role for precaution in the response of risk managers?” John Graham, “The Role of Precaution in Risk Assessment and Management: An American’s View,” supra, p. 2.

³⁷ “...[W]e need a conceptual bridge between assessment and management, which we have framed risk evaluation. This strategy should meet two goals, first to incorporate the best expertise of the professionals dealing with risk issues and, secondly, to include the legitimate concerns and perceptions of the public.” Ortwin Renn, “Risks and Society,” Presentation made at the Directorate General, Health and Consumer Protection, International Conference: “Risk Analysis and Its Role in the European Union,” supra.

³⁸ Par. 9, Draft Working Principles For Risk Analysis For Application in the Framework of the Codex Alimentarius (At Step 8 of the Procedure), Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission.

³⁹ Id.

⁴⁰ A thorough analysis of the science of risk assessment is beyond the scope of this paper. This author will attempt to summarize the general principles surrounding risk assessment, and leave the details to the experts in this highly technical field.

⁴¹ “Risk Analysis,” Food Safety and Inspection Service, United States Department of Agriculture, Backgrounders/Key Facts (July 2003), p. 1, supra.

⁴² Id. “Each risk assessment has four parts, as widely recognized in the international scientific and regulatory risk assessment communities and by such authoritative bodies as the National Academy of Sciences and the Codex Alimentarius Commission. First, risk assessors and risk managers must clarify the public health hazard that is the subject of the assessment and any possible policy options that are under consideration. Next, the risk assessors must evaluate the adverse health effects caused by the public health hazard. Then, an exposure assessment must be conducted to estimate the likelihood that the hazard will be present in food, and if present, at what level. Next, a dose-response model is constructed to figure out at what dose or concentration that hazard will cause illness or death.” Id., p. 2.

⁴³ Id., p. 2.

⁴⁴ “Risk assessment should be conducted in accordance with the *Statements of Principle Relating to the Role of Food Safety Risk Assessment* and should incorporate the four steps of the risk assessment, i.e., hazard identification, hazard characterization, exposure assessment, and risk characterization. Risk assessment should be based on all available scientific data...” Pars. 19-20, Draft Working Principles For Risk Analysis For Application in the Framework of the Codex Alimentarius.

⁴⁵ “The organization of risk assessment is based on a model proposed by the U.S. National Research Council, which is widely used in public health and regulatory decision-making.” See: “A Risk Assessment Model for Establishing Upper Intake Levels for Nutrients,” Health Education Alliance for Life and Longevity (HEALL), The Resource Center for Body, Mind, and Spirit, citing U.S. Department of Agriculture, Food Safety and Inspection Service, available online at <http://www.heall.com/medicalfreedom/codex.html>.

⁴⁶ Par. 25, Draft Working Principles For Risk Analysis For Application in the Framework of the Codex Alimentarius.

⁴⁷ “Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,” p. 56.

⁴⁸ See: “Framework for Cumulative Risk Assessment,” Risk Assessment Forum, United States Environmental Protection Agency, available online at <http://cfpub.epa.gov/ncea/raf/recordisplay.cfm?deid=54944>; (EPA/630/P-02/001F, April 2002), published May 27, 2003, FRL-7503-5 (Vol. 68, No. 101, p. 28825), available online at <http://www.epa.gov/fedrgstr/EPA-GENERAL/2003/May/Day-27/g13179.htm>. The accompanying press release indicates that the framework is merely an information document whose objective is to describe various aspects of cumulative risk—it “is not an attempt to lay out protocols to address all the risks or considerations that are needed to adequately inform community decisions.” “Fact Sheet: Release of EPA’s ‘Framework For Cumulative Risk Assessment’—May 2003.”

⁴⁹ For purposes of this report, “‘cumulative risk’ means ‘the combined risks from aggregate exposures to multiple agents or stressors’...assessments involving a single chemical or stressor are not ‘cumulative risk assessments’ under this definition...‘Cumulative Risk assessment’ in this report means ‘an analysis, characterization and possible quantification of the combined risks to health or the environment from multiple agents or stressors.’ One key aspect of this definition is that a cumulative risk assessment need

not necessarily be quantitative, so long as it meets other requirements.” Executive Summary, p. xvii.

⁵⁰ “The framework itself is conceptually similar to the approach used in both human health and ecological assessments, but it is distinctive in several areas. First, its focus on the combined effects of more than one agent or stressor makes it different from many assessments conducted today, in which, if multiple stressors are evaluated, they are usually evaluated individually and presented as if the others were not present. Second, because multiple stressors are affecting the same population, there is increased focus on the specific populations potentially affected *rather than on hypothetical receptors*. Third, consideration of cumulative risk may generate interest in a wider variety of non-chemical stressors...biological or physical agents or an activity that directly or indirectly alters or causes the loss of a necessity such as habitat...than do traditional risk assessments...” (emphasis added). Id., pp. xvii-xviii.

⁵¹ Par. 24, Draft Working Principles For Risk Analysis For Application in the Framework of the Codex Alimentarius (At Step 8 of the Procedure), Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission.

⁵² See: “Final Report on Setting the Scientific Frame for the Inclusion of New Quality of Life Concerns in the Risk Assessment Process,” Adopted by the Scientific Steering Committee at its Meeting of 10-11 April 2003, European Commission, Health & Consumer Protection Directorate-General (April 11, 2003).

⁵³ “Topics that have found public interest in this sense have been exposure to health hazards by chemical factors, safety of food and drinking water, natural and manmade poisons, infectious diseases, and new technologies, especially biotechnology. They include also the welfare of companion animals, wildlife and animals in general, as well as the environment as a whole.” Id., p. 3.

⁵⁴ “The framework of the areas to be considered in the quality of life assessment is provided by starting off from the health definition of WHO as ‘a state of complete physical, social and mental *well being*, and not merely the absence of disease or infirmity...’ (WHO, 1992). As a consequence, a wide range of traits need to be analyzed. *Apart from the classical medicinal, physical and chemical scientific areas, psychological, and social issues* have to be dealt with...The analysis should *not only* take in[to] account the *usual objective risks but also* the fact that *a substantial part of the population is sensitive from a perception point of view to threats even from risks which have not been shown to exist, but are only assumed or presented as hypothetic*. *Such a perception* has a direct impact on the *well being* by its psychological component, but it can also have a *psychosomatically induced physical health effect*” (emphasis added). Id. p. 2-3.

⁵⁵ “One major reason for the perception of threats is that—admittedly—here is so far no consequent and systematic dealing in the scientific risk assessments with uncertainties that cover a wide range of evidence to non-evidence.... Interactions between scientific assessment, public communication and the resulting perception are major relevant issues in the quality of life evaluation...The importance of such an enlargement results from the idea that the risks are no more only coming from natural causes external to humans. New risks due to the human activities in particular those related to technological innovations are nowadays very important and they are *perceived* in a very different way than the ‘natural ones.’ ” Id.

⁵⁶ See: “Descriptions of Selected Key Generic Terms Used in Chemical Hazard/Risk Assessment,” OECD Series on Testing and Assessment No. 44, Environment Directorate, Joint Meeting of the Chemicals Committee and the Working Party on Chemicals, Pesticides and Biotechnology, Organization for Economic Cooperation and Development ENV/JM/MONO(2003)15 (Oct. 30, 2003). According to the report, a consensus appears to have been reached on a possible concept definition of risk assessment: It “could read: *{process} {for measuring} {a specific risk}* where *{process}* is a four-step sequence of actions, *{measuring}* is meant in a quantitative as well as qualitative manner, *{specific risk}* means the risk associated with a specific agent.” Id., at par. 129, p. 34.

⁵⁷ “Risk Analysis,” Food Safety and Inspection Service, United States Department of Agriculture, Backgrounders/Key Facts (July 2003), p. 2, *supra*.

⁵⁸ “[P]reliminary risk management activities are taken to include: identification of a food safety problem; establishment of a risk profile; ranking of the hazard for risk assessment and risk management priority; establishment of risk assessment policy for the conduct of the risk assessment; commissioning of the risk assessment; and consideration of the result of the risk assessment.” (At Step 8 of the Procedure), Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, at fn 5.

⁵⁹ Id., at Par. 31.

⁶⁰ John Graham, “The Role of Precaution in Risk Assessment and Management: An American’s View,” p. 4.

⁶¹ John Graham and Susan Hsia, “Europe’s Precautionary Principle: Promise and Pitfalls,” p. 377.

⁶² “Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal

Regulations and Unfunded Mandates on State, Local, and Tribal Entities,” Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA), Part I, Report to Congress on the Costs and Benefits of Federal Regulations, Chapter III, “U.S. Approaches to Management of Emerging Risks,” p. 54.

⁶³ Theofanis Christoforou, “The Precautionary Principle in European Community Law and Science,” pp. 250-251.

⁶⁴ *Id.*, p. 251.

⁶⁵ See: Par. 31, Draft Working Principles For Risk Analysis For Application in the Framework of the Codex Alimentarius, at fn 5. “For the purpose of these Principles, preliminary risk management activities are taken to include: identification of a food safety problem; establishment of a risk profile; ranking of the hazard for risk assessment and risk management priority; establishment of risk assessment policy for the conduct of the risk assessment; and consideration of the result of the risk assessment.” *Id.*

⁶⁶ Ortwin Renn and Andreas Klinke, “A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based and Discourse-Based Strategies,” p. 4.

⁶⁷ *Id.*, p. 5.

⁶⁸ *Id.*, p. 6.

⁶⁹ Theofanis Christoforou, “The Precautionary Principle in European Community Law and Science,” p. 246.

⁷⁰ Theofanis Christoforou, “The Origins, Content and Role of the Precautionary Principle in European Community Law” (2001), p. 5.

⁷¹ *Id.*; “From a systemic point of view, this type of scientific uncertainty usually results from five sources of error in the scientific methods used to describe information and data; the variables chosen, the measurements made, the samples drawn, the models used, and the causal relationships employed.” Theofanis Christoforou, “The Precautionary Principle in European Community Law and Science,” p. 246.

⁷² According to one EU legal commentator, “In a complex and relatively slow regulatory system, like that applicable in the EC in the area of health and environmental protection, it is often more effective to apply *default* rules both in setting the actual level of acceptable risk and in the mandatory application of the precautionary principle in the case of scientific uncertainty for certain types of clearly unacceptable risks to society (e.g., of serious or irreversible harm).” Theofanis Christoforou, “The Origins, Content and Role of the Precautionary Principle in European Community Law,” (2001), 26, fn 61.

⁷³ Ortwin Renn and Andreas Klinke, “A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based and Discourse-Based Strategies,” p. 7.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*, pp. 8–9.

⁷⁸ “The Administrative Procedures Act (APA) is the law under which some 55 U.S. government federal regulatory agencies like the FDA and EPA create the rules and regulations necessary to implement and enforce major legislative acts such as the Food Drug and Cosmetic Act, Clean Air Act or Occupational Health and Safety Act.” See: available online at <http://usgovinfo.about.com/library/bills/blapa.htm>. The APA provides certain procedural guarantees. “Regulatory agencies are required to follow the notice-and-comment rulemaking procedures prescribed in the (APA) and related laws designed to encourage a transparent and inclusive process. The APA requires agencies to publish in the Federal Register a notice of proposed rulemaking that references the legal authority under which the rule is proposed and a description of the subjects and issues to be addressed by the proposed rule. The APA also instructs agencies to provide the public with an opportunity to submit comments on the proposed rulemaking, and the final rulemaking must address all significant comments. Finally, if affected parties believe a Federal regulatory agency has made an unlawful decision due to procedural and/or substantive error, they may seek review of the decision in a disciplined process of judicial review under the APA...” See: “Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,” pp. 52-53. See, also: Title 5, United States Code – Chapter 5, Sections 511-599.

⁷⁹ In the U.S., Executive Order No. 12866 “Regulatory Planning and Review” instructs federal agencies to evaluate all of the costs and benefits associated with a proposed regulation. See: 58 Fed. Reg. 51735 (Sept. 30, 1993), available online at <http://www.whitehouse.gov/omb/infocreg/12866.pdf>. “In deciding

whether and how to regulate, [12866 provides that] agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and by qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Furthermore, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental public health and safety and other advantages; distributive impacts; and equity) unless a statute requires another regulatory approach." Id. at Section 1(a) "Statement of Regulatory Philosophy and Principles—Regulatory Philosophy." "Executive Order 12866 states that Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well being of the American people..." See: "Circular A-4—New Guidelines for the Conduct of Regulatory Analysis," Office of Management and Budget, Office of Information and Regulatory Affairs (Sept. 17, 2003), at pp. 3-4. Circular A-4 "became effective for economically significant proposed rules. It becomes effective for *economically significant* final rules on January 1, 2005. *Economically significant* rules generally are rules that have an annual effect on the economy of \$100 million or more...The final guidelines are designed to help analysts in the regulatory agencies by encouraging good regulatory impact analysis and standardizing the way that benefits and costs of Federal regulations are measured and reported. *They include several significant changes from previous OMB guidance.* For example, they include (1) more emphasis on cost-effectiveness analysis, (2) formal probability analysis for rules with more than a \$ billion dollar impact on the economy, and (3) more systematic evaluation of qualitative as well as quantified benefits and costs." (emphasis added). John Graham, "Memorandum for the President's Management Council," Regarding OMB's Circular No.A-4, New Guidelines for the Conduct of Regulatory Analysis, p. 1.

⁸⁰ "Although the U.S. has taken such a [precautionary] approach for years—the 1958 Delaney Clause overseeing pesticide residues in food, for instance, and requirements for environmental impact statements—the more stringent requirements of the precautionary principle have not generally been welcome." David Appell, "The New Uncertainty Principle," *Scientific American* (Jan. 2001), available online at <http://www.biotech-info.net/uncertainty.html>.

⁸¹ "Unlike the situation in US law, there is no general guideline in Community law that obliges the regulatory authorities to analyze systematically the economic impact or cost of risk management measures...considerations of the level of economic impact or cost from adopting a future precautionary action do not play a decisive role in the determination *whether* to adopt a measure, but only in the actual choice or design of the measure to be taken and the acceptable level of risk...Some have argued in favor of adopting a detailed cost-benefit analysis in nearly all risk management decisions in the EC, based on the multirisk nature of our world and on reasons of efficient allocation of resources (Wiener 2001; Majone 2001). These arguments are not only misconceived and flawed but also potentially dangerous." (bold emphasis added). Theofanis Chrisotoforou, "The Precautionary Principle in European Community Law and Science," p. 249.

⁸² Theofanis Chrisotoforou, "The Precautionary Principle in European Community Law and Science," p. 249. For example, the World Wild Life Fund has argued that the U.S. government should not employ an economic cost benefit analysis to review the future designation by the U.N. Secretariat of additional chemicals as persistent organic pollutants, pursuant to the 'adding mechanism' of the Stockholm Convention on Persistent Organic Pollutants (POPs). "Proposals put forward earlier this year, coordinated by the White House's Office of Management and Budget, risk bogging down that mechanism in lengthy and cumbersome cost-benefit related proceedings that would make it extremely difficult if not possible for EPA to take action when POPs are added to the treaty." This statement was made in a letter submitted by WWF to the Senate Foreign Relations Committee Chair, Senator Lugar, in connection with the Senate's review of the POPs Treaty for U.S. ratification. See: Brooks B. Yeager, Vice President, Global Threats Program, World Wildlife Fund, Letter to Honorable Richard Lugar, Chairman, Senate Foreign Relations Committee (June 16, 2003), available online at http://www.worldwildlife.org/toxics/whatsnew/pr_37.htm, cited in Lawrence Kogan, "'Enlightened' Environmentalism or Disguised Protectionism? Assessing the Impact of EU Precaution-based Standards on Developing Countries," p. 20, fn 51.

⁸³ The terms 'precautionary principle,' 'precautionary approach,' 'precautionary measures' and 'precautionary safeguards' appear within various international environmental conventions, sometimes as an adjective and other times as an adverb.

⁸⁴ "...[I]n the real world many government officials behave as if their primary duty is not to protect our common heritage, but to 'balance' the interests of the polluters against the interests of public health and

the environment. In such a balancing act, money weighs heavily, and so we end up with a damaged natural world and large numbers of people killed each year and many more made sick...Usually in such 'balancing' acts, government officials use 'risk assessment' to show that their decisions will only cause 'acceptable' harm. But risk assessments are easily manipulated to get almost any desired answer. As a result—whether they intend to or not—risk assessors usually provide nothing more than a false veneer of 'sound science,' justifying the destruction and the killing. As William Ruckelshaus (the first administrator of U.S. Environmental Protection Agency) said in 1984, 'We should remember that risk assessment data can be like the captured spy: If you torture it long enough, it will tell you anything you want to know...' Risk assessment is still the main defense offered by 'balancing act' governments on behalf of polluters, even though most risk assessments are scientifically indefensible and are therefore about as phony as a three-dollar bill." See: Carolyn Raffensperger and Peter Montague, "Land Use and the Precautionary Principle," *Rachel's Environment and Health News*, No. 787 (March 18, 2004), available online at <http://www.organicconsumers.org/corp/landuse032304.cfm>, citing also: Peter Montague, "Chemical Wars," *New Solutions* vol. 14, no. 1 (2004), pp. 19-42.

⁸⁵ "The concept of risk appears at first glance to render environmental problems more tractable. The term has long been used in the financial sector to refer to a measurable probability of one or another adverse societal outcome. *Risk is actuarial in spirit*. One can (indeed, one often *must*) insure oneself against various kinds of risks for which actuarial data are available, such as fires, floods, earthquakes, catastrophic illnesses or automobile accidents. *When used in environmental decision making, risk retains the connotation of something that can be defined and quantified, hence managed*. It is a relative concept: risks can always be offset against benefits, and risk-based laws often explicitly prescribe that the benefits of policy action should outweigh the risks. Importantly as well, risks can be compared against one another, so that policymakers can meaningfully be instructed to focus attention on large risks over small ones, and to ignore altogether risks that are *de minimis*, or too tiny to matter" (emphasis added). Sheila Jasanoff, "Risk, Precaution and Environmental Values," Carnegie Council on Ethics and International Affairs (1998), p. 5, available online at http://www.carnegiecouncil.org/media/683_jasanoff.pdf.

⁸⁶ Id; See, also: Theofanis Christoforou, "The Precautionary Principle in European Community Law and Science," at p. 246. "Risk is a function of at least two variables: the likelihood (or probability) of an adverse effect and its severity or magnitude (Codex Alimentarius Commission, 2000). "A formal definition of risk, therefore, is a condition under which it is possible to describe the possibilities (or probabilities) of occurrence of nearly all possible outcomes, and their magnitude." Id.

⁸⁷ Sheila Jasanoff, "Risk, Precaution and Environmental Values," p. 5.

⁸⁸ See: David Appell, "The New Uncertainty Principle," quoting Carolyn Raffensperger, SEHN's executive director. "For science to evolve along the lines envisioned by Raffensperger, researchers will have to develop a broader base of skills to handle the multifaceted data from complicated problems." Id. See, also: discussion, *supra*.

⁸⁹ See, definition, *supra*, at fns 48 and 49. ...[S]cientific uncertainty should be distinguished from *risk*. (emphasis added). Theofanis Christoforou, "The Precautionary Principle in European Community Law and Science," p. 246. "Recognition of scientific uncertainty is central to the precautionary principle...Understanding cause and effect relationships in complex systems is limited by different kinds of uncertainties. Uncertainty sometimes results from more than a simple lack of data or inadequate models and is not easily reduced because of the nature of the problem being studied...Most complex problems have a mixture of three general kinds of uncertainty—statistical, model and fundamental—each of which should be explicitly considered before deciding how to act." Ted Schettler, Katherine Barrett, Carolyn Raffensperger, "The Precautionary Principle: Protecting Public Health and the Environment."

⁹⁰ "Uncertainty should be distinguished from *ignorance*, where some of the possible outcomes, at the time of assessing the activity or substance, are completely unknown or unknowable and, thus, fail entirely to be assessed (EEA, 2001). Although distinguishable, uncertainty and ignorance may co-exist in a risk assessment and this can further increase the potential for error *in the degree of confidence* regarding the existence of harm to health, the environment or in the workplace...*However, allowing fears from ignorance and indeterminacy to guide any risk regulation is likely to halt technological progress.*" (emphasis added). Theofanis Christoforou, "The Precautionary Principle in European Community Law and Science," p. 246.

⁹¹ "[T]he perception people have of risk is wider than that of experts and reflects a number of legitimate concerns (e.g., familiarity with risk, catastrophic potential, irreversibility of harm, threat to future generations, risk control possibilities, whether exposure is voluntary, etc.), which are frequently omitted from an expert risk assessment. It follows that...risk management measures, instead of trying to patronize consumers with positivist views on science, should also take into account their legitimate concerns and

perceptions.” Id., p. 248.

⁹² For example, the EU’s proposed REACH regulation potentially covering some 30,000 chemicals imposes a ‘Duty of Care’ on all manufacturers, importer and downstream users of such substances to fulfill their obligations under the REACH system and under other related legislation. The Duty of Care provisions “help to ensure that substances are used safely at all stages in their life cycle.” The EU has imposed a similar duty of care on these economic actors within a related proposed regulation covering persistent organic pollutants (POPs) intended to implement the Stockholm Convention on Persistent Organic Pollutants.

⁹³ Timothy Riordan, “The Precaution Principle in Environmental Management,” Robert U. Ayres and Udo E. Simonis, eds., in *Industrial Metabolism: Restructuring for Sustainable Development*, Appendix Part 3: Further Implications. (United Nations University Press, The United Nations University: 1994), p. 8, available online at <http://www.unu.edu/unupress/unupbooks/80841e/80841E0o.htm#12.%20The%20precaution%20principle>.

⁹⁴ Sheila Jasanoff, “Risk, Precaution and Environmental Values,” supra at pp. 5–6.

⁹⁵ Ted Schettler, Katherine Barrett, Carolyn Raffensperger, “The Precautionary Principle: Protecting Public Health and the Environment,” supra.

⁹⁶ Andrew Jordan and Timothy Riordan, “The Precautionary Principle in Contemporary Environmental Policy and Politics,” Paper presented for the Wingspread Conference on Implementing the Precautionary Principle, Racine Wisconsin (Jan. 23-25, 1998), available online at <http://www.johnsonfdn.org/conferences/precautionary/jord.html>.

⁹⁷ Timothy Riordan, “The Precaution Principle in Environmental Management,” p. 6.

⁹⁸ Id., pp. 6, 8.

⁹⁹ Andrew Jordan and Timothy Riordan, “The Precautionary Principle in Contemporary Environmental Policy and Politics.” As the author reveals, this notion can be traced back to a 1984 German Federal Government report on air quality. That report, in pertinent part, states the following: “The principle of precaution commands that the damages done to the natural world...should be avoided in advance and in accordance with opportunity and possibility. [Precaution] further means the early detection of dangers to health and environment by comprehensive, synchronized...research...[I]t also *means acting when conclusively ascertained understandings by science [are] not yet available*” (emphasis in original). Id.

¹⁰⁰ In general, “the burden to produce evidence (burden of production) is assigned to a Party who must generate information or proof [whereas] the burden of persuasion is an assignment of responsibility to a Party to provide sufficient proof or to remove uncertainty to the satisfaction of a fact-finding body. A common reason for assigning both burdens to a Party is that such Party is in the best position to have the information to resolve the factual and legal issues in question.” See: Carl F. Cranor, “Some Legal Implications of the Precautionary Principle: Improving Information-Generation and Legal Protections,” *Eur. J. Oncol. Library*, vol. 2, p. 37, available online at <http://www.collegiumramazzini.org/links/CRANOR.PDF>.

¹⁰¹ Id., p. 5.

¹⁰² Theofanis Christoforou, “The Precautionary Principle in European Community Law and Science,” p. 251.

¹⁰³ A legal standard of proof “specifies degrees of certainty that a decision maker must have before finding that the Party with the burden of proof carried it. They specify how much ‘uncertainty’ must be removed (or may be tolerated) in order to change some aspect of the legal status quo. In the US, one of the more demanding standards of criminal law is that the moving party, the state, must establish its case ‘beyond a reasonable doubt.’” By comparison, “[I]n civil litigation, the plaintiff must establish her case by a ‘preponderance (or balance) of the evidence.’” Carl F. Cranor, “Some Legal Implications of the Precautionary Principle: Improving Information-Generation and Legal Protections,” p. 37.

¹⁰⁴ According to the ‘polluter-pays’ principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures.

¹⁰⁵ Directive 2004/35/CE of the European Parliament and of the Council on Environmental Liability With Regard to the Prevention and Remedying of Environmental Damage (April 21, 2004), available online at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_143/l_14320040430en00560075.pdf.

The purpose of the new Directive is to “to establish a framework of environmental liability based on the ‘polluter-pays’ principle to prevent and remedy environmental damage. Article 1. “The new directive will, in effect, create a generalized offence of environmental pollution governed by a strict (no fault) liability

regime. Environmental damage will include damage to species and natural habitats protected by the 1992 Habitats and 1979 Birds Directives, damage to waters covered by the 2000 Water Framework Directive, and land contamination which causes significant risk of harming human health..." "Polluters Pays" Directive Finally Agreed," Environment Zone, (2/21/04), available online at <http://lawzone.thelawyer.com/cgi-in/item.cgi?id=109329&d=204&ch=243&f=209>. "The significance of any damage that has adverse effects on reaching or maintaining the favorable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data..." Annex I. "*The Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages*" (emphasis added). Preamble par. 14. "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2007." Article 19(1).

¹⁰⁶ "These are listed exhaustively in the Directive...Certain industries including oil and nuclear will fall outside of the Directive's scope and will continue to be covered by their own liability regimes...A controversial aspect of the proposal, at least as far as industry is concerned, is the wide definition of 'environmental damage' [contained in Article 2]. Not only does it cover land and water pollution but also damage to the biodiversity of any protected species or habitat." Id.

¹⁰⁷ See: "The Application of the Precautionary Principle in the European Union, EU-Project: 'Regulatory Strategies and Research Needs to Compose and Specify a European Policy on the Application of the Precautionary Principle' (PrecauPri)," 3. Executive Summary at p. Stuttgart (April 2003). "The PrecauPri-project was supported by the STRATA Programme of the European Commission and embedded within the scope of the Fifth Framework Programme of the European Community for research, technological development and demonstration activities." Id.

¹⁰⁸ Id., p. 4.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Jeremy Rifkin, "A Precautionary Tale—The EU Plans New Regulations for Scientific Risk-Taking, Based on the Principle of Sustainable Development—US Big Business is Furious," Guardian Unlimited (May 12, 2004), available online at <http://www.guardian.co.uk/life/opinion/story/0,12981,1214686,00.html>.

¹¹² Id.

¹¹³ According to one commentator, "the [precautionary] principle formed one of the basic principles of environmental policy...together with the *cooperation principle* and the *polluter pays principle*." In addition, this commentator believes that, "The fact that the [precautionary] principle came side by side to the *prevention principle* implies that these two principles do not mean the same" (emphasis added). See: Wybe Th. Douma, "The Precautionary Principle," T.M.C. Asser Institute, The Hague, The Netherlands (1998), available online at <http://www.eel.nl/virtue/precprin.htm>. The cooperation principle was essentially founded by the Social Democrat-Free Democrat coalition government formed within the Federal Republic of Germany during the early 1970s. It reflected "a desire to create corporatist relations between government, industry, and the trade unions...the main parties [then] concerned" for purposes of developing environmental, social and economic policy. See: Timothy Riordan, "The Precaution Principle in Environmental Management," p. 4. In addition, there is also the *principle of proportionality*, which "requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives and legitimately pursued by the legislation in question..." Theofanis Chrisotoforou, "The Precautionary Principle in European Community Law and Science," p. 250. The polluter's pay principle was recently enacted as an EU directive that "will force industries guilty of polluting the environment [for land and water pollution] to pay for the clean-up." It officially became law during March 2004. See: "EU Agrees to Make Polluters Pay for Environmental Damage," Agence France Presse (Feb. 20, 2004), available online at <http://www.eubusiness.com/afp/040220192846.bp8uy8zi>.

¹¹⁴ Sheila Jasanoff, "Risk, Precaution and Environmental Values."

¹¹⁵ Claude Henry, Marc Henry, "Formalization and Applications of the Precautionary Principles," Department of Economics, Columbia University, Discussion Paper #:0102-22 (March 2002), p. 3, available online at <http://www.columbia.edu/cu/economics/discpapr/DP0102-22.pdf>.

¹¹⁶ Wybe Th. Douma, "The Precautionary Principle," supra.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id; “By 1990, at the third conference in The Hague, the parties declared that they ‘will continue to apply the *precautionary principle*, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and liable to bioaccumulate even when there is no scientific evidence to prove that a causal link between emissions and effects.’ At the most recent North-Sea Conference, the Esbjerg Declaration of 1995 was adopted. It recommends that the *precautionary principle* is also applied where fisheries management policies are concerned. One of the reasons for this is that there is a recognized connection between fisheries and the marine ecosystem but gaps exist in the scientific knowledge of the impact of fisheries upon the ecosystems and (a conclusion of special importance to nations dependent on fisheries) of the impacts of environmental changes and pollution upon fisheries (emphasis added).” Id.

¹²⁰ Principle 15, the Rio Declaration on Environment and Development, United Nations Conference on the Environment and Development (June 1992).

¹²¹ See: Daniel Bodansky, “Scientific Uncertainty and the Precautionary Principle,” 33 *Environment* 4 (Sept. 1991), cited in David Hunter et al., *International Environmental Law*, Chap. 7, “Principles and Concepts of International Environmental Law—The Precautionary Principle,” pp. 360–363.

¹²² “[Rio Principle 15 reflects] a compromise between the Hague formulation of the *precautionary principle* and the US view that the lack of clear scientific evidence for a causal relationship between human behavior and the *greenhouse effect* meant that taking expensive measures was not acceptable. *As a result, there is no question of ‘principle,’ but of mere ‘approach,’* and the scope of the declaration is limited to damage which is either ‘serious’ or ‘irreversible’ and the measures are to be ‘cost-effective.’” Claude Henry, Marc Henry, “Formalization and Applications of the Precautionary Principles,” p. 4. See, also: Lawrence Kogan, “The U.S. Response to the Kyoto Protocol: A Realistic Alternative?” *Seton Hall Journal of Diplomacy and International Relations*, vol. III, no. 2 Sustainable Development (Summer/Fall 2002), p. 70, citing fns 137–138.

¹²³ “Commission of the European Communities, Communication From the Commission on the Precautionary Principle,” COM (2000) (Brussels, Feb. 2000), available online at http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf.

¹²⁴ “[I]n Article 130 R [of the Treaty on the European Union], the precautionary principle is added to the list of environmental principles which was introduced at an earlier stage in 1987 via the Single European Act... Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the *precautionary principle* and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay” (emphasis added). Wybe Th. Douma, “The Precautionary Principle,” *supra*.

¹²⁵ As one commentator notes, that “the Helsinki Convention underlines the importance of *precaution* at several stages. First of all, the parties to it shall take all appropriate measures to prevent, control and reduce pollution of waters causing *or likely to cause* transboundary impact (Article 2(2)(a), emphasis added). Secondly, Article 2(5)(a) expressly states that in taking the measures called for, the parties ‘shall be guided by’ a number of principles. The first one to be mentioned is the *precautionary principle*, ‘by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.’ ” Id.

¹²⁶ Id.

¹²⁷ According to Paragraph 2 of the Chairman’s conclusions, “Reflecting the variety of legal systems, incorporation of the Rio principles should be done in accordance with the legal culture and tradition of each state. This can be accomplished through explicit codification of principles, the elaboration of the principles into legislation and regulations, administrative policy, negotiated and/or voluntary agreements as well as case law.” See: “International Environmental Conference on Codifying Rio Principles in National Legislation,” The Peace Palace in The Hague (May 22–24, 1996), available online at <http://www.eel.nl/int/denhaag.htm>.

¹²⁸ Id., at pars. 1, 6 and 7.

¹²⁹ Preamble, the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

¹³⁰ Article 3.3., the United Nations Framework Convention on Climate Change (UNFCCC).

¹³¹ The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD), otherwise known as the ‘Biosafety Protocol.’

¹³² Article 8(g) of the CBD entitled, ‘In-Situ Conservation,’ provides that, “Each Contracting Party shall, as far as possible and appropriate...(g) Establish or maintain means to regulate, manage or control the

risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health...

¹³³ Preamble, the Biosafety Protocol.

¹³⁴ Article 1, The Biosafety Protocol.

¹³⁵ Article 10(6), the Biosafety Protocol.

¹³⁶ "Stockholm Convention on Persistent Organic Pollutants (POPs) To Enter Into Force On May 17, 2004," United Nations Environmental Program Press Release (Feb. 18, 2004), at: <http://www.pops.int/documents/press/pr2-04SC.pdf>. "The 90-day countdown to the treaty's entry into force was triggered on 17 February 2004 when France became the 50th state to ratify the agreement." *Ibid.* The Stockholm Convention is currently undergoing ratification proceedings within the U.S. Senate Foreign Relations and Environment and Public Works Committees. Apparently two federal statutes (TSCA and FIFRA) must be modified to implement the requirements of the Convention, and senators are examining how U.S. ratification of this treaty will impact both the activities of US industry domestically and the economic competitiveness of US industry internationally.

¹³⁷ Preamble, the Stockholm Convention on Persistent Organic Pollutants (the 'POPs Treaty').

¹³⁸ Article 1, the POPs Treaty.

¹³⁹ Article 8, the POPs Treaty. It reads as follows: "The Committee shall, based on the risk profile referred to...and the risk management evaluation...recommend whether the chemical should be considered by the Conference of the Parties for listing in Annexes A, B and/or C. The Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, *shall decide in a precautionary manner*, whether to list the chemical and specify its related control measures..."

¹⁴⁰ See: FAO News Room: "Rotterdam Convention Enters Into Force," (Feb. 24, 2004), available online at <http://www.fao.org/newsroom/en/news/2004/37667/>.

¹⁴¹ See: Article 5, The Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals and Pesticides in International Trade ('PIC Procedure'); Article 14 (1)(a) and (3)(d), available online at <http://www.pic.int/en/ViewPage.asp?id=104>.

¹⁴² Annex V (1)(e) 'Information Requirements For Export Notification,' PIC Procedure.

¹⁴³ Preamble, Montreal Protocol on Substances that Deplete the Ozone Layer, to the Vienna Convention for the Protection of the Ozone Layer.

¹⁴⁴ See: "Resolution 9.24—Criteria for Amendment of CITES Appendices I and II of the Convention." The Resolution has been revised several times. The most recent proposed version of this Resolution reads as follows: RESOLVES that, when considering proposals to amend Appendices I and II [of the Convention], the following applies: f) species included in Appendix I for which sufficient data are available to demonstrate that they do not meet the criteria listed in Annex 1 should be transferred to Appendix II only in accordance with the *relevant precautionary measures* listed in Annex 4; g) species included in Appendix II in accordance with Article II, paragraph 2(a), that do not meet the criteria listed in Annex 2a, should be deleted only in accordance with *the relevant precautionary measures* listed in Annex 4; and species included in accordance with Article II, paragraph 2(b), because they look like the species subject to the deletion, or for a related reason, should also be deleted only in accordance with the *relevant precautionary measures*..." Annex 4 entitled, '*Precautionary Measures*,' provides that, "When considering proposals to amend Appendix I or II, the Parties shall, *by virtue of the precautionary approach* and in case of uncertainty either as regards the status of a species or the impact of trade on the conservation of a species, act in the best interest of the conservation of the species concerned and adopt measures that are proportionate to the anticipated risks to the species." See, also: Annexes 5 and 6.

¹⁴⁵ The Ministerial Declaration issued at the WTO Ministerial Conference at Doha, Qatar, November 9-14, 2001, WT/MIN(01)/DEC/W/1, at par. 6.

¹⁴⁶ BNA Environmental Reporter (Nov. 23, 2001), p. 1.

¹⁴⁷ Indeed, the mission of the WTO's Committee on Trade and Environment (CTE) has been to discuss trade-environment policy linkages. During a March 2002 CTE special session meeting, the European Communities suggested that the "MEAs and WTO are equal bodies of international law." WTO CTE Special Session (March 21, 2002), at par. 19.

¹⁴⁸ The relevant passage of Article XX of the GATT provides that "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail...[pursuant to Article III(4)]...nothing in this Agreement shall be construed to prevent the adoption or enforcement by any

Member of measures: b) necessary to protect human, animal or plant life or health; or g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

¹⁴⁹ Lawrence Kogan, The National Foreign Trade Council, “Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science,” *supra* at pp. 16-18; Lawrence Kogan, “Unscientific ‘Precaution’: Europe’s Campaign to Erect New Foreign Trade Barriers,” *supra* at p. 7, citing SPS Articles 3, 4.1, 5.1, 5.2 and 5.3.

¹⁵⁰ Joost Pauwelyn, “The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes,” *Journal of International Economic Law* (1999) 641-664, at pp. 646, 648 citing the Appellate Body decision in the EC Hormones case, *infra*.

¹⁵¹ TBT Articles 2.4 and 2.7.

¹⁵² TBT Art. 2.2; TBT Annex 3 (E).

¹⁵³ TBT Art. 2.2. It also means that existing regulatory requirements shall not be maintained, if such legitimate state objectives can be addressed in a less trade-restrictive manner. TBT Art. 2.3.

¹⁵⁴ TBT Art. 2.2 and 2.5. This has been interpreted by some to mean that, regardless of their purposes it is the extraterritorial effects that such regulations have upon international trade that are determinative. See: Lawrence Kogan, “Unscientific ‘Precaution’: Europe’s Campaign to Erect New Foreign Trade Barriers,” *supra* at p. 9.

¹⁵⁵ TBT Art. 2.2.

¹⁵⁶ *Id.* When determining how to fulfill state objectives, “WTO Members, where appropriate shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics. TBT Art. 2.8; Annex 3(I) “Code of Good Practice for the Preparation, Adoption and Application of Standards.”

¹⁵⁷ SPS Art. 5.6.

¹⁵⁸ SPS Art. 2.2

¹⁵⁹ Joost Pauwelyn, “WTO Agreement on SPS Measures As Applied in the First Three SPS Disputes,” at pp. 649-50, citing the Appellate Body Report on ‘Measures Affecting Agricultural Products,’ hereinafter referred to as the Japan-Varietals case, adopted on March 19, 1999, WT/DS76AB/R.

¹⁶⁰ See: the Appellate Body Report on ‘EC Measures Concerning Meat and Meat Products (Hormones),’ hereinafter referred to as the EC –Hormones case, adopted on February 13, 1998, WT/DS26/AB/R; WT/DS48/AB/R.

¹⁶¹ Joost Pauwelyn, “WTO Agreement on SPS Measures As Applied in the First Three SPS Disputes,” *supra* at p. 651.

¹⁶² The six hormones in dispute are: oestradiol-17-beta, progesterone, testosterone, zeranol, trenbolone, and melengestrol acetate.

¹⁶³ The ban imposed by the Commission was subsequently adopted by the European Parliament and the Council of Ministers on July 22, 2003, through adoption of EC Directive 2003/74/EC, amending EC Directive 96/22/EC. This new directive “confirms the prohibition of substances having a hormonal action for growth promotion in farm animals. “The European Commission, Food Safety: Hormones in Beef,” DG Health and Consumer Protection. “Moreover, it drastically reduces the circumstances under which oestradiol 17b may be administered for other purposes to food producing animals. See: “The European Commission, Food Safety: Hormones in Meat,” Europa website.

¹⁶⁴ According to the EU Commission, it has acted in accordance with WTO law because of the manner in which it has responded to the WTO Appellate Body’s ruling in the Beef Hormones dispute. The Commission argues that it has complied with this ruling by mandating a new assessment of the risks to human health from hormone residues in bovine meat products treated with the six hormones used for growth promoters. Now, since the Commission has taken account of emerging scientific data and gathered what it considers ‘a substantial body of scientific evidence’ showing that these substances indeed pose risks to human health, it is justified in imposing the ban. *Id.*

¹⁶⁵ Tobias Buck, “Transatlantic Dispute—EU Says It Obeys WTO Over Beef Hormones,” *Financial Times* (Oct. 16, 2003).

¹⁶⁶ *Id.* According to the Financial Times, “Research undertaken by an EU committee on veterinary health had concluded that one of the six hormones banned by Brussels should be considered a cancer-inducing substance. The committee argued that there were strong indications that the five other hormones also posed a health risk, though they found no conclusive evidence. The new law therefore bans these five

hormones *on a provisional basis* pending further scientific evidence.” (emphasis added)

¹⁶⁷ Id.

¹⁶⁸ See: Lawrence Kogan, “‘Enlightened’ Environmentalism or Disguised Protectionism: Assessing the Impact of EU Precaution-based Standards on Developing Countries.”

¹⁶⁹ “About 99% of genetically modified crops are grown in just six countries: the U.S., Canada, Argentina, Brazil, China and South Africa.” Scott Kilman, “U.N. Backs Gene-Modified Crops To Help the World’s Poor Farmers,” *Wall Street Journal* (May 18, 2004), p. B10.

¹⁷⁰ See: Lawrence Kogan, “Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science,” National Foreign Trade Council, pp. 50-62; fns 218-219 (May 2003).

¹⁷¹ “Bowing to pressure from Washington, the European Union lifted a six-year moratorium on new biotech foods Wednesday by allowing onto the EU market a modified strain of sweet corn, grown mainly in the United States...The corn-genetically modified to resist corn borer insect damage would only be imported and not grown in Europe, although an application for cultivation is pending. The corn had been developed by Syngenta, a Swiss-based company.” Paul Geitner, “European Union Ends Six-Year Biotech Moratorium with Approval of Sweet Corn Imports,” Associated Press, (May 19, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A40180-2004May19.html>.

¹⁷² On May 12, 2003, the U.S. filed a WTO suit against the EU to invalidate a moratorium against GMO products imposed by at least seven EU Member States in October 1998. The moratorium covered any new approval of genetically engineered products. The U.S. claimed that since it was the primary producer of such products, the moratorium had primarily targeted U.S. exports. See: Lawrence Kogan, “Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science,” pp. 19-22. The U.S. case “was supported by Canada, Argentina and more than a dozen other countries.” Paul Geitner, “European Union Ends Six-Year Biotech Moratorium With Approval of Sweet Corn Imports.”

¹⁷³ Id.

¹⁷⁴ Id., quoting Richard Mills, spokesman for the U.S. trade representative in Washington.

¹⁷⁵ Id.

¹⁷⁶ Paragraph 8 of Directive 2001/18/EC provides that, “The precautionary principle has been taken into account in the drafting of this Directive and must be taken into account when implementing it.”

¹⁷⁷ China has also recently issued proposed regulations on GMOs said to mirror EU legislation. See: Lawrence Kogan, “Unscientific ‘Precaution’: Europe’s Campaign to Erect New Foreign Trade Barriers,” The National Foreign Trade Council, Washington Legal Foundation Critical Legal Issues Working Paper Series No. 118 (Sept. 2003), pp. 53-54, available at <http://www.wlf.org/upload/kogan.pdf>. See, also: Lawrence Kogan, “EU Regulation, Standardization and the Precautionary Principle: The Art of Crafting a Three Dimensional Trade Strategy that Ignores Sound Science,” National Foreign Trade Council (Sept. 2003), available at <http://nftc.org/default/white%20paper/WLFfinaldocumentII.pdf>.

¹⁷⁸ Tobias Buck, “Brussels Warns EU on Modified Crops, European Commission Governments Told to End Foot-Dragging on Approving Products But U.S. Attacked for Threat of WTO Challenge,” *Financial Times* (Feb. 4, 2003); Id. p. 33. See, also: Paul Geitner, “European Union Ends Six-Year Biotech Moratorium With Approval of Sweet Corn Imports.” “Byrne said the Bt11 had undergone ‘the most rigorous pre-marketing assessment in the world. It has been scientifically assessed as being as safe as any conventional maize.’” Id.

¹⁷⁹ Id; Lawrence Kogan, “Unscientific ‘Precaution’: Europe’s Campaign to Erect New Foreign Trade Barriers,” *supra* at pp. 11-13.

¹⁸⁰ See: Commission Published [New] Draft Chemicals Legislation for Consultation,” EU Press Release (May 7, 2003), available online at http://europa.eu.int/comm/press_room/presspacks/reach/pp_reach_en.htm; http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/646|0|RAPID&lg=EN.

¹⁸¹ Lawrence Kogan, “Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science,” *supra* at pp. 82-87; Lawrence Kogan, “Unscientific ‘Precaution’: Europe’s Campaign to Erect New Foreign Trade Barriers,” *supra* at pp. 14-16.

¹⁸² See: Commission Published [New] Draft Chemicals Legislation for Consultation.”

¹⁸³ On October 29, 2003, the EU Commission issued revised regulations “on testing chemicals for risks to health and the environment that could ban substances not registered by a certain date.” This revision, in some respects, reflected changes called for in comments the Commission had received from interested foreign stakeholders in response to its initial draft legislation, issued the previous May. See: “FACTBOX-

EU's Draft Chemicals Regulations," Reuters (10/29/03), available online at <http://www.forbes.com/markets/bonds/newswire/2003/10/29/rtr1127225.html>.

¹⁸⁴ Lawrence Kogan, "Enlightened' Environmentalism or Disguised Protectionism: Assessing the Impact of EU Precaution-based Standards on Developing Countries."

¹⁸⁵ Lawrence Kogan, "Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science," supra at pp. 87-104; See, also: "U.S. Comments on the EU's Draft Chemicals Regime," The United States Mission to the European Union (July 10, 2003), available online at <http://www.useu.be/Categories/Environment/July1003USEUChemicalsComments.html>.

¹⁸⁶ Id., at pp. 65-82.

¹⁸⁷ Id.

¹⁸⁸ Lawrence Kogan, "Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers," supra at pp. 28-29.

¹⁸⁹ Id.

¹⁹⁰ Joel P. Trachtman, "The Domain of WTO Dispute Resolution," *Harvard Int'l Law J.* vol. 40, 333 (1999), at pp. 342-343, fn 51, p. 349, fn 71. According to Professor Trachtman, several provisions of the Dispute Settlement Understanding provide this limitation – Articles 3(2), 7 and 11 require WTO panels to refer specifically to the 'covered agreements.' Draft at p. 10.; Lawrence Kogan, "Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers," supra at pp. 61-63.

¹⁹¹ Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" *Am. J. of Int'l Law* vol. 95, pp. 535, 560–561, 577–78. According to Professor Pauwelyn, "WTO Members can conclude...new treaties [e.g., MEAs] that may have an impact on the WTO treaty. These new post-1994 treaties may simply add to or confirm preexisting WTO rules, but they may also terminate, contradict or suspend WTO rules [depending] on the conflict rules set out in the WTO treaty, in the new post-1994 treaty or those of general international law..." Id. at p. 547; Lawrence Kogan, "Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers," supra at pp. 63–65.

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