

**HEALTH & SAFETY RIGHTS AND
TRANSNATIONAL LIABILITY FOR HARM**

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ABSTRACT

Safety and health is a basic human need and when not met, exacts costs that prevent societies from realizing development goals. Injury is increasing as a leading cause of death and disability. As the result of advances in public health knowledge and safety engineering technology, accidents and other injury events are often preventable. Injuries result from identifiable determinants and conditions that create exposure to identifiable hazards. By controlling hazards, the toll of injury can be reduced.

International trade and investment can create conditions that increase or diminish the global injury burden. International institutions and national governments face the question of how to protect safety and health rights and reduce the injury burden in a world of increasingly global business activity. International institutions do not yet provide comprehensive regulation for exported harms. In common law nations, liability through formal law plays an important role in regulating conditions that can lead to injury. In such nations, private law can play an important role in filling segments of the regulatory gap relating to exported harms.

La sécurité et la santé sont un besoin humain de base et quand non satisfaites, elles exigent les coûts qui empêchent les sociétés de réaliser les buts de développement. Les blessures augmentent comme une principale cause de décès et d'incapacité. À la suite des avancées dans la connaissance de santé publique et les technologies de sécurité, les accidents et d'autres événements des blessures sont souvent évitables. Les blessures résultent des causes déterminantes et des conditions identifiables qui créent l'exposition aux risques identifiables. En contrôlant les risques, on peut réduire le nombre des blessures.

Le commerce international et l'investissement peuvent créer les conditions qui augmentent ou diminuent le fardeau mondial des blessures. Les établissements internationaux et les gouvernements nationaux se trouvent devant la question de comment protéger les droits de sécurité et de santé et de comment réduire le fardeau des blessures dans un monde d'activité commerciale de plus en plus mondiale. Les établissements internationaux ne fournissent pas encore le règlement complet pour les dommages exportés. Dans les nations de common law, la responsabilité par la loi formelle joue un rôle important en régulant les conditions qui peuvent mener aux blessures. Dans de telles nations, le droit privé peut jouer un rôle important en comblant les lacunes du règlement concernant les dommages exportés.

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INTRODUCTION

The global environment of injury and illness is increasingly impacted by trade and investment resulting from deepening global and regional markets. As a result, international institutions and national governments confront the question of how to protect people's safety and health from risks arising in transnational contexts. This thesis examines the prevalence of unintentional injury¹ in the world today and argues that unintentional injuries are highly preventable but that significant gaps exist in regulatory frameworks for the control of hazards that cross national borders. The thesis advances transnational private law in the home states of transnational corporations² (TNCs) as one important regulatory measure that can contribute to global strategies for the prevention of unintentional injury.

Transnational activity implicates the interests of both home states and host states and is fairly the subject of multijurisdictional regulatory frameworks. Home states have substantial interests in controlling harms caused by their nationals. The activity causing injury in the context of trade and investment frequently originates from and is substantially controlled by nationals residing in the TNCs' home states. Effective injury prevention focuses on this activity as the object of regulatory actions.

Legal liability in the courts of the home countries of TNCs provides one effective means for deterring violations of safety and health rights committed during the course of a TNC's overseas operations. Through jurisdictional and conflicts of law doctrines, the law of home states has developed to resolve disputes where the interests of two or more jurisdictions are implicated. Continued evolution of jurisdictional and conflicts of law doctrines to account for present realities and the development of causes of action upon which liability is based can fill additional corners of a comprehensive injury prevention strategy to minimize and control harms arising from global trade and investment. This thesis examines the ongoing development of transnational private law in furtherance of these ends.

Injury surveillance data reveal that unintentional injury is steadily increasing as a leading cause of premature death and disability. The World Health Organization (WHO)

¹ Throughout this article, unintentional injury includes injuries, illnesses, and other adverse health effects where causative agents, in systems, processes, practices, or products, are determinable and an intention to harm is not present. The term excludes injuries resulting from natural events or illness of indeterminate natural origin.

² Analysis is confined to liability doctrines existing in home states with common law legal systems. Private law doctrines within civil jurisdictions may equally contribute to global injury prevention strategies however they are beyond the scope of this thesis.

estimates that injuries annually result in over six million fatalities³ and are the second leading cause of premature deaths.⁴ Additional studies find that exposure to environmental hazards such as chemical toxins and airborne particulates cause between twenty-three and forty percent of the world's deaths each year⁵ and work related injuries cause over two million fatalities each year.⁶ Between 1998 and 2001, the number of workplace fatalities grew by ten percent.⁷ The International Labor Organization (ILO) attributes recent increases in workplace fatalities to factors created by rapid economic expansion within nations with developing economies.⁸

Through trade and investment, TNCs are shaping the social and constructed environments in which people work and live in many nations across the globe. Trade and investment introduces new products, technologies, and systems⁹ into overseas communities that often lack knowledge and resources to protect against attendant risks. Furthermore, trade and investment policies can exert pressures resulting in domestic underregulation of hazardous activity. In these ways, international trade and investment can create conditions that increase or diminish the global injury burden. Whether trade and investment will enhance or detract from the safety and health of overseas communities will likely be determined less by the inherent characteristics of globalization and liberalized trade and more by the manner in which products, technology, and systems are designed, introduced, and regulated in particular applications.

The regulation of potentially hazardous activity may have significant consequences for the development goals of nations embracing liberalized trade and foreign investment.

³ See M. Peden, K. McGee & G. Sharma, *The Injury Chart Book: A graphical overview of the global burden of injuries* (Geneva: WHO, 2002) at 9, online: WHO <<http://www.who.int/>> [M. Peden, K. McGee & G. Sharma, *The Injury Chart Book*].

⁴ Pierre Maurice & Claire Laberge-Nadeau, "General Presentation" (Abstract presented to the 6th World Conference Injury Prevention and Control, May 2002) (Montreal: Les Presses de l'Université de Montréal, 2002) at xvii, online: Institut National de Santé Publique Québec <<http://www.inspq.qc.ca/>>.

⁵ See Kirk R. Smith, Charles F. Corvalán, & Tord Kjellström, "How Much Global Ill Health Is Attributable to Environmental Factors" (1999) 10 *Epidemiology* 573 at 581 online: WHO <<http://www.who.int/>> and David Pimentel, *et al.*, "Ecology of Increasing Disease: Population growth and environmental degradation" (1998) 48:10 *Bioscience* 817 (ProQuest).

⁶ ILO, *Safety in numbers: Pointers for a global safety culture at work* (Geneva: ILO 2003) at 3, online: ILO <<http://www.ilo.org/>> [ILO, *Safety in numbers*].

⁷ *Ibid.* at 4.

⁸ *Ibid.*

⁹ Unless context clearly indicates otherwise, as used in this thesis and consistent with meanings developed in safety sciences, the term 'system' refers to an "integrated composite of people, products, and processes that provide a capability to satisfy a stated need or objective." U.S. DoD., *Standard Practice for System Safety* MIL-STD-882D (Washington, D.C.: U.S. Department of Defense, 2000) at 2, online: U.S. Navy, Naval Safety

Safety and health is intimately related to economic potential.¹⁰ Safe workplaces and living environments “contribute to sustainable development.”¹¹ Safety and health improvements represent an investment in human capital¹² and are vital to the economic development of all nations, but particularly those dependent upon attracting foreign investment in labor intensive operations. Economic efficiency argues strongly for the protection of workers’ safety and health, however these arguments should not supersede or obviate ethical considerations. In an era when most occupational injuries and many other injuries can be eliminated, moral principles, as expressed in part through human rights instruments, require that measures be taken to prevent such injuries.

Through study and application, injury prevention specialists recognize that injury is best controlled by eliminating or minimizing, as much as possible, opportunities for people’s exposure to potential hazards.¹³ Knowing the causes of injury and methods of effective prevention however has not always led to the development of societal strategies for injury prevention.¹⁴ Scholars have argued for the conceptualization of societal strategies from a point grounded in human rights.¹⁵ Recognition of the place of safety and health within human rights discourse provides context and impetus for the development of injury prevention strategies protecting such rights.

In relation to overseas trade and investment, prevention strategies are commonly grounded in market theory, the development of voluntary codes of conduct, and regulation at the national level of host states.¹⁶ Market forces alone have long proved unable to

Center <<http://www.safetycenter.navy.mil/>>.

¹⁰ See Jerry Jeyaratnam, “Occupational Health Trends in Development” in Jeanne Mager Stellman, ed., *Encyclopaedia Of Occupational Health And Safety* (Geneva: International Labor Office, 1998) at Chpt. 20, (CCINFOweb) [Jerry Jeyaratnam, Occupational Health Trends in Development].

¹¹ G. Goldstein, R. Helmer & M. Fingerhut, “The WHO Strategy on Occupational Health and Safety” (2001) 8 Asian-Pacific Newslett. Occ. Safety Health 52 at 53, online: Finnish Institute of Occupational Health <<http://www.ttl.fi/>>.

¹² Jerry Jeyaratnam, Occupational Health Trends in Development, *supra* note 10.

¹³ See the ILO’s developing *Promotional Framework Convention on Occupational Safety and Health*, which is drafted upon a systems approach to occupational safety and health calling for preventative assessments of risks and hazards in workplace environments. ILO, *Provisional Records, Fourth item on the Agenda: Occupational safety and health, Report of the Committee on Safety and Health*, ILC95-PR20-164, ILC 95th Sess. (2006) at 20/2 & 20/64, online: ILO <<http://www.ilo.org>> [ILO, Provisional Records, Fourth item on the Agenda: Occupational safety and health, Report of the Committee on Safety and Health].

¹⁴ See Jonathan M. Mann, “Health and human rights” (1996) 312 Brit. Med. J. 924, online: BMJ.com <<http://bmj.bmjournals.com>> [Jonathan M. Mann, Health and human rights].

¹⁵ Jonathan M Mann & Scott Burris, “Public health and Human Rights” (1998) 25:4 Human Rights 2 at 4 (Proquest) [Jonathan M Mann & Scott Burris].

¹⁶ Throughout this thesis, host states refer to those nations where to which overseas trade and investment is directed.

produce optimal levels of protection for people's safety and health. Transaction costs,¹⁷ behavioral factors present in individual decision making,¹⁸ and the untranslatable nature of social values into price indicators¹⁹ hinder the market's ability to efficiently achieve optimal injury prevention. Voluntary codes may provide some level of protection but ultimately suffer from the lack of methods to ensure compliance,²⁰ a lack of reasonably certain consequences for noncompliance,²¹ and an inability to spur compliance from those who choose not to subscribe.²² The deficiencies of market forces and voluntary codes point to what national governments have long known. Regulation through formal law is a necessary component of strategies to protect people's safety and health and to prevent unintentional injuries arising from potentially harmful business activity.²³

In developed economies and in many developing ones, regulatory frameworks combine public law initiatives through command and control regulation and private law actions.²⁴ Analogous regulatory frameworks can be conceptualized at the international level, however international and regional frameworks remain largely undeveloped to directly regulate the potentially harmful conduct of TNCs. As a result, protection of safety and health rights in the context of transnational business activity is often left to national governments.²⁵

Globally, national governments do not possess equal resources and capacity for controlling harmful activity of TNCs. In countries where TNCs are often incorporated, maintain their headquarters, and make corporate decisions, regulatory agencies and domestic courts tend to be stable and have the institutional strength and experience to regulate

¹⁷ See generally, Keith N. Hylton, "Calabresi and the Intellectual History of Law and Economics" (2005) 64 Md. L. Rev. 85 at 103 (WL) [Keith N. Hylton, Calabresi and the Intellectual History of Law and Economics].

¹⁸ See generally, Christine Jolls, Cass R. Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 Stan. L. Rev. 1471 at 1477-1478 (WL) [Christine Jolls, Cass R. Sunstein & Richard Thaler].

¹⁹ See generally, Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: The New Press, 2004) [Frank Ackerman & Lisa Heinzerling, Priceless].

²⁰ See generally Ilias Bantekas, "Corporate Social Responsibility in International Law" (2004) 22 B.U. Int'l L.J. 309 at 337 (WL) [Ilias Bantekas].

²¹ Neil Kearney, "Corporate Codes of Conduct: the Privatized Application of Labour Standards" in Sol Picciotto & Ruth Mayne, eds., *Regulating International Business: Beyond liberalization* (New York: St. Martin's Press in association with Oxfam, 1999) 205 at 247 [Neil Kearney].

²² *Ibid.*

²³ See generally, OECD, *Corporate Responsibility: Private Initiatives and Public Goals* (Paris: OECD, 2001) at 27 [OECD, Corporate Responsibility].

²⁴ See generally Wendy E. Parmet, "Tobacco, HIV, And The Courtroom: The Role Of Affirmative Litigation In The Formation Of Public Health Policy," 36 Hous. L. Rev. 1663 at 1686-1697 (1999) (WL) [Wendy E. Parmet].

²⁵ See generally, William S. Dodge, "Extraterritoriality and Conflict-of-Laws Theory" (1998) 39 Harv. Int'l L.J.

hazardous business activity. In developing countries where TNCs locate higher risk natural resource extraction operations and labor-intensive production facilities, regulatory agencies and domestic courts tend to exist in a more fragile state and lack the institutional strength and experience to regulate hazardous business activity. Within this context, regulation through home state nations may provide immediate means of control for egregious conduct undertaken in the course of overseas trade and investment.

Command and control regulation through home state domestic institutions faces significant political and pragmatic barriers. Transnational private law liability in the home state may overcome, in some measure, existing gaps in the regulation of the activities of TNCs causing injuries in overseas jurisdictions.

Chapter 1 overviews the incidence and calculable burden of unintentional injury before discussing the impact of globalized trade and investment on the environments in which injuries are occurring. The chapter concludes with a discussion of national development goals in relation to people's safety and health.

Chapter 2 considers existing dominant methodologies for the control of harm and the protection of safety and health rights in the context of overseas trade and investment. This section closes with a discussion of the shortcomings of market forces and voluntary initiatives as dominant methodologies for controlling risks of harm.

Chapter 3 argues for formal law regulatory frameworks to control the activities of TNCs and overviews models at international and national levels of government. A discussion follows of existing barriers to public law measures through command and control frameworks. The chapter then discusses the goals of private law and argues for the development of transnational private law as one measure within global strategies for the protection of people's safety and health.

Chapter 4 discusses the development of transnational private law in the context of safety and health rights and examines efforts to date in home state judicial forums of common law jurisdictions.

CHAPTER 1

THE GLOBAL ENVIRONMENT OF INJURY

Jamais Personne Ne Pense Que Quelqu'un Va Mourir Au Moment Le Plus
Inopportun Même Si Cela Se Produit Constamment, Et Nous Ne Pouvons Pas
Croire Que Celui Qui Ne Le Devrait Pas Va Pourtant Mourir Près De Nous.

- *Javier Mariás*

While other health threats receive greater attention, unintentional injury quietly continues as a leading cause of death and disability in the world today. Often arising from risk factors within the constructed environments in which people work and live, injury threatens the safety and health rights of citizens in each nation and particularly those of citizens residing in countries with rapidly changing economies. World Health Organization researchers state that safety “is an essential resource for everyday life, needed by individuals and communities to realize their aspirations.”²⁶ The WHO sets forth four basic conditions for individuals, communities, and societies to attain optimal levels of safety. The conditions are: 1) an environment of social cohesion including equity protecting human rights and freedoms; 2) the prevention of injuries and other consequences of accidents; 3) respect for the physical and psychological integrity of individuals; and 4) providing “effective preventive, control and rehabilitation measures” to ensure the first three conditions.²⁷ Evidence suggests that the international institutions and national governments are failing to meet the conditions needed for people’s safety.

A. The Global Burden Of Unintentional Injury

Injury surveillance data reveals that unintentional injury exacts a heavy burden across the globe and is steadily increasing as a leading cause of premature death and disability.²⁸ In the past decade, the WHO initiated research intended to document the global incidence and burden of injuries. The resulting publications represent an important first step in developing epidemiological understandings of injury across the globe.²⁹

²⁶ WHO Collaborating Centre on Community Safety Promotion at the Karolinska Institute, *The Safe Community Network* (Stockholm: Karolinska Institutet 1999) at 9 online: Karolinska Institutet <<http://www.phs.ki.se/>>.

²⁷ *Ibid.*

²⁸ See generally World Health Organization, *Injury: A leading cause of the global burden of disease* (Geneva: WHO, 2000) at 1-4, online: WHO <<http://www.who.int/>>; and SmartRisk, *The Economic Burden of Unintentional Injury in Canada* (Toronto: SmartRisk, 1998) at 1 to 14, online: SmartRisk <<http://www.smartrisk.ca/>>.

²⁹ Injury data however continues to exist in imperfect form for ready determination of the full scope of the burden of unintentional injury. Many countries do not have injury surveillance programs. When programs exist, they frequently omit particular communities, economic sectors, and social groups. Widespread underreporting also compromises existing programs. Furthermore, different reporting methods complicate the

The WHO estimates that over six million people worldwide die from injuries each year.³⁰ Over half the deaths are attributable to unintentional injuries.³¹ Injury is the second leading single cause of deaths worldwide³² and represents nine percent of all deaths.³³ Except for persons older than sixty years of age, injury is a leading cause of death in all age groups.³⁴ Almost fifty percent of deaths to persons aged fifteen to forty-four, the most economically productive segment of the population, results from injury.³⁵ Research estimates over eighty-four million years of life are lost yearly due to premature death caused by injuries.³⁶ In addition to the fatalities, seventy-eight million people annually are disabled by injuries.³⁷ In 1990, years of life lived with disability caused by injury was estimated at over seventy-six million, with sixty-seven million attributed to unintentional injuries.³⁸

The WHO quantifies the global burden of disease through the measurement of disability adjusted life years (DALY). Disability adjusted life years represent the total amount of healthy life years lost. Researchers estimate that injuries caused over 208 million DALYs in 1990³⁹ and over 230 million DALYs in 2000⁴⁰ and will cause over 250 million DALYs in 2010.⁴¹ The WHO estimates that injuries account for twelve percent of the global burden of disease⁴² and injury's percentage of the global burden of disease is expected to rise over the next fifteen years.⁴³ Over half of the injury burden is attributed to unintentional injuries.⁴⁴

process of collecting information and of comparing data across different political jurisdictions. Despite their imperfections, existing studies provide a window on the prevalence of unintentional injury throughout the world.

³⁰ See M. Peden, K. McGee & G. Sharma, *The Injury Chart Book*, *supra* note 3 at 9.

³¹ *Ibid.* See also Christopher J. L. Murray & Alan D. Lopez, eds., *The Global Burden of Disease: A comprehensive assessment of mortality and disability from diseases, injuries, and risk factors in 1990 and projected to 2020* (Cambridge, MA: Harvard School of Public Health 1996) at 469 [Christopher J. L. Murray & Alan D. Lopez].

³² Pierre Maurice & Claire Laberge-Nadeau, "General Presentation" (Abstract presented to the 6th World Conference Injury Prevention and Control, May 2002) (Montreal: Les Presses de l'Université de Montréal, 2002) at xvii, online: Insitut National de Sante Publique Québec <<http://www.inspq.qc.ca/>>.

³³ See M. Peden, K. McGee & G. Sharma, *The Injury Chart Book*, *supra* note 3 at 9.

³⁴ M. Peden, K. McGee & E. Krug, eds., *Injury: A leading cause of the global burden of disease, 2000* (Geneva: WHO, 2002) at 3, online: WHO <<http://www.who.int/>>.

³⁵ See M. Peden, K. McGee & G. Sharma, *The Injury Chart Book*, *supra* note 3 at 16.

³⁶ See Christopher J. L. Murray & Alan D. Lopez, *supra* note 31 at 505.

³⁷ Bruce J. Farquhar, "The Consumer Perspective" (Abstract presented to the 6th World Conference Injury Prevention and Control, May 2002) (Montreal: Les Presses de l'Université de Montréal, 2002), online: Insitut National de Sante Publique Québec <<http://www.inspq.qc.ca/>>.

³⁸ Christopher J. L. Murray & Alan D. Lopez, *supra* note 31 at 547.

³⁹ *Ibid.* at 577.

⁴⁰ *Ibid.* at 687.

⁴¹ *Ibid.* at 759.

⁴² See M. Peden, K. McGee & G. Sharma, *The Injury Chart Book*, *supra* note 3 at 17.

⁴³ *Ibid.* at 5.

⁴⁴ *Ibid.* at 18.

World Health Organization estimates however do not yield a complete picture of the injury burden. The WHO develops injury estimates from data drawn from surveillance of specific injury categories. The categories do not encompass all types of injuries suffered by citizens. Most notably, WHO injury data does not include illnesses caused by exposure to many environmental hazards such as chemical toxins and airborne particulates.

Conservative estimates attribute environmental factors to between twenty-three and thirty-one percent of world deaths and between twenty-five and thirty-three percent of the global burden of disease.⁴⁵ Other researchers estimate that forty percent of the world's deaths each year are attributable to environmental factors, "especially organic and chemical pollutants."⁴⁶ Chemicals, ionizing and ultraviolet radiation, tobacco use, and other environmental factors may cause eighty percent of all cancer illnesses.⁴⁷ Lead poisoning is attributed to three percent of all cerebrovascular disease, five percent of all hypertensive heart disease, and three percent of ischaemic heart disease and other cardiovascular disease.⁴⁸ Neither WHO global injury data nor data regarding injury from environmental threats fully captures the burden of unintentional injury occurring in occupational settings. Occupational injury data provides another window on the scope of the injury burden.

1. The Burden of Injury Resulting from Workplace Hazards.

More than two million people die from work-related injuries each year.⁴⁹ Of this number, approximately three hundred and thirty-five thousand fatalities result from workplace accidents and 1.65 million fatalities result from workplace exposures causing disease processes.⁵⁰ Conservative estimates find that fatal occupational injuries account for 2.7 percent of the global burden of disease.⁵¹ An additional 160 million people annually suffer from non-fatal work-related injuries.⁵² Within the working population, occupational

⁴⁵ Kirk R. Smith, Charles F. Corvalán, & Tord Kjellström, "How Much Global Ill Health Is Attributable to Environmental Factors" (1999) 10 *Epidemiology* 573 at 581 online: WHO <<http://www.who.int/>>.

⁴⁶ David Pimentel, *et al.*, "Ecology of Increasing Disease: Population growth and environmental degradation" (1998) 48:10 *Bioscience* 817 (ProQuest).

⁴⁷ See *ibid.* at 818.

⁴⁸ WHO, "Global estimates of burden of disease caused by environment and occupational risks," online: WHO <<http://www.who.int/>>.

⁴⁹ See Timothy Driscoll, *et al.*, "Review of Estimates of the Global Burden of Injury and Illness Due to Occupational Exposure" [2005] 48 *Am J. Ind. Med.* 491 at 499 (ScienceDirect) [Timothy Driscoll]; and ILO, *Safety in numbers*, *supra* note 6 at 3.

⁵⁰ Jukka Takala, "Global Estimates of Fatal Occupational Accidents" (1999) 10 *Epidemiology* 640 at 643, online: WHO <<http://www.who.int/>> [Jukka Takala, *Global Estimates*].

⁵¹ James Leigh, *et al.*, "Global Burden of Disease and Injury Due to Occupational Factors" (1999) 10 *Epidemiology* 626, online: WHO <<http://www.who.int/>> [James Leigh, *et al.*, *Global Burden of Disease*].

⁵² ILO, *Safety in numbers*, *supra* note 6 at 8.

factors account for sixteen percent of the total burden of disease attributable to unintentional injuries.⁵³

Workplace fatalities and injuries result from exposure to a variety of hazards, including fires, explosions, unguarded mechanical devices, toxins, and airborne particulates. Two hundred and seventy million workplace accidents⁵⁴ occur in workplaces each year.⁵⁵ Exposure to carcinogens accounts for the largest percentage of workplace deaths, approximately thirty-two percent.⁵⁶ Workplace carcinogens include asbestos, toxic chemicals, radiation, toxic dusts, tobacco smoke, and diesel engine exhaust.⁵⁷ Asbestos alone annually causes one hundred thousand work-related deaths.⁵⁸ Within the working population, between twenty and thirty percent of male employees and five to twenty percent of female employees are exposed to lung carcinogens.⁵⁹ Circulatory diseases are the second leading cause of work-related deaths at twenty-three percent, followed by occupational accidents at nineteen percent.⁶⁰ Data further indicate that workplace injury has departed from past trends and is increasing globally.

Because fatalities in developing countries are increasing at a faster rate than they are declining elsewhere, workplace deaths grew by ten percent between 1998 and 2001.⁶¹ Researchers observe that the “difference in accident rates between developed and developing countries is remarkable.”⁶² For established market economies, the annual fatality rate is 3.2 per 100,000 workers and the accident rate is 3,240 per 100,000 workers.⁶³ For Latin America, the fatality rate is 24.9 and the accident rate is at 18,000.⁶⁴ China’s fatality and accident rates are 10.5 and 8,208 per 100,000 per workers⁶⁵ and India’s is at 11.4 and 8,700.⁶⁶

⁵³ WHO, *World Health Report 2002: Reducing Risks Promoting Health Lives* (Geneva: WHO 2002) at 75, online: WHO <<http://www.who.int/>> [WHO, World Health Report 2002].

⁵⁴ Defined as causing at least three days absence from work,

⁵⁵ Timothy Driscoll *supra* note 49.

⁵⁶ ILO, *Safety in numbers*, *supra* note 6 at 4

⁵⁷ *Ibid.*

⁵⁸ ILO, *World Day for Safety and Health at Work 2005: A Background Paper* (Geneva: ILO 2005) at 7, online: ILO <<http://www.ilo.org/>> [ILO, World Day for Safety and Health at Work 2005].

⁵⁹ WHO, *World Health Report 2002*, *supra* note 53 at 75.

⁶⁰ ILO *Safety in numbers*, *supra* note 6 at 4-5.

⁶¹ ILO, *World Day for Safety and Health at Work 2005*, *supra* note 58 at 4.

⁶² Päivi Hämäläinn, Jukka Takala, & Kaija Leena Saarela, “Global Estimates of Occupational Accidents” [2006] 44 *Safety Science* 137 at 138 (Elsevier).

⁶³ *Ibid.* at 143.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 147.

⁶⁶ *Ibid.* at 143.

Other Asia nations and sub-Saharan Africa's estimated fatality and injury rates are 21.5 and 16,000.⁶⁷

Fatalities from accidents cause a greater percentage of occupational deaths in nations with developing economies. Latin America accounts for eleven percent of all fatalities from accidents, while sub-Saharan Africa accounts for fifteen percent, India for eleven percent, and China for twenty six percent.⁶⁸ Researchers further estimate that forty percent of global fatalities from work-related diseases occur in India and China alone.⁶⁹ Latin America, the remaining nations of Southeast Asia, and sub-Saharan Africa account for thirty percent of global deaths from work-related diseases.⁷⁰ In recent years, Latin American work-related fatalities increased by thirty-three percent and in China work-related fatalities increased by twenty-three percent.⁷¹ In countries with developing economies, "the risk of fatal or severe accidents may be 10-20 times higher" than in the traditional industrialized nations.⁷² The ILO attributes the rapid increase in workplace fatalities to factors⁷³ created by rapid economic expansion within these regions.⁷⁴

In many ways, citizens in developing economies are experiencing rapid economic transformation with resulting safety and health impacts not unlike those of the industrial revolutions experienced in the United States and Western Europe in the late 19th century and early 20th century.⁷⁵ Significant differences exist however between the present environment of injury and those of past eras. During earlier eras, industrial technologies, safety sciences, and related regulatory models were often in early stages of development.⁷⁶ Today, injury prevention is a developed discipline within engineering and public health fields and the knowledge and technology exists to prevent many of the world's injuries. Likewise,

⁶⁷ *Ibid.* at 147.

⁶⁸ J. Takala, *Introductory Report: Decent Work-Safe Work* (Geneva: ILO, 2005) at 10, online: ILO <<http://www.ilo.org>>.

⁶⁹ *Ibid.* at 32.

⁷⁰ *Ibid.*

⁷¹ ILO, World Day for Safety and Health at Work 2005, *supra* note 58 at 1.

⁷² Jorma Rantanen, Suvi Lehtinen & Kai Savolainen, "The Opportunities and obstacles to collaboration between developing and developed countries in the field of occupational health" [2004] 198 *Toxicology* 63 at 65 (Elsevier) [Jorma Rantanen, Suvi Lehtinen & Kai Savolainen].

⁷³ Factors related to rapid economic transformation and increased risks of injury are discussed in sections C.2 and D of this chapter.

⁷⁴ *Ibid.*

⁷⁵ World Resources Institute, *World Resources 1998-99: Environmental Change and Human Health* (New York: Oxford University Press USA, 1998) at 51-54.

⁷⁶ See generally, Mark Aldrich, *Safety First: Technology, Labor, and Business in the Building of American Work Safety, 1870-1939* (Baltimore: John Hopkins University Press, 1997) at 259-282.

regulatory models are well developed to promote the implementation of safety measures to control known risks of injuries existing in workplace, marketplace, and living environments. With implementation of existing knowledge and technology and effective regulatory controls, an estimated two-thirds of the burden of all occupationally caused deaths and disabilities could be prevented.⁷⁷

B. Prevention Of Unintentional Injuries

Prior to the development of the modern science of injury prevention and control, injury was generally viewed as the product of random 'act of God' events or the careless or malevolent behavior of individuals.⁷⁸ As events resulting from an act of God, intervention strategies were considered impractical and ineffective.⁷⁹ Viewed as the foolish or malevolent behavior of individuals, accident analysis reflected the value judgment of individualism permeating scientific communities and institutions.⁸⁰ Individualistic approaches "bracket off questions about the structure of society ... [and] concentrate instead on questions about the behavior of individuals within that (apparently fixed) structure."⁸¹ "Unhealthy behavior results from individual choice, the ideology implies, so the way to change such behavior is to show people the error of their ways and urge them to act differently."⁸²

In the past half century, the science of injury prevention and control has moved beyond individualistic approaches to recognize that injuries are caused by physical conditions and environmental contexts.⁸³ The science of injury prevention and control has come to understand injury as the result of events that "are non-random, have identifiable risk factors, and involve interactions among people, vehicles, equipment, and processes, and the physical and social environment."⁸⁴ Health and engineering professionals articulate the causes of injury in differing but compatible ways.

⁷⁷ See Jerry Jeyaratnam, Occupational Trends in Development, *supra* note 10.

⁷⁸ See generally Tom Christoffel & Stephen P. Teret, *Protecting the Public: Legal Issues in Injury Prevention* (New York: Oxford University Press, 1993) at 6 [Tom Christoffel & Stephen P. Teret].

⁷⁹ See Richard J. Bonnie & Bernard Guyer, "Injury as a Field of Public Health: Achievements and Controversies" (2002) 30 J.L. Med. & Ethics 267 (WL) [Richard J. Bonnie & Bernard Guyer].

⁸⁰ Tom Christoffel & Stephen P. Teret, *supra* note 78.

⁸¹ Sylvia Noble Tesh, *Hidden Arguments: Political Ideology and Disease Prevention Policy* (New Brunswick, N.J.: Rutgers University Press, 1988) at 161-162.

⁸² *Ibid.* at 162.

⁸³ See Tom Christoffel & Susan Scavo Gallagher, *Injury Prevention and Public Health: Practical Knowledge, Skills and Strategies* (Gaithersburg, MD: Aspen Publishers, Inc., 1999) at 17.

⁸⁴ See Lawrence R. Berger & Dinesh Mohan, *Injury Control: A Global View* (Oxford: Oxford University Press 1996) at 39 [Lawrence R. Berger & Dinesh Mohan].

1. Health Sciences Understandings of Injury Events.

Public Health professionals recognize that conditions caused by societal factors comprise the most important variables affecting health status.⁸⁵ Societal factors include education, economic structures, social contexts, the built environment, natural environments, and other components.⁸⁶ Public health professionals further recognize that individual behavior is markedly influenced by societal factors, including the environments in which they work and live.⁸⁷ To address fundamental causes, strategies for the prevention of unintentional injury must include components directed to the control and elimination of the social and environmental conditions causing injury events.

Health professionals view accidents as a three-stage event. Initially, there is a release of energy, followed by its transmission to people such that homeostasis is lost.⁸⁸ The release and transmission stages are followed by actions aimed at regaining homeostasis.⁸⁹ Energy, existing in various forms, is the agent of injury.⁹⁰ Injuries occur in the context of an environment that permits a harmful interaction between the agent and persons.⁹¹ Injuries are prevented by: eliminating or reducing the aggregation of particular forms of energy; preventing the release of energy; altering the rate or spatial distribution of the release of energy from its source; separating persons from the energy release by space or time; placing physical barriers between persons and the energy released; modifying surfaces where persons contact other objects as the result of energy released; strengthening persons to reduce susceptibility to injury during energy release; detecting and preventing the continuation of injury following energy release; and taking countermeasures to treat injury and restore function.⁹²

2. Engineering Sciences Understandings of Injury Events.

Engineering professionals generally view the injury process from a systems safety perspective. The term system is used to describe the method of examining an arena of

⁸⁵ *Ibid.*

⁸⁶ See Lawrence O. Gostin, "Public health, ethics, and human rights: A tribute to the late Jonathan Mann" (2001) 29 J.L. Med. & Ethics 121 at 122 (WL) [Lawrence O. Gostin, Public health].

⁸⁷ See generally, Jonathan M Mann & Scott Burris, *supra* note 15 at 3.

⁸⁸ See Julian A. Waller, *Injury Control: A Guide to the Causes and Prevention of Trauma* (Lexington, MA: Lexington Books, 1985) at 12.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* 16-17.

⁹¹ *Ibid.* at 23-24.

⁹² *Ibid.* at 40-45.

potential hazards.⁹³ Systems include individual products, a work practice, production method, service provided, and an environmental setting. A single system may contain multiple subsystems. Injuries result from exposure to hazards existing within systems and subsystems.⁹⁴ Hazards are conditions or changing sets of conditions that create the potential for injury.⁹⁵ Analytical tools examine systems to identify hazards creating a potential for injury.⁹⁶ Action is then taken to minimize the risk of injury through a hierarchy of measures. First, hazards are eliminated or minimized through alternative designs. If all hazards cannot be eliminated through design changes, guards and barriers are incorporated to prevent persons from being exposed to the hazard. Finally, persons are educated on how to avoid injury through proper warnings, instructions, and the use of personal protection equipment.⁹⁷

Despite differences in the two methodologies, both health professionals and engineering professionals recognize injuries as greatly influenced by the larger environments in which they occur. In all countries, these environments are increasingly ones created by others, over which individuals have little meaningful choice or control.⁹⁸ Health and engineering professionals recognize injury as preventable through intervention strategies directed at controlling the individual's exposure to the conditions that create injury opportunities. The conditions increasingly arise within the context of events facilitated by and occurring through international trade and investment.

C. The Global Trade Environment

Momentum continues for the ongoing development, strengthening, and expansion of international free trade. Over the past twenty years, international trade "has grown twice as fast as world" Gross Domestic Product (GDP).⁹⁹ Of the world's 193¹⁰⁰ nations, 146 are now members of the WTO and an additional 25, including the Russian Federation, are in the

⁹³ See Fred A. Manuele, *On the Practice of Safety*, 3rd Ed. (Hoboken, N.J.: John Wiley & Sons, 2003) at 327-329.

⁹⁴ *Ibid.* at 60-61.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at 251-258.

⁹⁷ *Ibid.* 309-310.

⁹⁸ See 6th World Conference on Injury Prevention and Control, "Montreal Declaration: People's Right to Safety" in 16 Health and Human Rights 185 at para. 5-9, online: GBV Prevention Network <<http://www.preventgbv africa.org>> [Montreal Declaration].

⁹⁹ Oxfam International, *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight against Poverty* (Oxford: Oxfam, (2002) at 34, online: Make Trade Fair <<http://www.maketrade fair.com/>> [Oxfam International, *Rigged Rules and Double Standards*].

¹⁰⁰ Number includes the members of the United Nations plus the Vatican and Taiwan.

process of accession to membership.¹⁰¹ World Trade Organization members account for more than ninety percent of world trade.¹⁰² International free trade is accelerating not only through accession to the WTO, but also through other mechanisms operating regionally and binationally.

Over the past ten years, more Regional Trade Agreements (RTAs) were negotiated and drafted than in all other post-World War Two decades combined.¹⁰³ Between 1995 and 2003, the WTO received notifications of 148 additional RTAs.¹⁰⁴ Over 190 RTAs are now in force and an additional 70 are estimated to be operational, although not yet notified to the WTO.¹⁰⁵ Only four WTO members are not yet a member of any RTA, however three of these members are in negotiations to join at least one RTA.¹⁰⁶ These developments contribute to the significant increase in the volume and value of the world trade in goods and services in recent decades.

The volume of world trade has grown steadily since the Second World War and is anticipated to continue to grow in the future.¹⁰⁷ World exports increased from 1.8 trillion dollars in 1983, to 3.6 trillion in 1993, and 7.2 trillion in 2003.¹⁰⁸ Likewise, the global trade in services annually increased by seven percent from 2000 to 2003, and is estimated to value more than 1.7 trillion dollars annually. International trade principally occurs through the agents and activities of private TNCs and their prominence in the global economy is growing.

1. Growth of Modern Transnational Corporations.

Transnational companies have existed since the early days of the European colonial empires. At that time, trading typically occurred through government entities and royal chartered enterprises with exclusive rights in particular goods or territories of a nation's

¹⁰¹ See WTO, *Annual Report 2004* (Geneva: WTO 2004) at 58 online: WTO <<http://www.wto.org/>>.

¹⁰² *Ibid.* at 35.

¹⁰³ See WTO, "Regional Trade Agreements: Facts and Figures", online: WTO <<http://www.wto.org/>> [WTO, Regional Trade Agreements: Facts and Figures]. See also WTO, *World Trade Report 2003* (Geneva: WTO 2003) at 46, online: WTO <<http://www.wto.org/>> [WTO, Annual Report 2003].

¹⁰⁴ WTO, Regional Trade Agreements: Facts and Figures, *ibid.*

¹⁰⁵ WTO, Annual Report 2003, *supra* note 103.

¹⁰⁶ *Ibid.*

¹⁰⁷ WTO, *International Trade Statistics 2004* (Geneva: WTO 2004) at 28, online: WTO <<http://www.wto.org/>>.

¹⁰⁸ *Ibid.* at 30.

colonial outposts.¹⁰⁹ Over time, chartered companies became increasingly autonomous from their governments and evolved into today's TNCs.¹¹⁰

In 1970, approximately seven thousand TNCs were active in the global economy.¹¹¹ In 1997, the number was placed at over 44 thousand with an estimated 276 thousand foreign affiliates.¹¹² Today, the United Nations Conference on Trade and Development (UNCTAD) estimates that there are over 60 thousand TNCs with more than 925 thousand foreign affiliates.¹¹³ Transnational corporations account for approximately twenty-five percent of world production¹¹⁴ and employ more than fifty-four million persons through their foreign affiliates.¹¹⁵ From 1982 to 1990, foreign affiliates' sales rose from approximately 2 trillion dollars to 5.6 trillion dollars.¹¹⁶ Most recently, sales were estimated at 17.6 trillion dollars.¹¹⁷ Furthermore, an increasing percentage of world trade occurs through exchanges between companies affiliated with a single corporate parent. Intra-company trade may account for as much as two-thirds of all world trade.¹¹⁸ While TNCs role in world trade continues to increase, the largest TNCs continue to reside in a core group of countries and their activities are disproportionately prominent within the world economy.

Of the one hundred largest TNCs, eighty-six are based in the triad of the European Union, United States, and Japan.¹¹⁹ Adding in Australia, Canada, and Switzerland, the number increases to ninety-eight.¹²⁰ Forty-six of the top one hundred are based in traditionally common law nations.¹²¹

¹⁰⁹ See generally Jane McLean, "The Transnational Corporation in History: Lessons for Today?" 79 *Ind. L.J.* 363 (2003) (WL) [Jane McLean].

¹¹⁰ *Ibid.* Transnational corporations have diverse characteristics but can generally be described as for-profit companies that are financially dependent on overseas operations in two or more countries and that make corporate decisions based on multinational alternatives. See Yitzhak Hadari, "The Structure of the Private Multinational Enterprise" (1973) 71 *Mich. L. Rev.* 729 at 742-743 (Hein).

¹¹¹ Eric Kolodner, Eric Kolodner, "Transnational Corporations: Impediments or Catalysts of Social Development?" (1994) *The Social Effects of Globalization Occasional Paper Series* (UN, Research Institute for Social Development) (Elidis) at 1[Eric Kolodner].

¹¹² UNCTAD, *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy* (New York: UN, 1997) at 3, online: UNCTAD <<http://www.unctad.org>> [UNCTAD, World Investment Report 1997].

¹¹³ UNCTAD, *World Investment Report 2004: The Shift Towards Services* (New York: UN, 2004) at 273-275, online: UNCTAD <<http://www.unctad.org>> [UNCTAD, World Investment Report 2004].

¹¹⁴ Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 42.

¹¹⁵ UNCTAD, *World Investment Report 2004*, *supra* note 113 at 9.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 43.

¹¹⁹ See UNCTAD *World Investment Report 2004*, *supra* note 113 at 280-281.

¹²⁰ See *ibid.*

¹²¹ See *ibid.*

Observers estimate that twenty-nine to fifty-one of the one hundred largest economic entities in the world are TNCs with the other entities being nation states.¹²² The combined GNPs of the ten largest TNCs exceed the GNPs of all but eight nations.¹²³ The one hundred largest TNCs represent 0.2 percent of TNCs worldwide, yet they account for fourteen percent of sales by foreign affiliates, twelve percent of all TNCs' assets, and thirteen percent of TNCs' total employment.¹²⁴ The annual foreign sales of the largest companies amount to 2.1 trillion dollars, which represents seven percent of global GDP and twenty-five percent of all world trade.¹²⁵ Moreover, the largest five hundred TNCs are responsible for over eighty percent of all FDI.¹²⁶

2. Increased Value of Foreign Direct Investment.

Foreign direct investment is closely linked to the growth in world trade and the growth in exports from nations with developing economies. Advances in communications and transportation technology coupled with reductions in trade and investment regulations allow companies to more efficiently and more profitably develop integrated production systems.¹²⁷ Integrated production systems allow the stages of production to be divided and, through direct investment in overseas assets and facilities, located across national borders.¹²⁸ In 1987, FDI stock was valued at approximately 1 trillion dollars.¹²⁹ In 1996, FDI stock was estimated at 3.2 trillion dollars¹³⁰ and most recently, at 7 trillion dollars.¹³¹

i. Investment in the Primary Sector.

Foreign direct investment flows are generally calculated within three sectors of the economy: primary industries, manufacturing, and service industries. Transnational corporations have long operated within primary industries, such as mining, oil drilling, commercial fishing, and agriculture. Between 1989-1991 and 2001-2002, the primary sector's share of global FDI inward flows to developing countries decreased from twelve

¹²² See Jane McLean, *supra* note 109.

¹²³ Dennis Rondinelli, "Transnational Corporations: International Citizens or New Sovereigns?" [2002] 107:4 *Business & Society Review* 391, 393 (Ingenta).

¹²⁴ UNCTAD World Investment Report 2004, *supra* note 113 at xvii.

¹²⁵ Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 42.

¹²⁶ *Ibid.* at 43.

¹²⁷ Jose Antonio Ocampo & Juan Martin, eds., *Globalization and Development: A Latin American Perspective* (Palo Alto, CA: Stanford University Press 2003) at 4.

¹²⁸ *Ibid.*

¹²⁹ UNCTAD, World Investment Report 1997, *supra* note 112 at 3.

¹³⁰ *Ibid.*

¹³¹ UNCTAD, World Investment Report 2004, *supra* note 113 at xvii.

percent to ten percent.¹³² The value of inward flowing FDI stock however increased significantly, from approximately 23 billion dollars to 144 billion dollars over the same period.¹³³ Almost all primary sector FDI originates from developed nations and over ninety percent of inward FDI stock is directed toward mining industries.¹³⁴

Employment in the primary industries is highly hazardous. Fatality and injury rates in mining and agriculture are among the highest of all industries in most nations across the globe.¹³⁵ The ILO finds that mining accounts for about one percent of global employment, yet accounts for five percent of workplace deaths from accidents.¹³⁶ Agriculture employs approximately half of the global workforce and is one of the three most hazardous sectors. The agricultural sector accounts for nearly 170 thousand fatalities from workplace accidents alone each year.¹³⁷

In the United States in 2002¹³⁸, the fatality rate was 23 and 24 per 100,000 workers, in mining and agriculture respectively.¹³⁹ The rates are the two highest for industries surveyed. The average for all industries is 4 fatalities per 100,000 workers.¹⁴⁰ The injury rate was 3.8 and 6.0 per 200,000 hours worked in the respective industries, with the average for all industries calculated at 5.0.¹⁴¹ A similar pattern exists in the other common law countries. In Australia, Canada, New Zealand, and the United Kingdom, mining and agriculture are at or near the top of national fatality and injury rates.¹⁴²

For many developing nations receiving significant primary sector FDI, fatality and injury rates are largely unavailable. Brazil is a country that receives some investment within the sector and its primary sector injury statistics are similar to those in developed economies, though at much higher rates. The Brazilian fatality rate in 2000 was 29.2 and the injury rate was 2055, per 100,000 workers in the mining industry. In agriculture, the rates were 14.3 and 1,768 respectively.¹⁴³ Averages for all Brazilian industries were calculated at 11.5 and 1,491

¹³² *Ibid.* at 263.

¹³³ *Ibid.* at 302.

¹³⁴ *Ibid.* at 263.

¹³⁵ See generally ILO, *LABORSTA Internet: Yearly Data* (Geneva: ILO Bureau of Statistics, 1998-2005), online: ILO LABORSTA Internet <<http://laborsta.ilo.org/>> [ILO, LABORSTA].

¹³⁶ ILO, *Safety in numbers*, *supra* note 6 at 10.

¹³⁷ *Ibid.* Cited statistics do not include deaths from disease caused by exposure to hazardous substances.

¹³⁸ Most recent year available.

¹³⁹ See ILO, LABORSTA, *supra* note 135.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

per 100,000 workers.¹⁴⁴ In Zimbabwe, Azerbaijan, and Colombia, which receive higher rates of primary sector investment than Brazil, available data suggest similar patterns.¹⁴⁵ The fatality rate for agricultural workers in Burkina-Faso has been estimated at 99.7 per 100,000 workers and in other African nations, injury rates in dangerous industries is believed to approach 100 deaths per 100,000 workers.¹⁴⁶ Evidence also suggests that the global trading context and related foreign direct investment are factors in the injury environment of these and other countries with developing economies.

In the mining industry, numerous incidents occurring within the context of international trade have caught public attention over the past decade. In Ghana, high levels of mercury and other toxins from a TNC owned gold mine operation polluted community water supplies.¹⁴⁷ In Papua, New Guinea, one hundred thousand tons of waste per day from a TNCs' ore mine was dumped into local rivers and in Cajamarca, Peru, one hundred and fifty-one kilograms of liquid mercury were spread over a twenty-five mile stretch of highway by operators of a TNC owned mine.¹⁴⁸ These are just a few of the reported incidents where TNCs' mining activities are affecting the safety and health of overseas citizens. In addition to the mining industry, fatalities and injuries also occur in agricultural industries within an international context. An example can be found in Colombia's floriculture industry.

The floriculture industry is under scrutiny for high rates of worker illness and exposure to potentially harmful pesticides. More than fifty percent of the cut flowers annually sold in the United States are grown in Colombia, which supplies eleven percent of world demand.¹⁴⁹ Colombia's floriculture industry widely uses potentially hazardous pesticides, which are manufactured and sold by TNCs. Health investigators find that over 120 pesticides are used in the flower greenhouses and fields of production.¹⁵⁰ Pesticides of

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Jorma Rantanen, Suvi Lehtinen & Kai Savolainen, *supra* note 72 at 65.

¹⁴⁷ See Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 186; U.N. Commission on Human Rights, *Adverse effects of the illicit movement and dumping of toxic and dangerous products on the enjoyment of human rights*, U.N. Doc. E/CN.4/1997/19 (1997) at ¶ 44, online: UN at <<http://www.unhchr.ch/>>; and Michael Gochfeld, "Cases of Mercury Exposure, Bioavailability, and Absorption" [2003] 56 *Ecotox. Environ. Saf.* 174 at 178 (ScienceDirect).

¹⁴⁸ UNEP Mineral Resources Forum, "San Juan, Chorompama and Magdalena, Peru – Mercury Spill of 2 June 2000" online: Mineral Resources Forum <<http://www.mineralresourcesforum.org/>>.

¹⁴⁹ David Tenenbaum, "Would A Rose Not Smell As Sweet?" (2002) 110:51 *Environ Health Perspect.* A206 at A241-A242, online: EHP <<http://ehp.niehs.nih.gov/>> [David Tenenbaum].

¹⁵⁰ See Mary Matheson, "The Colombian Flower Trade – Success At A Price" *Pesticides News* (June 1996) at 3-5 online: Pesticide Action Network-UK <<http://www.pan-uk.org/>> [Mary Matheson].

high concern for endocrine disruption are shipped by North American manufacturers, principally to developing nations.¹⁵¹ These pesticides may interfere with hormonal signals directing fetal development during pregnancy.¹⁵² In 2000, over two million pounds of endocrine disrupting pesticides were exported to Colombia from the United States.¹⁵³

Despite government initiatives, workers' exposure to pesticides in Colombia's floriculture industry is far below the standards of developed nations.¹⁵⁴ In the early 1990s, observers estimated that up to twenty percent of the pesticides used in Colombia were either banned or severely restricted in Europe or the United States.¹⁵⁵ Another study found that after exposure to pesticides while working in Colombia's floriculture industry, female workers and the wives of male workers were at increased risk of adverse outcomes in pregnancies, including congenital malformations and spontaneous abortions.¹⁵⁶ Floriculture operations in Colombia provide an example of the safety and health impacts occurring in one nation, in one industry, with respect to a single potentially hazardous product group. The broader scope of world trade may have far broader impact on the global injury environment. The primary sector is not the only area of trade activity affecting the environment of global injury.

ii. Investment in the Manufacturing Sector.

Within world trade, the manufacturing sector is nearly as mature as the primary sector. Like the primary sector, manufacturing's share of global FDI inward flows to developing countries decreased between 1989-1991 and 2001-2002.¹⁵⁷ The decrease reflects a maturation of the sector rather than a decrease of investment activity.

From 1980 to 1998, manufactured goods rose from twenty-five percent to eighty percent of developing countries' exports.¹⁵⁸ The value of inward FDI stock also increased

¹⁵¹ Carl Smith, "Pesticide Exports from U.S. Ports, 1997-2000" (2001) 7:4 Int J. Occup. Environ. Health 266 at 271, (ProQuest).

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ See Mary Matheson, *supra* note 150; and Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 85.

¹⁵⁵ David Tenenbaum, *supra* note 149 at A242.

¹⁵⁶ Jacqueline Sims, ed., *Anthology on Women, Health and Environment* (Geneva: WHO 1995) at 116, online: WHO <<http://www.who.int/>>.

¹⁵⁷ UNCTAD, *World Investment Report 2004*, *supra* note 113 at 263 (corresponding with the decreases in the primary and manufacturing sectors, the share of flows in the service sector increased significantly from 35 percent to 50 percent).

¹⁵⁸ EC, Commission, *Responses to the Challenges of Globalisation: A Study on the International Monetary and Financial System and on Financing for Development*, SEC(2002)185 final (Brussels: EC, 2002) at 18, online: European Union <<http://europa.eu.int/>> (Feb. 13, 2002).

during the past two decades. In 1990, inward FDI stock to developing countries was valued at approximately 156 billion dollars.¹⁵⁹ In 2001, inward FDI stock was valued at 750 billion dollars.¹⁶⁰ While generally not as fatal as mining or as injurious as agriculture, manufacturing historically ranks as significantly more hazardous than averages across all private sector business activity. In Australia, Canada, New Zealand, and the United Kingdom, manufacturing's fatality rates and injury rates exceed the average for all industries.¹⁶¹ In the United States, the fatality rate is slightly below averages for all industries, while the injury rate remains above the average.¹⁶²

Brazil, Costa Rica, and Mexico are developing countries that have seen significant growth in manufacturing exports over the past two decades.¹⁶³ Reported fatality rates in manufacturing industries exceed national averages in Brazil and Costa Rica and injury rates exceed national averages in all three countries.¹⁶⁴ Reliable injury surveillance data by industry sector remains largely unavailable for China, Indonesia, Malaysia, and other newly industrializing Southeast Asian nations.¹⁶⁵ Nevertheless, trade and investment are factors in injuries occurring in the manufacturing sector of these countries. Observers note that industrial fires and frequent accidents appear prevalent in China's special export zones.¹⁶⁶ Studies in one new economic development area east of Shanghai found that the manufacturing sector accounted for more fatalities than all other industries except those in the construction sector.¹⁶⁷ Women working in plating areas of Malaysia's electronics industry report a range of increased illnesses including miscarriages and respiratory problems.¹⁶⁸ The international trade in asbestos provides an example of the interrelated nature of trade practices and safety and health risks in the manufacturing sector of developing economies.

In recent decades, asbestos use has declined in the existing industrial economies and has increased in developing ones.¹⁶⁹ Despite recognition of the substances danger to human

¹⁵⁹ UNCTAD, World Investment Report 2004, *supra* note 113 at 302.

¹⁶⁰ *Ibid.*

¹⁶¹ See ILO, LABORSTA, *supra* note 135.

¹⁶² *Ibid.*

¹⁶³ See UNCTAD, *Trade and Development Report 2002: Developing Countries in World Trade* (New York: UN, 2002) at 71-81, online: UNCTAD <<http://www.unctad.org>>.

¹⁶⁴ See ILO, LABORSTA, *supra* note 135.

¹⁶⁵ *Ibid.*

¹⁶⁶ Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 196.

¹⁶⁷ Zhao-lin Xia, *et al.*, "Fatal Occupational Injuries in a New Development Area in the People's Republic of China" (2000) 42 J. Occup Environ Med 917 (MDConsult).

¹⁶⁸ Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 196.

¹⁶⁹ ILO, "Asbestos the Iron Grip of Latency" (19 January 2006), online: ILO <<http://www.ilo.org/>> [ILO,

health and the availability of alternative safer substances, Canadian, Russian, and other nation's manufacturers continue to export to nations, which often lack the capacity to monitor and control exposure in the environments where the product is used.¹⁷⁰ A recent inspection of a Vietnamese asbestos sheet manufacturing facility found the production line covered in asbestos dust, employees working without protective masks, no safe ventilation system in the factory, fans operating that blew the dust through the air, and other dangerous practices allowing employee inhalation of asbestos fibers.¹⁷¹ In India, researchers examined practices in a pipe manufacturing facility and found that raw asbestos is imported without warning labels on bags, which are then sliced open by workers without protective masks, shaken into open mixing troughs, and manufactured into a finished product that is repackaged for export with warning labels.¹⁷² As a consequence of these practices and the latency period between exposure and the manifestation of symptoms, asbestos related deaths in the developing world will likely "prove to be a health 'time bomb' in these countries in 20 to 30 years' time."¹⁷³

iii. Investment in Services.

While injury occurring within the primary and manufacturing sectors is often the most visible, trade in services is rapidly increasing and provides further context for understanding the global burden of injury. Between 1989-1991 and 2001-2002, the service sector's share of global FDI inward flows to developing countries grew from thirty-five percent to fifty percent.¹⁷⁴ The value of inward flowing FDI stock also increased from approximately 163 billion dollars to one trillion dollars.¹⁷⁵ While the service sector traditionally has the lowest overall fatality and injury rates, these statistics are somewhat misleading.

Asbestos the Iron Grip of Latency].

¹⁷⁰ Barry Castleman, "Canada's Deadly Export" *Washington Post* (19 November 2004) A29, online: [Washington Post <http://www.washingtonpost.com/>](http://www.washingtonpost.com/).

¹⁷¹ Sanjiv Pandita, "Asbestos: Miracle Mineral, Human Disaster – Part Two" *Asian Labour Update*, No. 51, April - June 2004, online: [Asia Monitoring Resource Center <http://www.amrc.org>](http://www.amrc.org).

¹⁷² Al Ramanathan & V. Subramanian, "Present Status of Asbestos Mining and Related Health Problems in India – A Survey" 39 *Industrial Health* 309 at 311-316, online: [Japan National Institute of Industrial Health <http://www.niih.go.jp/>](http://www.niih.go.jp/).

¹⁷³ ILO, *Asbestos the Iron Grip of Latency*, *supra* note 169. At the 96th International Labour Conference, the ILO passed a resolution noting the annual toll of asbestos related deaths and disease and calling for elimination of the use of asbestos. See ILO, *Provisional Records, Fourth item on the Agenda: Occupational safety and health, Report of the Committee on Safety and Health*, *supra* note 13 at para. 299 & 363-365.

¹⁷⁴ UNCTAD, *World Investment Report 2004*, *supra* note 113 at 263.

¹⁷⁵ *Ibid.* at 302.

The service sector is a catchall category for a number of unrelated industries, including several that are highly hazardous. Foreign direct investment within the sector is largest in the financial, business, and trade services industries, which have low rates of injury. The sector also includes the construction industry, transportation industry, and the water, gas, and electricity delivery industry.¹⁷⁶ These three industries have fatality and injury rates comparable with the primary sector.¹⁷⁷ While the value of FDI stock in these three industries is much smaller than other service industries, their percentage share of FDI stock is growing.¹⁷⁸ The environment of injury is shaped by developments within the sector, which are often related to developments in other business sectors. The transport and construction industries provide two examples.

Along with trends in over-the-road transportation, practices within the shipping industry reveal evolving hazards arising from international trade and foreign direct investment activities. With the advent of increased trade over greater and greater distances comes increased demand for transportation services.¹⁷⁹ The increased demand taxes road networks in developing nations. Traffic safety requires a systems approach to prevent roadway fatalities and injuries.¹⁸⁰ The vehicle operator is only one component of the system.¹⁸¹ Other components include road surfaces, signage, and vehicle structures. The increased demands of export driven commercial activity taxes the safe limits of existing roadways and vehicles designed for more limited usages.¹⁸²

World shipping volumes have also grown with increases in international trade.¹⁸³ The need for larger cargo capacities and environmental concerns lead older ships to being turned out of service and replaced by new ones.¹⁸⁴ Out-of-service vessels are sold for

¹⁷⁶ *Ibid.* at 99.

¹⁷⁷ See generally regional and national statistics in ILO, LABORSTA, *supra* note 135.

¹⁷⁸ UNCTAD, World Investment Report 2004, *supra* note 113 at 99.

¹⁷⁹ See I. Roberts, "Injury and Globalisation" (2004) 10 *Inj. Prev.* 65 (BMJ).

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ U.S. Dept. of Transportation, Marine Administration, *An Assessment of the U.S. Marine Transportation System* (Washington, D.C.: U.S. Department of Transportation 1999) at 26, online: U.S. Dept. of Transportation, Marine Administration <<http://www.marad.dot.gov/>>.

¹⁸⁴ See generally Greenpeace, "What is shipbreaking?" online: Greenpeace <<http://greenpeaceweb.org/>> [Greenpeace, Shipbreaking]; Aage Bjørn Anderson, *Worker Safety in the Ship-breaking Industries* (Geneva: International Labor Office, 2001) [Aage Bjørn Anderson], online: <http://www.ilo.org/>. and Ataur Rahman and AZM Tabarak Ullah, *Shipbreaking: A Background Paper* (Geneva: International Labor Organization, 1999), online: ILO <<http://www.ilo.org/>>.

scrap.¹⁸⁵ A practice known as shipbreaking then occurs. Shipbreaking often takes place along coastlines in Turkey, Pakistan, India, Bangladesh, and China with little or no regulatory oversight.¹⁸⁶ During shipbreaking, the vessel is stripped of reusable material.¹⁸⁷ The vessels, however, also contain large amounts of nonreusable hazardous substances, including heavy metals and asbestos.¹⁸⁸ Once ships are stripped, the remainder of the vessel, along with its toxic components, is often left in place to deteriorate into the environment with no plans for final disposal.¹⁸⁹

Trade in the primary and manufacturing sectors also creates construction demands within developing economies. Power is needed to generate increased energy demands from industrial facilities. Reliable telecommunications networks are needed to communicate between corporate affiliates and with overseas markets. Railroads, roads, and port facilities are needed to move raw materials and finished products to overseas markets. As a result, large-scale construction projects for the improvement of infrastructure are undertaken, in part, to attract and support export activities.¹⁹⁰ Private foreign investment and participation “in infrastructure projects has risen dramatically since 1990.”¹⁹¹ The process of industrialization is also characterized by urbanization, which creates additional construction demands. The ILO finds that “the most dramatic and prolonged growth in construction output and employment in the past two or three decades has been in the newly industrializing countries in Asia and Latin America.”¹⁹² In recent decades, the percentage of the workforce employed in the construction sector has more than doubled in countries such as Korea, Malaysia, Brazil and China.¹⁹³ With high fatality and injury rates in the industry,¹⁹⁴

¹⁸⁵ Aage Bjørn Anderson, *ibid.* at 2.

¹⁸⁶ *Ibid.* at 15-18.

¹⁸⁷ *Ibid.*

¹⁸⁸ Greenpeace, Shipbreaking, *supra* note 184.

¹⁸⁹ *Ibid.*

¹⁹⁰ See Colin Kirkpatrick, David Parker & Yin-Fang Zhang, *Foreign Direct Investment in Infrastructure in Developing Countries: Does Regulation make a Difference?* (Paper presented at the Asian Development Bank Annual Conference on Infrastructure Development: Poverty, Regulation and Private Sector Development, 6 December 2004) at 2, online: Asian Development Bank Institute <<http://www.adbi.org>>. See also, Daniele M. Seitz, “Globalization of the Power Industry” *Institutional Investor* 31:10 (October 1997) E8 (Proquest).

¹⁹¹ Colin Kirkpatrick, David Parker & Yin-Fang Zhang, *ibid.* at 4.

¹⁹² ILO, *The Construction Industry in the Twenty-First Century: Its image, employment prospects and skill requirements* (Geneva: International Labor Office, 2001) at 9, online: ILO <<http://www.ilo.org>>.

¹⁹³ *Ibid.*

¹⁹⁴ Enno Koehn, Rupesh K. Kothari & Chih-Shing Pan, “Safety in Developing Countries: Professional and Bureaucratic Problems” 121 *J. Constr. Eng. Manage.* 261 (Proquest).

the injury burden is directly impacted by pressures created by liberalized trade policies that favor the development of export economies and related industrialization.

D. Trade And Investment's Impact On The Environment Of Injury.

The impact of trade and investment on people's safety and health is multifaceted.¹⁹⁵ In a very general sense however, safety and health is most directly affected in two ways by liberalized trade systems. In the first instance, liberalized trade carries the potential for the introduction of hazardous products and services into environments unaccustomed to their use and where regulatory controls are weak, absent, or otherwise ineffective.¹⁹⁶ In the second instance, trade rules may restrict the application of domestic safety and health regulations.¹⁹⁷

1. Overseas Transfers of Products, Technologies and Systems.

Through international trade and investment, nations, communities, and individuals are becoming exposed to new products, technologies, and systems in both their working and living environments. New products, technologies and systems can increase the potential for injury in a number of ways. When exported to nations with developing economies, too often potentially hazardous products, technologies, and systems are transferred without components, add-on devices, and personal protective equipment necessary for safe use.¹⁹⁸ Additionally, products banned or whose sale is highly circumscribed in home markets many times have found new markets in developing nations.¹⁹⁹ Newly industrializing economies

¹⁹⁵ In addition to the factors discussed in this section, other conditions contribute to the increased risk of injury to workers in the developing world. Long work hours, child labor, job insecurity, and few protections for organized labor may further compromise the safety environment of workplaces in nations with rapidly changing economies. See WHO, *Global Strategy on Occupational Health for All: The Way to Health at Work* (Geneva: World Health Organization, 1995) at 12-14, online: WHO <<http://www.who.int/>>, [WHO, Global Strategy]. Additionally, when injury occurs, a lack of access to health services leads to poor outcomes, including an increased risk of death and long-term disability. Charles Mock, Manjul Joshipura & Jacques Goosen, "Global strengthening of care for the injured" [2004] 82:4 Bull. World Health Organ. 241, online: WHO <<http://www.who.int/bulletin/>>. In nations with developing economies, between five and ten percent of workers are estimated to have access to occupational health services and citizens "with 'life-threatening' but potentially treatable injuries are six times more likely to die from their injuries." *Ibid.* See also, Christer Hogstedt & Bodhi Pieris, *Occupational Safety and Health in Developing Countries: Review of strategies, case studies and a bibliography* (Stockholm: National Institute for Working Life, 2000) at 1, online: National Institute for Working Life <<http://www.niewl.se/arb/>> [Christer Hogstedt & Bodhi Pieris].

¹⁹⁶ See generally Peter Barss, *et al.*, *Injury Prevention: An International Perspective* (New York: Oxford University Press, 1998) at 98-100. See also, Jane H. Ives, *The Export of Hazard* (Boston: Routledge & Kegan Paul, 1985) at 172-187

¹⁹⁷ See generally Jason W Sapsin *et al.*, "International Trade, Law, and Public Health Advocacy" (2003) 31 J.L. Med. & Ethics 546 at 547-548 (WL) [Jason W Sapsin].

¹⁹⁸ WHO, Global Strategy, *supra* note 195 at 13.

¹⁹⁹ *Ibid.* A few examples include the international trade in dipyrene, DDT, and hazardous waste in the form of discarded electronic goods. See Eric Kolodner, *supra* note 111; U.S. Department of Health and Human

also provide an expanded market for remanufactured and old machinery from developed nations.²⁰⁰ Without retrofitting, this machinery presents exposure to hazards that current safety technology could otherwise eliminate. Machinery sold on secondary markets also often requires a level of monitoring and maintenance for safety purposes that is unavailable in developing economies.

Information deficits also cause harmful exposures, interactions, and uses that otherwise might be avoided. Local workers are frequently unfamiliar with hazards involved in new production methods, machinery, and other tools of production and are unaware of necessary engineering controls, add-on components, work methods, and personal protective equipment needed for safe operations.²⁰¹ With new products, technologies, and systems, citizens lack a knowledge base derived from past lessons learned by individuals and communities, which otherwise informs future use incorporating compensating actions to ensure peoples' safety.²⁰² Safety training for workers is often infrequent or unknown.²⁰³ New products, technologies, and systems are often transferred without safety instructions and warnings.²⁰⁴ When warnings and instructions are provided they are often printed in languages not understood to end-users²⁰⁵ and can suffer from other design deficiencies that result in ineffective communications of the risks of injury.

While well developed in industrialized nations, the concept of product stewardship, whereby manufacturers consider and retain responsibility for the safety of their products throughout a product's life cycle,²⁰⁶ often breaks down in overseas contexts. Informational, regulatory, and liability factors existing within industrialized nations encourage and sustain the concept of product stewardship.²⁰⁷ When transferred to environments where

Services, Agency for Toxic Substances and Disease Registry, *Toxicological Profile for DDT, DDE, and DDD* (Atlanta: USDHHS 2002) at 221-224, online: U.S. Center for Disease Control and Prevention <<http://www.atsdr.cdc.gov/>>; and The Basel Action Network & Silicon Valley Toxics Coalition, *Exporting Harm: The High-Tech Trashing of Asia* (Seattle: BAN 2002), online: BAN <<http://www.ban.org/>>.

²⁰⁰ See "Trade in Machinery is a booming market" (2004) 31:2 *Appropriate Tech.* 68, at 68-70 (Proquest).

²⁰¹ See generally Christer Hogstedt & Bodhi Pieris, *supra* note 195 at 2-3.

²⁰² See Susan-Rose Ackerman, "Progressive Law and Economics-And The New Administrative Law" (1988) 98 *Yale L.J.* 341 at 355 (WL) [Susan-Rose Ackerman].

²⁰³ See Garrett Brown, "Vulnerable Workers in the Global Economy" 66:4 *Occupational Hazards* 29 (Proquest) [Garrett Brown, *Vulnerable Workers*]; and WHO, *Global Strategy*, *supra* note 195.

²⁰⁴ See Jim Yong Kim, *et al.*, *Dying for Growth: Global Inequality and the Health of the Poor* (Monroe, ME: Common Courage Press, 2000) at 196-197 [Jim Yong Kim].

²⁰⁵ *Ibid.*

²⁰⁶ The product's life-cycle begins at the initial design stages and continues throughout the product's initial sale, useful life, refurbishment, resale and disposal.

²⁰⁷ Barry Castleman, "Product Stewardship and the Migration of Industrial Hazards" in Jeanne Mager Stellman,

information is absent and regulatory and liability regimes highly uncertain, stewardship can be marginalized, delegated, or abandoned with consequent increased risks to the safety and health of citizens.²⁰⁸

Increased risk of injury also arises, in part, from the lack of adequate regulatory structures and the introduction of new hazards and work methods.²⁰⁹ Developing nations undergoing industrialization frequently lack the institutional and regulatory structures that can research, investigate, and implement programmatic initiatives in support of safety promotion and injury prevention.²¹⁰ Consequently, safety standards for industry are often inadequate and poorly enforced.²¹¹ Existing underresourced institutions and lax regulatory controls are further challenged to keep pace with a rapidly evolving pool of risks created by new industries, worksites, production methods, and products introduced into a country.

Evidence further suggests that many industries introduced into developing economies are ones that may be characterized as highly hazardous.²¹² As noted above, primary sector industries are traditionally highly hazardous and also represent the largest percentage of investments made in nations with developing economies. Other highly hazardous industries including asbestos,²¹³ chemical,²¹⁴ and pesticide manufacturing²¹⁵ have also invested heavily in overseas operations. Workers' risk of injury is most directly impacted by such transfers, but is also impacted by other subtler and less overt consequences of free trade and investment policies.

2. Potential Curtailment of Safety & Health Regulation.

Trade instruments and ancillary agreements may create conditions and perceptions that can undermine regulatory environments protecting people's safety and health. Trade

ed., *Encyclopaedia Of Occupational Health And Safety* (Geneva: International Labor Office, 1998) Chpt. 20, (CCINFOweb) [Barry Castleman, Product Stewardship and the Migration of Industrial Hazards].

²⁰⁸ *Ibid.*

²⁰⁹ See generally Lawrence R. Berger & Dinesh Mohan, *supra* note 84 at 18; and Garrett Brown, *Vulnerable Workers*, *supra* note 203 at 29-30.

²¹⁰ See Jorma Rantanen, Suvi Lehtinen & Kai Savolainen, *supra* note 72 at 67-69.

²¹¹ *Ibid.*

²¹² See generally, Jennifer Clapp, *Toxic Exports* (Ithaca: Cornell University Press, 2001) at 104-126; and J. Jeyaratnam, "The Transfer of Hazardous Industries" [1990] 40 J. Soc. Occup. Med. 123 at 123-125 (Oxford Journals) [J. Jeyaratnam].

²¹³ Guadalupe Aguilar-Madrid, et. al., "Globalization and the Transfer of Hazardous Industry: Asbestos in Mexico, 1979-2000" (2003) 9 Int. J. Occup. Environ. Health 272, online: IJOEH <<http://www.ijoe.com/>>.

²¹⁴ Joseph LaDou, "Transfer of Technology and Technological Change" in Jeanne Mager Stellman, ed., *Encyclopaedia Of Occupational Health And Safety* (Geneva: International Labor Office, 1998) Chpt. 20, (CCINFOweb) [Joseph LaDou, Transfer of Technology].

²¹⁵ *Ibid.*

instruments typically contain language preserving the rights of governments to protect people's safety and health.²¹⁶ Determining whether a particular regulation is a valid safety and health measure or an impermissible trade barrier however is a matter of interpretation. This interpretative space leaves ample room for parties to challenge safety and health regulations as impermissible trade barriers. As a result, safety and health regulations have been contested under the provisions of trade instruments.²¹⁷ Facilitated by the language and structure of trade instruments, these challenges can discourage or chill domestic regulatory action that affects goods, services, or technologies brought into the country by TNCs.²¹⁸ Free trade and investment may also generate regulatory chill in other ways.

As a matter of competitive efficiency, TNCs are adept at locating operations in jurisdictions where investment conditions are most profitable.²¹⁹ Regulatory controls force firms to internalize social costs that in other jurisdictions can be externalized, thereby increasing a firm's operating costs and reducing profitability. Corporations then have economic incentives to seek jurisdictions with diminished regulation or with lax enforcement. The incentive of corporations to reduce overall costs, in part through the externalization of costs, may create a condition of regulatory arbitrage, where corporations

²¹⁶ See e.g. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, 61 Stat A11, TIAS No 1700, (entered into force 1 January 1948) at Art XX(b), online: WTO <<http://www.wto.org>>; *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 (entered into force 1 January 1958) at Art. 36, online: Europa <<http://europa.eu.int>> [Treaty Establishing the European Economic Community]; and *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No.2, 32 I.L.M. 289 (entered into force 1 January 1994) at Art. 2101, online: NAFTA Secretariat <<http://www.nafta-sec-alena.org>> [NAFTA].

²¹⁷ See e.g. *European Communities-- Measures Affecting Asbestos and Products Containing Asbestos, Request for the Establishment of a Panel by Canada*, WTO Doc. WT/DS135/3 online: WTO <<http://www.wto.org/>> (Canada's claim that the certain measures taken by France measures taken by France for the prohibition of asbestos and products containing asbestos violated the GATT); *United States--Standards for Reformulated and Conventional Gasoline, Request for Establishment of Panel by Venezuela Under Article XXIII.2 of the GATT*, WTO Doc. WT/DS2/1 online: WTO <<http://www.wto.org/>> (Venezuela's claim that portions of the Clean Air Act of 1990 acted as a unfair trade barrier to imported gasoline products); *Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health*, C-154/04, [2005] E.C.R. ____ online: EurLex <<http://europa.eu.int>> (Dispute before the European Court of Justice arising from industry claims that a Commission Directive relating to food supplements violate EU principles regarding equal treatment); and *Methanex Corporation v. United States of America*, "Statement of Claim," (3 December 1999) (UNCITRAL Arbitration) para. 4-5 online: NAFTALAW.ORG <<http://www.international-economiclaw.org>> (dispute before a NAFTA Chapter 11 panel regarding California restrictions on a potentially harmful gasoline additives). Notably, WTO panels and NAFTA panels have now both affirmed the right of panels to receive amicus briefs from nonparties, allowing safety and health advocates to attain some measure of voice in trade proceedings contesting the validity of public health regulations.

²¹⁸ See Jason W Sapsin, *supra* note 197 at 547. See also Aaron Cosbey, Luke Eric Peterson & Laszlo Pinter, *Environmental Health and International Trade* (International Institute for Sustainable Development, 2004) at 19-20, online: IISD <<http://www.iisd.org>>.

²¹⁹ See *ibid.* See also Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford & Portland, OR:

“shift operations among countries to take advantage of differing legal requirements.”²²⁰ By their nature, TNCs operate in more than one legal jurisdiction and can conceivably take “advantage of ... gaps and conflicts among national regulatory regimes.”²²¹ The mobility of transnational corporations can generate regulatory competition between nations seeking to attract FDI investment.²²² By corporate movement between jurisdictions or by the actual or perceived threats of such movement, FDI recipient nations feel pressure to lower regulatory standards or to relax their enforcement to prevent the risk of lost foreign investment opportunities.²²³

Economic pressure of this nature has caused critics to express concern that free trade and investment lead to a ‘race to the bottom’ and social dumping arising from regulatory competition where nations seek to offer the lowest regulatory standards and hence, lower operating costs to industry.²²⁴ The significance of trade policies as a causative factor in domestic regulatory policy and their long term effect upon the ultimate level of social regulation is hotly disputed. Bangladesh,²²⁵ Kenya,²²⁶ and other nations²²⁷ however have established enterprise protection zones within their borders and enacted legislation suspending the enforcement of labor regulations, including safety and health regulations, to attract foreign investment. International pressure has brought some changes where regulations were explicitly rolled back through legislation to attract foreign investment. In

Hart Publishing, 2004) at 150 [Sarah Joseph, Corporations and Transnational Human Rights].

²²⁰ Douglas M. Branson, “The Social Responsibility of Large Multinational Corporations” (2002) 16 *Transnat’l Law*. 121 at 133 (WL).

²²¹ Robert Wai, “Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization” (2002) 40 *Colum. J. Transnat’l L.* 209 at 252 (WL) [Robert Wai, *Transnational Liftoff*].

²²² *Ibid.* at 254.

²²³ David Kinley & Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law” (2004) 44 *Va. J. Int’l L.* 931 at 935 (WL) [David Kinley & Junko Tadaki]. See also Sarah Joseph, *Corporations and Transnational Human Rights*, *supra* note 219 at 150; Katherine Van Wezel Stone, “Labor and the Global Economy: Four Approaches to Transnational Labor Regulation” (1995) 16 *Mich. J. Int’l L.* 987 at 992 (WL); Jessica Woodroffe, “Regulating Multinational Corporations in a World of Nation States” in Michael K. Addo, ed., *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law Int’l, 1999) 131 at 139-140; and Lena Ayoub, “Nike Just Does It – and Why the United States Shouldn’t: The United States International Obligation to Hold MNCs Accountable for their Labor Rights Violations Abroad” (1999) 11 *DePaul Bus. L. J.* 395 at 422-423 (WL) [Lena Ayoub].

²²⁴ See generally Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005) at 13-15 [Bob Hepple]; J. Jeyaratnam, *supra* note 212; and WHO, *Global Strategy*, *supra* note 195 at 14.

²²⁵ See Oxfam International, *Rigged Rules and Double Standards*, *supra* note 99 at 192-193.

²²⁶ ILO, *Employment and Social Policy in Export Processing Zones*, GB.286/ESP/3 (Geneva: International Labor Office, 2003) at 9, online: ILO <<http://www.ilo.org/>>.

²²⁷ Herbert Jauch “Export Processing Zones and the Quest for Sustainable Development: A Souther African perspective” 14 *Environ. Urban.* 101 at 104, online: Global Policy Network <<http://www.gpn.org/>>.

the case of individual nations that perceive investment gains, the risk of regulatory rollbacks continues to exist, though likely in less explicit and subtler forms, such as tacit nonenforcement and the failure to enact new legislation.²²⁸

While trade, investment, and the related operations of TNCs have a significant impact on the environment of global injury, debate among proponents and critics of globalization often focus on whether TNC's operations cause less social harm than other firms. The relevant inquiry for regulators however is not whether TNC's activities are causing fewer devastating injuries and deaths than other domestic industries. The relevant inquiry is whether TNCs have the knowledge and ability to prevent the devastating injuries and deaths occurring within their operations and if so, how regulatory devices might be implemented to reduce the occurrence of these injuries. Findings of higher injury and death rates between operations located in developing nations and those located in developed nations suggest that safety and health may be valued or implemented quite differently based upon the locale of TNC's operations.²²⁹ Thus, the operations of TNCs and the policy instruments that have empowered them are rightfully the subject of inquiry by proponents of regulation for people's safety and health. As explored in the following section, attainment of development goals of free trade policies may be dependent upon resolution of these regulatory issues.

E. Relationship Between Safety & Health And Development.

A central goal of global trade and investment policies is the development of national economies to improve the well-being people. Improvements to social well-being are unlikely to be achieved in environments where institutional policies diminish people's safety and health and add to a society's injury burden.

1. Safety & Health as an Outcome of Economic Development.

Liberalized trade seeks to foster economic growth and as a consequence, improve living conditions, including people's safety and health. The multilateral agreement establishing the WTO recognizes that "the field of trade and economic endeavor should be conducted with a view of raising standards of living ... while allowing for the optimal use of

²²⁸ See generally, Oxfam, *Trading Away Our Rights: Women working in the global supply chain* (Oxford: Oxfam International, 2004) at 62; online: Oxfam <<http://www.maketradefair.com/>>; and Rene H. Loewenson, "Women's Occupational Health in Globalization and Development" (1999) 36 *Am. J. Ind. Med.* 34 at 37-38 (Wiley InterScience).

²²⁹ See Joseph LaDou, *Transfer of Technology*, *supra* note 214; and Barry Castleman, *Product Stewardship and the Migration of Industrial Hazards*, *supra* note 207.

the world's resources in accordance with the objective of sustainable development.²³⁰ Improved living standards and sustainable development cannot be achieved without attention to people's safety and health.

Liberal trade theory posits that reduced trade barriers lead to a global marketplace for goods and services. Within the global market, countries, through their domestic industries, compete with each other to provide those goods and services.²³¹ Competition creates incentives for rational countries to craft policy and allocate resources to the production and export of goods and services in sectors where they enjoy comparative advantages, or at least smaller disadvantages.²³² Those goods and services are more likely to be in demand from marketplace buyers. By allocating resources to the production of goods and services with greater potential for economic growth, greater domestic earnings and employment may be realized.²³³ Increased earnings and employment reduces poverty, which leads to better health.²³⁴ Increased domestic earnings may also generate increased tax revenues, creating greater resources for nations to invest in programs for the improvement of people's safety and health.²³⁵ Additionally, competitive markets can lead to decreased costs and wider distribution of medical equipment, pharmaceutical products, and even health.²³⁶ Liberal trade policies may thereby lead to safety and health improvements.²³⁷

Emphasis upon the role of liberalized trade, investment, and other economic factors in relation to development can obscure the role of social conditions, such as safety and health. Often economic objectives are made "primary to the objectives of social protections."²³⁸ In the drive to create idealized economic conditions for attracting foreign investment, nations may take short-term actions detrimental to people's safety and health

²³⁰ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 ILM 1144 (WL).

²³¹ See generally Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 2nd Ed. (London: Routledge, 1999) at 1-7.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Ronald LaBonte, "Globalization, Health, and the Free Trade Regime: Assessing the Links" (2004) 3 *Perspec. Global Devel. Technol.* 47 at 49 (Ovid). See also David Dollar, "Is Globalization Good for your Health" (2001) 79 *Bull. World Health Organ.* 827 at 828, online: WHO <<http://www.who.int/>>.

²³⁵ See generally Jagdish Bhagwati, "Poverty and reforms: Friends or Foes?" (1998) 52 *J. Int. Affairs* 33 at 34-35 (Proquest).

²³⁶ *Ibid.*

²³⁷ See WHO & WTO, *WTO Agreements & Public Health: A Joint Study of the WHO and the WTO Secretariat* (Geneva: the WTO Secretariat, 2002) at 137, online: WHO <<http://www.who.int/>> [WHO & WTO, *WTO Agreements & Public Health*].

²³⁸ Jorma Rantanen, Suvi Lehtinen & Kai Savolainen, *supra* note 72 at 65.

based upon the hope of attaining long-term development goals. Examples can be found in the erosion of support and investment in public health services,²³⁹ privatization of municipal water services,²⁴⁰ and the relaxation of labor and occupational safety and health laws.²⁴¹ Governmental policies of this nature place a high stakes bet on economic gains and hoped-for development being able to outpace harm from the increased risks to safety and health. Poor health and injuries in particular, exact very real social and economic costs within society that undermine economic growth and social development.

The economic costs of injury are readily quantifiable. Economic costs are categorized in various ways but generally include direct and indirect costs. Direct costs to workers, their families and others include physician, hospital, rehabilitation and other medical costs, the cost of health and accident insurance, and compensation payments and administrative costs of employers, insurers, and government agencies.²⁴² Indirect costs include the worker's income losses during the period of disability, household production losses and the cost of replacement services, the employer's productivity losses from interrupted production, staff turnover and retraining.²⁴³ Additional economic impacts include the human capital loss to society,²⁴⁴ the loss of government revenue earned from taxes paid by incapacitated and deceased persons²⁴⁵ and opportunity costs – “the value to society of the goods and services (including leisure) it could otherwise have enjoyed had there been no diversion of resources” resulting from accidents and injuries.²⁴⁶

²³⁹ See Kelley Lee, “The Impact of Globalization on Public Health: Implications of the UK Faculty of Public Health Medicine” (2000) 22 J. Public Health Med. 253 at 259-260 (Oxford Journals); and Stephen Bach, Decentralization and Privatization in Municipal Services: The case of public health services Working Paper, WP. 164 (Geneva: International Labor Office, 2000) at 1-2, online: ILO <<http://www.ilo.org>>.

²⁴⁰ John R. Mulreany, et. al. “Water Privatization and Public Health in Latin America” (2006) 19 Pan Am. J. Pub. Health 23 at 29-30, online: Pan American Journal of Public Health <<http://journal.paho.org>>.

²⁴¹ ILO, *Employment and Social Policy in respect of Export Processing Zones (EPZs)*, GB 286/ESP/3 (Geneva: International Labor Office, 2003) at 8-9, online: <http://www.ilo.org/>.

²⁴² See National Occupational Health and Safety Commission, *The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community* (Canberra: Australian Government, National Occupational Health and Safety Commission, 2004) at 11-13, online: National Occupational Health and Safety Commission <<http://www.nohsc.gov.au>> [National Occupational Health and Safety Commission]; and J. Paul Leigh & John A. Robbins, “Occupational Disease and Workers’ Compensation: Coverage, Costs, and Consequences” (2004) 82 *Milbank Q.* 689, 693 (Blackwell).

²⁴³ National Occupational Health and Safety Commission, *ibid.* at 15-16; and J. Paul Leigh & John A. Robbins, *ibid.*

²⁴⁴ National Occupational Health and Safety Commission, *ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ Peter Dorman, *The Economics of Safety, Health, and Well-Being at Work: An Overview* (Geneva: International Labor Office, 2000) at 13; online: ILO <<http://www.ilo.org/>>.

Existing estimates illustrate the substantial costs arising from occupational injury. In Australia, the costs of workplace injuries have been estimated at \$34 billion annually.²⁴⁷ Estimates from the United States, have placed annual direct costs of workplace injuries in excess of \$42 billion with indirect costs estimated between \$127 and \$212 billion.²⁴⁸ Given limited coverage under social security, workers' compensation, and private insurance programs, cost estimates are less available for developing economies. Researchers however estimate annual direct and indirect costs of occupational injury for the region of Latin America at \$53 billion or at approximately 4 percent of the region's GDP.²⁴⁹ Others estimate the costs of occupational injury in Latin American at 10 percent.²⁵⁰ In countries with the highest rates of occupational injury, the WHO estimates that occupational injury may represent as much as twenty percent of GDP.²⁵¹ Globally, the ILO calculates the economic cost of occupational injury at four percent of GDP,²⁵² while other researchers place the costs between two and fourteen percent of Gross National Product (GNP).²⁵³

While calculations of economic costs are readily quantifiable, other societal costs of injury are less quantifiable but no less real. Injuries also exact costs in terms of physical, psychological, and social suffering that are borne by the injured, their families, and the societies in which they live.²⁵⁴ The consequences of injury often include physical pain, disability, enhanced susceptibility to future injury, and reduced life expectancy. Psychological suffering includes behavioral, cognitive, and emotional components and may include symptoms of irritable or impulsive behavior, fatigue, concentration and memory problems, and feelings of anxiety and depression,²⁵⁵ and occasional suicidal tendencies.²⁵⁶

²⁴⁷ National Occupational Health and Safety Commission, *supra* note 242 at 23.

²⁴⁸ "Costs of Workplace Accidents Grow" (2003) 35:6 *Industrial Eng.* 9 (Proquest).

²⁴⁹ Antonio Giuffrida, Roberto Fiunes, & William D. Savedoff, "Occupational Risks in Latin America and the Caribbean: Economic and health dimensions" (2002) 17 *Health Policy Plan* 235, 241 (Oxford Journals).

²⁵⁰ Pan American Health Organization, *Workers Health in the Region of the Americas*, CE124/18 Corrig. I (Washington, D.C.: Pan American Health Organization, 1999) at 9, online: PAHO <<http://www.paho.org/>>.

²⁵¹ WHO, *Global Strategy On Occupational Health For All*, *supra* note 195 at 31.

²⁵² Jukka Takala, *Global Estimates supra* note 50 at 15.

²⁵³ James Leigh, *et al.*, *Global Burden of Disease*, *supra* note 51.

²⁵⁴ See generally World Health Organization, *Injury: A leading cause of the global burden of disease* (Geneva: WHO, 2000) at 1-4, online: WHO <<http://www.who.int/>>; SmartRisk, *The Economic Burden of Unintentional Injury in Canada* (Toronto: SmartRisk, 1998) at 1 to 14, online: SmartRisk <<http://www.smartrisk.ca/>>.

²⁵⁵ See C.K. van der Sluis *et al.*, "Long-term physical, psychological and social consequences of severe injuries" [1998] 29 *Injury* 281 at 283 (Elsevier Science).

²⁵⁶ Allard E. Dembe, "The Social Consequences of Occupational Injuries and Illnesses" [2001] 40 *Am. J. Ind. Med.* 403 at 409 (Wiley-Interscience) [Allard E. Dembe].

'Social suffering' eludes easy definition.²⁵⁷ Social suffering however includes social and cultural consequences arising from the loss of identity, status, and relationships associated with gainful employment, membership in a family, and involvement with other social groups.²⁵⁸ While difficult to quantify, the impact of physical, psychological, and social suffering on individuals, families, and communities is substantial. The significant economic and social impacts of injury detract from, and may prevent, a nation's ability to achieve development goals.

2. *Safety & Health as a Condition to Economic Development.*

Safety and health therefore may not be achieved as a potential outcome of economic development, but rather may be a necessary condition for such development.²⁵⁹ No empirical evidence exists to show that "any country or company in the long run would have benefited from a low level of safety and health."²⁶⁰ Recent studies indicate that the most economically "competitive countries are also the safest."²⁶¹ Evidence further suggests that safety and health improvements provide a basis for developing and sustaining economic growth.²⁶² Researchers estimate that within a cross section of developed and developing countries, health improvements accounted for eleven percent of overall economic growth between 1965 and 1990.²⁶³ Other researchers estimate that thirty percent of the United Kingdom's economic growth between 1780 and 1979 is attributable to improvements in the nation's health.²⁶⁴ Specific means by which a healthy citizenry contributes to a nation's

²⁵⁷ See Iain Wilkinson, "Health, risk and 'social suffering'" [2006] 8 Health, Risk & Soc. 1 (Taylor & Francis Journals). As described by Iain Wilkinson, 'social suffering' is the "cumulative sufferings of everyday life that so often elude the conceptual grasp of disciplines in thrall of the 'scientific' authority of 'objective' terms of measurement.

²⁵⁸ See generally C.K. van der Sluis et. al., *supra* note 255; Leslie I. Boden, Elyce A. Biddle, & Emily A. Spieler, "Social and Economic Impacts of Workplace Illness and Injury: Current and Future Directions for Research" [2001] 40 Am. J. Ind. Med. 398 at 399 (Wiley-Interscience). Mary Adams, et. al. *Aftermath: The Social and Economics Consequences of Workplace Injury and Illnesses* (Wellington, NZ: New Zealand Department of Labour and the Accident Compensation Commission, 2002) at 25-26, online: New Zealand Department of Labour <<http://www.osh.dol.govt.nz/>>; and Allard E. Dembe, *supra* note 256 at 403-404.

²⁵⁹ See WHO & WTO, *WTO Agreements & Public Health*, *supra* note 237.

²⁶⁰ Jukka Takala, *Introductory Report: Decent Work – Safe Work* (Geneva: International Labor Organization, 2005) at 12, online: ILO <<http://www.ilo.org/>>.

²⁶¹ *Ibid.*

²⁶² See WHO, *World Health Report 1999: Making A Difference* (Geneva: WHO 1999) at 7-8, online: WHO <<http://www.who.int>> [WHO, *World Health Report 1999*].

²⁶³ Dean T. Jamison, Lawrence J. Lau, & Jia Wang, *Health's Contribution to Economic Growth in an Environment of Partially Endogenous Technical Progress*, Disease Control Priorities Project Working Paper No. 10 (Bethesda, MD: National Institutes of Health, 2004) at 17 [forthcoming in G. Lopez-Casasnovas, B. Rivera, & I. Currais, eds., *Health and Economic Growth: Findings and Policy Recommendations* (Cambridge, MA: MIT Press), online: Fogarty International Center, National Institutes of Health <<http://www.fic.nih.gov>>.

²⁶⁴ See Mark R. Rosenzweig & Oded Start, eds., *Handbook Of Population And Family Economics*, Vol. 1A

economic growth include: 1) reducing productivity losses resulting from worker injuries and illness; 2) increasing children's productivity during their schooling and thereby improving education levels; 3) allowing for the increased use of natural resources previously off-limits during times of disease and famine; and 4) freeing for other uses, assets allocated to the ongoing treatment and care of sick and injured individuals.²⁶⁵

Inference and evidence of safety and health as a condition to economic development or as a condition to sustained development is persuasive. In the world today, social development of nations is directly impacted by the free trade and investment policies occurring within the ongoing wave of globalization. Globalization and international trade and resulting industrialization processes however are not new. The first wave of globalization occurred during European nations' colonization of many regions of the globe.²⁶⁶ The first wave resulted in "the growth of world trade, [ac]cumulation of capital, increased consumption in western countries and in the breakdown of [colonized people's] traditional cultures, standard of living and people's basic rights."²⁶⁷ The second wave of globalization is ongoing and has resulted from technological advancements and the liberalized trade and investment policies implemented over the past two decades. Whether the current wave of globalization and industrialization will prove more beneficial to broader global development and people's well-being than similar movements in earlier eras depends, in part, upon on how hazardous goods and services are regulated.

Having examined in this chapter the broad contours of the global injury problem, the impact of trade and investment on the environment of injury, and the role of safety and health in national development, the next chapter more closely examines existing recognition of citizens right to safety and health and existing measures for the protection of these rights and the prevention of unintentional injuries.

(Amsterdam: Elsevier Science, 1997) at 433-481 cited in WHO, World Health Report 1999, *supra* note 262 at 8.

²⁶⁵ World Bank, *World Development Report 1993: Investing In Health* (New York: Oxford University Press 1993) at 17, online: World Bank <<http://www.worldbank.org>>.

²⁶⁶ J. Rantanen, "Impact of Globalization on the Development of OH&S and Occupational Health Services" (1999) *Aft. Newslett. Occ. Safety Health*, 1999-01 Supplement at 1, online: Finnish Institute of Occupational Health <<http://www.ttl.fi/>>.

²⁶⁷ *Ibid.*

CHAPTER 2

SAFETY & HEALTH RIGHTS AND THEIR ENFORCEMENT

There are inalienable obligations as well as inalienable rights.

- Abraham Joshua Heschel

Understanding the factors that cause unintentional injury does not necessarily lead to implementation of effective programs targeting dominant risk factors to people's safety and health.²⁶⁸ Implementing measures that address factors such as energy agents or hazards that occur within the context of commercial activity is often the most politically challenging as it affects the activities of corporations, calling upon changes to products and production systems.²⁶⁹ Politically, the safest measures are those that place the responsibility on the injured person through efforts at behavior modification, with diminished impact on primary prevention.²⁷⁰ As a result, societal measures for public health and injury prevention often appear derived from a point far removed from existing best practices to prevent injury.

Jonathan Mann articulated the problem as rooted in how to conceptualize public health from a perspective that leads to programs upon which society can act.²⁷¹ With the "profound knowledge about the dominant impact of society on health,"²⁷² Mann advocated for the conceptualization of health strategies grounded in human rights. By conceptualizing from the vantage point of human rights, a framework may be established that expresses fundamental values in societal terms and that links directly with societal structures.²⁷³

A. Recognition of Safety & Health Rights.

A right to safety and health can be found in international human rights instruments. Despite a well-developed body of instruments and state practices, economic, social and cultural rights such as a right to safety and health have often been treated as second tier human rights.²⁷⁴ The United States and other nations, while articulating many economic,

²⁶⁸ See Jonathan M. Mann, Health and human rights, *supra* note 14 at 924.

²⁶⁹ *Ibid.*

²⁷⁰ See E. McLoughlin & A. Fairweather, "Influence of free trade on the politics of safety" (2002) 8 *Inj. Prev.* 3, online: *Injury Prevention* <<http://ip.bmjournals.com>>.

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ Lawrence O. Gostin, Public health, *supra* note 86.

²⁷⁴ See David Montgomery, "Labor and Human Rights: A Historical Perspective" in Lance A. Compa & Stephen A. Diamond, eds., *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press, 1996) 13 at 17. See generally, James A. Gross, ed., *Workers Rights as Human Rights* (Ithaca, N.Y.: Cornell University Press, 2003)1-22.

social and cultural rights as human rights in many contexts, remain reluctant to endorse or ratify related treaties and conventions.²⁷⁵ If the benchmark exists through their enforceability within the institutions of international law, human rights status may elude a right to safety and health in the foreseeable future. Meaningful enforcement through international institutions however continues to elude even the most widely recognized human rights. For the present purposes, recognition of a right to safety and health as a human right is considered less from the perspective of existing enforcement mechanisms than for the breadth of their recognition internationally.

While this discussion principally focuses upon recognition of a right to safety and health at work, it is important to keep in mind that workplace risks are often arbitrarily defined as such. Hazards in the workplace migrate from that environment to the homes of workers and into the surrounding community, affecting family members, neighbors, and others.²⁷⁶ Likewise, hazards existing in environments outside the workplace also migrate in the opposite direction. Thus, a right to safety and health might be more broadly conceived, as existing beyond conditional environmental settings.

At its most general, a right to safety and health may be derived from the United Nations' Universal Declaration of Human Rights.²⁷⁷ The Universal Declaration proclaims that "[e]veryone has the right to life, liberty, and the security of their person."²⁷⁸ Substantially similar statements may be found in instruments from around the globe including the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁷⁹ the African [Banjul] Charter on Human and Peoples Rights,²⁸⁰ American Convention on Human Rights,²⁸¹ Canada's Charter of Rights and Freedoms,²⁸² and the

²⁷⁵ See generally, David Montgomery, *ibid.*

²⁷⁶ See generally, Annaless Yassi & Tord Kjellstrom, "Linkages between Environmental and Occupational Health" in Jeanne Mager Stellman, ed., *Encyclopaedia Of Occupational Health And Safety* (Geneva: International Labor Office, 1998) Chpt. 53, (CCINFOweb).

²⁷⁷ Ilise Levy Feitshans, "Occupational Health as a Human Right" in Jeanne Mager Stellman, ed., *Encyclopaedia Of Occupational Health And Safety* (Geneva: International Labor Office, 1998) Chpt. 23, (CCINFOweb).

²⁷⁸ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 at Art III, online: United Nations <<http://www.un.org/>> [Universal Declaration of Human Rights].

²⁷⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 at Art. 2 & Art. 4, Eur. T.S. 5, online: Council of Europe <<http://conventions.coe.int/>>.

²⁸⁰ *African [Banjul] Charter on Human and People's Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986) at Art. 4, online: African Commission on Human and Peoples Rights <<http://www.achpr.org/>> [African Charter on Human and Peoples Rights].

²⁸¹ *American Convention on Human Rights*, 21 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978) at Art. 4, Art. 5 & Art. 7, online: Organization of American States <<http://www.oas.org/>> [American Convention on Human Rights].

United States Constitution.²⁸³ Many of these instruments further recognize a right “to just and favourable conditions of work.”²⁸⁴ Past and developing initiatives recognize broader notions of a right to safety and health²⁸⁵ and expand the right to social contexts extending beyond the workplace.²⁸⁶ These initiatives hold future promise, however the right to safety and health at work remains the most widely recognized right in relation to the prevention of unintentional injuries.

The most prominent instruments recognizing a right to safety and health emanate from the United Nations and the International Labor Organization. Presently the vast majority of the world’s nations are members of both organizations. United Nations instruments recognize workers’ safety and health as a fundamental value. The International Bill of Rights, through the International Covenant on Economic, Social, and Cultural Rights recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”²⁸⁷ More specifically the Covenant states that persons have the right to just and favorable conditions of work, in particular the right to safety and health.²⁸⁸ Consistent with the United Nations, instruments of the International Labor Organization also recognize safety and health as a fundamental value.

²⁸² *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 7, online: Canada Department of Justice <<http://laws.justice.gc.ca/>>.

²⁸³ U.S. Const. amend. V, online: U.S. National Archives and Records Administration <<http://www.archives.gov/>>.

²⁸⁴ See the Universal Declaration of Human Rights, *supra* note 278 at Art. 23, sec. 1; and African Charter on Human and Peoples Rights, *supra* note 280 at Art. XV & Art. XVI. See also the American Convention on Human Rights, *supra* note 281 at Art 26 incorporating by reference those “rights implicit in the economic, social, ... standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.” The referenced instrument calls for “acceptable working conditions for all” and for working “conditions ... that ensure life [and] health.” *Protocol of Amendment to the Charter of the Organization of American States*, “Protocol of Buenos Aires”, 27 February 1967, O.A.S.T.S. No. 1-A (entered into force 12 March 1970) at Art. 31 & Art.43, online: Organization of American States <<http://www.oas.org/>>.

²⁸⁵ See Montreal Declaration, *supra* note 98; and the 1st World Conference on Injury Prevention and Control, *Manifesto for Safe Communities* (Geneva: World Health Organization, 1989).

²⁸⁶ “Draft Principles On Human Rights And The Environment” in Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, UN ESCOR, UN Doc. No. E/CN.4/Sub.2/1994/9 (1994) at Annex I (UNBISnet); *Vienna Declaration and Programme of Action*, UN GAOR, 1993, UN Doc. A/CONF.157/23 (1993) (UNBISnet); and Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection* (New York: United Nations, 2003), online: United Nations <<http://www.un.org/>>.

²⁸⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 G.A. Res. 2200A (XXI), 21 U.N.GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 January 1976) at Art. 12 [*International Covenant on Economic, Social, and Cultural Rights*].

²⁸⁸ *Ibid.* at Art. 7.

Arising from the Treaty of Versailles ending the First World War, the ILO was founded with the adoption of the organization's Constitution.²⁸⁹ The ILO Constitution recognizes that lasting peace can only be established if founded upon social justice, including the protection of workers against injury and illness.²⁹⁰ In 1944, the ILO adopted a further Declaration of the organization's aims and principles including an affirmation of efforts to develop initiatives for the "adequate protection for the life and health of workers in all occupations."²⁹¹ The Declaration is annexed to the Constitution and constitutes part of the ILO's present Charter.

International Labor Organization Conventions and Recommendations restate the value of safety and health and apply it to particular industries, hazards, and methods of work.²⁹² The ILO's Convention concerning Occupational Safety and Health in the Working Environment calls upon each nation to draft and implement "a coherent national policy on occupational safety, occupational health and the working environment"²⁹³ and with the aim "to prevent accidents and injury to health ... by minimising ... the causes of hazards inherent in the working environment."²⁹⁴ Of the 185 Conventions adopted by the ILO since its founding, twenty-four directly address workplace safety and health issues.²⁹⁵ Of the 195 Recommendations adopted by the ILO, thirty-eight directly address safety and health matters.²⁹⁶ Additional ILO conventions and recommendations implicitly address work place safety and health while also addressing other labor and employment concerns.²⁹⁷ At the ILO's 95th annual International Labor Conference, delegates voted to adopt a new

²⁸⁹ ILO, "ILO History" (26 October 2000), online: ILO <<http://www.ilo.org/>>.

²⁹⁰ ILO, "ILO Constitution", online: ILO <<http://www.ilo.org/>> [ILO Constitution].

²⁹¹ ILO, "Declaration concerning the aims and purposes of the International Labour Organization" (10 May 1944), online: ILO <<http://www.ilo.org/>>.

²⁹² See *Occupational Safety and Health Convention*, 22 June 1981, 1331 U.N.T.S. 279 (No. 155) (ILOLEX) [Occupational Safety and Health Convention]. See also ILO "International Labour Standards – Occupational Safety and Health" online: ILO <<http://www.ilo.org/>> (Identifying all ILO Conventions and Recommendations).

²⁹³ Occupational Safety and Health Convention, *ibid.* at Art. 4, s. 1.

²⁹⁴ *Ibid.* at Art. 4, s. 2.

²⁹⁵ See e.g., *Safety and Health in Agriculture Convention*, 2 June 2001, I.L.O. No. C184 (ILOLEX) (entered into force 20 September 2004); *Safety and Health in Mines Convention*, 22 June 1995, I.L.O. No. C176 (ILOLEX) (entered into force 5 June 1998); and *Asbestos Convention*, 24 June 1986, I.L.O. No. C162 (ILOLEX) (entered into force 16 June 1989).

²⁹⁶ See e.g., I.L.O., *Prevention of Major Industrial Accidents Recommendation*, I.L.O. No. R181 (Geneva: International Labor Organization, 1993) (ILOLEX); I.L.O., *Occupational Health Services Recommendation*, I.L.O. No. R171 (Geneva: International Labor Organization, 1985) (ILOLEX); and I.L.O., *Benzene Recommendation*, I.L.O. No. R144 (Geneva: International Labor Organization, 1971) (ILOLEX).

²⁹⁷ See e.g., *Medical Examination (Fishermen) Convention*, 19 June 1959, I.L.O. No. C113 (ILOLEX) (entered into force 7 November 1961); and I.L.O., *Worst Forms of Child Labour Recommendation*, I.L.O. No. R190 (Geneva:

Promotional Framework Convention on Occupational Safety and Health and a related recommendation.²⁹⁸ The framework seeks to “promote the development of a ‘preventative safety and health culture’ through the elevation of occupational safety and health high on national agendas.”²⁹⁹

The ILO Declaration of Fundamental Principles and Rights at Work,³⁰⁰ adopted in 1998, is criticized as devaluing core workplace rights such as the right to safety and health.³⁰¹ Other commentators, however, note that the Declaration is not an end unto itself but rather an instrument seeking to crystallize those rights that impact the attainment of other rights³⁰² and an instrument that complements initiatives related to other workplace rights such as the right to safety and health.³⁰³ The Declaration identifies “freedom of association and the effective recognition of the right to collective bargaining” as a core principle.³⁰⁴ A central concern of labor associations and trade unions in collective bargaining is working conditions that threaten workers’ safety and health. In this way, the Declaration can be said to aid in the protection of worker’s fundamental right to safety and health.

Regional instruments further affirm workers’ safety and health as a core right of people. The European Union’s founding documents recognize the importance of safety and health and commit the parties to its improvement.³⁰⁵ European community resolutions,³⁰⁶ charters,³⁰⁷ and directives³⁰⁸ further affirm the EU’s recognition of workplace safety and health as a core value.³⁰⁹

International Labor Organization, 1999) (ILOLEX).

²⁹⁸ ILO, Press Release, ILO/06/34, “ILO adopts new measures on occupational safety and health, the employment relationship, asbestos” (15 June 2006), online: ILO <<http://www.ilo.org>>.

²⁹⁹ *Ibid.*

³⁰⁰ ILO, “Declaration of Fundamental Principles and Rights at Work,” (18 June 1998) 37 I.L.M. 1233, online: ILO <<http://www.ilo.org>> [ILO, Declaration of Fundamental Principles].

³⁰¹ See Philip Alston, “Core Labour Standards and the Transformation of the International Labour Rights Regime” (2004) 15 EJIL 457 at 498 (Ingenta).

³⁰² See Francis Maupain, “Revitalization Not Retreat: The real potential of the 1998 ILO Declaration fo the Universal Protection of Workers” (2005) 16 EJIL 439 at 448-449 (Ingenta).

³⁰³ *Ibid.* at 463.

³⁰⁴ ILO, Declaration of Fundamental Principles and Rights at Work, *supra* note 300 at para 1(a).

³⁰⁵ Treaty Establishing the European Economic Community, *supra* note 216 at Art. 117-118a, online: European Union <<http://europa.eu.int/>>; and Treaty Establishing the European Community, 24 December 2002, O.J.C. 325/33 at Art. 136-137, online: European Union <<http://europa.eu.int/>> (Consolidated Version).

³⁰⁶ Council of Europe, P.A., *Resolution on the Community Charter of Fundamental Social Rights of Workers*, 22.11.1989, [1989] O.J.C. 323/44 at para. 6, online: European Union <<http://europa.eu.int/>>.

³⁰⁷ See Council of Europe, *European Social Charter (Revised)*, [1996] E.T.S. No. 163 (3 May 1996) at Part I, para. 3, online: European Union <<http://europa.eu.int/>>; and Commission of the European Communities, *Community Charter on the Fundamental Social Rights of Workers* (Luxembourg: Office of the Official Publications of the European Communities, 1990) at Art. 19, online: Policy Institute Studies <<http://www.psi.org.uk/>>.

³⁰⁸ EC, *Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the*

While no regional instruments like those of the EU exist in the Americas, the Organization of the American States (OAS) and North American Free Trade Agreement (NAFTA)³¹⁰ recognize the importance of worker safety and health. The OAS affirms a right to safety and health at work through the Additional Protocol of the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.³¹¹ NAFTA recognizes workers' right to safety and health through the North American Agreement on Labor Cooperation (NAALC).³¹² The NAALC commits the parties to "promote, to the maximum extent possible" specified fundamental labor principles.³¹³ Among those principles is the prevention of occupational injuries and illness.³¹⁴ The NAALC further commits the parties to ensuring that affected persons have access to appropriate forums for the enforcement of occupational safety and health rights.³¹⁵ While the right to safety and health at work is well recognized, only recently have international statements begun to express the right in the context of overseas trade and investment activity.

B. Safety & Health Rights in the Context of Trade and Investment.

The UN, ILO, and other organizations have affirmed the right to safety and health during the course of activity undertaken by TNCs. Through the U.N. Sub-Commission on the Promotion and Protection of Human Rights' Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights³¹⁶ and through the UN Secretary General's Global Compact initiative,³¹⁷ groups within the

safety and health of workers at work, [1989] O.J.L. 183/1 at 1-8, online: European Union <<http://europa.eu.int/>>. See generally, European Union, "Health, hygiene and safety at work: introduction", online: European Union <<http://europa.eu.int/>> (identifying additional Directives relating to safety and health within the EU).

³⁰⁹ See also EC, Commission, *Green Paper: Promoting a European framework for Corporate Social Responsibility* (Brussels: EC, 2001), online: EU <<http://europa.eu.int/>>.

³¹⁰ See NAFTA, *supra* note 216.

³¹¹ *Additional Protocol of the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*, 17 November 1988, 28 I.L.M. 161 at 163 (WL).

³¹² See *North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States*, 14 September 1993, Can. T.S. 1994 No.4, 32 I.L.M. 1499 (entered into force January 1, 1994) online: Commission for Labor Cooperation <<http://www.naalc.org/>> [NAALC].

³¹³ *Ibid.* at Art. 1.

³¹⁴ *Ibid.* at Annex 1, para. 9.

³¹⁵ *Ibid.* at Art. 4.

³¹⁶ U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 1 (2003), online: UN at <<http://www.unhcr.ch/>> [U.N. Sub-Commission on the Promotion and Protection of Human Rights].

³¹⁷ UN, "The Global Compact", online: UN <<http://www.unglobalcompact.org/>>.

United Nations articulate safety and health as a fundamental right to be protected during the course of transnational business activity.³¹⁸

To address concerns arising out of transnational business activity, the ILO issued the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. Adopted in 1977, the Tripartite Declaration sets forth voluntary guidelines for TNCs regarding the conditions of work.³¹⁹ The Declaration calls upon TNCs to “maintain the highest standards of safety and health” in light of the “relevant experience within the enterprise as a whole, including any knowledge of special hazards.”³²⁰ Other international organizations also affirm workers’ right to safety and health and apply the right to contexts involving the activities of transnational business activity.

The Organization for Economic Co-operation and Development (OECD) also addresses the overseas conduct of TNCs in relation to workers’ safety and health. The OECD Guidelines for Multinational Enterprises calls for companies to “take steps to ensure safety and health” in overseas operations.³²¹

European Union bodies have also begun to address safety and health concerns arising from the overseas operations of its corporate citizens. In 1999, the European Parliament adopted a resolution concerning a code of conduct for enterprises operating overseas. The resolution calls upon European corporations to recognize the rights of workers, to comply with EU environmental and health standards, and to comply with standards expressed in the ILO Tripartite Declaration, the UN Covenant on Economic, Social, and Cultural Rights, and the OECD Guidelines on Multinational Enterprises.³²²

³¹⁸ See U.N. Sub-Commission on the Promotion and Protection of Human Rights, *supra* note 316 at para. 7; and The Global Compact, *The Ten Principles*, online: UN <<http://www.unglobalcompact.org/>>. Principle 1 of the Global Compact provides that TNCs “should support and respect the protection of internationally proclaimed human rights.” *Ibid.* As an example of how TNCs can bring company policy in line with human rights principles the UN cites the development of safety and health systems and as an example of how TNCs can guarantee human rights in daily activities, the UN cites the provision of safe and healthy working conditions. *Ibid.* The UN’s illustrations indicate that safety and health is contemplated as within the internationally proclaimed human rights’ provided for within Principle 1 of the Global Compact.

³¹⁹ Abdallah Simaika, “The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas” (2005) 38 Colum. J.L. & Soc. Probs. 321 at 325 (WL).

³²⁰ ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (Geneva: ILO, 1977) at para. 37, online: ILO <<http://www.ilo.org/>>.

³²¹ OECD, *The OECD Guidelines for Multinational Enterprises Revision 2000* (Paris, OECD, 2000) at 21, online: OECD <<http://www.oecd.org/>>.

³²² Council of Europe, P.A., *Code of conduct for European Enterprises operating in developing countries*, [1989] O.J.C. 104/180, online: European Union <<http://europa.eu.int/>>.

North America has experimented with the control of potential cross-border trade and investment in a unique fashion. The region has not adopted a code or other statements concerning safety and health in relation to cross-border trade. Under the NAALC however, workers from any member nation may submit complaints to the National Administrative Offices (NAO) of other member nations alleging that another member is failing to enforce its labor laws in several fundamental areas, including occupational safety and health.³²³ Citizen's complaints and resulting investigations are typically directed to a party's enforcement in relation to the operations of specific corporation and facility. Through the NAO offices of other signatory nations, the NAALC thus permits injured workers an indirect route to seek enforcement of domestic safety and health regulations law against transnational corporations.³²⁴

As noted, an array of international agreements and related statements articulate rights in relation people's safety and health. Through such articulations, greater impetus is given towards strategies to control trade and investment activity that infringes such rights. In the present, strategies for the protection of safety and health rights, in the context of trade and investment, remain principally grounded in economic theory, voluntary initiatives, and existing domestic regulation, resulting in often incomplete and uncertain control of the conditions causing unintentional injuries.

C. Market Strategies For The Protection Of Safety & Health Rights.

Current waves of globalization arise in large measure from economic arguments favoring liberalized trade and investment policies as the principal tools for global development. Consequently, market theory plays a significant role in advancing nongovernmental strategies for the control of social harms arising from overseas trade and investment. While market strategies are widely complemented by regulatory measures at the domestic levels of government, in international trade environments market theories of economic activity and the ability of markets to control harmful activity³²⁵ often dominate discussion of regulatory strategy.

³²³ See NAALC, *supra* note 312 at Art. 16.

³²⁴ The weakness of the procedure lies at the back-end. Few investigations have resulted in action taken after reporting and consultations.

³²⁵ See generally International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (Versoix: ICHRP, 2002) at 117-120, online: ICHRP <online: ICHRP <<http://www.ichrp.org/>> [International Council on Human Rights Policy, *Beyond Voluntarism*]; Harvard Law Review, "Developments in the Law - Jobs and Borders: Legal Tools for Altering Labor

1. *Economic Theory and the Protection of Safety & Health.*

Under market theory, in the absence of transaction costs and in the presence of rational actors, a pure market finds the most efficient way to reduce social costs of commercial activity to optimal levels, regardless of initial legal entitlements.³²⁶ Recognizing that society cannot avoid unintentional injury 'at all costs', market theory evaluates societal injury prevention on the basis of individuals' aggregate willingness-to-pay.³²⁷ The market allocates resources through bargaining and exchange between individual actors.³²⁸ Through bargaining and exchange, individual actors continue to pay for additional injury prevention so long as the benefits exceed the costs.³²⁹ Individuals cease to pay for additional injury prevention measures at the point when its costs exceed benefits.³³⁰ The following simplified example illustrates the general theory.³³¹

Assume a closed society where workplace injuries result in costs of \$100, where air monitors cost \$50, and where injuries after the use of air monitors only cost \$10. In the absence of transaction costs, air monitors will be used regardless of who bears the initial cost of injury.³³² Employers might bear the cost of injuries alone. Employers are then faced with either paying for the full costs of each injury or for the costs of air monitors plus the remaining injury costs after installation of the air monitors. In the absence of air monitors, employers would pay the full cost of injury. Using air monitors, employers incur the cost of air monitors plus the remaining costs of injury. The savings to employers is the difference between the two options – paying the full costs of injury (\$100) or the total costs after use of

Conditions Abroad" (2005) 118 Harv L. Rev. 2202 at 2221 (WL) [Harvard, Developments in the Law - Jobs and Borders]; and Aurret van Heerden & John Salem Shubash II, "Labor Relations and International Labor Rights: The Role of Private Labor Rights Initiatives," in *Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Settlement: Papers emanating from the Fifth PCA International Law Seminar May 7, 2002*, (The Hague: Kluwer Law International, 2003) at 96 [Aurret van Heerden & Shubash II].

³²⁶ See R.H. Coase, "The Problem of Social Costs," (1960) 3 J. Law & Econ. 1 (JSTOR). Guido Calabresi, "Transaction Costs, Resource Allocation and Liability Rules – A Comment, (1968) 11 J. Law & Econ. 67 (Hein).

³²⁷ See Frank Ackerman & Lisa Heinzerling, *Priceless*, *supra* note 19 at 176.

³²⁸ See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, CT: Yale University Press, 1970) at 68-75, 88-92 & 138-140 [Guido Calabresi, *The Costs of Accidents*].

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ The example is adapted from those provided by Michael G. Faure, "Environmental Regulation" in in Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (Cheltenham, UK: Edward Elgar, 2000) 443 at 446, online: *Encyclopedia of Law & Economics* <<http://encyclo.findlaw.com>>; and Professor Calabresi's in Guido Calabresi, *The Costs of Accidents* *supra* note 328 at 136.

³³² *Ibid.*

the air monitors (\$60). Rational employers will pay for the air monitors and obtain a net savings of \$40.

If workers alone bear the cost of injuries, they will pay \$50 for employers to use air monitors for the same savings.³³³ The same result will occur if the costs of injury were allocated to a third party, such as the government³³⁴ or if costs were shared among employers, workers, and third parties, although the apportioning of cost payment and savings would be more complex. If air monitors were to rise in price to \$90, no cost savings would accrue from their use. Employers and others would therefore forgo purchasing air monitors. The costs of injury would then be externalized to workers who could then bargain for higher wages. Through the payment of wage premiums, the costs of injury would then be internalized back to the employer. In perfectly functioning markets, bargaining and exchange would then lead towards a balanced exchange of costs and benefits between parties.

i. Imperfect Markets.

In imperfect markets as exist in the world today, the market may still allocate safety and health resources with some efficiency. Employers with unsafe policies and practices externalize the cost of safety and health to workers and communities.³³⁵ The externalized costs cause greater expenses to workers and affected communities and thereby reduce the value of wages paid by the employer to workers and the value of tax benefits generated by the employer to communities. As a result, workers and communities may bargain for higher wages and other concessions from employers³³⁶ and communities may introduce regulatory measures or initiate enforcement actions against the employer. Unsafe employers will incur higher operating costs. The higher operating costs lead to higher prices for the delivery of the company's goods and services, placing unsafe operators at a competitive disadvantage to safer operators. Economists recognize however that real world conditions can diminish opportunities for marketplace actions to deter unsafe conduct by employers.

In existing markets, transaction costs and other variables impose substantial barriers

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ See Thomas A. Lambert, "Avoiding Regulatory Mismatch in the Workplace: An Informational Approach to Workplace Safety Regulation" (2004) 82 Neb. L. Rev. 1006 at 1021-1023 (WL) [Thomas A. Lambert].

³³⁶ *Ibid.* But see Peter Dorman & Paul Hagstrom, "Wage Compensation for Dangerous Work Revisited" (1998) 52 Ind. Lab. Rel. Rev. 116 (WL). Dorman and Hagstrom find that noncompetitive elements in modern labor markets overcome the competitive tendency towards wage differentials in hazardous industries. *Ibid.* at

to the market's ability to allocate resources efficiently.³³⁷ These barriers cause the market to fail, in the sense that the market does not perform as it might in a pure state.³³⁸ The market, acting alone, is then unable to allocate resources efficiently and thereby minimize socially undesirable activity.³³⁹ Information costs and opt-out costs are two barriers that prevent the market's ability to deter unsafe policies and practices.³⁴⁰

Information costs are those faced by individuals to learn, access, and understand information regarding hazardous conditions and safety risks.³⁴¹ With adequate information, individuals can then exercise marketplace choices regarding hazards and risks.³⁴² In the absence of information, workers are exposed to hazards and risks of injury upon which they might otherwise have negotiated. Opt-out costs are those incurred to avoid exposure to hazards and the risk of injury.³⁴³ Exposure can be avoided by measures including the use of protective devices and equipment or choosing employment in other occupations.³⁴⁴

ii. The High Costs of Information and Opting-Out.

Information costs and opt-out costs are often impossibly high for workers and communities, particularly those in nations with developing economies. In the context of workplace hazards, systemic factors discourage the free flow of safety information in the marketplace.³⁴⁵ It is impractical for prospective employees and concerned third parties to obtain safety information independently and at optimal levels.³⁴⁶ Transnational corporations

133-134.

³³⁷ See Guido Calabresi, *The Costs of Accidents*, *supra* note 328 at 88-92 and 138-140.

³³⁸ *Ibid.*

³³⁹ Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, *supra* note 17.

³⁴⁰ See Christopher Hood, Henry Rothstein & Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford: Oxford University Press, 2001) at 73 [Christopher Hood, Henry Rothstein & Robert Baldwin].

³⁴¹ *Ibid.* Information and knowledge are not the same things, though the terms are often blurred in economics. See Errol Mendes and Ozay Mehmet, *Global Governance and Law* (London and New York: Routledge, 2003) at 168 [Errol Mendes and Ozay Mehmet]. Information is technical or statistical while knowledge refers to a deeper understanding. *Ibid.* Even when safety and health information is available, the costs of acquiring the appropriate knowledge to freely act remain high. To be told that an occupation is dangerous or that asbestos causes harm, does not necessarily imply knowledge of the risks, hazards, and means of avoiding injury. Within the context of safety and health matters, information costs might be more properly considered as the costs of obtaining a level of knowledge concerning hazards and risks upon which the individual can be said to make informed and free decisions.

³⁴² Emily A. Spieler, "Risk and Rights: The Case for Occupational Safety and Health as a Core Worker Right" in James A. Gross, ed., *Workers' Rights As Human Rights* (Ithaca, N.Y.: Cornell University Press, 2003) 78 at 90 [Emily A. Spieler].

³⁴³ Christopher Hood, Henry Rothstein & Robert Baldwin, *supra* note 340.

³⁴⁴ *Ibid.*

³⁴⁵ See Thomas A. Lambert, *supra* note 335 at 1023-1024.

³⁴⁶ *Ibid.* at 1025-1026 and 1029-1030.

are typically private entities. As private entities, they are subject to limited scrutiny from outside observers. In the absence of government mandates, no disclosure may be forthcoming and safety and health information may only be learned through the experiences of firm employees. Most employees are not safety and health experts and, thus, are not always the best source for learning safety and health information. Current employees may also be reluctant to disclose information that could negatively impact their job status or their employer.

Where government mandates require the disclosure of safety indicators, various factors compromise the accuracy of data. No international body requires the disclosure of safety and health information from TNCs. Rather, reporting requirements are established at the national level. Even in jurisdictions with relatively strong reporting requirements, corporate data are rarely checked for accuracy and underreporting is common.³⁴⁷ In other jurisdictions, there are no centralized or uniform safety and health reporting requirements. Furthermore, data is often collected from representative samples of employers in specific industries but is aggregated and then made public on the basis of regions, industries, or particular hazards and not on the basis of individual business entities or individual facilities.³⁴⁸ As a result, the nature and extent of a particular employer's or facility's hazards, accident rates, injury data, and related information is frequently unavailable to those outside the firm.³⁴⁹

Economic factors also work against the likelihood of firms voluntarily disclosing safety and health data within their operations. As noted earlier, market theory holds that when workers bear costs associated with workplace injuries, they will bargain for higher wages from higher risk employers. Disclosure of safety and health data strengthens the bargaining position of workers.³⁵⁰ Knowing that they will have to compensate workers for greater safety risks creates an incentive for employers to keep risk information beyond workers' knowledge.³⁵¹ Disclosure also may draw the attention of regulators.³⁵² Firms who draw the attention of regulators may incur increased costs through consultancy fees, legal

³⁴⁷ See generally, Jukka Takala, Global Estimates of Fatal Occupational Accidents, *supra* note 50 at 641.

³⁴⁸ See e.g., U.S. General Accounting Office, *Occupational Safety and Health: Efforts to Obtain Establishment Specific Data on Injuries and Illnesses*, GAO/HEHS-98-122 (Washington, D.C.: U.S. General Accounting Office, 1998) at 5-7, (GPOAccess).

³⁴⁹ *Ibid.* at 1025.

³⁵⁰ See Thomas A. Lambert, *supra* note 335 at 1023.

³⁵¹ See Susan-Rose Ackerman, *supra* note 202 at 355.

expenses, and civil fines. These costs add to the costs of production and potentially decrease the competitiveness of the firm's goods and services in the marketplace.

Other factors also militate against the likelihood of firms openly disclosing safety information, either as first movers or comparatively with competitors.³⁵³ Disclosure of safety information without disclosure from competing firms compromises a company's competitiveness by exposing firm vulnerabilities, which can be exploited by others. First movers often cannot know the safety records of competitors and risk being undercut by the subsequent disclosures of their competitors.³⁵⁴ Comparative advertising is impractical with the inability of firms to know and contest the safety information of competitors.³⁵⁵ As a result, few firms would be willing to 'open up the books' on safety and health data at their facilities without first knowing how such information fares comparatively with other firms in the industry. Furthermore, the most neglectful employers are unlikely to ever disclose safety and health information even in the presence of competitors' disclosure or may only do so with manipulated data, which without independent verification presents a reduced likelihood of becoming contested.

In addition to systemic factors, practical aspects of international trade and investment also militate against the likelihood of equally informed actors in the global marketplace. Cultural differences, language gaps, geographical barriers, and other conditions create obstacles diminishing the likelihood of an existing pool of informed workers engaged in marketplace bargaining and exchange over the conditions of employment. Technological changes in the workplace also increase the information costs to workers.

Technology is changing the face of traditional industries throughout the developing world.³⁵⁶ The nature of ongoing technological transfers through trade and investment is complex. In some instances, the tools, machinery, and facilities of existing industries are transferred from developed nations to overseas markets in the early stages of industrialization.³⁵⁷ In other instances, labor-intensive production processes and facilities of newer industries, such as the semi-conductor industry, are transferred to developing nations, whose citizens may be among the first workers exposed to new and evolving hazards

³⁵² See Thomas A. Lambert, *supra* note 335 at 1023.

³⁵³ *Ibid.* at 1027-1028.

³⁵⁴ *Ibid.* at 1028.

³⁵⁵ *Ibid.* at 1027-1028.

³⁵⁶ See generally Joseph LaDou, *Transfer of Technology and Technological Change*, *supra* note 214.

³⁵⁷ *Ibid.*

occurring within those industries.³⁵⁸ In each instance, the technological changes diminish the value of information learned through the worker's past experience and present hazards and risks of injury with which workers have limited available sources from which to derive safety information.³⁵⁹ The agricultural industry provides an example.

In many parts of the world, traditional agriculture is being replaced by large-scale agribusiness owned and operated by TNCs.³⁶⁰ Unlike traditional farming methods, agribusiness operations use large quantities of manufactured pesticides and herbicides.³⁶¹ The new technological practices within the industry alter the hazards and risks faced by workers.³⁶² The use of pesticides and herbicides creates changing hazards and risks of injury in their storage before use, application during use, in the residues that remain in fields, and in the disposal of unused quantities and packaging. While workers in traditional agriculture may have recognized risks of musculoskeletal and other injuries arising from hazards involved with the use of traditional tools and working animals. They now face hazards including vapors, airborne particulates, and chemical residues and their injury risks now include cancer, fertility disorders, and other toxigenic illness.³⁶³

Furthermore, exported pesticides are frequently found to be poorly labeled and written in languages foreign to inhabitants of the country to which the pesticides are exported.³⁶⁴ Labels also often lack information regarding the names of all active ingredients, the quantities of each ingredient, and instructions for safe handling.³⁶⁵ Low literacy rates and poor training of workers act as further barriers to workers' ability to learn of pesticide hazards and related risks.³⁶⁶ As a consequence, workers lack necessary information allowing for meaningful bargaining and exchange regarding safety and health risks.

Workers in nations with developing economies may also lack meaningful opportunities to opt-out of hazardous work brought about by globalization. Foreign investment is attracted to countries with developing economies in part because of large labor

³⁵⁸ *Ibid.*

³⁵⁹ Susan-Rose Ackerman, *supra* note 202.

³⁶⁰ See Jim Yong Kim, *supra* note 204 at 196.

³⁶¹ *Ibid.* 196-197.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ Food and Agricultural Organization of the United Nations, Press Release, "FAO/WHO: Amount Of Poor-Quality Pesticides Sold In Developing Countries Alarming High" (1 May 2001), online: FAO <<http://www.fao.org/>>.

³⁶⁵ *Ibid.*

³⁶⁶ See Jim Yong Kim, *supra* note 204 at 196-197.

surpluses.³⁶⁷ In these nations, workers may face few employment alternatives, creating “exchanges born of desperation”³⁶⁸ where workers are not selecting among jobs of greater or lesser conditions of safety. Domestic safety and health laws protecting workers are often relaxed or abandoned in export processing zones and other areas where TNCs locate and where job growth is occurring.³⁶⁹ Seeking jobs elsewhere and in other sectors may simply not be possible for many. Relocation internally or to other countries with less hazardous work opportunities is constrained by a host of cultural, social, and economic conditions, including the migration policies of individual nations.³⁷⁰

An example from Peru illustrates the difficulties faced in opting-out of hazards created in the context of globalized business activities. In rural Ilo, Peru, the smelter operations of a transnational mining concern emit between twenty and one hundred times the amount of sulfur dioxide smoke than would be allowed in the TNC’s home country.³⁷¹ The emissions cause vegetation to wilt and die in the fields of local farmers.³⁷² The emissions will also likely have long term impacts on the health of all persons working those fields.³⁷³ Local farmers may hypothetically opt-out of exposure by purchasing protective devices, by paying the company to adopt emissions controls, or by selling their plots and moving elsewhere. As a practical matter, it is difficult to conceive of traditional farmers possessing the resources to avoid exposure to the emissions. The costs of opting-out are simply too high to indigenous farmers whose plots produce subsistence levels of income and have been worked by traditional methods for centuries.

Another example from Mexico illustrates the interrelated nature of barriers to global workers obtaining safety information and exercising opting-out options so as to engage in meaningful marketplace bargaining and exchange. In the matter of *ITAPSA*, CAN 98-1, Canadian officials undertook an investigation pursuant to the NAALC. The investigation

³⁶⁷ See Emily A. Spieler, *supra* note 342 at 91-92.

³⁶⁸ Arthur M. Okun, *Equality and Efficiency: The Big Tradeoff* (Washington, D.C.: Brookings Institution, 1975) at 20.

³⁶⁹ See Jim Yong Kim, *supra* note 204 at 185-192.

³⁷⁰ See generally, Patrick A. Taran & Eduardo Geronimi, *Perspectives On Labour Migration 3E, Globalization, Labour and Migration: Protection is Paramount* (Geneva: International Labor Office, 2003) at 7-9, online: ILO International Migration Programme <<http://www.ilo.org/>>.

³⁷¹ See Jim Yong Kim, *supra* note 204 at 192.

³⁷² *Ibid.*

³⁷³ See The World Bank Group, *Pollution and Prevention Abatement Handbook* (Washington, DC: The World Bank, 1998) at 231-232, online: World Bank: <<http://www.worldbank.org/>> (discussing the health effects of sulfur dioxide emissions).

arose from workers' complaint that included allegations of the non-enforcement of occupational safety and health laws at a TNC's facility located in Los Reyes La Paz, Mexico.

After investigation, Canadian officials expressed concerns that safety and health labeling on bags of asbestos and chemical containers were not printed in Spanish, the native language of the plant's workers.³⁷⁴ Authorities also found that asbestos dust in the plant exceeded Mexican national standards,³⁷⁵ which are significantly less stringent than those of its North American neighbors.³⁷⁶ Most notably however, investigators expressed "major concern" with the adequacy of personal respiratory equipment at the facility.³⁷⁷ Through its subsidiary, the TNC supplied workers with half-face dust masks of the type 3M Model 8710, which were manufactured by another TNC.³⁷⁸ As a result of safety concerns, the Model 8710 mask was pulled from the U.S. market by the manufacturer.³⁷⁹ The investigation found that the supplied masks did not protect against either asbestos dust or the fumes of chemicals being used at the facility.³⁸⁰ For all practical purposes, workers thus had neither sufficient information nor a meaningful opportunity to opt-out of exposure through use effective protective equipment.³⁸¹

2. Criticisms of Market Theory in the Context of Safety & Health.

Beyond the problem of transaction costs, market regulation comes under criticism from various schools of thought.³⁸² Market theory is based on the assumptions of rational

³⁷⁴ *Ibid.* at sec. 3.2.

³⁷⁵ See *ITAPSA* (1998), CAN 98-1, Part II (Canadian National Administrative Office Review of Public Communication) at sec.5.2, online: Canada Human Resources and Skills Office <<http://www.hrsdc.gc.ca/>> [*ITAPSA* (1998), CAN 98-1, Part II].

³⁷⁶ *Ibid.* at sec. 3.1.2.

³⁷⁷ *Ibid.* at sec.5.2.

³⁷⁸ *Ibid.*

³⁷⁹ Greg Gordon "Liability Lawsuits Galore Dog 3M" *Minneapolis Star Tribune* (18 April 2004) at 1A, (Lexis) (noting that the mask was phased out of the U.S. market over a three-year period ending in 1998).

³⁸⁰ See *ITAPSA* (1998), CAN 98-1, Part II, *supra* note 375 at sec. 5.2.

³⁸¹ The *ITAPSA* matter illustrates the limits of the NAALC reporting process. The U.S. NAO also received and reached similar conclusions. *ITAPSA* (1998), 9703 (United States National Administrative Office Public Report of Review 9703) at s. V-VII, online: U.S. Department Labor, International Labor Affairs Bureau <<http://www.dol.gov/ilab/>>. Both NAOs recommended consultations with the labor minister of Mexico but no meaningful remedies for affected workers and little or no change in conditions experienced by workers at the plant. See Linda Delp, et. al., *NAFTA's Labor Side Agreement: Fading into Oblivion?* (Los Angeles: UCLA Center for Labor Research and Education, 2004) at 26-27 and 49, online: : UCLA Center for Labor Research and Education <<http://www.labor.ucla.edu/>>.

³⁸² See generally Robin West, "Rights, Capabilities, and the Good Society" (2001) 69 *Fordham L. Rev.* 1901 (WL) [Robin West]; Wayne Eastman, "Critical Legal Studies" in Boudewijn Bouckaert & Gerrit De Geest, in Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (Cheltenham, UK: Edward Elgar, 2000) 754; and Robin Paul Malloy, "Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy" (1986) 47 *Ohio St. L. J.* 163 (WL).

choice theory to explain how persons make marketplace choices and respond to incentives.³⁸³ Rational choice conceptions vary but all generally hold that persons make choices to maximize expected utility or self-interest.³⁸⁴ Under either conceptualization, decisions are made based on an internalized cost-benefit analysis.³⁸⁵ Empirical research suggests, however, that persons do not make choices and respond to incentives in ways contemplated by market theory.³⁸⁶

i. Bounded Rationality and the Manipulation of Marketplace Choice.

Law and behavior commentators argue that individuals simply do not make choices and respond to incentives in ways articulated by market theory. Individual rationality as contemplated by economists may be 'bounded' by inherent human limitations.³⁸⁷ Individual willpower is limited and so is the extent to which individuals make decisions based on the maximization of benefits and the minimization of costs.³⁸⁸ Established preferences, heuristics, and reference points such as status, tradition, and other variables all form the basis of individual decisions, resulting in choices not directed to maximizing expected utility.³⁸⁹ Empirical evidence also suggests that people make decisions in accordance with socially constructed norms and based on notions of fairness and social justice.³⁹⁰ While individual decisions which are inconsistent with the maximization of utility are perfectly rational, traditional market theory has difficulty accommodating and accounting for choices of this nature, generally finding them as sub-optimal decisions impeding efficient outcomes.

Behavioral studies further note that manufacturers seek to influence perceptions of risk in the marketplace.³⁹¹ Corporations have the incentive and ability to influence marketplace actors through campaigns that manipulate scientific and probabilistic judgments concerning risk, that manipulate individual perceptions of risk, and that manipulate perceptions regarding the safety and health practices of individual corporations.³⁹² Given the

³⁸³ Russell B. Korobkin & Thomas S. Ulen, "Law and Behavioral Science: Removing the Rationality Assumption of Law and Economics" (2000) 88 Cal. L. Rev. 1051 at 1055 (WL) [Russell B. Korobkin & Thomas S. Ulen].

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.* at 1069.

³⁸⁶ *Ibid.* at 1068.

³⁸⁷ Christine Jolls, Cass R. Sunstein & Richard Thaler, *supra* note 18.

³⁸⁸ *Ibid.* at 1479-1480.

³⁸⁹ Russell B. Korobkin & Thomas S. Ulen, *supra* note 383 at 1069.

³⁹⁰ *Ibid.*

³⁹¹ Jon D. Hanson & Douglas A. Kysar, "Taking Behavioralism Seriously: The Problem of Market Manipulation" (1999) 74 N.Y.U. L. Rev. 630 at 743 (WL).

³⁹² *Ibid.* at 727-742. See generally Rhys Jenkins, Ruth Pearson & Gill Seyfang, eds., *Corporate Responsibility &*

vast sums expended on corporate advertising and public relations campaigns, it is difficult to conceive of there not being some tangible benefits accruing to sponsors. Efficient outcomes may then be impeded, not only from a lack of information, but also from active disinformation in the marketplace.

ii. Price Indicators and the Value of Safety & Health.

Another central criticism of market regulation is its general reliance upon monetary pricing systems as the principal criteria for determining optimal protection of human values.³⁹³ Market analysis of injury prevention recognizes that all risk of injury cannot be prevented and that unlimited risks of injury are undesirable.³⁹⁴ In both instances, the costs to society are too great.³⁹⁵ Market economists employ cost-benefit analysis to navigate between these two poles and thereby arrive at a balancing of the costs of injury prevention against the benefits derived from injuries prevented.³⁹⁶ At the point where costs exceed benefits, society's willingness-to-pay for additional safety will end.³⁹⁷ Utilized in this way, cost-benefit analysis is often presented as an objective, scientific, and non-political tool.³⁹⁸ Critics argue that it satisfies none of these criteria and that the cost-benefit tool is ill-suited to the task of making these determinations.³⁹⁹

Cost-benefit analysis is a useful tool to analyze quantitative data but is less valuable as a tool to analyze personal and societal values.⁴⁰⁰ Critics find that qualitative factors are not adequately translated into quantitative data represented by price indicators.⁴⁰¹ When transposed to the value of safety and health, the tool seeks to quantify factors that are qualitative in nature.⁴⁰² The value of safety and health may be poorly represented by price indicators assigned to the costs of accident prevention measures and to the benefits of

Labour Rights (London: Earthscan, 2002) at 4-5; and Neil Kearney, *supra* note 21 at 208.

³⁹³ See Robin West, *Rights*, *supra* note 382. at 1920-1921.

³⁹⁴ See Susan-Rose Ackerman, *supra* note 202 at 355.

³⁹⁵ Joseph P. Tomain, "Junk Economics" Book Review of *Priceless: On Knowing the Price of Everything and the Value of Nothing* by Frank Ackerman & Lisa Heinzerling (2005) 93 *Geo. L. J.* 689 at 693 (WL) [Joseph Tomain].

³⁹⁶ See generally Robert W. Hahn, "The Economic Analysis of Regulation: A Response to Critics" (2004) 71 *U. Chi. Rev.* 1021 at 1041-1044 (WL); and Irwin M. Speltzer, "A Conservative Case for Regulation" (1997) 128 *Public Interest* 85 at 94-95 (Proquest).

³⁹⁷ See generally Sidney A. Shapiro, "Occupational Safety and Health Regulation, in Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (Cheltenham, UK: Edward Elgar, 2000) 596 at 602-603, online: *Encyclopedia of Law & Economics* <<http://encyclo.findlaw.com>>.

³⁹⁸ Frank Ackerman & Lisa Heinzerling, *Priceless*, *supra* note 19 at 35.

³⁹⁹ *Ibid.* at 35-39.

⁴⁰⁰ *Ibid.* at 206-207.

⁴⁰¹ *Ibid.* 206-207.

⁴⁰² *Ibid.* at 39-40.

injuries and illnesses prevented. The process of translating qualitative factors into price indicators generates suspect data to be applied in a simple formula that can deform and obscure the moral choices being made.⁴⁰³ Utilizing price in this way may be little more than a “crude measurement, guess or [unarticulated] political choice.”⁴⁰⁴

To critics of market theory, the value of human life and health “cannot be described meaningfully in monetary terms, they are ‘priceless.’”⁴⁰⁵ To characterize safety and health as priceless is not to say that unlimited sums should be spent on their protection.⁴⁰⁶ Rather, it is to argue that translating their value into dollar figures is an artificial construct that does not lead to fruitful determinations of socially desirable levels of safety and health.⁴⁰⁷ There is a place for economic analysis. However a more holistic approach that includes more ethically based assessments of society’s values may be needed.⁴⁰⁸

Awareness of the market’s shortcomings has led to the development of supplemental strategies to prevent social harms, including unintentional injuries, resulting from global trade and investment. The most developed supplemental strategy exists in the form of voluntary codes of conduct.

D. Deficiencies Of Voluntary Initiatives For Regulating Transnational Harms.

Over the past fifteen years codes of conduct have proliferated for companies doing business overseas. Codes of conduct encompass a wide range of standards, guidelines, and recommended practices intended to impact the behavior of TNCs to promote socially responsible behavior.⁴⁰⁹ The first attempts at codes of conduct for TNCs began within the OECD, ILO, and the United Nations Commission on Transnational Corporations (UNCTC) in the late 1970s.⁴¹⁰ The initiatives began with intentions to develop mandatory codes but lack of consensus “moderated the original intention.”⁴¹¹ As a result, voluntary

⁴⁰³ *Ibid.* at 9.

⁴⁰⁴ Joseph P. Tomain, *supra* note 395 at 711.

⁴⁰⁵ Frank Ackerman & Lisa Heinzerling, *Priceless*, *supra* note 19 at 8. The authors write further:
When the question is whether to allow one person to hurt another ... when people “buying” harms have no relationship with the people actually harmed – then we are in the realm of the priceless, where market values tell us little about the social values at stake.

⁴⁰⁶ *Ibid.* at 9

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.* at 211-223 and 229-233.

⁴⁰⁹ Ans Kolk & Rob van Tulder, “Setting new global rules? TNCs and Codes of Conduct” (2005) 14:3 *Transnat’l Corporations* 1 at 3, online: UNCTAD <<http://www.unctad.org/>>.

⁴¹⁰ *Ibid.* at 5

⁴¹¹ *Ibid.*

codes of conduct were drafted by the OECD and ILO while UNCTC's draft code was never finalized and was abandoned.⁴¹² By the mid-1990s, voluntary codes re-emerged and have continued to grow in number ever since.⁴¹³ Recent surveys have found over 246 existing codes with many others believed to be in existence.⁴¹⁴

Consistent with values expressed by human rights instruments, concerned civil society groups, industry associations, private bodies, and individual corporations have adopted statements affirming workplace safety and health rights and duties in the context of transnational business activity.⁴¹⁵ To date, codes emanating from noncommercial groups and private industry have focused on measures that are voluntary in nature.⁴¹⁶ Examples of these instruments include: Fair Labor Association Workplace Code of Conduct,⁴¹⁷ Clean Clothes Campaign Code of Labour Practices,⁴¹⁸ Global Sullivan Principles,⁴¹⁹ Caux Round Table Principles for Business,⁴²⁰ Worldwide Responsible Apparel Production Principles,⁴²¹ ICFTU/ITS Basic Code of Labour Practice,⁴²² ICMM Principles,⁴²³ and SA8000.⁴²⁴ These and other statements are part of the ongoing development of strategies to prevent harm by promoting people's human rights, including a right to safety and health, in a globalized economy.

⁴¹² *Ibid.*

⁴¹³ *Ibid.* at 6

⁴¹⁴ See OECD, Codes of Corporate Conduct: Expanded Review of their Contents, Working Papers on International Investment No. 2001/6 (Organization for Economic Co-operation and Development, 2001) at 3-5, online: OECD <<http://www.oecd.org/>>.

⁴¹⁵ See Rhys Jenkins, "The political economy of codes of conduct" in Rhys Jenkins, Ruth Pearson & Gill Seyfang, eds., *Corporate Responsibility & Labour Rights* (London: Earthscan, 2002) at 18-21.

⁴¹⁶ Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" 19 Conn. J. Int'l L. 1 (WL).

⁴¹⁷ Fair Labor Association, *Workplace Code of Conduct* (Washington, D.C.: FLA, 1998), online: FLA <<http://www.fairlabor.org/>>.

⁴¹⁸ Clean Clothes Campaign, *Code of Labour Practices for the Apparel Industry Including Sportswear* (Amsterdam: CCC, 1998), online: CCC <<http://www.cleanclothes.org/>>.

⁴¹⁹ Leon H. Sullivan Foundation, *The Global Sullivan Principles* (Washington, D.C.: Leon H. Sullivan Foundation, 1976), online: Leon H. Sullivan Foundation <<http://www.thesullivanfoundation.org/>>.

⁴²⁰ The Caux Round Table, *Principles for Business* (St. Paul, MN: The Caux Round Table, 1994), online: The Caux Round Table <<http://www.cauxroundtable.org/>>.

⁴²¹ Worldwide Responsible Apparel Production, *Apparel Certification Program Principles* (Arlington, VA: Worldwide Responsible Apparel Production, 1998), online: WRAP <<http://www.wrapapparel.org/>>.

⁴²² International Confederation of Free Trade Unions, *ICFTU/ITS Basic Code of Labour Practice* (Brussels: ICFTU, 1997), online: ICFTU <<http://www.icftu.org/>>.

⁴²³ International Council on Mining and Metals, *ICMM Principles* (London, ICMM, 2001), online: ICMM <<http://www.icmm.com/>>.

⁴²⁴ Social Accountability International, *SA8000* (New York: SAI, 2001) at Part IV, Sec. 3, online: SAI <<http://www.sa-intl.org/>>.

While voluntary measures contribute to comprehensive strategies for injury prevention, the nonbinding nature of codes of conduct leaves wide opportunities for harmful conduct by less responsible firms. By their nature, voluntary measures only apply to those who adopt and adhere to them.⁴²⁵ In practice, only a small percentage of corporations will adopt and adhere to voluntary codes.⁴²⁶

Incentives for corporations to adopt and adhere to voluntary codes rely heavily on the existence of a consumer sunshine effect whereby abuses are learned and channeled into media sources causing the consuming public to seek marketplace alternatives, which, in turn, induce shareholders to place their investments elsewhere.⁴²⁷ This form of incentive and sanctioning is dependent upon the dissemination of information concerning violations, a high degree of choice among goods and services in the marketplace, and a range of suppliers of marketplace goods and services who do not engage in similar abuses.⁴²⁸ These conditions may not exist in optimal forms for many goods and services and in different geographic locations. As a result, those companies with high brand identity in highly competitive consumer markets are the most susceptible to sunshine effect pressures and are the most likely candidates to adopt and adhere to voluntary codes.⁴²⁹ Other companies operating in different markets are less likely. As a result of uncertain sunshine effects, when those espousing adherence fail to meet code obligations, accountability is often illusory.

Code drafters have struggled to develop methods to ensure compliance and provide reasonably assured consequences in instances of breach.⁴³⁰ Authorities recognize that

⁴²⁵ International Council on Human Rights Policy, *Beyond Voluntarism*, *supra* note 325 at 8.

⁴²⁶ Scott Pegg, "An Emerging Market for the New Millennium: Transnational Corporations and Human Rights" in Jędrzej George Frynas & Scott Pegg, eds., *Transnational Corporations and Human Rights* (New York: Palgrave Macmillan, 2003) 1 at 22-23 [Scott Pegg]; and Alex Wawryk, "Regulating Transnational Corporations through Corporate Codes of Conduct" in Jędrzej George Frynas & Scott Pegg, eds., *Transnational Corporations and Human Rights* (New York: Palgrave Macmillan, 2003) 53 at 62 [Alex Wawryk].

⁴²⁷ See generally International Council on Human Rights Policy, *Beyond Voluntarism*, *supra* note 325 at 23. Social and ethical investing is a growing percentage of the investor marketplace however is estimated at just 13 percent of assets under professional investment management in the United States. Steve Schueth, "Socially Responsible Investing in the United States" (2003) 43 *J. Bus. Ethics* 189 at 191 (Springer).

⁴²⁸ See generally, Stehnen Panther, "Non-Legal Sanctions" in Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (Cheltenham, UK: Edward Elgar, 2000) 999 at 1004-1007, online: *Encyclopedia of Law & Economics* <<http://encyclo.findlaw.com>>.

⁴²⁹ See generally, Ruth Mayne, "Regulating TNCs: the Role of Voluntary and Governmental Approaches" in Sol Picciotto & Ruth Mayne, eds., *Regulating International Business: Beyond liberalization* (New York: St. Martin's Press in association with Oxfam, 1999) 235 at 247 [Ruth Mayne].

⁴³⁰ See Mark B. Baker, "Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise" (2001) 20 *Wis. Int'l L.J.* 89 (WL); Harvard, *Developments in the Law - Jobs and Borders*, *supra* note 325; International Council on Human Rights Policy, *Beyond Voluntarism*, *supra* note 325; and Auret van Heerden & Shubash II, *supra* note 325. See also Terry Collingsworth, "Boundaries in the Field of Human

independent third-party monitoring of compliance with codes of conduct provides the highest measures of accountability.⁴³¹ Codes range from those with no meaningful internal compliance reviews to those with compliance audits performed by private bodies.⁴³² Corporations however generally prefer self monitoring or monitoring conducted by consultants retained by the corporation, with attendant inherent conflicts of interest.⁴³³ Without opportunities for meaningful internal auditing, it becomes difficult for outside parties to evaluate firm compliance in the absence of intensive investigative resources or headlines generating disasters.

In the presence of uncertain accountability measures, voluntary initiatives are easily departed from when in perceived conflict with other corporate goals.⁴³⁴ During economic downturns, corporate profitability goals may be perceived as conflicting with social responsibility goals. In the face of such pressures, voluntary initiatives are easily circumvented when the perceived benefits of noncompliance exceed costs.⁴³⁵ Without independent auditing and assured consequences for breach, the costs of noncompliance can be perceived as quite low.⁴³⁶

Uncertain accountability for noncompliance also contributes to the problem of free riders.⁴³⁷ Individual corporations may in good faith comply with socially responsible codes of conduct. Complying companies internalize the costs of developing, implementing, and enforcing codes.⁴³⁸ Other firms may express adherence to similar codes as a public relations strategy yet forgo the costs of meaningful development, implementation, and enforcement.⁴³⁹ Under these circumstances, good faith actors are placed at an economic disadvantage to noncomplying firms.⁴⁴⁰ Where voluntary initiatives are advanced by industry and trade associations, the free rider problem becomes particularly pronounced absent certain and

Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms" (2002) 15 Harv. Hum. Rts. J. 183 at 202-203 (WL).

⁴³¹ Alex Wawryk, *supra* note 426.

⁴³² See Ilias Bantekas, *supra* note 20.

⁴³³ *Ibid.* See also Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005) at 229-230.

⁴³⁴ See Alex Wawryk, *supra* note 426 at 64.

⁴³⁵ See Ruth Mayne, *supra* note 429 at 247.

⁴³⁶ Alex Wawryk, *supra* note 426 at 63.

⁴³⁷ *Ibid.* at 69. See also Ruth Mayne, *supra* note 429 at 247.

⁴³⁸ See Alex Wawryk, *ibid.*

⁴³⁹ *Ibid.* See also Scott Pegg, *supra* note 426 at 23.

⁴⁴⁰ See Alex Wawryk, *ibid.* at 69.

meaningful sanctions, which are often lacking.⁴⁴¹ As a result, voluntary codes hold little promise for compelling responsible behavior or otherwise holding accountable market actors who are carelessly or purposefully disinterested in the safety and health consequences of their actions. For such actors, more formal regulation is needed.

Trade liberalization expands the rights of corporations in relation to states and their citizens.⁴⁴² The increase in the rights of TNCs has led to a dramatic increase in corporate power in relation to host states institutions.⁴⁴³ The increase in corporate power correspondingly expands the scope of opportunities under which human rights abuses, including safety and health abuses, may occur.⁴⁴⁴ Human rights initiatives arose, in part, to curb the abuses of expanding state power, the negative consequences of which came to the fore during the Second World War.⁴⁴⁵ The increasingly lengthy history of abuses occurring within transnational activity instructs that market forces and voluntary initiatives alone are unlikely to constrain many transnational actors.⁴⁴⁶ In the face of the expanding potential for corporate abuse and in the face of occurring tragedies, formal law instruments are revealed as a necessary component of strategies to deter and prevent future abuses.⁴⁴⁷

State power, exercised and executed through formal law, is an important source of mediating outcomes when rights clash. When corporate activity clashes with people's safety and health rights, law facilitates the peaceful resolution of disputes. Formal law acts as the ultimate tool of resolution when the discretionary acts of one come into conflict with the rights of the other. When mutually agreeable solutions are not found between the parties, law mediates an outcome obviating recourse to extrajudicial measures. Acceptance of legal outcomes is tied to the way law is formed through democratic institutions.

Formal law is promulgated and enforced by governments, which in democratic systems are ultimately accountable to their citizens.⁴⁴⁸ As such, government is the body best situated to mediate between competing interests among citizens.⁴⁴⁹ A democratic deficit exists in the development of many voluntary initiatives. Industry trade groups, individual

⁴⁴¹ *Ibid.* at 69.

⁴⁴² See generally, International Council on Human Rights Policy, *Beyond Voluntarism*, *supra* note 325 at 12.

⁴⁴³ *Ibid.* at 9-10.

⁴⁴⁴ See generally *ibid.*; and Alison Brysk, *Human Rights and Private Wrongs* (New York: Routledge, 2005) at 17 [Alison Brysk].

⁴⁴⁵ See International Council on Human Rights Policy, *Beyond Voluntarism*, *supra* note 325 at 9.

⁴⁴⁶ *Ibid.* at 7-8.

⁴⁴⁷ *Ibid.* at 7-11.

⁴⁴⁸ *Ibid.*

corporations, and even nongovernmental organizations are probably the leading groups developing and monitoring voluntary codes. The governing structure of each group serves far narrower interests than those of democratic states and their court systems.⁴⁵⁰ Citizen stakeholders may have input, but ultimately have few avenues to pursue accountability within such institutions. With government accountability to its citizens, outcomes promulgated through formal law stand a greater likelihood of being accepted by all parties when disputes arise.⁴⁵¹

At their best, codes reflect sincere attempts to address social ills through new strategies. Perhaps equally prevalent sentiments however employ voluntary codes to stave off meaningful accountability for harmful conduct and to mislead the public as to the realities of corporate activity in nations overseas. In both instances, the proliferation of codes arises from existing observed and perceived weaknesses in the enforcement capacity of international and national regulatory regimes.⁴⁵² The following chapter examines these weaknesses in greater depth. The chapter begins with a discussion of existing regulatory models and then proceeds to examine existing shortcomings before arguing the potential of transnational private law as one tool for protecting people's safety and health from the potentially harmful conduct of transnational business activity.

⁴⁴⁹ See generally, *ibid.*

⁴⁵⁰ See generally, Ruth Mayne, *supra* note 429 at 246.

⁴⁵¹ Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society" (2005) 46 Harv. Int. L.J. 471 at 474-476 (WL) [Robert Wai, Transnational Private Law].

⁴⁵² See Bob Hepple, *supra* note 226 at 72.

CHAPTER 3

REGULATION THROUGH STATE LAW FOR INJURY PREVENTION

Morality cannot be legislated but behavior can be regulated.
Judicial decrees may not change the heart but they can restrain the heartless.
- *Martin Luther King, Jr.*

Health professionals have learned to deploy a range of intervention strategies when targeting particular health problems.⁴⁵³ In the context of injury prevention and global trade and investment, aspects of a multifaceted approach may be found in existing market forces and voluntary initiatives. The deficiencies of these two approaches however leave wide gaps in an effective injury prevention strategy. The gaps perhaps reveal less of a comprehensive strategy than a devaluing of the rights such measures serve to protect in relation to other priorities. The devaluing is further suggested by the absence of formal regulation for most transnational harms while formal regulation operates as a consensus within national domains.⁴⁵⁴ As a consequence, it may be at these levels of government that gaps in the web of protection for people's safety and health might be most readily filled.

A. Government's Role In Establishing Regulatory Frameworks.

Government has an ethical obligation to protect and promote people's safety and health.⁴⁵⁵ Political communities are formed to protect and act for the common good.⁴⁵⁶ Governments, and particularly democratic forms of government, are formed to provide for the people's common defense, security, safety, and welfare.⁴⁵⁷ As a consequence, "the first thing that public officials owe to their constituents is protection against natural and manmade hazards."⁴⁵⁸ Acting alone, individuals face insurmountable obstacles to assure their safety and health.⁴⁵⁹ Acting together, people overcome these obstacles.⁴⁶⁰ Meaningful

⁴⁵³ See generally Richard J. Bonnie & Bernard Guyer, *supra* note 79 at 270.

⁴⁵⁴ Saying that formal regulation operates as a consensus at national levels is not to say that all agree to the form and content of domestic regulatory regimes, but rather is intended to recognize that virtually all governments with developed economies have established wide ranging regulatory frameworks to control potential harms.

⁴⁵⁵ See Lawrence O. Gostin, "Health of the People: The Highest Law?" (2004) 32 J. Law, Med. & Ethics 509 at 511 (WL) [Lawrence O. Gostin, Health of the People].

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

safety and health protections can only be achieved through communal effort, most commonly realized through the actions of government.⁴⁶¹

Recognition of the need for communal efforts to protect people's safety and health, and for injury prevention, can be seen through governmental actions at local, national, and international levels. The four largest nations with common law legal systems provide an example. Australia, Canada, the United Kingdom, and the United States each possess occupational safety and health legislation and related agencies operating in all regions of those countries.⁴⁶² Each also maintains well developed legal institutions that apply a sophisticated body of laws for the protection of people's safety and health.⁴⁶³ The four nations also maintain membership in the UN, ILO, and other organizations participating in development of conventions, recommended practices, and other initiatives for workplace safety and health.

Government action for the protection and promotion of people's safety and health occurs through multiple avenues. Among the tools available to government is its power to tax, spend, and regulate.⁴⁶⁴ Governments regulate by establishing coercive, or binding,

⁴⁶¹ *Ibid.*

⁴⁶² Australian legislation provides for a National Occupational Health Commission that establishes national workplace safety and health standards. See *Australian Workplace Safety Act 2001* (Cth.) (ILO NATLEX) and *National Occupational Health Commission Act 1985* (Cth.) (ILO NATLEX). Workplace safety and health laws are made at the state and territorial level of government with each having its own related legislation and enforcement agency. National standards are advisory until adopted as law by individual states and territories. In Canada, national legislation established the Canadian Centre for Occupational Safety and Health, which undertakes research, consultations and disseminates information throughout the country regarding occupational safety and health matters. See *Canadian Centre for Occupational Health and Safety Act*, R.S. C. 1978 (ILO NATLEX). National legislation also establishes safety and health standards for a narrow range of workplaces while provincial and territorial legislation covers the majority of workplaces within their jurisdictions. The Health and Safety at Work Act establishes standards in the United Kingdom, excepting a few territories that maintain their own workplace safety legislation. *Health and Safety at Work, etc. Act 1974* (U.K.), c. 37 (ILO NATLEX). Likewise, standards are developed and principally enforced by national agencies, the Health and Safety Commission and the Health and Safety Executive and local authorities. A developing body of European Union safety and health law also applies within the United Kingdom. Through national legislation, the United States Department of Labor's Occupational Safety and Health Administration develops and enforces safety standards governing many of that nation's workplaces. See *Occupational Safety and Health Act (OSHA) of 1970*, 29 U.S.C. § 651 *et. seq.* (1990) (WL). States and territories may opt-out of the national scheme and establish their own legislation governing workplace safety. At present, approximately half the states have their own standards and agencies for enforcement.

⁴⁶³ Examples of such laws include tort laws, workers compensation laws, environmental laws, whistleblower protection laws, and labor laws protecting collective bargaining rights.

⁴⁶⁴ See generally Lawrence O. Gostin, *Health of the People*, *supra* note 454 at 511-513. Gostin suggests at least seven models of government intervention to promote public health. Three of the models, the power to alter the informational environment, the built environment, and the socio-economic environment might equally be seen as implemented through taxing, spending, and/or regulatory frameworks. Three Examples of the power to tax for the promotion of public health include those on cigarettes and alcohol. Examples of the power to spend include spending on research projects, clinical facilities, and educational campaigns.

regulatory frameworks in three principal ways: through criminal penalties, command and control regulation, and private causes of actions.⁴⁶⁵ Within the common law countries, regulatory frameworks for the protection and promotion of people's safety and health are principally established through public law measures related to command and control regulation⁴⁶⁶ and private law measures related to liability based causes of action.⁴⁶⁷

Regulatory frameworks for injury prevention are most overtly visible in the form of legislation establishing command and control regulation through governmental agencies.⁴⁶⁸ Upon passage of legislation, agencies are typically delegated the task of developing norms of behavior for particular classes of potentially hazardous goods or services. Enforcement of norms is traditionally vested within the discretion of the relevant agency and people's safety and health rights are enforced derivatively through the agency's actions.

Private law actions also serve to establish regulatory frameworks for activity that affects people's safety and health. Private actions are generally created through constitutional and statutory instruments that vest people with rights and impose duties. The enabling instruments typically establish general norms, which in common law countries are developed further through individual cases. Examples include constitutionally and legislatively created causes of action and common law tort suits. Enforcement of norms is vested with individuals who suffer harm.

The two models for establishing regulatory frameworks should perhaps be viewed less as competing alternatives than as complementary devices. In the absence of either, the shared goal of achieving the highest attainable standards of safety and health is made poorer. By this standard, the global environment of unintentional injury and illness prevention in the context of international trade and investment presently exists in a state of poverty.

B. Regulatory Frameworks In The International Context.

At the international level, regulatory frameworks are conceivable through the establishment of command and control regulation and private causes of action for violations of people's safety and health rights. Hazardous trade activities can be regulated through

⁴⁶⁵ The necessity of binding normative frameworks is beyond the scope of this article, but has been compellingly advanced by other authors. See e.g. International Council on Human Rights Policy, *Beyond Voluntarism*, *supra* note 325; and Janet Dine, *The Governance of Corporate Groups* (Cambridge: Cambridge University Press, 2000) [Janet Dine, *The Governance of Corporate Groups*].

⁴⁶⁶ Command and control regulation generally operates through government agencies charged with identifying hazardous activity and establishing and enforcing standards with respect to the conduct of that activity.

⁴⁶⁷ See generally, Wendy E. Parmet, *supra* note 24 at 1665-1669.

cooperatively negotiated instruments vesting regulatory powers in international institutions.⁴⁶⁹ Negotiated instruments can also establish rights and duties vesting individuals with avenues for enforcement actions through international bodies.⁴⁷⁰ While existing instruments or each type contain normative elements of command and control and private action regulation, international agreements generally do not provide for direct enforcement against TNCs but rather delegate the enforcement of norms to national institutions.

1. Command and Control Regulation through International Treaties.

Various treaties and conventions articulate economic, social and cultural human rights including a right to safety and health.⁴⁷¹ Instruments have also been adopted resulting in the formation of international institutions whose missions include research and the development of guidelines in areas of occupational safety⁴⁷² and environmental health.⁴⁷³ Direct enforcement of safety and health norms against TNCs by international agencies, however is generally not provided by existing agreements.⁴⁷⁴ The lack of binding regulatory enforcement at the international level arises from “collective action problems such as ... free-rider problems, and regulatory competition, as well as genuine differences in regulatory preferences.”⁴⁷⁵ Two factors compound the uncertain status of regulatory enforcement under international law when applied to the activities of TNCs: the view of international human rights instruments as only binding states⁴⁷⁶ and the view of corporate regulation as the provenance of domestic law.⁴⁷⁷

⁴⁶⁸ *Ibid.*

⁴⁶⁹ See generally Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell Publishing, 1995) at 111-114 [Peter Muchlinski]. Such agreements are conceivable based on model trade agreements, the text of which establish regulatory frameworks and provide for fact finding, interpretation, and methods of enforcement.

⁴⁷⁰ The North American Agreement on Environmental Cooperation is an example in part. The agreement provides avenues for citizens to bring complaints for nonenforcement of national environmental laws to a regional agency. *North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States*, 14 September 1993, 32 I.L.M. 1545 (entered into force January 1, 1994), online: North American Commission on Environmental Cooperation <<http://www.cec.org/>>. The agreement provides for fact-finding but no meaningful enforcement. *Ibid.*

⁴⁷¹ See e.g. the *International Covenant on Economic, Social and Cultural Rights*, *supra* note 287 at 49.

⁴⁷² See e.g. the International Labor Organization.

⁴⁷³ See e.g. the United Nations Environmental Programme and programs of the World Health Organization.

⁴⁷⁴ Jamie Cassels, “Outlaws: Multinational Corporations and Catastrophic Law” (2001) 31 *Cumb. L. Rev.* 311 at 317 (WL) [Jamie Cassels, Outlaws]. See also, Surya Deva, *supra* note 416.

⁴⁷⁵ Robert Wai, *Transnational Private Law*, *supra* note 451 at 479.

⁴⁷⁶ David Kinley & Junko Tadaki, *supra* note 223 at 935.

⁴⁷⁷ *Ibid.*

While enforcement through ready and certain sanctions has largely eluded the international community,⁴⁷⁸ frameworks exist that aide in indirect enforcement of safety and health norms. International Labor Organization procedures provide for some measure of enforcement against state actors that can indirectly influence the actions of TNCs. International Labor Organization conventions concerning safety and health matters typically require signatory states to develop a national policy addressing the subject of the convention.⁴⁷⁹ National policies are commonly developed through legislation establishing domestic agencies principally concerned with command and control regulation of occupational safety and health issues.

Through Articles 24 and 26, the ILO is empowered to investigate and report concerning state failures to meet obligations under ILO conventions. Under Article 24, enforcement is generally limited to the outcomes of a sunshine effect, whereby public exposure may bring pressure for change from other quarters, and findings can result in the commencement of Article 26 procedures.⁴⁸⁰ Under Article 26, reporting may include recommendations and further action to ensure implementation of recommendations.⁴⁸¹ International Labor Organization procedures thereby possess the potential to pressure states through the public exposure and shaming that investigation and reporting generates.⁴⁸² States may then exert influence on TNCs operating within their jurisdictions.⁴⁸³ International Labor Organization procedures may thereby indirectly regulate TNCs.⁴⁸⁴

In the absence of direct enforcement at the international level however, existing conditions allow TNCs to frequently operate in a “legal vacuum” unburdened by the constraints of international law.⁴⁸⁵

2. Private Law Regulation through International Treaties.

Regulatory frameworks may also be achieved through negotiated agreements

⁴⁷⁸ See generally, Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 2003) at 152.

⁴⁷⁹ See e.g., Occupational Safety and Health Convention, *supra* note 292 at Art. 4.1.

⁴⁸⁰ ILO Constitution, *supra* note 290 at Art. 24.

⁴⁸¹ *Ibid.* at Art. 26.

⁴⁸² See David Kinley & Junko Tadaki, *supra* note 223 at 1017-1018.

⁴⁸³ See generally James Atleson, “An Injury to One ...”: Transnational Labor Solidarity and the Role of Domestic Law” in James A. Gross, ed., *Workers’ Rights As Human Rights* (Ithaca, N.Y.: Cornell University Press, 2003) at 161.

⁴⁸⁴ See David Kinley & Junko Tadaki, *supra* note 223 at 1017-1018. The ILO has also expanded its factory inspection activities for compliance with core labor standards. *Ibid.* at 1019. Inspections and consequent remedial action are however dependent upon the consent of the firms inspected.

⁴⁸⁵ *Ibid.* at 935

validating private causes of action before the national courts of signatory nations.⁴⁸⁶ In certain areas of commercial activity with the potential to cause catastrophic harm, a limited number of international treaties provide for private law liability.⁴⁸⁷ These instruments often validate private liability but cap potential damages for highly hazardous industries that might otherwise have difficulty operating in an environment of unlimited damages. The agreements typically do not establish standards but rather affirm liability through national law for certain types of highly hazardous activity. Enforcement is thereby delegated to the national institutions of the parties to the agreement.

Treaties most notably exist concerning cross-border harms resulting from nuclear accidents⁴⁸⁸ and from maritime accidents involving the transport of nuclear materials or petroleum products.⁴⁸⁹ Additional treaties have been drafted expanding the scope of regulated activities relating to substances covered by existing treaties⁴⁹⁰ and also seeking to regulate additional substances and activities, thereby providing additional basis for civil liability.⁴⁹¹ Among the goals of treaty based civil liability systems for transboundary harms is the internalization of the costs of harm, through the 'polluter pays' principle.⁴⁹² Through incorporation of the polluter pays principle, important signals are sent to corporations

⁴⁸⁶ See e.g. the *Paris Convention on Third Party Liability in the Field of Nuclear Energy*, 29 July 1960, 956 U.N.T.S. 251 (entered into force 1 April 1968) (WL) [*Paris Convention*]; and the *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 29, 1969, 973 U.N.T.S. 3 (entered into force 19 June 1975) (WL) [*International Convention for Civil Liability for Oil Pollution Damage*] (amended by the Protocols adopted on 19 November 1976, 25 May 1984, and 2 December 1992).

⁴⁸⁷ See Anne Daniel, "Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort" in *Reconciling Law, Justice, and Politics in International Law* (Toronto: Canadian Council on International Law, 2003) 132 at 134-140 [Anne Daniel].

⁴⁸⁸ See e.g. the *Paris Convention*, *supra* note 486 at 266; and the *Vienna Convention on Civil Liability for Nuclear Damage*, 21 May 1963, 1063 U.N.T.S. 265 at 266 (entered into force 12 November 1977) (WL).

⁴⁸⁹ See e.g., *International Convention for Civil Liability for Oil Pollution Damage*, *supra* note 486 at 5; and *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material*, 17 December 1971, 974 U.N.T.S. 255 at 256 (entered into force 15 July 1975) (WL).

⁴⁹⁰ *International Convention on Civil Liability for Bunker Oil Pollution Damage*, 27 March 2001, IMO Doc. No. LEG/CONF 12/19 (convention not in force), online: IMO <<http://www.imo.org/>>.

⁴⁹¹ *Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal*, 10 December 1999, online: Secretariat of the Basel Convention <<http://www.basel.int/>>; and *Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, 3 May 1996, 35 I.L.M. 1415 at 1417-1418 (convention not in force) (Hein). See also the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 39 I.L.M. 1027 at 1039 (entered into force 11 September 2003) (Hein) (within four years, the parties will "adopt a process with respect to liability and redress resulting from transboundary movements").

⁴⁹² Betsey Baker Røben, "Civil Liability as a Control Mechanism for Environmental Protection at the International Level" in Fred L. Morrison & Rüdiger Wolfrum, eds., *International, Regional and National Environmental Law* (The Hague: Kluwer Law International, 2000) 821 at 821-827.

encouraging the adoption of preventive practices that diminish the likelihood of untoward events occurring.⁴⁹³

While existing treaties with civil liability provisions show potential avenues to address safety and health concerns, they also possess imbedded limitations. The development of international treaties is a slow process.⁴⁹⁴ Many years and even decades may pass from a treaty's conception to the time an instrument is drafted, ratified, and finally enters into force.⁴⁹⁵ Incorporation of civil liability provisions confronts the power of influential commercial sectors, thereby creating negotiation dynamics that may further slow the process of adoption and ratification. In the field of safety and health, the undue passage of time quite literally translates into needless injuries, illnesses, and deaths.

Characteristics of the treaty development process may hinder the negotiation of treaties for the regulation of dynamic and disparate hazards arising from transnational business activity. Treaties concerning cross border harms are focused on specific highly hazardous agents and are often limited to a narrow set of applications under which those agents are used.⁴⁹⁶ The impetus for treaties is often a tragic event, and resulting instruments are narrowly tailored towards preventing similar events in the future.⁴⁹⁷ The difficulty of obtaining assent from a plurality of independent nations favors negotiating and drafting an instrument that addresses narrowly defined agents and specific uses upon which parties share a common concern. While effective for addressing narrow classes of highly hazardous agents used in limited applications, the process is less suited to the development of treaties addressing general and evolving hazards used in many different settings. As a result, "direct

⁴⁹³ *Ibid.* See generally Michael R. Mason, *The New Accountability: Environmental Responsibility Across Borders* (London: Earthscan, 2005) 133-134.

⁴⁹⁴ See Anne Daniel, *supra* note 487 at 158.

⁴⁹⁵ The passage of four years from adoption of the *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material* to its coming to be enforced is relatively fast for such treaties. Over a decade elapsed before the *Vienna Convention on Civil Liability for Nuclear Damage* came into force. Instruments such as the *Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal* and the *Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea* were drafted six or more years ago and have yet to come into force.

⁴⁹⁶ See generally Jutta Brunée, "Of Sense and Sensibility: International Liability Regimes as a Tool for Environmental Protection" (2004) 53 I.C.L.Q. 351 at 365 (WL).

⁴⁹⁷ The maritime oil pollution conventions and corresponding civil liability provisions are widely seen as having arisen in response to the Torrey Canyon disaster in 1967 when an oil tanker off the coast of England struck a reef and spill 31,000 tons of oil into the ocean causing significant environmental damage along the coasts of England and Normandy. Following the Chernobyl nuclear disaster, the international community developed the *Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention*, 21 September 1988, 42 Nuc. L. Bull. 56 (entered into force 27 April 1992), online: Nuclear Energy Agency <<http://www.nea.fr/>>, in response to perceived shortcomings of the existing conventions.

responsibility, including the obligation to enforce” people’s safety and health rights and corporate duties principally reside with the individual states.⁴⁹⁸

C. Regulation By National Authorities.

As a consequence of limited international frameworks, regulation of potentially harmful activity of TNCs is largely entrusted to national governments.⁴⁹⁹ The effectiveness of regulation by national regulatory agencies or national courts is dependent on the strength of those institutions. While potentially effective within a community of nations possessing equally strong domestic institutions, comprehensive regulation can be illusory when nations exist in significantly divergent stages of institutional development. Little protection will be afforded to people located in nations whose institutions lack the technical capacity, economic resources, or will to establish and meet elevated norms. Since much of international trade is occurring between countries in unequal stages of institutional development, delegating regulatory enforcement to national levels leaves significant gaps in the protection of people’s safety and health rights.

1. *Barriers to Command and Control Regulation in Host and Home States.*

Public law regulation for occupational safety and health is widely recognized as underdeveloped in the host states where TNCs operate.⁵⁰⁰ Efforts to improve national command and control regulatory frameworks for occupational safety and health are ongoing in some regions, but face obstacles that may take decades to overcome. Occupational safety and health regulatory models imported to developing nations have been beset by problems including poor adaptation to local conditions, poor development of legislation and standards, lack of technical capacity, lack of funds and resources, and inadequate levels of enforcement.⁵⁰¹ Workplace safety and health laws are estimated to cover only ten percent of

⁴⁹⁸ Sarah Joseph, Corporations and Transnational Human Rights, *supra* note 219 at 8-9.

⁴⁹⁹ In addition to autonomous national regulatory schemes, a number of international agreements establish regulatory frameworks, which delegate enforcement to national institutions. See e.g. the *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1541 (entered into force 1 January 1989) (WL) and the *Rotterdam Convention on the Prior Informed Consent Procedure for Hazardous Chemicals and Pesticides*, 11 September 1998, 38 I.L.M. 1 (entered into force 24 February 2004) (WL).

⁵⁰⁰ See G. Goldstein, R. Helmer & M. Fingerhut, *supra* note 11 at 54-56.

⁵⁰¹ See generally Michael Findley & June Gorski, “OSH Disparities in Developing Countries: The SH & E Professional as an Agent of Change” (2005) 50:4 Professional Safety 24 at 25 (Proquest); Joseph LaDou, “International Occupational Health” (2003) 206 Int. J. Hyg. Environ. Health 1 at 4-5, (Ingenta) [Joseph LaDou]; and Roberto Fontes Iunes, *Occupational Safety and Health in Latin America and the Caribbean: Overview, Issues and Policy Recommendations* (Washington D.C.: IADB 2001), online: Inter-American Development Bank <<http://www.iadb.org>>.

the workforce in developing nations.⁵⁰² The limited coverage of safety and health laws is exacerbated by the application of law in national export processing zones. In export processing zones, companies have been exempted from safety and health regulations and local officials have been discouraged from enforcement.⁵⁰³ Institutional quality indicators further illustrate barriers to effective regulation of safety and health risks.

Without fair and effective administration of justice and rule of law, regulatory frameworks for the protection of people's safety and health rights cannot be established.⁵⁰⁴ Though often containing embedded political value judgments and varying meanings, regulatory quality,⁵⁰⁵ control of corruption,⁵⁰⁶ and rule of law⁵⁰⁷ measurements remain the best available indications of the regulatory capacity of individual nations. Existing indicators

⁵⁰² Joseph LaDou, *ibid.* at 3.

⁵⁰³ See Timo J Partanen, *et al.*, "Perspectives for Workplace Health Promotion in Latin America and the Caribbean" (2005) 11 *Int. J. Occup. & Environ. Health* 313 at 316 (Proquest); and David Kinley & Junko Tadaki, *supra* note 223 at 938, fn 12.

⁵⁰⁴ See generally, World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Geneva: International Labor Organization, 2004) at 55-56, online: ILO <<http://www.ilo.org>>; World Bank, *The World Bank Legal Review: Law and Justice for Development Volume 1* (The Hague: Kluwer Law International 2003) at xiii [World Bank, *The World Bank Legal Review*]; International Conference on Financing for Development, *Monterrey Consensus A/Conf.198/11* (Monterrey: 18-22 March 2002), online: United Nations <<http://www.un.org/esa/ffd/>>.

⁵⁰⁵ Of all indicators, regulatory quality may be the most problematic. Existing indicators often use the term 'quality' interchangeably with 'burden' and frequently measure regulatory frameworks in relation to the ease of doing business. While this context may distort regulatory quality measures against national safety and health regulation in some ways, it should not be wholly discounted. Indicators capturing regulatory status in relation to business activity, while different in kind, may also capture the qualitative status of the general regulatory environment, including that of safety and health. A nation without a developed culture of regulation and without the institutional framework for regulating in one area is unlikely to have developed regulatory cultural and institutional framework in other areas. Regulatory quality indicators also include measurements of the availability of regulatory information and consistency in the application and interpretation of regulatory standards, which is equally applicable to safety and health regulation.

⁵⁰⁶ Control of corruption indicators are measured through data indicating the susceptibility of government officials to undue influence in decision making through bribes, nepotism, patronage, and through measures assessing the national perception of corruption in particular states. Where control of corruption is weak, the risk increases for potential undue influence by disproportionately wealthy corporations operating in economically poor nations. Corruption compromises regulatory control frameworks further when regulatory officials may be unduly influenced by class and ethnographic commonalities with employers that are not shared with workers.

⁵⁰⁷ Rule of law measures can be as problematic as those for regulatory quality. Rule of law indicators include data concerning the independence of the judiciary, the fairness of court proceedings, the speediness of proceedings, the enforceability of civil law in courts and the enforceability of judicial decisions, and public trust in judicial proceedings. Although some measures are taken in the context of property rights most valued by corporations, landowners, and wealthy citizens, many factors considered and the results obtained may equally apply in the context of safety and health. The enforcement of regulatory law protecting safety and health is often dependent upon the functioning of judicial institutions and administrative law tribunals. If courts and tribunals are poorly developed for enforcing property rights, they are likely in similar stages of development with respect to the enforcement of regulations protecting safety and health rights.

suggest that the developing countries receiving the most FDI lack the capacity to control potentially hazardous operations of TNCs.⁵⁰⁸

In examining the five leading recipients of FDI in Latin America and the Caribbean,⁵⁰⁹ Asia and the Pacific,⁵¹⁰ and Africa,⁵¹¹ existing indicators show that over two-thirds rank significantly below world averages in measures of regulatory quality,⁵¹² control of corruption,⁵¹³ and rule of law.⁵¹⁴ When compared with the leading regions serving as home bases for TNCs, the gaps widen markedly.⁵¹⁵ While significant incremental improvements continue to be made in some countries, the available data also suggests that, in the aggregate, scores for these governance indicators have not improved significantly in recent decades.⁵¹⁶

Within home states, few public law measures extend corporate duties extraterritorially to protect economic, social, and cultural rights. In the area of safety and health rights and duties, domestic public law measures in common law countries generally do not reach beyond the territorial limits of individual nations. Of all common law home states, the United States is the most liberal in extending extraterritorial application of regulatory statutes. Robert Wai observes that “there seems to be a bias in the extraterritorial application of U.S. laws by U.S. courts towards application of commercial laws but against an application of social laws.”⁵¹⁷

⁵⁰⁸ World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Geneva: International Labor Organization, 2004), online: ILO <<http://www.ilo.org>>.

⁵⁰⁹ UNCTAD, World Investment Report 2004, *supra* note 113 at 60, indicates that Mexico, Brazil, Chile, Venezuela, and Colombia were the top five developing country recipients of FDI in the region. Bermuda and the Cayman Islands are excluded as the two remain territories of the United Kingdom, and FDI flows to those territories are dominated by specialized services related to offshore financial investments and banking services.

⁵¹⁰ *Ibid.* at 51, indicates that China, India, Azerbaijan, Malaysia, and Kazakhstan were the top five developing country recipients of FDI in the region. Hong Kong (China), Singapore, and the Republic of Korea are excluded as the three are within the top thirty nations on the United Nation’s Development Index, UNDP, *Human Development Report 2004: Cultural Liberty in Today’s Diverse World* (New York: UNDP 2004) at 139-142, online: UNDP <<http://hdr.undp.org/>>.

⁵¹¹ UNCTAD, *ibid.* at 41, indicates that Morocco, Equatorial Guinea, Angola, Sudan, and Nigeria were the top five developing country recipients of FDI in the region.

⁵¹² See Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004* (Washington, D.C.: The World Bank 2004) at 57 & 112-129, online: The World Bank <<http://www.worldbank.org>> [Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi].

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ UNCTAD, World Investment Report 2004, *supra* note 113 at 276-278, identifies Australia, Canada, European Union, Japan, Switzerland, and United States as the location of the headquarters of over ninety-five percent of the 100 largest non-financial TNCs. The EU based TNCs are located in Belgium, Finland, France, Germany, Ireland, Italy, the Netherlands, Spain, Sweden, and the United Kingdom.

⁵¹⁶ See Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, *supra* note 512 at 10-11.

⁵¹⁷ Robert Wai, Transnational Liftoff, *supra* note 221 at 254.

Domestic legislators have few incentives to enact new legislation extending the reach of domestic safety and health laws. The parliaments and legislatures of individual nations lack political incentives to regulate international business activity that principally harms people overseas.⁵¹⁸ These bodies are often focused on protecting people in their own jurisdiction to whom they are accountable politically.⁵¹⁹ As a result, domestic legislation is drafted without consideration of the social costs to overseas citizens.⁵²⁰

2. Barriers to Private Law Regulation in Host State Judicial Systems.

Persons living in many developing nations often do not have meaningful avenues of legal redress. Legal empowerment and access to justice initiatives seek to allow persons to take control of their lives and to participate fully in public decision-making processes through the use of law.⁵²¹ Deficiencies in global citizen's legal empowerment and access to justice are pervasive.⁵²²

Court performance and rule of law research suggest a widespread incapacity to create meaningful regulatory frameworks through private law in many host states. The effectiveness of private law as a regulatory tool is dependent upon fair and effective administration of justice. Deficiencies in court performance caused by high volumes of cases, too few judges, lack of judicial independence, inadequate administrative support, high transaction costs for filing and processing suits, corruption, and other inefficiencies are noted in many nations.⁵²³ Improvements in court performance and rule of law areas alone, however, do not resolve the myriad problems related to the effective functioning of private law.⁵²⁴ National legal structures are also compromised in more subtle ways.

Long delays, understaffed and poorly funded court systems, and accordingly high transaction costs in filing and processing claims are common conditions in countries with

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.* at 252.

⁵²⁰ *Ibid.*

⁵²¹ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank 2001* (Asian Development Bank 2001) at 26-28, online: Asian Development Bank <<http://www.adb.org>> [Asian Development Bank].

⁵²² See Asian Development Bank, *ibid.* at 25-41; Roberto Gargarella, *Too far removed from the people: Access to Justice for the Poor: The Case of Latin America*, Working Paper Series (Bergen, Norway: Chr. Michelsen Institute, 2004), online: UNDP <<http://www.undp.org>>; and Rudolf V. Van Puymbroeck, ed., *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (Washington, D.C.: The World Bank, 2001) at 53-110.

⁵²³ See Christina Biebesheimer & J. Mark Payne, "IDB Experience in Justice Reform" Sustainable Development Department Technical Paper Series SGC-101 (Washington, D.C.: Inter-American Development Bank 2001) at 9, online: Inter-American Development Bank <<http://www.iadb.org>>; and Maria Dakolias, *ibid.* at 6-7.

⁵²⁴ Asian Development Bank, *supra* note 521.

developing economies.⁵²⁵ Marc Galanter argues that the existence of these and other factors produces legal systems and courts that are able to deliver “little in the way of remedy, protection and vindication.”⁵²⁶ This type of legal system “serve[s] those who benefit from delay and nonimplementation of legal norms, that is, parties who are already in possession or [are] satisfied with the status quo.”⁵²⁷ For others who require vindication and the implementation of remedies changing the status quo, the system works “only haltingly, partially and occasionally.”⁵²⁸ Lengthy delays, coupled with the prevalence of low compensatory damages awards in injury cases, leaves the present value of awards for money damages “close to zero.”⁵²⁹

In countries with “sharp social stratifications” and wide gaps between income classes, the judiciary is often subsumed by the interests of financially and politically powerful groups.⁵³⁰ The ability of wealthy corporations to unduly influence government officials and court personnel in poor nations is real, if more nuanced than sometimes characterized.⁵³¹ The process does not necessarily occur through overt corruption.⁵³² Subtle influences also act to shape the administration of justice.⁵³³ In socially and economically stratified societies, persons employed in the judiciary, working as lawyers, and utilizing legal systems may

⁵²⁵ See Michael Anderson, “Transnational Corporations and Environmental Damage: Is Tort Law the Answer?” (2002) 41 Washburn L.J. 399 at 409 (WL) [Michael Anderson]; Halina Ward, “Securing Transnational Corporate Accountability Through National Courts,” (2001) 24 Hastings Int'l & Comp. L. Rev. 451 at 463-464 (WL) [Halina Ward, Securing Transnational Corporate Accountability]; and Sarah Joseph, “An Overview of the Human Rights Accountability of Multinational Enterprises” in Menno T. Kamminga & Saman Zia-Zarifi, eds., *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 75 at 78-79 [Sarah Joseph, An Overview of the Human Rights Accountability]. See also Marc Galanter, “Law’s Elusive Promise: Learning from Bhopal,” in Michael Likosky, ed., *Transnational Legal Processes* (London: Butterworths: 2002) 172 at 174-179 [Marc Galanter, Law’s Elusive Promise] (discussing factors existing in India’s legal system and its impact on the feasibility of private litigation following the explosion of Union Carbide’s chemical plant in Bhopal).

⁵²⁶ Marc Galanter, *Law’s Elusive Promise*, *ibid.* at 180.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ Iain Ramsay, ed., *Consumer Law in the Global Economy: National and International Dimensions* (Aldershot: Ashgate Dartmouth 1997) at 71 [Iain Ramsay].

⁵³¹ See Robert McCorquodale, “Human Rights and Global Business” in Stephen Bottomley & David Kinley, eds., *Commercial Law and Human Rights* (Aldershot: Ashgate, 2002) 89 at 97 [Robert McCorquodale]; Errol Mendes and Ozay Mehmet, *supra* note 341 at 174-175; and Sarah Joseph, An Overview of the Human Rights Accountability, *supra* note 525 at 78. See generally, Nikolay A. Ouzounov, “Facing the Challenge: Corruption, State Capture and the Role of Multinational Business” (2004) 37 J. Marshall L. Rev. 1181 (WL); and Jose Bengoa, Poverty, Income Distribution and Globalization: A Challenge for Human Rights, Addendum to the Final Report, at ¶ 28, U.N. ESCOR, 50th Sess., U.N. Doc. E/CN.4/Sub.2/1998/8 (1998) at ¶ 30, online: United Nations High Commissioner for Human Rights <<http://www.unhchr.ch>>.

⁵³² Iain Ramsay, *supra* note 530.

⁵³³ *Ibid.*

represent a single social class or group. Court systems and interpretations of law can develop in ways that reflect the interests of those who work within and come before legal institutions, to the exclusion of others in society.⁵³⁴ When the economic interests of powerful societal groups align with those of TNCs, court systems hold limited promise for the administration of justice to workers often drawn from more marginalized segments of society.

Institutional factors discouraging the use of the legal system for the resolution of private disputes contribute to further difficulties for the effective regulation of harms through private law in host states. In the courts of developing economies, legal systems often exist in “low accountability-low remedy” stages, where liability law has yet to develop to control and redress the harms of an industrialized society and to comport with people’s expectations.⁵³⁵ Few host states possess legal rules for class actions, intensive pretrial discovery, contingency fees, legal aid, and other devices that evolved in response to people’s demands for access to courts and meaningful accountability from industry.⁵³⁶ Few tort claims are brought in response to industry action, few products liability suits or class actions are filed, and other private law liability claims with the potential to deter corporate harms rarely appear in host state courts.⁵³⁷

As a result, there is no institutional support for specialization within the legal community to develop a bar of advocates with the training or resources for holding the world’s largest corporations accountable for harmful conduct.⁵³⁸ For example, Galanter finds “there is a constant stream of [these] mini-Bhopals in India – and the law, courts and lawyers are not involved in establishing accountability or securing compensation.”⁵³⁹ In the absence of reliable statistics, evidence suggests that India’s legal system is rather typical of many developing economies. Beyond institutional deficiencies, the nature of TNCs’ management structures further compromise the ability of host state courts to regulate harmful activity through private law.

⁵³⁴ *Ibid.*

⁵³⁵ See generally Marc Galanter, *Law’s Elusive Promise*, *supra* note 525 at 174-177.

⁵³⁶ See *ibid.*; Sarah Joseph, *An Overview of the Human Rights Accountability*, *supra* note 525 at 78-79; and Jamie Cassels, “The Uncertain Promise of Law: Lessons from Bhopal” (1991) 29 *Osgoode Hall L.J.* 1 at 5-6 & 20-23 (Hein) [Jamie Cassels, *The Uncertain Promise of Law*].

⁵³⁷ Marc Galanter, *Law’s Elusive Promise*, *ibid.* Regarding India’s legal system, see generally Marc Galanter, *Law and Society in Modern India* (Oxford: Oxford University Press, 1989) at 183-207 & 296-304.

⁵³⁸ Marc Galanter, *Law’s Elusive Promise*, *ibid.*

⁵³⁹ *Ibid.* 174.

A host state whose judicial institutions are willing and able to litigate private law actions against a transnational corporation may find its power to do so constrained by an inability to obtain jurisdiction over the overseas parent corporation that owns and effectively controls host state operations but maintains no physical presence in that country.⁵⁴⁰ As a result, litigation in the host state may create a mismatch between the jurisdictional and regulatory reach of host state courts and “the managerial reach of [the] firm.”⁵⁴¹ In other instances, the offending TNC may remove itself from the host state prior to the manifestation of injuries.⁵⁴² Illnesses resulting from exposure to environmental toxins such as asbestos often take years to manifest symptoms. During the intervening years between exposure and illness, TNCs may close operations in the host state.

Furthermore, host country judgments against overseas subsidiaries are often illusory. Parent companies can use transfer pricing techniques whereby “high-risk subsidiaries [are] maintained on the borderline of solvency.”⁵⁴³ When catastrophic injuries arise, the subsidiaries’ assets and insurance are unable to cover the company’s liabilities to injured victims, “while the assets of the parent are shielded from any claim.”⁵⁴⁴ Again, the parent company is shielded from private law’s efforts to internalize costs of injury to the marketplace actor whose conduct caused harm. As a result, reliance upon host state courts for private law regulation may be “tantamount to turning a blind eye” to the abuses of TNCs.⁵⁴⁵ In the absence of effective accountability and remedies in the courts of host states, the courts of the home states of TNCs may provide a forum for the goals of private law regulation.

Private law regulation in the home state may also aid the protection of basic safety and health rights for persons from traditionally disadvantaged groups. In the transnational context, persons most affected by transnational business activity often come from groups otherwise disadvantaged and disenfranchised within their host state societies.⁵⁴⁶ These groups have few avenues of redress and opportunities to be heard in the host state.⁵⁴⁷ Chances for a fair hearing of claims and the vindication of rights may be more realistic in

⁵⁴⁰ See *ibid.* See also Robert McCorquodale, *supra* note 531 at 98.

⁵⁴¹ Peter Muchlinski, *supra* note 469 at 108.

⁵⁴² Halina Ward, Securing Transnational Corporate Accountability, *supra* note 525 at 463.

⁵⁴³ Jamie Cassels, Outlaws, *supra* note 474 at 323.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ David Kinley & Junko Tadaki, *supra* note 223 at 1021 (WL).

⁵⁴⁶ Robert Wai, Transnational Private Law, *supra* note 451 at 474-476.

home state institutions, removed from host state political conditions. The 'distance' of the judicial system from host and home state political administrations in common law countries further aides these objectives.⁵⁴⁸

A survey of 60,000 poor people in 60 developing nations found:

that people in poverty do not start immediately talking about money or even baskets of goods. What they start talking about is voice, access, integrity ... What does a country's legal and justice system have to do with this? Everything. It has to do with the protection of rights. It has to do with equity. It has to do with access. It has to do with voice.⁵⁴⁹

This voice might be found in some small but potentially meaningful measure through private law actions in the national courts of countries where TNCs are based.

3. Opportunities for Private Law Regulation in Home State Judicial Systems.

When catastrophic injury results from the operations of TNCs, an immediate question arises as to where private law actions might be brought to best achieve the regulatory goals of private law liability. The question, however, is often less of one as to which nation's law is more effective than one of determining where existing laws might be enforced.

Ethical notions support home state liability for the harmful conduct of TNCs. The home state is under an obligation to prevent its nationals from inflicting harms that violate the rights of others.⁵⁵⁰ It is debatable under international law whether a state has obligations to control the conduct of its nationals in overseas jurisdictions.⁵⁵¹ It is less debatable that it is unethical for a state to permit its nationals to violate human rights overseas,⁵⁵² to conduct harmful activity overseas that it would not permit at home,⁵⁵³ and to permit its nationals to use the home state as a base to cause harms in other jurisdictions.⁵⁵⁴ Furthermore, there is

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ World Bank, *The World Bank Legal Review*, *supra* note 504.

⁵⁵⁰ See Sarah Joseph, *An Overview of the Human Rights Accountability*, *supra* note 525 at 77.

⁵⁵¹ See generally, Nicola M.C.P. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, School of Human Rights Research Series, Vol. 17 (Antwerp: Intersentia, 2002) at 138-149 and 216 [Nicola M.C.P. Jägers].

⁵⁵² See generally, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, 22-26 January 1997, at paras. 6 & 18, reprinted in 20 Hum. Rts. Q. 691 (1998).

⁵⁵³ See generally, Tina Winqvist, *Trade in Domestically Prohibited Goods* (Winnipeg: International Institute for Sustainable Development, 1999); online: Trade Knowledge Network <<http://www.tradeknowledgenetwork.net>>.

⁵⁵⁴ See generally, Mark Gibney, Katarina Tomaševski & Jens-Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights" (1999) 12 Harv. Hum. Rts. J. 267 at 273-275 (WL).

something unsettling in the notion that the mobility brought about by liberalized trade regimes allows less responsible corporations to choose the location of harm and then to effectively choose the venue for hearing disputes when those venues present a practical impossibility for meaningful accountability and the vindication of rights.

While TNCs have, in many ways, achieved “liftoff” from the regulatory apparatus of national legal systems, firms “must still, to some degree, ‘put down roots.’”⁵⁵⁵ Transnational corporations maintain their roots in their home states because of the benefits derived from doing so. One of the benefits derived by TNCs in their home states, are the national courts. National courts are vitally important for transnational actors to have contracts enforced, property rights protected, and other matters litigated.⁵⁵⁶ To maintain credibility and legitimacy over these and other matters, a nation’s courts, used so vigorously to protect the interests of TNCs, are appropriate venues to control and redress the harmful impact of international business activity.⁵⁵⁷

Home state courts have evolved to respond to harmful conduct generated in the course of economic development and to respond to changing social values. In the developed economies of Western Europe and North America, the common law liability system developed and evolved in response to rapid industrialization, improvements in technology, and people’s expectations from their legal system.⁵⁵⁸ From a liability system that rarely and poorly compensated injured persons in the early years of industrialization, legal systems in developed economies evolved into ones characterized as “high accountability—high remedy.”⁵⁵⁹

In the common law systems of many home states, which are the focus of this thesis, civil liability legal principles are well-suited to regulate the overseas conduct of TNCs.⁵⁶⁰ The adaptability and flexibility of private law in common law systems aides its ability to respond

⁵⁵⁵ Robert Wai, *Transnational Liftoff*, *supra* note 221 at 265.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ Malcolm J. Rogge, “Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in *In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*” (2001) 36 *Tex. Int’l L. J.* 299 at 317 (WL). See generally, Dinah Shelton, “Protecting Human Rights in a Globalized World” (2002) 25 *B.C. Int’l & Comp. L. Rev.* 273 at 307 (WL).

⁵⁵⁸ See Marc Galanter, “The Transnational Traffic in Legal Remedies” in Sheila Jasanoff, ed. *Learning from disaster: risk management after Bhopal*, (Philadelphia : University of Pennsylvania Press, 1994) 133 at 139-144 [Marc Galanter, *The Transnational Traffic in Legal Remedies*]. See also, John C. P. Goldberg, “Twentieth Century Tort Theory” (2003) 91 *Geo. L.J.* 513 at 519-521 (WL).

⁵⁵⁹ Marc Galanter, *ibid.* at 141-142.

⁵⁶⁰ This statement is not to suggest that other systems are less well-suited to regulate overseas activity through private law but rather, analysis of those systems are beyond the scope of this thesis.

to diverse harms occurring in developing and evolving factual contexts.⁵⁶¹ The adaptability of the common law is explained through the process by which rules of law are developed.⁵⁶² Distinctive features including judicial discretion and independence, the role of jurors, and the standards of proof aid adaptability and flexibility.⁵⁶³

Judicial discretion and independence favors a consideration of the merits of cases with some measure of independence from government's collective goals and may aide in focusing consideration upon the rights of individuals.⁵⁶⁴ The jury's role allows for the influence of community standards in evaluating the defendant's conduct and determining the outcome of cases.⁵⁶⁵ Standards of proof allow for considerations of the reasonableness of conduct on a case by case basis with consideration of factors including foreseeability and cost.⁵⁶⁶ These features and others may aide in the common law's adaptability to deter changing conditions that create a risk of harm.⁵⁶⁷ Through its adaptability, the common law creates "ever-growing incentives against harmful acts" and its flexibility allows it to interpret and apply liability rules to diverse and evolving conditions that create a risk of injury in circumstances "where specific rules and regulations are not present."⁵⁶⁸

Perhaps most importantly, home state courts are an appropriate forum for achieving the regulatory goals of private law. Harmful conduct causing injury to workers implicates the private law regulatory goals of both the home states where TNCs are based and host states where injuries occur. Regulatory enforcement through private law actions in courts where the injury is caused, rather than exclusively in courts where injury occurs, can allow for a fuller development of the enforcement component of unintentional injury prevention. The structure of TNCs is such that parent companies often control and operate overseas facilities through corporate subsidiaries. Through a web of corporate relationships, parent corporations retain control over the operations of subsidiaries yet maintain no physical presence in the host state. The decisions and conduct of the subsidiary often remains under the effective control of directors and managers located outside of the host state. Thus, while

⁵⁶¹ Michael L. Smith, "Deterrence and Origin of Legal System: Evidence from 1950-1999" (2005) 7 *Am. L. & Econ. Rev.* 350 at 360 (WL) [Michael L. Smith].

⁵⁶² *Ibid.* at 356.

⁵⁶³ *Ibid.* at 356-357.

⁵⁶⁴ *Ibid.* at 357.

⁵⁶⁵ *Ibid.* at 359

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Ibid.* at 360.

injury may occur in the host state, it is the parent company's corporate policies, managerial decision making, and conduct in the home state that is sought to be regulated.

The home state maintains a regulatory interest in deterring illegal harmful conduct that occurs within its borders regardless of where victims in a particular instance may be located. Within liability law, deterrence goals are merged with compensation goals. In other words, deterrence is achieved through awards that provide compensation and compensation is achieved through awards that deter harmful conduct. The home state's interest in deterring such activity through compensation to victims does not evaporate because the current victims happen to be located overseas. As stated by one American judge in a private law action arising in the state of Texas:

[I]n a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet ... This perspective ignores the reality that actions of our corporations affecting those abroad will also affect Texans. Although DBCP is banned from use within the United States, it and other similarly banned chemicals have been consumed by Texans eating foods imported from Costa Rica and elsewhere. In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come.⁵⁶⁹

Given existing barriers to liability in host states, home state institutions often present the best available forum for achieving the regulatory goals of liability through private law.

D. The Regulatory Function Of Private Law Liability.

Liability through private law serves a social regulatory function in addition to providing compensation to injured persons.⁵⁷⁰ The social regulatory function arises from liability law's potential to deter socially harmful conduct.⁵⁷¹ In this section, deterrence is examined as a principle function of liability law.⁵⁷²

⁵⁶⁹ *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 at 689 (Tex. 1990) (WL) [*Dow Chemical Co. v. Castro Alfaro*].

⁵⁷⁰ See Robert Wai, *Transnational Private Law*, *supra* note 451 at 474. See generally, Michael L. Smith, *supra* note 561; Alma Cohen, & Rajeev Dehejia, "The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities" (2004) 47 J. L. & Econ. 373 (WL); Thomas Koenig & Michael Rustad, *In Defense of Tort Law* (New York: New York University Press, 2001); and Gary T. Schwartz, "Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice" (1997) 76 Tex. L. R. 1801 (WL).

⁵⁷¹ Robert Wai, *ibid.*

⁵⁷² While deterrence and compensation are seen as the dominant functions of liability law, it should be noted that scholars dispute the role of liability law in achieving deterring harmful activity, seeing it as serving other

Liability through private law most directly deters harmful conduct by providing compensation to injured persons. As noted in the previous chapter, persons and, by extension, corporations are generally assumed to act rationally.⁵⁷³ Rational behavior assumes that persons seek to maximize their well-being.⁵⁷⁴ In commercial contexts, well-being is improved through the course of market activity, the benefits of which exceed costs.⁵⁷⁵ In the absence of liability law, the costs of potentially harmful activity are artificially low to the persons and corporations undertaking and profiting from harmful activity.⁵⁷⁶ When harm results, medical costs, rehabilitation costs, lost wages, lost services to households and communities, and other related social costs are borne by the injured person and the community in which they live. These costs are externalized from those deriving profits from and in control of harmful activity to employees, consumers, and communities.⁵⁷⁷ The financial incentive to prevent harm is thereby also transferred to those upon whom injury alights.⁵⁷⁸ Liability law seeks to reorient this paradigm.

Under the classic law and economics model, liability law attempts to transfer externalized social costs back to persons in control of and profiting from potentially harmful activity. In general, it does so by requiring wrongdoers to pay compensation to injured parties in the amount of harm caused.⁵⁷⁹ By requiring payment in the amount of harm caused, liability law requires those undertaking potentially harmful activity to more fully internalize all the costs of that activity.⁵⁸⁰ Through the internalization of costs, liability law creates financial incentives for the rational actor to invest in safety so as to reduce the likelihood of harmful outcomes.⁵⁸¹

important functions related more intimately to compensation and notions of corrective and distributive justice. An examination of each school of thought is beyond the scope of this article however, in an interconnected world it is believed that home state private law liability may also be supported by schools of thought less grounded in the role of deterrence.

⁵⁷³ See Keith N. Hylton, Calabresi and the Intellectual History of Law and Economics, *supra* note 17 at 97.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ See generally, Thomas C. Galligan, Jr., "The Risks and Reactions to Underdeterrence in Torts" (2005) 70 Mo. L. Rev. 691 at 695 (WL) [Thomas C. Galligan, Jr., The Risks and Reactions to Underdeterrence].

⁵⁷⁷ See Thomas C. Galligan Jr., "Deterrence: The legitimate function of the public tort" (2001) 53 Wash. & Lee L. Rev. 1019 at 1032 (WL).

⁵⁷⁸ See generally, *ibid.* at 1021.

⁵⁷⁹ See generally, A. Mitchell Polinsky & Steven Shavell, "Punitive Damages: An Economic Analysis" (1998) 111 Harv. L. Rev. 869 at 873 (WL).

⁵⁸⁰ *Ibid.*

⁵⁸¹ See Keith N. Hylton, "The Theory of Tort Doctrine and the Restatement (Third) of Torts" (2001) 54 Vand. L. Rev. 1413 at 1417 (WL) [Keith N. Hylton, The Theory of Tort Doctrine].

In the presence of market failure, law intervenes to create outcomes similar to those that would occur if the market were operating efficiently.⁵⁸² Since transaction costs obscure risks, law ameliorates the effects of these costs. Insurmountable transaction costs result in incomplete bargaining and exchange regarding the risks and benefits of a market transaction.⁵⁸³ Persons thereby become exposed to risks of which they were unaware and over which they have not bargained. Employers gain the benefit of not having to bargain over and pay compensating differentials for workers being exposed to the risk of harm.

When harm results from non-negotiated risks, private law often intervenes as a compensation regime.⁵⁸⁴ The law does so by assignment of property-type rights.⁵⁸⁵ Persons possess a property right to their own bodily integrity and to their health.⁵⁸⁶ When that right is infringed upon in the context of a suboptimal exchange, private law actions create an ex post exchange through liability and a transfer of compensation to the injured person.⁵⁸⁷

By assigning liability rules, law forces costs to be internalized for non-negotiated safety and health risks in marketplace transactions.⁵⁸⁸ Liability rules create incentives for potentially liable actors to take precautions against the risk of injury to others.⁵⁸⁹ Private law liability rules thereby deter potentially harmful activity.⁵⁹⁰ In this way, regulation through liability rules seeks to redirect activity back to efficient levels that would be otherwise created by the market in the absence of transaction costs.⁵⁹¹

⁵⁸² Donald Wittman "General Structure of the Law" in Boudewijn Bouckaert and Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (Cheltenham, UK: Edward Elgar, 2000) 1072, online: [Encyclopedia of Law & Economics <http://encyclo.findlaw.com>](http://encyclo.findlaw.com).

⁵⁸³ See Saul Levmore, "Explaining Restitution" (1985) 71 Va. L. Rev. 65 at 67 (WL) [Saul Levmore].

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Denis J. Brion "Norms and Values in Law and Economics" in Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (Cheltenham, UK: Edward Elgar, 2000) 1041 at 1045. Brion describes the philosophical underpinnings as this general view as follows:

The philosophical underpinnings of this approach are captured by Robert Nozick's concept of the 'night watchman' state. This approach is based on the values of Individualism. The autonomy of the individual is the highest political and social value. By nature, humans seek to maximize their individual welfare ... Economic resources are a source of plenty, to be developed through the trial and error process of individual action. The optimal social arrangement establishes the maximal freedom of individual action; and public institutions are properly confined to the function of protection of individual autonomy. *Ibid.* (citations omitted).

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Saul Levmore, *supra* note 583.

⁵⁸⁸ See generally Richard J. Pierce, Jr., "Encouraging Safety: The Limits of Tort Law and Government Regulation" (1980) 33 Vand. L. Rev. 1281 at 1289-90 (WL).

⁵⁸⁹ See Guido Calabresi, *The Costs of Accidents*, *supra* note 328 at 26-31.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

Although liability is enforced retrospectively, its deterrent function operates prospectively. According to Galanter, “preventive effects depend on potential injurers extracting appropriate signals from what the courts do and modifying their behavior.”⁵⁹² In common law systems, liability attaches when conduct falls below accepted legal norms and causes injury to others.⁵⁹³ The standards of conduct are published through legal rules in general statutes and specific case decisions. The outcomes of cases are published through reports of the judgments, verdicts and awards of individual lawsuits.

Publication of statutes and court decisions signals to market actors the nature and scope of conduct found socially unacceptable, and publication of verdicts and awards send price signals to market actors regarding the cost of engaging in that conduct.⁵⁹⁴ Through signaling, market actors undertake sophisticated risk assessments, which evaluate the benefits of potentially harmful activity against its costs.⁵⁹⁵ Market actors will increase safety investments until the point costs exceed benefits.⁵⁹⁶ By making these investments, the occurrence of injuries is reduced to socially optimal levels.⁵⁹⁷ Through its financial incentives to invest in safety, liability law prospectively deters potentially harmful conduct and promotes efficient investments in safety.

Liability law also achieves deterrent effects beyond those created through the compensation of injured persons. Liability law possesses a “communication or ideational function ... in a fragmented transnational order.”⁵⁹⁸ Liability law assists in the circulation of standards through political, social and economic systems.⁵⁹⁹ Through individual cases, norms are contested, debated, established, and acted upon. Through this discourse further debate and evolution occurs within governments, boardrooms, and elsewhere leading to the establishment of normative behavior well beyond the community of actors subject to potential liability.⁶⁰⁰

⁵⁹² Marc Galanter, *The Transnational Traffic in Legal Remedies*, *supra* note 558 at 135.

⁵⁹³ The tort doctrine of negligence assesses liability based on one’s conduct while strict liability focuses upon the nature or quality of products and services.

⁵⁹⁴ See Catherine Paskoff Chang, “Two Wrongs Can Make Two Rights: Why courts should allow recovery for intentional concealment of contract breach” (2005) 39 *Colum. J. L. & Soc. Probs.* 47 at 85 (WL).

⁵⁹⁵ See Keith N. Hylton, *The Theory of Tort Doctrine*, *supra* note 581 at 1420.

⁵⁹⁶ See Thomas C. Galligan, Jr., *The Risks and Reactions to Underdeterrence*, *supra* note 576 at 695.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ Robert Wai, *Transnational Private Law*, *supra* note 451 at 481. See generally, Alison Brysk, *supra* note 444 at 119-120.

⁵⁹⁹ Robert Wai, *ibid.*

⁶⁰⁰ *Ibid.* at 482.

The litigation of cases also serves an informational function. The litigation of cases exposes and publicizes harmful practices of TNCs. Trials are public events capable of drawing media attention.⁶⁰¹ Litigation also possesses an element of compulsion that facilitates its informational function. As a government proceeding, litigation can require the discovery and disclosure of information from TNCs regarding internal safety research, policies, practices, and impacts.⁶⁰² Without the state's power of compelled disclosure, information would often remain shielded from public view. As public proceedings, this information becomes known to other groups advocating for improved safety and health conditions.⁶⁰³ Through these avenues, litigation generates and contributes to sunshine effects sought to be created by other regulatory measures.⁶⁰⁴

In addition to the internalization of costs through compensation, and its communicative and informational functions, liability law may deter harmful conduct under a normative model of regulatory compliance. Consistent with other expressions of formal law, liability law may deter harmful conduct through its relationship to social norms. Within compliance theory, scholars note that expressions of formal law can lead to compliance, even in the absence of enforcement.⁶⁰⁵ In some measure, people comply with law out of "a sense of obligation" rather than their fear of being sanctioned.⁶⁰⁶ The sense of obligation arises in response to a shared social norm.⁶⁰⁷

The relevant social norm is a person's general respect for the law and belief in complying with it, even when they may otherwise disagree with the law's contents.⁶⁰⁸ Recalcitrant members are further brought into compliance through informal discipline within peer groups.⁶⁰⁹ Enforcement can then be employed to bring remaining violators into

⁶⁰¹ See Wendy E. Parmet, *supra* note 24 at 1695-1696.

⁶⁰² Robert Wai, *Transnational Private Law*, *supra* note 451 at 482.

⁶⁰³ *Ibid.*

⁶⁰⁴ *Ibid.* See also, Saman Zia-Zarifi, "Suing Multinational Corporations in the U.S. for Violating International Law" (1999) 4 UCLA J. Int'l L. & Foreign Aff. 91 at 146 (WL) [Saman Zia-Zarifi].

⁶⁰⁵ See Timothy F. Malloy, "Regulation, Compliance and the Firm" (2003) 76 Temp. L. Rev. 451 at 464-474 (WL); Robert Cooter, "Expressive Law and Economics" (1998) 27 J. Legal Stud. 585 at 593-96 (WL); Cass R. Sunstein, "On the Expressive Function of Law," (1996) 144 U. Pa. L. Rev. 2021 at 2029-2033 (WL).

⁶⁰⁶ Timothy F. Malloy, *ibid.* 464. See also, Tom R. Tyler & John M. Darley, "Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law" (2000) 28 Hofstra L. Rev. 707 at 714-718 (WL); and Raymond Paternoster & Sally Simpson, "Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime" (1996) 30 Law & Soc'y Rev. 549 at 579-580 (JSTOR).

⁶⁰⁷ Timothy F. Malloy *ibid.* at 464-465.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.* at 465

compliance. As formal law, liability law taps into the social norms of those corporations inclined to obey law, even though they may disagree with the law's contents. In part, these factors underlie one commentator's observation that: "[a] single successful foreign direct liability case would likely trigger a raft of risk management thinking not only among internal company managers, but also within the insurance industry, lenders and investors."⁶¹⁰

While theory and empirical evidence support private law as an important vehicle for deterring socially harmful activity, a number of scholars find shortcomings in private law as a vehicle for deterring harmful conduct. Criticisms generally focus on optimality concerns. Critics ask whether private law as presently conceived optimally achieves the ends it seeks. Critics of private law liability as a regulatory vehicle principally focus on the potential for existing expressions of liability law to produce inefficient outcomes that deter socially desirable but risk intensive activity.⁶¹¹ Inefficient outcomes may arise when corporate obligations are uncertain,⁶¹² when lawsuits are too easily recovered upon, when awards become excessive,⁶¹³ and under a variety of other conditions. Corporations may then rationally respond by ceasing to engage in potentially beneficial activity.

In the context of cross-border harms however, the optimality concerns of private law and the potential for 'overdeterrence' by chilling desirable business activity are likely less real than concerns existing at the other end of the efficiency spectrum. Rather, the present structure of international regulation of safety and health arising from trade related activity suggests that law presently fails to deter cross-border harms at optimal levels.

Regulation fails to deter risk intensive activity when market actors do not internally factor all safety and health costs arising from that activity.⁶¹⁴ These costs are externalized, in whole or in part, to injured persons and other entities.⁶¹⁵ The externalization of costs impacts the behavior of market actors and results in inefficient outcomes.⁶¹⁶ In the face of artificially low costs, market actors overinvest in harmful activities, causing overproduction,

⁶¹⁰ Halina Ward, *Securing Transnational Corporate Accountability*, *supra* note 525 at 466.

⁶¹¹ See e.g. Cass Sunstein, *et al.*, "Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)", (1998) 107 *Yale L.J.* 2071 at 2077 (WL) [Cass Sunstein].

⁶¹² See Dru Stevenson, "Toward a New Theory of Notice and Deterrence" (2005) 26 *Cardozo L. Rev.* 1535 at 1552-1558 (WL) (discussing theories of uncertainty's effect upon deterrence).

⁶¹³ See e.g. Cass R. Sunstein, *supra* note 611.

⁶¹⁴ Thomas C. Galligan, Jr., *The Risks and Reactions to Underdeterrence in Torts*, *supra* note 576 at 694-695.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*

underpricing, and excessive injuries and deaths.⁶¹⁷ These outcomes raise issues relating to the misallocation of resources, the advantaging of unsafe actors in competition with safe actors with wealth distribution consequences, and the “impact [on] injured people’s freedom in a way that is not only inefficient but also morally disturbing.”⁶¹⁸ Under these circumstances inefficiencies result from inadequate levels of regulation to deter harmful activity.

The ‘underdeterrence’ of cross-border harms arises from the underregulation of potentially harmful cross-border activity, as seen through the pervasive gaps in existing regulatory frameworks. Regulatory gaps are created by “the structure of the contemporary international system where there are many transnational problems, but few or inadequate international regulatory” solutions.⁶¹⁹ As a result, the social costs of transnational corporations’ harmful practices are too often externalized to overseas citizens and are not considered in TNCs’ cost-benefit analysis. Intervention through public and private law regulation seeks to remedy the problem of externalized costs.⁶²⁰

In the existing fragmented regulatory framework, private law may be the best available vehicle in the present for regulating TNCs through formal law.⁶²¹ To date, international institutions, domestic regulators and courts “seem likely to have tended to underestimate the role of national courts and national [liability] laws in addressing regulatory concerns for foreign interests.”⁶²²

In private liability law, the state is not absent. Rather the state plays a role in establishing standards of conduct and facilitating the resolution of disputes.⁶²³ States establish norms defining rights and duties, which provide the basis for private actions in domestic forums.⁶²⁴ The state however “forgoes [the] ‘command and control’ regulation” of public law.⁶²⁵ Rather, private individuals are entrusted with monitoring and enforcement of their own rights.⁶²⁶ In so doing, individual cases affirm and further refine the rights of

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.*

⁶¹⁹ Robert Wai, Transnational Liffoff, *supra* note 221 at 251.

⁶²⁰ *Ibid.*

⁶²¹ Robert Wai, Transnational Private Law, *supra* note 451 at 479.

⁶²² Robert Wai, Transnational Liffoff, *supra* note 221 at 274.

⁶²³ Robert Wai, Transnational Private Law, *supra* note 451 at 475.

⁶²⁴ *Ibid.*

⁶²⁵ *Ibid.*

⁶²⁶ See generally, Michael Anderson, *supra* note 525 (noting that private actors may have better information regarding ongoing harms and be better placed to respond).

others. In this way, the lawsuits of private persons “serve larger social purposes” in the regulation of potentially harmful conduct.⁶²⁷ As accountability in private law develops further, the deterrent effects of liability law may begin to be felt in transnational contexts.⁶²⁸

The following section examines the developing responses of common law jurisdictions to achieve the deterrent function private law liability.

E. Foreign Direct Liability In Common Law Jurisdictions.

Liability is provided at the domestic level in common law nations, most notably through tort law, but also through constitutional law and statutory instruments. Through the adjudication of cases, deterrent effects and remedial justice might be achieved for harms caused by globalized business activity.

Over the past two decades, an increasing number of lawsuits have been filed in the courts of TNCs’ home countries seeking to hold corporations accountable for harms caused during the course of overseas operations.⁶²⁹ The suits are often termed ‘foreign direct liability’ claims.⁶³⁰ While no single definition holds, foreign direct liability suits share common characteristics. Most notably, the lawsuits: a) are brought by the injured parties; b) seek to impose standards of conduct directly against parent corporations; c) seek to achieve accountability through compensation for harms caused; and d) are filed in the courts of TNCs’ home states.⁶³¹

Foreign direct liability lawsuits are typically brought by those who have suffered injury. The suits thereby are instituted by those who are closest to the harm alleged and do not rely on potentially reticent government officials for enforcement.⁶³² In the context of safety and health issues, suits are brought by those suffering physical injury from the defendant’s conduct. By providing access to a potentially effective forum, the suits thereby provide access to justice⁶³³ and the potential for victims to obtain a remedy for the violations to their rights.⁶³⁴

⁶²⁷ Robert Wai, *Transnational Private Law*, *supra* note 451 at 474.

⁶²⁸ See generally, Beth Van Schaack, “With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change” (2004) 57 *Vand. L. Rev.* 2305 at 2334 (WL) (discussing effects of private actions in field of human rights).

⁶²⁹ See generally Halina Ward, *Legal Issues in Corporate Citizenship* (Stockholm: Swedish Partnership for Global Responsibility, 2003) at 7-9, online: International Instituted for Environment and Development at <<http://www.iied.org>> [Halina Ward, *Legal Issues in Corporate Citizenship*].

⁶³⁰ See *ibid.* at 7.

⁶³¹ See generally *ibid.*

⁶³² See Sarah Joseph, *Corporations and Transnational Human Rights*, *supra* note 219 at 15.

⁶³³ See generally, Andrew S. Bell, “Human Rights and Transnational Litigation – Interesting Points of

Foreign direct liability lawsuits seek to impose standards of conduct directly upon TNCs rather than indirectly through the obligations of home or host states.⁶³⁵ In seeking to impose liability, lawsuits require evidence that a defendant breached established legal norms. A defendant's breach is shown by evidence that the defendant transgressed rights possessed by the victims or by evidence that the defendant deviated from an obligatory standard of conduct. Often the lines between violation of victim's right and breach of obligatory duties are inter-related, each serving as an implicit affirmation of the other.⁶³⁶

Foreign direct liability lawsuits seek to provide compensation to the victims of cross-border harms. Monetary compensation serves the dual goals of deterrence in a language that profit seeking entities understand and of providing a remedy to victims.⁶³⁷ Through compensation, victims are able to recoup hospital expenses, obtain rehabilitative services, and replace lost income. While sometimes referred to as a 'litigation lottery' by those far removed from these tragedies, compensation serves as one of society's few available tools for the important goals of enforcing the internalization of the costs of harmful conduct to those profiting from harmful activities and of providing victims with resources necessary to recoup some aspects of the lives that have been taken from them.

The majority of foreign direct liability suits are brought under two general theories of liability.⁶³⁸ The first types of claims are those that are brought under legislation that permits private litigation for violations of rights developed within the penumbra of international law.⁶³⁹ The second group of claims asserts liability based on theories of liability sounding in tort. Both types of cases "complement campaigners' calls for minimum standards for

Intersection" in Stephen Bottomley & David Kinley, eds., *Commercial Law and Human Rights* (Aldershot: Ashgate, 2002) 115.

⁶³⁴ *Ibid.*

⁶³⁵ See generally Nicola M.C.P. Jägers, *supra* note 551 at 215-216.

⁶³⁶ See generally International Council on Human Rights Policy, *Duties sans Frontières* (Versoix: ICHRP, 2003) at 14-15, online: ICHRP <<http://www.ichrp.org/>>.

⁶³⁷ *Ibid.* at 15; Robert Wai, Transnational Liffoff, *supra* note 221 at 235-236; and Greg Tzeuschler, "Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad" Note (1999) 30 Colum. Human Rights L. Rev. 359 at 418 (WL).

⁶³⁸ Peter Newell, "Managing Multinationals: the Governance of Investment for the Environment" (2001) 13 J. Int'l Dev. 907 at 914 (Proquest).

⁶³⁹ Halina Ward, Securing Transnational Corporate Accountability, *supra* note 525 at 455. While recognizing that the law of nations is part of domestic law, common law courts have been reticent to find that human rights norms provide a cause of action in the absence of an enabling statute. See generally, Jordan J. Paust, *International Law as Law of the United States* (Durham, N.C.: Carolina Academic Press, 2003) at 224 [Jordan J. Paust].

multinational corporations by testing the boundaries of existing legal principles.”⁶⁴⁰ At present, the United States is the only common law country with a statute that has been tested in court and found to permit noncitizens and nonresidents to seek the direct enforcement of customary international law norms against nonstate actors for injuries occurring overseas.⁶⁴¹ Claims based on common law tort principles have been filed in the United States, the United Kingdom, Canada, and Australia.⁶⁴² These cases may be influenced by values expressed in international law but rely on traditional tort principles of liability.⁶⁴³

1. Criticisms of Foreign Direct Liability Lawsuits.

Foreign direct liability claims have been opposed on a number of grounds. Critics contend that regulatory measures imposed by foreign direct liability lawsuits risk chilling overseas investment and resulting social development⁶⁴⁴ and place local TNCs at a competitive disadvantage to TNCs based where liability is not enforced.

The risk of chilling overseas investment is substantially premised on finding dominant causal links between FDI and economic development and the between economic development and the development of democratic institutions and respect for human rights. The argument contends that expanded liability discourages foreign investment which in turn prevents economic development, thereby hindering “the advancement of human rights in developing countries.”⁶⁴⁵ This criticism however unduly marginalizes law’s role in development, human rights, and democratic outcomes.

While investment may aid economic development and lead to improvements in human rights, there is little evidence to suggest that foreign investment independently leads to improvements in people’s rights. Rather, legal regulation is a necessary component of a market economy in facilitating and aiding the movement of economic and social conditions to desired outcomes.⁶⁴⁶ Whether viewed from the perspective of maximizing economic wealth or social well-being, regulation is an important component for achieving these

⁶⁴⁰ Halina Ward *ibid.* at 454.

⁶⁴¹ See Barnali Choudhury, “Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses” (2005) 26 Nw. J. Int’l L. & Bus. 43 at 46 (WL).

⁶⁴² Halina Ward, Securing Transnational Corporate Accountability, *supra* note 525 at 456.

⁶⁴³ *Ibid.* at 455-456.

⁶⁴⁴ Donald J. Kochan, “No Longer Little Known but now Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Jurisprudence” 8 Chap. L. Rev. 103 at 132 (WL).

⁶⁴⁵ *Ibid.*

⁶⁴⁶ Sol Picciotto & Ruth Mayne, eds., *Regulating International Business: Beyond liberalization* (New York: St. Martin’s Press in association with Oxfam, 1999) at 1-4.

goals.⁶⁴⁷ The presence of transaction costs, predatory actors, and other factors are real conditions that can and have resulted in tragic outcomes.

Moreover, the criticism unduly subordinates the direct effects of regulation to potential spillover effects that result only under static legal conditions. Foreign direct liability seeks to deter the worst excesses of transnational business activity and to provide a remedy to the victims of harmful activity. Foreign direct liability suits are rarely litigated at the margins of morally debatable conduct, but rather arise from activity closer to the center of universally condemned abuses of workers and other people. In the present, the “only unhappy parties will be those few [TNCs] that follow their profit-seeking motive into violating customary international law” and grossly unreasonable tortious conduct.⁶⁴⁸ As stated by one Appellate Court allowing a foreign direct liability suit to proceed, “one hopes the universe of potential defendants is not that large.”⁶⁴⁹

By permitting liability in their jurisdictions, critics also suggest that foreign direct liability suits may “harm the economy by putting companies with a ... presence [in the home state] at a unique and unfair competitive disadvantage.”⁶⁵⁰ Home state corporations are at a competitive disadvantage to foreign competitors who “presumably remain free to engage in violations of fundamental human rights” and safety and health norms.⁶⁵¹ An extension of this argument is the criticism that the risk of liability in home states will drive TNCs from those jurisdictions.⁶⁵²

Beyond its moral flaws,⁶⁵³ the criticism ignores the high costs of moving to alternative jurisdictions where no liability attaches. Transnational corporations rely on their home states for benefits extending well beyond those imposed by its regulations. Access to home state infrastructure, governmental institutions, consumer, financial, and labor markets all provide significant incentives to remaining in the home state that greatly exceed benefits

⁶⁴⁷ Janet Dine, *The Governance of Corporate Groups*, *supra* note 465 at 109-118.

⁶⁴⁸ Saman Zia-Zarifi, *supra* note 604 at 148.

⁶⁴⁹ *Ibid.* (citing *In re Estate of Ferdinand Marcos Alien Rights Litigation*, 978 F.2d 493, 501 (9th Cir. 1994)).

⁶⁵⁰ See Terry Collingsworth, “Corporate Social Responsibility, Unmasked” (2004) 16 *St. Thomas L. Rev.* 669 at 672 (WL) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (Brief of Amicus Curiae The National Foreign Trade Counsel at 10)) [Terry Collingsworth].

⁶⁵¹ *Ibid.* at 672.

⁶⁵² Lena Ayoub, *supra* note 223 at 439.

⁶⁵³ Terry Collingsworth, *supra* note 650 at 672.

derived from engaging in activity from which most corporations refrain and from which shareholders and consumers increasingly recoil.⁶⁵⁴

Corporations may also find fewer and fewer unregulated jurisdictions in which to relocate. Advocates in civil law jurisdictions are also seeking regulatory mechanisms to deter overseas harms. In France,⁶⁵⁵ Belgium,⁶⁵⁶ and Quebec⁶⁵⁷ litigation and other regulatory measures have been initiated to hold corporations accountable for overseas conduct, and observers note that the potential for liability in their home states exists in other jurisdictions.⁶⁵⁸ While meeting with varying degrees of success in the present, these initiatives are unlikely to abate in the future.

Foreign direct liability is one small but potentially meaningful component of an emerging regulatory framework to control potential harms. Theories of liability are in early stages of development. As time passes new criticisms will evolve, and the common law will adapt to meet the demands of proponents while remaining cognizant of the positive aspects of TNCs overseas activity. The following sections examine existing theories of liability and illustrative cases developing and refining strategies for bringing cases in the future.

⁶⁵⁴ Lena Ayoub, *supra* note 223 at 440.

⁶⁵⁵ See "Total Pays 5.2 mln eur to Settle Claims of Forced Labor Use in Myanmar" *AFX News Limited* (29 November 2005), online: Forbes <<http://www.forbes.com/>>. See also Lucien J. Dhooge, "Beyond Voluntarism: Social disclosure and France's Nouvelles Régulations Économiques" (2004) 21 *Ariz. J. Int'l & Comp., L.* 441 (WL).

⁶⁵⁶ See "Belgian Court Stops Human Rights Probe of Total Oil" *Reuters* (1 July 2005), online: CorpWatch <<http://www.corpwatch.org/>>; and "Belgium to Reopen Rights Probe on Total in Myanmar" *Reuters* (14 April 2005), online: The Epoch Times <<http://english.epochtimes.com/>>.

⁶⁵⁷ See *Recherches Internationales Québec v. Cambior Inc.*, (14 August 1998), Montreal, 500-06-000034-971, J.E. 98-1905 (S.C.) (QL) reprinted in UNEP PADELIA, *Compendium of Judicial Decisions on Matters Related to Environment: National Decisions*, Vol. III (Nairobi: United Nations Environmental Program, Partnership for the Development of Environmental Laws and Institutions in Africa, 2001) 24, online: UNEP <<http://www.unep.org/>> [*Recherches Internationales Québec v. Cambior Inc.*].

⁶⁵⁸ See Mark Taylor & Christian H. Ruge, "The Arm of the Law gets Longer" *Aftenposten* (14 March 2005) (translated from Norwegian), online: Fafo <<http://www.fafo.no/>> (discussing the operations of Norwegian corporations and noting that "[l]eaders of Norwegian companies that operate in legally perilous terrain may one day find themselves in a courtroom in Norway or abroad, answering the kind of questions they today get from journalists or activists); and André Nollkaemper, "Public International Law in Transnational Litigation against Multinational Corporations: Prospects and problems in the courts of the Netherlands" in Menno T. Kamminga & Saman Zia-Zarifi, eds., *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) at 265 *et seq.*

CHAPTER 4

PRIVATE LAW LIABILITY

We must not make a scarecrow of the law; setting it up to fear the birds of prey
and let it keep one shape till custom make it their perch and not their terror.

- *William Shakespeare*

Fundamental values expressed in the normative statements of international instruments come to be enforced through formal law in many ways. Some are adopted explicitly.⁶⁵⁹ Some inform the discussion of legal rules during law's gestational stages⁶⁶⁰ and others inform understandings of existing law allowing it to evolve and remain relevant to changing conditions.⁶⁶¹ International expressions of human rights norms inform and influence interpretations of domestic law.⁶⁶² Voluntary codes have further impact on domestic liability law.⁶⁶³ In these ways, existing norms contribute to ongoing efforts to regulate TNCs in their home states.⁶⁶⁴ The sections of this chapter overview some of the ways private law actions in home state jurisdictions are beginning to regulate the conduct of TNCs for the protection of people's right to safety and health.

A. Liability Pursuant to International Law And Related Legislation.

In recent years, legislation has been proposed to expand the scope of safety and health protections based on international law to overseas citizens and to provide access to justice through home state courts. The United States is the only common law nation with existing statutes that have been found to permit overseas citizens to bring suit in United States courts for violations of international human rights norms by TNCs.

⁶⁵⁹ See generally Monica Schurtman, "Los 'Jonkeados' and the NAALC: The Autotrim/Customtrim Case and its Implications for Submissions under the NAFTA Labor Side Agreement" (2005) 22 *Ariz. J. Int'l & Comp. L.* 291 at 369-374 (WL).

⁶⁶⁰ See generally Lisa Valenta, "Disconnect: The 1988 Brazilian Constitution, Customary International Law, and Indigenous Land Rights in Northern Brazil" (2003) 38 *Tex. Int'l L.J.* 643 at 659 (WL) (Discussing the impact of ILO Conventions on domestic laws affecting indigenous populations).

⁶⁶¹ See *Whitman v. Miles*, 294 F.Supp.2d 117 at 122 (D.Me, 2003) (WL)

⁶⁶² See "The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer" (2005) 3 *Int'l J. Const. L.* 519 at 523-525 (WL); Philip Alston & Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) *Human Rights Q.* 156 at 171 (JSTOR), (Citing H. Kelsen, *Pure Theory of Law* at 125-126); Francisco Forrest Martin, *Challenging Human Rights Violations: Using International Law in U.S. Courts* (Ardley, N.Y.: Transnational Publishers, 2001) at 39-61; Jordan J. Paust, *supra* note 639 at 12-16.

⁶⁶³ Daniel E. Feld, "Admissibility in Evidence, On Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association" (2004) 58 *A.L.R.3d* 148 (WL).

⁶⁶⁴ See generally John J. Kirton & Michael J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance*. (Burlington, VT: Ashgate, 2004) at 24.

1. Legislative Initiatives in Common Law Jurisdictions.

In 2000, the Corporate Code of Conduct Act was introduced in the United States House of Representatives.⁶⁶⁵ The proposed bill required U.S. corporations to “comply with minimum international human rights standards,”⁶⁶⁶ “comply with internationally recognized worker rights and core labor standards,”⁶⁶⁷ and “provide a safe and healthy workplace”⁶⁶⁸ to employees. The bill further provided injured persons with a cause of action in United States courts for violations of the bill’s provisions.⁶⁶⁹ The bill was referred to committees for review but did not come to a vote before the end of the congressional session and was not reintroduced in the following session.⁶⁷⁰

In the United Kingdom, the Corporate Responsibility Bill was introduced before the House of Commons in 2003.⁶⁷¹ The Corporate Responsibility Bill provided that British companies “shall carry out its activities in accordance with ... international agreements, responsibilities and standards, including but not limited to those relating to public health and safety” and human rights.⁶⁷² The bill also contained liability provisions for people harmed during the course of overseas activity. The provision would hold parent companies liability for injuries caused overseas.⁶⁷³ The Corporate Responsibility Bill however was not supported by the Executive Government and did not become law.

In 2000, legislation was also introduced in the Australian Parliament that would have established a code of conduct for Australian corporations operating overseas.⁶⁷⁴ The obligations of the code of conduct “were deduced with reference to internationally agreed and recognized human rights standards.”⁶⁷⁵ The bill required Australian corporations to

⁶⁶⁵ Erin L. Borg, “Sharing the Blame for September Eleventh: The Case for a New Law to Regulate the Activities of American Corporations Abroad” (2003) 20 *Ariz. J. Int’l & Comp. L.* 607 at 626 (WL) [Erin L. Borg].

⁶⁶⁶ U.S., Bill H.R. 2782, *Corporate Code of Conduct Act*, 107th Cong., 2001, at Sec. 3(b)(6), online: Thomas <<http://thomas.loc.gov/>>.

⁶⁶⁷ *Ibid.* at Sec. 3(b)(4)(B).

⁶⁶⁸ *Ibid.* at Sec. 3(b)(1).

⁶⁶⁹ *Ibid.* at Sec. 8(b)(2).

⁶⁷⁰ See Erin L. Borg, *supra* note 665.

⁶⁷¹ Fiona Macmillan, “Regulating Multinational Enterprises” (2003) *Comp. Law.* 2003, 24(12) 355 at 356 (WL).

⁶⁷² Bill 129, *Corporate Responsibility Bill*, 2002-2003 Sess., 2003 at Sec. 2, online: The United Kingdom Parliament <<http://www.publications.parliament.uk/>>.

⁶⁷³ *Ibid.* at Sec. 6(1)(c)(i).

⁶⁷⁴ Surya Deva, “Acting Extraterritorially to Tame Multinational Corporations: Who Should ‘Bell the Cat?’” (2004) 5 *Melbourne J. Int’l L.* 37 at 39, online: Social Sciences Research Network <<http://papers.ssrn.com/>> [Surya Deva, Acting Extraterritorially to Tame Multinational Corporations].

⁶⁷⁵ *Ibid.* at 59.

“comply with minimum international labour standards,”⁶⁷⁶ “provide a safe and healthy workplace for employees,”⁶⁷⁷ and ensure that goods and services provided overseas met the safety and health standards existing in Australia as well as the overseas jurisdiction.⁶⁷⁸ The bill further provided that harmed persons could bring a civil action in Australian courts.⁶⁷⁹ The bill was reported out of committee, however did not pass into law.⁶⁸⁰ Since its initial defeat, the Australia Democrats party has revised the bill and continues efforts towards future passage.⁶⁸¹

While the efforts to enact new legislation have failed to date, they represent important first steps towards statutory recognition of a right to bring suit in home states for harms caused by domestic companies to overseas citizens. As transnational business activity continues and in the absence of binding measures at the international level, domestic legislative efforts are likely to continue to arise in the future. In the interim, a United States statute remains the only domestic legislation empowering overseas citizens to bring private law actions against corporations operating in the home state when corporations violate international law norms relating to safety and health.

2. The United States’ Alien Tort Claim Act and Torture Victims Prevention Acts.

The United States’ Alien Tort Claims (ATCA) and Torture Victims Prevention Acts (TVPA) possess some protections for people’s safety and health rights through the application of human rights principles and provide overseas citizens with access to home state courts. The ATCA gives federal courts in the United States jurisdiction to hear the civil claims of foreign citizens for injuries that are caused by actions “in violation of the law of nations or a treaty of the United States.”⁶⁸² The TVPA is more limited in application, granting jurisdiction in home state courts to overseas citizens who are the victims of torture

⁶⁷⁶ Aus, Bill No. 00163, *Corporate Code of Conduct Bill 2000*, 39th Parl., 2000, at para. 9, online: Parliament of Australia <<http://parlinfoweb.aph.gov.au/>>.

⁶⁷⁷ *Ibid.* at para. 8

⁶⁷⁸ *Ibid.* at para. 12.

⁶⁷⁹ *Ibid.* at para. 17.

⁶⁸⁰ Surya Deva, Acting Extraterritorially to Tame Multinational Corporations, *supra* note 674 at 39-40.

⁶⁸¹ See Australia Democrats, *Corporate Code of Conduct Bill 2004*, Exposure Draft, online: Australia Democrats <<http://www.democrats.org.au/>>.

⁶⁸² *Alien Tort Claims and Torture Victim Prevention Act*, 28 U.S.C. § 1350 (2001) [ATCA]. The full text of the ATCA statute reads as follows: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Ibid.* For a discussion of the history of the Alien Tort Claims Act, see Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts*, (Irvington-on-Hudson, N.Y.: Transnational Publishers 1996) at 7-18 [Beth

or when one of their family has been the victim of an extrajudicial killing.⁶⁸³ Both statutes provide for monetary damages as provided in civil law torts.

The ATCA is a jurisdictional statute vesting federal courts in the United States with the authority to hear claims from overseas persons. To meet the jurisdictional requirements, plaintiffs must assert actions violating ‘the laws of nations’ or violating a treaty of the United States.⁶⁸⁴ Over the past two decades lower courts arrived at differing understandings of when ATCA jurisdiction might be asserted.⁶⁸⁵ In recent years, the United States Supreme Court decided the case of *Sosa v. Alvarez-Machin*,⁶⁸⁶ which seeks to clarify how the ATCA should be interpreted by lower courts.

In *Sosa v. Alvarez-Machin*, the Supreme Court provided parameters for understanding when conduct might be found in violation of the laws of nations. The Court found that at the time Congress enacted the ATCA statute it “intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations”⁶⁸⁷ and “enabled federal courts to hear claims in a very limited category” of actions.⁶⁸⁸ The Court however rejected arguments that the statute should be circumscribed to the types of actions existing at the time of the statute’s enactment in 1789.⁶⁸⁹ Rather, the Court cautiously held that present-day claims should be based on international norms accepted and defined with the specificity of norms existing at the time of the statute’s enactment.⁶⁹⁰ In the absence of a treaty to which the United States is a party, the asserted international law norms must be “specific, universal, and obligatory.”⁶⁹¹ Thus, while the *Sosa* decision circumscribes the scope of claims that might be brought pursuant to the ATCA, the decision leaves the “door ajar subject to vigilant doorkeeping, and thus open to a narrow class of international

Stephens & Michael Ratner].

⁶⁸³ ATCA, *ibid.* Under the TVPA litigants are restricted to suing entirely individuals who are acting “under actual or apparent authority, or color of law, of any foreign nation.” The TVPA also contains a provision requiring litigants to exhaust local remedies before bringing suit in the United States. *Ibid.*

⁶⁸⁴ *Ibid.*

⁶⁸⁵ See Lucien J. Dhooge, “The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism” (2003) 35 *Geo. J. Int’l L.* 3 at 26- 65 (WL).

⁶⁸⁶ *Sosa v. Alvarez-Machin*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004).

⁶⁸⁷ *Ibid.* at 720.

⁶⁸⁸ *Ibid.* at 722.

⁶⁸⁹ *Ibid.* at 732-733.

⁶⁹⁰ *Ibid.* at 725.

⁶⁹¹ *Ibid.* (citing with approval *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

norms.”⁶⁹² Importantly, the decision leaves room for additional claims as the law of nations continues its growth in the future.

The ATCA thus provide narrow but potentially valuable avenues for achieving liability in the home states of TNCs. The strength of the statutes lies in their implicit recognition of the potential lack of available forums at the place of injury for litigating universal rights, though forum non conveniens may still be raised as a defense in these cases. The statutes’ limitations may be found in the narrowly construed categories of rights that provide a basis for liability, effectively creating subsets of human rights norms deemed worthy of universal protection. In the context of overseas citizens’ safety and health, the statutes are most effective where injuries result from activity that violates highly specific and universally recognized human rights norms. The following section examines recent cases arising under the ATCA based on allegations of violations of overseas citizens’ safety and health rights.

B. ATCA And TVPA Lawsuits For The Protection Of Safety & Health.

Court decisions issued since the Supreme Court’s ruling in *Sosa v. Alvarez-Machin* indicate the types of ATCA and TVPA cases against TNCs that may have the greatest opportunities to proceed to trial. The suits achieving a measure of success to date involve abuses inflicted by corporations’ private security forces and corporations’ complicity with the armed forces of rogue governments. These security forces and armed forces are employed in the protection of TNCs’ facilities in host states. Too often, their mission encompasses the suppression of labor unions and people advocating for workers’ and neighboring communities’ rights. Suits against TNCs’ for torture and deaths caused by security forces and military units acting in this way most directly implicate safety and health rights by seeking to deter complicit behavior resulting in torture or death. The suits also indirectly promote people’s safety and health rights by protecting people’s labor rights.

The case of *Estate of Rodriguez v. Drummond Co.*⁶⁹³ is the most significant case to have been decided at this time involving ATCA claims and labor rights issues. In *Drummond*, the plaintiffs filed suit under the ATCA and TVPA seeking damages for the extrajudicial killing of family members. The defendants are a TNC that manages mining operations in

⁶⁹² *Ibid.* at 729.

⁶⁹³ *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (WL).

Colombia and the mine owner.⁶⁹⁴ Plaintiffs' decedents were union leaders engaged in contract negotiations with the mine⁶⁹⁵ and were assassinated by a paramilitary group allegedly acting as agents for the mine company.⁶⁹⁶

Upon consideration of defendants' motions to dismiss, the district court dismissed in part the plaintiffs' claims. The district court, however, granted plaintiffs leave to file an amended complaint.⁶⁹⁷ In reaching its decision, the court notably found that TNCs are considered 'individuals' for purposes of the TVPA and therefore, can be properly named as party defendants.⁶⁹⁸ The court also found that labor rights violations can support a claim under the ATCA. The court found that the right to assemble and organize labor unions is a fundamental right within the customary international law.⁶⁹⁹ By protecting the right to organize unions that exist to protect workers rights including their right to safety and health, the decision creates the potential for further advancement of safety and health rights in the overseas operations of TNCs.

Lawsuits have also been filed against TNCs for illnesses arising from the production and use of herbicides and pesticides in overseas operations. In *Arias v. Dyncorp*, suit was brought against the defendant for its illegal spraying of herbicides in Ecuador.⁷⁰⁰ The suit alleges that the company illegally sprayed in parts of Ecuador during part of a Colombian program undertaken in conjunction with the United States government to control coca production.⁷⁰¹ The suit alleges that the illegal spraying in Ecuador resulted in serious illness and deaths to native farmers and their families.⁷⁰² Defendant's motion to dismiss is pending.

Doe v. Unocal,⁷⁰³ *Wiwa v. Royal Dutch Petroleum Co.*,⁷⁰⁴ *Bowoto v. ChevronTexaco*,⁷⁰⁵ and *Mujica v. Occidental Petroleum Corp.*⁷⁰⁶ are ATCA and TVPA suits, which survived motions to

⁶⁹⁴ *Ibid.* at 1254.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Ibid.* at 1268.

⁶⁹⁷ *Ibid.* at 1267.

⁶⁹⁸ *Ibid.* at 1254.

⁶⁹⁹ *Ibid.* at 1264

⁷⁰⁰ *Arias v. Dyncorp*, Case No. 01-01908 (D.D.C. 2001) (Plaintiff's Complaint) at para. 2, online: International Labor Rights Fund <<http://www.laborrights.org/>>.

⁷⁰¹ *Ibid.*

⁷⁰² *Ibid.*

⁷⁰³ *John Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002) (WL) (involving issues of forced labor, rape, and other human rights abuses by soldiers of the military government in Myanmar).

⁷⁰⁴ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 1999) (WL) (involving grave human rights violations alleged to have been committed by oil company acting in concert with the Nigerian government). See subsequent history at *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. Lexis 3293 (S.D.N.Y. 2002) (WL).

⁷⁰⁵ *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (WL) (also involving allegations of

dismiss. Each case involved allegations of a TNCs complicity with private security forces or government forces accused of attacking and in some instances killing persons opposing the corporations' activities in the host country.⁷⁰⁷ After denial of its motion to dismiss, the defendant entered into a settlement agreement with plaintiffs in *Doe v. Unocal*.⁷⁰⁸ *Bowoto v. ChevronTexaco*, *Wiwa v. Royal Dutch Petroleum Co.*, and *Mujica v. Occidental Petroleum Corp.* remain pending. Other suits that remain pending for claims related to corporate complicity with security forces include *Aldana v. Del Monte Fresh Produce*⁷⁰⁹ and *Bauman v. DaimlerChrysler AG*.⁷¹⁰

The recent rulings suggest that ATCA and TVPA claims possess the greatest potential where overseas corporate safety and health abuses are closely aligned with the most egregious forms of human rights abuses. Lawsuits against corporations for their activities can advance safety and health rights by preventing direct intentional harms against individuals but also may contribute to the protection of safety and health rights by protecting labor activists and officials seeking to improve working conditions. The narrow scope of activity supporting ATCA and TVPA suits however limits the range of conduct that might be deterred by private law litigation. Tort law actions can complement ATCA and TVPA protections thereby contributing to overall deterrence of practices harmful to overseas people's safety and health. The following section examines tort law's potential in further detail.

C. Liability Pursuant To Common Law Torts.

In addition to domestic statutes, tort law plays an equally important role in common law jurisdiction in the protection of people's safety and health through the imposition of duties on others not to cause injury to others. Consistent with this principle, domestic

grave human rights violations committed by oil company acting in concert with the Nigerian government).

⁷⁰⁶ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 1134 (C.D. Cal. 2005) (WL) (involving allegations of attacks on civilians by oil company's security forces and government military forces).

⁷⁰⁷ But see *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (WL) (involving allegations of human rights violations against oil company acting in concert with Indonesian government. Case dismissed for lack of subject matter jurisdiction resulting in part from undue entanglement with executive branches powers relating to nation's foreign policy).

⁷⁰⁸ See Anthony J. Sebok, "Unocal Announces It Will Settle A Human Rights Suit: What is the real story behind its decision?" *Findlaw* (10 January 2005), online: Findlaw Legal News and Commentary <<http://news.findlaw.com/>>.

⁷⁰⁹ *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F. 3d 1242 (11th Cir. 2005) (WL).

⁷¹⁰ *Bauman v. DaimlerChrysler AG*, 2005 U.S. Dist. Lexis 31929 (N.D. Cal 2005) (Lexis). The suit presently is tentatively dismissed on grounds that personal jurisdiction did not exist over the defendant in California, where the suit was filed. Discovery is however proceeding on that issue, pending a final determination by the court.

courts have long litigated tort actions where injury arose outside the forum jurisdiction.⁷¹¹ Early in the last century, Alfred Kuhn noted “[j]ustice demands that wrongs be redressed even if they occur outside the jurisdiction. If this were not so, the guilty party could easily escape liability because of the facility of movement in modern life.”⁷¹²

Under the doctrine of transitory torts, domestic courts traditionally possessed discretion to litigate actions against a local defendant for injuries occurring to someone overseas.⁷¹³ The common law courts of Canada,⁷¹⁴ the United States,⁷¹⁵ the United Kingdom,⁷¹⁶ and Australia⁷¹⁷ generally recognized the transitory tort doctrine as granting jurisdiction over actions for harm occurring outside the venue court’s jurisdiction. With certain modifications, the principle stated by Lord Mansfield in *Mostyn v. Fabrigas* remains true today. Lord Mansfield wrote:

(I)f A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found (A)s to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.⁷¹⁸

In modern application, the transitory tort doctrine often merges issues of jurisdiction and choice of law.⁷¹⁹ Modern courts more often discard formal application of the transitory tort doctrine, while retaining its principles through independent analysis of personal jurisdiction, subject matter jurisdiction, and choice of law issues in particular cases.⁷²⁰ Through proper service, courts located where a TNC is incorporated or maintains a base of operations can readily obtain personal jurisdiction over the defendant to hear private law disputes against that corporation, regardless of the citizenship of the plaintiff.

⁷¹¹ See *Filartiga v. Pena-Irala*, 630 F. 2d 876 at 885 (2nd Cir. 1980) (WL) [*Filartiga v. Pena-Irala*].

⁷¹² Arthur K. Kuhn, *Comparative Commentaries on Private Int’l Law* (New York, Macmillan, 1937) at 304.

⁷¹³ See Beth Stephens & Michael Ratner, *supra* note 682 at 36.

⁷¹⁴ A full detailing of the doctrine in each province is beyond the scope of this article, however see generally, *McCully et al. v. Barbour, et al.*, 2 N.B.R. 346 (N.B.S.C.) (WL/Carswell); and *Simonson v. C.N.R. Co.*, (1913) 15 D.L.R. 24 (Man. K.B.) (Lexis) *aff’d*. 17 D.L.R. 516 (C.A.).

⁷¹⁵ A full detailing of the doctrine in each state jurisdiction is beyond the scope of this article, however see generally *Filartiga v. Pena-Irala*, *supra* note 711.

⁷¹⁶ See *Chaplin v. Boys*, [1971] AC 356, [1969] 2 All ER 1085 (H.L.) (Lexis) (See Judgmentby-3: Lord Wilberforce).

⁷¹⁷ See *Blunden v. Commonwealth of Australia*, (2003) 203 A.L.R. 189 at para. 12 (H.C.A.)(Lexis) [*Blunden v. Commonwealth of Australia*].

⁷¹⁸ *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161, [1775-1802] All E.R. Rep. 266 (K.B.) (Lexis).

⁷¹⁹ See generally, *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 (WL/Carswell) at para. 24-35 (separating consideration of choice of law issues from jurisdictional considerations embodied in transitory tort

While variations exist within common law jurisdictions, the general rule finds that forum courts have subject matter jurisdiction over actions for torts causing effects in other jurisdictions or arising entirely in other jurisdictions where the underlying tort does not involve issues intimately related to land and two conditions are met. The two conditions are that the act is "actionable as a tort according to English law" and that the act is "actionable according to the law of the foreign country where it was done."⁷²¹

The conduct of TNCs resulting in injuries and illness to people located overseas can often satisfy both conditions of the modern rule. Intentional torts other than trespass and negligence actions are generally considered transitory in nature.⁷²² The conduct at issue would be actionable in tort cases in common law home state jurisdictions. Despite the lack of enforcement in host states, most legal systems also incorporate tort or delict doctrines,⁷²³ which should satisfy the condition that the conduct at issue also is actionable in the foreign jurisdiction where injury occurred.

While the transitory tort doctrine grants jurisdiction in home state courts for torts both committed in and causing effects in overseas jurisdictions, home states also generally retain jurisdiction over conduct occurring within its jurisdiction that causes effects in other jurisdictions. The *Restatement (Second) of Foreign Relations Law*, § 17 summarizes the principle as granting states jurisdiction to proscribe rules of law attaching to conduct occurring within its borders regardless of whether consequences of such conduct cause effects within its borders.⁷²⁴

Applicable doctrines thus grant jurisdiction to common law courts for the adjudication of a range of harms arising from home state corporations' overseas operations. Jurisdiction however remains discretionary and courts can decline to exercise their jurisdiction through the doctrine of *forum non conveniens*. Once jurisdiction is found and accepted, the court will then consider whether to apply the law of the forum or the law of the place of injury. The following discussion examines the resolution of related issues in tort actions arising in common law jurisdictions.

analysis).

⁷²⁰ See *Blunden v. Commonwealth of Australia*, *supra* note 717.

⁷²¹ *Dicey and Morris on the Conflict of Laws*, Vol. 2, 11th ed. (London : Stevens, 1987) at 1365-66.

⁷²² See *Blunden v. Commonwealth of Australia*, *supra* note 717; and Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After *Filartiga v. Pena-Irala*," (1981) 22 Harv. Int'l L.J. 53 at 63 (Hein).

⁷²³ See Robert Wai, *Transnational Lifting*, *supra* note 221 at 235.

D. Tort Liability Lawsuits For The Protection Of Safety & Health.

Tort law addresses harms to persons and their property and consequently often inherently arises within a context seeking to vindicate people's right to safety and health. While transnational tort cases are too numerous to comprehensively review, a number of suits have arisen in recent years in response to issues intimately related to the activities of TNCs.

1. *Lawsuits in the United States.*

Like other common law jurisdictions, the federal and state courts have long recognized that the nation's courts have jurisdiction to hear claims brought by foreign plaintiffs against domestic corporations and persons. Like other common law jurisdictions, courts retain discretion to decline jurisdiction through application of the doctrine of forum non conveniens. The doctrine has proved to be the most immediate significant hurdle to foreign direct liability suits whether proceeding under the ATCA or common law tort. In the United States, forum non conveniens doctrine exists in modified form depending upon the court in which suit is brought. In general, differences between federal and state court articulations are slight.

The federal court's decision in *Piper Aircraft v. Reyno*⁷²⁵ established criteria for application of the doctrine to suits involving foreign nationals that is followed in federal courts and frequently referenced in state jurisdictions. In *Piper*, the Court first analyzed whether an adequate available alternative forum exists where the defendant could be sued.⁷²⁶ The Court then undertook a multifactor analysis considering both public and private interests of the forum and other jurisdictions in hearing the case. Among factors considered were administrative difficulties,⁷²⁷ "local interest of having localized controversies decided at home",⁷²⁸ the application of foreign law and possible conflicts of law,⁷²⁹ ease of access to necessary evidence,⁷³⁰ "availability of compulsory process for attendance of" witnesses,⁷³¹ and the ability to conduct a trial easily, expeditiously, and inexpensively.⁷³²

⁷²⁴ *Restatement (Second) of Foreign Relations Law*, § 17 (St. Paul, MN: American Law Institute Publishers, 1965).

⁷²⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

⁷²⁶ *Ibid.* at 254, fn 22.

⁷²⁷ *Ibid.* at 241 fn 6.

⁷²⁸ *Ibid.*

⁷²⁹ *Ibid.*

⁷³⁰ *Ibid.*

⁷³¹ *Ibid.*

⁷³² *Ibid.*

Litigation brought by overseas citizens against domestic corporations for injuries often arises in the context of products liability litigation, most notably airline crashes, automobile defects and medical products.⁷³³ Given the particularized facts of individual cases and inherent subjectivities in evaluating criteria such as those in *Piper*, courts have arrived at different outcomes in particular cases.⁷³⁴ Successful claims in the area of products liability are one particularized form of tort action that should provide some guidance for other foreign direct liability actions involving injuries to overseas citizens. Conceptualized from the perspective of safety science, both arise from hazards in systems. Products are one type of system and production lines, distribution channels, and work methods are other types of systems. Injuries arise from harmful interaction between persons and energy agents and hazards within a particular system. Foreign direct liability claims based on other tort principles however appear to have had more difficulty in surviving forum non conveniens dismissals than those sounding in products liability.

More than any other single event, the Bhopal chemical explosion gave rise to current initiatives towards establishing foreign direct liability against parent companies for harms caused overseas. Around midnight on December 2, 1984, a chemical explosion occurred at a pesticide manufacturing plant in Bhopal, India. The manufacturing plant was operated by Union Carbide of India.⁷³⁵ Union Carbide of India was established pursuant to an agreement between the transnational Union Carbide Corporation of the United States and the Indian government.⁷³⁶ The Union Carbide Corporation maintained a majority ownership in its Indian subsidiary.⁷³⁷

⁷³³ See generally *American Law Reports 4th*, Vol. 76 (Rochester, N.Y.: Lawyers Cooperative Publishing Co. 1980-1991) "Forum Non Conveniens in Products Liability Cases" at 22 (W.L.) (Supplemented annually to the present); and Warren Freedman, *Foreign Plaintiffs in Products Liability Actions: The Defense of Forum Non Conveniens* (New York: Quorum Books, 1988).

⁷³⁴ Cases in decline foreign non conveniens dismissal include: *In re Bridgestone/Firestone*, 138 S.W.3d 202 (Tenn. Ct. App., 2003)(WL); *Chan Tse Ming v Cordis Corp.* 701 F.Supp 217 (S.D. Fla, 1989)(WL); *Carlenstolpe v Merck & Co.*, 819 F.2d 33 (1987)(WL); *Haddad v Richardson-Merrell, Inc.*, 588 F Supp 1158 (N.D., 1984)(WL); *Hodson v. A.H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983)(WL); *Gimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764 (D.C. Kan, 1981)(WL). Cases favoring dismissal include *In re Air Crash Over Tawain Straits on May 25, 2002*, 331 F. Supp.2d 1176 (C.D. Cal. 2004)(WL); *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002)(WL); *In re Silicone Gel Breast Implants Prods. Liab. Litig.* 887 F. Supp 1469 (N.D Ala., 1995)(WL); *Dowling v Hyland Therapeutics Div., Travenol Laboratories, Inc.*, 767 F. Supp 57 (S.D.N.Y., 1991, SD NY)(WL); *Agyenkwa v American Motors Corp.*, 622 F. Supp 242 (E.D. N.Y., 1985)(WL); *Lui Sui Nai-Chao v. The Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982)(WL); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1 (D.C. Penn. 1980)(WL).

⁷³⁵ Jamie Cassels, *The Uncertain Promise of Law*, *supra* note 536 at 3.

⁷³⁶ *Ibid.*

⁷³⁷ *Ibid.*

The explosion released clouds of deadly methyl isocyanate gas that resulted in the deaths of between 2,000 and 8,000 people in the days immediately following.⁷³⁸ At least 22,000 more died in the coming years⁷³⁹ as a result of exposure to the chemical cloud and estimated 150,000 continue to live with “chronic illnesses such as fibrosis, bronchial asthma, chronic obstructive airways disease, emphysema, pulmonary tuberculosis, and other illnesses.”⁷⁴⁰

Following the tragedy, numerous lawsuits were filed by individuals against the Union Carbide Corporation in India and the United States.⁷⁴¹ The numbers of persons affected, the inability of many to afford legal representation in India, the institutional incapacity of the host state’s legal system to process hundreds of thousands of individual claims, and other factors led the Indian government to pass the *Bhopal Gas Leak Disaster Act*.⁷⁴² The statute designated the government as legal representative of injured persons and allowed the government to take over control of the claims filed in the United States.⁷⁴³

The claims in the United States were consolidated into a single action in the United States District Court, Southern District of New York.⁷⁴⁴ In 1985, Union Carbide brought a motion to dismiss on the forum non conveniens grounds.⁷⁴⁵ The government of India, now representing all plaintiffs, argued that the justice for the victims could only be obtained in the United States courts.⁷⁴⁶ The Chief Justice of the Indian Supreme Court echoed the government’s position stating: “It is my opinion that these cases must be pursued in the United States ... It is the only hope these unfortunate people have.”⁷⁴⁷ The U.S. District Court however ultimately granted Union Carbide’s motion to dismiss. The court wrote that “[t]he administrative burden of this immense litigation”⁷⁴⁸ and that the “cost to American

⁷³⁸ See Derek Brown, “Dead Zone” *The Guardian* (21 September 2002) 44, (Lexis).

⁷³⁹ *Ibid.*

⁷⁴⁰ Dinesh C. Sharma, “Bhopal’s health disaster continues to unfold” *The Lancet* 359:9336 (14 September 2002). 859, (Lexis).

⁷⁴¹ Jamie Cassels, *The Uncertain Promise of Law*, *supra* note 536 at 11.

⁷⁴² *Ibid.* at 12.

⁷⁴³ *Ibid.* at 13.

⁷⁴⁴ *Ibid.* at 16.

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*

⁷⁴⁷ James B. Stewart, “Legal Liability: Why suits for damages such as Bhopal claims are very rare in India” *Wall Street Journal* (23 January 1985) 1 (Proquest) (quoting Y.V. Chandrachud, Chief Justice of the Supreme Court of India).

⁷⁴⁸ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1994*, 634 F.Supp. 842 at 867 (S.D.N.Y. 1986) (WL).

taxpayers of supporting the litigation in the United States would be excessive.”⁷⁴⁹ Ultimately the court found India’s courts to be an “adequate and more convenient forum” with greater interests in adjudicating the litigation.⁷⁵⁰ The district court’s decision was upheld on appeal.⁷⁵¹

The rulings have been widely criticized.⁷⁵² Most troubling is the court’s narrow conceptualization of home state interests in regulating the conduct of TNCs. The district court’s approach is criticized as unduly ‘localizing’ disasters. The Bhopal tragedy was localized by the decision’s focus on the subsidiaries conduct in weighing the forum non conveniens factor and distancing the conduct of the parent corporation from the events of the tragedy. Jamie Cassels finds that the decision “[presupposes] that the parent company would not, and should not, be held responsible for its overseas operations.”⁷⁵³ As a result, home state interests in the litigation are conceived narrowly. Upendra Baxi writes that “[a]s long as no harm occurs to Americans ... how can the public interest of the United States be ever adversely affected? Indeed it is best served by dumping dangerous technology [abroad].”⁷⁵⁴

Cassels observes that the court effectively refused *any* regulatory role over the conduct of home state corporations in overseas jurisdictions thereby “entrench[ing] double standards for safety whereby ultrahazardous products and processes are exported from developed to developing countries.”⁷⁵⁵ He observed that it was disingenuous for courts to refuse to hear such cases “out of respect for sovereignty ... [when] extraterritorial regulation of foreign affiliates is an established instrument of U.S. domestic and foreign policy.”⁷⁵⁶ He concludes that “To treat health and safety matters as purely “private” concerns of the corporation and its host country ignores that the most significant arena in which modern-day imperialism is played out is the international economy.”⁷⁵⁷

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Ibid.*

⁷⁵¹ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1994*, 809 F.2d. 195 (2nd Cir. 1987) (WL).

⁷⁵² See Marc Galanter, *Law’s Elusive Promise: Learning from Bhopal*, *supra* note 525; Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: N.M Tripathi, Pvt. Ltd., 1986) [Upendra Baxi]; and Jamie Cassels, *The Uncertain Promise of Law*, *supra* note 536 at 18-20.

⁷⁵³ Jamie Cassels, *ibid.* at 18.

⁷⁵⁴ Upendra Baxi, *supra* note 752 at 29.

⁷⁵⁵ Jamie Cassels, *The Uncertain Promise of Law*, *supra* note 536 at 19.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

Widespread dissatisfaction with the court's decision in the Bhopal matter may, however, have contributed to subsequent reassessments of the forum non conveniens doctrine by in Texas courts. In 1990, the Texas Supreme Court considered the case of *Dow Chemical Co. v. Castro Alfaro*.⁷⁵⁸ The case was a class action filed on behalf of Costa Rican employees of the Standard Fruit Company.⁷⁵⁹ The case arose from personal injuries the plaintiffs suffered from exposure to the pesticide, dibromochloropropane (DBCP).⁷⁶⁰ In 1984, the class action was filed in Texas state court against the pesticide's manufacturers, Dow Chemical Co. and Shell Oil Co.⁷⁶¹ The defendants brought motions to have the case dismissed on forum non conveniens grounds.⁷⁶² The trial court found that it had jurisdiction to hear the suit, but declined to exercise it and granted defendant's motion.⁷⁶³

On appeal, the Texas Supreme Court overturned the trial court's judgment and found that based on a state statute from 1913, the doctrine of forum non conveniens was abolished from the state's common law.⁷⁶⁴ In a concurring opinion, Justice Lloyd Doggett noted how application of the doctrine of forum non conveniens often served as a surrogate for implementation of a particular social policy having little to do with convenience of the parties or fairness to the litigants.⁷⁶⁵ Noting that one defendant maintained its world headquarters and the other maintained extensive operations in the state, he observed further:

The proffered foundations for [forum non conveniens] are "considerations of fundamental fairness and sensible and effective judicial administration." ... In fact, the doctrine ... is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery. The contorted result of the doctrine ... is to force foreign plaintiffs "to convince the court that it is more convenient to sue in the United States, while the American defendant argues that ... [the foreign court] is the more convenient forum." ... A forum non conveniens dismissal is often, in reality, a complete victory for the defendant.⁷⁶⁶

While the opinions of Justice Doggett and others in the majority carried the day in *Dow Chemical Co. v. Castro Alfaro*, the Texas state legislature subsequently reversed the

⁷⁵⁸ *Dow Chemical Co. v. Castro Alfaro*, *supra* note 569.

⁷⁵⁹ *Ibid.* at 675.

⁷⁶⁰ *Ibid.*

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.*

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.* at 677-679.

⁷⁶⁵ *Ibid.* at 680.

decision by statutorily reestablishing the doctrine of forum non conveniens in state law.⁷⁶⁷ While the doctrine remains a substantial hurdle to achieving home state liability, decisions applying the doctrine indicate avenues for overcoming its application in the future.

2. *Lawsuits in Canada.*

Canadian law concerning the application of forum non conveniens in the common law provinces is stated in the case of *Amchem v. British Columbia (Workers' Compensation Board)*.⁷⁶⁸ In that case, the Supreme Court of Canada recognized the doctrine as stated in England through the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*⁷⁶⁹ The Court recognized the House of Lords' two part test requiring that courts first determine whether there is another available forum which is clearly more appropriate and, if so, only decline a stay where circumstances where justice requires that a stay not be granted.⁷⁷⁰

The *Amchem* decision however declined to treat the loss of a juridical advantage to the plaintiff as a separate and distinct condition whereby justice would require denial of a stay on forum non conveniens grounds.⁷⁷¹ The Court endorsed a single part test considering similar factors as the British Court but without the shifting burdens of proof of the two-stage analysis.⁷⁷² Factors to be considered in making forum non conveniens evaluations are deliberately open-ended, though Canadian courts have explicitly considered factors such as the location of parties, witnesses, and evidence, the applicable law of the case and its relation to the forum, and whether plaintiff has a legitimate juridical advantage in their chosen forum.⁷⁷³ Legal principles in similar actions indicate that Canadian courts might properly retain jurisdiction over such cases.

In *R.P.C. Inc. v. Fournell*, the Supreme Court of British Columbia considered an action brought by a Canadian distributor seeking to enjoin proceedings against it in Georgia, U.S.A.⁷⁷⁴ The United States action was initiated by British Columbia citizens, whose injuries

⁷⁶⁶ *Ibid.* at 682-683.

⁷⁶⁷ See Tex. Civ. Prac. & Rem.Code Ann. § 71.051(i) (Vernon Supp. 2003).

⁷⁶⁸ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), [1993] 1 S.C.R. 897 (WL) [*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*].

⁷⁶⁹ *Spiliada Maritime Corp. v. Cansulex Ltd.* (1986), [1987] A.C. 460 (U.K. H.L.) (WL).

⁷⁷⁰ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, *supra* note 768 at para. 36-39

⁷⁷¹ *Ibid.* at para. 37.

⁷⁷² Jeffrey Talpis & Shelley L. Kath, "The Exceptional as Commonplace in Quebec Forum Non Conveniens Law: Cambior, a Case in Point" (2000) 34 R.J.T. 761 at 779-781 (Lexis) [Jeffrey Talpis & Shelley L. Kath].

⁷⁷³ Watson et C. Perkins, eds., *Holmsted and Watson, Ontario Civil Procedure* (Carswell, Toronto: 1985 - to date) at R.17§5, Sec. A(1)(b) (WL).

⁷⁷⁴ *R.P.C. Inc. v. Fournell* (2003), [2003] 2003 B.C.S.C. 917, 33 C.P.C. (5th) 174 at para. 1-3 (WL) [*R.P.C. Inc. v. Fournell*].

occurred in British Columbia, against a product manufacturer based in Georgia and against the Canadian distributor.⁷⁷⁵ The distributor claimed that under Canada's forum non conveniens doctrine, the United States forum was inappropriate for trial of the action.⁷⁷⁶

The British Columbia court analyzed the request for an injunction pursuant to forum non conveniens principles articulated in *Amchem*. The court held that the injunction should only be granted if the foreign court's jurisdiction was retained in a manner representing "such a *departure from our own test of forum non conveniens* as to justify our courts refusing to respect that assumption of jurisdiction."⁷⁷⁷ Applying Canadian forum non conveniens principles, the court found that the Georgia court could reasonably have concluded that there was no alternative forum that was "clearly more appropriate."⁷⁷⁸ Presumably, the court would arrive at similar findings had the facts been reversed, that is if foreign plaintiffs had initiated suit in British Columbia against a local defendant for injuries suffered in the plaintiff's home state. In making its determination, the court weighed factors including where the cause of action arose. Recognizing the decision of *Moran v. Pyle National (Canada) Ltd.*⁷⁷⁹, the court stated that "[a] determination of where the cause of action in tort arose requires [examination of] the location of the wrongful activity."⁷⁸⁰ This factor is highly significant in foreign direct liability claims brought on tort principles where corporate decisions in their home state are alleged to cause harmful effects overseas. To date however, the only foreign direct liability claim to have been brought in Canada arose in Quebec.

In the matter of *Recherches Internationales Québec v. Cambior Inc.*,⁷⁸¹ a Quebec court considered a lawsuit seeking to vindicate the safety and health rights of Guyanese citizens following a catastrophe at a Canadian TNC's gold mine. The case turned on application of the common law doctrine of forum non conveniens. While Quebec is principally a civil law jurisdiction, the Civil Code of Quebec provides for dismissal based on grounds analogous to common law forum non conveniens.⁷⁸² In evaluating forum non conveniens, Quebec courts have considered factors such as the place of the defendant's domicile, the 'natural forum' for

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Ibid.* In the U.S. action, the trial court denied the defendant's motion for dismissal based on that doctrine.

⁷⁷⁷ *Ibid.* at para. 19-21.

⁷⁷⁸ *Ibid.* at para. 37-39.

⁷⁷⁹ *Moran v. Pyle National (Canada) Ltd.* (1973), [1973] 43 D.L.R. (3d) 239 (S.C.C.)(WL).

⁷⁸⁰ *R.P.C. Inc. v. Fournell*, *supra* note 774 at para. 28.

⁷⁸¹ *Recherches Internationales Québec v. Cambior Inc.*, *supra* note 657.

⁷⁸² See Art. 3135 C.C.Q. Article 3135.

the action, the residence of witnesses, the applicable law, juridical advantages of the forum, and the interests of justice.⁷⁸³

The case arose from facts where Cambior was the principal owner of a subsidiary, Omai Gold Mines Limited (Omai).⁷⁸⁴ Cambior also closely controlled the management and operations of its subsidiary.⁷⁸⁵ Omai operated a gold mine in Guyana, which employed over a thousand local workers.⁷⁸⁶ On August 19, 1995, the mine's tailings dam released approximately 2.9 million square meters of the toxic waste into local rivers.⁷⁸⁷ In 1996, a motion to authorize the institution of a class action was filed in the Montreal District of Quebec Superior Court alleging, in part, potential long term health effects arising from the polluted waterways.⁷⁸⁸ Shortly after plaintiffs' motion was filed, the defendant filed a declinatory exception arguing that the court did not have jurisdiction over the subject of the case and alternatively that the court should decline to exercise jurisdiction pursuant to the doctrine of forum non conveniens.⁷⁸⁹

After considering the arguments, the court found that it had jurisdiction to hear plaintiffs' motion.⁷⁹⁰ The court, however, declined to exercise jurisdiction.⁷⁹¹ In reaching its decision on the issue of forum non conveniens, the court weighed factors including the residence of the parties and witnesses, the location of evidence, the existence and location of pending litigation, the location of defendant's assets, the law applicable to the case, the advantages of plaintiffs being able to sue in their chosen forum, and the interests of justice.⁷⁹² In balance, the court found that the location of witnesses and evidence, the existence of pending litigation in Guyana and the parties' agreement that the law of Guyana applied to the substantive issues in the case, weighed significantly in favor of granting the declinatory exemption on forum non conveniens grounds.⁷⁹³

In evaluating the factors related to the interests of justice, the court however provided insight into how future cases might overcome forum non conveniens obstacles.

⁷⁸³ Jeffrey Talpis & Shelley L. Kath, *supra* note 772 at 809.

⁷⁸⁴ *Ibid.* at 818.

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Ibid.*

⁷⁸⁸ Jeffrey Talpis & Shelley L. Kath, *supra* note 772 at 818-819; and Philip Preville, "Coming Home to Roost" *Montreal Mirror* (27 March 1997), online: *Montreal Mirror* <<http://www.montrealmirror.com/>>.

⁷⁸⁹ *Recherches Internationales Québec v. Cambior Inc.*, *supra* note 657 at 25.

⁷⁹⁰ *Ibid.* at 27.

⁷⁹¹ *Ibid.* at 34.

⁷⁹² *Ibid.* at 27-34.

The court wrote that it would “have little hesitation” in dismissing the Declinatory Exception if deficiencies in Guyana’s legal system had been proved.⁷⁹⁴ From its decision, consideration of the adequacy of the host state’s legal system under interests of justice analysis is confirmed as an important factor in the court’s determination.

3. Lawsuits in the United Kingdom.

In recent years, United Kingdom courts considered three cases involving the conduct of home state TNCs causing harm overseas. *Ngcobo v. Thor Chemicals* involved the claims of South African citizens arising out of conditions at defendants’ South African facilities engaged in the “manufacturing and reprocessing of mercury compounds.”⁷⁹⁵ Claims were brought in the English High Court alleging liability for negligent design, operation, and supervision of an “intrinsicly hazardous process.”⁷⁹⁶ The defendants’ applied for a stay on forum non conveniens grounds, however the Court of Appeal found that defendants had acceded to jurisdiction in prior filings.⁷⁹⁷ The parties reached a settlement before trial.⁷⁹⁸ Subsequent claims were filed by South African plaintiffs against Thor Chemicals and its subsidiaries.⁷⁹⁹ Defendant’s application for stay was dismissed in the High Court and on appeal⁸⁰⁰ and the parties again reached a settlement before trial.⁸⁰¹

In *Connelly v. R.T.Z.*,⁸⁰² plaintiff had worked at a uranium mine in Namibia before suffering cancer of the larynx as the result of exposure to uranium silica and radioactive decay materials at the mine.⁸⁰³ The mines were owned by R.T.Z. Corp. Plc. (RTZ) and operated by its subsidiary, Rossing Uranium Ltd.⁸⁰⁴ After workers’ compensation claims were rejected by the subsidiary and workers’ compensation boards in Namibia, plaintiff

⁷⁹³ *Ibid.*

⁷⁹⁴ *Ibid.* at 33.

⁷⁹⁵ *Ngcobo and others v. Thor Chemicals and others*, [1995] T.L.R. 579 (Lexis).

⁷⁹⁶ Richard Meeran, “Liability of Multinational Corporations: A Critical Stage in the UK” in Menno T. Kamminga & Saman Zia-Zarifi, eds., *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 251 at 256 [Richard Meeran, Liability of Multinational Corporations].

⁷⁹⁷ *Ibid.*

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Sithole and others v. Thor Chemicals and others*, [1999] T.L.R. 110 (Lexis).

⁸⁰⁰ Richard Meeran, Liability of Multinational Corporations, *supra* note 796.

⁸⁰¹ Halina Ward, Legal Issues in Corporate Citizenship *supra* note 629 at 13.

⁸⁰² *Connelly v. R.T.Z.*, [1998] A.C 854 (H.L.) (WL).

⁸⁰³ *Ibid.* at para. 1.

⁸⁰⁴ *Ibid.* at para. 1-2.

obtained a legal aid certificate and brought suit in England against RTZ.⁸⁰⁵ RTZ applied for a stay of proceedings arguing that Namibia was the proper forum for the proceedings.⁸⁰⁶

The High Court of London granted the stay holding that it was bound to disregard the fact that plaintiff was unable to afford legal representation in Namibia and that legal aid was unavailable to him in that country.⁸⁰⁷ Plaintiff's appeals proceeded to the House of Lords arguing that the availability of legal representation in the host state was a relevant consideration in evaluating whether England was an appropriate forum for suit.⁸⁰⁸ The House of Lords granted plaintiff's appeal finding that the availability of legal aid was a relevant factor in evaluating forum non conveniens.⁸⁰⁹ While not a determinative issue as argued by one Lord, the ability to secure legal representation and its necessity to the development of the case were held to be relevant factors in determining whether substantial justice could be done in alternative forums.⁸¹⁰

In *Lubbe v. Cape Plc.*,⁸¹¹ the House of Lords considered a case by the estates of deceased workers and family members, who were employed in and living near asbestos mining operations in South Africa and died as a result of exposure to asbestos dust.⁸¹² The mine was owned by Cape Plc. and operated by its South African subsidiaries.⁸¹³ The House of Lords was again asked to evaluate application of forum non conveniens. The judgment stated a stay would only be granted where there exists another available forum "with competent jurisdiction ... in which the case may be tried more suitably for the interests of all the parties and the ends of justice."⁸¹⁴ In applying these principles, the judgment recognized the conduct of the parent corporation occurring in the home state as a factor in determining the appropriateness of the forum and further recognized the importance of the ability to process a large class action, the availability of legal representation, expert witnesses, and related legal resources as factors in determining whether justice could be done in alternative host state forums.⁸¹⁵

⁸⁰⁵ *Ibid.* at para. 2-3.

⁸⁰⁶ *Ibid.* at para. 4.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *Ibid.* at para. 30-33.

⁸⁰⁹ *Ibid.* at para 30.

⁸¹⁰ *Ibid.*

⁸¹¹ *Lubbe v. Cape plc.*, [2000] 4 All. E.R. 268, [2000] 2 Lloyd's Rep. 383 (H.L.) (W.L.).

⁸¹² *Ibid.* at 387.

⁸¹³ *Ibid.*

⁸¹⁴ *Ibid.* at 389.

⁸¹⁵ *Ibid.* at 390-393.

In weighing these factors, England was held to be the most appropriate forum for the case.⁸¹⁶ The judgments in *Connelly* and *Lubbe* suggest a developing understanding that prior conceptualization of injuries as localized events are increasingly unrealistic and that on-the-ground realities are important factors influencing whether effective regulation can be achieved for harmful activities and justice can be done for injured parties.

The decisions in *Connelly* and *Lubbe* were made on the basis of common law application of the forum non conveniens doctrine. The doctrine's application in future cases will be shaped by developing interpretations of the Brussels Convention by the European Court of Justice.⁸¹⁷ In the United Kingdom, the common law doctrine of forum non conveniens is preserved through the Civil Jurisdiction and Judgments Act 1982.⁸¹⁸ The Act states that forum non conveniens stays and dismissals may be granted "where to do so is not inconsistent with the 1968 [Brussels] Convention."⁸¹⁹ Pursuant to its provisions, the Brussels Convention is ultimately interpreted through proceedings in the European Court of Justice. Article 2 of the Convention states that persons "domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that Member State."⁸²⁰

At the time of the House of Lord judgments in *Connelly* and *Lubbe*, a previous Court of Appeals judgment found that application of the doctrine of forum non conveniens to cases involving citizens of noncontracting nations did not contravene Article 2 duties.⁸²¹ And at that time, no European Court of Justice decisions had considered the doctrine of forum non conveniens for compatibility with Article 2.⁸²²

Since the *Connelly* and *Lubbe* judgments, the European Court of Justice rendered a decision in the case of *Owusu v Jackson and Others*. In that case, the Court held that the Convention "precludes ... a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-

⁸¹⁶ *Ibid.* at 395.

⁸¹⁷ See generally Binda Sahini, "Limitations of Access at the National Level: Forum Non Conveniens" (2005) 9 *Gonz. J. Int'l L.* 119 at 122-135 (WL) [Binda Sahini].

⁸¹⁸ *Civil Jurisdiction and Judgments Act 1982* (U.K.), c. 27, Pt. V, § 49, as amended by the *Civil Jurisdiction and Judgments Act 1991* (U.K.) c. 12, Sch. 2, P 24 (WL).

⁸¹⁹ *Civil Jurisdiction and Judgments Act 1982* (U.K.), *ibid.*

⁸²⁰ *European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil Matters*, 27 September 27, 1968, 8 I.L.M. 229 at Art. 2 (WL) [Brussels Convention] (Emphasis added). The Brussels Convention also identifies the place of domicile for corporate entities. Article 60 states that corporations are considered domiciled in those nations where it has: "(a) a statutory seat, or (b) central administration, or (c) principal place of business." *Ibid.* at Art. 60.

⁸²¹ See *In re Harrods (Buenos Aires) Ltd.*, [1992] Ch. 72 (WL).

⁸²² See Binda Sahini, *supra* note 817.

Contracting State would be a more appropriate forum.”⁸²³

The *Owusu* decision likely greatly circumscribes the application of the doctrine of forum non conveniens in British courts.⁸²⁴ While the case did not involve an overseas plaintiff, the principles stated in the Court’s decision are directly applicable to foreign direct liability suits. The decision focuses on the mandatory nature of Article 2 obligations and notes that the obligations are not conditional or qualified by additional language. The decision finds that a Contracting party shall provide a forum for suit when the person sued is domiciled in that nation and that Art. 2 does not permit a Contracting party’s courts to stay proceedings or decline jurisdiction once the condition of domicile is met. As a result, opportunism for foreign directly liability suits by injured overseas citizens in the courts of the United Kingdom may be markedly expanded. The doctrine of forum non conveniens may also be diminishing as a barrier to foreign direct liability suits in other jurisdictions.

4. Lawsuits in Australia.

In Australia, the forum non conveniens doctrine has evolved in an alternative direction from other common law jurisdictions. In *Voth v. Manildra Flour Mill*,⁸²⁵ the High Court of Australia confirmed that a ‘clearly inappropriate forum’ standard would be applied in evaluation of forum non conveniens issues.⁸²⁶ In other words, the home state forum will be deemed appropriate unless it is shown to be a clearly inappropriate one. Australia’s test differs markedly from the ‘more appropriate forum’ and ‘more convenient forum’ tests of England and Canada and the United States respectively.⁸²⁷ Australia’s test is considered friendlier to overseas plaintiffs but has been tested in few cases of harms occurring outside the country.⁸²⁸

In *James Hardies Industries Pty. Ltd. v. Grigor*,⁸²⁹ the plaintiff developed mesothelioma while performing construction work in New Zealand.⁸³⁰ The mesothelioma was believed to have been caused by asbestos that was present in building materials manufactured by an

⁸²³ *Owusu v. Jackson*, C-281/02, [2005] E.C.R. I-1383 (WL).

⁸²⁴ See Trevor C. Hartley, “The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws” 54 ICLQ 813 at 824-828 (WL).

⁸²⁵ *Voth v. Manildra Flour Mill*, (2002) 171 C.L.R. 491 (H.C.A.) (WL).

⁸²⁶ *Ibid.* at 559-564.

⁸²⁷ See generally, Sarah Joseph, Corporations and Transnational Human Rights, *supra* note 219 at 123.

⁸²⁸ See *ibid.*

⁸²⁹ *James Hardies Industries Pty. Ltd. v. Grigor* (1998), [1998] 45 N.S.W.L.R. 20, 1998 NSW LEXIS 1867 (Lexis).

⁸³⁰ *Ibid.* 1998 NSW LEXIS 1867 at 2.

Australian corporation and its New Zealand subsidiary.⁸³¹ Plaintiff brought suit in the Dust Disease Tribunal of New South Wales, Australia, alleging common law negligence against the manufacturer.⁸³² Defendant brought a motion to stay proceedings based on forum non conveniens.⁸³³ The trial court denied the stay and defendant appealed.⁸³⁴ Applying the standard established in *Voth*, the appellate court dismissed the appeal.⁸³⁵

In *Dagi v. Broken Hill Properties*,⁸³⁶ citizens of Papua New Guinea brought four suits against an Australian corporation for damages caused by its overseas mining operations. Waste generated by the Ok Tedi mine and containing copper sulphide and cyanide was released into local waters killing eighty percent of the fish, destroying wide areas of vegetation, and causing other damages.⁸³⁷ The cases were filed in the Victoria Supreme Court based on common law nuisance claims. The defense of forum non conveniens was not raised prior to the parties reaching settlement.⁸³⁸ Pursuant to the terms of the settlement, the defendant agreed to pay compensation and contain waste generated by the mine.⁸³⁹ The ability to bring suit in Australia and for a settlement to be reached is credited as providing “a peaceful resolution of the Ok Tedi dispute, avoiding the real prospect of a further armed conflict in Papua New Guinea,” as had arisen in the Bougainville region in response to local people’s dissatisfaction with another TNC’s mining operation.⁸⁴⁰

E. Ongoing Developments.

New suits are contributing not only to the ongoing development of human rights and tort law but are also seeking to expand conceptions of the law of contracts and statutes governing consumer protection to redress violations of people’s safety and health rights overseas.⁸⁴¹ New suits have been filed in the past two years against Wal-Mart for violations

⁸³¹ *Ibid.* at 4-5.

⁸³² *Ibid.* at 6-16.

⁸³³ *Ibid.* at 2-3.

⁸³⁴ *Ibid.* at 3-4.

⁸³⁵ *Ibid.* at 44-47 and 62.

⁸³⁶ *Dagi v. Broken Hill Properties*, [1995] 1 V.R. 428 (S.Ct. Vic.) (WL).

⁸³⁷ UNEP, *Vital Waste Graphics* (Nairobi: United Nations Environmental Programme, 2004) at 18-19, online: UNEP <<http://www.grid.unep.ch/waste/>>.

⁸³⁸ Sarah Joseph, Corporations and Transnational Human Rights, *supra* note 219 at 124.

⁸³⁹ In recent years, plaintiffs claimed that defendants were in breach of the terms of the settlement agreement and brought suit in Australia to enforce the agreement. This case was settled by the parties in 2004.

⁸⁴⁰ Peter Prince, “Bhopal, Bougainville and OK Tedi: Why Australia’s *Forum Non Conveniens* Approach is Better” [1998] 47 I.C.L.Q. 573 at 594 (Oxford Journals).

⁸⁴¹ *Jane Doe et. al. v. Wal-Mart Stores Inc.*, Case No. BC339737 (California Superior Court-Los Angeles County, Central District 2005) (Plaintiff’s Complaint), online: International Labor Rights Fund <<http://www.laborrights.org/>> (Complaint alleges workers as third party beneficiaries to supplier contracts

of workers' rights in five developing countries,⁸⁴² against Bridgestone Corporation for dangerous workplaces and "slave-like conditions" on rubber plantations in Liberia, and against Coca-Cola for beatings, tear gassing, and other attacks on workers attempting to organize a bottling facility in Turkey.⁸⁴³ These suits allege ATCA and TVPA and common law torts claims but also include other basis for liability.

In *Doe et. al. v. Wal-Mart et. al.*, plaintiffs are from China, Bangladesh, Indonesia, The Swaziland, Nicaragua, and California and working in Wal-Mart's global supply chain.⁸⁴⁴ Wal-Mart contracts with suppliers contain a standard agreement requiring suppliers to adhere to certain fundamental labor standards.⁸⁴⁵ The complaint alleges that the standards are widely violated by suppliers without consequences from Wal-Mart.⁸⁴⁶ The complaint states that plaintiffs "were forced to work in sub-standard sweatshop conditions detrimental to their health and safety."⁸⁴⁷ Chinese workers specifically allege that they were not provided safety equipment such as protective masks and suffered respiratory illness and skin rashes from exposure to cotton and wool dust.⁸⁴⁸ Bangladeshi workers were subject to physical beatings from supervisors.⁸⁴⁹ The lawsuit's complaint asserts claims on behalf of workers as third-party beneficiaries to the standard supplier's agreement.⁸⁵⁰ The lawsuit further asserts liability based on common law principles of negligence and unjust enrichment and based on California legislation concerning unfair business practices.⁸⁵¹

The case of *Roe et. al. v. Bridgestone Corporation et. al.* arises from conditions existing on rubber plantations in Liberia.⁸⁵² Among other allegations, plaintiff's complaint states that

requiring fair labor standards and alleges violations of California consumer rights legislation).

⁸⁴² International Labor Rights Fund, Press Release, "Sweatshop Workers on Four Continents Sue Wal-Mart in California Court" (13 September 2005), online: International Labor Rights Fund <<http://www.laborrights.org/>>.

⁸⁴³ See "Daily Briefing – Legal: Slave, child labor alleged" *Atlanta Journal Constitution* (18 November 2005) 2F (Lexis); and ILRF, "Lawsuit Charges Coca-Cola with Torture, Intimidation of Trade Unionists in Turkey" (17 November 2005), online: International Labor Rights Fund <<http://www.laborrights.org/>>.

⁸⁴⁴ *Doe et. al. v. Wal-Mart et. al.*, [Class Action Complaint for Injunctive Relief and Damages], [2005] Case No. --- at para. 1-6 (California Superior Court, Los Angeles County, Central District), online: Law offices of Schonbrun, DeSimone, Seplow, Harris & Hoffman LLP <<http://www.losangelesemploymentlawyer.com/>>.

⁸⁴⁵ *Ibid.* at para. 37-40.

⁸⁴⁶ *Ibid.* at para. 42-43.

⁸⁴⁷ *Ibid.* at para. 4.

⁸⁴⁸ *Ibid.* at para. 52.

⁸⁴⁹ *Ibid.* at para. 55-57.

⁸⁵⁰ *Ibid.* at para. 96-110.

⁸⁵¹ *Ibid.* at para. 119-142.

⁸⁵² *Roe et. al. v. Bridgestone Corporation et. al.* [Class Action Complaint for Injunctive Relief and Damages], [2005] Case No. CV05-8168 at para. 1-4 (U.S. District Court, Central District of California), online: International Labor Rights Fund <<http://www.laborrights.org/>>.

workers and their families tap “trees with a sharp tool, exposing their eyes to the blinding potential of raw latex, to applying by hand various dangerous pesticides and fertilizers ... [and] are not given any safety equipment in performing their tasks, nor are they provided with warnings about the chemicals they are required to handle.”⁸⁵³ The *Bridgestone* lawsuit asserts civil liability based on the ATCA and common law torts. The complaint however also asserts civil liability based on violations the United States’ Constitution, Amendment XIII⁸⁵⁴ and federal legislation prohibiting slavery and involuntary servitude.⁸⁵⁵

The *Türedi et. al. v. Coca-Cola et. al.* lawsuit is brought on behalf of Turkish workers at subsidiary’s bottling facility.⁸⁵⁶ The complaint alleges that Turkish security forces, acting on behalf of the defendants, tear-gassed, clubbed, kicked, and detained workers and their families who supported efforts to form a trade union.⁸⁵⁷ Like the *Wal-Mart* and *Bridgestone* lawsuits, plaintiffs’ complaint alleges ATCA and common law tort claims. The *Türedi* complaint however also contains a claim based on civil law remedies under the Racketeer Influence and Corrupt Organizations Act (RICO)⁸⁵⁸ and based on New York state consumer protection law.⁸⁵⁹ The RICO Act generally permits individuals to bring suit against corporations and others who conspire to commit acts prohibited by specified federal and state criminal laws.⁸⁶⁰ The complaint alleges RICO violations through “a pattern of racketeering activity consisting of multiple acts and threats of murder, torture and other acts of violence.”⁸⁶¹ New York State consumer protection law prohibits corporations from engaging in deceptive practices.⁸⁶² Plaintiffs allege that Coca-Cola’s public representations of compliance with international and national labor laws are deceptive and violate state law.⁸⁶³ The state law unfair business practices, national Constitutional law, and RICO claims based

⁸⁵³ *Ibid.* at para. 4.

⁸⁵⁴ *Ibid.* at para. 110-119.

⁸⁵⁵ *Ibid.* at para. 120-129.

⁸⁵⁶ *Türedi et. al. v. Coca-Cola et. al.* [Complaint for Equitable Relief and Damages], [2005] Case No. 05CV9635 at para. 2-5 (U.S. District Court, Southern District of New York), online: International Labor Rights Fund <<http://www.laborrights.org/>> [*Türedi et. al. v. Coca-Cola et. al.*].

⁸⁵⁷ *Ibid.* at para. 38-108.

⁸⁵⁸ *Ibid.* at para. 122-123.

⁸⁵⁹ *Ibid.* at para.164-168.

⁸⁶⁰ See *Racketeer Influence and Corrupt Organizations Act*, 18 U.S.C. § 1961 *et. seq.* (1970) (WL).

⁸⁶¹ *Türedi et. al. v. Coca-Cola et. al.*, *supra* note 856 at para. 122-23.

⁸⁶² *Consumer Protection From Deceptive Acts And Practices*, N.Y. C.L.S. Gen. Bus. § 349 (Matthew Bender 2006) (Lexis).

⁸⁶³ *Türedi et. al. v. Coca-Cola et. al.*, *supra* note 856 at para. 167.

on TNCs' activity harming the safety and health of overseas citizens remain generally untested in courts.

In the author's view, these developments reflect less dissatisfaction with the results of traditional foreign direct liability causes of action than increased understandings of the nature of harms occurring. In recent years, the highest judicial forums in the United Kingdom and the United States directly addressed core issues relating to foreign direct liability claims and in each instance expanded or narrowly preserved opportunities for redress by overseas citizens. Where foreign direct liability lawsuits were once summarily dismissed, claims increasingly survive dismissal, and in a small but important number of cases settlements have been reached. The ongoing development of causes of action draws the attention and deepens understandings of academics, the judiciary, and the practicing bar, which fosters further testing of opportunities for redress.

Foreign direct liability claims are often viewed as efforts by overseas victims to obtain redress for injuries suffered. While this is so, this view is incomplete. The foreign direct liability suits being filed by overseas victims are supported by the efforts of advocates and legal practitioners in home state jurisdictions. In the home states, the suits represent not only efforts towards compensatory relief for victims, but also regulatory action to deter the harmful conduct of corporate citizens. Many people in the home state remain dependent upon employment opportunities and wealth generated by local TNCs and these companies are often the most visible image of the home state that overseas citizens encounter. Foreign direct liability suits send signals that home state citizens have a different vision of sustainable economic growth than the directors of TNCs who act without regard to overseas harms, and it is a vision that will not exchange short-term economic gains for the safety and health rights of people.

Pressures for access to justice and remedies for victims harmed by the overseas activities of TNCs will likely continue into the future.⁸⁶⁴ The ongoing assertion of traditional and new foreign direct liability claims reflects ongoing pressure from people to obtain access to justice and achieve accountability through legal remedies for victims whose fundamental safety and health rights are violated. Through the ongoing development of legal principles evolving in response to global conditions, existing legal space can be claimed and expanded to achieve regulatory effects through private law actions in the host states of TNCs.

CONCLUSION

This thesis has been concerned with the increasing problem of global injury and how activity occurring through global trading and investments that causes injury might come to be regulated through private law actions. Globally, traditional injuries from traumatic events are increasing as a leading cause of death and disability, as is injury resulting from exposure to environmental conditions. Research indicates that such trends are expected to continue in the decades to come. Moreover, in nations with developing economies injury exacts a greater burden. In such nations, communicable diseases are anticipated to decrease as a percent of the burden of premature death and disability from forty-one percent to seventeen percent by the year 2020.⁸⁶⁵ Over the same period, noncommunicable disease, often caused by environmental exposures, and more traditional-type injuries are forecasted to climb from fifty-seven percent to eighty-two percent of the total burden.⁸⁶⁶ Injuries are caused by situations that create the exposure of individuals to agents and hazards in contexts that create the potential for harm. The economic conditions that shape the environments in which people live and work is a significant context within which injury events occur.

The exchange of goods, services and investments across borders has increased dramatically in recent decades and is a central factor in the economic development of newly industrializing nations.⁸⁶⁷ Like corporate activity at the domestic level, international trade carries with it potentially beneficial and potentially harmful consequences. Increased trade and investments across borders introduces new goods and services into overseas homes, communities, and workplaces, often with positive results. The successes of liberalized trade, however, should not shield one's eyes to potential harms. Introduced into new environments, goods and services carry potential hazards, which can cause devastating injuries, illnesses, and fatalities. Evidence suggests that these harms are occurring in the overseas communities and workplaces where corporations locate facilities and transfer their products. It will be years, if ever, before scholars can calculate whether the benefits of world trade outweigh the harms. Moreover, cost-benefit calculations often mask important social

⁸⁶⁴ Sarah Joseph, Corporations and Transnational Human Rights, *supra* note 219 at 151.

⁸⁶⁵ Christopher J. L. Murray & Alan D. Lopez, eds., *The Executive Summary of the Global Burden of Disease and Injury Series* (Cambridge, MA: Harvard School of Public Health 1996) at 37, online: Harvard School of Public Health <<http://www.hsph.harvard.edu/>>.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ See WHO, Global Strategy *supra* note 195 at 13.

choices. Injury prevention is more than a risk-benefit analysis, no matter how diligently planned and executed at corporate headquarters or in the central offices of government. Injury prevention requires ethical and moral choices, informed by economics and other disciplines, but never subject to them.

Transnational corporations have long developed the ability to inspect, monitor, and enforce standards in overseas facilities to ensure that workers' skills, production methods, and plant equipment are capable of consistently producing end-use services and goods that meet or exceed the standards of regulators and consumers in the markets of developed economies where those services and goods are consumed.⁸⁶⁸ Put another way, TNCs demand and expect no double standards between the quality of services and goods produced from workers between their overseas facilities and home state facilities. Yet, in the realm of safety and health, TNCs too often fail to expect and ensure equal conditions of safety and health between facilities operating overseas and those in home states.⁸⁶⁹ TNCs have developed sophisticated methods to ensure that overseas suppliers meet first world standards in the quality of their services and goods. Yet few TNCs seek to ensure that the supplied services and goods were not produced under abhorrently injurious conditions violating workers' basic human rights. The challenge for those concerned with globalization and safety and health is to develop meaningful mechanisms that close the gaps existing between the quality of overseas services demanded by TNCs, and the safety and health impacts produced by TNCs in overseas jurisdictions.

The science of injury prevention has come to recognize that injuries are generally caused by people's exposure to energy agents and hazards that carry the potential to harm. Injuries are prevented by action that eliminates and minimizes opportunities for exposure, and by further action that seeks to minimize the extent of injury when harmful exposures occur. In national arenas, safety and health strategies to prevent injuries take multiple complementary forms. Each strategy is generally directed to an overall goal of eliminating and minimizing harmful agents and hazards, isolating harmful agents and hazards from environments where people will be exposed to them, and training and informing people of

⁸⁶⁸ See generally, Charles Sabel, Dara O'Rourke & Archon Fung, *Ratcheting Labor Standards for Continuous Improvement in the Global Workplace*, Social Protection Discussion Paper Series No. 0011 (Washington, D.C.: The World Bank, 2000) at 8-9, online: The World Bank <<http://web.worldbank.org/>>.

⁸⁶⁹ Barry Castleman, *Product Stewardship and the Migration of Industrial Hazards*, *supra* at 207.

measures they can take to avoid and minimize injurious consequences when exposure occurs. Legal regulation forms an important component of such strategies. Regulation through formal law is a necessary component of corporate regulation and effective injury prevention.⁸⁷⁰ The effectiveness of legal measures for the protection of safety and health is dependent upon the independence and stability of political and legal institutions responsible for investigating, evaluating, and enforcing regulatory actions.

At the international level, institutions have found voice to articulate human rights. Diverse commentators recognize the need for legal accountability of corporations for human rights violations. Norms expressed in human rights instruments reflect the international community's consensus concerning minimal standards of conduct for governments, corporations and persons. One such norm is a person's right to safety and health. The right expresses a reasonable expectation of safety in one's workplace, home, and community environments. The individual's right to safety and health provides the social justification for safety and health laws existing in most nations. International institutions, however, frequently lack authority to hold transgressors accountable through obligatory measures and remedial actions. As a result, when standards of conduct regarding a person's right to safety are violated, people are often without recourse to an international forum to protect those rights. The protection of safety and health rights in the context of global trade and investment is explicitly or de facto delegated to national institutions. National institutions however exist in uneven stages of development, and the regions where citizens suffer disproportionate numbers of injury often possess critically underdeveloped regulatory institutions. As a consequence, the home states of TNCs are an important forum for near term strategies to protect people's safety and health in the context of cross border business activity and, as argued in this thesis, private law actions are an important component of such strategies.

Recognition of the existing regulatory gaps and the potential of private law is not to argue for the continued underdevelopment of international public law. Public law measures are needed and with effort may be developed in the future. Public law and private law measures complement one another. Neither obviates the need for the other. There is no single existing regulatory model, or any model that has been conceptualized to date, that will obviate the need for complementary measures in various forms. The outlines of

⁸⁷⁰ See generally, OECD, Corporate Responsibility, *supra* note 23 at 27.

international and regional public law strategies for injury prevention may be taking shape. European Union measures binding all member states and efforts of the Caribbean Community and Common Market are examples of regional initiatives that may serve as a global model or a web of interlocking regional models for public law regulation to control potentially harmful consequences of global trade and investment. Through the emergence of a multifaceted approach to the normative and legal structures protecting safety and health, a comprehensive web of global injury prevention may emerge. In the present though, cross border harms remain systematically under regulated by international or regional public law measures.

Recognition of the problems of host state regulatory institutions, agencies, and courts is also not to argue that such institutions can or should be sidelined in reaching solutions to the problem of controlling the harms of international trade and investment. Rather, it is to argue that the world community move beyond the knowing charade that presently exists. It is to argue for the continued development of host state institutions and to argue for complementary action in support of their missions. It is also to argue that people's safety and health deserves protection now as well as in the future when such institutions may come to operate effectively. It is to recognize further that we live in a global community where, in the context of international trade and investment, few harms are truly local and existing solely within the interests of a single governing authority. It is to argue that the nation where the wrongdoer resides and undertakes a course of activity causing harms to others 'over there' has as much an interest in regulating that conduct as the nation where harm alights. In these contexts both nations possess important regulatory interests and neither is nor should be subordinate to the other. Private law actions in the home states of TNCs is an important avenue through which home states can realize their interests in deterring potentially harmful activity undertaken by local corporations.

A number of private law cases have achieved success both in the recognition and exercise of jurisdiction in home states and in obtaining settlements for injured victims. Settlements have been reached in ATCA and TVPA suits and numerous cases remaining pending before United States Courts. The Bhopal litigation conditioned dismissal upon Union Carbide agreeing to accept jurisdiction in Indian courts, which despite deficiencies in

the amount and distribution of the award, led to a settlement with the defendant.⁸⁷¹ DBCP plaintiffs in *Dow Chemical Co. v. Castro Alfaro* secured settlement against multiple defendants after filing suit in the United States and suits against remaining defendants continue to be litigated in home state courts.⁸⁷² In *Lubbe*, plaintiffs reached settlements with the defendants before trial and in the *Thor Chemicals* cases, South African workers obtained settlements after filing suit in English courts.⁸⁷³ Likewise in *Dagi v. Broken Hill Properties* settlements were reached. Though settlements were comparatively small in relation to plaintiffs' damages, in each of these matters, defendants were, in some measure, held accountable for harms caused. Through such accountability these corporations and others may begin to internalize more of the social costs of activity harmful to safety and health.

While certain successes in private law litigation have been achieved, the lack of suits proceeding to trial on their merits highlights that foreign direct liability is still a project in development. Overcoming jurisdictional and forum non conveniens barriers are the first steps to achieving home state liability. Other legal doctrines impose further barriers. Conflict of law issues further complicate potential suits and can act as a barrier to attaining justice even where home state jurisdiction is exercised. Parent corporations seek to isolate themselves from liability through subsidiary and contractual relationships, necessitating further development of doctrines permitting corporate veils to be pierced.⁸⁷⁴ Causation and remoteness doctrines have also barred suits surviving jurisdictional challenges.⁸⁷⁵

Beyond the impediments of various existing legal doctrines, the costs of transnational litigation are high. The uncertainty of recovery, costs of processing cases, coordination problems across borders, and other issues suggest that many actions might not be brought.⁸⁷⁶ Suits are expensive to investigate and litigate necessitating that redress is only likely to be sought where injuries are widespread and at their most tragic. Many injuries, devastating to victims, but too small to overcome the costs inherent in bringing suit will remain without redress until host state legal systems can provide effective remedies. Other

⁸⁷¹ Marc Galanter, *The Transnational Traffic in Legal Remedies*, *supra* note 558 at 148-149.

⁸⁷² See Rick Kennedy, "Fruit of the Poisonous Tree" *Dallas Observer* (10 March 2005), online: Dallas Observer <<http://www.dallasobserver.com/>>.

⁸⁷³ See Halina Ward, *Legal Issues in Corporate Citizenship*, *supra* note 629 at 14.

⁸⁷⁴ See Richard Meeran, *Liability of Multinational Corporations*, *supra* note 796 at 252.

⁸⁷⁵ See *Republic of Guatemala v. Tobacco Institute*, 249 F.3d 1068 (D.C. Cir. 2001) (WL) (Affirming dismissal of actions brought by Guatemala government in *parens patriae* on behalf of citizens for costs imposed by tobacco illnesses).

⁸⁷⁶ Robert Wai, *Transnational Lifftoff*, *supra* note 221 at 273.

injuries may simply pass without entering international information channels, such that legal representation is never sought.

Despite legal and practical barriers, private law liability possesses significant potential to spur and complement a developing net of protection for people's safety and health rights. At the international level, human rights law has struggled to find avenues for holding TNCs accountable to victims, and comprehensive international regulation to protect safety and health rights remains in conceptual stages. By comparison, international treaties establishing civil liability exist and serve as a model for future treaties. Alien Tort Claims Act legislation vests injured parties with certain rights to proceed in court, and expanded legislation has been proposed in three leading common law jurisdictions. Tort law is well-developed and has a long history of adapting to meet changing economic conditions and social values. The existing mechanisms of private law liability serve important regulatory functions in the present and can adapt alongside changes in the global economy to meet the scale of harms occurring both now and in the future.

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