

ARTICLES

**TWO DIMENSIONAL HARD-SOFT LAW THEORY AND THE
ADVANCEMENT OF WOMEN’S AND LGBTQ+ RIGHTS
THROUGH FREE TRADE AGREEMENTS**

Raj Bhala and Cody N. Wood***

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*Brenneisen Distinguished Professor, The University of Kansas, School of Law; Senior Advisor, Dentons US LLP; Monthly Columnist, “On Point,” BloombergQuint (India), www.bloombergquint.com; http://en.wikipedia.org/wiki/Raj_Bhala.

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**Associate, Dentons U.S. LLP, Kansas City, Missouri, J.D., University of Kansas School of Law, 2017.

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I. FTAS AND WOMEN'S AND LGBTQ+ RIGHTS

A. *Argument*

What should free trade agreements (FTAs) say about gender, sexual orientation, and gender identity? No longer is “nothing” the only answer. The *Comprehensive and Progressive Agreement for a Trans Pacific Partnership (CPTPP)* and the *United States-Mexico-Canada Agreement (USMCA)* now discuss the rights of women and Lesbian, Gay, Bisexual, Transgender, Questioning, and Other (LGBTQ+) persons. They do so in Articles 23.4 and 23.9, respectively.¹ But, these provisions are soft law.

These Articles ought to be strengthened to advance women's and LGBTQ+ rights. That is, we argue gender, sexual orientation, and gender identity should be effectively addressed through hard law legal structures using hard law language that incorporates empirical insights.

Increased openness to trade and foreign direct investment (FDI) are reliably and positively associated with increased scores on the United Nation's Gender Equality Measure (GEM) and Gender Development Index (GDI).² Countries whose trade and FDI constitute greater percentages of their GDP tend to have higher GEM and GDI scores than countries with inward-looking economies. Free trade, it would seem, is good for women.³ We seek to show how free trade, effected through FTAs, may be made even better for women, as well as for LGBTQ+ persons.

B. *Inspirations*

One inspiration for this argument comes from Down Under. New Zealand's Minister of Trade and Environment, David Parker, correctly states: “It's not fair to rely upon trade to cure *all* of the world's environmental problems. But it is fair to ask if trade agreements can *help*.”⁴ The same point

¹ See Comprehensive and Progressive Agreement for a Trans Pacific Partnership art. 23.4, Mar. 8, 2018 (available at the official depository), <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources> [hereinafter TPP]; United States-Canada-Mexico Agreement, Can.-Mex.-U.S., Nov. 30, 2018, art. 23.9, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USCMA] [hereinafter all citations to these Articles are to the sources listed in this footnote, unless otherwise indicated].

² See David L. Richards & Ronald Gellenny, *Women's Status and Economic Globalization*, 51 INT. STUD. Q. 4, 867 (2007).

³ *Id.*

⁴ Quoted in Murray Griffin, *Trade Could Drive Environmental Commitments, New Zealand Says*, BLOOMBERG ENV'T (May 29, 2018), <https://www.bna.com/trade-drive-environmental-n57982093014/> (emphasis added).

applies to women's and LGBTQ+ rights. The fact that trade cannot empower all women and all LGBTQ+ persons in all dimensions of life does not mean FTAs should exclude obligations that would help them participate more fully in import-export businesses. Doubtless, Mr. Parker's boss, Jacinda Ardern—the third female Prime Minister of New Zealand—agrees. Her government signed *CPTPP* in January 2018, staying in this deal with 10 other Asia-Pacific nations, a year after U.S. President Donald J. Trump withdrew America from its predecessor agreement, the *Trans Pacific Partnership (TPP)*.⁵ In doing so, President Trump took America out of the first FTA in human history to incorporate a provision on women's rights. So, a second inspiration for our argument is that provision—Article 23.4 of the *CPTPP*.

A third inspiration for this argument comes from America's neighbor to the North. Thanks to Prime Minister Justin Trudeau, who took office in 2015, Canada insists on social clauses in its FTAs.⁶ Canada successfully negotiated for the inclusion of Article 23.9 in the new version of the *North American Free Trade Agreement (NAFTA)*, *USMCA*, and in September 2018 the United States and Mexico agreed to it and the overall deal.⁷ *USMCA*, thus, is the first

⁵ *CPTPP* is sometimes called "*TPP 11*," reflecting the fact that the text of the FTA is identical to that before the United States infamously withdrew in January 2017, leaving the remaining eleven *TPP* parties (These two acronyms are used interchangeably herein). Those parties suspended twenty-two provisions, most of which relate to intellectual property (IP), and which had been included at the insistence of the United States. See Raj Bhala, *TPP Objectively: An Interdisciplinary Analysis 2d* (forthcoming 2019) (unpublished manuscript at 753-63) (on file with author) [hereinafter, *TPP Objectively*]. *CPTPP* entered into force on December 30, 2018, 60 days after ratification by the sixth party, Australia; the first five parties being Mexico, Japan, Singapore, New Zealand, and Canada. As to the other five parties (Brunei, Chile, Malaysia, Peru, Vietnam), they neither benefit from the rights under *CPTPP* nor assume its obligations until they ratify it under their domestic legislative procedures. Matthew Brockett, *Pacific Trade Pact Abandoned by Trump Officially Set to Kick In*, BLOOMBERG (October 30, 2018), <https://www.bloomberg.com/news/articles/2018-10-30/pacific-trade-pact-abandoned-by-trump-officially-set-to-kick-in>; *In Big Win for Japan, CPTPP to Start at Year's End After Australia Ratifies Pacific Trade Pact*, THE JAPAN TIMES (Oct. 30, 2018), www.japantimes.co.jp/news/2018/10/31/business/big-win-japan-cptpp-start-years-end-new-zealand-ratifies-pacific-trade-pact/#.W9tX9y-ZP2U; Janyce McGregor, *Pacific Rim Trade Deal to Kick in Dec. 30 Including Canada, Australia*, CBC NEWS (Oct. 31, 2018), www.cbc.ca/amp/1.4885344.

⁶ See Joanna Smith, *Trudeau Wants To Include a Gender Chapter in the New NAFTA*, THE STAR (Nov. 26, 2017), www.thestar.com/news/canada/2017/11/26/gender-chapters-in-trade-deals-could-become-standard-canadians-argue-in-nafta-negotiations.html.

⁷ The *USMCA* also is referred to as "*NAFTA 2.0*," that is, the new version of the *North American Free Trade Agreement* (the two acronyms are used interchangeably herein). Negotiations were concluded on September 30, 2018 to update *NAFTA 1.0*, which had been in force since January 1, 1994. See Raj Bhala, *International Trade Law: A Comprehensive Textbook* (forthcoming 2019) (unpublished manuscript) (on file with author) [hereinafter, *International Trade Law Textbook*]. The three *USMCA* Parties—America, Canada, and Mexico—signed the deal on November 30, 2018. See Josh Wingrove & Bruce Baschuk,

FTA, to which America is a party, that includes a provision not only on women's rights, but also on LGBTQ+ rights. Succinctly put, New Zealand and Canada have seized the opportunity FTAs present to help two suffering groups that are otherwise disadvantaged from enjoying the full economic benefits these agreements are meant to provide.

That they are right to do so is a fourth inspiration; namely, these two significant trading nations have highlighted the problem of discrimination in their international commercial relations. Unfortunately, reliable, comprehensive global survey data concerning discrimination against LGBTQ+ persons is lacking. But it is reasonable to infer from the plethora of global data concerning the plight of women that LGBTQ+ persons may be afflicted by similar, or even worse, discrimination. Anecdotal evidence abounds (including informal discussions by the authors with colleagues and friends overseas). And, in many countries, homosexuality remains a criminal offense punishable by imprisonment or even death.⁸ That is especially the case in many Islamic law (*Shari'a*) jurisdictions, where homosexual behavior is categorized as a *haqq Allah* (claim of God) offense that triggers a *hadd* (limit) punishment of flogging.⁹ The data concerning discrimination against women is stark. Across 144 countries ranked by economic opportunities, education, health, and political engagement, women have 68% of the chances and positive outcomes of men.¹⁰ This gender gap, which worsened between 2016 and 2017, is estimated to take 100 years to close across these four areas.¹¹ Gender parity is most skewed with respect to the economy: it is estimated to take 217 years before women, globally, are equally represented in the labor market and earn the same amount as men.¹² Worldwide, women hold unpaid or lower paid positions in disproportionately high numbers, and hold highly-paid senior

Trump Reviewing Tariffs on Canada Steel and Aluminum, Craft Says, BLOOMBERG (Oct. 26, 2018), <https://www.bloomberg.com/news/articles/2018-10-26/trump-reviewing-tariffs-on-canada-steel-and-aluminum-craft-says>. It enters into force after it is ratified under the domestic procedures of each party.

⁸ See, e.g., *U.S. Warns its Citizens in Tanzania before Anti-Gay Crackdown*, NBC NEWS (Nov. 4, 2018), <https://www.nbcnews.com/feature/nbc-out/u-s-warns-its-citizens-tanzania-anti-gay-crackdown-n931066> (reporting that under Tanzanian law, "a conviction for having 'carnal knowledge of any person against the order of nature' could lead to a sentence of up to 30 years in jail" and that "[h]omosexuality remains taboo across much of Africa and gay people face discrimination or persecution, with rights groups often reluctant to speak publicly in defense of gay rights").

⁹ See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*SHARI'A*) (Carolina Acad. Press, 2d ed., 2016) [hereinafter, UNDERSTANDING ISLAMIC LAW].

¹⁰ See *Women Won't Have Equality for 100 Years—World Economic Forum*, BBC NEWS (Nov. 2, 2017), www.bbc.com/news/world-41844875 (discussing a World Economic Forum report) [hereinafter, *Women Won't Have Equality*].

¹¹ *Id.*

¹² *Id.*

positions in disproportionately low numbers.¹³ And, gendered salary differences infect many jobs that both sexes occupy. Unsurprisingly, the Nordic countries top the ranking for best overall gender parity, while countries across the Middle East and North Africa are at the bottom of the Global Gender Gap Index.¹⁴ Rwanda is a notable exception: it ranks fourth, and this happy ranking at least correlates with having the highest share of women in the legislature of any country in the world—60%.¹⁵ In the United States, which overall ranks a poor 49th (falling between 2016 and 2017), the gender income gap worsened in the ten years from 2008 to 2017, and female political empowerment (ranking 96th in the world) is at its lowest level in a decade.¹⁶

More than half of the children in the world—1.2 billion kids—are at risk of poverty, conflict, and/or discrimination against girls.¹⁷ Among these 1.2 billion kids, 153 million are cursed by all three plagues, and “575 million girls live in countries where discrimination against women is common.”¹⁸ Child labor, forced marriage, malnutrition, pre-mature motherhood, and under-education rob girls of their childhood, and differentiate countries on an “End of Childhood” Index.¹⁹ Of the 175 countries ranked eight of the bottom ten are in West or Central Africa, yet some developed and emerging nations have little to brag about: the U.S. ranks 36th, Russia 37th, and China 40th.²⁰ Singapore is the model, ranking first, with Slovenia second, Norway and Sweden tied for third, and Finland fifth.²¹

The final inspiration for the argument is pragmatic. Legal barriers inhibit the economic potential of women and LGBTQ+ persons, and thus the economic potential of the countries in which they live. Indeed, 2.7 billion women around the world are legally restricted from the same occupational choices as men.²² Countless LGBTQ+ persons are inhibited in the labor force, through, for instance, underemployment, constrained by fear, depression, or other maladies brought on by a discriminatory paradigm that is difficult to change endogenously.²³ Suppose strong FTA provisions to enhance women’s and

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Save the Children Report Says 1.2bn Children at Risk*, BBC NEWS (May 30, 2018), <https://www.bbc.com/news/world-44307402>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See *Women, Business and the Law 2018*, WORLD BANK (2018), <http://pub-docs.worldbank.org/en/999211524236982958/WBL-Key-Findings-Web-FINAL-2.pdf>.

²³ Sejal Singh & Laura Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, CTR. FOR AMERICAN PROGRESS (May 2, 2017), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widesp>

LGBTQ+ rights are negotiated, drafted, and implemented. This exogenous change can help close the gender and sexual preference gap by changing the legal environments in favor of helping women get jobs and start businesses. Wholly apart from the moral justification for pursuing this opportunity, there is a pragmatic one. Closing the gender gap alone could add statistically significant increases to the GDPs of the U.S. (\$1.75 trillion), China (\$2.5 trillion), France and Germany (\$300 billion each), and the United Kingdom (\$250 billion).²⁴ Simply put, advancing women's and LGBTQ+ rights through FTAs is smart macroeconomic policy.

C. *Three Steps*

"Hard" and "soft" law is a nomenclature sometimes employed to categorize international law that affects open-economy macroeconomics. In Part II, we scrutinize previous attempts at defining the terms "hard" and "soft" law. This discussion provides the essential background for our argument, which proceeds in three steps. First, Part III, develops a new theory of "soft" international law and shows that "hard" and "soft" law have two dimensions, structural and textual. That is, the type of international law—the vehicle for conveying rules—can be "hard" or "soft." And, the language—the specific English grammatical formulations and diction—used to articulate those rules can be "hard" or "soft." Hence, we dub our approach "Two Dimensional Hard-Soft Law Theory," and summarize it in a simple two-by-two matrix.

As to the first dimension, we emphasize not all "hard" law instruments are the same, nor are all "soft" law ones. They fall on a continuum of "hardness" and "softness." Of particular importance is the distinction between an instrument that qualifies as "hard" law because it takes the form of a treaty or other international agreement, yet has no dispute settlement mechanism, versus such an instrument with a built-in set of procedures to adjudicate disputes. Likewise, the second dimension is not a binary choice between "hard" and "soft." Rather, textual language can be manipulated to create more, or less, binding obligations. Much depends on diction, especially with respect to verbs.

Second, Part IV applies Two Dimensional Theory to *CPTPP* Article 23.4 and *USMCA* Article 23.9 and shows how each is situated at an intermediate point along the continuum between "hard" and "soft" law. On the structural dimension, *CPTPP* Article 23.4 is housed in a hard-law instrument, an FTA, with an enforcement mechanism and the same is true of *USMCA* Article 23.9.

However, regarding the textual dimension, we analyze the text of *CPTPP* Article 23.4, and show it relies too heavily the grammatical constructions and

read-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/.

²⁴ *Women Won't Have Equality*, *supra* note 10 (citing a World Economic Forum report).

diction of “soft” law. We perform the same textual analysis of *USMCA* Article 23.9 and conclude that it also suffers from softness in its key verbs and phrases. Our close reading of *CPTPP* leads to the conclusion that the ten nations that have or are in the process of ratifying *CPTPP*, and indeed any nation contemplating a new, or revising an old, FTA, should consider leveraging Article 23.4 into a series of “hard” law rules. We offer a similar conclusion with respect to *USMCA* Article 23.9. In terms of trade jargon, we call for “*CPTPP-USMCA Plus*” rules, *i.e.*, rules that go beyond the current ones in the texts of the Trans Pacific Partnership with its 11 Parties (*TPP 11*) and *NAFTA 2.0*.

Third, Part V follows up on the conclusion that *CPTPP* Article 23.4 and *USMCA* Article 23.9 could be made more “hard.” We argue for these harder provisions, “*CPTPP-USMCA Plus*” rules, based on empirical data collected from around the globe by the World Bank. Culling from this data, we develop four topics to measure the progress of women engaged in import, export, and/or foreign direct investment (FDI) transactions: Education, Business Capital, Social Capital, and Legal Protection. We propose specific, “hard” law rules for each of these variables that we believe should be considered for *CPTPP*, *USMCA*, and any other *FTA*. Doing so would make women’s and LGBTQ+ rights “Hard-Hard” law obligations, as they would be housed in binding international agreements and written in binding terms.

D. Two Assumptions

What is the general economic context in which women and LGBTQ+ persons are situated in the eleven countries that are party to *CPTPP* and the three countries that are party to *NAFTA 2.0*? Asked more precisely, is discrimination against women and LGBTQ+ persons in the labor market a problem that needs fixing in the FTA parties? There are 12 such FTA party countries:²⁵

- Australia(*CPTPP* Party)
- Brunei(*CPTPP* Party)
- Canada(*CPTPP* and *NAFTA 2.0* Party)
- Chile(*CPTPP* Party)
- Japan(*CPTPP* Party)
- Malaysia(*CPTPP* Party)
- Mexico(*CPTPP* and *NAFTA 2.0* Party)
- New Zealand(*CPTPP* Party)

²⁵ Note Canada and Mexico qualify as *NAFTA 2.0* and *TPP 11* Parties, while the United States is covered in the first FTA, and potentially could re-join the second one. The same question can be asked of other countries based on their potential candidacy for *CPTPP*. These countries are; China, India, Indonesia, Korea, Philippines, Taiwan, Thailand, and the United Kingdom. All such countries have expressed an interest in joining *TPP*. See *TPP Objectively*, *supra* note 5, at 326-48, 780. However, extending coverage to *CPTPP* candidates is beyond the present scope.

Peru(*CPTPP* Party)
Singapore(*CPTPP* Party)
United States(*NAFTA 2.0* Party)
Vietnam(*CPTPP* Party)

We assume the answer to this question is affirmative, *i.e.*, the labor market position of women and LGBTQ+ persons should be improved. We offer a few empirical points about discrimination against women and LGBTQ+ persons in the aforementioned existing FTA Parties and candidate countries. However, a comprehensive analysis is beyond the scope of our present work to prove this assumption.

We also assume the answer to a second question is affirmative, namely, are FTAs an appealing tool to help fix the problem? Our three-step argument is built on this assumption. We regard it as a reasonable one, because of the reality that all twelve FTA parties already operate on this assumption. They would not have agreed to include Article 23.4 in *TPP*, or Article 23.9 in *NAFTA 2.0*, if they thought such provisions in FTAs were pointless.

II. CRITICAL REFLECTIONS ON “HARD” VERSUS “SOFT” LAW

A. *Unsettled Public International Law Scholarship*

International arrangements are the products of time and effort that are of some consequence to the broader international community. FTAs are an example. *TPP* took eight years to negotiate (2008-2015), and *NAFTA 1.0* took thirteen months to renegotiate (August 2017-September 2018).²⁶ *CPTPP* and *USMCA* are designed to affect importers, exporters, and investors across the Asia-Pacific and North American regions that, on balance, will prove mutually beneficial in keeping with standard free trade theory, namely, net social welfare gains thanks to increased consumption opportunities and expansion of output through efficient allocation of factors of production.²⁷ But, not all of the myriad rules in the texts, annexes, appendices, and side letters to *CPTPP* and *USMCA* are equally authoritative. Some are unmistakable and binding commands. Others are ambiguous and unenforceable suggestions. The broad distinction between the two baskets of rules is one reason why terms like “hard” and “soft” law are used in the discourse of public international law. The terms are the product of a discursive necessity to package complex relationships into meaningful, yet easily digestible, concepts.²⁸

²⁶ See *TPP Objectively*, *supra* note 5, at 27-28, 779.

²⁷ See *International Trade Law Textbook*, *supra* note 7, vol. 1, ch. 6.

²⁸ See, e.g., Jan Klabbbers, *The Undesirability of Soft Law*, 67 *NORDIC J. INT'L. L.* 381, 385 (1998) (discussing how “soft law” arises as the natural category of authoritative sources when it cannot be categorized under the predicate of “hard law”).

Unfortunately, the discourse in public international law about “hard” and “soft” law typically proceeds without much attention to international trade law, let alone FTAs and their details. Rather, that discourse about “hard” and “soft” law is comfortable at the convergence of international relations theory and law in general. We are told that whether a rule is “hard” law, “soft” law, or something in between is a product of its “functional value and the preferences of domestic political actors.”²⁹ That is both true and obvious, and there is little from such anodyne remarks of use to the real world in which international traders, lawyers, government officials, and judges operate.

Moreover, the conventional discourse on “hard” versus “soft” law carries with it epistemological baggage. Conceptions of the distinction between the two baskets of rules often are subsumed under, or subordinate to, concerns about the best approaches to understanding public international law. These paradigms vacillate among:

(1) Positivism (*i.e.*, broadly, the assertion that there is no necessary connection between law and morality),³⁰

(2) Rationalism (the doctrine that holds states are sovereign and self-interested, thereby defeating any possibility of “binding” international law),³¹

²⁹ Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1410 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) [hereinafter, *Book Review*].

³⁰ Positivism, generally, focuses on the distinction between moral and legal rules that develop in the “sociopolitical process...dominated by state actors operating in a communicative realm.” Martin Totaro, *Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development*, 48 VA. J. INT’L L. 719, 724 (2008). See also Gregory C. Shaffer & Mark A. Pollack, *Hard Law and Soft Law: What Have We Learned?*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: INSIGHTS FROM INTERDISCIPLINARY SCHOLARSHIP 198 (Jeffrey L. Dunoff & Mark A. Pollack eds., Cambridge Univ. Press 2012) [hereinafter, Shaffer & Pollack Research Paper] (explaining that “Positivist legal scholars generally adopt a simple binary binding/non-binding divide to distinguish hard law from soft law,” whereby “what makes law distinctive with respect to other norms is its claim to bind actors, to impose legal obligation, and the fundamental distinction between hard and soft law is the distinction between legally binding and non-binding commitments,” and that “taking the legal positivist argument to its logical conclusion, some scholars go further and reject the very concept of soft law . . . because, from the internal perspective of a judge or legal advocate, law is by definition ‘binding,’” though also noting that “[o]ther legal scholars remain open to the idea that non-binding agreements may retain some characteristics and effects of law, but generally agree that the fundamental distinction between hard and soft law is determined by its binding or non-binding nature.”).

³¹ Rationalism extends from the international relations theory of realism, which characterizes the world as existing in a constant state of anarchy and shifting power relations. See MUSARAT AMIN ET AL., *REALISM—DOMINATING THEORY IN INTERNATIONAL RELATIONS: AN ANALYSIS* (2011).

(3) Constructivism (which focuses on the actual consequences of State action and behavior as opposed to examining what is legal or not),³²

(4) Liberalism (which sees states acting according to self-interest, as in Rationalism, but at the behest of sub-state rather than state actors),³³ or

(5) Some idiosyncratic combination of the first four approaches.³⁴

As the public international law community delves ever-further into these paradigms, the international trade law community may be forgiven for feeling ever-more perplexed as to what the various approaches, however intellectually appealing each may be, mean for cross-border trade in goods and services, and the protection of FDI and IP. Lacking in the discourse of the first community is that for which the latter community yearns: a reasonable, working definition of “hard” versus “soft” law that will help navigate the rules in FTAs to which their trade negotiators have agreed. What “must” be followed? What “should” be followed?

Public international law has yet to settle on an all-encompassing distinction between the concepts of “hard law” and “soft law,” much less a nuanced understanding for the context of international trade law. The reasons for this lacuna range from arguments that there is no such thing as “soft law,”³⁵ to arguments that the distinction is mostly meaningless.³⁶ In between these two

³² See, e.g., Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000).

³³ See *Book Review*, *supra* note 29, at 1432-33; Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000). See also Shaffer & Pollack Research Paper, *supra* note 30, at 199 (observing with respect to Rational Institutionalism that “[i]nternational relations scholars . . . frequently express skepticism about the binding nature of international law, because international law tends to be soft in comparison with domestic law”).

³⁴ The major schools of thought consider “hard” and “soft” law concepts as complementary and interactive. See Shaffer & Pollack Research Paper, *supra* note 30, at 208 (stating “non-binding soft law can lead the way to binding hard law, and binding hard law can subsequently be elaborated through soft-law instruments”). But, there exists a comprehensive international relations argument that both “hard” and “soft” law can be used by states as antagonists (wherein one state might see it as advantageous to use “soft” law to undermine its “hard” law obligations). See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707 (2010) [hereinafter, *Hard versus Soft Law*] (discussing this potential antagonism); Shaffer & Pollack Research Paper, *supra* note 30, at 209 (arguing “distributive conflict provides states (and other actors) with the incentive to use both soft and hard legal provisions strategically and often antagonistically to shape and reorient international law in line with their substantive preferences, while the existence of legal fragmentation and regime complexes offers them the opportunity to do so at a relatively low cost.”).

³⁵ See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 586 (2005) (stating “there is no such thing as ‘soft law,’” *i.e.*, it is a category without an analytic basis).

³⁶ See, e.g., *Hard versus Soft Law*, *supra* note 34, at 713 (noting that modern “Constructivist” legal scholars view the law based on the behavioral and functional consequences for

poles is the colloquial interpretation that “hard law” is a rule that is binding, while “soft law” is law that is non-binding.³⁷

B. Precise, Binding, and Articulate Variable

In delineating “hard” from “soft” law, a simple analogy characterizes “hard” law in the international arena as having the same value and function as the laws adopted, followed, and enforced in a domestic system, such as a customs law statute in Title 19 of the United States Code. However, when the concept of “hard” law is examined through an international legal paradigm, this explanation begins to go awry.

An oft-cited definition of “hard law” describes it as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”³⁸ This definition is succinct, yet it begs the questions of what makes an obligation “precise,” and of the nature and level of “authority” needed to be “binding.” The fact that these terms of art leave much to disentangle has not escaped debate, hence competing schools of thought exist in which the essence of “hard” law is regarded differently.³⁹

To eliminate complicating factors such as state behavior, that is, issues of “authorities” that are specific to individual countries, we might examine the construction and foundation of a particular legal regime formed around a particular type of legal agreement, such as a treaty and its corresponding international body. Such an examination would determine the degree to which the agreement establishes an institutional infrastructure to resolve disputes arising out of its terms. That is, examining the historical and institutional culmination of an international agreement, codified in writing, may help explain the degree

international institutions). *See also* Shaffer & Pollack Research Paper, *supra* note 30, at 199 (explaining that “Constructivist scholars . . . focus less on the formal terms of law as understood at a single point of time, such as the enactment stage, and more on law as part of a process of social interaction which can shape shared social understandings of appropriate behavior,” and noting “[m]any constructivist scholars have thus questioned the characterization of law as either “hard” or “soft,” because such characterizations focus too narrowly in the interpretation and enforcement of law by courts and fail to capture how law operates normatively as part of an interactional process over time.”).

³⁷ *Hard versus Soft Law*, *supra* note 34, at 714-15.

³⁸ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421 (2000); *See* REBECCA M.M. WALLACE, INTERNATIONAL LAW 31 (3d ed. 1997) (“Soft law is the generic term used to describe non-legally binding international instruments A requisite of soft law is that it must be in written form.”).

³⁹ Depending on the school of thought, the problem of what constitutes “law” may itself become the focus of attention. *See Hard versus Soft Law*, *supra* note 36, at 713 (describing the distinction between positivist, rationalist, and constructivist approaches to understand the development of law).

to which the purported law binds others.⁴⁰ From this apex position, articulable factors come into focus.

In particular, an international agreement or body can be articulated along four delineations: (1) the instrumentum (the formal, physical and written-down language of an agreement, which is the source of law versus other instruments), (2) obligations (the authority and mandatory nature of the language), (3) precision (accuracy and specificity of the language used to create the obligation), and (4) delegation (extent and authority of delegation given to implement and interpret the language) that are expressed by an international agreement or body.⁴¹ According to this approach, the more intensely these factors are represented, the more rigid (as in “hard”) the law is. And, consistent with this approach, the World Trade Organization (WTO) and its associated legal commitments are touted as the best example of an international legal regime that is emblematic of “hard” law.⁴²

C. GATT-WTO Law and Practical Effects

Multilateral trade law, that is, the General Agreement on Tariffs and Trade (GATT), the WTO, and many associated treaty texts, covers cross-border trade in goods, services, intellectual property (IP), and investments among the 164 WTO Member countries.⁴³ Even this coverage is not comprehensive. Topics such as competition policy, digital trade, and currency manipulation are partially or wholly excluded. Socio-economic matters are also imperfectly covered, and gender equality and LGBTQ+ protections are entirely omitted. Yet, gender and sexuality are cross-cutting phenomena that directly or indirectly relate to every international legal regime, most obviously to instruments concerning human rights, law of war, international economic and political development, and also to ones about international trade law. The entanglement of legal commitments (*e.g.*, regulating trade in farm products), treaty bodies (*e.g.*, the WTO *Agreement on Agriculture*), and organizational structures (*e.g.*, the WTO Panels and Appellate Body, which have jurisdiction over *Agriculture Agreement* cases) is called a “regime complex,” which is characterized as “an array of partially overlapping and nonhierarchical institutions

⁴⁰ Harri Kalimo & Tim Staal, “Softness” in *International Instruments: The Case of Transnational Corporations*, 42 SYRACUSE J. INT’L. L. & COM. 257, 281-82 (2014) (noting that the degree of “hardness” of a law varies with the manner in which the instrument is developed and presented).

⁴¹ *Id.* at 281-82.

⁴² Joanna Langillea, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting out Through Regional Trade Agreements*, 86 N.Y.U. L. REV. 1482, 1483 (2011).

⁴³ See generally WORLD TRADE ORG., <http://www.wto.org> (last visited March 25, 2019)(setting out the texts and listing the Members).

governing a particular issue-area.”⁴⁴ Currently, gender and sexuality have no space in the multilateral trade law “regime complex,” even though the explicit and implicit ways in which gender and sexuality are entangled in global trade suggest this complex should make space for them. Moreover, the “regime complex” jargon brings us no closer to a practical understanding of “hard” versus “soft.”

What is apparent from the jargon is that because there are complexities associated with each specialty of international law, a narrow interpretation of a “hard” law regime will fall short of capturing the full effect of international organizations (IOs) and pronouncements. It will be under-inclusive. The WTO regime has plenty of formal and precise legal obligations (such as bound tariff commitments), which are backed up by an authoritative body (the signing of the Marrakesh Agreement on April 15, 1994 by 124 nations gave the Organization substantial credence from the outset), and which are enforced by formal consequences for their violation (thanks to the *Understanding on Rules and Procedures Governing Settlement of Disputes*, or *DSU*).⁴⁵ The WTO regime also is influenced by “soft” law characteristics.⁴⁶ Examples of “soft” legal elements include ministerial declarations made at the end of biennial conferences, decisions of working councils, committees, parties, and pronouncements from other advisory functionaries that are associated with the operation of the WTO.⁴⁷ These sorts of actions undertaken by the WTO are not legally binding, yet they might be legally pertinent, and have some practical ramifications.⁴⁸ A narrow definition of what qualifies as “hard” law would cast them aside as ineffectual and irrelevant.

A practical effect that is legally relevant is probably the most minimal criterion for a rule to be considered “hard” law. Of course, defining “hard” law based on this single criterion could be regressive, in that any international decree or action may be legally relevant. In turn, the well-worn difficulty may arise, namely, when is an arrangement “legally relevant” enough to become

⁴⁴ *Hard versus Soft Law*, *supra* note 34, at 737 (quoting Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 279 (2004)).

⁴⁵ See *Marrakesh Declaration of 15 April 1994*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm (last visited Nov. 9, 2018); International Trade Law Textbook, *supra* note 7, vol. 1, chs. 18, 22.

⁴⁶ See Mary E. Footer, *The (Re)turn to “Soft Law” in Reconciling the Antinomies in WTO Law*, 11 MELB. J. INT’L L. 241 (2010).

⁴⁷ *Id.* at 247.

⁴⁸ See *id.* at 246-47. Indeed, as Professor Wallace not only identifies several such instruments, but also divides them into two categories, “legal” and “non-legal” soft law based on their issuance by an organization or individuals: “The term [soft law] embraces treaties (“legal soft law”) containing general obligations and non-binding or voluntary resolutions, statements of intent and codes of conduct produced by international and regional organizations and statements by individuals, for example groups of eminent international lawyers purporting to articulate international principles (‘non-legal soft law’).” WALLACE, *supra* note 38, at 31.

international law, as opposed to a custom or norm?⁴⁹ It has been argued that despite the degrees of formality, “formal treaties, soft law, customary international law, and international norms all operate through the same basic set of mechanisms.”⁵⁰ From this argument, which is more in line with the tenets of constructivism or rationalism, the important consideration is not necessarily the intensity of the instrumentum, obligation, and precision of the purported law, but rather the degree to which other nations internalize the positive or negative consequences of playing along with the rule. These consequences can be reputational, reciprocal, or retaliatory, but they all motivate states to take action.⁵¹

So, we can view GATT-WTO rules as the pre-eminent exemplar of international “hard” law in two distinct ways. One view sees its core existence as binding international trade law because the regime is authoritative and contains specific obligations and consequences for violating them. The alternative view sees the multilateral trading system and its rules as a power broker among nations vying with each other to make the best of their international economic situations. They must maintain their reputation, engage in reciprocally beneficial trades, and minimize hardship. Under this view, what is real is not the “law” of the WTO, but rather the underlying consequential value of one WTO Member’s action relative to another. After all, it is possible to imagine a world where all states decide it would be better for each to exist in complete autarky, leaving the WTO with little to do to stop them.

D. Rebutting Skepticism About “Soft” Law

If there is no consensus definition of “hard” law, then it follows logically that there is none of “soft” law. Some public international law sources avoid the question entirely, containing little to no discussion of the term.⁵² Others

⁴⁹ ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 9 (2008) (“The difference among these sources of legal or quasi-legal rules is a matter of degree rather than of kind.”).

⁵⁰ *Id.*

⁵¹ *Id.* There is, of course, a vast body of public international law literature on why nations do (or do not) comply with international law. *See, e.g.*, Edith Brown Weiss, *International Compliance with Nonbinding Accords*, in 29 *STUDIES IN TRANSNATIONAL LEGAL POLICY* (1997). Theories of compliance are not ripe here. Our focus is on the structural and textual dimensions of language used to create a rule to which nations are (or are not) obliged. In other words, our inquiry is antecedent to the issue of “why comply?” That issue begs the more fundamental concern, which we address: “What is the nature of the rule with which compliance is sought?” The matter of compliance with a rule arises only after that rule, in its vital dimensions, is examined and understood.

⁵² *See, e.g.*, VAUGHAN LOWE, *INTERNATIONAL LAW: A VERY SHORT INTRODUCTION* 41 (Oxford Univ. Press 2015) (observing “it is often not entirely certain when a State has broken the law,” but eschewing any reference to “hard” versus “soft” law in explaining the reasons for this uncertainty); STEPHEN C. MCCAFFREY, *UNDERSTANDING INTERNATIONAL*

embrace the concept. They note it may help resolve an impasse among countries with diametrically opposed agendas and aims.⁵³ So, they urge that “soft” law “[is] not indifferent in legal terms and deserve[s] the international lawyer’s attention,” and that “[s]uch rules of behavior must be ascertained on a case-by-case basis, depending on the will of the parties.”⁵⁴

Still others say “soft” law does not exist, that there is no intermediate category between binding law and no law.⁵⁵ For example, in raising the “distinction between treaties (legalized agreements) and agreements that are not binding under international law.”⁵⁶ Professors Goldsmith and Posner identify “[n]onlegal agreements” as including “memoranda of understanding ... joint communiqués, joint declarations ... administrative agreements, voluntary guidelines, ... arrangements ... statements or declarations of principles, ‘best practices,’ exchanges of letters ... and side letters.”⁵⁷ They acknowledge “[t]he literature usually labels nonlegal international agreements ‘soft law,’” but they “avoid this label because nonlegal agreements are *not* binding under international (or any other) law, so it is *confusing* to call them law, soft or otherwise.”⁵⁸ This skepticism—dare it be called cynicism—holds that soft law is not analytically useful for examining legal relationships between countries, because that term does nothing more than describe what in fact are either deficient contracts or political pledges.⁵⁹ When nations negotiate over issues like trade barriers or human rights, the consideration is whether the forged relationship will be of legal consequence. Focusing on any other result is merely

LAW 3 (2d. 2015) (recounting the definitions of “international law” in Section 101 of the *Restatement 3d of the Foreign Relations Law of the United States*; J. L. Brierly’s classic treatise, *The Law of Nations*, first published in 1928; and the New Haven School of the 1960s, none of which raise or deal with “hard” versus “soft” law); THOMAS BUERGENTHAL & SEAN D. MURPHY, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* (5th ed. 2013) (stating “[t]o the extent that international law is perceived as ‘law’ by the international community, it imposes *restraints* on the behavior of states and *affects* their decision-making process,” thus eliding a delineation between “hard” and “soft” law, but implying the “law” consists of rules with practical effects on deliberation and action) (emphasis added); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 534-37 (Oxford Univ. Press, 6th ed. 2003) (discussing standard-setting “non-binding” versus “binding” instruments, but eschewing the “soft”-“hard” terminology).

⁵³ WALLACE, *supra* note 38, at 30.

⁵⁴ Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 515 (1999). See also MARK WESTON JANIS, *INTERNATIONAL LAW* 55 (5th ed. 2008) (defining “soft law” as “rules which are neither strictly binding nor completely void of any legal significance”) (citing *Customary International Law*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 61, 62 (Rudolph Bernhardt ed., 1984)).

⁵⁵ See Raustiala, *supra* note 35, at 586.

⁵⁶ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 81 (2005).

⁵⁷ *Id.*

⁵⁸ *Id.* at 81-82 (emphasis added).

⁵⁹ See Raustiala, *supra* note 35, at 587.

an examination of political economy or state behavior, and not an examination of any system of law.⁶⁰

In some respects, this skepticism towards “soft” law makes a compelling argument by interpreting the deliberate negotiating positions and processes of a state. If a state crafts an agenda that is explicitly adopted into an agreement with another country replete with non-legal obligations, why should those provisions, and the agreement itself, be considered instruments of “law?”⁶¹ To the extent there is no real authoritative structure in an agreement, there is again no intention to establish any legal effect.⁶² Yet, from this intention it ought not be inferred that the instrument or its rules are pointless, and a slippery descent from skepticism to cynicism and onward to nihilism should be avoided. We utterly reject the skeptic or cynic who, “observing what he takes to be spectacular violations on every hand,” regards international law as “a pious fraud, at most a rhetorical disguise for foreign policies based upon expediency.”⁶³

We think the choice about binding-ness is not “either or,” but “both and.” Several of the instruments Professors Goldsmith and Posner identify are used in connection with FTAs, such as *CPTPP* and *USMCA*, and are binding on the FTA Parties to greater or lesser extents, depending on the factors we identify in our Two Dimensional Model below. And, we think the denial of the label “soft law” is confusing because it leaves these instruments akin to stateless, status-less, refugees. We agree, therefore, with the observation of Professor Murphy:

The traditional sources of international law do not take account of non-legally binding norms, even though such “soft law” may have important effects on the ordering of relations among international actors and, over time, on the formation of international law. State (and non-state actors) see certain advantages in developing such norms ... Despite being non-legally binding, such norms are taken seriously by state and non-state actors (they are usually regarded as at least “politically binding”), and once agreed upon may have the effect of narrowing the options that would otherwise be legally-available.⁶⁴

⁶⁰ *Id.*

⁶¹ See Kalimo & Staal, *supra* note 40, at 385 (citing Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT. L. 1075, 1081-82 (2008)).

⁶² Raustiala, *supra* note 35, at 589.

⁶³ J.G. MERRILLS, *ANATOMY OF INTERNATIONAL LAW* 1 (2d ed. 1981).

⁶⁴ SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 111-12 (2d ed. 2012) (emphasis added).

Indeed, the treatment of labor rights in FTAs is evidence in favor of this observation, and thus helps explain why an inclusive “both and” approach is a more accurate portrayal of reality, at least in international trade law, than an exclusive “either or” condemnation.

Before *NAFTA 1.0*, the inclusion of labor rights in an FTA to which America was a party was unthinkable. President George H.W. Bush negotiated side letters on these topics, which President Bill Clinton turned into *Side Agreements* to *NAFTA 1.0*. Some of the provisions were strict and binding, while others were exhortative and unenforceable. In 2001, seven years after *NAFTA 1.0* entered into force, the United States put labor rights in the core text of its FTAs, starting with its FTA with Jordan.⁶⁵ In 2018, the United States accepted enhanced labor rights provisions in the core text of *NAFTA 2.0*.⁶⁶ Cynically dismissing the humble “soft” law starting position of labor rights in FTAs ignores the positive evolution to the ever “harder” nature of those rights in America’s trade deals.⁶⁷ It also ignores the truism that “[t]here is a balance to be struck in the context of multilateral treaty negotiations between the aims of maximizing participation by states and maximizing the extent of the commitments made by parties.”⁶⁸

E. Sidestepping Jurisprudential Questions

Perhaps the reluctance to accept “soft” law as a meaningful concept is understandable. Whether international law qualifies as “law” is a centuries old debate. Broaching the question might subvert international attempts, controversial in some political circles, to affirm international law as no different from any other “law” to be followed. So, the question has been downplayed as

⁶⁵ See *Jordan Free Trade Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta>; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Jordan-U.S., art. 6, Oct. 24, 2000, 41 I.L.M. 63, <https://ustr.gov/sites/default/files/Jordan%20FTA.pdf>.

⁶⁶ TPP, *supra* note 1.

⁶⁷ The phenomenon of soft law laying the foundation for hard law is well recognized. See, e.g., WALLACE, *supra* note 38, at 32 (“Soft law is intended to mold conduct on the international scene and may become hard law.”); JANIS, *supra* note 54, at 55 (pointing out that “soft law” rules of international organizations “may in time ‘harden’ into customary international law,” and arguing “[p]erhaps the most important use of ‘soft law’ in practice has involved the development of international environmental law,” wherein various international and regional organizations have “elaborated ‘soft law’ norms which have effectively molded state behavior, yielding ‘harder’ customary international law”); VALERIE EPPS, *INTERNATIONAL LAW* 257 (5th ed. 2014) (explaining “soft law” statements “are not meant to create immediately enforceable legal rights,” but “[r]ather represent the direction in which the international community is seeking to move and may in time come to represent the underlying norms that give rise to specific binding obligations upon states.”).

⁶⁸ LOWE, *supra* note 52, at 31.

“both somewhat simplistic and not particularly meaningful.”⁶⁹ And yet, for centuries Natural Law and Positivist theorists offer competing perspectives of this project.⁷⁰ The use of the term “soft” law might undermine the integrity of international law *qua* “law,” and the efforts made to build an international rule of law among nations.⁷¹ Thus, euphemisms like “aspirational” or “non-binding” are more palatable than “soft” law, because these substitutes do not present a lexicographic threat to international legalism.

Our purpose here is not to step into this jurisprudential discourse. Our aim is to enhance women’s and LGBTQ+ rights through FTAs. Toward that end, we believe the question is sophisticated and relevant, and we confess an appreciation for the Austinian Positivist assumption that law is the command of a sovereign habitually obeyed under threat of punishment.⁷² We have previously published an argument that international trade law, carved out from the rest of international law, meets this strict definition, at least at the multilateral level.⁷³ This is thanks to the texts that emerged from the 1986-1994 Uruguay Round, one of which is the *DSU*, which create an enforcement mechanism to ensure the obligations set out in all other texts are habitually obeyed under the threat of punishment. We agree that “while the notion that international law would have anything to say about the way in which a country treated those subject to its authority may at one time have been controversial, that is *not* the case today.” Empirical facts indicate that (1) all 193 United Nations member States accept the human rights provisions of the 1945 United Nations Charter (*i.e.*, the Preamble, which “reaffirm[s] faith . . . in the equal rights of men and women,” and Articles 55-56, and 59); (2) 169 States (71 Signatories) participate in the 1966 *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; (3) 172 States (74 Signatories) participate in the 1966 *International Covenant on Civil and Political Rights (ICCPR)*; and (4) 189 States (99 Signatories) are parties to the 1980 *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*.⁷⁴

⁶⁹ MCCAFFREY, *supra* note 52, at 9.

⁷⁰ RAJ BHALA, *INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY NON-WESTERN TEXTBOOK*, ch. 1 (4th ed. 2015).

⁷¹ *See, e.g., id.* at 35-36 (discussing the definitions of “Positivism” and “Natural Law” and their relationship to international law).

⁷² *See* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832). For the modern Positivist definition of what constitutes “law,” namely, the union of primary and secondary rules (in effect, substantive rules, and rules about rules, respectively) *see* H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

⁷³ *See* Raj Bhala & Lucienne Attard, *Austin’s Ghost and DSU Reform*, 37 *INT’L. LAWYER* 651, 651-76 (2003).

⁷⁴ MCCAFFREY, *supra* note 52, at 250 (emphasis added); U.N. Charter arts. 55-56, 59; *International Covenant on Economic, Social, and Cultural Rights*, Jan. 3, 1976, 993 U.N.T.S. 171; *Convention on the Elimination of all Forms of Discrimination Against Women*, Sept. 3, 1981, 1249 U.N.T.S. 13.

Rather, our focus is on consequences—results to help people, regardless of gender or sexual preference, engaged in import, export, and FDI transactions, and socioeconomic life in general. For us, the relevant underlying assumption is not whether we toe a particular jurisprudential line as to whether international law is “law” and how to justify it as such, but whether we ask the question “what works?” We need only point out that despite the broad participation of states in the aforementioned four human rights treaties from the mid- and late-20th century, deprivations against the dignity of the human person continue well into the 21st century, and we need only recall our empirical discussion in Part I about discrimination on the basis of gender and sexual preference to show this. Therefore, in addressing “what works,” we think it is helpful to be clear-headed about “hard” versus “soft” law in theory, and empirically-justified criteria to help women and LGBTQ+ persons through FTAs in practice.

F. Recalling Reality Since 1930

The term “soft” law has been in the discourse of international law since at least 1930.⁷⁵ Though there is no single, harmonized definition of “soft” law, the term is worth using in the discourse of international trade law. Complementing the widely used definition of “hard” law (that of Abbott and Snidal, discussed earlier), there exist commonalities in approaches used to define “soft” law. The approaches endeavor to fill in nooks and crannies that disqualify a rule from qualifying as “hard” law, because that rule lacks obligation, precision, and delegation.⁷⁶ “Soft” law is any sort of measure that lacks obligation, precision, and delegation. Some examples of “soft” law measures include:

... the resolutions of international organizations, programmes of action, the texts of treaties which are not yet in force or are not binding for a particular actor, interpretive declarations to international conventions, non-binding agreements and codes of conduct, recommendations, and reports adopted by international agencies or within international conferences as well as similar instruments and arrangements used in international

⁷⁵ A.J.P. Tammes, *Soft Law*, in *ESSAYS ON INTERNATIONAL AND COMPARATIVE LAW IN HONOUR OF JUDGE ERADES* 187, 187 (1983) (noting the first documented use of the term “soft law” was by Lord Arnold D. McNair in 1930). See Arnold D. McNair, “*The Functions and Differing Legal Character of Treaties*,” 11 *BRITISH Y.B. INT’L. L.* 100 (1930).

⁷⁶ Abbott & Snidal, *supra* note 38, at 422.

relations to express commitments which are more than just policy statements but less than law in its strict sense.⁷⁷

Manifestly, from this list, many international cooperation documents used by governmental and non-governmental actors in the world trading system would be considered “soft” law. Examples include communiqués, joint statements, memoranda of understandings, and side letters.

We are confident that the nearly century-old term “soft” law is unlikely to disappear anytime soon. The existence of normative foundations for the behavior of countries, and the healthy process of questioning those foundations with a view to strengthening them—in effect, to get countries to do the right thing—convincingly makes the discussion of soft law “unavoidable.”⁷⁸ As with “hard” law, with “soft” law we are left with a necessary discussion of how different international arrangements may be evaluated on the basis of their ability to enforce compliance and shape behavior.⁷⁹

We thereby avoid discarding potentially useful rules and instruments as possible precursors to “harder” rules and instruments. To the extent “soft” law is not just some instrument lacking in its ability to create a legal obligation, it can encompass a wide range of “hortatory” obligations or ideals.⁸⁰ In describing “soft” law as international agreements that encourage forms of action by countries, the door opens to considering non-state agreements and measures as being “soft” law as well.⁸¹

III. STEP ONE: TWO DIMENSIONAL HARD-SOFT LAW THEORY

A. *Definitional Starting Points*

In moving toward a user-friendly definition of “soft” law, with a view to identifying how *CPTPP* Article 23.4 and *USMCA* Article 23.9 should be made “harder” for the benefit of women and LGBTQ+ persons, we find it helpful

⁷⁷ HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 167 (2014) (quoting Thürer, “*Soft Law*,” *MAX PLANCK ENCYCLOPEDIA*, ix, 270, para. 2).

⁷⁸ ANDREA BJORKLUND & AUGUST REINISCH, *INTERNATIONAL INVESTMENT LAW AND SOFT LAW* 43 (2012) (citing Ulrich Fastenrath, *Relative Normativity in International Law*, 4 *EUROPEAN J. INT'L L.* 305 (1993)).

⁷⁹ See Andrew T. Guzman & Timothy Meyer, *International Soft Law*, 2 *J. LEGAL ANALYSIS* 171, 222 (2010) (“nonbinding rules can have legal consequences when they shape expectations as to what constitutes compliance with binding rules”).

⁸⁰ Andrew T. Guzman & Timothy Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 *CHI. J. INT'L. LAW* 515, 518 (2009) (explaining distinctions amongst competing definitions of soft law).

⁸¹ *Id.* at 518-19 (contending international guidelines, such as those regulating the exporting of nuclear material, are examples of quasi-legal rules that may impact state behavior and thus be soft law).

to consider different dimensions of the term. The most obvious dimension, and indeed the common denominator across approaches to “soft” law, concerns binding-ness. Consider *Black’s Law Dictionary*, which defines “soft” law as:

“Collectively, rules that are *neither strictly binding nor completely lacking in legal significance*. 2. *Int’l law*. Guidelines, policy declarations, or codes of conduct that *set standards of conduct but are not legally binding*.”⁸² Manifestly, a rule, while not “binding,” nevertheless may have “legal significance.” That “significance” is its effect on conduct, *i.e.*, the rule constrains or modifies behavior in some way. Yet, this lexicographic source goes no further; it does not explain why a rule may be non-binding.

Judge Richard Baxter of the International Court of Justice (ICJ) explores “soft” law in greater depth. He defines “soft” law:

[T]here are norms of *various degrees of cogency, persuasiveness, and consensus* which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as “soft” law, as distinguished from the “hard” law consisting of treaty rules which States expect will be carried out and complied with.⁸³

His definition, which uses “norm” in the “soft” law context and “rule” in the “hard” law context, suggests non-binding sources lie in “cogency,” “persuasiveness,” and “consensus.” Immediately, it is apparent that the term is not uni-dimensional, that it means something more than “non-binding.”

But, for that “something,” we need to turn again to lexicographic sources, for instance, the online *Oxford English Dictionary* to push further on what those three sources mean. If a rule is “cogent,” then by the meaning of that term, it is logical, well-reasoned, coherent, clear, and has authoritative force—it is, simply put, strong. “Persuasive” is a synonym of “cogent.” As for “consensus,” in keeping with the meaning of this term, the emphasis is on the harmony, or unity, among states in forging the rule. If there is considerable solidarity among the states as to the rights and duties set out in the rule, then that rule is supported by a “consensus.” There is a sliding scale between the poles of “cogency” and “consensus”: “cogent,” “consensus-based” rights and duties are closer to “hard” law rules, whereas rights and duties lacking these features are closer to “soft” law norms.

Satisfying the identification of these features is Judge Baxter’s definition complemented by lexicographic support. However, the question of how a rule acquires “cogency” or “consensus” is left unresolved. Professor Murphy

⁸² *Soft Law*, BLACK’S LAW DICTIONARY (9th ed. 2009) (emphasis added).

⁸³ R.R. Baxter, *International Law in “Her Infinite Variety,”* 29 INT’L & COMP. L.Q. 549 (1980) (emphasis added); MURPHY, *supra* note 64, at 112 n.108.

suggests ways to address this question in his discussion of the four major contexts in which “soft” law is observed: (1) general treaty provisions, (2) declarations by states, (3) recommendations of IOs, and (4) codes of conduct for states or non-state actors.⁸⁴ In the first context, he identifies provisions in treaties that are too “vague,” without “further elaboration,” to have a “serious legal effect.”⁸⁵ Such provisions are “susceptible to myriad interpretations.”⁸⁶ In the second context, aspirations for the purpose of promoting a particular goal are non-binding, a point reinforced when states do not treat the instrument as one needing ratification in their domestic legal systems.⁸⁷ In the third context, resolutions that derive from the expertise or recognized competence of an IO and that enjoy widespread participation of states with little or no dissent, though non-binding, “can have a very powerful influence on the development of international law.”⁸⁸ In the last context, entities as diverse as the U.N. Food and Agriculture Organization (FAO) and multinational corporations (MNCs) may create non-legally binding norms, albeit out of their own self-interest or that of their members, which though voluntary, seek to promote well-being and fairness and constrain socially undesirable behavior.⁸⁹

Professor Shaffer conceives of “soft” law as non-binding, yet also identifies the circumstances under which rights and duties expressed in a text may be more or less binding:

...if an agreement is *not formally binding*, it is soft along one *dimension*. Similarly, if an agreement is formally binding but its content is *vague* so that the agreement leaves *almost complete discretion* to the parties as to its implementation, then the agreement is soft along a *second dimension*. Finally, if an agreement does not delegate any authority to a third party to *monitor its implementation or to interpret and enforce it*, then the agreement again can be soft (along a *third dimension*) because there is no third party providing a “focal point” around which parties can reassess their positions, and thus the parties can discursively justify their acts more easily in legalistic terms with less consequence, whether in terms of reputational costs or other sanctions.⁹⁰

⁸⁴ See MURPHY, *supra* note 64.

⁸⁵ *Id.* at 112.

⁸⁶ *Id.* at 113.

⁸⁷ *Id.*

⁸⁸ *Id.* at 115.

⁸⁹ *Id.* at 118.

⁹⁰ *Hard versus Soft Law*, *supra* note 34, at 715 (emphasis added).

Suggesting there are different dimensions to the meaning of “soft” law may rekindle the opposition to stating “soft” agreements are a form of “law.” To the extent agreements lack precision, obligation, or authority, they may be poorly drafted laws, or intentionally drafted to eschew legal status. But, this disavowal fails to provide a useful alternative to discuss and explain how categorically distinct forms of agreement “play a major role in the development of international law . . . needed for the regulation of States’ activities and for the creation of expectations.”⁹¹

B. Five Inferences

From these lexicographic, judicial, and scholarly sources, we draw five inferences. First, the definitions of “soft” law are neither perfectly synchronized nor mutually exclusive. Rather, they emphasize different aspects of what causes a rule to be “soft.” Some focus on the statement of the rule/norm. Others consider the status of the instrument that contains the rule. In other words, the definitions accept that “soft” law is a sophisticated concept in that it has two or more features, or “dimensions.”

Second, none of the definitions are binary. Each envisions a continuum or spectrum of possibilities. For instance, the *Black’s Law Dictionary* definition concerns the obligatory nature, describing “softness” as somewhere between clear enforceability and mere behavioral suggestion. Likewise, the other approaches refuse to leave “soft” law in a state of unrecognized limbo.

Third, the definitions do not insist on sovereign-only rule makers. While states are the traditional leading actors in setting the “main rules” about the conduct of international relations, including international trade, “the main rules are not the whole story.”⁹² Civil society, that is, the diverse array of “social group[s] capable of articulating a collective opinion,” often formalized in non-governmental organizations, plus international organizations, help shape the agenda for new rules or the amending of existing rules, and with the creating or revising of detailed technical regulations necessary to implement rules.⁹³ International trade law is replete with examples, such as to technical barriers to trade (TBT), sanitary and phytosanitary (SPS) measures, and labor and environmental standards, where industry groups, such as presidential advisory committees in the United States, play leading roles. That also is true with respect to women’s rights. For example, when private sector entities and the United Nations helped forge *CEDAW*.⁹⁴ Setting aside the question of whether non-state actors need to use state actors to make rules, the point is

⁹¹ Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L. & COMP. L. Q. 850, 866 (1989).

⁹² LOWE, *supra* note 52, at 36.

⁹³ *Id.* at 37.

⁹⁴ *See generally id.* at 31-32 (discussing *CEDAW* and reservations to it).

that a delineation between “hard” and “soft” law need not, indeed should not, rely on a distinction between state and non-state actors.

Fourth, none of the definitions explore in much depth the contribution of English grammar to the “softness” or “hardness” of a rule. Professor Murphy mentions “vague” language.⁹⁵ But, what is “vagueness?” What grammatical constructions contribute to language being “vague?”

Fifth, the definitions do not connect the language of a rule to the enforcement mechanisms that may, or may not, exist to enforce the rights and duties set out in the rule. A “soft” law provision, in textual terms, may have greater force because it is in a “hard” law instrument, and vice versa. The definitions treat the textual and institutional dimensions of a rule as separate and distinct. In fact, they can be closely connected, as our labor rights example suggests, and with respect to women’s and LGBTQ+ rights.

C. *Five Structural Dimension Variables*

Based on the above inferences, we argue for an evolution in the existing definitions of “soft” law that conceives of the concept in two dimensions: textual and institutional. We do so in the context of international trade law, and leave open the possibility of applying our theory to other international legal specialties, perhaps with appropriate adjustments for those contexts. Given our interest in applying our theory to women’s and LGBTQ+ rights through FTAs, this analysis focuses on those instruments.

The structural dimension considers the type of international instrument in which a textual provision is located, and the existence of mechanisms to monitor and/or enforce the language of the rule in question. Five variables are vital to ascertaining the degree of hardness or softness of the structure that frames the text of a rule.

i. *Type of Instrument*

We are interested to know the type of instrument in which a rule is situated. We suggest that an international trade agreement entered into by sovereign states that is ratified by those states through their respective domestic legislative procedures, and implemented into their domestic law, is an indicator of “hardness.” In contrast, a document that is not passed by the legislatures suggests “softness.” We note that documentary titles can be misleading. For example, side agreements and side letters to an FTA may be part of the treaty package a legislature evaluates for passage. That appears to be the case in the United States with respect to *NAFTA 2.0*, but may be unclear with respect to Canada and Mexico in regard to both *CPTPP* and *NAFTA 2.0*.

⁹⁵ MURPHY, *supra* note 64, at 113.

ii. *Scope of Application*

We also are interested to know the scope of application of the instrument. An instrument that purports to regulate the behavior of private actors, such as business organizations and individuals, is an indicator of “hardness.” This suggestion follows from what Professor Jessup regarded in his 1948 classic, *A Modern Law of Nations*, to be “keystones of a revised international order:”⁹⁶ “International law, like national law, must be directly applicable to the individual. It must not continue to be remote from him, as is the traditional international law, which is considered to be applicable to states alone and not to individuals.”⁹⁷

An instrument that affects only sovereign State behavior, that is, the conduct of parties to an FTA, and leaves it to each party to decide whether and how to regulate private party conduct suggests “softness.” In turn, women or LGBTQ+ persons will suffer the uncertainties of whether, and how, they may avail themselves of FTA provisions ostensibly for their benefit. As a general matter, both *CPTPP* and *NAFTA 2.0* regulate public and private entities.

iii. *Monitoring*

We consider whether a monitoring mechanism exists in the instrument to check compliance with, and address controversies about alleged transgressions of rules. We suggest an instrument with a mechanism to monitor the rights and obligations it creates is indicative of “hardness,” especially if the mechanism consists of representatives from all the parties to the agreement, and possibly independent (third party) officials. As a general matter, *CPTPP* and *NAFTA 2.0* create monitoring mechanisms, such as committees.

iv. *Dispute Settlement (Adjudication)*

We also consider whether a dispute settlement mechanism exists in the instrument to address controversies about alleged transgressions of norms/rules. An instrument lacking in such a mechanism is an indicator of “softness.” The mechanism may be direct recourse to the judicial system of the relevant parties, rather than an instrument-based mechanism. For example, the bilateral FTA between the United States and Australia does not include investor state dispute settlement (ISDS), the use of ISDS is restricted by *CPTPP*, and *NAFTA 2.0* cuts back on its use of ISDS in comparison with

⁹⁶ PHILIP C. JESSUP, *A MODERN LAW OF NATIONS 2* (The Macmillan Co., 1948).

⁹⁷ *Id.*

NAFTA 1.0.⁹⁸ The dispute settlement mechanism may be arbitration, court-like proceedings, or some combination thereof.

v. *Enforcement*

If a dispute settlement mechanism exists, does it include an enforcement mechanism that threatens punishment for non-compliance with a rule, and concomitantly, is the threat made credible in part by step-by-step procedures, each with a specified end date. The Austinian Positivist proclivity propels us to look for the “hard” law feature of real punishments for transgressions. The nature of the punishment may differ, from suspension of substantially equivalent trade concessions to imposition of fines. The threat of any punishment may be made “softer” by procedures that are ill-defined and/or subject to delays. Generally speaking, in *CPTPP* and *NAFTA 2.0*, enforcement measures exist, albeit in neither case for currency manipulation allegations.

We call these five structural variables, respectively, *Type*, *Scope*, *Monitoring*, *Adjudication*, and *Enforcement*. With respect to each of them, when we say (as above) that the variable leads to “hardness,” we mean a greater degree of legal binding than a variable that leans toward “softness.”

In turn, there are a range of possible outcomes. At one extreme, all five variables may suggest that the structure of the instrument in which a rule is situated is “hard,” and thus the norms/rules it embodies are binding. That is, (1) the instrument is an FTA passed by the legislatures of the parties and enacted into their domestic laws, (2) the norms/rules regulate non-state actors and individuals, (3) the FTA has an independent monitoring mechanism, and (4) it contains a dispute settlement mechanism with (5) eye-catching enforcement measures. At the other extreme, precisely the opposite outcomes may be recorded on all five variables, in which case the instrument and the norms/rules are “soft,” and are less binding, or even non-binding. In between these poles is a spectrum along which an instrument may be placed depending on its score. That placement calls for judgment, weighing and balancing the variables in the context of the specific instrument.

D. *Five Textual Dimension Variables*

The textual dimension concerns the language of a rule, that is, of a provision concerning rights and/or obligations of one or more parties to an FTA.⁹⁹

⁹⁸ See generally TPP Objectively, *supra* note 5, at ch. 15; see also International Trade Law Textbook, *supra* note 7, at vol. 4, ch. 11.

⁹⁹ We avoid the term “measure,” as in GATT-WTO jurisprudence, a “measure” connotes a rule that is enforceable. We wish not to prejudge whether a textual provision is or is not “soft.” International Trade Law Textbook, *supra* note 7, ch. 32 (discussing the 1984 *Canada Foreign Investment Review* case and whether voluntary purchase undertakings

Five variables are essential to assessing the degree of textual hardness or softness of a rule.

i. Verb Constructions

We are interested to know whether a rule uses mandatory or non-mandatory verb constructions. Such constructions may occur through the use of a single, lexical verb, that is, a full verb that serves as the main verb and conveys an independent meaning.¹⁰⁰ Examples are “monitor” or “enforce.” More likely, they consist of a verb cluster, that is, a lexical verb plus a modal verb (which is a type or subset of “auxiliary” or “helping” verb).¹⁰¹ There are nine

constituted a law, rule, or regulation, *i.e.*, a measure subject to GATT Article II:4 national treatment discipline).

¹⁰⁰ See DAVID CRYSTAL, *THE CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE* 212 (Cambridge Univ. Press, 1995).

¹⁰¹ “[L]exical verbs . . . express the principal action or event in a clause, whereas auxiliary verbs . . . are traditionally said to ‘help’ lexical verbs in specifying additional meanings.” BAS AARTS, *OXFORD MODERN ENGLISH GRAMMAR* 67 (Oxford Univ. Press, 2011). A lexical verb, namely “be” and “have,” can be on its own in a clause, whereas a modal (auxiliary) verb cannot occur on its own in a clause. See *id.* at 69. For a summary of the “NICE” properties (Negation, Inversion, Code, and Emphasis) of modal verbs, see *id.* at 68-69. The property most relevant to rendering a verb construction harder is “prosodic emphasis,” that is, “the force with which something is uttered,” as in “will” versus “should.” *Id.* at 69. For a tour of modal verbs, with examples of their use in legal contexts, see BRYAN A. GARNER, *THE CHICAGO GUIDE TO GRAMMAR, USAGE, AND PUNCTUATION* 121-23 at ¶¶ 198-205 (Univ. Chi. Press, 2016).

Auxiliary (helping) verbs may be put into one of four categories:

- (1) Modal auxiliaries (also called “modals”).
Examples of modal auxiliaries are “can” and “could,” “may” and “might,” “shall” and “should,” “will” and “would,” and “must.”
- (2) Aspectual auxiliaries.
There are two aspectual auxiliaries – “have” (in the perfect construction, *i.e.*, expression of an event that occurred in the past that has results in the present, accomplished by “have” plus the past participle form of a verb, *e.g.*, “have increased”) and “be” (in the progressive construction, *i.e.*, expression of an ongoing situation, achieved by “be” plus the *-ing* participle of a verb, *e.g.*, “is increasing”).
- (3) Passive auxiliaries.
There is only one passive auxiliary – “be.” The effect is a passive construction, achieved by “be” plus the past participle of a lexical verb (*e.g.*, “was increased”).
- (4) Dummy auxiliaries.
Likewise, there is only one dummy auxiliary – “do.” It is used to allow a lexical verb to negate, serve as an interrogatory, or for emphasis, but has no meaning (*e.g.*, “They increase” versus “They do not increase.”).

modal verbs.¹⁰² Three are mandatory, “will,” “shall,” and “must.” The other six modal verbs are non-mandatory, “can,” “could,” “may,” “might,” “should” (“ought”), and “would.” There are three special “primary” verbs: “be,” “have,” and “do,” which can serve as either lexical or auxiliary verbs.¹⁰³ The combinations and consequent meanings are infinite.¹⁰⁴ Interpreting the verb construction of a rule—and specifically, whether that construction creates obligation, or (in the grammatical lingo, with respect to “will” versus “would” and “shall” versus “should”) “deontic modality”¹⁰⁵—is essential to ascertaining whether it leans toward the hard or soft end of the textual dimension.¹⁰⁶

That is especially true when confronted not with a stand-alone lexical verb, where the obligatory character of the single verb is clear, but rather with a verb cluster. Then, both the selection and combination of modal and lexical or primary verbs need scrutiny to see if the construction advances, or undermines, the force of the rule. A modal verb like “must” or “shall,” as distinct from “may” or “should” must be read in conjunction with the lexical verb it helps. For example, the mandatory character of a modal verb like “must” or

See AARTS, *supra* note 101, at 67, 69-74. On the perfect versus the progressive construction, *see id.* at 23. Of these four categories, the first one is especially relevant to rendering a verb construction “harder.” That is because “[m]odal auxiliaries . . . are involved in expressing the following meanings . . . : ‘ability,’ ‘probability,’ ‘possibility,’ ‘prediction,’ ‘obligation,’ ‘necessity,’ ‘intention,’ ‘permission,’ [and] ‘logical conclusion.’” *Id.* at 69-70. To forge “harder” textual rules, verb constructions from modal auxiliaries that express obligation and necessity are preferred, indeed, required.

¹⁰² *See* CRYSTAL, *supra* note 100, at 212; AARTS, *supra* note 101, at 70; GARNER, *supra* note 101, at ¶¶ 198, 206, 208.

¹⁰³ *See* CRYSTAL, *supra* note 100, at 212.

¹⁰⁴ Thus:

With only a few verb endings to take into account . . . and a very limited range of auxiliary verbs and sequences . . . , the verb phrase would seem to provide the linguist with an easy syntactic description. But appearances are deceptive. It is true that the possible patterns of constituents can be described quite quickly, but the meanings which each pattern can convey are extremely difficult to state, being influenced by what else is happening in the sentence, and even by the meaning of particular types of verb. . . . *Teasing out the various meaning contrasts of tense, aspect, mood, and voice makes the verb phrase one of the most intriguing areas of English syntax.*

Id. at 224 (emphasis added).

¹⁰⁵ *See* AARTS, *supra* note 101, at 285.

¹⁰⁶ Even a verb construction using the modal “should” can be used in what is known as the “mandative should,” for instance: “It is important that the Parties should publish their rules about discrimination against women and LGBTQ+ persons.” The mandative should conveys “a directive meaning” that is “recommended, decreed, or important [but] has not (yet) been brought about.” *Id.* at 290. Depending on the trigger word used, the mandative should may connote a “harder” or “softer” rule. In the example, “It is recommended/preferable/desirable/suggested that . . .” is softer, whereas “It is essential/necessary/decided/ordered . . .” is harder.

“shall” may be reinforced by a lexical verb like “punish” or “sanction,” or a primary verb like “be” or “do,” thereby creating a “hard” right or duty. Or, that mandatory character may be undermined if the modal verb is followed by a lexical verb such as “consider” or “endeavor,” thereby yielding a “soft” provision. In other words, whether the force of a modal verb carries through to the entire text of a rule, and thus whether “hard” law is established, depends (at least in part) on the lexical verb that follows it.

An additional matter requiring interpretation is whether the verb is a “lexeme,” that is, a lexical item or unit, where meaning is conveyed by the particle that follows the verb.¹⁰⁷ That particle could be a spatial adverb (e.g., “ahead,” or “away”), preposition (e.g., “at,” “for,” “or,” or “from”), or a word that serves as either a spatial adverb or preposition (e.g., “about,” “by,” “down,” “in,” or “toward”).¹⁰⁸ These constructions are called “phrasal verbs.”¹⁰⁹ Consider the distinction between the phrasal verb “must develop towards” versus “must develop in.” “Towards” suggests a lesser commitment to what “must” be developed (e.g., policies against discrimination based on gender, gender identity, or sexual preference) than does for example “about.” That is because “toward” allows for movement in the general direction of a targeted outcome, whereas “about” implies being at that target.

As analyzed in Step Two (Part IV), *CPTPP* Article 23.4 and *USMCA* Article 23.9 rely heavily on verb clusters with non-mandatory modal verbs, and flexible phrasal verbs, thus yielding “soft” constructions. This reliance may be understandable as a pragmatic political compromise to ensure all FTA parties accept the text, and may be useful as a step toward “harder” law. Nevertheless, we regard the “soft” constructions as shortcomings in these articles, insofar as they allow parties to take protections for women and LGBTQ+ persons less seriously than if they were constrained by “hard” constructions.

ii. *Vagueness*

We also look for vagueness in diction (word choice) and syntax (word order). A vague rule is not specific, hence it has no clear meaning.¹¹⁰ The rights and obligations it purports to create, its range, and the way in which it is to be

¹⁰⁷ The basic unit of meaning of a word, regardless of the inflection of that word, is a “lexeme” or “lexical item.” In effect, what is stated in a dictionary definition under the head word as listed therein is the lexicographic meaning of the term. *See id.* at 118.

¹⁰⁸ *See* CRYSTAL, *supra* note 100, at 212.

¹⁰⁹ *See id.* at 212 (also noting the distinction of “phrasal verbs” as verbs followed by a spatial adverb versus “prepositional verb” as ones followed by a preposition).

¹¹⁰ *See* OXFORD AMERICAN DICTIONARY AND THESAURUS 1700 (Oxford Univ. Press, 2003) (definition of “vague”) [hereinafter, OXFORD DICTIONARY]; *Chapter 9: Vagueness, Ambiguity, and Philosophy*, LUCID PHILOSOPHY (Mar. 25, 2019), <http://lucidphilosophy.com/chapter-9-vagueness-ambiguity-and-philosophy/> [hereinafter, Lucid Philosophy].

adopted, monitored, and/or enforced are uncertain. So, we look at the diction and syntax that follow the verbs, and again point out the importance of close textual reading. For example, a “hard” law simple or compound verb structure can be undermined by subsequent vague word choice or order.

Consider the statement, “Parties to this FTA must implement policies for the fair treatment of women and LGBTQ+ persons.” “Must implement” indicates a mandatory obligation, but “fair” is an adjective with no single meaning. Indeed, a key issue in the decades of WTO litigation about zeroing in antidumping cases was the meanings of “fair” and “all” as used in Article 2.4 of the WTO *Antidumping Agreement*.¹¹¹ The agreement mandates a “fair” comparison between export price and a normal value of “all” relevant transactions.¹¹² The agreement is based on Article VI of the GATT, which “condemns” dumping, that is, injurious sales at “less than normal value.”¹¹³ The noun “policies” also is unclear. Must the “policies” carry the force and effect of a binding rule, and be nation-wide, or may private entities decide what to do through voluntary codes of conduct?

As analyzed in Step Two (Part IV), *CPTPP* Article 23.4 and *USMCA* Article 23.9 are vague in certain aspects of their diction and/or syntax. We regard such vagueness as a textual deficiency, insofar as it detracts from the “hardness” of the obligations these provisions otherwise would create on behalf of women and LGBTQ+ persons.

iii. Ambiguity

We also look for ambiguity in diction and syntax. Vagueness and ambiguity are not perfect synonyms. An ambiguous statement is specific, but has two or more clear meanings, and the choice among those meanings (*i.e.*, which is the single best interpretation to draw) is uncertain.¹¹⁴ So, we look at the word choice and order that follow the key verbs in a rule, and ask whether they reinforce or undermine the hardness or softness of those verbs.

Consider the statement “Parties to this FTA agree parents must have six months of paid child-care leave.” This provision is specific in calling for six months of paid parental leave. But, it is ambiguous, because multiple inferences may be drawn as to who qualifies as “parents” and whether adopted kids qualify for “child-care.” A narrow inference is “parents” are restricted to heterosexual couples, where same-sex couples and therefore who may adopt a

¹¹¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, 1868 U.N.T.S. 201, https://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

¹¹² *Id.*

¹¹³ See International Trade Law Textbook, *supra* note 7, ch. 5, at 10.

¹¹⁴ OXFORD DICTIONARY, *supra* note 110, at 43 (definition of “ambiguous”); LUCID PHILOSOPHY, *supra* note 110.

child are ineligible. A broad inference is both types of couples, and biological or adopted children, are beneficiaries.

iv. Metrics

We are interested to know what a rule asks FTA parties to do, namely, whether it calls on them to meet identifiable metrics. If so, then we further ask whether they must do so by a fixed deadline. We suggest that a right or duty that lacks measurable criteria for compliance is softer than one with benchmarks or thresholds to check whether a party is complying with that right or duty, or even making progress toward completing it.

As analyzed in Step Two (Part IV), *CPTPP* Article 23:4 and *USMCA* Article 23.9 contain no metrics whatsoever. Their failure to do so is not only a serious criticism we make of these provisions, but also the basis for our suggesting in Step Three (Part V) quantitative benchmarks based on empirical data.

v. Status

If a rule lays out a specific criterion for FTA parties to meet, then we seek to know whether the parties already meet the metric. If they do, then we suggest the metric serves as a “Standstill” rule, and that any improvements above the metric have a “Ratchet” effect.

By “standstill,” we mean parties cannot weaken their laws below the level of conduct called for in the rule. For example, if parties are obliged to ensure that women and LGBTQ+ persons earn an average hourly wage of at least 90% of that of men, then they cannot drop the threshold to 85%. They must, at a minimum, get up to and standstill level of 90%. Furthermore, any enhancement over that level serves as a “ratchet” for yet more improvements. For example, suppose a party satisfies the 90% average hourly wage test, and improves conditions for women and LGBTQ+ persons such that it attains a new minimum of 95%. The 95% figure becomes the new base level from which a party may ratchet upward average hourly wages for women and LGBTQ+ persons. The party could have stood still at 90%, but once it opted to a higher level, it cannot go back down to a lower level. In sum, we suggest that the treatment of identifiable metrics as “Standstill” and “Ratchet” rules adds to the hardness of an FTA obligation. The “Standstill” and “Ratchet” characteristics of a rule increase the certainty and predictability of the obligation the metric measures.

Because *CPTPP* Article 23.2 and *USMCA* Article 23.9 contain no metrics whatsoever, they obviously lack “Standstill” or “Ratchet” rules. We attempt to rectify this problem in Step Three (Part V). We not only propose quantitative benchmarks, but also divide them into fifteen “Standstill” and five

“Ratchet” rules (summarized in Table II), based on empirical data as to the metrics with which the *CPTPP* and *NAFTA 2.0* parties already do and do not satisfy.

We call these five textual variables, respectively, *Verb*, *Vagueness*, *Ambiguity*, *Metrics*, and *Status*. As with each of the five structural variables, with each of the five textual variables, we mean a textual variable indicates a rule is more of a constraint on an FTA party when that variable is “harder,” but imposes less of an obligation on the party when it is “softer.”

Here, too, there is a range of possible outcomes. At one extreme, all five variables may suggest that the text of a rule is “hard,” and thus compliance is obligatory. That is, (1) the text contains mandatory verbs, is neither (2) vague nor (3) ambiguous in its diction or syntax, (4) establishes a right or duty to be measured with a quantitative metric, and (5) indicates the metric is a standstill, with any improvements having a ratchet effect. At the other extreme, precisely the opposite outcomes may be recorded on all five variables, in which case the rule is “soft,” with compliance voluntary. In between these poles is a spectrum along which a text may be placed depending on its score on the variables. That placement calls for a close reading of the text, coupled with judgment as to how to weigh and balance the variables.

E. Two-by-Two Matrix

Our argument indicates not all “hard” law structures and the texts of the norms and rules they embody are the same, nor are all “soft” law structures and their texts. And, the categorization of “hard” versus “soft” is not either-or. There is a continuum of possibilities along two dimensions, thus creating four possible outcomes. The result is the matrix that Table I depicts.

Table 1 : TWO DIMENSIONAL HARD-SOFT LAW THEORY MATRIX

STRUCTURAL DIMENSION			
← <i>Harder Structure – Softer Structure:</i> → Evaluate (1) Type, (2) Scope, (3) Monitoring, (4) Adjudication, and (5) Enforcement			
TEXTUAL DIMENSION ↑ <i>Harder Language – Softer Lan- guage:</i> Evaluate (1) Verbs, (2) Vagueness, (3) Ambiguity, (4) Metrics, and (5) Status ↓		Binding Struc- ture	Non-Binding Structure
	Obligatory Text	Hard-Hard Law Both structure and text are “hard.”	Soft-Hard Law Structure is “soft,” but text is “hard.”
	Non-Obligatory Text	Hard-Soft Law Structure is “hard,” but text is “soft.”	Soft-Soft Law Neither structure nor text is “hard.”

Source: Raj Bhala & Cody Wood 2018

A rule may be hard-hard, because its structure and text are appropriately categorized as “hard” using the five variables that define each dimension. For instance, the national treatment obligation in *CPTPP* Article 2.3(1)-(2) and *USMCA* 2.3(1)-(2) satisfy this categorization.¹¹⁵ A rule may be “soft-soft,” for

¹¹⁵ See *TPP*, *supra* note 1, at art. 2.3 at 2-3. *USMCA*, *supra* note 1, at art. 2.3 at 2-4. Each of these Articles contains three paragraphs, the first one of each is identical, and the second and third are nearly so.

exactly the opposite reason. For instance, an aspirational statement in a voluntary corporate code would fit into this category. In between these two outcomes are two others. A rule could be in a “soft” structure, but the behavior it calls for is regarded as obligatory. An example might be a commitment in a private exchange of letters between two parties to an FTA, which is unenforceable under that FTA or in the domestic legal systems of the parties, but which sets out a tariff rate quota (TRQ) whereby one party agrees to import from the other party one million metric tons of sugar annually, duty-free, and binds its tariff on over-quota shipments (those above the one million ton threshold) at 25%. Finally, a rule is “hard-soft” if the structural variables indicate it is housed in a hard law structure, but the textual variables show it is written as “soft” law. It is this final possibility that informs trade liberalization efforts, and thus is relevant to advancing women’s and LGBTQ+ rights through FTAs.

IV. STEP TWO: APPLYING TWO DIMENSIONAL HARD-SOFT LAW THEORY TO *CPTPP* ARTICLE 23.4 AND *USMCA* ARTICLE 23.9

To summarize our conclusion at the outset, in applying Two-Dimensional Hard-Soft Law Theory to the provisions of *CPTPP* and *USMCA* concerning women’s and LGBTQ+ rights, the provisions are “hard” law in the structural dimension, but “soft” law in the textual dimension. Thus, these Articles are “hard-soft” law.

With respect to the first dimension, most, if not all, of the five variables point to the “hardness” of the structure in which *CPTPP* Article 23.4 and *USMCA* Article 23.9 are situated. As to Type, they are in the core text of an FTA. These FTAs, including these Articles, take effect because the parties ratify them through their domestic legislative processes. The scope of these Articles cover the parties, as sovereign states, and non-state actors and covers individuals within the parties. The Articles address the conduct of employers toward women and LGBTQ+ persons. Both *CPTPP* and *NAFTA* 2.0, for Articles 23.4 and 23.9, respectively, contain Monitoring, Adjudication, and Enforcement mechanisms.

In general, these mechanisms are in Chapter 28 of *CPTPP* and Chapter 31 of *USMCA*, both entitled “Dispute Settlement.”¹¹⁶ Each FTA contains additional dispute settlement provisions specific to labor matters. With respect to *CPTPP* Article 23.4, joint development activities among the parties are encouraged in Articles 23.1(6) and 23.6, and a committee is established in Article 23.7 to monitor the implementation and operation of these activities and the other Chapter 23 provisions.¹¹⁷ However, Article 23.9 makes clear that the

¹¹⁶ See TPP, *supra* note 1, at ch. 28; USMCA, *supra* note 1, at ch. 31.

¹¹⁷ See TPP, *supra* note 1, at ch. 23.

dispute settlement mechanisms of Chapter 28 are not applicable to the provisions in Chapter 23.¹¹⁸ In other words, Article 23.4 meets three of the five variables in the structural dimension. Not satisfying the Adjudication or Enforcement variables, Article 23.4 thus is not as “hard” as it should be.

USMCA Article 23.9 meets the three structural variables, in addition to Type and Scope. As for Adjudication and Enforcement of Article 23.9, *USMCA* Articles 23.17 and 23.5, respectively, cover these topics. With respect to monitoring, they are supplemented by Articles 23.12-13, which encourage the parties to cooperate on labor rights issues, and Article 23.14, which establishes a Labor Council comprised of a senior government official from each party, and Article 23.15, which obliges the parties to have contact points for labor matters. These mechanisms may rectify problems in the original iteration of *NAFTA*, specifically with respect to the dispute settlement procedures of the *Labor Side Agreement*.¹¹⁹ They also may contain flaws once they are tested with experience, but at present they appear sufficiently “hard” so as not to be the principal source of concern about *CPTPP* Article 23.4 or *USMCA* Article 23.9.

However, with respect to the second dimension, neither *CPTPP* Article 23.4 nor *USMCA* Article 23.9 can be called “hard” law texts. That—the language of these provisions—is the principal source of concern. As we indicated above (in Part III.D), these provisions satisfy none of the five textual dimension variables for creating binding obligations on the parties to these FTAs. Their texts suggest, but does not mandate, what behavior is acceptable, and what behavior is to be avoided. That is, they contain neither prescriptive nor proscriptive rules. Therefore, the parties have no choice but to interpret them as constraints.

To see why these provisions are “soft” in this second dimension, we offer the following close reading of each text. *CPTPP* Article 23.4, which is entitled “Women and Economic Growth,” states:

1. The Parties *recognize* that enhancing opportunities in their territories for *women*, including workers and business owners, to participate in the domestic and global economy contributes to economic development. The Parties further *recognise* the benefit of sharing their diverse experiences in designing, implementing and strengthening programmes to encourage this participation.

2. Accordingly, the Parties *shall consider* undertaking cooperative activities *aimed at enhancing* the ability of women, including workers and business owners, to fully access and

¹¹⁸ *Id.* at art. 23.9 at 23-5.

¹¹⁹ See generally International Trade Law, *supra* note 7, ch. 24.

benefit from the opportunities created by this Agreement. These activities *may include providing advice* or training, such as through the exchange of officials, and *exchanging information* and experience on:

- (a) programmes aimed at helping women *build their skills and capacity*, and *enhance their access* to markets, technology and financing;
- (b) developing women's *leadership* networks; and
- (c) identifying *best practices* related to workplace flexibility.¹²⁰

Manifestly, Paragraph one creates no obligations, soft or hard, whatsoever. The eleven *TPP* parties simply restate in this paragraph their shared observations: that there is a direct relationship between labor market opportunities for women, on the one hand, and economic development, on the other hand; and that they can learn from each other how best to promote this positive linkage. Paragraph one is noteworthy in that two of the eleven *TPP* Parties—Brunei and Malaysia—are Islamic countries, and traditional interpretations of Islamic Law may constrain non-household employment of women.¹²¹ Yet, they were willing to join parties such as Canada, New Zealand, and Singapore, with progressive approaches to women's employment, in these observations.

The operative part of Article 23.4 is paragraph two. In the first sentence, the mandatory modal verb "shall" is followed by the loose verb "consider," resulting in a soft verb cluster. What specific steps they "shall" take that constitute "consideration" is ambiguous. One interpretation is the parties convene an annual joint governmental conference. Another inference is they develop their thoughts through cross-border, private party trade exhibitions. Both inferences are reasonable. The phrasal verb "aimed at," plus the present participle "enhancing," also indicate softness. "Aimed at" is an aspirational construction, because a target might or might not be hit. "Enhancing" is vague, with no determinate meaning as to what the target actually is or should be, and what would constitute enhancement. The final clause is both obvious and meaningless: "to fully access and benefit from the opportunities created by this Agreement."¹²² It is obvious in that each of the eleven *TPP* Parties enters into *CPTPP* having calculated that the FTA will produce net benefits to its society (along familiar Smith-Ricardian free trade theory lines.)¹²³ It is

¹²⁰ *TPP*, *supra* note 1, at art. 23.4(2)(a)-(c) (emphasis added).

¹²¹ UNDERSTANDING ISLAMIC LAW, *supra* note 9, at ch. 37.

¹²² *TPP*, *supra* note 1.

¹²³ See International Trade Law Textbook, *supra* note 7, ch. 6.

meaningless because it identifies none of the opportunities the Agreement creates for women have traditionally been excluded.

The second sentence of paragraph two, and the three sub-paragraphs it contains, also begin with the manifestly soft law modal verb “may.” The lexical verb “include” shows the subsequent list is non-exclusive, which leaves Parties free to supplement the suggestions on the list with serious obligations beyond “providing advice” and “exchanging information,” each of which can be read as a nearly trivial administrative function, satisfied by a few brochures in a government office and an occasionally updated website with a few useful hyperlinks. What saves paragraph two from being put at the “soft” pole of the textual dimension are the highlighted terms in its sub-paragraphs. They contain the seeds of metrics, namely, skill capacity building, market access, leadership, and best practices. Yet, those seeds are not watered with quantitative benchmarks, nor fertilized with the “Standstill” and “Ratchet” distinctions.

Turning to *USMCA* Article 23.9, entitled “Sex-Based Discrimination in the Workplace,” this provision states:¹²⁴

The Parties *recognize* the goal of eliminating [*sex-based*] discrimination in employment and occupation, and *support* the goal of promoting equality of *women* in the workplace. Accordingly, each Party *shall implement policies* that . . . *protect workers* against employment discrimination on the basis of *sex* (*including* with regard to) sexual harassment, pregnancy, *sexual orientation, gender identity*, and caregiving responsibilities; *provide* job-protected leave for birth or adoption of a child and care of family members, and *protect* against wage discrimination.¹²⁵

¹²⁴ United States-Canada-Mexico Agreement, *supra* note 1 (emphasis added).

¹²⁵ *Id.* (emphasis added). The United States insisted on the insertion of a footnote (footnote 13 at page 23-26 of the text, following the word “policies”) that states:

The United States’ existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance, with the obligations set forth in this Article.

Id. Manifestly, this footnote is designed to limit the effect of Article 23.9 with respect to LGBTQ+ protections in America. This footnote does not explicitly strip these persons of any protections they may have under applicable federal or state law, but it does not oblige the United States to do any more on their behalf, and does not guarantee the protections they do have will remain in place.

Footnote 13 to Article 23.9 raises two serious problems. First, substantively, as of November 30th, 2018, when the Parties signed the *USMCA*, there was no U.S. federal law concerning workplace protection on the basis of sexual orientation and gender identity. *See*

The first sentence of this text, like that of its *CPTPP* analog, does nothing more than restate what the FTA parties acknowledge, namely, a policy goal. However, in contrast to the analog, in *USMCA*, the Parties take two more steps: (1) their goal is not limited to eliminating discrimination against “women,” but—depending on their definition of “sex” (discussed below)—expands to discrimination on grounds of “sex,” and (2) they declare their “support” for that broader goal. Nothing in this first sentence constitutes “hard” law, but it does serve to inform the meaning of the second sentence.

The second sentence, which is the operative part of Article 23.9, uses the mandatory modal verb “shall,” followed by three lexical verbs, “implement,” “protect” (used twice), and “provide.” All three lexical verbs are harder than “consider,” which *TPP* Article 23.4 uses. But, each lexical verb is so flexible as to be vague. What the parties must “implement” are “policies” against sex-based discrimination. Each party can define for itself what constitutes a “policy.” Must the party amend its constitution? Pass a statute? Promulgate a regulation? Issue a declaration? Oblige companies to establish manuals? The answer to all these options is uncertain. Each is a reasonable inference as to the meaning of the lexical verb “implement” coupled with the noun “policy.”

Likewise, what each party must do to “provide” for child and family care leave, and to “protect” against wage discrimination is ambiguous. Would one week of job protection for one child and one parent suffice or is a longer period for more kids and their grandparents? Is equal pay for equal work mandatory, or are there allowances for wage discrepancies based on perceived differential capacities to take on and complete work? In sum, the undefined lexical verbs undermine the force of the modal verb. Parties have considerable discretion. The vagueness of that text preserves parties’ sovereignty, but possibly at the expense of women and LGBTQ+ persons.

Rebecca Joseph, *Footnote in CUSMA Text Allows U.S. to Avoid LGBTQ Rights Clause*, GLOB. NEWS (Dec., 2018), <https://globalnews.ca/news/4732591/cusma-lgtbq-footnote/> (hereinafter, *Footnote in CUSMA*); Grace Dobush, *Republicans Win Rollback Of Sex Discrimination Protections In New Free Trade Deal*, FORTUNE (Dec. 4, 2018), <http://fortune.com/2018/12/04/new-nafta-usmca-lgtbq-rights/> (hereinafter, *Republicans Win*). At the state level, it remained legal to discriminate on the basis of sexual orientation in twenty-nine states, and legal to discriminate against transgender workers in thirty-four states. See *Footnote in CUSMA*. By contrast, Canadian and Mexican law have protections for LGBTQ+ workers. In 1996, Canada banned discrimination based on sexual orientation, and in 2003, Mexico did so; in 2017, Canada banned discrimination based on gender identity or expression, but Mexico has not done so. See *Footnote in CUSMA*. Second, procedurally, footnote thirteen was inserted in a non-transparent manner. Its insertion may well have occurred because of the above-referenced Republican letter to the President. See *Republicans Win*. There was no advance discussion or notice about the footnote, nor any official mention of it once it was inserted. Indeed, the entire episode was scarcely reported. Simply put, the footnote is demonstrably false in asserting the U.S. is in compliance with Article 23.9, and its insertion was oddly if not eerily secretive. Overall, the existence of this footnote strengthens our argument concerning the need for Hard-Hard provisions, such as Standstill and Ratchet Rules, for LGBTQ+ persons.

Moreover, the coverage of the “policies” the parties are supposed to “implement,” “provide,” and “protect” is ambiguous. That coverage is determined by the noun “sex.” What does “sex” mean? Is it restricted to the traditional binary opposites, male or female? Or, does it include not only women and men, but also persons based on gender identity and transgender status? That is, are all “TQ+” persons, as well as all “LGB” females and males, intended beneficiaries of Article 23.9? “Yes” and “no” answers are permissible, thus the coverage is ambiguous.¹²⁶ Parties are free to take conflicting interpretations, broad and narrow, as follows.

A. Broad Interpretation: USMCA Protects Women and LGBTQ+ Persons, Because “Sex” Includes “Sexual Orientation” and “Gender Identity”

With a broad interpretation, *USMCA* Article 23.9 fills a gap left by *TPP* Article 23.4 in addressing LGBTQ+ rights. That is because of the non-exclusive list that sets homosexuality and transgender status a part in the context of “sex.”¹²⁷ “Sexual orientation” and “gender identity” follow the term “sex.”¹²⁸ “Sexual orientation” covers all lesbian, gay, and bisexual persons, and “gender identity” covers all persons who view themselves differently from, or are questioning, their gender at birth, plus all transgender persons. Two interpretative points counsel in favor of this interpretation.

Both points follow from the application of Article 31.1 of the 1969 *Vienna Convention on the Law of Treaties*.¹²⁹ This *Convention* is the starting point for interpreting disputed words in GATT-WTO texts, and certainly may be used for FTAs. Article 31.1 states:

“A treaty shall be interpreted in *good faith* in accordance with the *ordinary* meaning to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.”¹³⁰

¹²⁶ A third interpretation is possible, namely, *USMCA*, *supra* note 1, at art. 23.9 is designed only to rectify discrimination against “women,” thanks to the use of this noun in the second clause of the first sentence. That reading, however, seems perverse in light of the entire second sentence, and in light of the use of “sex” in the title and the first clauses of the first and second sentences, which—at a minimum—refers to the traditional binary opposites of females and males (as discussed above).

¹²⁷ United States-Canada-Mexico Agreement, *supra* note 1.

¹²⁸ *Id.*

¹²⁹ See Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹³⁰ *Id.* at 340 (emphasis added). Further, Article 31.2-4 states:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

Arguably (as discussed below with respect to the narrowest interpretation), the “ordinary” meaning of “sex” is the traditional binary male-female distinction. Equally arguable, that narrow definition would be in “bad faith,” particularly given the “context” of the term “sex” in *USMCA* Article 23.9, and the “object and purpose” of both the Article and *NAFTA* 2.0.¹³¹ That “context”

-
- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Id. A full Article 31 analysis of the meaning of “sex” thus would require an inquiry into the two sources Paragraph (2) lists, and the three sources Paragraph (3) lists (though there appear to be none with respect to *CPTPP* or *USMCA*). And, Article 32, entitled “Supplementary Means of Interpretation,” provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

Id. Recourse to Article 32 may counsel in favor of a broad interpretation of “sex,” because of the points suggested above.

¹³¹ A narrow definition also might be unscientific. In October 2018, 1,642 scientists signed a letter opposing a binary definition of gender. See Letter signed by Biologists, Geneticists, Psychologists, Anthropologists, Physicians, Neuroscientists, Social Scientists,

(as just explained) includes express mention of “sexual orientation” and “gender identity.”

Moreover, one goal of any FTA is to eradicate, as far as possible, discrimination on trade and trade-related matters. Consider the national treatment rules in *NAFTA* 2.0 Articles 2.3, 14.4, 15.3, 17.3, and 20.A.8.¹³² Essentially, they prohibit discrimination against foreign persons producing a like domestic product, engaging in foreign direct investment, supplying a like service, sponsoring a like financial institution or investment, or holding an intellectual property right (IPR) vis-à-vis domestic producers of a like product, investors service suppliers, financiers, or IPR holders. Suppose Canada adopts the broadest interpretation, but America does not. An American entity that exports goods or supplies a service to Canada, or operates an investment in Canada which provides a good or service to the Canadian market, would be forbidden by *USMCA* from discriminating against a “T,” “Q,” or “+” person. Conversely, *USMCA* would not forbid a Canadian entity engaged in the same activities in the United States from such discrimination (though any applicable Canadian law might bar the discrimination). In other words, the protection for “TQ+” persons would be asymmetric: they would operate on inbound transactions, ones directed to or in Canada from the United States.

What might be the ramifications of this asymmetry? Assume the Canadian-inbound “TQ+” protection protects all “TQ+” persons employed by the goods trader, the service supplier, or the direct investor, regardless of where they are employed. If that company is an American one, then the protection extends to all such persons the company employs, whether they reside in Canada or the United States. The company would be on par, with respect to its Canadian “TQ+” employees, and with Canadian entities in the Canadian market: neither the American company nor its Canadian competitors could discriminate against Canadian TQ+ employees they employ in Canada. But, the American company would face a higher burden, with respect to its American “TQ+” employees, in comparison to its competitors in its home market of the United States. Those domestic competitors would be free to discriminate against “TQ+” persons (absent any applicable domestic law).

Conversely, consider the position of Canadian-outbound traders and investors under the same assumptions namely, the broadest interpretation that all

Biochemists, Mental Health Service Providers, and other scientists in Solidarity, *Transgender, intersex, and gender non-conforming people #WontBeErased by pseudoscience* (Oct. 26, 2018), <https://not-binary.org/statement/>; see also Azeen Ghorayshi, *1,600 Scientists Just Signed A Letter Opposing A Legal Definition Of A Gender Binary*, BUZZ FEED NEWS (Nov. 1, 2018), <https://www.buzzfeednews.com/article/azeenghorayshi/scientists-vs-gender-binary#.toZbaqxJ1x>.

¹³²See *USMCA*, *supra* note 1, at arts. 2.3 at 2-3 (national treatment for cross-border trade in goods); art. 14.4 at 14-4 (national treatment for FDI); art. 15.3 at 15-2 (national treatment for cross-border trade in services); art. 17.3 at 17-6 (national treatment for financial services); art. 20.8 at 20-5 (national treatment for IPRs).

LGBTQ+ persons are covered by USMCA Article 23.9. A Canadian company could not discriminate against its Canadian “TQ+” employees, but it could do so with respect to its offshore “TQ+” workers, such as those in America (or Mexico). Canada could choose to apply the broadest interpretation extraterritorially to its companies. They might object that extraterritorial application of Article 23.9 to them by the Canadian government puts a higher burden on them in the American market than their American competitors face.

The point is not to state definitively the consequences of one *USMCA* Party, but not all three of them, adopting the broadest interpretation of “sex” as used in Article 23.9. The point is to show the ambiguity of the term, and potential conundrums that may arise if one Party takes the narrowest interpretation. Those conundrums suggest how the overall “object and purpose” of creating a level North American playing field—specifically, treatment no less favorable is afforded to all workers, regardless of “sexual orientation” or “gender identity,” and regardless of employment location, by all traders, service suppliers, and investors in cross-border operations across all three countries—could be undermined.

B. Narrow Interpretation: Article 23.9 Protects Women and “LGB” Persons, because “Sex” Includes “Sexual Orientation but Excludes “Gender Identity”

The narrow interpretation questions whether a level playing field is, indeed, an “object and purpose” of *USMCA*. It casts doubt on the use of Article 23.9 to harmonize the treatment of LGBTQ+ persons in Canada, Mexico, and the United States by an expansive definition of “sex” including “sexual orientation” and “gender identity.” So, under the narrowest interpretation, *USMCA* Article 23.9 does not extend beyond women, and its coverage of gays, lesbians, and bisexuals is uncertain, as is its coverage with respect to non-birth gender identity and transgender status.

This interpretation starts with the observation that the first sentence refers to “women,” which is “context” under Article 31.1 of the *Vienna Convention*.¹³³ This “context” constrains the second sentence. The *NAFTA 2.0* Parties “recognize” the goal of eliminating “sex-based” discrimination, but they “support” only the narrower goal of promoting labor market equality for women.¹³⁴ Of course, the “ordinary meaning” is of primary importance in applying Article 31.1 of the *Vienna Convention*, to be checked first, before “context” or “object and purpose.”¹³⁵

¹³³ Vienna Convention, *supra* note 129.

¹³⁴ TPP, *supra* note 1.

¹³⁵ Vienna Convention, *supra* note 129.

Hence, this interpretation emphasizes how the term “sex” is defined by current dictionary definitions in use at the time the Parties negotiated *NAFTA* 2.0 (namely, August 2017-September 2018). Though a complete survey of the “ordinary meaning” is beyond the present scope, even a casual appreciation of leading lexicographic sources, such as the *Oxford English Dictionary*, suggests sources focus on the traditional binary distinction between males and females. Whether sources expand to “sexual orientation” is uncertain, though arguably they do not exclude such coverage. Sexual preference is not typically a topic for a definition of “male” or “female.” From this silence, it could be inferred that “sex” includes “males” who are gay or bisexual, and “females” who are lesbian or bisexual. But, the conventional lexicography about “sex” does not expand to “gender identity,” though a full analysis of the sources is not the point here. Rather, the point is that a strict textual approach to Article 23.9 suggests the “workers” referred to in the second sentence are limited to “males” and “females,” thanks to the ordinary meaning of the word “sex” to which “protect[ing] workers” is geared.

Not only is this approach reinforced by the “context” of the second sentence (*i.e.*, the first sentence, as just indicated), but also, arguably, by the “object and purpose” of *USMCA*. Effecting a convergence or harmonization of workplace anti-discrimination law across North America is not a goal of this FTA. Providing national treatment for goods, services, and FDI is the goal, manifest in the obligations to ensure treatment no less favorable to foreign traders, services suppliers, and investors than to domestic entities dealing in like matters. Convergence or harmonization of regulatory standards is more intrusive, creating post-border infringements on the sovereignty of each *NAFTA* 2.0 Party. We see where they are interested in cooperation on such matters in Chapter 28, which is entitled “Good Regulatory Practices.”¹³⁶ Sexual preference and gender identity are not mentioned in this Chapter.¹³⁷ In brief, national treatment is a separate and distinct international trade law concept from regulatory convergence or regulatory harmonization, and to conflate these terms is to sneak in social policy preferences into the FTA when the Parties manifestly, and arguably intentionally, left themselves policy space to disagree on whether and how far to extend Article 23.9 beyond women.

Yet, the narrow interpretation suffers from weaknesses. First, in the non-exclusive second clause of the second sentence, “sexual orientation” and “gender identity” are expressly mentioned. The Parties are obliged to have protections against “sex” based discrimination, including discrimination against women or men that arise from their orientation or identity. That is, even if “sex” is defined in the traditional sense of binary opposites of male-female, the inclusive, illustrative language that follows this term broadens that meaning to include LGBTQ+ persons.

¹³⁶ See *USMCA*, *supra* note 1, at ch. 28.

¹³⁷ *Id.*

Second, restricting “sex” to male-female status does not address an ambiguity embedded in the noun “sex.” Three interpretations are permissible: a person is “male” or “female” based on genitalia at birth, the person’s current anatomical structure, or at any point (birth or post-birth). The first option does not allow for Article 23.9 to protect transgender persons, as status is set for all of life. Whereas the second and third ones do, because they allow for status to change.¹³⁸ The problem with the first option (“sex” is defined at birth) is that it conflicts with the express recognition of “gender identity” in the second clause of the second sentence. The problem with the second and third options (“sex” may be changed later in life) is recursive: one or more *NAFTA* 2.0 Parties may urge that applying Article 23.9 to “TQ+” persons is an unwarranted extension of the “object” and “purpose” of the FTA. Moreover, the second option is unhelpful in determining whether androgynous persons are protected.

As between these two interpretations, the broad one seems to be preferable. It flattens the North American playing field against all workplace discrimination, and thus avoids complaints about unlevel playing fields that might arise with respect to national treatment. The broad interpretation is also more efficient than the narrow one. That is because the broad one clarifies the ambiguity about what “sex” means for all three parties, and thus avoids the costs of disputes among them about the range of “policies” they “shall implement.” In Step Three of our argument (set out in Part V, below), we adopt this broad interpretation. But (as per our discussion above) we admit, that whether the broad interpretation is legally correct is by no means indisputable. We also acknowledge a full *Vienna Convention* analysis (under the remainder of Article 31, and as necessary, Article 32) could be appropriate. Finally, we appreciate there may be alternatives other than the two outlined above.

To sum up thus far, two textual dimension variables of “softness” in *USMCA* Article 23.9 are apparent, verb structure and ambiguity. However, Article 23.9 is not entirely soft law. That is thanks to its mention of metrics.

¹³⁸ The first option is favored by the Administration of President Donald J. Trump. See Gabriella Borter & Barbara Goldberg, *Trump Says Transgender Policy Seeks to “Protect the Country,”* REUTERS (Oct. 22, 2018), <https://www.reuters.com/article/us-usa-lgbt/trump-says-transgender-policy-seeks-to-protect-the-country-idUSKCN1MW2XE>. There is a considerable volume of litigation in the United States concerning the definition of “sex,” typically arising under Titles VII and IX of the *Civil Rights Act of 1964*. See, e.g., Lydia Wheeler, *Transgender Fight Could Prove Major Test for Supreme Court*, THE HILL (Oct. 28, 2018) <https://thehill.com/regulation/court-battles/413420-transgender-fight-could-prove-major-test-for-supreme-court>; *R.G. & G.R. Harris Funeral Homes v. EEOC & Aimee Stephens*, ACLU UPDATES, <https://www.aclu.org/cases/rg-gr-harris-funeral-homes-v-eecoc-aimee-stephens> (last updated Oct. 24, 2018). The Trump Administration takes the position the term “sex” refers only to biological sex as being male or female. The definition of the term for which we advocate herein would create an international legal definition, through FTAs, that would resolve the question by including all forms of sex, sexual orientation, and gender identity.

The second clause of the second sentence contains metrics for the parties through its non-exclusive list of the substantive content of “policies.”¹³⁹ The parties are to focus those anti-discrimination “policies” on discrimination. Likewise, the third and fourth clauses clearly emphasize job preservation and wage parity. None of these benchmarks comes with a quantitative indicator to measure progress. And, no mention is made about what to do if a Party already satisfies a metric, or what to do if it boosts its compliance standards—the standstill and ratchet concerns. Thus, like *CPTPP* Article 23.4, *USMCA* Article 23.9 fails to break out of the Hard-Soft box of the Two Dimensional Theory matrix. To move to Hard-Hard law, these provisions need to be redrafted, a task we undertake in Step Three.

V. STEP THREE: TOWARDS A HARD-HARD RULE

A. *World Bank Data, Extensions to LGBTQ+ Persons, and Four Topics*

Our goal is to strengthen protections for women and LGBTQ+ persons in FTAs. Given that *CPTPP* Article 23.4 and *USMCA* Article 23.9 are Hard-Soft law, what can be done to make them Hard-Hard law? Asked differently, how should these provisions be redrafted to yield a “*CPTPP-USMCA Plus*” rule that is hard law in the textual as well as the structural dimension? To address this question, we need to draft text that resolves the problems discussed in Part IV with the first three textual dimension variables; verb construction, vagueness, and ambiguity. We also need to address the other two variables; metrics and status. We do so immediately, preferring to build a rule on quantitative benchmarks, with assigned standstill and ratchet obligations, rather than to tread the same path of the *TPP* and *NAFTA* 2.0 Parties, drafting text that lacks these characteristics.

What metrics should be used in a Hard-Hard FTA rule to advance the rights of persons notwithstanding gender, sexual orientation, or gender identity? What metrics should be used to create Standstill Rules, and which ones should be used for Ratchet Rules? We turn to the World Bank, which collects raw data on gender inequality in 189 countries, and publishes the data set in *Women, Business, and the Law*.¹⁴⁰ This data measures legal restrictions on women’s employment and entrepreneurship by identifying gender-based legal differences. In turn, it helps us address these questions.

This data calls for a GDP-oriented selection. The World Bank’s research concludes “legal gender differences are estimated to significantly decrease female labor force participation and undermine GDP growth.”¹⁴¹ Without doubt,

¹³⁹ *TPP*, *supra* note 1.

¹⁴⁰ See *Women, Business and the Law 2018*, *supra* note 22.

¹⁴¹ *Women, Business and the Law 2016*, WORLD BANK 1, 29 (2016), <http://pub-docs.worldbank.org/en/810421519921949813/Women-Business-and-the-Law-2016.pdf>.

increasing the workforce participation rate of women increases overall economic growth, as does increasing the productivity of women through education.¹⁴² Female participation in the labor force of a country has demonstrably positive economic benefits for that country.¹⁴³ Yet, such participation is uneven across the globe.¹⁴⁴ Eliminating income and workforce participation gaps in the world could potentially add \$12 trillion to global GDP by 2025.¹⁴⁵ For example, anticipated economic gains help explain why, in Japan, increasing the participation of women is a policy priority of the administration of Prime Minister Shinzo Abe.¹⁴⁶ The International Monetary Fund reports (as of 2012) that if Japan's female labor participation rate was raised to the level of the Group of Seven (G-7) countries (Japan plus Canada, France, Germany, Italy, United Kingdom, and United States), or of Northern Europe, then GDP per capita in Japan would rise 4% or 8%, respectively.¹⁴⁷ Goldman Sachs argues

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Nowhere is the problem of gender inequity worse than in Arab Muslim countries. According to the 2005 United Nations *Arab Human Development Report*, Arab female economic activity rates (defined as females over the age of 15 who supply or are available to supply labor for goods and services) are the lowest in the world, at 33%, compared to 69% in East Asia and the Pacific, and the global average of 56%. See S.A. Minam Jafri, *Missing Women: Trends, Protraction and Economic Development in Muslim Countries*, 60 PAKISTAN HORIZON 1, 11 (2007) (discussing this *Report*). Similarly, with respect to female economic empowerment in the Middle East and North Africa, the Organization for Economic Cooperation and Development (OECD) determined women generate only 18% of GDP (while comprising 50% of the working age population), because of unequal access to assets and employment. See Jamille Bigio, *Discriminatory Laws Against Women Costs the Middle East Billions of Dollars Annually*, THE HILL (Nov. 21, 2017), <http://thehill.com/opinion/international/361388-discriminatory-laws-cost-the-middle-east-billions-of-dollars-annually?rnd=1511290012>.

For many Arab Muslim countries, oil may (partly) explain the pathetically low female labor force participation rates. One study of oil producing nations suggests women do not participate in the workforce, and thus lack political standing, because of a variant of the "resource curse." See Michael L. Ross, *Oil, Islam, and Women*, 102 THE AM. POL. SCI. REV. 107, 109-11 (2008). Economic reliance on oil increases wages in the non-traded sectors of the economy (ones, such as construction, which require heavy labor) that male workers dominate, while lowering wages in the traded sectors (e.g., agriculture, textiles, and apparel) where women workers predominate. The disparity results in a rise in the unearned income of women (through their spouses), and thus the "reservation wage" of women (the wage at which women find it worthwhile to join the labor force).

¹⁴⁵ See Rachel Vogelstein, *Let Women Work*, FOREIGN AFF. (Dec. 12, 2017), www.foreignaffairs.com/articles/2017-12-12/let-women-work (discussing a 2015 McKinsey Global Institute report).

¹⁴⁶ See Toko Sekiguchi, *Abe Wants to Get Japan's Women Working*, WALL ST. J. (Sept. 11, 2014), www.wsj.com/articles/abes-goal-for-more-women-in-japans-workforce-prompts-debate-1410446737.

¹⁴⁷ See Chad Steinberg & Masato Nakane, *Can Women Save Japan?* (IMF, Working Paper No. 12/248, 2012), <https://www.imf.org/external/pubs/ft/wp/2012/wp12248.pdf>.

raising the current female labor force participation rate (62.5%, as of 2013) to that of the male rate (80.6%) would boost Japan's GDP by 12.5%.¹⁴⁸

There are no such data for LGBTQ+ persons. That is, there are no analogous comprehensive, cross-border data sets for LGBTQ+ persons.¹⁴⁹ This gap

¹⁴⁸ Jiyeoun Song, *Economic Empowerment of Women as the Third Arrow of Abenomics*, 22 J. OF INT'L & AREA STUD. 113, 116 (2015).

¹⁴⁹ The Nordic Trust Fund funded one survey, resulting in a published report. The acronym "LGBTI" (used in Europe) stands for Lesbian-Gay-Bisexual-Transgender-Intersex. The World Bank "conducted [the survey] to better understand the lives of LGBTI people in seven countries in Southeastern Europe: five in the Western Balkans – Albania, Bosnia and Herzegovina, Kosovo, FYR Macedonia, and Montenegro; as well as two European Union (EU) members, Croatia and Slovenia." See *Life on the Margins: Survey Results of the Experiences of LGBTI People in Southeast Europe*, WORLD BANK 7 (2018), <http://documents.worldbank.org/curated/en/123651538514203449/pdf/130420-REPLACEMENT-PUBLIC-FINAL-WEB-Life-on-the-Margins-Survey-Results-of-the-Experiences-of-LGBTI-People-in-Southeastern-Europe.pdf>. In turn, the World Bank drew on a 2012 benchmark survey by the European Agency for Fundamental Rights (FRA), which included Croatia (an EU member as of 2013). Relative to conditions in the comparatively more liberal western European members of the EU, the "situation for LGBTI people in the Western Balkan countries is much worse than the experience of their peers in the EU, across nearly all dimensions." *Id.* Violence, discrimination, and intolerance are considerably more prevalent in the Western Balkans. *Id.* at 10-11. According to the FRA, the solution is "increased public acceptance for LGBTI people," because it is:

...the smart thing to do. More inclusive societies are more likely to make the most of the all their entire stock of human capital. More open and inclusive cities are better placed to attract international capital and talent. More open and inclusive countries make attractive international tourist destinations ... addressing these challenges will not only ensure that all people's rights are protected, respected and fulfilled, but will bring benefits to the societies, economies, and region at-large.

Id. at 4 (emphasis added). This reasoning mirrors our own: inclusion builds human capital, which contributes to GDP. To be sure, the solution the FRA proposes is not derived from the survey data of the Western Balkans. Rather, to support its economic reasoning, the survey relies upon more specific studies of discrimination against LGBTI populations in Canada and India, and extrapolates back to the European Union. *Id.*

In addition, there is data from the 2016 Canadian census indicating that legalization of same-sex marriage has popularized marriage among same sex couples, and may lead to better economic outcomes and affluence. See *Distribution of Income Between Married Spouses or Common-law Partners, Characteristics of Couples and Opposite-/Same-sex Status of Couple for Married Spouses or Common-law Partners in Private Households of Canada*, STATISTICS CAN., <http://census2006.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?TABID=2&Lang=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=1165051&GK=0&GRP=1&PID=110239&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2016&THEME=119&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0> [hereinafter STATISTICS CAN.].

The 2016 Canadian census covers same-sex couple characteristics, including income, for all of Canada. Canada's legalization of same-sex marriage in 2005 sparked a significant increase in same-sex marriage: of the 72,880 same-sex couples recorded in the census, 24,370 were married as of 2016, which is a threefold increase over the number of recorded

is unsurprising, given the lack of status, even illegal status, in many countries that afflicts such persons, making open and even anonymous responses a terrifying and potentially lethal endeavor. Therefore, we proceed on the assumption that data about labor force discrimination against women lends insights into inequality on the basis of sexual orientation and gender identity. The extrapolation of World Bank data is not a perfect solution, to be sure, and we do not mean to suggest these distinct groups face identical issues. Our assumption is the problems of workplace inequality women face are a reasonable approximation for difficulties LGBTQ+ persons suffer, in the absence of comprehensive, targeted data.

However, this assumption presents us with a difficulty: while most of the Standstill and Ratchet Rules we recommend can be extended to include LGBTQ+ persons, a few of them require addressing cultural, social, and religious norms before that extension can occur. For example, any Standstill or Ratchet Rule concerning marriage can be extended to include LGBTQ+ persons only if same-sex marriage, or some acceptable civil union arrangement, is lawful in the FTA party. We do not go so far as to opine on how a party should resolve that matter. Likewise, how is our recommendation for a minimum quota for representation of women on corporate boards to apply to LGBTQ+ persons? The answer begs the question whether such persons are, and indeed wish to be, identified as such.

Our resolution to such questions is imperfect. In the first instance, we suggest that if an FTA party allows for same-sex marriage or civil unions, then it should extend the relevant Standstill or Ratchet Rule accordingly. In the second instance, we urge that no person should be precluded from corporate board owing to sexual preference or gender identity. In other words, we opt for a pragmatic, *ad hoc* approach to resolving the application of a particular Standstill or Ratchet Rule in situations where parties to the same FTA hold disparate views on the underlying law the rule implicates.

Though FTAs encompass topics beyond strictly economic growth, such as the rights of identifiable constituencies and communities, they are fundamentally instruments designed for the mutual economic benefit of their Parties. No country enters an FTA seeking a decline in Gross Domestic Product (GDP) from the combination of trade creation and trade diversion the FTA causes. Quite the contrary: every country expects the FTA will boost its GDP, and in

same sex marriages in 2006. See Laura Kane, *Same-Sex Marriage More Popular Than Ever in Canada*, THE TORONTO SUN (Aug. 2, 2017), <https://torontosun.com/2017/08/02/same-sex-marriage-more-popular-than-ever-in-canada/wcm/406eb754-2b05-4b89-8603-6c53d0666668>. The combined median total income of same-sex couples was nearly \$10,000 (Canadian dollars) greater per year than that of opposite-sex couples (\$87,605 for opposite-sex couples and \$96,870 for same-sex couples). See STATISTICS CAN. The Census does not offer a causal explanation for the difference. One possibility is the relative inclusiveness of Canadian society, which allows Canada to more fully develop the potential of its human capital, specifically that of its LGBTQ population.

entering into *CPTPP* or *USMCA*, the parties hope their FTA stimulates GDP. Whether this hope is realized depends on an array of exogenous factors, from international conflict to domestic tax policy, *i.e.*, variables beyond the boundaries of the FTA. Discrimination on the basis of gender, sexual orientation, or gender identity typically is another such exogenous factor, because (as explained in Part V.B-E, below) discrimination constrains GDP growth. Yet regulating discrimination is not covered by FTAs. Thanks to *CPTPP* Article 23.4 and *USMCA* Article 23.9, twelve countries are willing to view this matter as an endogenous factor, a variable governed by their FTA. Of course (as explained in Part IV), though they have made anti-discrimination an endogenous factor, they have not turned it into hard-law. Our project is to do so.

Accordingly, in exploring the linkage of FTAs to women's and LGBTQ+ rights, we identify metrics that are pro-growth. We turn to the World Bank's 2018 data on gender inequality, which are presented in the charts in the Annex (hereinafter all references to the Annex are in reference to charts available with the author and on Georgia's Journal of International and Comparative Law website). We select from this data set, organizing our picks into four areas that link gender inequality to GDP growth.¹⁵⁰ This selection tracks the four topics with which *CPTPP* Article 23.4(2)(a)-(c) deals: Education; Business Capital; Social Capital; and Legal Protection.

Two reasons justify attention to these four topics. First, the eleven *CPTPP* Parties already pay attention to these areas. Those Parties include Canada and Mexico, and (until it withdrew from *TPP*), the United States. Second, *USMCA* Article 23.9 covers the area of "legal protection" (albeit without using that term), but only that category. Article 23.9 is narrow, in that it does not identify "policies" the *NAFTA* 2.0 Parties "shall implement" that address education, business capital, or social capital. Focusing on these four areas, rather than just one of them, promotes our goal of advancing the rights of women and LGBTQ+ persons in a broad array of trade and trade-related areas implicated by FTAs.

Fortunately, the World Bank data set can be reviewed with these four *TPP* Article 23.4 areas in mind. The World Bank does not expressly organize its data along the lines of the four *TPP* areas. But, the correlation between economics and the law, specifically, the World Bank's categories, on the one hand, and the Article 23.4 areas, on the other hand, is straightforward and common-sense. Additionally, viewing the empirical categories through the *TPP* lens helps identify Standstill and Ratchet Rules in each of the four areas. We choose each metric from within the World Bank data set based on its direct or indirect relevance, intuitively if not empirically, to GDP. Our selections are not the only possibilities, and practical debates may surround them.

¹⁵⁰ See *Women, Business and the Law 2018*, *supra* note 22; *TPP*, *supra* note 1, at art. 23.4(2)(a)-(c).

However, we urge these metrics are plausible choices, intuitively if not also empirically, and in making them, we highlight the possibility of hardening the textual provisions in FTAs concerning gender, sexual orientation, and gender identity.

B. Selecting Metrics and Standstill Versus Ratchet Rules

Drawing upon the 2018 World Bank data set across all four *TPP* Article 23.4 areas, we identify twenty total rules that we recommend as metrics for a Hard-Hard FTA provision on the rights of women and LGBTQ+ persons. The data is set out in Tables A through D of the Annex, covering Education, Business Capital, Social Capital, and Legal Protection, respectively. Each Table sets out dozens of possible criteria by which to evaluate FTA Parties, and in total, there are eighty-three such criteria. Those eighty-three criteria, set forth in the Annex hereto, are drawn from over 100 questions surveyed by the World Bank. Manifestly, it is not feasible to incorporate all of them into an FTA. Aside from the sheer complexity of understanding and enforcing, and the magnified prospects of infringing on the sovereignty of one or more parties by reaching for too many criteria, it is not necessary to select all eighty-three of them. A targeted approach is preferable, one where the criteria focuses directly on advancing women's and LGBTQ+ rights. Following this approach, we have selected twenty from among the eighty-three possibilities.

Tables II and III summarize our proposed Standstill and Ratchet Rules. Fifteen of our recommendations constitute Standstill Rules (using metrics one, four, seventeen, eighteen, nineteen, twenty, twenty-two, twenty-three, twenty-seven, thirty-seven, forty, forty-one, sixty-six, seventy-four, and seventy-seven, each of which is highlighted in the data set in the annexed tables). Five of our suggestions are Ratchet Rules (using metrics two, thirty-two, thirty-eight, fifty-six, and fifty-seven, each of which is highlighted in the annexed data set). We delineate between "Standstill" and "Ratchet" Rules based on whether a majority of the eleven *CPTPP* Parties already satisfy the metric in the Rule. So, for fifteen of the twenty metrics reflected in our proposed Standstill Rules, the majority of the parties already are in compliance. They are obliged not to reduce their level of compliance. The minority of the parties are obliged to achieve and maintain compliance. On the remaining five of the twenty metrics, on which our Ratchet Rules are premised, the majority of parties are not in compliance. They are obliged to bring their laws up to the benchmarks, and keep them at those levels. Whereas the minority of the Parties currently in compliance are obliged not to backslide.

Table 2: SUMMARY OF PROPOSED STANDSTILL RULES TO ADVANCE WOMEN'S AND LGBTQ+ RIGHTS VIA FTAS

Proposed Standstill Rules	
<i>Metric Number in World Bank Data Set</i>	<i>Rule</i>
Topic 1: Education	
1.	The law prohibits discrimination by creditors on the basis of gender in access to credit.
4.	Women are permitted to perform the same jobs as men.
17.	Unmarried men and unmarried women have equal ownership rights to property.
18.	Married men and married women have equal ownership rights to property.
19.	Female and male surviving spouses have equal inheritance rights.
20.	Sons and daughters have equal inheritance rights.
Topic 2: Business Capital	
22.	Marital property is administered by either the original owner or by the agreement of both spouses.
23.	If the husband administers property, then spousal consent is not required for major transactions by the wife.
Topic 3: Social Capital	
27.	The minimum legal age of marriage for girls is 18 years.
Topic 4: Legal Protection	
37.	The law mandates paid or unpaid maternity leave.
40.	There is a prescribed minimum length of paid maternity leave.
41.	There is a prescribed minimum length of paid paternity leave.
66.	There are criminal penalties for domestic violence.
74.	There is legislation against sexual harassment in employment.
77.	There are civil remedies for sexual harassment in employment.

Source: Raj Bhala & Cody Wood 2018

Table 3: SUMMARY OF PROPOSED RATCHET RULES TO ADVANCE WOMEN'S AND LGBTQ+ RIGHTS VIA FTAS

Proposed Ratchet Rules	
<i>Metric Number in World Bank Data Set</i>	<i>Rule</i>
Topic 1: Education	
2.	The law prohibits discrimination by creditors on the basis of marital status in access to credit.
Topic 3: Social Capital	
32.	The minimum quota for women on corporate boards is 40%.
Topic 4: Legal Protection	
38.	The law mandates paid or unpaid paternity leave.
56.	The law mandates equal remuneration for work of equal value.
57.	The law mandates nondiscrimination based on gender in hiring.

Source: Raj Bhala & Cody Wood 2018

How do we delineate between “Standstill” and “Ratchet” Rules? If six or more of the eleven *TPP* Parties already meet the metric, *i.e.*, currently comply with the quantitative benchmark in the Rule, then we identify that Rule as “Standstill.” As such, those six parties are obliged to not slide backwards in compliance. And, the remaining five parties are obliged to move forward in an effort to comply with the Rule. In contrast, if five or less parties meet the metric referred to in a Rule, *i.e.*, if five or fewer satisfy the numerical threshold in the Rule, then we label that Rule a “Ratchet” Rule.

Over time, the distinction between a Standstill and Ratchet Rule can shift in two ways, depending on the position of a party. First, with respect to a Standstill Rule, the minority (five or fewer) non-complying parties are obliged to “ratchet up” their compliance level to that of the majority (six or more) parties. To be sure, the delineation is not perfect. The five or fewer parties that do not currently comply with a Standstill Rule are obliged to do so, and not to backslide once they have done so. This forward movement in compliance by the minority gives what is a “Standstill Rule” for the majority a “ratchet” quality for the minority. If and when a minority party does move forward, then

what in effect was a Ratchet Rule becomes a Standstill Rule, as the formerly non-complying party is not permitted to reduce their level of compliance. Second, with respect to a Ratchet Rule, once the majority of non-complying parties satisfy the metric of the Rule, that Rule becomes a Standstill Rule. These shifts are to be expected, if the rights of women and LGBTQ+ persons are to be advanced.

C. Topic 1: Education

The first area for advancement TPP Article 23.4(a) suggests is education, specifically the promotion of programming to help women build their skills and capacity.¹⁵¹ Their education at all levels (primary, secondary, tertiary, and adult) adds to their human capital, which is a factor of production and a vital source of GDP growth. That is, gender neutrality in educational participation is strongly correlated with higher per capita incomes, in which greater education for women lead to greater human capital development and enhanced overall productivity.¹⁵² Intuitively, rather than discriminating against women, and thereby limiting their human capital, we can remove barriers to their ability to succeed, ultimately contributing to a higher GDP. Conversely, gender inequality results in parents sending boys to school more often than girls, causing a two-tier labor force, in terms of the quality of human capital, and leading to unrealized growth potential.

There may be a greater return on investment (ROI) on expenditures to enhance the education of women and gender equality than on investments in men (*ceteris paribus*). For instance, a study of gender inequality in Pakistan shows the returns on public education are greater from investing in females than investing in males, because of the greater unrealized growth potential for women than men.¹⁵³ Furthermore, the ROI to investments in women are compounded. Women invest more in the human capital of their children than do men, and therefore would further increase Pakistan's economic growth over the traditional male-slanted investments.

Investing in the education of women also increases their participation in the labor force, resulting in both more workers, and better trained workers. These two factors of production—labor and human capital—operate in tandem. The relative wage rates of well-educated versus less well-educated women explain why. Women of lower education levels have lower workforce participation rates, because their compensation is lower than that of more educated

¹⁵¹ TPP, *supra* note 1, at art. 23.4(2)(a).

¹⁵² Claudia Goldin, *The Human-Capital Century and American Leadership: Virtues of the Past*, THE J. OF ECON. HIST. 263, 272-73 (2001).

¹⁵³ Imran Sharif Chaudhry, *Gender Inequality in Education and Economic Growth: Case Study of Pakistan*, PAKISTAN HORIZON 81, 89-9 (2007).

women.¹⁵⁴ For less educated women, compensation does not exceed the value of uncompensated household work or child care, unless they are compelled by exigent circumstances to work for compensation. Conversely, greater education for women induces them to participate in paid labor for the opposite reason—their compensated work is of greater value than their uncompensated household work/child care.

Which World Bank data categories in Table A of the Annex are most critical to helping women access education opportunities? The answer is Children, Job Restrictions, Nondiscrimination in Building Credit, Property, and Inheritance. Therefore, based on metrics one, four, seventeen, eighteen, nineteen, and twenty, we recommend the following Standstill Rules:

1. The law prohibits discrimination by creditors on the basis of gender in access to credit.

Five *CPTPP* Parties, namely, Brunei, Chile, Japan, Malaysia, and Singapore, do not satisfy this proposed Standstill Rule.

4. Women are permitted to perform the same jobs as men.

Four *CPTPP* Parties, namely, Chile, Japan, Malaysia, and Vietnam, do not satisfy this proposed Standstill Rule.

17. Unmarried men and unmarried women have equal ownership rights to property.

All *CPTPP* Parties satisfy this proposed Standstill Rule.

18. Married men and married women have equal ownership rights to property.

All *CPTPP* Parties, except Chile, satisfy this proposed Standstill Rule.

19. Female and male surviving spouses have equal inheritance rights.

Two *CPTPP* Parties, Brunei and Malaysia, do not satisfy this proposed Standstill Rule.

¹⁵⁴ The persistent effect of women entering the workforce during the Second World War was experienced almost entirely by women in the upper half of the educational distribution. Higher educated women earned wages that exceeded any return from unpaid/uncompensated household labor that less educated women were subject to. Claudia Goldin & Claudia Olivetti, *Shocking Labor Supply: A Reassessment of the Role of World War II on Women's Labor Supply* (NBER, Working Paper No. 18676, 2013).

In contrast, in Afghanistan, paid work is accorded respect that is not given to uncompensated work and the lack of opportunities for paid work hold back the socioeconomic advancement of women. See Cheryl Benard et al., *Economic Participation and Women, in WOMEN AND NATION-BUILDING* 102 (2008).

Of course, non-wage factors are pertinent to female labor force participation. For example, lower relative pricing of home appliances encourages higher female workforce participation rates, as the cost of performing household tasks decreases and the relative value of paid work outside the home increases. In the United Kingdom, the decrease in the prices of home appliances alone from 1975 to 1999 accounts for 10% to 15% of the increase in the female labor participation rate over the same time period. See Tiago V. De Cavalcanti & José Tavares, *Assessing the "Engines of Liberation:" Home Appliances and Female Labor Force Participation*, 90 *REV. OF ECON. & STAT.* 81, 81-88 (2008).

20. Sons and daughters have equal inheritance rights.

Two *CPTPP* Parties, Brunei and Malaysia, do not satisfy this proposed Standstill Rule.

We further recommend metric two as a Ratchet Rule:

2. The law prohibits discrimination by creditors on the basis of marital status in access to credit.

Six *CPTPP* Parties, Brunei, Chile, Japan, Malaysia, Peru, Singapore, and Vietnam, do not satisfy this proposed Ratchet Rule.

These recommendations follow from the empirical finding that girls are more likely to be sent to school if their earning potential is not limited by their gender.¹⁵⁵

Each of these metrics gauge the earning potential of women. So, we recommend FTA parties target access to credit and jobs (metrics one and four), as discriminatory policies in either respect impede the ability of women to work or run their own business. The law should prohibit discrimination by creditors of one's access to credit on the basis of either their gender or marital status. Women should be able to do the same jobs as men (metric four). The wage gap is also likely to be smaller where there are no job restrictions on women's work.¹⁵⁶

We further recommend that FTA parties emphasize property ownership and inheritance rights. These rights include providing equal ownership rights to property for married men and married women (metric eighteen), and equal inheritance rights for males and females (metric nineteen), and sons and daughters (metric twenty). Access to property increases women's financial security and bargaining power within the household, which can lead to mothers securing better educational and financial outcomes for their daughters.¹⁵⁷

The fact Brunei and Malaysia fail to satisfy metrics nineteen and twenty may be due to the influence, interpretation, or operation of Islamic Law on their inheritance regimes.¹⁵⁸ The *Sharī'a* does not guarantee equal inheritance shares of female and male surviving spouses, nor of sons and daughters. Rather, at least two-thirds of the estate of a decedent must pass in accordance with rules sourced in the Holy Qur'ān.¹⁵⁹ Non-Muslim FTA parties committed to equal inheritance rights regardless of gender, sexual orientation, and gender identity need to confront parties claiming their religious law, be it the *Sharī'a* or any other sacred legal system, should take precedence over this commitment. The problem of granting a religiously-based exception to this commitment is the proverbial slippery slope: the cumulative effect of one exception

¹⁵⁵ *Women, Business and the Law 2018*, *supra* note 22, at 4.

¹⁵⁶ *Id.* at 13-15.

¹⁵⁷ *Id.* at 12-13.

¹⁵⁸ See UNDERSTANDING ISLAMIC LAW, *supra* note 9, at ch. 42.

¹⁵⁹ See *id.* at § 42.03(B) at 1052-64, § 42.06 at 1071-73.

after another can leave women and LGBTQ+ persons as vulnerable with an FTA that purports to protect them as they were before FTA entered into force.

D. Topic 2: Business Capital

Business Capital, or “access to markets, technology and financing,” is the second area *TPP* Article 23.4(2)(a) refers to.¹⁶⁰ Gender-based constraints on access to business capital—that is, real and personal property—artificially reduces the pool of talent from which employers can draw, causing a diminution of, and distortions in, factor productivity.¹⁶¹ Intuitively, increases in the productivity of labor (*i.e.*, output per labor hour) are constrained thanks to limits on output growth. Gender-based discrimination keeps its victims from the labor force, or denies the full use of their talents and skills. It also inhibits women’s entrepreneurship: burdens on capital access are hurdles to starting enterprises and employing workers. This unemployment or underemployment of women as employees and/or employers limits output growth.

Gender-based discrimination also inhibits the efficient utilization of the other factors of production; land, physical capital, human capital, and technology. With the labor force constrained, complementarities among the factors, *e.g.*, the best quality labor operating the highest technology, are not fully realized. Distortions in overall factor productivity are the consequence. Here again, with productivity restrained, GDP growth, by definition, is too.

Reducing gender-based legal restrictions encourages broad participation in the labor force. Women are free to pursue economic opportunities that are best for them, their families, and their communities.¹⁶² Unencumbered by those restrictions, their collective free market choices contribute to GDP growth. We suggest that Business Capital metrics may be the most critical to rectifying these legal restrictions, other than the Education metrics discussed above.

Which World Bank data categories in Table B of the Annex are most pertinent to boosting Business Capital throughout FTAs? In reviewing the World Bank data set, we focus on Spousal Protections and Marital Property. They concern the interplay of the marital status of a woman, on the one hand, and her ability to access property and put it to productive use, on the other hand. We recommend metrics twenty-two and twenty-three as Standstill Rules:

22. Marital property is administered by either the original owner or by the agreement of both spouses.

¹⁶⁰ *TPP*, *supra* note 1, at art. 23.4(2)(a).

¹⁶¹ See Gaëlle Ferrant & Alexandre Kolev, *The Economic Cost of Gender-based Discrimination in Social Institutions*, OECD DEVELOPMENT CENTRE 1, 2 (2016), https://www.oecd.org/dev/development-gender/SIGI_cost_final.pdf [hereinafter, OECD].

¹⁶² *Women, Business and the Law 2018*, *supra* note 22, at 5.

One *CPTPP* Party (Chile) does not satisfy this proposed Standstill Rule.¹⁶³

23. If the husband administers property, then spousal consent is not required for major transactions by the wife.

One *CPTPP* Party (Chile) does not satisfy this proposed Standstill Rule.¹⁶⁴

FTA parties should incorporate equitable measures within their marital property regime (metric twenty-two), including spousal protections for marital property. Such measures enhance the degree to which women have access to financing and credit.¹⁶⁵ Moreover, married women are more likely to perform unpaid activities to benefit the household if there are legal recognitions for nonmonetary contributions to marital property.¹⁶⁶ Married women residing in a country in which husbands control marital property (metric twenty-three) are less likely to have an account at a financial institution.¹⁶⁷ Conversely, where married women need the consent of their husbands to engage in a transaction, the full productive use of property is impeded.

E. Topic 3: Social Capital

The third area that *CPTPP* Article 23.4(2)(b) targets to improve, with respect to women's rights, is Social Capital. The sole illustration the provision references is "developing ... leadership networks."¹⁶⁸ Gender equality in the promotion of such networks builds social capital, complementing human and business capital, and empowers women. Women are discouraged from early marriage, and rather encouraged to enter traditionally "male" domains, leading to work with men. All of this combats negative perceptions about a woman's participation in the labor force.¹⁶⁹ Their participation is not restricted to working for men as employees in large corporations. Through their leadership networks, they develop the essential networks to create and build businesses as entrepreneurs in small and medium sized enterprises (SMEs), and to function effectively as employers in senior positions at multinational corporations (MNCs). Intuitively, this positive sequence—deferring marriage, developing networks, and destroying stereotypes—helps boost GDP. With more, better connected women in the labor force, productivity rises, and with them at the helm of SMEs and MNCs, investment increases.

¹⁶³ Mexico reports "Other" with respect to metric twenty-two, which means that its marital property regime does not fit the World Bank's standard responses (Original Owner, Husband, or Both Must Agree). *See id.* at 48.

¹⁶⁴ *Id.* at 5.

¹⁶⁵ *Id.* at 13.

¹⁶⁶ *Id.* at 2, 4.

¹⁶⁷ *Id.*

¹⁶⁸ TPP, *supra* note 1, at art. 23.4(2)(b).

¹⁶⁹ OECD, *supra* note 161, at 4.

In the World Bank data set, specifically Table C in the Annex, we find two quantitative measurements pertinent to the category of Social Capital; Children and Early Marriage, and Quotas. On the first benchmark, we suggest metric twenty-seven as a Standstill Rule:

27. The minimum legal age of marriage for girls is 18 years.

Ten of the *CPTPP* Parties establish a minimum age for first marriage (AFM), eight of them at age eighteen, one at age twenty (Japan), and one at age twenty-one (Singapore). Data for Malaysia for 2018 is unavailable, but in 2016 Malaysia reported an AFM of sixteen.¹⁷⁰

Though perhaps a case can be made for a Japanese or Singaporean-level AFM, *i.e.*, for one higher than 18 years, we realize marriage is among the most sensitive of human decisions, and respectful of the diverse cultures represented across FTA parties, and within some FTA parties, we decline to infer one. From a pragmatic perspective, it is sensible to oblige parties not to lower their AFM below the threshold they already mandate, and thus preserve the FTA, rather than push for a higher AFM, and risk the FTA being rejected amidst a cultural backlash.

On the second benchmark, we recommend metric thirty-two as a Ratchet Rule:¹⁷¹

32. The minimum quota for women on corporate boards is 40%.

No *CPTPP* Party sets quotas for representation of women on corporate boards.¹⁷²

With respect to this proposed Ratchet Rule, our suggested minimum quota of 40% is not arbitrary. That is the Icelandic, Norwegian, and Spanish requirement, and EU recommendation.¹⁷³

¹⁷⁰ See *Women, Business and the Law 2016*, *supra* note 141, at 167.

¹⁷¹ The quota for women representation on corporate boards is 40%. Metrics thirty-three through thirty-six in the World Bank data set concern quotas for the representation of women in parliament, local government, and on candidate lists for national and local elections. Mindful of the intrusion into the sovereign political space of FTA parties, and of the number and significance of Standstill and Ratchet Rules that we are recommending herein, we do not currently recommend fashioning such quotas into a Standstill or Ratchet Rule. *Id.*

¹⁷² *Women, Business and the Law 2018*, *supra* note 22, at 5.

¹⁷³ See *id.* at 10-12 (at least one member quota in India, 20% quota in France, 30% quota in Germany, 40% quota in Iceland, Norway, and Spain, and 40% quota encouraged by EU). See *Gender Diversity and Corporate Performance*, CREDIT SUISSE (Aug. 2012), https://www.calstrs.com/sites/main/files/file-attachments/csri_gender_diversity_and_corporate_performance.pdf (“look[ing] at the impact [of gender diversity on corporate leadership] from a global perspective by analyzing the performance of close to 2,400 companies with and without women board members from 2005 onward”); but see *The Old-Girls Network: Ten Years on from Norway’s Quota for Women on Corporate Boards*, THE ECONOMIST (Feb. 17, 2018), <https://www.economist.com/news/business/21737079-gender-quotas-board-level-europe-have-done-little-boost-corporate-performance-or> (concluding European

This suggestion affords flexibility. Each FTA party is free to decide whether the minimum quota applies strictly to corporations, or if it extends to other forms of business associations, such as partnerships, and if so, how. Each party is also free to set the minimum size of a corporation or business organization to which the quota applies. Thus, parties in the same FTA with businesses of diverse forms and sizes are not straightjacketed.

Of course, flexibility can be abused. A party may administer the quota in such a way that it affects only a minority of businesses that account for a small percentage of economic growth. Were such *de facto* non-compliance with the Ratchet Rule to occur, then supplementary metrics could be used, such as mandating coverage of a specified percentage of businesses and/or economic activity. Nevertheless, the use of quotas within political representation and service on corporate boards to secure more equitable representation of women in leadership positions enables more opportunities for mentorship and discussion of women's interests in the exercise of business judgment and the making of strategic and tactical decisions. As a result, the end goal of provisions creating any quota should be total parity of representation.

F. Topic 4: Legal Protection

The fourth and final area that *TPP* suggests to advance women's rights is, per Article 23.4(2)(c), "identifying best practices related to workplace flexibility."¹⁷⁴ This area most closely correlates with Legal Protections in the World Bank data set because the best practices covers a wide range of aspirational norms designed to institutionalize the equal treatment of women. With respect to gender-based discrimination, "non-discriminatory and gender-sensitive laws are the first step to challenge discriminatory social institutions."¹⁷⁵ Intuitively, reducing such discrimination helps workers, whether employees or employers, realize their full productive potential, based on their individual human, business, and social capital endowments. Their effect on GDP is positive, as they are able to contribute fully in their respective economic endeavors.

Which World Bank data categories are most pertinent to Legal Protection? There is a plethora of such categories, and metrics within each one, from which to choose. In reviewing the data set, we select those metrics directly related to workplace flexibility. That is, we look to the metrics that are most promising to increase the latitude employers and employees have to maximize participation and productivity, with a view to enlarging GDP. In reviewing

gender quotas at the board level have not had the expected impact, on either corporate performance or women at lower corporate levels).

¹⁷⁴ *TPP*, *supra* note 1.

¹⁷⁵ OECD, *supra* note 161, at 4.

Table D in the Annex, we focus on Parental Benefits, Workplace Protections, Domestic Violence, Sexual Harassment, and Care.¹⁷⁶

In these respects, we recommend metrics thirty-seven, forty, forty-one, sixty-six, seventy-four and seventy-seven as Standstill Rules:

37. The law mandates paid or unpaid maternity leave.

All *CPTPP* Parties satisfy this proposed Standstill Rule, except Australia. (The United States does not satisfy this Rule.)

40. There is a prescribed minimum length of paid maternity leave.

All *CPTPP* Parties satisfy this proposed Standstill Rule, except possibly Australia and New Zealand, for which data are unavailable.

41. There is a prescribed minimum length of paid paternity leave.

All *CPTPP* Parties satisfy this proposed Standstill Rule, except possibly Brunei, Canada, Japan, and Malaysia, for which data are unavailable, and New Zealand, which reports zero.

66. There are criminal penalties for domestic violence.

All *CPTPP* Parties satisfy this proposed Standstill Rule, except Brunei, Chile, Japan, New Zealand, and Singapore.

74. There is legislation against sexual harassment in employment.

All *CPTPP* Parties satisfy this proposed Standstill Rule, except Brunei and Japan.

77. There are civil remedies for sexual harassment in employment.

All *CPTPP* Parties satisfy this proposed Standstill Rule, except Brunei, Chile, Japan, and Mexico.¹⁷⁷

We further recommend from Annex Table D metrics thirty-eight, fifty-six, and fifty-seven as Ratchet Rules:

38. The law mandates paid or unpaid paternity leave.

Only Chile, Mexico, New Zealand, Peru, and Singapore satisfy this proposed Ratchet Rule. The United States does not satisfy this Rule.

56. The law mandates equal remuneration for work of equal value.

¹⁷⁶ We do not put forth any Standstill or Ratchet Rules drawn from metrics eighty-four through ninety. Those metrics concern constitutional rights. We are hesitant to use FTAs as vehicles for constitutional change. Such changes may be difficult for FTA Parties to enact. Moreover, underlying statutory protections, if they exist and are enforced, may suffice to advance the rights of women and LGBTQ+ persons, and ultimately may be enshrined in a constitution. Inverting the order—mandating constitutional change, followed by statutory protections—may be appropriate, but also may be unnecessarily intrusive as a first resort to create a Hard-Hard law FTA obligation.

¹⁷⁷ Metric seventy-eight references criminal penalties for sexual harassment in employment. Whether such penalties would be appropriate in these cases could raise human rights concerns, insofar as they could involve the infliction of corporal punishments, for example, under Islamic Law. See UNDERSTANDING ISLAMIC LAW, *supra* note 9, § 43.02(B) at 1082-84.

Only Australia, Canada, Peru, and Vietnam satisfy this proposed Ratchet Rule. The United States does not satisfy this Rule.

57. The law mandates non-discrimination based on gender in hiring.

Only Australia, Japan, Mexico, New Zealand, and Vietnam satisfy this proposed Ratchet Rule.¹⁷⁸

The Standstill and Ratchet Rules on legal protection operate in tandem.

For example, the ease and cost of having a child, plus the availability of care for young children, impacts whether a mother decides to work outside of the home.¹⁷⁹ The inverse relationship between reducing the costs of child care, on the one hand, and increasing female labor force participation, on the other hand, is unmistakable.¹⁸⁰ To afford choice, a specific mandate is needed.¹⁸¹

¹⁷⁸ *Women, Business and the Law 2018*, *supra* note 22, at 5.

¹⁷⁹ *Id.* at 16.

¹⁸⁰ For example, one study reports:

The results . . . show that the labor force participation rate of married women is sensitive to the average cost of child care. One measure of this sensitivity is the elasticity of the probability of participation due to a change in the average cost of child care. This is -0.20, when evaluated at the mean values of probability and child care cost. Another way to measure sensitivity is to simulate how the probability of participation would change if the cost of child care changed. The mean of the probabilities of participation from our sample . . . is 58.8%. This is quite close to the actual proportion employed in our sample of 56.5%. If child care cost were subsidized 50%, our model predicts that 64.0% of married women with young children would be employed, and if there were universal no-cost child care available, 68.7% of women would be employed.

Rachel Connelly, *The Effect of Child Care Costs on Married Women's Labor Force Participation*, *THE REV. OF ECON. & STAT.*, Feb. 1992, at 83, 89-90. (showing that a 1988 differential study by Blau and Robins, found an even stronger relationship: with zero child care costs, 87%, of married women would be employed).

A more recent analysis of the effects of child care costs on female labor supply comes from So Kubota, a Ph.D. candidate in economics at Princeton University. Kubota examines women's employment in the United States from 1985 to 2011. At the beginning of this period, women entered the workforce in large numbers, and by the early 1990s, America boasted one of the highest female labor force participation rates in the world. Yet by the early 2000s, many peer advanced industrialized nations surpassed the United States. Kubota finds that rising childcare expenditures by families resulted in a 5% decline in total employment of women, and a 13% decline in the employment of working mothers with children under the age of five. He further argues the rising cost of child care not only negatively impacts female labor supply, but "also has a significant factor on total labor supply." In turn, the decline in labor force participation among women and men adversely impacts American economic growth. For households, women staying out of, or leaving, the labor force, threatens family financial security. See BRIDGET ANSEL, *IS THE COST OF CHILDCARE DRIVING WOMEN OUT OF THE U.S. WORKFORCE?*, WASHINGTON CENTER FOR EQUITABLE GROWTH(2016) (citing Kubota's research), <https://equitablegrowth.org/is-the-cost-of-childcare-driving-women-out-of-the-u-s-workforce/>.

¹⁸¹ Likewise, we leave it to the discretion of each Party, based on its domestic situation, to consider implementation and enforcement of metrics 43-55. There is considerable variance in these metrics. For example, consider metrics 52-55. No *CPTPP* Party requires parental leave be taken by the father, and no Party, except Chile, required parental leave be

Without mandated maternity and paternity leave (metrics thirty-seven and thirty-eight), the work life of parents is impeded. We leave it to the sovereign prerogative of an FTA party to choose the appropriate minimum threshold, but insist there be some minimum paid leave for both parents (metrics forty and forty-one).

Discriminatory practices and limitations to earning potential are a direct disincentive for women to enter the workforce, and an inhibition on their potential productivity and ultimate contribution to GDP.¹⁸² We recommend statutory protections such as equal pay for equal work, and non-discriminatory hiring procedures (metrics fifty-six and fifty-seven). Legislative protections that target sexual harassment in the workplace have a similar positive impact on the participation of women in the labor force.¹⁸³ We recommend that FTA parties have specific statutory protections regarding sexual harassment in the employment context (metric seventy-four), backed by civil penalties (metric seventy-seven).

An important additional protection concerns domestic violence. Women are likely to have shorter lifespans in countries in which the law does not protect them from domestic violence. An artificial reduction in the lifespan of any worker means that worker's full potential to contribute to GDP goes unrealized. We recommend criminal penalties for domestic violence (metric sixty-six). This recommendation is based upon the demonstrated empirical link that decreasing domestic violence positively impacts life expectancy factors for women,¹⁸⁴ which in turn can enhance GDP.

G. Proposed Hard-Hard Law Text

Based on the foregoing discussion, we offer text as a possible model for reform of *CPTPP* Article 23.4, *USMCA* Article 23.9, and also for consideration in other FTAs. This model is designed to retain the benefits of hard law

taken by the mother. Brunei, Malaysia, Mexico, Peru, and Vietnam make no considerations to required parental leave.

¹⁸² "Research shows a strong positive relationship between having legislation on non-discrimination in hiring on the basis of gender and women's employment relative to men's in 58 developing countries." *Women, Business and the Law 2018*, *supra* note 22, at 13.

¹⁸³ Our theory in picking the variables is to be the least intrusive and most respectful of sovereignty. The criteria we used is focused on those issues most directed to trade.

¹⁸⁴ Intimate partner violence results in negative health issues, accepting attitudes toward violence, risky sexual behavior, and substance abuse later in life. *See Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, WORLD HEALTH ORG. (2013), http://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf;jsessionid=A0D56C83E1383970DB2AB952AF557014?sequence=1 (a systematic review of evidence on intimate partner violence); *Violence Against Women Fact Sheet*, WORLD HEALTH ORG. (Nov. 29, 2017), <http://www.who.int/mediacentre/factsheets/fs239/en/> (discussing the health consequences and social and economic costs of intimate partner violence).

in the structural dimension of our Two-Dimensional Theory. Tracking the five variables of the structural dimension, the model is housed in an FTA (Type) that covers FTA Parties and private agents (Scope), and there are mechanisms for checking compliance (Monitoring), resolving disputes (Adjudication), and applying sanctions (Enforcement). Significantly, with respect to the textual dimension of the Theory, the model is designed to offer hard law language, consistent with the five variables of that dimension. Thus, attention is paid to lexical and modal verbs (Verbs), uncertain interpretations (Vagueness) or multiple interpretations (Ambiguity) are avoided, and benchmarks (Metrics) that are Standstill or Ratchet Rules (Status) are established. Table IV contains our proposal:

Table 4: MODEL HARD-HARD LAW FTA RULE AGAINST WORKPLACE SEX-BASED DISCRIMINATION

<i>Paragraph</i>	<i>Text</i>
(1)	Goal: The Parties recognize the goal of eliminating sex-based discrimination in employment.
(2)	Definition: The Parties agree “sex-based” discrimination refers to discrimination on the basis of gender, sexual orientation, or gender identity, and thus the term “sex” encompasses not only women and men, but also Lesbian, Gay, Bisexual, Transgender, Questioning, and Other (LGBTQ+) persons.
(3)	Obligation: The Parties commit to the elimination of sex-based discrimination in employment and occupation through rules in four areas; Education, Business Capital, Social Capital, and Legal Protections.
(4)	Metrics and Standstill Rules: On or before the date of the entry into force of this FTA, each party shall ensure its domestic legal system contains the following 15 rules as Standstill Rules, that is, as minimum levels of protection against sex-based discrimination: (a) Education <ul style="list-style-type: none"> (i) Sex-based discrimination by creditors in access to credit is prohibited. (ii) Sex-based discrimination in access to jobs is prohibited. (iii) Unmarried persons, regardless of sex, have equal ownership rights to property.

	<ul style="list-style-type: none"> (iv) Married persons, regardless of sex, have equal ownership rights to property. (v) Surviving spouses, regardless of sex, have equal inheritance rights. (vi) Children, regardless of sex, have equal inheritance rights. <p>(b) Business Capital</p> <ul style="list-style-type: none"> (i) Marital property may be administered by either the original owner of that property, or by the agreement of both spouses, regardless of sex. (ii) If a husband administers the property, then spousal consent is not required for major transactions involving that property by the other spouse. <p>(c) Social Capital</p> <ul style="list-style-type: none"> (i) Regardless of sex, the minimum legal age of marriage is 18 years. <p>(d) Legal Protection</p> <ul style="list-style-type: none"> (i) Paid or unpaid maternity leave is mandatory. (ii) A prescribed minimum length of paid maternity leave is mandatory. (iii) A prescribed minimum length of paid paternity leave is mandatory. (iv) Domestic violence is categorized and punished as a criminal offense. (v) Sexual discrimination in employment is prohibited. (vi) Sexual harassment in employment is prohibited.
(5)	<p>Metrics and Ratchet Rules: Within two years of the date of the entry into force of this FTA, or other period as agreed by the Parties, each party shall ensure its domestic legal system contains the following 5 rules as Ratchet Rules, that is, as enhanced levels of protection against sex-based discrimination:</p> <p>(a) Education</p> <ul style="list-style-type: none"> (i) Discrimination by creditors on the basis of marital status in access to credit is prohibited. <p>(b) Social Capital</p>

	<p>(ii) The minimum quota for women on corporate boards is 40%.</p> <p>(c) Legal Protection</p> <p>(i) Paid or unpaid paternity leave is mandatory.</p> <p>(ii) Equal remuneration for work of equal value is mandatory</p> <p>(iii) Sex-based discrimination in hiring is prohibited.</p>
(6)	<p>Monitoring, Adjudication and Enforcement: Any dispute concerning this provision shall be subject to the monitoring and dispute resolution mechanisms of this FTA.</p>

Source: Raj Bhala & Cody Wood 2018

This text is by no means a flawless model. In addition to specific drafting improvements, our implementation dates in Paragraphs (4) and (5) may be adjusted, depending on a variety of circumstances that FTA parties face. Beyond the World Bank-oriented indicators, it is reasonable to require the minimum quota for women on corporate boards to be 50%. We welcome changes to the model in keeping with our goal of advancing the rights of women and LGBTQ+ persons through FTAs.

Finally, appropriate penalty schemes need to be considered with respect to Paragraph (6) for instances in which a party fails to meet the Hard-Hard law we suggest. The penalties may or may not resemble traditional trade remedies, such as antidumping and countervailing duties. Also needing study are the jurisdictional implications of alternative penalties, and the extent to which they may be punitive, compensatory, or both.

VI. CONCLUSION

Dismissing or downplaying the importance of the concepts of “hard” and “soft” law is a mistake in both theory and practice. Parties to an international trade agreement may manipulate the structures in which they place the norms and rules they negotiate. They may manipulate the text they draft to create those rules. Depending on their structural and textual choices, the rules help their citizens—everyday people engaged in importing, exporting, and investing—to a greater or lesser extent. Often, more help comes from harder rules and/or harder structures. Sometimes, help may be appropriate, or possible, only through softer rules and/or softer structures.

The parties to *CPTPP* and *NAFTA 2.0* have shown an interest in helping women and LGBTQ+ persons. In Articles 23.4 and 23.9, respectively, the parties have opted for Hard-Soft law. They cannot be faulted for this choice;

indeed, as these are the first provisions to help these constituencies in any FTS, we commend them for their courage. We also encourage them to be yet-more intrepid. New iterations of these Articles, with the empirically-driven textual amendments we suggest, would create Hard-Hard law to advance women's LGBTQ+ rights. Indeed, the framework we suggest may be of assistance to promote the international trade empowerment of any disadvantage group. And, we are sure there are non-utilitarian philosophical and theological grounds, complementing the economic ones, for these suggestions. There are plenty of solid, non-mutually exclusive, rationales to create Hard-Hard Law to help the marginalized and the excluded.