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ARTICLES

ESSAY

AN UNLAWFUL OVERREACH: TRYING NATIONALS OF NON-CONSENTING, NON-PARTY STATES BEFORE THE INTERNATIONAL CRIMINAL COURT

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"*A treaty does not create either obligations or rights for a third State without its consent*."[1]

International law can be defined as "the system of rules, principles, and processes intended to govern relations at the interstate level, including the relations among states, organizations, and individuals."[2] Article 38 of the Statute of the International Court of Justice (ICJ) lists three primary and several secondary sources of international law.[3] The

1. Vienna Convention on the Law of Treaties, art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Article 34 simply incorporates the customary law principle into the treaty. This is a common practice, and doing so does not remove the principle from customary international law, although it does make it part of binding conventional law for those States which are a party to the treaty which incorporates the customary law principle. As such, those States that have acceded to the Vienna Convention are bound by both conventional and customary law regarding that principle.

2. THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 3 (Mary Ellen O'Connell et al. eds., 6th ed. 2010) [hereinafter O'CONNELL].

3. Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute]. See *also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1986) [hereinafter RESTATEMENT], for sources of international law:

> (1) A rule of international law is one that has been accepted as such by the international community of states
> (a) in the form of customary law;
> (b) by international agreement; or
> (c) by derivation from general principles common to major legal systems of the world.
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
> (3) International agreements create law for the states parties thereto . . . .
> (4) General principles common to the major legal systems . . . may be invoked as supplementary rules of international law where appropriate.

Id.

three primary sources are: (1) "international conventions . . . establishing *rules expressly recognized by the contesting states*"[4] (commonly referred to as "conventional international law" and generally binding on the parties to the respective convention); (2) "international custom, as evidence of a general practice accepted as law"[5] (commonly referred to as "customary international law" and generally binding on all nations); and (3) "the general principles of law recognized by civilized nations."[6] Secondary sources of international law include "judicial decisions," "teaching of the most highly qualified publicists of the various nations,"[7] as well as principles of equity and fairness.[8] In this Article, we will focus primarily on the relationship and interaction between conventional international law and customary international law.

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4. ICJ Statute, *supra* note 3, art. 38(1)(a) (emphasis added). Note especially the phrase, "establishing rules expressly recognized by the contesting states." Such rules need not be recognized by states which are not parties to the convention. Some jurists question whether treaties should even be considered as a source of international law. Sir Gerald Fitzmaurice, for example, has opined that "'treaties are no more a source of law than an ordinary private law contract that creates rights and obligations . . . . In itself, the treaty and "the law" it contains only applies to the parties to it.'" INTERNATIONAL LAW: CASES AND MATERIALS 95 (Louis Henkin et al. eds., 3d ed. 1993) [hereinafter HENKIN] (quoting Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 153, 157–58 (Von Asbeck, et al. eds., 1958)).

5. ICJ Statute, *supra* note 3, art. 38(1)(b).

> The view of most international lawyers is that customary law is not a form of tacit treaty but an independent form of law; and that, when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every state.

HENKIN, *supra* note 4, at 87. That "one reservation" applies to the State which, "while the custom is in process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law." *Id.*

6. ICJ Statute, *supra* note 3, art. 38(1)(c); *see also* O'CONNELL, *supra* note 2, at 60. These include common principles of law and justice reflected in the legal systems of civilized states.

7. ICJ Statute, *supra* note 3, art. 38(1)(d). Louis Henkin aptly notes that

> [t]he place of the writer in international law has always been more important than in municipal legal systems. The basic systematization of international law is largely the work of publicists, from Grotius and Gentilis onwards . . . . In the [civil law] systems reference to textbook writers and commentators is a normal practice, as the perusal of any collection of decisions of the German, Swiss or other European Supreme Courts will show.

HENKIN, *supra* note 4, at 123.

8. HENKIN, *supra* note 4, at 123.

Conventional international law is found in conventions, treaties, and similar negotiated agreements between and among States as well as agreements between States and other international actors (like the United Nations or NATO), and it is binding on the parties to such agreements.[9] Accordingly, it is a consent-based legal regime. Customary international law, on the other hand, is law based on custom that develops over an extended period of time and is considered binding on all States.[10] Although it is not necessarily written law, customary international law is nonetheless considered "law" because States generally comply with its requirements because they believe that they have a legal obligation to do so.[11]

It is a foundational principle of customary international law that a State that has not become a party to a treaty or other international convention is not bound by the terms of such treaty or convention.[12] Accordingly, since principles of customary international law constitute the default provisions governing the relationship between States, they will always supersede contrary provisions of conventional international law as far as States not a party to the respective convention are concerned. In other words, a non-party State to an international convention is not bound by the terms of such convention without its consent. As such, in general (and absent an intervening, bilateral agreement between them that modifies custom), the relations between a

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9. Vienna Convention, *supra* note 1, art. 26 ("Every treaty in force is binding upon the *parties* to it and must be performed by them in good faith") (emphasis added).

10. There is one notable exception. A State may exempt itself from an international custom if that State is a "persistent objector" during the period that the custom develops. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 211 (2010). Additionally, customary law is frequently incorporated into treaties, thereby making it also binding as conventional law for the States Parties to the respective treaty.

11. North Sea Continental Shelf (Ger./Den.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

> The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

Id. In that sense, customary international law differs from customary usage (such as ceremonial salutes at sea or exempting diplomatic vehicles from certain parking regulations), because States recognize no legal obligation to do the latter.

12. *See, e.g.*, Vienna Convention, *supra* note 1, art. 34. There can be an exception here, too. Principles enshrined in treaties may evolve into custom over time if non-party States to the respective treaty begin to conform their activities to such principles because they believe that they have a legal obligation to do so. *See also supra* note 11.

State Party to a convention and a non-party State to that same convention are governed solely by customary international law. Recognition of this principle is key when determining the legal reach of an institution like the International Criminal Court (ICC), an institution created pursuant to the Rome Statute,[13] a treaty to which a significant number of States have not acceded (such as, the United States of America, the People's Republic of China, Russia, India, Pakistan, Israel, Iran, and Egypt, to name but a few[14]).

The Rome Statute exists solely because its States Parties (*i.e.*, States that have signed and ratified the treaty) have negotiated, and agreed to its terms.[15] In certain circumstances, the Statute purports to permit the ICC to exercise jurisdiction over the nationals of non-consenting, non-party States.[16] The grant of such jurisdiction violates customary international law.[17] Indeed, this issue was one of the points of contention during the drafting of the Rome Statute, and many key State players in the international community were uncomfortable with a treaty which contravened international legal norms.[18]

Despite the fact that the Rome Statute contains a provision that clearly violates customary international law by subjecting nationals of non-consenting, non-party States to the terms of a treaty to which they have not acceded, attempts to bring nationals of such States before the ICC for investigation and possible trial—via that very provision—are ongoing. In 2009, for example, despite the fact that Israel is not a State Party to the Rome Statute, the Palestinian Authority (PA) submitted a declaration to the ICC Registrar, in which it purported to accede to the Rome Statute pursuant to Article 12(3).[19] It did so in an effort to bring

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13. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. As of July 31, 2013, 122 States have acceded to the Statute. *Chapter XVIII*, U.N. Treaty Collection, *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#11 (last visited July 31, 2013).

14. *See* States Parties to the Rome Statute, *available at* http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited July 22, 2013). Note that among the non-acceding States are the four most populous States in the world (*i.e.*, China, India, the United States, and Indonesia). Cent. Intelligence Agency, *Country Comparison: Population*, The World FactBook (July 31, 2013), https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html. As such, approximately one-half of the world's population lives in countries that have rejected the Rome Statute and ICC jurisdiction. Note, further, that many States in volatile regions of the world have also declined to accede to the Statute (*e.g.*, Israel, Iran, Egypt, and Pakistan).

15. *See generally* Rome Statute, *supra* note 13.

16. *Id.* art. 12(2)(a).

17. *See generally* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

18. *Id.*

19. Article 12(3) permits a non-party "State" to accede to ICC jurisdiction by lodging a

Israeli soldiers and government officials within ICC jurisdiction, *inter alia*, for alleged crimes committed in the Gaza Strip during the 2008–09 Israeli military incursion known as "Operation Cast Lead."[20] More recently, the Union of the Comoros filed a referral with the ICC Prosecutor, requesting that the Office of the Prosecutor (OTP) investigate and (ultimately) try Israeli soldiers for their alleged unlawful actions during the 2010 boarding of the Mavi Marmara, at the time a Comoros-flagged vessel, which was attempting to breach Israel's naval blockade of the Gaza Strip.[21]

Irrespective of the truthfulness or falsehood of the allegations of criminal wrongdoing in the above examples, the ICC is not the correct forum when nationals of a non-party State to the Rome Statute, like Israel, are involved, absent such State's express grant of its consent thereto, consent which Israel has not granted—and is unlikely to grant.

This Article is divided into three parts. Part I traces the development of international criminal tribunals, culminating in the creation of the ICC. Part II examines the nature of the ICC as a court of limited jurisdiction under the Rome Statute. It also introduces the reader to Article 12(2)(a)—the provision that explicitly grants the ICC jurisdiction over the nationals of non-party States. Part III argues that such jurisdiction is unlawful and that current attempts to broaden the meaning and reach of the Rome Statute constitute an assault on unambiguous international custom. This Article concludes with a call to uphold the rule of law by recognizing the ICC's status as a court of limited jurisdiction and to reject the attempt reflected in the Rome Statute to expand its reach in violation of customary international law.

I. DEVELOPMENT OF INTERNATIONAL CRIMINAL TRIBUNALS

The historical development of post-conflict tribunals to bring to

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declaration with the ICC Registrar. *See* Rome Statute, *supra* note 13, art. 12(3). The PA attempted that, see *infra* note 202, even though it was not a State.

20. Ali Khashan, Minister of Justice, Palestinian Nat'l Auth., Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009), *available at* http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf. The ICC Office of the Prosecutor subsequently rejected this declaration because it recognized that the PA was not a State for purposes of the Rome Statute. Statement, Office of the Prosecutor, International Criminal Court, Situation in Palestine (Apr. 3, 2012), *available at* http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

21. Referral of the Union of the Comoros with Respect to the 31 May 2010 Israeli Raid on the Humanitarian Aid Flotilla Bound for Gaza Strip to the International Criminal Court (May 14, 2013), *available at* http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf. As of the writing of this Article, the ICC Office of the Prosecutor is currently reviewing this submission.

justice perpetrators of war crimes has not been a smooth process. Nor has it been based on custom; what development there has been has occurred by means of international agreements. Following the First World War, for example, the Treaty of Versailles provided for the establishment of *ad hoc* tribunals to try war criminals,[22] although no such tribunals were formed.[23] Article 227 of the Versailles Treaty specifically called for the establishment of a tribunal composed of five judges (one each from the United States, Great Britain, France, Italy, and Japan) to try the former German Kaiser.[24] Article 227 also called for requesting that the government of the Netherlands surrender the Kaiser for trial.[25] Dutch officials declined to surrender the Kaiser to the requesting powers, and no trial was ever held.[26] This may have been because Germany had never surrendered;[27] instead, German officials had agreed to an armistice[28] with the so-called Allied and Associated Powers.

In 1920, the Advisory Committee of Jurists, which had gathered to prepare the foundation for the Permanent Court of International Justice, also proposed the creation of a High Court of International Justice to try perpetrators of crimes against international public order and

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22. Treaty of Peace Between the Allied and Associated Powers and Germany, arts. 227–29, June 28, 1919, 2 Bevans 43 [hereinafter Versailles Treaty].

23. Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the Criminal Court*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 3, 4 (Antonio Cassese et al. eds., 2002).

24. Versailles Treaty, *supra* note 22, art. 227. At the end of the war, the Kaiser abdicated and was granted asylum in the Netherlands. SPENCER TUCKER & PRISCILLA MARY ROBERTS, WORLD WAR I: A STUDENT ENCYCLOPEDIA 1015 (2006).

25. Versailles Treaty, *supra* note 22, art. 227.

26. 2 LAMAR CECIL, WILHELM II: EMPEROR AND EXILE, 1900—1941, at 299–300 (1996). Historians may disagree regarding the issue of who was solely or primarily responsible for the outbreak of the First World War. *See, e.g.*, Hayley Dixon, *Germany and Austria started WWI Seeking European Domination, Historian Says*, *available at* http://www.telegraph.co.uk/history/britain-at-war/10110657/Germany-and-Austria-started-WWI-seeking-European-domination-historian-says.html; *The Causes of World War One*, *available at* http://www.firstworldwar.com/origins/causes.htm (referring to multiple causes); John Bourne, *Total War I: The Great War*, *available at* http://www.english.illinois.edu/maps/ww1/bourneessay.htm (referring to multiple causes). However, few would dispute that the German violation of Belgian neutrality was not a war crime for which German officials could—or should—be held liable.

27. Even today, November 11th in the United States marks "Armistice Day" (since renamed "Veterans Day"), because the fighting in the First World War ceased on the eleventh hour of the eleventh day in the eleventh month in 1918. *History of Veterans Day*, U.S. DEP'T VETERANS AFFAIRS, http://www1.va.gov/opa/vetsday/vetdayhistory.asp (last visited June 21, 2013).

28. An "armistice" is defined as "a temporary cessation of fighting *by mutual consent*." *See Armistice*, FREE DICTIONARY, http://www.thefreedictionary.com/armistice (last visited June 21, 2013) (emphasis added). As such, an armistice does not indicate that one side was defeated in the conflict.

international law.[29] The League of Nations rejected as "premature" the proposal for such a High Court.[30] Following the League of Nations rejection, the idea of a standing international court to deal with international breaches of the peace was kept alive by NGOs, but none of their ideas came to fruition in the interwar period.[31] States were simply not ready to cede their sovereign prerogatives to such a court.

Following the Second World War, the international community was reeling from the sheer magnitude of the horrors perpetrated by the Nazi regime in Europe and by the Japanese regime in large portions of East and South-East Asia.[32] Recalling the failure to hold war criminals accountable following the First World War, the Allied powers resolved not to repeat that mistake. In Spring 1945, representatives from the United States, the Soviet Union, Great Britain, and France gathered in London to decide how to punish Nazi war criminals.[33] The result was the so-called Nuremberg Charter which established the International Military Tribunal (IMT) to try high-ranking Nazis for "crimes against peace," "war crimes," and "crimes against humanity."[34] Each power also prosecuted within its respective zone of occupation lower-level Nazis for the same crimes.[35]

The Nuremberg trials served as a precedent and started a process that has, by fits and starts, continued to this day. Shortly after the Nuremberg and Tokyo trials, the newly formed U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which recognized the potential of a future "international penal tribunal" to assist states in the punishment of genocide.[36] The General Assembly also invited the International Law Commission (ILC) to investigate the feasibility of creating a permanent international tribunal with power to try individuals for international crimes, such as genocide.[37] Accordingly, in 1951, the ILC transmitted a draft statute to the United Nations, detailing the structure and jurisdiction of the proposed international criminal court.[38] In 1952, the General Assembly

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29. Cassese, *supra* note 23.
30. *Id.* at 5.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 6–7.
35. *Id.* at 7.
36. Convention on the Prevention and Punishment of the Crime of Genocide, art. 6, G.A. Res. 260(III)(A), U.N. Doc. A/RES/260(III) (Dec. 9, 1948).
37. G.A. Res. 260(III)(B), U.N. Doc. A/RES/260(III) (Dec. 9, 1498) ("Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trail of persons charged with genocide or other crimes over which jurisdictions will be conferred upon that organ by international conventions . . . .").
38. Rep. of the Comm. on Int'l Criminal Jurisdiction, 1st Sess., Aug. 1–31, 1951, U.N.

created a new committee charged with the responsibility of perfecting the draft statute,[39] and the committee produced an updated draft for consideration in 1953.[40]

Despite the multiple drafts presented to the General Assembly, the United Nations eventually abandoned its efforts to institute an international criminal court owing to the realities of the Cold War. Soon after the Second World War ended, the relations among the victorious allies deteriorated politically to the point where the world was divided into two competing camps: the Western Bloc, led by the United States, and the Eastern (or Soviet) Bloc, led by the Soviet Union. The resulting division manifested itself in international organizations like the United Nations. The U.N. Security Council, for example, which was charged under Chapter VII of the U.N. Charter with the responsibility to maintain international peace,[41] was rendered virtually impotent by the East-West split. Each of the five permanent members of the U.N. Security Council[42] (often called the P-5) possessed veto power over any action being considered by the Council.[43] As such, each bloc could effectively check the other bloc's initiatives in the Council. Moreover, as the sides competed for influence around the globe, armed conflicts became more, rather than less, frequent, especially in regions where the two blocs sought to expand their influence or control.[44] Only after the demise of the Soviet Bloc did the Security Council begin to function in a manner more akin to that which was originally intended.

Yet, the demise of the Soviet Union and the end of the Cold War did not lead to peace. The disintegration of the Soviet Bloc unleashed long pent-up frustration and anger among various peoples and groups which led to increasing instability in previously stable regions. For example, the disintegration of Yugoslavia along ethnic lines led to armed conflicts among Croats, Serbs, Muslims, Slovenes, Albanian Kosovars, and others.[45] These internecine conflicts were characterized by horrific

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Doc. A/2136; GAOR, 7th Sess., Supp. No. 11, Annex I (1952).

39. G.A. Res. 687(VII), U.N. Doc. A/RES/687(VII) (Dec. 5, 1952).

40. Rep. of the 1953 Comm. on Int'l Criminal Jurisdiction, July 27–Aug. 20, 1953, U.N. Doc. A/2645; GAOR, 9th Sess., Supp. No. 12, Annex (1954).

41. *See* U.N. Charter arts. 39–42.

42. The P-5 consisted of the Republic of China, France, Great Britain, the Soviet Union, and the United States. Over time, the China seat passed from the Nationalist Chinese regime on Taiwan to the People's Republic of China on the mainland, and, with the demise of the Soviet Union, the Soviet seat passed to the Russian Federation.

43. U.N. Charter art. 27, ¶ 3.

44. Among the conflicts were the Greek civil war, the French war in Indo-China, the Chinese civil war, the Korean war, the Vietnam war as well as numerous colonial wars in such disparate places as Indonesia, Algeria, and Kenya, to name but a few.

45. Ivo Banac, *Bosnian Muslims: From Religious Community to Socialist Nationhood and Post-Communist Statehood, 1918–1922*, *in* THE MUSLIMS OF BOSNIA-HERZEGOVINA: THEIR

atrocities.[46] It was then that the Security Council—no longer hobbled by Cold War intrigue and competition—resolved to create an *ad hoc* tribunal (the International Criminal Tribunal for the Former Yugoslavia or ICTY) to try and punish those responsible for crimes against humanity and war crimes committed in the former Yugoslavia.[47]

Similarly, in response to the genocide in Rwanda, the Security Council created an *ad hoc* tribunal (the International Criminal Tribunal for Rwanda or ICTR) to try and punish those responsible for the horrendous crimes that occurred in Rwanda.[48] Additionally, a U.N.-backed, mixed, International-Cambodian tribunal is currently dealing with atrocities committed by members of the Khmer Rouge in Cambodia.[49] Note that in each of the three tribunals just mentioned, the vast majority of the crimes being handled were committed internally (*i.e.*, within the State involved). In other words, these "international" tribunals are dealing essentially with crimes committed in internal conflicts (*i.e.*, crimes committed within the territory of a State by nationals of that State).

As the *ad hoc* tribunals were being created, momentum was gathering, once again, for the creation of a permanent international criminal tribunal. In 1989, Trinidad and Tobago, motivated by domestic criminal drug-trafficking beyond its ability to control, appealed to the United Nations to move forward with creating an international tribunal to deal with international criminal activity.[50] The General Assembly responded by requesting the ILC to provide an updated version of its

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HISTORIC DEVELOPMENT FROM THE MIDDLE AGES TO THE DISSOLUTION OF YUGOSLAVIA 129 (Mark Pinson ed., 1996); Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 394–95 (2003).

46. Williams, *supra* note 45, at 395–97.

47. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

48. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

49. *See* G.A. Res. 57/228 B, U.N. Doc. A/RES/57/228 B (May 22, 2003).

50. Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-Fourth Session, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs and Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes, in letter dated Aug. 21, 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General, U.N. Doc. A/44/195, Annex (Aug. 21, 1989).

> The establishment of an international criminal court with jurisdiction to prosecute and punish individuals and entities who engage in, *inter alia*, the illicit trafficking in narcotic drugs across national borders would serve to bolster the legal process whereby such offenders are prosecuted and punished and would also contribute substantially to the progressive development and codification of international law.

Id.

previous draft statutes.[51]

In 1994, the ILC transmitted to the General Assembly a new draft statute and recommended, *inter alia*, that U.N. member states convene to negotiate a treaty establishing such a court.[52] For the next four years, various U.N. bodies discussed and amended the statute. Then, from June 15 to July 17, 1998, 160 states gathered in Rome to negotiate a final version of the treaty. On July 17, 1998, the conference voted to adopt the Rome Statute,[53] whose terms established the International Criminal Court and its jurisdiction.

Ratification by 60 States was required for the treaty to take effect.[54] The required 60th ratification came on April 11, 2002.[55] The Rome Statute entered into force on July 1, 2002.[56]

II. DESPITE THE ROME STATUTE'S STATED GOAL OF ENSURING THAT THE PERPETRATORS OF THE MOST SERIOUS INTERNATIONAL CRIMES NOT GO UNPUNISHED,[57] THE ICC IS NONETHELESS A COURT OF LIMITED JURISDICTION

The ICC is, by the Rome Statute's own terms, a court of limited, not plenary, jurisdiction. The ICC is limited in a number of significant ways (each of which, in some measure, works against the actual achievement of the Statute's stated goal of ensuring that the perpetrators of the most serious international crimes are brought to justice for their crimes[58]). Among the explicit limitations are the following:

The Rome Statute only permits "States"[59] to accede to ICC

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51. G.A. Res. 44/39, U.N. Doc. A/RES/44/39 (Dec. 4, 1989).

52. Rep. of the Int'l Law Comm'n, 45th Sess., May 3–July 23, 1993, U.N. Doc. A/48/10; GAOR, 48th Sess., Supp. No. 10, Annex (1994).

53. 2 U.N. DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT'L CRIMINAL COURT, SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE COMMITTEE OF THE WHOLE, at 362, U.N. Doc. A/CONF.183/13 (Vol. II), U.N. Sales No. E.02.I.5 (2002).

54. Rome Statute, *supra* note 13, art. 126.

55. U.N. Treaty Collection, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last updated June 14, 2013).

56. *Id.*

57. Rome Statute, *supra* note 13, pmbl. ¶¶ 4, 5.

58. *Id.*

59. The term "State," in U.N. and international practice, especially when capitalized, refers to recognized, sovereign nation-states. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 25/2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 29–30 (1990);

jurisdiction.[60] That is why the ICC Prosecutor ultimately rejected the 2009 Declaration of the Palestinian Authority (PA) attempting to accede to ICC jurisdiction.[61]

The Statute limits ICC jurisdiction to the finite list of crimes found in Article 5: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[62] The Statute further limits the ICC's jurisdiction over war crimes to those committed as "part of a plan or policy or as part of a large-scale commission of such crimes."[63] Finally, "the Court shall determine that a case is inadmissible where . . . [t]he case is not of sufficient gravity to justify further action by the Court."[64]

The Statute limits ICC jurisdiction by time. The ICC Prosecutor, for example, may only investigate and try crimes committed *after* the treaty came into force.[65] In addition to the time limit regarding when the treaty came into force, ICC jurisdiction may be deferred by the U.N. Security Council acting under Chapter VII of the U.N. Charter for an indefinite number of successive twelve-month periods.[66] Further, each State upon

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EMERICH DE VATTEL, THE LAW OF NATIONS OF THE PRINCIPLES OF NATURAL LAW 3–6, 11 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

60. *See, e.g.*, Rome Statute, *supra* note 13, art. 12 (limiting accession to "States"); *id.* art. 14 (limiting referral of situations to "States"); *id.* art. 112 (limiting membership in Assembly of States Parties to "States"); *id.* art. 125 (limiting accession to the Statute to "States"). Moreover, Professor Otto Triffterer noted in his Commentary on the Rome Conference that, "[i]n accordance with normal modern practice for multilateral treaties, the [ICC] Statute [was] open for signature by all *States*." OTTO TRIFFTERER & KAI AMBOS, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1287 (1999) (emphasis added). The only exception would be a referral by the U.N. Security Council acting under Chapter VII of the U.N. Charter of a situation to the ICC. The Security Council alone has authority to refer a non-State entity to the ICC (as it did with respect to the Darfur region of Sudan). S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

61. Statement, Office of the Prosecutor, International Criminal Court, Situation in Palestine (Apr. 3, 2012), *available at* http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

62. Rome Statute, *supra* note 13, art. 5. Note that, with respect to the crime of aggression,

> Article 121(5) gives States Parties the choice either to accept or not to accept any amendment to Article 5. This means that a State party may exclude the jurisdiction of the Court with regard to the crime of aggression even when this crime should have been defined and accepted by seven-eighths of the States Parties as required by Article 121(4).

Rome Statute, *supra* note 13, art. 5; Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at 583, 605.

63. Rome Statute, *supra* note 13, art. 8.

64. *Id.* art. 17(1)(d).

65. *Id.* art. 11. *See also id.* art. 8*bis* (regarding crime of aggression).

66. *Id.* art. 16.

acceding to the Statute may declare that the treaty shall not apply to its territory or nationals regarding war crimes for up to seven years from the respective State's date of accession.[67]

The Statute permits ICC jurisdiction to be limited by a State Party's explicit rejection of the definition of aggression, once adopted, or of amendments to the other listed crimes.[68] Were a State Party to reject the definition of aggression or any amendment to other listed crimes, it would not be answerable for the crime of aggression or for the amended crimes. In the case of rejecting amendments to already listed crimes, the State Party would remain answerable, but only for the crimes as originally defined in the Statute.

The Statute precludes prosecution of persons who may have committed Article 5 crimes when under the age of eighteen.[69]

The Statute precludes trials *in absentia*.[70]

The Statute limits the admissibility of ICC prosecutions to situations where national courts are either unwilling or unable to try and punish perpetrators for Article 5 crimes.[71] In other words, where national courts are willing and able to try and punish accused perpetrators, the ICC lacks the ability to act. This reflects the concept of "complementarity." According to Luis Moreno-Ocampo, the ICC's first Prosecutor, the ideal situation would be for the ICC never to have to try a case.[72]

The Statute precludes ICC jurisdiction to try alleged Article 5 perpetrators who are not nationals of a State Party to the Statute *and* who commit the crime in the territory of a non-Party State.[73] This generally reflects the consent-based nature of treaties.

As we have seen in (3) and (4) above, despite its stated goal of ensuring that perpetrators of Article 5 crimes are to be brought to justice, in reality, the Rome Statute permits its own States Parties to opt out of certain provisions and obligations in certain circumstances.

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67. *Id.* art. 124.

68. *Id.* arts. 5(2) & 121(5). The definition of "aggression" was agreed to at the 2010 Kampala Review Conference in Uganda. It is to take effect in a State one year after it is adopted by thirty States Parties and after a decision made by the required majority of States on a date after January 1, 2017. Resolution RC/Res.6, INTERNATIONAL CRIMINAL COURT (June 11, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

69. Rome Statute, *supra* note 13, art. 26.

70. *Id.* art. 63.

71. *Id.* pmbl. ¶ 10; *id.* art. 1.

72. *See Global Leaders—Luis Moreno Ocampo*, INT'L BAR ASS'N (Jan. 2, 2013), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=81213dcf-0911-4141-ad29-486f9b03d37.

73. Rome Statute, *supra* note 13, art. 12 (expressly delineating when the ICC may exercise jurisdiction, which does not include third-party nationals committing Article 5 crimes on third-party States' territory); *see also* Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 23, at 583, 612.

Hence, application of the Statute's terms may vary even among States Parties.

It is important to keep in mind the jurisdictional exemptions that the Rome Statute reserves to its own States Parties, especially since the Rome Statute claims the right of the ICC to investigate and try nationals of non-party States in certain circumstances. Specifically, Article 12(2)(a) permits the ICC to exercise jurisdiction over alleged perpetrators of Article 5 crimes committed on the territory of a State Party, irrespective of the nationality of the accused.[74] That means that nationals of non-consenting, non-party States may be hauled before the ICC. Yet, the Rome Statute allows nationals of its own States Parties to evade ICC jurisdiction in repeated instances[75] while simultaneously claiming the right of the ICC to try non-party State nationals for such crimes. In other words, under the Rome Statute, accused nationals of a State that has rejected the Rome Statute altogether may have fewer rights and protections than the nationals of States that agreed to be bound by the Statute in the first place.[76] That is a perverse and wholly unreasonable result. It is also wholly unlawful under customary international law and, hence, *ultra vires*.

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74. Article 12(2) of the Rome Statute reads, in pertinent part, as follows:

> 2. In the case of article 13 [deals with Exercise of Jurisdiction], paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft . . . .

Rome Statute, *supra* note 13, art. 12(2)(a). Note that Article 12(2)(a) applies irrespective of the nationality of the perpetrator of the crime. Accordingly, nationals of non-party States are subject to ICC prosecution according to the Rome Statute. Note further that a non-party State may accede to ICC jurisdiction pursuant to Article 12(3).

75. Such as by allowing newly acceding States to defer ICC jurisdiction over their nationals and territories for war crimes for up to seven years. *Id.* art. 124. As well as, allowing States Parties to reject the definition of aggression (once adopted) or future amendments to other listed crimes. *Id.* art. 121(5). None of this is allowed to non-consenting, non-party States.

76. JENNIFER ELSEA, CONG. RESEARCH SERV., RL 31437, INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 13 n.68 (2002) [hereinafter CRS REPORT] (noting that the ICC appears to have broader jurisdiction over war crimes committed by non-party nationals than by nationals of States Parties to the Statute).

III. ARTICLE 12(2)(A) OF THE ROME STATUTE PURPORTING TO ASSERT ICC JURISDICTION OVER THE NATIONALS OF NON-CONSENTING, NON-PARTY STATES DEFIES INTERNATIONAL LAW

In this part we will argue that the incorporation of Article 12(2)(a) into the Rome Statute stands in defiance of international law, at least as it concerns the nationals of non-consenting, non-party States. In support of this contention, we offer the following three points: First, Article 12(2)(a) disregards the well-established principle in customary international law requiring a State's consent in order for a treaty to bind that State or its nationals. Second, other international tribunals recognize and have affirmed the consent-based nature of international law. Third, asserting the existence of "universal jurisdiction" over Article 5 crimes does not automatically or necessarily mean that the ICC, a court created by only a portion of the world community, may exercise lawful jurisdiction over the nationals of a non-consenting, non-party State from the world community at large.

A. *Article 12(2)(a) of the Rome Statute Constitutes a Legal Overreach Which Violates Customary International Law and is, Therefore, Ultra Vires and Void*

When the government of a State exercises its sovereign will regarding the acceptance or rejection of a convention or treaty, the officials of that State are, in fact, acting as agents on behalf of that State's population, its nationals.[77] We must recognize, for example, that the territorial entities we call "Nigeria" or "Jordan" or "Canada" do not—and, indeed, cannot—"do" anything. Only people from such entities—to wit, "Nigerians" and "Jordanians" and "Canadians"—can act.

Further, we cannot haul "Nigeria" or "Jordan" or "Canada" before the bar of any court; we can only haul "Nigerians" and "Jordanians" and "Canadians" before such a court. Accordingly, when we say that the State of Israel or the United States of America or the People's Republic of China "refuses to accede" to a treaty like the Rome Statute, what we

77. The Rome Statute claims the right to subject the nationals of third-party States who commit (or are alleged to have committed) Article 5 crimes in the territory of a State Party to the Rome Statute to investigation and/or trial by the ICC. Rome Statute, *supra* note 13, art. 12(2)(a). Yet, such a claim violates the right of that individual as determined by his State of nationality not to be transferred to and tried by a Court whose jurisdiction was created pursuant to a convention that his State of nationality rejected. *See* Vienna Convention, *supra* note 1, art. 34. That does not mean that such an individual is not subject to investigation and trial; he may be investigated and tried by the courts of the State on whose territory he allegedly committed the crime. What is prohibited is his being turned over to a Court created by a treaty to which his State of nationality has refused to accede and, hence, does not recognize.

really mean is that actual persons—the leaders of those States acting on behalf of their respective nationals—are refusing to place their respective "States" (meaning their respective nationals and territories) under the authority of, or within the jurisdiction of a court created pursuant to, such treaty. Thus, when international law states that "[a] treaty does not create either obligations or rights for a third *State* without its consent,"[78] it is, in reality, referring to obligations and rights on the part of the third State's nationals.

To paraphrase, "[a] treaty does not create either obligations or rights for the *nationals* of a third-party State without the consent *of that State as embodied by its authorized representatives*." In truth, all actual actors in international law are real persons,[79] and all decisions in international law affect real persons. Hence, when it is asserted that the purpose of the ICC is to punish "individuals" not "States,"[80] although that is a literally true statement, it is, in a sense, a meaningless statement, since it is impossible to punish "States" as such. One can only punish individual persons in or from such States.[81]

When "States" (meaning the authorized representatives of the people in those States) get together to negotiate a treaty, they are free to modify the application of customary international law principles amongst themselves as they see fit pertaining to their respective nationals and territories. This constitutes agreement based on mutual consent. Yet, such an agreement to modify customary international law amongst the States Parties to a treaty like the Rome Statute does not, and indeed cannot, change the law that applies to "States" (meaning nationals and territories of such States) that choose not to accede to the treaty. Such an imposition is not consent-based. In the final analysis, a principle of customary international law takes precedence over a contrary principle contained in a treaty with respect to those States (meaning their

78. Vienna Convention, *supra* note 1, art. 34 (emphasis added). Article 34 simply incorporates the customary law principle into the treaty. This is a common practice, and doing so does not remove the principle from customary international law, although it does make it part of binding conventional law for those States which are a party to the treaty which incorporates the customary law principle.

79. Even corporations, which enjoy legal "personality" and possess "nationality," act through real persons (to wit, their corporate officers and boards of directors), and, if "punished," it is real persons who pay the penalty (*i.e.*, officers, directors, and shareholders).

80. *See, e.g.*, CRS REPORT, *supra* note 73, at 5.

81. For example, the sanctions regime aimed at "Iran" actually targets and punishes, not only the Iranian officials who may have been designated by name, but all other Iranians as well, irrespective of their roles and responsibilities for the Iranian nuclear program. The same is true of the U.S. sanctions regime against "Cuba"; it is individual Cubans who suffer as a result of the sanctions, not the entity "Cuba" *per se*. Hence, the "individual-versus-State" argument is, in reality, a contrived argument that seeks to sidestep the inconvenient strictures of contrary customary law.

respective nationals and territories) that are not parties to that treaty. Hence, the fact that States Parties to the Rome Statute have agreed amongst themselves that the ICC shall have jurisdiction over the nationals of non-party States who are alleged to have committed an Article 5 crime on the soil of a State Party[82] does not—and lawfully cannot—override the non-party State's rights under customary international law not to be bound in any way by the terms of a treaty to which it is not a party.[83] Accordingly, if no individual State or group of like-minded States can lawfully compel a third-party State to be bound by terms of a treaty to which the latter has not acceded, neither may a subordinate creation of such individual State or group of States (such as the Office of the Prosecutor (OTP) or the ICC) lawfully do so.

Each State Party to the Rome Statute has freely yielded part of its national sovereignty to the ICC, a specific creation of that treaty. As such, officials at the ICC—not a sovereign entity itself—have authority to compel the States Parties, all of which are sovereign entities, to yield to the will of the ICC in certain circumstances as laid out in the Rome Statute. ICC officials have no such authority in relation to non-consenting, non-party States (meaning their nationals and territories),[84] this in spite of what the Rome Statute may say, because States Parties to the Rome Statute lack the authority themselves to encroach upon the rights of non-party States *vis-à-vis* the nationals and territories of those States.[85] That the Rome Statute purports to grant such authority[86] is a legal overreach in violation of customary international law. Such overreach is both *ultra vires* and *void ab initio*.

Accordingly, notwithstanding explicit language to the contrary in the Rome Statute, neither the ICC Prosecutor nor any ICC judge has any lawful authority to violate customary international law by asserting authority over a non-party State's nationals. As such, neither the ICC Prosecutor nor any ICC judge may lawfully apply the provision of the Rome Statute (to wit, Article 12(2)(a)) that purports to compel nationals of non-consenting, non-party States to submit to ICC jurisdiction for alleged Article 5 crimes committed on the soil of a State Party to the

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82. Rome Statute, *supra* note 13, art. 12(2)(a).

83. Once again, that does not mean that the third-party national may not be tried for the alleged offense. He may be tried in the courts of the State in which the alleged crime took place, pursuant to that State's law and legal procedures. What customary international law prohibits is the transfer of jurisdiction over the accused to the ICC, a court created by a treaty to which the non-consenting, third-party State has not acceded.

84. *See, e.g.*, CRS REPORT, *supra* note 73, at 21 n.111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States).

85. *See supra* note 75.

86. *See* Rome Statute, *supra* note 13, art. 12(2)(a).

Rome Statute.[87] Were either to do so, he or she would be acting in clear violation of customary international law. In truth, such a decision would undermine the rule of law—ironically, the very value they would be claiming to uphold.

B. *Other International Courts Recognize and Have Affirmed the Consent-Based Limitation to Their Jurisdiction Under Customary International Law*

The principle of customary international law that "[a]n international agreement does not create either obligations or rights for a third-party state without its consent"[88] is well-established and has been recognized by other international courts. In fact, this principle has been expanded upon by international tribunals.

The Statute of the International Court of Justice (ICJ), for example, specifically requires that parties consent to its jurisdiction before the ICJ will adjudicate a matter.[89] The ICJ's case law has affirmed this principle throughout its history. The first time the ICJ had cause to make such a determination came in the 1954 case, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (*Monetary Gold*).[90] That case centered around an incident that occurred in 1943, in the midst of World War II, when the German Army removed a large amount of gold from Rome.[91] When the war ended, both Albania and Italy claimed the gold and submitted competing claims to international arbitration.[92]

While waiting for the outcome of the arbitration proceeding, the governments of France, the United Kingdom, and the United States signed an agreement to hold the gold in escrow in the United Kingdom so that it could retain the gold "in partial satisfaction of the [j]udgment

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87. Even when the U.N. Security Council, acting under Chapter VII of the U.N. Charter, refers a situation concerning a non-party State's nationals to the ICC Prosecutor, the Council is acting under its authority as found in the U.N. Charter, not on any article found in the Rome Statute, because the Council (as a non-State entity) is not—and cannot be—a party to the Rome Statute. Further, compliance by the third-party State is based on its being a party to the U.N. Charter (which obligates it to obey certain Security Council decisions), not on any obligation that it owes to the Rome Statute or any right claimed by ICC officials. When the Security Council refers a situation to the ICC Prosecutor regarding a non-party State to the Rome Statute, the Council is, in effect, incorporating by reference the appropriate provisions of the Rome Statute into its decision, thereby obligating the U.N. Member State to comply with those provisions.

88. *See* Vienna Convention, *supra* note 1, art. 34; RESTATEMENT, *supra* note 3, § 324(1).

89. ICJ Statute, *supra* note 3, arts. 34(1), 36(2)–(3).

90. Monetary Gold Case (It. v. Fr., U.K., & U.S.), 1954 I.C.J. 19 (15 June).

91. *Id.* at 19.

92. *Id.*

in the Corfu Channel case"[93] in the event that the gold was found to belong to Albania. After the arbitrator found in favor of Albania, Italy filed an action with the ICJ against France, the United Kingdom, and the United States. In its application, Italy argued (1) that France, the United Kingdom, and the United States should deliver the gold to Italy, and (2) that its right to the gold superseded the United Kingdom's right to partial satisfaction of damages sustained during the Corfu Channel incident.[94]

Before proceeding to the merits of Italy's first claim, the ICJ stated that it "must [first] examine whether . . . jurisdiction [conferred by Italy, France, the United Kingdom, and the United States] is [co]-extensive with the task entrusted to it."[95] However, integral to this dispute was the claim of Albania—an unnamed party—to the gold. Indeed, the ICJ stated that, "[i]n order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to [Italy][;] and, if so, to determine also the amount of compensation."[96] Therefore, the ICJ held that it "cannot decide such a dispute without the consent of Albania."[97] The ICJ's explanation of that ruling is particularly telling: "To adjudicate upon the international responsibility of Albania without her consent would run counter to a *well-established principle of international law* embodied in the [ICJ's] Statute, namely, that the [ICJ] can only exercise jurisdiction over a State with its consent."[98] That well-established principle remains a vital part of customary international law to this day.

In a more recent case concerning East Timor, the ICJ once again applied the principle that an international tribunal cannot decide a case involving the legal rights of a third party without that party's consent.[99] In 1989, Australia, believing that the island of East Timor was under Indonesian control, signed a treaty with Indonesia regarding use of East Timor's continental shelf.[100] Yet, Portugal, which had controlled East Timor exclusively from the sixteenth century until 1975,[101] claimed that

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93. *Id*. at 21.

94. *Id*. at 22. The ICJ found that a provision in the agreement signed by France, the United Kingdom, and the United States amounted to acceptance of ICJ jurisdiction; therefore, it had been duly authorized by all named parties to adjudicate the matter. *See id*. at 31.

95. *Id*.

96. *Id*. at 32.

97. *Id*.

98. *Id*. (emphasis added).

99. East Timor (Port. v. Austl.), 1995 I.C.J. 90 (30 June).

100. *Id*. at 101–02.

101. *See id*. at 95–96.

any treaty executed without its consent was invalid.[102] Thus, "the fundamental question in the . . . case [wa]s ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia."[103] Like the *Monetary Gold* case, in which the ICJ refused to make a legal determination that would affect the legal rights of a non-consenting third party (Albania), the ICJ in the *East Timor* case refused to rule because Indonesia had not accepted its jurisdiction.[104] It further refined the *Monetary Gold* standard by stating that the necessity of determining third-party rights did not necessarily preclude it from exercising jurisdiction.[105] However, when a State's "rights and obligations . . . constitute the very subject-matter of . . . a judgment," the ICJ may not exercise jurisdiction without that State's consent.[106]

The ICJ is not the only international tribunal that has upheld the *Monetary Gold* principle. The Permanent Court of Arbitration (PCA) in The Hague, The Netherlands, applied this principle in its 2001 decision, *Larsen v. Hawaiian Kingdom*.[107] In that case, Larsen refused to pay fines associated with traffic citations.[108] Instead of registering his automobile as required by state law, Larsen argued that as a citizen of the Hawaiian Kingdom, he was not subject to U.S. law[109] and that Hawaii was in violation of its obligations under an 1849 treaty between the Hawaiian Kingdom and the United States by allowing U.S. municipal law to govern.[110] The PCA held that because the interests of the United States were "a necessary foundation for the decision between the parties," it could not rule on the dispute at hand.[111] Moreover, even though both parties to the arbitration proceeding argued that the *Monetary Gold* principle should apply only to ICJ proceedings, the PCA held that the principle must be applied by all international tribunals, stating that,

> [a]lthough there is no doctrine of binding precedent in

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102. *Id*. at 94–95.

103. *Id*. at 102.

104. *Id*. at 105.

105. *Id*. at 104.

106. *Id*. at 105. Such would be the case with Israel concerning both Operation Cast Lead and the enforcement of the naval blockade of the Gaza Strip, because both matters implicate Israel's inherent right to self-defense in a situation of armed conflict.

107. Larsen v. Hawaiian Kingdom, Award, 119 I.L.R. 594 (Perm. Ct. Arb. 2001) [hereinafter Award], *available at* http://www.pca-cpa.org/upload/files/LHKAward.PDF.

108. Larsen v. Hawaiian Kingdom, *Memorial of Lance Paul Larsen*, paras. 48–52 (Perm. Ct. Arb. 2000), *available at* http://www.alohaquest.com/arbitration/memorial_larsen.htm.

109. *Id.* para. 47.

110. Award, *supra* note 107, para. 2.3.

111. *Id*. para. 11.23.

> international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice.[112]

Indeed, "[t]he *principle of consent in international law* would be violated if [the PCA] were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party."[113] The ICC, as an international tribunal bound by international law, should likewise refrain from invoking jurisdiction to determine the relative rights of nationals of non-consenting, non-party States.

As in *East Timor* and *Larsen v. Hawaiian Kingdom*, where the ICJ and PCA, respectively, refused to exercise jurisdiction because third-party rights constituted the very subject matter of the proceedings, the ICC should refuse to exercise jurisdiction over nationals of non-consenting, non-party States. Such action would directly contravene the well-established customary international legal principle articulated in *Monetary Gold* and subsequently—both in the ICJ and in other international tribunals—that an international tribunal may not determine the legal rights of a third-party State without its consent if such rights go to the very subject matter of the proceedings. Because the ICC is an international tribunal akin to the ICJ and the PCA, the ICC should be bound by the *Monetary Gold* principle in accordance with customary international law. In short, absent a referral by the U.N. Security Council under Chapter VII of the U.N. Charter, the ICC must decline to exercise jurisdiction over nationals of non-consenting, non-party States.

C. *Asserting the Existence of "Universal Jurisdiction" Over Article 5 Crimes Does Not Automatically or Necessarily Require that Nationals of a Non-Consenting, Non-Party State Submit to ICC Jurisdiction*

Some argue that the ICC may investigate and try nationals of non-consenting, non-party States under the principle of universality.[114] That

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112. *Id*. para. 11.21.

113. *Id*. para. 11.20 (emphasis added).

114. *See, e.g.*, Dapo Akanda, *The Jurisdiction of the International Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618 (2003) (arguing that "it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the [world's] collective interest by individual states . . . simultaneously prevented those states from acting collectively in the prosecution of these crimes" and further that collective action "should be encouraged"). There is nothing wrong with encouraging collective action against such crimes. States Parties to the Rome Statute are free, amongst themselves, to resort to the ICC as they see fit. Further, other States that agree with what the Rome Statute provides are free to accede to the Statute and accept its terms. Where Akanda and other proponents of the ICC go

argument is built upon a number of assumptions. For example, "[t]he universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes [*i.e.*, Article 5 crimes]."[115] The first assumption is followed by the argument "that States must be entitled to do collectively what they have the power to do individually."[116] From these statements, the argument continues as follows:

> Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf. Thus a State which becomes a party to the Statute thereby accepts jurisdiction with respect to the international core crimes. *As a consequence, no particular State—be it State Party or non-State Party—must give its specific consent to the exercise of this jurisdiction in a given case*. This, in essence, is the regime that follows from an approach based on the principle of universal jurisdiction.[117]

The first two sentences above are legally correct. The portion of the foregoing quotation in italics is only partly correct *vis-à-vis* non-party States. While it is true that a non-party State need not give its consent to the exercise of jurisdiction *in* some cases (to wit, cases having nothing whatsoever to do with the non-party State), it is not true with respect to a case involving that State's nationals or other interests. Under customary international law, a non-universal treaty (*i.e.*, a treaty to which only part of the international community has acceded) that creates a court that claims universal jurisdiction over a host of offenses does not, and cannot, bind a non-consenting, non-party State.[118] To

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astray is by attempting to force—contrary to Customary International Law—the terms of the Rome Statute on States that do not agree with its terms as is their sovereign right under international law.

115. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 23, at 583, 587. *But see* CRS REPORT, *supra* note 73, at 21 n.111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States).

116. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 23, at 583, 587. The assertion that States may do collectively what each may do individually is reasonable as far as it goes. A problem arises when that assertion is stretched to mean that mutual agreement amongst a certain group of States can obligate non-consenting States outside that group. Such an assertion violates the sovereign rights of the States not a party to the agreement. As such, mutual agreement amongst a number of States does not affect in any way the rights of States not a party to such agreement.

117. *Id.* (emphasis added).

118. *See* Vienna Convention, *supra* note 1, art. 34.

assert otherwise is simply not true logically or legally. Moreover, even if one were to accept the fact that "all States may exercise universal jurisdiction" over certain crimes, that does not automatically—or necessarily—mean that one must also agree that a non-consenting, non-party State has no say about whether its nationals have to submit to a court like the ICC, a court agreed to and established in a treaty negotiated by other States. That is simply a *non-sequitur*. Such "other States" have no authority to decide such matters for a non-party State.

Universal jurisdiction does not inevitably lead to the conclusion that nationals of non-consenting, non-party States are triable by a court created pursuant to an international treaty like the Rome Statute. The inherent sovereignty of the non-consenting, non-party State takes precedence over other States' grant of authority to such a court. In short, a non-sovereign entity like the ICC has no lawful authority to assert jurisdiction over nationals of a non-consenting, non-party, sovereign State.

CONCLUSION

The stated goals of the Rome Statute are laudable. Ensuring that perpetrators of the most serious international crimes do not go unpunished is clearly a worthy goal. Ending impunity for such perpetrators is unquestionably a goal worth pursuing. Those are all goals with which people of good will can agree. However, consistent with the rule of law and in the interest of justice, one must use lawful means to achieve such ends.

Customary international law governs all States, whereas conventional international law governs only those States that have acceded thereto. The Rome Statute contains a provision, to wit, Article 12(2)(a), that can ensnare in the ICC's jurisdictional web nationals of non-consenting, non-party States. That is a clear violation of customary international law which recognizes that third-party "States" (by which we mean nationals and territories of such States) are not—and cannot be—bound, absent their consent, by the terms of a treaty to which such States have not acceded. Accordingly, the offending provision in the Rome Statute is *ultra vires* and legally unenforceable with respect to the nationals of non-consenting, non-party States. Any application of Article 12(2)(a) against nationals of such States by either the ICC Prosecutor or any ICC judge would violate the rights of those States under customary international law and be unlawful, absent prior consent by appropriate authorities of such States.

The rule of law is the bedrock principle which underlies civilized society. It is too important a principle to compromise because, once

compromised, it is difficult to regain the trust that was lost. In the final analysis, even the most desirable ends do not justify unlawful means to achieve them. The Rome Statute created a court of limited jurisdiction. Such limitations must be acknowledged and respected. The Rome Statute also includes a provision that unlawfully extends the ICC's jurisdiction to reach nationals of non-consenting, non-party States in clear and direct violation of customary international law. Such a provision must be acknowledged as violating customary international law and be rejected as *ultra vires* and *void ab initio vis-à-vis* the nationals of non-consenting, non-party States to the Rome Statute. ICC jurisdiction may not reach nationals of non-consenting, non-party States without the express consent of such States. To exert such jurisdiction without proper consent would be a lawless act in clear violation of an unambiguous principle of international law.

INNOCENCE LOST: INSTITUTING HARSHER INTERNATIONAL CRIMINAL COURT SENTENCES FOR PERPETRATORS OF SEX CRIMES AGAINST CHILDREN

Rachel F. Braden[*]

I started to ask myself what was going on. These weren't just violent acts of war, but part of a strategy. You had situations where multiple people were raped at the same time, publicly—a whole village might be raped during the night. In doing this, they hurt not just the victims but the whole community, which they force to watch. The result of this strategy is that people are forced to flee their villages, abandon their fields, their resources, everything. It's very effective.

–Denis Mukwege, gynecologist and surgeon working in the Democratic Republic of the Congo[1]

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1. *Denis Mukwege: The Rape Surgeon of DR Congo*, BBC NEWS (Feb. 18, 2013, 20:04 ET), http://www.bbc.co.uk/news/magazine-21499068 (quoting Denis Mukwege).

They would rape me in turns. It got to a point where I did not feel pain . . . .

One day they tied me to a tree and tried to pull the baby out. The blood . . . it just kept flowing.

–15-year-old rape survivor, Goma, Democratic Republic of the Congo[2]

I. INTRODUCTION

The face of armed conflict in the world today is changing. Gone are the days where the armed forces of two countries faced each other on the battlefield; today, wars are increasingly fought by non-state actors who target civilians as often as they target government forces.[3] As the strategy of targeting vulnerable civilian populations increases in popularity, non-state actors turn to rape as a preferred weapon of war.[4] Even more disturbing, the growing trend seems to be in targeting children as the victims of these attacks.[5] In the face of increasing attacks on civilians in conflicts across the globe, the international community is searching for a solution.

In July 2002, the International Criminal Court (ICC) became the first permanent international court with the jurisdiction to try war crimes, crimes against humanity, genocide, and the crime of aggression,

2. Anne Mawathe, *Haunted by Congo Rape Dilemma*, BBC NEWS (May 15, 2010, 07:58 GMT), http://news.bbc.co.uk/2/hi/africa/8677637.stm (quoting anonymous 15-year-old rape survivor).

3. The terrorist attacks of September 11, 2001 in the United States, of July 7, 2005 in London, and most recently the bombings in Boston, Massachusetts, are all signs of this trend, as are many of the ongoing conflicts on the African continent. Civilian attacks in Syria, although allegedly committed by state actors, are also indicative of the increased targeting of civilians in conflict. *See* Laura Smith-Spark et al., *Rights Group Accuses Syrian Military of Targeting Civilians*, CNN (Apr. 11, 2013, 8:18 PM EDT), http://www.cnn.com/2013/04/11/world/meast/syria-civil-war/index.html.

4. *See Women Under Siege: About*, WOMEN'S MEDIA CENTER, http://www.womenundersiegeproject.org/pages/about (last visited Feb. 12, 2014).

5. *See generally* Michele Lent Hirsch, *Report: Sexualized Violence May Disproportionately Affect Children in War*, WOMEN'S MEDIA CENTER: WOMEN UNDER SIEGE (Apr. 11, 2013), http://www.womenundersiegeproject.org/blog/entry/report-sexualized-violence-may-disproportionately-affect-children; VERONIQUE AUBERT ET AL., UNSPEAKABLE CRIMES AGAINST CHILDREN: SEXUAL VIOLENCE IN CONFLICT 5 (2013) (discussing the alarmingly high percentage of child victims of sexual violence in conflict today and proposing reforms to address the problem).

committed by or in the territory of its signatory countries.[6] As a "court of last resort," the ICC hears cases regarding conflicts both of an international nature and of a domestic nature when the subject countries are either unable or unwilling to conduct the prosecution themselves.[7] Because of the nature of its subject matter jurisdiction, the ICC sees some of the most horrific crimes committed in the world. And because the perpetrators of these crimes target vulnerable populations, many of the victims are children.

As conflicts today shift from interstate to intrastate, the rules governing warring parties are less clear. Rebel groups and other non-state actors have never been party to the treaties states sign amongst themselves regulating their own behavior during wartime; the fact that non-state actors are not party to these treaties is often reflected in the groups' disregard for these behavioral guidelines. Due to a confluence of factors, crimes committed by both state and non-state actors against vulnerable populations—and in particular, sex crimes committed against children—are on the rise.[8] Yet despite the disproportionate number of child victims, the Rome Statute—which is the only international instrument holding non-state actors accountable,[9] and which so clearly establishes which actions are considered illegal in modern conflict—includes no provision specifically addressing sentences for perpetrators who commit crimes against children. Rather, the same sentencing guidelines apply to all crimes within the court's jurisdiction.[10] Additionally, there has been no judicial opinion establishing the concept of harsher sentences for crimes committed

6. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Treaty]. The Rome Treaty (referred to interchangeably in this Article as both the Rome Treaty and the Rome Statute) is the treaty that established the International Criminal Court. The Crime of Aggression was not part of the Court's original subject matter jurisdiction but was added to the Rome Statute via Resolution RC/Res.6 on June 11, 2010. Resolution RC/Res.6, June 11, 2010, 11-E-011110, *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ Resolutions/RC-Res.6-ENG.pdf.

7. Rome Treaty, *supra* note 6, art. 17 (regarding crimes of a domestic nature).

8. *See generally* Sara Meger, *Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo*, 28 J. CONTEMP. AFR. STUD. 119 (2010) (discussing reasons why instances of rape are increasing in the conflict in the DRC).

9. Non-state actors are not parties to international treaties (such as the Geneva Conventions governing states' wartime behavior). Although non-state actors are not signatories to the Geneva Conventions or other international treaties, the Rome Statute gives the ICC subject matter jurisdiction over crimes committed on a state party's territory, or when the perpetrator is a citizen of a state party—regardless of whether the perpetrator is acting on behalf of a state government or a rebel group. Rome Treaty, *supra* note 6, art. 12.

10. *See id.* art. 78 (emphasis added) (noting that when sentencing for any offense, "the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person").

against children.[11] In this Article, I will argue the ICC should judicially adopt the practice of giving "augmented" sentences to defendants found guilty of committing of sex crimes against children.[12] The child status of the victim would be its own aggravating factor, considered under the structure of the International Criminal Court's Rules of Procedure and Evidence Rule 145(2)(b) (governing aggravating factors to be considered in sentencing).[13] Although not binding on the court, such a judicial rule could influence the court going forward: Article 21 of the Rome Statute provides that the court "*may* apply principles and rules of law as interpreted in its previous decisions."[14] Thus, a judicial opinion establishing the victim's child status as a separate aggravating factor would provide useful precedent for ICC judges considering such cases in the future.[15] Indeed, given the prevalence of sex crimes committed

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11. Indeed, only one case has completed adjudication and sentencing. *See* INTERNATIONAL CRIMINAL COURT, *Case Information Sheet: Situation in Democratic Republic of the Congo The Prosecutor v. Thomas Lubanga Dyilo*, *Case No. ICC-01/04-01/06*, (last updated Sept. 13, 2012), http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf.

12. Although children are the victims of many different crimes, due to the heinous nature of sex crimes committed against children, I have chosen to limit my argument only to include these crimes. Arguments for augmented sentencing of criminals who commit other crimes against children can—and should—be made; they are, however, beyond the scope of this Article.

13. International Criminal Court's Rules of Procedure and Evidence Rule 145(2)(b), *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court* ICC-ASP/1/3 and Corr.1, (Sept. 3–10, 2002). There are those who might say a proposed judicial rule will be insufficient for the needs of the situation. In response to these critics, I say, this is a "both/and" situation, not an "either/or." The root causes of these conflicts are myriad, and the international community should continue to seek to address the underlying causes of sex crimes against children. Use of this proposed judicial rule in continued ICC prosecution, however, is important for two reasons. First, it demonstrates to both the general international community and the specifically affected communities that these crimes are taken seriously. On a more pragmatic level, however, augmented ICC sentencing for sex crimes against children should be pursued because it sets an example for the judicial systems of the affected countries. By modeling how perpetrators of these crimes should be sentenced, the ICC provides a template for countries to conduct their own prosecutions. Although addressing this phenomenon is beyond the scope of this Article, such "modeling" will be particularly valuable to post-conflict countries seeking to establish and legitimize their judicial systems.

14. Rome Treaty, *supra* note 6, art. 21 (emphasis added).

15. Although at the time of writing we have no indication of how the court will treat its past decisions (as so far only one case has been fully concluded), like its predecessors, the ICC will face the most difficult legal and moral issues of the day as well as cases of first impression. This Author believes that, like the ICTR and ICTY before it, the ICC will find it helpful to consider its past cases when deciding cases with similar fact patterns or legal questions, even though its precedent is non-binding. *See, e.g.*, Jens David Ohlin, *Precedent and* Stare Decisis *at International Tribunals*, LIEBERCODE (Mar. 3, 2012), http://www.liebercode.org/2012/03/precedent-and-stare-decisis-at.html (noting that the ICTY has considered judicial rules from previous cases "settled jurisprudence" when considering cases on appeal). A judicial decision

against children in conflicts around the world today, such a case is likely to appear before the Court soon.

The case of Bosco Ntaganda, the notorious general of the Congolese M23 rebel group, is one such case. In March 2013, Ntaganda gave himself up to the ICC[16]—rendering the issue of augmented sentences for sex crimes against children particularly timely. Ntaganda, known as "The Terminator" due to his ruthless treatment of soldiers and civilians alike, was charged in two separate arrest warrants with conscripting child soldiers, rape, murder, and other war crimes and crimes against humanity.[17] The Court's arrest warrants do not specifically allege sex crimes committed against children; however, given Ntaganda's well-documented practice of recruiting child soldiers,[18] the fact that female child soldiers are often used as sex slaves,[19] and the plethora of accounts of rape committed by Ntaganda and his accomplices,[20] it is likely that the Court will find Ntaganda complicit in and/or directly responsible for sex crimes against children. If the Court were to establish a judicial rule requiring harsher sentences for perpetrators of sex crimes against children in a case decided before Ntaganda's, that opinion could be considered by the Court when sentencing him.[21] If no such rule has been established by the time Ntaganda is sentenced, his case provides the perfect opportunity for the ICC to create one. Given the trend in armed conflict today of targeting children with rape,[22] Ntaganda will certainly not be the last defendant to appear before the court accused of committing such crimes.

Part II of this Article will provide a brief summary of the situation in

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establishing the practice of giving higher sentences to perpetrators of sex crimes against children will therefore likely influence the ICC when treating similar cases in the future, even if it is not legally binding. *Id.*

16. Ntaganda handed himself in to the U.S. Embassy in Kigali, Rwanda, on March 18, 2013, specifically requesting to be sent to the ICC. *See, e.g.*, *Bosco Ntaganda: Wanted Congolese in U.S. Mission in Rwanda*, BBC NEWS (Mar. 18, 2013, 18:23 ET), http://www.bbc.co.uk/news/world-africa-21835345.

17. *Id.*

18. *See, e.g.*, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 7, 2006), http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF.

19. *See, e.g.*, Karen Allen, *Bleak Future for Congo's Child Soldiers*, BBC NEWS (July 25, 2006, 15:51 GMT), http://news.bbc.co.uk/2/hi/africa/5213996.stm (noting the practice of using girl child soldiers as sex slaves).

20. *See* Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58 (July 13, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1441449.pdf.

21. One such opportunity was already presented through the case of Thomas Lubanga; unfortunately, a judicial rule similar to the one proposed was not adopted in this case. For more on *Lubanga*, see *infra* Part IIB.

22. *See, e.g.*, Mawathe, *supra* note 2; Hirsch, *supra* note 5.

the Democratic Republic of the Congo (DRC) as an illustration of the kind of conflict where enhanced sentencing for sex crimes against children is necessary. Through an analysis of the case of Thomas Lubanga, Part II will show not only that an enhanced sentencing provision is necessary, but that the ICC has already laid the groundwork for such a judicial rule. Part III will discuss the theory behind augmented sentences for sex crimes against children, providing a brief summary of prevailing theories of criminal punishment and applying these theories to explain why augmented sentences are warranted. In particular, I will argue that this "augmented sentence rule" is warranted under the retributivist theory of criminal punishment, as the crimes to which the rule would apply have much graver long term consequences for children than they do for adults. Finally, Part IV of this Article will propose a rule which would be established through an ICC judicial opinion, and which would require the judges to specifically take into account the child status of victims when considering the "gravity of the crime" (as directed under Article 78 of the Rome Statute). This new judicial rule would require the sentence for sex crimes committed against children to be greater than that for an identical crime committed against an adult. Part IV will end by looking at how the hypothetical new "rule" could be applied to the case of Bosco Ntaganda specifically and to the situation in the DRC generally.

II. THE CONFLICT IN THE DRC

The conflict in the DRC has its roots in events that took place twenty years ago. After the Rwandan genocide in 1994, many of those who participated in the genocide, as well as members of the Hutu ethnic group who had not participated in the actual killing but feared reprisal nonetheless, fled across the border into eastern DRC.[23] As the Rwandan Hutus settled in to the DRC, they joined forces with Congolese Hutus and targeted Congolese Tutsis, seeking to ethnically cleanse them from the area and force them into Rwanda.[24] In response, the newly formed Rwandan government supported Congolese Tutsi rebel groups in their fight against the Hutus; the conflict has been further fueled by disputes over the country's vast natural resources.[25] Although the war between the groups officially ended in 2003, ten years later there is still vicious

23. *See, e.g.*, *Q&A: DR Congo Conflict*, BBC NEWS (Nov. 20, 2012, 07:13 ET), http://www.bbc.co.uk/news/world-africa-11108589. The DRC is Africa's largest country, comparable in size to Western Europe. *See id.*

24. *See id.*

25. *See id.*

fighting in the eastern part of the Congo.[26] The cumulative death toll is estimated at three million.[27]

A. *The Nature of the Crimes in the DRC*

The situation in the DRC has made international headlines—not simply because of its length or the number of casualties, but because of the brutal nature of the crimes committed. In choosing the DRC for its first investigation, ICC officials noted "[s]tates, international organizations and non-governmental organizations have reported thousands of deaths by mass murder and summary execution in the DRC since 2002. The reports allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers."[28] In particular, rape is used in the DRC as a weapon of war.[29] For members of the Congolese Army (known by its acronym FARDC—*Forces Armées de la République Démocratique du Congo*) as well as for rebel groups, rape is no longer a side-effect of war: rather, it is part of a greater strategy of oppressing and dehumanizing the targeted populations.[30] Single-instance rapes have, of course, been prevalent throughout the conflict.[31] Within the past several years, however, armed groups (both state-affiliated *and* non-state affiliated) have engaged in raping sprees leaving dozens—even hundreds—of victims each time.[32]

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26. *See id.*; Barbara Plett, *U.N. "Plans to Fight Rebels in DRC*," BBC NEWS (Jan. 25, 2013, 18:55 ET), http://www.bbc.co.uk/news/world-africa-21208401.

27. *See Q&A: DR Congo Conflict*, *supra* note 23 (death toll including deaths due to starvation and displacement).

28. Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation, ICC Press Release 23.06.2004 (June 23, 2004), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx.

29. *See, e.g.*, K. Chandler, *Atrocities in Democratic Republic of Congo Outpacing Darfur; Rape, Weapon of Choice for Fighting Forces*, 36 WESTSIDE GAZETTE 1A (Jan. 17, 2008); Juliane Kippenberg, *Soldiers Who Rape, Commanders Who Condone*, HUM. RTS. WATCH, July 16, 2009, at 15, *available at* http://www.hrw.org/sites/default/files/reports/drc0709web.pdf; MARTIN BELL, CHILD ALERT: DEMOCRATIC REPUBLIC OF CONGO, UNICEF 3 (2006), *available at* http://www.unicef.org/childalert/drc/content/Child_Alert_DRC_en.pdf.

30. *See, e.g.*, Kippenberg, *supra* note 29, at 21 (noting the strategy has been adopted specifically by the 14th brigade of the FARDC); Mawathe, *supra* note 2.

31. *See generally* Brett D. Nelson et al., *Impact of Sexual Violence on Children in the Eastern Democratic Republic of Congo*, 27 MED., CONFLICT & SURVIVAL 211 (2011) (discussing, among other things, the different "kinds" of rape: single instance, sexual slavery, gang rape).

32. A four-day raping spree by rebel groups in late summer 2010 left over 300 victims. "The known victims include 235 women, 52 girls, 13 men, and 3 boys, some of whom were raped multiple times." *Preliminary U.N. Report Confirms over 300 Rapes by Rebels in Eastern*

The specific targeting of women and girls as the subject of public sexual violence is an extremely effective way to "break" a community. Not only are the direct victims of the sexual assault often gravely wounded and as a result lose their reproductive capabilities, they are also ostracized and shunned by members of the community at large who have themselves been victimized through being forced to witness the violations of their loved ones.[33] Even more troubling, sources report that many of the victims of this type of sexual violence are girls under the age of 18. One report estimated that 65% of the sexual violence survivors in the DRC are minors;[34] according to Human Rights Watch, "an estimated ten percent of victims are children less than ten years old."[35] The victimization of girls is compounded by the conflict's use of child soldiers: not only are both boys and girls conscripted against their will, but the girls are often used by the soldiers as "soldier wives"—sex slaves who also help around the camp as needed.[36] Although it is beyond the scope of this article to conduct an in-depth exploration of the use of child soldiers in the conflict, it is important to consider this crime in the wider context of crimes against children and their adjudication in the ICC. A brief consideration of how the ICC treats child conscription is particularly warranted given the recent case of Thomas Lubanga.

B. *Prosecutor v. Thomas Lubanga Dyilo*

Thomas Lubanga Dyilo has the distinction of being the first person to be found guilty and sentenced by the ICC.[37] On March 14, 2012, Thomas Lubanga was convicted of "enlisting and conscripting of children under the age of 15" into his rebel group the Force Patriotique pour la Libération du Congo (FPLC) and "using them to participate

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DR Congo, U.N. NEWS CENTRE (Sept. 24, 2010), http://www.un.org/apps/news/story.asp?NewsID=36129#. In January 2011, a Congolese army lieutenant led his troops in a raping spree in Fizi, South Kivu province, leaving over 60 survivors of sexual violence. David Smith, *Congolese Soldiers go on Trial Accused of Raping More than 60 Women*, GUARDIAN (Feb. 10, 2011, 11:44 EST), http://www.theguardian.com/world/2011/feb/10/congolese-soldiers-rape-trial-gender-court.

33. Mawathe, *supra* note 2.

34. AUBERT ET AL., *supra* note 5, at 2.

35. *Id.*

36. *See, e.g.*, Allen, *supra* note 19. UNICEF estimates that 30–40% of children in armed groups are girls, many of whom are "held in captivity as sexual slaves." BELL, *supra* note 29, at 4.

37. *See, e.g.*, *ICC's Landmark Verdict in Congolese Rebel Case*, HUM. RTS. WATCH, http://www.hrw.org/node/104711.

actively in hostilities."[38] In their opinion, three judges found Lubanga guilty of conscripting and using the child soldiers in *intra*state conflict in the DRC.[39] Four months later, Lubanga was sentenced to fourteen years' imprisonment (including time already served).[40]

Absent from the charges against Lubanga, however, were those for sex crimes[41]—and this absence did not go unnoticed. [42] Although the Prosecution failed to bring the charges initially, the former Chief Prosecutor Luis Moreno Ocampo did ask the court to consider Lubanga's complicity in alleged sex crimes as an aggravating factor when determining his sentence.[43] In the Sentence Request, the

38. *See, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (2012). Lubanga was charged under the articles criminalizing the conscription of child soldiers for both interstate and intrastate conflict (articles 8(2)(b)(xxvi) and 25(3)(a), and article 8(2)(e)(vii), respectively), but found guilty only of the intrastate aspect (articles 25(3)(a) and 8(2)(e)(vii). *See id.* A short summary of the case, including a brief recap of the legal theory behind Lubanga's conviction, can be found on the ICC website. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Summary of the "Judgment Pursuant to Article 74 of the Statute" (Mar. 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf [hereinafter Dyilo, Summary of Judgment].

39. *See* Dyilo, Summary of Judgment, *supra* note 38.

40. *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf [hereinafter Dyilo, Decision on Sentence]. In finding Lubanga guilty of conscripting child soldiers, the court considered extensive testimony from witnesses who observed the soldiers in Lubanga's army and testified that many soldiers were clearly less than 15 years of age. *Id.* at 290. Based largely on this witness testimony, the court learned about the activities of these child soldiers. *Id.* at 367 (participating in battle as soldiers and bodyguards); *id.* at 372–73 (serving as military/body guards); *id.* at 385, 388–91 (doing domestic service which often included a sexual slavery component); *id.* at 289, 304 (serving in a special unit comprised solely of small children. This unit was called the Kadogo unit; the word "kadogo" means a child roughly between the ages of 13–16.). The court also found that in addition to ordering/condoning the use of these children in his armed forces, Lubanga himself used children as young as nine years old as his personal bodyguards. *Id.* at 376–80.

41. *See, e.g.*, Dyilo, Summary of the Judgment, *supra* note 38.

42. *See, e.g.*, Dyilo, Decision on Sentence, *supra* note 40, at 390–91, 398.

> The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. . . . [N]ot only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis. Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for the purposes of sentencing.

Id. at 24.

43. *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Prosecution's Sentence Request 16 (May 14, 2012), http://icc-cpi.int/iccdocs/doc/doc1411278.pdf.

Prosecution stated that "the sexual violence and rape to which the girl child soldiers were subjected show that the crimes were committed with particular cruelty and against victims who were particularly defenseless, as contemplated in Rule 145(2) (b) (iii)."[44] Yet despite the Prosecution's request for a higher sentence, the Court sentenced Lubanga to only 14 years' imprisonment. Although the Court did find that evidence of sex crimes against girl child soldiers could be considered under Rule 145 as an aggravating factor, it ultimately held that the prosecution had not met its burden of proving that sexual abuse of girl soldiers was widespread, and that Lubanga was complicit in the abuse.[45]

Lubanga is crucial to our analysis of augmented sentencing for sex crimes against children for two reasons. First, as many opined in the wake of the pronouncement, Lubanga's sentence was exceedingly light.[46] Fourteen years' imprisonment for conscripting children and using them in hostilities—especially when Lubanga used children as young as nine for his personal bodyguards[47]—seemed inappropriate given his victims' child status.[48] In light of this lenient sentence, the Chief Prosecutor of the ICC, Fatou Bensouda, petitioned the court for a

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44. *Id.* Rule 145 of the ICC's Rules of Procedure and Evidence governs the court's sentencing. Rule 145(1)(c) and 145(2)(b) direct the court as follows:

> (c) [The court should give] consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime . . .
> 2. In addition to the factors mentioned above, *the Court shall take into account, as appropriate*:
> (a) . . . [subsection omitted]
> (b) As aggravating circumstances:
> [subsections (i) and (ii) omitted]
> (iii) *Commission of the crime where the victim is particularly defenseless*;
> (iv) Commission of the crime with particular cruelty or where there were multiple victims;
> (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3

Id. (emphasis added). Rules of Procedure and Evidence, ICC-ASP/1/3 (Part. II-A), Sept. 9, 2002, *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf.

45. Dyilo, Decision on Sentence, *supra* note 40.

46. *See, e.g.*, Abdoulaye Bah, *République Démocratique du Congo: Thomas Lubanga, une Sentence Controversée*, GLOBAL VOICES (July 12, 2012, 2:03 PM GMT), http://fr.globalvoicesonline.org/2012/07/12/115116/ (quoting various sources' editorials—including Radio France International and France24—arguing that Lubanga's sentence was extremely light).

47. *See* discussion in *supra* note 40.

48. *Id.*

higher sentence. In her December 3, 2012, application to the court, Ms. Bensouda stated that Lubanga's sentence was "manifestly inadequate and disproportionate to the gravity of the crime."[49] Specifically, Ms. Bensouda argued that crimes against children were particularly grave, and that the extent of the damage suffered by children, their families and communities was not reflected by the fourteen-year sentence.[50] Ms. Bensouda's argument that conscripting a child soldier has graver repercussions than similar crimes committed against adults is key: the fact that an office of the ICC believes Lubanga should receive a higher sentence due to the child status of his victims is support for the general belief that crimes against children are particularly heinous. This argument may then be applied to sex crimes committed against children: as a subset of the greater category of crimes against children, sex crimes against children (which are arguably even more terrible than other crimes) are certainly deserving of a higher sentence than similar crimes committed against adult counterparts.

Second, *Lubanga* is important to our analysis of augmented sentences for sex crimes against children because of the court's reasoning behind his awarded sentence. The Court found there was not enough evidence of his complicity in sex crimes against children to consider it as an aggravating factor at the sentencing stage.[51] Crucially, however, the Court did acknowledge that the victim's child status could be considered an aggravating factor in future cases. In order to consider the sex crimes against girl soldiers as an aggravating factor, the prosecution would have to show: "(i) child soldiers under 15 were subjected to sexual violence; and (ii) this can be attributed to [the defendant] in a manner that reflects his culpability, pursuant to Rule 145(1)(a) of the Rules."[52] The Court's explicit statement that sex crimes against child soldiers under 15 could be considered as an aggravating factor is robust support for our argument: a sex crime against a child soldier under 15 shares many characteristics with a sex crime against any child. Therefore, the Court's reasoning behind one may logically be applied to the other.

That both the Chief Prosecutor and ICC judges believe that the child status of a victim should trigger a harsher sentence is indicative of a larger philosophy behind criminal punishment. Put simply, their belief is an embodiment of the reasoning that crimes that are "more horrible" should be punished more harshly. To better understand the reasoning behind harsher sentences, we now turn to a discussion of theories of

49. *Id.*
50. *See, e.g.*, *id.*
51. Dyilo, Decision on Sentence, *supra* note 40, at 28.
52. *Id.* at 27.

punishment.

III. PUNISHMENT IN THEORY: WHY AUGMENTED SENTENCING FOR SEX CRIMES AGAINST CHILDREN IS WARRANTED

A. *Theories of Punishment*

The most serious offenses are crimes not simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape, to rob, to assault—these acts are destructive of the very possibility of society and affronts to the humanity of their victims. Parents do not instruct their children to be law abiding merely by pointing to the risks of being caught . . . .

–James Q. Wilson[53]

In any discussion of modern Western criminal justice, two theories of punishment will inevitably be mentioned: utilitarian theory and retributivist theory.[54] Understanding these theories is a necessary prerequisite to implementing any kind of punishment system, as the types of punishments depend on the goals of the punishers, and the goals of the punishers are determined by the theory of punishment to which they adhere. For the purposes of our discussion, we first turn to the utilitarian theory of punishment.

The utilitarian theory focuses on the consequences of punishment: utilitarianists seek the punishment which is most likely to deter future similar crimes.[55] In deterring crimes, the utilitarian approach strives to provide the greatest benefit to the whole community.[56] As the philosopher H.J. McCloskey noted:

[T]he utilitarian, even the enlightened utilitarian who is clear

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53. JAMES Q. WILSON, THINKING ABOUT CRIME 252 (Rev. ed. 1983).

54. *See, e.g.*, David B. Muhlhausen, *Theories of Punishment and Mandatory Minimum Sentences*, THE HERITAGE FOUNDATION (May 27, 2010), http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences#_ednref8 (citing RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA (2000)).

55. The deterrence being the consequence. *See, e.g.*, Bernard Weiner et al., *An Attributional Examination of Retributive Versus Utilitarian Philosophies of Punishment*, 10 J. SOC. JUST. RES. 431, 432 (1997) (summarizing the utilitarian theory of punishment) (citations omitted).

56. In keeping with the greater theory of utilitarianism espoused by philosophers such as Jeremy Bentham and John Stuart Mill, that is, seeking to maximize the most happiness for the most people.

> about what constitutes responsible behavior, is committed to taking full note of the beliefs of the members of his community about responsibility when determining what constitutes useful deterrent punishment. Punishment which would have no utility in a community of enlightened people and which would shock as callous, pointless inhumanity, may in a less enlightened community be very useful punishment.[57]

Because the focus of utilitarian punishment systems is to deter future crimes and provide the best benefit for the community, when a crime is seen as attributable to an "unstable factor," utilitarian communities will try to address that factor.[58] For example, under a cause-and-effect analysis, if the "effect" is drug dealing and the "cause" is addiction, a utilitarian punishment would be to send the perpetrator to rehab and counseling. A successful completion of rehab is likely the best way to deter, as someone who is truly cured of their addiction will be much less likely to deal in the future.[59] A retributivist punitive system, however, would take a very different approach.

According to philosopher Emmanuel Kant, under the retributive theory, punishment "must in all cases be imposed *only* because the individual on whom it is inflicted has committed a crime . . . . *He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens*."[60] First and foremost in the retributive theory of punishment, then, is the idea that the perpetrator of a crime deserves punishment because he committed a crime. To put it another way, "[r]etribution pertains to retaliation for a past wrong rather than being concerned with the subsequent consequences of the punishment. That is, the goal is to avenge a prior evil deed rather than to prevent future ones."[61]

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57. H.J. McCloskey, *Utilitarian and Retributive Punishment*, 63 J. PHIL. 91, 99 (1967). McCloskey made this statement in his argument regarding the famous *Tait* case. Despite the facts that (1) the Victorian government had been conducting a campaign against the death penalty and it had not been used in years and (2) Tait was declared insane, the jury sentenced Tait to death because, as his crime had caused such a stir, giving the death sentence in such a visible case would be a greater deterrent for similar crimes in the future than if it had been given to someone who was "more guilty" of committing a similar crime but whose case was less visible. *Id.* at 98–99.

58. *See* Weiner et al., *supra* note 55, at 437–38.

59. *See id.* (Utilitarian systems will often adopt rehabilitative measures when the crime is perceived as being caused by an unstable factor. *Id.*

60. Immanuel Kant, *The Retributive Theory of Punishment*, excerpted and translated from IMMANUEL KANT, THE PHILOSOPHY OF LAW, PART II (W. Hastie, trans.) (1887) (emphasis added), *available at* http://faculty.msmary.edu/Conway/PHIL%20400x/Kant%20Retributive%20Theory.pdf.

61. Weiner et al., *supra* note 55, at 432.

The retributivist theory of punishment then takes the concept of avenging a past wrong one step further. As the main reason for punishing the perpetrator is his wrongdoing, it follows that his punishment should "fit the crime": the more heinous the crime, the harsher the punishment. As Kant reasoned, proportionality of the sentence to the crime is essential to true justice; "[a]ll other standards are wavering and uncertain."[62] In other words, the retributivist theory of punishment gives us a clear rubric: punishment commensurate to the severity of the crime is a constant standard. The ease with which one can apply this "bright line" standard is likely one of the reasons why retributive justice is found in judicial systems around the world.[63] Retributive justice is also popular in many Western societies given its strong religious overtones; Exodus 21:24's famous quote of an "eye for eye, tooth for tooth, hand for hand, foot for foot" is perhaps one of the clearest and most literal illustrations of retributive justice. (This exact verse is often quoted by American supporters of the death penalty as they argue that retribution is not only right, it is ordered by G-d.[64]). While other judicial systems have eschewed retributive justice in favor of what is known as restorative justice,[65] the theory of retributive justice

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> [Justice] may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself . . . if you strike another, you strike yourself; if you kill another, you kill yourself." This is the right of retaliation (*Jus talionis*); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice.

Kant, *supra* note 60.

63. The United States, China, and Saudi Arabia all have the death penalty for murder—one clear illustration of retributive justice. Other countries exhibit retributive justice at the more lenient end of the spectrum: for example, by making marijuana use a "non-arrestable" offense on par with a speeding ticket (based on the theory that personal use causes harm to none but the user).

64. *See, e.g.*, John Blake, *How Does a Christian Support the Death Penalty?*, CNN BELIEF BLOG (Sept. 23, 2011, 10:10 AM ET), http://religion.blogs.cnn.com/2011/09/23/how-does-a-christian-support-the-death-penalty/.

65. Although beyond the scope of this Article, many scholars find the juxtaposition between retributive and restorative justice fascinating. *See generally* Max Fisher, *A Different Justice: Why Anders Breivik Only Got 21 Years for Killing 77 People*, ATLANTIC (Aug. 24, 2012, 12:48 PM ET), http://www.theatlantic.com/international/archive/2012/08/a-different-justice-why-anders-breivik-only-got-21-years-for-killing-77-people/261532/ (discussing the

remains persuasive to a certain degree—no country, for example, punishes speeding with amputation or the pettiest of thefts with execution.

If we hold the idea of "more terrible crimes deserve harsher punishments" to be true, we must then establish what makes one crime more "terrible" than another. One source of information for making such considerations is the effects—long- and short-term, physical and psychological—of the crime on the victim. Under the retributive theory of justice, a crime resulting in grievous bodily harm or death would merit a much harsher punishment than a "victimless" crime, as the outcome is much more severe (and permanent). When it comes to sexual violence, many jurisdictions recognize that acts of sexual violence committed with a weapon or use of physical force are deserving of harsher penalties than other kinds of sexual assault; these crimes often leave the survivor with more physical and emotional damage.[66] Sexual violence against children should therefore be treated similarly, as the effects of sexual violence on children are both more severe and longer-lasting (physically and mentally) than they are on adults.[67]

B. *The Physical and Psychological Effects of Sexual Violence on Children*

Sexual violence against children is, unfortunately, prevalent throughout the world—not just in the DRC. Despite what this prevalence says about society as a whole, it does mean that much research has been conducted documenting the physical and

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restorative justice approach in the case of Anders Breivik).

66. For example, the American state of North Carolina's rape statute describes "First-degree rape" as when someone has vaginal intercourse:

> [w]ith another person by force and against the will of the other person, and:
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
> b. Inflicts serious personal injury upon the victim or another person[.]

N.C. GEN. STAT. § 14-27.2 (2004). This is punished more harshly than second-degree rape, which is defined as vaginal intercourse "[b]y force and against the will of the other person; or [when the person is] is mentally disabled, mentally incapacitated, or physically helpless[.]" N.C. GEN. STAT. § 14-27.23 (2004). The fact that the rape resulting in "serious personal injury upon the victim or another person" is punished more harshly is proof that North Carolina legislators believe violent sexual assault is deserving of a more severe punishment; many other states and countries have very similar statutes.

67. *See, e.g.*, AUBERT ET AL., *supra* note 5, at 15–16 (discussing the long-term psychological and physical effects of sexual violence on children).

psychological effects of sexual abuse on children. In considering these effects—and their relative severity compared to the effects suffered by adults—we strengthen the argument that such crimes against children merit a higher sentence.

1. Physical Effects

Generally speaking, children (particularly female children) suffer more severe and more long-term health effects from sexual injury than their adult counterparts. One survey of recent studies found that in American female children, incidences of genital injury from sexual abuse ranged from 50-90%; according to this survey, at least half the time an abuse occurs, a girl will suffer a genital injury.[68] "The major cause of genital trauma sustained during a rape is an entry injury with insertion or attempts of insertion of the penis into the vagina."[69] Genital injuries sustained from sexual assault are evaluated along the TEARS protocol, which is particularly adept at identifying injuries that heal with time and medical care.[70]

Although the above research is certainly a strong "opening bid" in our argument that sex crimes against children should receive a higher sentence (as the percentage of injury among children is so high), the majority of research regarding the physical effects of child sexual abuse has been done in instances where the abuse was largely non-violent.[71]

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68. Diane F. Merritt, *Genital Trauma in Prepubertal Girls and Adolescents*, 23 CURRENT OPINION IN OBSTETRICS & GYNECOLOGY 307, 308 (2011), http://goemescam.com.br/BD_Arquivos/Genital%20trauma%20 in%20prepubertal%20girl%20and%20adolescents.pdf.

69. *Id.* at 311 (citation omitted). This statement does not take into account the nature of the rapes committed in the DRC, which are often accompanied by (or solely committed by) insertion of dangerous objects into the victim—the injuries sustained in such situations are clearly different. *Infra* Part IV(A)(b) (discussing the unique nature of the rapes committed in the DRC).

70. The TEARS protocol categorizes injuries in the following way:

> (1) Tears: any breaks in tissue integrity, including fissures, cracks, lacerations, cuts, gashes, or rips.
> (2) Ecchymoses: skin or mucous membrane discolorations due to damage to small blood vessels beneath the skin or mucosal surface "bruising."
> (3) Abrasions: skin excoriations caused by removal of the epidermal layer with a defined edge.
> (4) Redness: erythematous skin which is abnormally inflamed because of irritation or injury without a defined edge or border.
> (5) Swelling: edematous or transient engorgement of tissues.

Id. at 309 (citation omitted).

71. *See generally id.*; Christopher J. Hobbs, *Physical Evidence of Child Sexual Abuse*, EUR. J. PEDIATR. 171(5), 751–55 (2012); David Finkelhor & Angela Browne, *The Traumatic*

This concentration in research is due in part to the fact that until recently, most recorded instances of child sexual abuse occurred in a situation where the abuser was known to the child and the abuse took place on multiple occasions (both factors contributing to the non-violent nature of the abuse). In a Western setting where the abuse is non-violent and immediate, state-of-the-art medical care is available to the survivor, long-term physical effects are less common and therefore less documented in medical studies of child sexual abuse.[72] As previously noted, the sex crimes in the DRC are being committed on a never-before-seen scale. Consequently, there is less research documenting the long-term physical effects on the survivors, which in turn provides us with less definitive evidence for our argument.

There have, however, been a few studies documenting the sexual abuse suffered by both civilian children and child soldiers in conflict settings and predicting the long-term effects on the survivors. One such study was conducted by doctors and public health officials from the United States, the United Kingdom, and the DRC in a hospital in South Kivu province (one of the most affected areas in the conflict).[73] In their study, Nelson et al. documented both individual injuries sustained as well as trends in injuries for "pediatric survivors" (victims under the age of 18 at the time of assault),[74] who constitute over half of all victims of sexual assault in the DRC.[75] Generally speaking, "pediatric survivors were more likely than adult survivors to have experienced gang rape, been attacked by a civilian perpetrator, and been assaulted during the day."[76] Over half of the survivors interviewed were between the ages of 11-15 at the time the assault occurred.[77] Common injuries (reported by nearly a quarter of interviewees) sustained by the survivors interviewed included "chronic pain, urinary incontinence, generalized malaise, and symptoms consistent with sexually transmitted infections (such as, vaginal discharge, dysuria, skin lesions, and abdominal or pelvic pain). In 19.3% of cases, survivors reported pregnancy as a result of the sexual violence."[78] Nelson et al. drew some interesting conclusions from their research, noting that "the odds among pediatric survivors for being attacked by a civilian were 92.6 times greater than the odds of civilian

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Impact of Child Sexual Abuse: A Conceptualization, 55 AM. J. ORTHOPSYCHIATRY 1 (1985).

72. *See, e.g.*, Merritt, *supra* note 68; Hobbs, *supra* note 71.
73. Nelson et al., *supra* note 31.
74. *Id.* at 211.
75. *Id.* at 212.
76. *Id.* at 211.
77. *Id.* at 215.
78. *Id.* at 218 (75 cases out of a total of 389).

attacks among adult survivors."[79]

While Nelson et al. concentrated on the short-term physical effects of the sexual violence and analyzed the long-term implications of the demographic differences between adult and child rape cases, a report issued in 2013 by Save the Children addressed the long-term physical effects for child victims of sexual violence. In their study titled "Unspeakable Crimes against Children: Sexual Violence in Conflict," Save the Children began the section on physical and psychological impact with this harrowing quote:

> The physical, psychological and social impact on both girls and boys of experiencing sexual violence is significant, in both the short and the long term. The impact of the violence on children's bodies may be very severe given their smaller size and physical immaturity and the risk of infertility.[80]

The study went on to note that, in the cases of violent rape seen in conflict situations,[81] the injuries suffered by children are so severe they often require "long-term and complex treatment."[82] The well-documented practice in the DRC conflict of inserting objects into the victim's vagina and mutilating her genitals with the intent to permanently injure only serves to highlight the potential for permanent physical injuries in child victims.[83] Most common among the long-term injuries are those that, under different circumstances, could be fully healed but due to lack of proper medical care become permanent.[84] In

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79. *Id.* at 215. The fact that children were more likely to be attacked by civilians than by armed groups is also an indication that even once the conflict is brought under control, children will continue to suffer more than their adult counterparts: although an easing in the conflict would logically mean less armed groups, children will still be vulnerable to rape in their communities.

80. AUBERT ET AL., *supra* note 5, at 15.

81. Compared to the "non-violent" instances of sexual abuse noted in the Merritt study.

82. AUBERT ET AL., *supra* note 5, at 15.

83. *See, e.g.*, *id.*; *Denis Mukwege: The Rape Surgeon of DR Congo*, *supra* note 1 (giving specific examples of injuries sustained by victims).

84.

> Girls may suffer uterine prolapses (the descent of the uterus into the vagina or beyond), vesico-vaginal or recto-vaginal fistulas and other injuries to the reproductive system or rectum . . . . Other effects of sexual violence on girls can include gastrointestinal problems . . . and gynecological symptoms—for example, dysmenorrhea (severe pain or cramps in the lower abdomen during menstruation) and menorrhagia (abnormally heavy or prolonged bleeding during menstruation).

addition to permanent physical injury, long-term effects include: living with HIV/AIDS, infertility in girls, and "difficult[y] maintaining normal sexual relationships."[85]

The Save the Children report also highlighted specific health repercussions for female children and adolescents who become pregnant as a result of the assault. Although a girl child may be menstruating, during the first few years of fertility her body is still not fully developed to bear children.[86] "Adolescents aged 15–19 are twice as likely to die during pregnancy and childbirth, and girls under 15 are five times more likely to die, compared with women aged 20 and older."[87] To make matters worse, abortion is illegal in many countries where women suffer sexual violence as a result of conflict—in the DRC the minimum sentence is five years in prison.[88] Female children and adolescents impregnated by their assailant are therefore faced with a decision where both choices (having the child or getting an abortion) will likely result in injury—further compounding the negative effect of the rape on their lives. Adult women, by contrast, are less likely to suffer physically from pregnancy and childbirth.[89]

2. Psychological Effects

In addition to physical injury, child victims of sexual violence also suffer psychological trauma. The psychological effects of sexual assault on a child are often just as (if not more) severe and debilitating as the physical effects, and, compared to the average injury sustained in a child victim's sexual encounter, can last longer than the average physical injury.[90] In the immediate aftermath of a sexual assault, children's experiences vary enormously, and can include "intense feelings of terror, shock, rage and shame, depression, loss of self-esteem, loss of confidence, self-blame, memory loss, nightmares and

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AUBERT ET AL., *supra* note 5, at 15 (citation omitted). Additionally, some sexually transmitted infections (like gonorrhea and syphilis) can be cured if caught early, but receiving medical attention in time to treat these diseases is extremely rare. *Id.* at 15. The Save the Children study also notes that boy child victims of sexual violence also suffer physical trauma, including "damage to the anus, pain during urination, blood in the stools and severe anal, rectal, penile and testicular pain." *Id.* (citation omitted).

85. *Id.* at 16 (citation omitted).

86. *Id.*

87. *Id.* (citation omitted).

88. *Id.*

89. Small comfort, of course, to an adult woman who is pregnant as a result of rape and who may be suffering from other physical effects from her assault.

90. *See generally* AUBERT ET AL., *supra* note 5 (discussing both the physical and psychological effects of child sex abuse in conflict settings).

day-time 'flashbacks' to the rape."[91] Generally speaking, adult survivors of sexual abuse suffered as a child experience a range of long-term psychological effects, including depression, alcoholism and other forms of substance addiction, self-harming behaviors, anger management issues, and intimacy issues.[92] However, more acute effects are all too common. In a study using 30 years of data from 2759 adult survivors of child sexual abuse in New Zealand, researchers found that "[r]ates of psychiatric and schizophrenic illnesses were 4-fold higher among CSA [child sexual abuse] individuals less than 12 years of age with penetrative injuries; and 15-fold higher for CSA individuals over 12 years of age with penetrative injuries and more than one abuser compared with controls."[93] Another study of female child victims of sexual violence in Turkey found that Post Traumatic Stress Disorder (PTSD) was the "most common psychiatric diagnosis established after sexual abuse."[94] Regardless of where or under what circumstances the abuse occurs, long-term psychological effects are a near-certainty for child survivors, and therefore, another reason why harsher sentences should be given to those who commit child sexual abuse.

The physical and emotional effects of sexual violence on children are horrifying. Compared to their adult counterparts, children are more likely to suffer physical trauma from the assault,[95] and the trauma suffered is likely to be more severe and long-term.[96] From incontinence to infertility, the long-term physical effects of sexual violence are manifold, and for children these effects are compounded by the fact that child bodies are not fully developed to handle sexual activity and its many consequences.[97] Additionally, children are arguably more affected by sexual violence than their adult counterparts,[98] and research on adult survivors of child sexual abuse suggests the long-term effects are incredibly severe.[99]

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91. *Id.* at 16.

92. *See, e.g.*, *Long Term Effects for Adult Survivor*, TURNING POINT SERVICES, http://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf?sfvrsn=2.

93. Merritt, *supra* note 68, at 312 (citation omitted).

94. *Id.* at 309-10.

95. *See supra* Part III(B)(a). Furthermore, Merritt notes that in a study of sexual violence victims conducted in Taiwan, "[g]enital and anal lesions were most commonly found in victims with no sexual experience"—further evidence that child sexual violence victims (who are much more likely to have no sexual experience compared to their adult counterparts) suffer more than adult victims. Merritt, *supra* note 68, at 312.

96. *See, e.g.*, AUBERT ET AL. *supra* note 5, at 15-16.

97. *See id.*

98. *See, e.g.*, *id.*

99. *See* Merritt, *supra* note 68.

Within the conflict in the DRC, the instances of sexual violence against children have increased at an alarming rate.[100] Although charges of sexual violence against children were not brought in the ICC's first DRC case, the Court has since brought charges of sexual slavery and rape against defendants from the DRC.[101] The ICC's charges against these defendants reflect the Court's recognition of the need to address the widespread use of children in conflict and the sex crimes committed against them and their communities. In light of this recognition, the time is ripe for a judicial rule establishing higher sentences for perpetrators of sex crimes against children. Indeed, countries around the world have already adopted similar rules via legislation, penal codes, and judicial precedent further strengthening the theory that sex crimes against children should receive harsher punishment, and therefore providing further support for the creation of a similar rule in the ICC.[102]

IV. GOING FORWARD: ESTABLISHING THE CHILD STATUS OF VICTIMS AS A FACTOR WHEN CONSIDERING "GRAVITY"

A. *The Solution: A Judicial Rule*

As it stands, Article 78 of the Rome Statute (governing sentencing) provides only this guidance: "[i]n determining the sentence, the Court

100. *See supra* Part II(A).

101. In addition to bringing similar charges against defendants from other situations. *See infra* Part IV(B).

102. *See, e.g.*, Sexual Offences Act, 2003, c. 42, §§ 5–9 (Eng.); STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBL.] 3214, as amended, §§ 176–77 (Ger.); NAT'L CONFERENCE OF STATE LEGISLATURES, STATE STATUTES RELATED TO JESSICA'S LAW (2008), *available at* http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf (providing information on which states have enacted mandatory minimum sentences for sex crimes against children; these mandatory minimum sentences are often higher than those imposed by the state for the same crime committed against an adult). Other examples include U.S. Federal law, which imposes a mandatory life sentence (when the death sentence is not imposed) for repeat perpetrators of sex crimes against children. (A mandatory life sentence is not automatically imposed for repeat perpetrators of sex crimes against adults.) 18 U.S.C. § 3559 (2013). *See also* U.S. SENTENCING COMM'N, SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 37–39 (1996) (analyzing the increased penalties requested by Congress for sex crimes against children). In Lithuania, the Penal Code imposes a mandatory minimum sentence of three years in addition to a higher maximum sentence (ten years for rape against minors, fifteen for rape against children under the age of 10) for rape against a child, in contrast to no mandatory minimum sentence and a maximum sentence of seven years for rape against an adult. Law on the Approval and Entry into Force of the Criminal Code, Sept. 26, 2000, *as amended*, Chapter XXI: Crimes and Misdemeanors against Freedom of a Person's Sexual Self-Determination and Inviolability, § 149 (Lith.).

shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."[103] Rule 145 of the Rules of Procedure and Evidence does provide further guidance to the sentencing judges, instructing the judges to take into consideration "all the relevant factors, including any mitigating and aggravating factors and [to] consider the circumstances both of the convicted person and of the crime."[104] Specific circumstances do include "the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location,"[105] and the court should also consider as aggravating "[c]ommission of the crime where the victim is particularly defenseless [and] commission of the crime with particular cruelty or where there were multiple victims."[106] And yet, despite these instructions, the ICC judges failed to award Thomas Lubanga the appropriate sentence. Without a specific rule to guide them in the future, they will continue to under-sentence perpetrators who commit crimes against children.[107]

A judicial opinion issuing such a rule would clearly state that in cases where a victim of sexual violence is under age 18 at the time of assault, the judges must consider the age of the victim as a separate aggravating factor when sentencing the defendant. Specifically, in considering aggravating factors that merit a harsher sentence for the defendant, "victim[s] [who are] particularly defenseless" (as included in the Rules of Procedure and Evidence Rule 145(2)(b)(iii)) should automatically be read to include children under the age of eighteen. When a sentence is being considered for a sex crime against a child, this specific aggravating factor should be considered separately and in addition to other aggravating factors, thus necessitating a greater sentence for a defendant who committed a crime against a child as compared to his counterpart who committed the same crime against an adult. Depending on how the opinion is written, the judicial rule could be interpreted to mean that for any crime committed against a person under age 18, the victim's age should be considered a separate aggravating factor under Rule 145. I have chosen to frame my argument for augmented sentencing solely within the context cases of sex crimes against children. Under my argument, then, the judges writing the rule should issue it within a Sentencing Judgment for a perpetrator who

103. Rome Treaty, *supra* note 6, art. 78.
104. Rules of Procedure and Evidence, *supra* note 44, r. 145(1)(b).
105. *Id.* r. 145(1)(c).
106. *Id.* r. 145(2)(b)(iii), (iv).
107. *See supra* Part II(B).

committed sex crimes against children. The rule would then clearly be applicable to future cases of sex crimes against children; theoretically, it could be distinguished from cases with different fact patterns.

Such a judicial rule would not be binding on the Court the way *stare decisis* is in common law courts. The Rome Treaty specifically states that the Court "*may* apply principles and rules of law as interpreted in its previous decisions;"[108] this is deliberately distinguished from the previous provision which states the court shall consider the Rome Treaty and its "Elements of Crimes" and "Rules of Procedure and Evidence," as well as international law norms, when sentencing.[109] Despite this non-binding quality, an ICC opinion establishing a rule of augmented sentences for perpetrators of sex crimes against children would likely be influential for future similar cases. As noted in the introduction, the ICC's predecessors (the ICTY and ICTR) considered their previous decisions precedent, despite the fact that their founding treaties did not create a rule of *stare decisis*.[110] Although the ICC has decided two cases so far, given (A) the general usefulness of direction established by previous cases, and (B) the fact that the ICC's predecessors used the rules established by their previous cases, this Author believes that the ICC will likely use the rules established by its previous decisions when deciding future cases. A judicial rule establishing a higher sentence for perpetrators of sex crimes against children is therefore a useful rule for the Court to institute, as it will likely be referred to in similar cases in the future. As previously mentioned, the Court has in fact multiple cases pending with defendants accused of committing sex crimes against children.

B. *In Action: The Rule as Applied to the DRC*

Bosco Ntaganda was allegedly a co-perpetrator of Thomas Lubanga's, committing crimes under the jurisdiction of the ICC. Given the nature of the conflict in the Congo,[111] the charges against him naturally include enlisting children under the age of fifteen in armed

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108. Rome Treaty, *supra* note 6, art. 21(2) (emphasis added).

109. *Id.* art. 21(1).

110. *See, e.g.*, Ohlin, *supra* note 15 (noting that the ICTY has considered judicial rules from previous cases "settled jurisprudence" when considering cases on appeal). The ICTR case of Jean-Paul Akayesu is also an example of a rule established in one case being used in the court's future cases (as well as future international treaties). *Akayesu* established that rape can be an act of genocide when it meets certain conditions; this rule was applied in many later ICTR cases. *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

111. *I.e.*, that the conflict in the DRC is notorious for the use of child soldiers. *See, e.g.*, Allen, *supra* note 19.

conflict. Ntaganda, however, also faces charges of rape and sexual slavery,[112] particularly relevant to our analysis as reports from the conflict in the DRC have established that much of the rape and sexual slavery is committed against children.[113] Through two arrest warrants, the Office of the Prosecutor (OTP) charged Ntaganda on ten counts, including two counts of rape and sexual slavery (one as a War Crime and one as a Crime Against Humanity).[114] The documents accompanying Ntaganda's arrest warrant describing his alleged crimes are currently not available to the public, thus, we do not know with certainty if he stands accused of committing sex crimes against children. As it is likely that at least some of his victims were children, however, a judicial rule previously issued establishing harsher sentences for perpetrators of sex crimes against children would almost certainly be applied in his case.

If such a rule has not been established by the time *Ntaganda* is decided, the court will likely consider the nature of sex crimes in its

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112. *See* Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Case Information Sheet (last updated June 18, 2013), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx [hereinafter Ntaganda].

113. *See, e.g.*, *2010 Human Rights Report: Democratic Republic of the Congo*, U.S. EMBASSY, http://www.state.gov/documents/organization/160453.pdf, at 9 (describing rapes committed against victims ranging in age from three to fifteen years old). One report currently estimates the majority of sex crimes committed in the DRC are committed against children. *See* Hirsch, *supra* note 5.

114. Ntaganda, *supra* note 112:

> [T]hree counts of war crimes on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute:
> The enlistment of children under the age of fifteen;
> The conscription of children under the age of fifteen; and
> Using children under the age of fifteen to participate actively in hostilities,
> [S]even counts . . . on the basis of his individual criminal responsibility as an indirect co-perpetrator under article 25(3)(a) of the Rome Statute:
>
> Four counts of war crimes:
> Murder;
> Attack against the civilian population;
> Rape and sexual slavery;
> Pillaging
>
> And three counts of crimes against humanity:
> Murder;
> Rape and sexual slavery; and
> Persecution[.]

sentencing under Rule 145 as aggravating factors under "(iii) Commission of the crime where the victim is particularly defenseless" and "(iv) Commission of the crime with particular cruelty or where there were multiple victims," and will award a higher sentence. However, unless the court reveals in its opinion that the "defenseless" nature of the victims was due solely to their age and not to other environmental factors (gender and socioeconomic status), we will never know if Ntaganda's sentence is due only to the general heinous nature of his crimes, where the court did not take into consideration the age of his victims as a separate factor requiring a higher sentence than if his victims had been exclusively adults. As it seems unlikely that the court will consider age as a separate factor in and of itself requiring a higher sentence for Ntaganda (see Court's Decision on Sentence for the Lubanga trial, discussing age as just one of the many factors in its holistic approach[115]), a judicial rule establishing age as a separate aggravating factor requiring a higher sentence is essential to ensure Ntaganda and other defendants receive just sentences going forward. Whether such a precedential rule is established in Ntaganda's case or one adjudicated before his, a rule requiring harsher sentences for sex crimes committed against children is necessary to ensure justice is served to Bosco Ntaganda and others like him. Until society reaches a point where such crimes are no longer committed against children, a judicial rule establishing this sentencing practice will serve to promote justice in Ntaganda's case and in cases to come.[116]

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115. *See* Dyilo, Decision on Sentence, *supra* note 40.

116. The ICC has also brought charges of sex crimes (instances of which often include said crimes against children) against defendants in other Situations. In the Situation in Uganda, Joseph Kony (alleged commander in chief of the Lord's Resistance Army, or LRA) has been charged with sexual enslavement and rape (crimes against humanity under Article 7 of the Rome Statute) and inducing rape and enlisting children (war crimes under Article 8); Vincent Otti (Kony's second-in-command), Okot Odhiambo (a deputy LRA commander) and other LRA officials face the same or similar charges. In the Situation in the Central African Republic (CAR), Jean-Pierre Bemba Gombo has been charged with rape under Articles 7 (crimes against humanity) and 8 (war crimes). In Darfur, three of the seven defendants are charged with rape; charges of rape have also been leveled against defendants in the Situations in Kenya and the Republic of Côte d'Ivoire—in other words, charges of sex crimes have been brought in all but two of the Situations currently before the court. For more information on these Situations and the charges against the defendants, see *Situations and Cases*, ICC-CPI.INT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx. In some of the Situations more than others, sex crimes committed against children were incredibly prevalent. While no one can know for sure the number of child victims, it is almost guaranteed that at least some of the rape victims in each Situation were minors. The need for augmented sentencing for those who commit sex crimes against minors is therefore all the more necessary, given that so many defendants before the ICC face such charges.

V. CONCLUSION

Unfortunately, the crimes committed in the conflict in the DRC are not unique. Although they are seen on an unprecedented scale there, sex crimes against children are committed every day in conflicts around the world.[117] Establishing a judicial rule in the International Criminal Court requiring harsher sentences for perpetrators of sex crimes against children is therefore essential to making sure such perpetrators are brought to justice in the future. Under the retributivist theory of criminal punishment, a harsher sentence for such perpetrators is warranted, given the particularly heinous nature of the crime and the potential for physical and psychological consequences more severe than those suffered by the child victim's adult counterparts. Given the practice established by the ICTY and ICTR of considering precedent in subsequent cases, such a rule at the ICC would likely be applied to future cases concerning sex crimes against children—and unfortunately, it is virtually certain the Court will see such cases.[118]

Such a rule is needed all the more because it will likely influence future cases of sex crimes against children in other jurisdictions. Given the scale of the atrocities committed in the DRC, the ICC will not be able to bring the perpetrators of every crime to justice. By establishing a rule mandating harsher sentences for perpetrators of sex crimes against children, the ICC will be signaling to other jurisdictions (including domestic courts in the DRC) that such a practice is preferable. Pilot programs are already in place in the DRC for trying such crimes on a domestic level;[119] this Author believes they will likely take into consideration sentencing practices of the ICC when adjudicating such crimes on the domestic level. By establishing such a rule, the ICC will not only ensure the defendants it sees are brought to justice, it will set a precedent for all perpetrators to come.

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117. *See, e.g.*, *supra* text accompanying note 114.

118. *See supra* Part IV(B).

119. *See, e.g.*, JUSTICE IN DRC: MOBILE COURTS COMBAT RAPE AND IMPUNITY IN EASTERN CONGO, OPEN SOCIETY FOUNDATION (2013) (documenting the progress of the Mobile Courts in Eastern DRC established by the American Bar Association, the Open Society Foundation, and other NGOs).

PUBLIC POLICY IN INTERNATIONAL INVESTMENT AND TRADE LAW: COMMUNITY EXPECTATIONS AND FUNCTIONAL DECISION-MAKING

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> [T]here is nothing in the interests protected by international law which is fundamentally different from those protected by municipal and private law . . . It might be said that interests of individuals are chiefly economic, whereas those of States are political in character; but even if this be so, it ought not to be forgotten that, as a rule, the political activities of States in the field of international relations are primarily devoted to safeguarding collective economic interests, no matter under what disguise they happen to appear.
> – SIR HERSCH LAUTERPACHT (1927)[1]

> It is a truism that all law is policy, in the sense that every legal arrangement, however humble, procedural, or "technical" it may seem, has been designed in order to achieve some preferred social or economic objective, including objectives about the structure of the decision-making process itself.
> – W.M. REISMAN (2012)[2]

I. INTRODUCTION: DIFFERENCES BEYOND METAPHOR

It is a proposition frequently asserted—sometimes argued in the tenor of self-evident truth—in contemporary international economic law scholarship that WTO law is always instructive for international investment law.[3] The proposition seems intuitive when one visualizes a

1. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 72–73 (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) (Archon Books, reprint 1970) (Longmans, Green and Co. Ltd., 1927).

2. W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT, at 28–29 (2007 General Course on Public International Law, Hague Academy of International Law) (Martinus Nijhoff 2012).

3. The degree of WTO influence on, and authoritativeness for, investment law, remains much a matter of debate. *See, e.g.*, Melaku Geboye Desta, *GATT/WTO Law and International Standards: An Example of Soft Law Instruments Hardening Up?*, *in* INTERNATIONAL INVESTMENT

straightforward transactional linkage between trade and investment. Intra-firm transnational trading, for example, simultaneously involves issues of inter-State foreign market access (between the State of the parent firm and the State of the affiliate firm), as well as the establishment of an investment in the host State (through the creation of the affiliate firm responsible for direct operations).[4]

Viewed from fundamental principles of economics, however, the trade-investment relationship might not seem as immediately obvious. Modern neoclassical trade theory uses the Ricardian theory of comparative advantage and the basic factor proportions model[5] to show how the incentive structure (and thus, the decision to trade or exchange) depends on factor intensities and resource endowments between States

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LAW AND SOFT LAW 148–90 (Andrea K. Bjorklund & August Reinisch eds. 2012); David Collins, *A New Role for the WTO in International Investment Law: Public Interest in the Post-Neoliberal Period,* 25 CONN. J. INT'L L. 1 (2009); Anastasios Gourgourinis, *Lex Specialis in WTO and Investment Protection Law*, 53 GERMAN Y.B. INT'L L. 579 (2010); Robert Howse et al., *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 EUR. J. INT'L L. 1087 (2010); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EUR. J. INT'L L. 749 (2009); Andrew Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law*, CHI. J. INT'L L. (forthcoming 2013); Levent Sabanogullari, *Most Favoured Nation Treatment in International Trade and Investment Law – Comparing Apples and Oranges?*, 8 TRANSNAT'L DISP. MGMT. 3 (2011); Greg Tereposky & Morgan Maguire, *Utilizing WTO Law in Investor State Dispute Settlement*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010, at 247–83 (Arthur Rovine ed., 2011).

4. *See* Arwel Davies, *Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?*, 15 J. INT'L. ECON. LAW 793 (2012).

5. Mordechai E. Kreinin & Michael G. Plummer, *Economic Principles of International Trade*, ch. 37, 3–22, at 6, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC, AND POLITICAL ANALYSIS VOL. II (Patrick F.J. Macrory et al. eds., 2005).

> In sum, each country exports the commodities that are relatively intensive in the factor with which it is relatively well endowed. That is how it acquires a comparative advantage in these commodities. . . . this model has considerable explanatory power. One of its implications is that each country exports the "factor services" of its abundant factor, as embodied in the bundle of its export goods, and imports the "factor services" of its abundant factor, as embodied in the bundle of its import goods. (Commodity trade and factor movements, therefore, are substitutes, as a country can either export its factor services or its factors.) Thus, trade raises the demands for, and the price of the abundant factor, and lowers the demand for, and the price of, the scarce factor. The effect of trade on the country's income distribution is at the heart of the controversy over free trade versus protectionism in many countries: the scarce factor lobbies for protectionism, to minimize its losses. Likewise, factors employed in the export industries gain from trade, and those employed in import-competing industries lose.

Id.

(*e.g.*, the relative capital/labor ratios in two States in relation to the bundle of commodities produced). Theories of foreign direct investment (FDI), on the other hand, attribute firms' decisions to invest abroad to either of the following: (1) the nature of business operations in a production cycle (*e.g.*, innovation, growth, maturity and decline); (2) the effect of exchange rates on imperfect capital markets (*e.g.*, stronger currencies tend to reduce the volume of FDI); (3) the processes of internalization (*e.g.*, FDI occurs when firm-specific advantages outweigh the costs of outsourcing operations abroad); or (4) the eclectic theory of firms' advantages (*e.g.*, ownership advantages, location advantages, internalization advantages) that create a sufficient incentive for foreign direct investment, as opposed to other transactional options available to such firms.[6]

The transactional differences between trade and investment thus translate into different sets of respective determinants for international investment (capital) flows and international trade flows. The International Monetary Fund's key 1991 global survey and analysis of the determinants of global capital flows identified three major determinants that significantly influence firms' decisions to invest (whether in a direct manner through the establishment of operations in the host State, or through indirect forms such as equity, securities, or other types of portfolio investment): (1) economic fundamentals (*e.g.*, "global investment opportunities available, the covariances between expected returns on various investments, the growth of wealth in different countries, and differences across economic agents in their willingness to assume risk and in rates of time preference"); (2) relevant official policies (*e.g.*, tax policies; official guarantees; capital controls; limitations on the entry of foreign firms into domestic markets; restrictions on the domestic activities, products, locations and interest rates charged by financial institutions; misaligned real exchange rates; restrictive trade policies; debt-servicing arrears and reschedulings; and unstable macroeconomic policies"); and (3) market distortions (*e.g.*, "transaction costs and asymmetric information among market participants").[7] On the other hand, a World Bank report identifies

6. Vintila Denisia, *Foreign Direct Investment Theories: An Overview of the Main FDI Theories*, 3 EUR. J. INTERDISC. STUD. 53, 55–57 (2010). There are of course more new theories of FDI decision-making. *See also* IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT: THEORY, EVIDENCE, AND PRACTICE (2002); A.L. Calvet, *A Synthesis of Foreign Direct Investment Theories and Theories of the Multinational Firm*, 12 J. INT'L BUS. STUD. 43 (1981); Olga Vasyechko, *A Review of FDI Theories: An Application for Transition Economies,* 89 INT'L RES. J. FIN. & ECON. 118–37 (2012).

7. Morris Goldstein et al., *Determinants and Systemic Consequences of International Capital Flows*, *in* DETERMINANTS AND SYSTEMIC CONSEQUENCES OF INTERNATIONAL CAPITAL FLOWS: A STUDY BY THE RESEARCH DEPARTMENT OF THE INTERNATIONAL MONETARY FUND 1, 19–24 (International Monetary Fund, Occasional Paper No. 77, Mar. 1991) [IMF FEE].

different determinants of global trade flows, composed of the traditional variables of factor endowments (*e.g.*, capital/labor ratios and resource endowments) and exchange rate spreads between States,[8] as well as several new determinants that have been observed from cross-country data (*e.g.*, productivity differences, consumer preferences, scale returns and technology, increase in mean incomes, improvements in information and communication technology or infrastructure, and trade intensity as affected by country size and trade barriers).[9]

Given these conceptual differences, it is unsurprising that the separate and distinct international economic transactions of trade and investment are governed by distinct international regulatory architectures which, while sharing some early "common roots," ultimately demonstrated "diverging evolutions."[10] As Nicholas Di Mascio and Joost Pauwelyn observed in 2008:

> The trade regime is about overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities – not individual rights . . . [while] the traditional investment regime is about fairness grounded in customary rules on treatment of aliens, not efficiency. It is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities.[11]

The regulatory content for international trade, as opposed to that which has evolved for international investment, has understandably been designed with consideration for the particularity of each subject-matter to be regulated, as well as the respective policy purposes behind each sphere of regulation.[12]

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8. *See* Marianne Baxter & Michael A. Kouparitsas, *What Determines Bilateral Trade Flows?*, NBER Working Paper 12188, Apr. 2006, *available at* http://cid.bcrp.gob.pe/biblio/Papers/NBER/2006/Abril/w12188.pdf (last accessed Jan. 10, 2013); Eswar S. Prasad & Jeffery A. Gable, *International Evidence on the Determinants of Trade Dynamics*, 45 IMF Staff Papers 401 (Sept. 1998), *available at* http://www.perjacobsson.org/external/Pubs/FT/staffp/1998/09-98/pdf/prasad.pdf (last accessed Jan. 10, 2013).

9. Julien Gourdon, *Explaining Trade Flows: Traditional and New Determinants of Trade Patterns*, CERDI, *Etudes et Documents* E 2007.06, *available at* http://halshs.archives-ouvertes.fr/docs/00/55/71/25/PDF/2007.06.pdf (last accessed Jan. 10, 2013).

10. Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 1 48, 51–53 (Jan. 2008).

11. *Id*. at 54–56.

12. *See* David P. Baron, *Design of Regulatory Mechanisms and Institutions*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION, vol. II, ch. 24 1347, 1349, (R. Schmalensee & R.D. Willig eds. 1989).

> Regulation involves government intervention in markets in response to some

Nonetheless, it would be quite unrealistic to deny the existence of any nexus whatsoever between trade regulation and foreign investment rules.[13] However, as I caution in this Article, it is also dangerous to hyperbolize the influence of the former regime on the latter, or to mechanistically design public policy solutions in international investment law by mere transplant of the public policy interpretations, methodological approaches, and institutional solutions that have uniquely evolved within international trade law, and which, to date, have mostly achieved a mixed record of success.[14] The obstacles to the automatic transplantation of WTO law into investment law are neither imagined nor speculative. For one, investment treaty texts may not necessarily possess the same linguistic elasticity as trade treaty

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> combination of normative objectives and private interests reflected through politics. Whatever objective the regulation is intended to achieve, the regulator must choose policies tailored to the particular regulatory setting and to the characteristics of the firms subject to its authority. In choosing those policies, the regulator must take into account the strategies the firm might employ in response to those policies.

Id.

13. *See* MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 444 (3d ed. Routledge):

> There is a complex interaction between foreign investment and trade protection. First of all, foreign investment may occur as a means of jumping tariff walls or avoiding harassment of imports under the trade remedy laws of the host country (so-called "cooperative protectionism"). If much of its comparative advantage is portable, consisting of know-how, processes and technology, a company may avoid border restrictions simply by manufacturing within the domestic market. Enhanced access to host-country markets generally ranks high among the factors that industries cite as reasons for foreign investment.

Id.

14. On the debate regarding the WTO's favorable or unfavorable impact and record on human rights and public interest protection, see Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective*, (John M. Olin L. & Econ. Working Paper No. 188, 2003), *available at* http://www.law.uchicago.edu/files/files/188.aos_.human-rights.pdf (last accessed Jan. 10, 2013); Robert D. Anderson & Hannu Wager, *Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy*, 9 J. INT'L ECON. L. 3 (2006), 707–47, *available at* http://jiel.oxfordjournals.org/content/9/3/707.full.pdf+html; HOLGER P. HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2007); Peter Hilpold, *WTO Law and Human Rights: Bringing Together Two Autopoietic Orders*, 10 CHINESE J. INT'L L. 323–72 (2011), *available at* http://chinesejil.oxfordjournals.org/content/10/2/323.full.pdf+html?sid=a3056730-1db0-4cd4-8acf-247574fc4c25; JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANIZATION 17–68 (2007); SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE 7–141 (2011); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753–814 (2002).

provisions.[15] Investment arbitration tribunals, operating as they do under the parameters of a specific and limited mandate to resolve a particular dispute, may find that their jurisdictional competence cannot easily echo the broad judicial functions of the WTO Appellate Body,[16] even if both types of tribunals adhere to some sense and understanding of a *jurisprudence constante*.[17] Finally, grafting WTO law onto investment law would have to reckon with how this proposal would be received within the different strategic bargaining dynamics in the investment law system's usual triage of a host State, its constituents, and a prospective foreign investor,[18] as opposed to the predominantly inter-State bargaining dynamics within the complex, "multilevel," and constitutionalized system[19] in the WTO.[20]

Notwithstanding these contextual differences, it is curious that there

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15. *See* Diane A. Desierto, *Necessity and Supplementary Means of Interpretation of Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827, 882–94 (2010); Jose E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011 (Karl P. Sauvant ed., 2012).

16. *See* Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 231, 235 (Karl P. Sauvant ed., 2008); Asif H. Qureshi, *An Appellate System in International Investment Arbitration?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1155, 1165, (Peter Muchlinski et al. eds., 2008). On the international judicial function of the WTO Appellate Body, see ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 159–64 (2009) (noting that, under the "principle of *non ultra petita*," the WTO panels and Appellate Body "should not decide more than is covered by their jurisdiction in a particular dispute . . . [t]he exception to this principle in appellate review is that the Appellate Body may review the exercise of inherent powers by panels, even in the absence of a claim to that effect." VAN DAMME, *supra*, at 160).

17. *See* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014–49 (2007); Andrea K. Bjorklund, *Investment Treaty Arbitral Awards as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265–80 (Colin B. Picker et al. eds., 2008).

18. *See* Tai-Heng Cheng, *Power, Authority, and International Investment Law*, 20 AM. U. INT'L L. REV. 465 (2005); Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507 (2009), *available at* http://jiel.oxfordjournals.org/content/12/2/507.full.pdf+html?sid=ab78494f-aee8-48e5-bf62-52d2f1b03a7b; JAN PETER SASSE, AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES 67–123 (2011); Stephania Bonilla & Rosa Castro, *A Law and Economics Analysis of International Investment Treaties: Latin America*, Oct. 2006 unpublished paper, *available a*t http://www.papers.ssrn.com/sol3/paperscfm?abstract_id=1007684 (last accessed Jan. 10, 2013).

19. Famously coined and conceptualized by Ernst-Ulrich Petersmann. *See Among Others* Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, *in* CONSTITUTIONALISM 5–58 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011); ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS 2–7 (2012).

20. *See generally* KYLE BAGWELL & ROBERT W. STAIGER, THE ECONOMICS OF THE WORLD TRADING SYSTEM (2002).

remains an enduring scholarly purchase to the proposition that WTO law is always instructive for investment law. To some, importing trade interpretations into investment treaty standards ultimately means taking a crucial ideological position favoring the discursive unity, rather than normative fragmentation, of international law in general.[21] Where one accepts this theoretical prism of unity and the coherence of international economic law (IEL) as a system[22] (or for that matter, IEL's unity with international law at large),[23] it would seem that there is nothing at all

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21. Among the voluminous literature on the subject of fragmentation *vis-à-vis* unity between international trade and international investment law, see Jose Manuel Alvarez-Zarate, *Searching for Coherence in Trade and Investment Arbitration: Domestic Policies under Siege*, Working Paper No. 2012/48, Society of International Economic Law Global Conference, July 2012, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102665 (last accessed Jan. 10, 2013); RAFAEL LEAL-ARCAS, INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL AND BILATERAL GOVERNANCE ch. 1 (2011) (Introduction); Jürgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW ch.8 (Stephan W. Schill ed., 2010); David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?*, J. INT'L DISPUTE SETTLEMENT 1, 20 (2011), *available at* http://jids.oxfordjournals.org/content/2/2/471.full.pdf+html?sid=8f094943-182f-4133-9742-a3467ea56f70.

> It is worth underscoring that having resort to the WTO system is to seek out reinforcements entirely in sync with the project of spreading economic liberalism worldwide. Having recourse to the world trading regime precedent is to look for a reliable and steady ally whose international rationality differs little from the investment rules regime.

Id.; Julien Chaisse & Philippe Gugler, *Foreign Investment Issues and WTO Law – Dealing with Fragmentation While Waiting for a Multilateral Framework*, *in* ESSAYS ON THE FUTURE OF THE WORLD TRADE ORGANIZATION 135–71 (Julien Chaisse & Tiziano Balmelli eds., 2008).

22. *See* Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996); Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships*, 4 J. INT'L ECON. L. 3–39 (2001), *available at* http://jiel.oxfordjournals.org/content/4/1/3.full.pdf+html?sid=38d71102-c873-4a2f-b2f3-61a7f4ecdc1e; Bradly J. Condon, *Trade, Environment and Sovereignty: Developing Coherence Between WTO Law, International Environmental Law, and General International Law*, unpublished Ph.D. Thesis (2004), *available at* http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1018&context=theses (last accessed Jan. 10, 2013); Thomas Cottier et al., *Introduction: Fragmentation and Coherence in International Economic Regulation: Analysis and Conceptual Foundations*, *in* THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE 1, 52 (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

23. On the general systems coherence of international law despite the proliferation of numerous functional and specialized regimes, see Christian Tomuschat, *International Law as a Coherent System: Unity or Fragmentation?*, *in* LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN 323–54 (Mahnoush H. Arsanjani et al., 2010). An incipient proposal suggests transposing systems theory into the analysis of international investment law. *See* Julia Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, unpublished draft for the ASIL International Economic Law Interest Group dated Nov. 16, 2012,

unusual in the rising clamor for international investment law to increase its receptiveness to trade law.[24] Tomer Broude has recently gone so far as to argue in favor of the pure consolidation of international trade and investment law into one system of law altogether, stressing that:

> The regulation of trade and the law of investment have inevitably gravitated towards each other, drawing on their common genetic makeup. However, the convergence is far from true consolidation. Rather, it is piecemeal and unplanned, lacking a unifying logic . . . . From a policy perspective, it seems difficult to justify such a continued bifurcation. [In regard to] subsidies, one wonders if it makes any sense to effectively proscribe subsidies that influence the physical movement of goods as inefficient, while at the same time, at least by default, sanctioning subsidies that create an inefficient global allocation of investment resources. Much the same could be said about other specific areas of regulation – discriminatory treatment of goods and services compared to discriminatory treatment of investment; the treatment of intellectual property as trade-related issues when they are no less related to international investment; increased access to goods and services markets when access to capital markets remains constrained; incongruous limitations on trade and investment-related based on the same "non-economic" considerations; differences between regional trade arrangement and regional investment structures. The list goes on.[25]

Evidently, the tribe of enthusiasts for some kind of "systemic integration"[26] between WTO law and investment law is increasing. The academic literature alone is rife with many innovative WTO law *qua* investment law proposals. On one end of the spectrum, there are those who concede a minimum of normative and ideological convergence

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available at http://www.asil.org/iel_biennial/files/Maupin%20paper.pdf (last accessed Jan. 10, 2013).

24. Jose Manuel Alvarez-Zarate, *Searching for Coherence in Trade and Investment Arbitration: Domestic Policies Under Siege*, (Soc'y of Int'l Econ. Law Working Paper No. 2012/48, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102665.

25. Tomer Broude, *Investment and Trade: The 'Lottie and Lisa' of International Economic Law?* (Hebrew Univ. of Jerusalem Legal Studies Res. Paper No. 10-11), *in* NEW DIRECTIONS AND EMERGING CHALLENGES IN INTERNATIONAL INVESTMENT LAW AND POLICY 12, 19 (Pierre Sauve & Robert Echandi eds., 2012).

26. The coinage and concept is attributable to Professor Campbell McLachlan. *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279–320 (2005), *available at* http://journals.cambridge.org/action/displayFulltext?type=1&pdftype=1&fid=1531876&jid=ILQ&volumeId=54&issueId=02&aid=1531868.

between WTO law and investment law—at least enough to regard WTO law as having some "persuasive" effect on the interpretation and application of investment treaty norms.[27] Some plumb the conceptual commonalities between substantive standards in investment treaties (such as the most favored nation clause and the national treatment clause) with their trade law counterparts, to push for a shared normative interpretation within a broader epistemic and interpretive community of law-appliers.[28] At the opposite extreme, there are those who find little or no conceptual divide between WTO law and investment law, such that WTO law and jurisprudence may, ought, or should be incorporated as much as possible as "authoritative" sources of law in the interpretation

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27. *See* Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93 (2013) (proposing the adoption of judicial methodologies developed by WTO panels, particularly proportionality analysis for necessary measures in GATT exceptions); Thomas Klein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, *in* INTERNATIONAL JUDICIAL LAWMAKING 251, 274–77 (Armin von Bogdandy & Ingo Venzke eds., 2012); ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 104–12 (2011) (advocating an "integrative" interpretation of the FET standard that could include references to WTO law); Robert Howse, *The Relevance of WTO Law and Jurisprudence to Investor-State Dispute Settlement*, Notes for Panel Discussion, Investment Treaty Forum, British Institute for International and Comparative Law, Sept. 9, 2011, *available at* http://www.biicl.org/files/5638_robert_howse.pdf (last accessed Jan. 10, 2013) (noting specific investment treaty concepts and principles originating from the GATT/WTO *acquis* and the dangers of re-litigation of the same issues in parallel trade *vis-à-vis* investment arbitration proceedings, but also cautioning that "the use of WTO law and jurisprudence in investor-state dispute settlement requires careful attention to contextual differences and a range of other considerations"). Although note that arguments have been advanced in favor of a strict separation between WTO law and investment law. *See* Cesar Giovanni Chaparro Rincon, *The Relationship Between International Investment Agreements and the WTO Legal System – Conflicts and Sustainable Development*, 8 TRANSNAT'L DISP. MGMT. 33–42 (2011) (finding that "complementary relationship between WTO [law] and IIA [international investment agreement] is unfeasible").

28. KLÄGER, *supra* note 27, at 110; Michael Ewing-Chow, *Thesis, Antithesis and Synthesis: Investor protection in BITs, WTO and FTAs*, 30 U. NEW S. WALES L.J. 548–71 (2007); Martins Paparinskis, *Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law*, *in* MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 259–88 (Tomer Broude & Yuval Shany eds., 2011); Jürgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW ch. 8 (Stephan W. Schill ed., 2010); Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECON. L. 493, 503–06 (2003) (arguing that WTO law and jurisprudence are relevant external rules to international investment treaties, applying Article 31(3)(c) of the Vienna Convention on the Law of Treaties). On fundamental conceptual differences between the assessment of discrimination in WTO law as opposed to that undertaken in investment law, see Thomas Wälde, *The Serbian Loans Case – A Precedent for Investment Treaty Protection of Foreign Debt?*, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 383, 411–14 (Todd Weiler ed., 2005).

of investment treaties.[29] Full convergence and cross-fertilization between WTO law and investment law, according to this view, would

29. Mitchell & Henckels, *supra* note 27. For the famous investment law case that directly used WTO law to interpret investment treaty norms, see *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of Sept. 5, 2008, ¶¶ 192–94 (using GATT Article XX exceptions to interpret Article XI of the Argentine-U.S. bilateral investment treaty). Other tribunals have not gone as far as the *Continental Casualty* tribunal in directly incorporating WTO law and jurisprudence to interpret an investment treaty norm. For example, the interpretation of WTO law of national treatment was not deemed pertinent by the tribunal in *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. U.N. 3467, Award of July 1, 2004, ¶¶ 173–76.

> The Tribunal is mindful of the discussion of the meaning of "like products" in respect of national treatment under the GATT/WTO. In that context it has been held that the concept has to be interpreted narrowly and that like products are related to the concept of directly competitive or substitutable products . . . However, those views are not specifically pertinent to the issue discussed in this case. In fact, the purpose of national treatment in this dispute is the opposite of that under the GATT/WTO, namely it is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in GATT/WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination.

Id. The tribunal in *International Thunderbird Gaming Corporation v. Mexico*, Ad hoc (UNCITRAL), Award of Jan. 26, 2006, ¶ 37 acknowledged the further development of the concept of "transparency" and "legitimate expectations" in WTO law and jurisprudence. In *Canfor Corporation v. United States*, Ad hoc (UNCITRAL), Decision on Preliminary Question June 6, 2006, ¶ 183, the tribunal took into account the fundamental principle that the North American Free Trade Agreement (NAFTA) reflects "compatibility with GATT/WTO law." WTO law was cited as an additional source to provide evidence of the existence of the general principle of good faith in *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of Apr. 15, 2009, ¶ 77. The tribunal in *Methanex Corporation v. United States*, Ad hoc (UNCITRAL), Final Award on Jurisdiction and Merits, Aug. 3, 2005, ¶¶ 5–6, was careful to avoid adjudicating allegations that the United States had violated GATT law, but initially conceded that

> [w]hen it comes to interpreting the provisions of Section A of Chapter 11, in particular in the instant case Article 1102, *the Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past*. While such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant. If (as appears to be the case) Methanex's argument amounts to no more this, it accords with the approach taken by the Tribunal.

Id. (emphasis added). Ultimately, the tribunal's textual examination of NAFTA Article 1102 revealed that the incorporation of GATT criteria on "like goods" had not been intended by the NAFTA drafters: "the intent of the drafters to create distinct regimes for trade and investment is explicit in Article 1139's definition of investment" (*Methanex*, ¶¶ 33–35).

ostensibly cure further "fragmentation" and abate growing "dissonance" among arbitral tribunals within the international investment law regime.[30]

Apart from the foregoing ideological motivations, acceptance of the WTO law *qua* investment law proposition also unmasks certain methodological and institutional preferences. Some endorse the interpretive methodologies of WTO panels or the Appellate Body to investment arbitrators dealing with open-textured or ambiguous treaty clauses such as non-precluded measures or necessity.[31] Others hold up the centralized system of interpretation in the WTO as the functional paradigm to be emulated by the diffuse and decentralized investment law regime.[32] In recent years, some investment treaty-making practices have started reflecting States' decisions to favor direct incorporation of, or specific reference to, trade law provisions within investment treaties.[33]

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30. Of course, this assumes that "dissonance" among investment arbitral awards is itself a problem, in the first place, and not merely an expected phenomenon in a treaty regime governed by a universe of over 3000 international investment agreements to date. It has been argued that this dissonance is characteristically expected of the particular "system design" for investment law. *See* R. Doak Bishop & Margrete Stevens, *A Systemic Perspective of the Foreign Investment Dispute Settlement System: Feedback, Adaptation, and Stability*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011, at 25–59 (Arthur W. Rovine ed., 2012). It has also been proposed that dissonance in the international investment law regime can be overcome internally by adopting a public law conceptual perspective in investment treaty arbitration. *See* Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 78–85 (2011).

31. Mitchell & Henckels, *supra* note 27. *See also* Alberto Alvarez-Jimenez, *New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law*, unpublished paper, *available at* http://biblioteca.ucp.edu.co/OJS/index.php/paginas/article/viewFile/916/838. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 504 (2009) ("IIA tribunals should consider applicable interpretive principles drawn from WTO jurisprudence on Article XX GATT . . ."). For a regime-specific analysis of methodologies in WTO jurisprudence regarding necessity exceptions, see Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J. INT'L ECON. L 153 (2009), *available at* http://jiel.oxfordjournals.org/content/12/1/153.full.pdf+html?sid=dfd01605-e443-4de3-b09d-6931c26f8c31.

32. Collins, *supra* note 3, at 3–4 ("WTO principles may further some of the key public interest issues that could arise in the investment context . . . the inclusive and internally coherent nature of WTO dispute settlement is more responsive to public interest concerns than the private, largely inconsistent commercial arbitration of investment disputes."); NEWCOMBE & PARADELL, *supra* note 31, at 503–04. On the increasing resort to WTO/GATT language for new generations of investment treaty standards, see Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037 (2010), *available at* http://jiel.oxfordjournals.org/content/13/4/1037.full.pdf+html?sid=83d81b7c-8c86-4328-82c6-d839eff90f92.

33. *See, e.g.*, ASEAN Comprehensive Investment Agreement arts. 17–18 (reproducing

It is not my intent to seek a sharp and indissoluble line of separation between WTO law and investment law for any and all cases. Where it can be shown that States' investment treaty practices purposely and discernibly adopt GATT/WTO treaty language, the unitary system of treaty interpretation would itself require law-appliers to refer to WTO law and jurisprudence.[34] Rather, for purposes of this Article, I invite scrutiny to the deployment of the WTO law *qua* investment law proposition in "public interest" narratives much in vogue now with certain quarters of international investment law scholarship,[35] and which tacitly assume that WTO law contains the veritable and venerable public policy toolbox for solving the "legitimacy crisis"[36] in investment

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GATT Articles XX/GATS Article XIV and GATT Article XXI), *available at* http://www.thaifta.com/thaifta/Portals/0/acia.pdf; Energy Charter Treaty arts. 3 & 4 (explicitly referring to GATT provisions and related instruments), *available at* http://www.ena.lt/pdfai/Treaty.pdf; United States/Estonia BIT (1994) art. II (expressly stating that "[t]he free trade area exception in this Treaty is analogous to the exception provided for with respect to trade in the GATT"), *available at* http://www.state.gov/documents/organization/43560.pdf; Japan/Cambodia BIT (2007) art. 18 (providing for direct incorporation of GATT and related instruments, *e.g.* "For the purposes of this Agreement other than Article 13. General Agreement on Tariffs and Trade 1994 arts. XX & XXI; bis of the General Agreement on Trade in Services (GATS) in Annex 1B arts. XIV & XV. The GATS are incorporated into and from part of this Agreement, "mutatis mutandis."); ASEAN-China Investment Agreement, nn.10–11, arts. 16(1) & (2), *available at* http://www.miti.gov.my/storage/documents/46f/com.tms.cms.document.Document_d5b6cac4-c0a81573-5b605b60-f919ea54/1/ACFTA%20Investment%20Agreement%20-%20ASEAN%20Version%20%20(19%20Nov% 202008%20clean).pdf

34. DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION 234 (2012); Lars Markert, *The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (Special Issue: International Investment Law and EU Law) 145, 169 (Marc Bungenberg et al. eds., 2011); Vienna Convention on the Law of Treaties arts. 31 & 32, *available at* http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

35. Collins, *supra* note 3. *See also* Kevin P. Gallagher, *Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements*, U.N. G-24 Discussion Paper No. 58 (May 2010), *available at* http://www.ase.tufts.edu/gdae/Pubs/rp/KGCapControlsG-24.pdf (last accessed Jan. 10, 2013) (concluding, among others, that investment treaty provisions on capital controls should adopt provisions already found in free trade agreements on balance of payments, essential security exceptions, and a state-to-state dispute resolution process); ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 66–76, 127–66, 179–88 (2012) (referring to proportionality, necessity, and balancing tests in WTO jurisprudence on GATT Article XX exceptions).

36. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT'L DISPUTE SETTLEMENT 1–42 (2012), *available at* http://jids.oxfordjournals.org/content/3/1/95.full.pdf+html?sid=000f2776-6a36-4227-b860-fc3be7dd0604; Christina Cathey Schuetz, *Legitimacy and Inconsistency: Is Investment Arbitration Broken and if so, Can or Should it Be Fixed*, *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW ch.12 (Ian A. Laird & Todd J. Weiler eds., 2010); Charles N. Brower &

law. Those doubtful of the investment law regime's ability to enable States to continue vindicating and defending public interest would often contrast the alleged paralysis in investment law against the evolution of WTO adjudicative practices toward balancing human rights compliance with foreign market access demands of liberalization and free trade.[37] For some, the public policy dialogue in WTO law might appear more settled, well-reasoned, and coherent in the multilateral and plurilateral trading system, more so than the oft-alluded current quest for "policy space" across constellations of thousands of bilateral and regional investment treaties.[38] At this point in the ongoing public policy and regulatory freedom debate in the international investment law regime, one might be led to believe that trade law's engagement with human rights and public policy has never looked rosier.

This Article suggests there is need to pause and rethink the proposition that WTO law could, and indeed should, be grafted into investment law in order to resolve the latter's current controversies on States' regulatory freedom to vindicate the public interest and human rights. I advance three contextual policy reasons to dial back some of the current enthusiasm, or even over enthusiasm. First, I submit that the public interest and human rights dialectics have evolved and are

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Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471 (2009).

37. Davies, *supra* note 4; Mitchell & Henckels, *supra* note 27; Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013); William w. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 333–43 (2010); Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75–106 (Stephan W. Schill ed., 2010). On emulating the increased participation rights found in regional free trade agreements, see Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 807–18 (2008).

38. *See* Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 TEX. INT'L L.J. 371 (2007); Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 355, 366 (Marie-Claire Cordonier Segger et al. eds., 2011).

> [G]eneral exceptions are intended to provide greater regulatory flexibility to host States in pursuing the specific legitimate objectives established in the exceptions. Since the inclusion of GATT and GATS-like exceptions in IIAs is quite exceptional, an *effet utile* interpretation might suggest that the parties intended to provide the host State greater regulatory flexibility and a corresponding lower level of investment protection than other IIAs without general exceptions.

Id. (indicating an interpretation of general exceptions).

evolving within the WTO and investment treaty regimes according to unique and separate trajectories, to the point that the years of entrenched and embedded treaty texts as well as institutionalized functional decision-making practices in each regime, militate against the automatic transposition of WTO law into investment law. Part II lays-out and synthesizes fundamental differences between treaty language, communities of law-appliers and treaty interpreters, and institutional structures in both WTO law and international investment law, which have heretofore yielded nonlinear interpretations and constructions of the "public interest" and "human rights" norms in both the dispute settlement process and the law-making processes of each treaty regime.[39] As aptly observed by one scholar, the very concept of "public interest" itself remains as "ambiguous" for human rights law as for trade law.[40]

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39. On human rights and the public interest in WTO law, see among others Viktoriia Kotsiubska, *Public Interest Consideration in Domestic and International Anti-Dumping Disciplines*, unpublished Master's Thesis for the World Trade Institute, Sept. 2011, *available at* http://www.wti.org/fileadmin/user_upload/wti.org/1_master-programme/pdfs/Masters_thesis_Viktoriia%20Kotsiubska.pdf; Ernst-Ulrich Petersmann, *Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution*, *in* INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 29, 54–56 (Frederick M. Abbott et al. eds., 2006). On the proposed taxonomy of "conditionality-based measures" (*e.g.*, measures taken by one WTO Member State in order to promote or protect the human rights of persons in another WTO Member State through trade restrictions or incentives), "compliance-based measures" (*e.g.*, measures taken by a WTO Member State in order to protect and promote the human rights of persons in its own country, usually distributive rights such as economic, social and cultural rights), and "cooperation-based measures" (*e.g.*, States cooperate in order to protect and promote the human rights of individuals in another State, usually for the protection of distributive rights), see JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION 175–79 (2007). On human rights and the public interest in international investment law, see among others Susan L. Karamanian, *Human Rights Dimensions of Investment Law*, *in* HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 236–71 (Erika de Wet & Jure Vidmar eds., 2012); Jorge E. Vinuales & Pierre-Marie Dupuy, *Human Rights and Investment Disciplines: Integration in Progress*, *in* INTERNATIONAL INVESTMENT LAW (M. Bungenberg et al. eds., 2012); Pierre-Marie Dupuy, *Human Rights and International Investment Law: A Case for Fragmentation or Unity of Public International Law?*; Christoph Schreuer & Clara Reiner, *Human Rights and International Investment Arbitration*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82 (Pierre-Marie Dupuy et al. eds., 2009); Ursula Kriebaum, *Privatizing Human Rights: The Interface Between International Investment Protection and Human Rights*, *in* THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD 165–89 (August Reinisch & Ursula Kriebaum eds., 2007); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573 (July 2011), *available at* http://journals.cambridge.org/action/displayFulltext?type=1&fid=8351571&jid=ILQ&volumeId=60&issueId=03&aid=8351569&bodyId=&membershipNumber=&societyETOCSession=; *Aligning Human Rights and Investment Protection*, 10 TRANSNAT'L DISP. MGMT. 1 (2013), *available at* http://www.transnational-dispute-management.com/article.asp?key=1925.

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Furthermore, the severance of investment law from WTO law in the aftermath of failed negotiations on a multilateral investment regime,[41] I submit, is by no means a historical accident. The competing individual State and non-State interests that resulted in the failure to reach a multilateral investment accord in 1997, have since crystallized into different political and sociological configurations of dispersed public and private sector constituencies, each affecting numerous individual investment treaty negotiations and the eventual contours of the first to third generations of investment treaties.[42] It should be of little surprise then that in the earliest investment treaty generations, public interests through human rights had scarcely any visibility either in treaty language or institutional design.[43]

After the failure of the Doha Development Round[44] and the increasing proliferation of regional free trade agreements,[45] there has been an incremental rise of new investment treaty provisions carving out State regulatory freedom to vindicate public interest and human rights in recent generations of investment treaties (particularly model BITs of the United States and Canada).[46] The current proposal of the

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(2012).

41. TREBILCOCK & HOWSE, supra note 13, at 458–60; Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network*, unpublished paper for the U.N. Vision Project on Global Public Policy Networks, *available at* http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf.

42. On alternative visions of the ideological and political histories behind the emergence of the international investment law system, see generally KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 19–120 (2010); M. SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 18–29 (2d ed. 2004); NEWCOMBE & PARADELL, *supra* note 31, at 1–74; STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 25–64 (2009); Jose E. Alvarez, *The Once and Future Foreign Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN, *supra* note 23, at 607–40.

43. *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD 9–20, 28–32, 41–48, 53–77 (2008), *available at* http://unctad.org/en/Docs/iteiit20073_en.pdf.

44. ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS 419–35 (2012) (detailing the failed negotiations and lack of political support for human rights approaches to the Doha Round Agreements).

45. *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES at 84–85, 99–103, *available at* http://www.unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf (last accessed Jan. 10, 2013); Susan Ariel Aaronson, *Human Rights*, at 443–66, *available at* http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf (last accessed Jan. 10, 2013) (surveying and summarizing the human rights provisions that have proliferated in preferential trade agreements of Canada, the European Union, the European Free Trade Association, and the United States).

46. On the negotiation of investment chapters within free trade agreements between Latin American countries and the United States, see Roberto Echandi, *A New Generation of*

U.N. Conference on Trade and Development (UNCTAD), entitled "Investment Policy Framework for Sustainable Development," puts forward various policy options and recommendations for host States to design various elements in their international investment agreements that would contribute to the achievement of development objectives.[47] Some of these recommendations are drawn from experiences in WTO law and adjudication, and, in my view, require careful analysis of their ultimate applicability to investment law. In an UNCTAD investment policy hub exchange I recently had with Andrew Mitchell and Caroline Henckels on their proposed adoption of "necessity tests" in WTO jurisprudence on GATT Article XX exceptions for investment law, I expressed some reservations primarily due to the lingering contextual and textual differences between WTO law and investment law. WTO Counselor for Legal Affairs Gabrielle Marceau concurred, acknowledging that

> [o]ne should be prudent about pursuing this route. The "necessity" provisions under WTO, those in investment treaties, and the necessity principle in general international law in general international law respond to different wordings, objectives, purposes and contexts . . . investment tribunals may gain from the WTO experience in the necessity test, but a mere transposition of the WTO's approach to the necessity analysis with the view of guiding investment tribunals should take into account the specificity [of] investment treaties concerned.[48]

Understandably, more than a decade of the legal, adjudicative, and policy dialogue on human rights in WTO law and jurisprudence have engineered sufficient practical, as well as theoretical, sedimentation of "trade and human rights" approaches[49]—at least enough to attract

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International Investment Agreements in the Americas: Impact of Investor-State Dispute Settlement over Investment Rule-Making, *available at* http://www.cepii.com/anglaisgraph/communications/pdf/2006/20211006/ses_3_echandi.pdf (last accessed Jan. 10, 2013).

47. I examine some of the WTO law-based proposals (particularly proportionality analysis for exceptions, and special and differential treatment provisions) in the IPFSD in Part III. *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2012), *available at* http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (last accessed Jan. 10, 2013).

48. *See* ANDREW D. MITCHELL & CAROLINE HENCKELS, THE CONCEPT OF 'NECESSITY' AND NON-PRECLUDED MEASURES IN INTERNATIONAL INVESTMENT LAW: THREE LESSONS FROM WTO TRIBUNALS 8 (2013); Diane A. Desierto Jan. 29, 2013 comment and Gabrielle Marceau Jan. 30, 2013 comment, *available at* http://www.investmentpolicyhub.unctad.org/Views/Public/FeaturedDiscussionDetails.aspx?fdid=18 (last accessed Feb. 1, 2013).

49. On the counter-narrative showing how the history of international trade has always contained certain ideas related to the protection and promotion of human rights, albeit reflecting different ideological compromises over time at each stage of political actors' engagement with

interest in the possibility of transplanting these public policy interpretations and methodologies in WTO law into the supposedly beleaguered international investment law regime. However, one must also deal with a counterpart reality in the investment treaty regime. Years of entrenchment of diverse treaty texts and institutional dynamics in separate "investor-home State-host State" configurations across the globe have also resulted in unique law-making processes and institutional practices, along with an investor-host State dispute settlement mechanism that emerged as a fully distinct enforcement process from that of the inter-State extended litigation process in the WTO Dispute Settlement Understanding (DSU).[50] As I explain further in Part II, disparate treaty texts, functional practices, and institutional structures, pose some substantive and procedural hurdles for law-appliers and authoritative decision-makers to accept *a priori* the WTO law *qua* investment law proposition.

Part III then proceeds to develop my second argument—namely, that while the issue of domestic policy space appears common to both WTO law and investment law (or for that matter, mirrors the perennial tension in the interplay of international law and the *domaine réservé*[51]), they are addressed to different operational questions. WTO interpretations and dialectical conceptions of States' regulatory freedom have been framed according to the interacting *ratione materiae* of market access issues, non-discrimination issues, standards regulation, and extensive exceptions,[52] and as such are not so analogous or easily transplantable

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neoliberalism, see ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 23–60 (2011).

50. The U.N. High Commissioner for Human Rights has long recognized the unique differences and challenges in achieving human rights protection for different forms of investment. *See* Report of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, July 2, 2003, ¶¶ 7–12.

51. *See* Joseph H.H. Weiler, *The Geology of International Law – Governance, Democracy, and Legitimacy*, ZaöRV 64, 547–62 (2004), *available at* http://www.zaoerv.de/64_2004/64_2004_3_a_547_562.pdf (last accessed Jan. 10, 2013); Galina G. Shinkaretskaya, *Content and Limits of 'Domaine Réservé,' in* INTERNATIONAL LAW AND MUNICIPAL LAW 123–42 (Grigorii Ivanovich Tunkin & Rüdiger Wolfrum eds., Duncker & Humblot 1988); JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM 165–222 (2012).

52. Erich Vranes, *The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services*, 12 J. INT'L ECON. L. 4, 953–87 (2009); Jörg Mayer, *Policy Space: What, for What, and Where?*, 27 DEV. POL'Y REV. 4, 373–95 (2009); Henning Grosse Ruse-Khan, *A Comparative Analysis of Policy Space in WTO Law* (Max Planck Inst. for Intellectual Prop., Competition & Tax Law Research Paper Series, No. 08-02, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309526 (last accessed Jan. 10, 2013); Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations Versus Private Rights and Obligations*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE 95–136 (Thomas Cottier et al. eds.,

to issues of regulatory freedom that States confront in international investment law, particularly in matters of expropriation, legitimate expectations in the fair and equitable treatment standard, national treatment, and non-precluded measures.[53]

Moreover, one can expect that the respective institutional understandings of State regulatory freedom within WTO law and investment law would accordingly cycle back to future treaty-drafting and rule-making processes in each treaty regime. State regulatory freedom in WTO law, for example, is not simply a matter of interpretation for the DSU Panels and the Appellate Body,[54] but rather, is also manifested as a continuing legislative issue to be politically mediated and coordinated between States, non-State actors, and the WTO in processes such as the Trade Policy Review Mechanism,[55] the negotiation of special and differential treatment (SDT) rules in various trade agreements,[56] the authentic interpretations of the General Council and the Ministerial Conference,[57] the use of the waiver power in the WTO,[58] among other internal procedures and functions. By contrast, international investment law remains devoid of any centralized mechanism for States to periodically and transparently review, renegotiate, or authentically interpret investment treaty provisions that involve the issue of States' regulatory freedom to vindicate the public

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2005).

53. Spears, *supra* note 32; Jürgen Kurtz, *Balancing Investor Protection and Regulatory Freedom in Investor-State Arbitration: The Complex Search for State Purpose in a National Treatment Inquiry*, Jan. 19, 2012 unpublished draft, *available at* http://www.iilj.org/research/documents/KurtzBalancingInvestorProtectionandRegulatoryFreedomPaper.pdf (last accessed Jan. 10, 2013); U.N. CONFERENCE ON TRADE AND DEVELOPMENT, EXPROPRIATION (UNCTAD Series on Issues in International Investment Agreements II, 2012), *available at* http://www.unctad.org/en/docs/unctaddiaeia2011d7_en.pdf (last accessed Jan. 10, 2013); Howard Mann, *The Right of States to Regulate and International Investment Law*, Nov. 2002 unpublished paper, *available at* http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (last accessed Jan. 10, 2013); U.N. CONFERENCE ON TRADE AND DEVELOPMENT, THE PROTECTION OF NATIONAL SECURITY IN IIAS (UNCTAD Series on International Investment Policies for Development 2009), *available at* http://www.unctad.org/en/docs/diaeia20085_en.pdf (last accessed Jan. 10, 2013).

54. *See* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 LAIRD EUR. J. INT'L L. 4, 753–814 (2002).

55. *See* SAM LAIRD & RAYMUNDO VALDES, *The Trade Policy Review Mechanism*, *in* THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION (2012); ANTHONY E. CASSIMATIS, HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW 141 (2007).

56. Bernard Hoekman, Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment (Oct. 2004) (unpublished paper), *available at* http://wwwdfidgov.uk/pubs/files/itd/operationalizing-sdt.pdf (last accessed Jan. 10, 2013).

57. *See* Barnali Choudhury et al., *A Call for a WTO Ministerial Decision on Trade and Human Rights*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 52, at 323–58, 343.

58. *See* Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 3 (2009).

interest and human rights.[59]

The immediate consequence of the interpretive/legislative gap is that the concept of State regulatory freedom in WTO law might not have as much traction or utility to the design of States' regulatory freedom in international investment law. As I also show briefly in Part III, they generate some interpretive complications already for a few new investment treaties that expressly adopt GATT Article XX or GATS Article XIV. It is more than likely that parallel, rather than identical visions of State regulatory freedom are emerging in both treaty regimes. Thus, while WTO law might present a convenient template for investment treaty language, one has to carefully assess whether the former's treaty design assumptions and drafting history would indeed apply, and truly benefit, the latter.

Thirdly, I submit in Part IV that WTO law and jurisprudence itself does not possess an unvarnished record in successfully vindicating the public interest through human rights.[60] Despite some well-known victories (such as the TRIPS waiver on compulsory licensing to make essential drugs available to developing countries,[61] and the Kimberley Process Certification waiver to prevent the further proliferation of

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59. Note, however, some recent investment treaties have started providing for joint decision mechanisms, a standing treaty monitoring and/or interpretative inter-State body, or consultation mechanisms. Diane Desierto, *Joint Decisions by States Parties: Fair Control of Tribunal Interpretations?*, KLUWER ARBITRATION BLOG (June 8, 2012), http://kluwerarbitration blog.com/blog/2012/06/08/joint-decisions-by-state-parties-fair-control-of-tribunal-interpretati ons/ (on inter-State joint decision and consultation mechanisms within investment treaties). *See also* NEWCOMBE & PARADELL, *supra* note 32, at 61 (on renegotiation and new model international investment agreements); Meg Kinnear & Robin Hansen, *The Influence of NAFTA Chapter 11 in the BIT Landscape*, 12 U.C. DAVIS J. INT'L L. & POL'Y 101, 112 (2005) (on procedural mechanisms from NAFTA such as binding notes of interpretation).

60. For some skeptical findings showing human rights failures under the WTO system, see Sandrine Dawar, Trade and Human Rights; Exploring the Impact of WTO Law on State Capacity to Protect, Promote and Fulfill the Human Right to Health (May 2004) (unpublished Master of Arts in Law and Diplomacy Thesis for Fletcher School of Diplomacy, Tufts University) (on file with author); Allison Carnegie, Instruments of Coercion: Aid and Trade as Substitute Policy Levers (Nov. 7, 2012) (unpublished paper), *available at* http://ncgg.princeton. edu/IPES/2012/papers/S400_rm1.pdf (last accessed Jan. 10, 2013) (demonstrating that states punish illiberal policies of fellow WTO member states by decreasing aid allocations, rather than by increasing trade protection); Susan Ariel Aaronson & M. Rodwan Abouharb, Does the WTO Help Member States Clean Up? (Aug. 2011) (unpublished paper) (on file with the Institute for International Economic Policy, George Washington University), *available at* http://www.gwu. edu/~iiep/assets/docs/papers/Aaronson_IIEPWP2011-13.pdf (last accessed Jan. 10, 2013) (finding that "empirical analysis did not show that GATT/WTO accession or membership over time improves governance outcomes . . . new members of the WTO did not improve their performance on our measures of due process, access to information and even-handedness during the accession process or as members.").

61. *See* Decision of General Council, *TRIPS Waiver for the Exportation of Essential Drugs Under Compulsory Licensing*, WT/MIN(01)DEC/2 (Aug. 30, 2003).

conflict diamonds[62]), full acceptance of States' regulatory freedom to enact policies that vindicate public interest or human rights concerns remains very much a work-in-progress throughout the WTO system.[63] Human rights obligations are, to date, still thinly incorporated in the WTO commitments.[64] Interpretations of trade law exceptions in WTO jurisprudence still struggle for full consistency with human rights.[65] Clearly, the jury is still out on whether WTO law has indeed succeeded in facilitating human rights compliance in a post-Doha era.[66] This casts some doubts for inducing investment law authoritative decision-makers to follow where WTO law has not even clearly or certainly succeeded.

Pending the full convergence of treaty language and epistemic interpretive communities between WTO law and investment law, I submit that questions of public policy and human rights will continue to filter through different channels, albeit with some occasional normative and experiential resemblances that could inform future treaty and institutional design developments in each regime. In Part V, I explore how each treaty regime would likely regard and accommodate State defenses anchored on competing obligations under the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and why this next dialogue will take place on different terms within each regime.

By way of Conclusion, I offer some further reflections on the broader theme of systemic integration and the chimera of attaining a

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62. *See* Decision of the General Council of May 15, 2003, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WT/L/518 (May 27, 2003).

63. On the other hand, for promising findings on achieving human rights compliance under the international trading system, see Drusilla K. Brown et al., *Labor Standards and Human Rights: Implications for International Trade and Investment* (Univ. of Michigan, IPC Working Paper Series No. 119, 2011), *available at* http://ipc.umich.edu/working-papers/pdfs/ipc-119-brown-deardorff-stern-labor-standards-human-rights-international-trade-investment.pdf (last accessed Jan. 10, 2013); HAKAN NORDSTROM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT (1999); Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 593–629 (2005); Michael J. Trebilcock, *Critiquing the Critics of Economic Globalization*, 1 J. INT'L L. & INT'L RELATIONS 213–38 (2005).

64. *See* HOLGER P. HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2007); Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* 52, at 205–31.

65. Report of the Panel, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R (Nov. 7, 1990); Report of the Panel, *United States – Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Sept. 3, 1991); Report of the Panel, *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (June 16, 1994); Report of the Panel, *United States – Taxes on Automobiles*, GATT Doc. DS31/R (Oct. 11, 1994).

66. On the imminent failures of abandoning the Doha Round, see Petros C. Mavroidis, *Doha, Dohalf or Dohaha? The WTO Licks Its Wounds*, 3 DAVIS TRADE L. & DEV. 367, 367–81 (2011).

fully "closed system" for governing different forms of international economic relations. Fragmentation becomes a "problem" only as a matter of perspective—one wrestles with it only if we persist in regarding international law through a kind of "gestalt," always preferring to see an elegant and integral whole much greater than the sum of its parts. The realities of political deadlocks, institutional rigidities, and international negotiations that define the processes of authoritative decision-making in our modern international economic law, policies, and institutions, however, impel us to reject such a utopian view.

II. TEXTS, APPLIERS AND STRUCTURE: NONLINEAR INTERPRETATION OF THE "PUBLIC INTEREST" AND HUMAN RIGHTS

As will be seen in the following subsections, the legal universes in WTO law and international investment law are fundamentally comprised of different bases of obligation, authoritative decision-makers, and constitutive decision-making processes. The following subsections show how plural understandings of the "public interest" and human rights abound in each of those different constitutive elements.

A. *Hard and Soft Texts: Bases of Obligation in WTO Law* Vis-à-vis *International Investment Law*

1. WTO Law

As the WTO itself states, its core rules are contained in around sixty agreements, annexes, decisions, and understandings, mostly concluded during the 1986-1994 Uruguay Round, spanning the Marrakesh Agreement Establishing the WTO, and agreements in trade in goods, trade in services, intellectual property, dispute settlement, and government trade policy review.[67] The WTO categorizes these agreements into three: (1) "broad principles" (*e.g.*, the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights); (2) "extra agreements and annexes dealing with the special requirements of specific sectors or issues"; and (3) "detailed and lengthy schedules (or lists) of commitments made by individual countries allowing specific foreign products or service providers access to their markets."[68] While it is usually observed that individual rights

67. *See* Navigational Guide to the WTO Agreements, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Jan. 10, 2013).

68. *Id.*

are nowhere found in most of the WTO agreements,[69] Steve Charnovitz famously showed that "individuals secure rights indirectly from the WTO,"[70] (*e.g.*, from individual property rights guaranteed in the TRIPS agreement, rights to standard of treatment under the MFN and national treatment clauses, to transparency and due process rights and remedial procedures that could be asserted by individuals against their own governments), as well as certain direct procedural rights (*e.g.*, rights under the grievance procedure for exporters under the Agreement on Preshipment Inspection).[71] Apart from the WTO agreements, other sources of WTO law (alternatively dubbed as soft law[72] in the WTO) that may "clarify or define the law applicable between WTO Members"[73] include: the WTO dispute settlement reports, the acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles of law, other international agreements, subsequent practice of WTO Members, teachings of the most highly qualified publicists, and the negotiating history.[74]

The WTO Agreements usually do not explicitly contain any references to international human rights law. At best, the general exceptions clauses in GATT Article XX and GATS Article XIV justify States to adopt trade-restrictive measures necessary for protecting various public interest concerns, such as the protection of public morals; human, animal or plant life or health; ensuring compliance with domestic laws and regulations on fraud, deceits, data protection, and

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69. Breining-Kaufmann, *supra* note 52, at 102.

70. Steve Charnovitz, *The WTO and the Rights of the Individual*, 36 INTERECONOMICS 98 (2001).

71. *Id.*

72. Mary Footer identifies soft law instruments in the WTO as

> the resolutions adopted by the organisation's institutional bodies. These include not only ministerial declarations and decisions but also the decisions of the various councils and committees, which may embody understandings, guidelines, notes produced by the WTO Secretariat at the request of the members, Chairman's statements and so on. While they are not intended to be legally binding they may nevertheless have practical effect and may prove legally relevant . . . . [soft law in the WTO] has proven to be particularly useful where there is broad lack of agreement or a lack of coordination among WTO members, where an issue is highly contestable or where cooperation gives rise to distributive conflicts.

See Mary E. Footer, *The (Re)turn to 'Soft Law' in Reconciling the Antinomies in WTO Law*, 11 MELB. J. INT'L. L. 241, 247–48 (2010).

73. PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 53 (2d ed. 2008).

74. *Id*. *See also* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW, 40–52 (2003).

safety; labor; cultural heritage; and national resource conservation.[75] There is now a substantial body of jurisprudence authoritatively interpreting these provisions, following a two-tier test adopted by the WTO dispute settlement panels and the Appellate Body: a challenged trade-restrictive measure must first be provisionally evaluated or justified according to any of the specific enumerated exceptions (*e.g.*, ten exceptions in GATT Article XX (a) to (j), or five exceptions in GATS Article XIV (a) to (e)). If this first tier test is met, then the second tier of analysis requires examining the measure's compliance with the provision's chapeau.[76] The chapeau imposes the requirement that the challenged measure should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[77] The chapeau has been progressively linked to the principle of good faith in international law.[78]

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75. *See* Thomas Cottier et al., art. *XIV GATS: General Exceptions*, *in* MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, WTO – TRADE IN SERVICES, vol. 6, at 287 (Rüdiger Wolfrum et al. eds., 2008); TREBILCOCK & HOWSE, *supra* note 13, at 507–87; CASSIMATIS, *supra* note 55, at 334.

76. RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENTS ON TARIFFS AND TRADE 531–33 (2005); VAN DEN BOSSCHE, *supra* note 73, at 620, 653; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* at 22, WT/DS2/AB/R, (Apr. 29, 1996).

77. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 art. XX (1999); General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 art. XIV (1999); *see* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WT/DS58/AB/R (Oct. 12, 1998).

78. *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, Report of the Appellate Body, 12 Oct. 1998, ¶ 158. *See also Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, Report of the Appellate Body, Dec. 3, 2007, ¶ 224.

> [T]he function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX . . . the task of interpreting and applying the chapeau is the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. art. XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.

Id. (The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."); *China – Measures Affecting Trading Rights and Distribution Services for Certain Products and Audiovisual Entertainment Products,* WT/DS363/AB/R, Report of the Appellate Body, Dec. 21, 2009, ¶ 306 (clarifying that the chapeau element of "disguised restriction on international trade" must

Notwithstanding the established nature of the two-tiered test for general exceptions, it cannot be lightly assumed that the Appellate Body (and/or the dispute settlement panels in the WTO) has consistently applied the test uniformly and consistently in actual disputes brought before them. The "public morals" exception under GATT Article XX(a) and GATS Article XIV(a) presents a classic example of how the Appellate Body can purposely choose to develop or flesh out its pre-existing interpretations or methodologies.

In *China—Publications and Audiovisual Products*,[79] the WTO Appellate Body affirmed that—similar to other jurisprudence on GATT Article XX and GATS Article XIV[80]—the method of interpreting the "public morals" exception under GATT Article XX(a) would be through "a sequential process of weighing and balancing factors involved."[81] The 2009 Appellate Body ruling in *China—Publications and Audiovisual Products* was the first case to interpret the "public morals" exception under GATT Article XX(a). Before then, the only comparable interpretation of the "public morals" exception was that issued by the Appellate Body in 2005, in relation to GATS Article XIV(a) in *United States—Gambling Services.*[82]

> be applied in the light of the specific obligation of the covered agreements that the respective measure infringes. The assessment of the restrictive effect to be taken into account in a particular dispute may, in appropriate cases, extend beyond an assessment of the restrictive effect on imported products, as this assessment must be undertaken in the light of the measure at issue, the specific obligation of the covered agreements that the measure infringes, and the defence being invoked.

United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 158; *see also* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 224, WT/DS332/AB/R (Dec. 3, 2007); Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Products and Audiovisual Entertainment Products*, ¶ 306, WT/DS363/AB/R (Dec. 21, 2009).

79. *See generally* Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

80. *Id*. ¶ 239 (citing *Korea – Various Measures on Beef* in the context of Article XX(d) of the GATT 1994); *see* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) (in the context of Article XIV(a) of the GATS); *see Brazil – Retreaded Tyres* (in the context of Article XX(b) of the GATT 1994).

81. *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 239–42.

82. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, Report of the Appellate Body, Apr. 7, 2005, ¶¶ 306–11:

306. The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be "weighed and balanced." The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available."

308. The requirement, under Article XIV(a), that a measure be "necessary"—that is, that there be no "reasonably available," WTO-consistent alternative—reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be "reasonably available," however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.

309. It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence. In the context of Article XIV(a), this means that the responding party must show that its measure is "necessary" to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party's burden to show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.

310. Rather, it is for a responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is "necessary." If the panel concludes that the respondent has made a *prima facie* case that the

In *China—Publications and Audiovisual Products*, China had invoked GATT Article XX(a) to justify a range of measures that regulated the entry of foreign publications, audiovisuals and other media forms, under a content review mechanism and system for the selection of import entities, in order to protect public morals in China.[83] China had essentially argued that the public policy function behind the regulations (particularly the cultural nuances of Chinese public morals), made it inevitable that content review for such media could only be conducted by State-owned entities.[84] In its analysis of the public morals defense under GATT Article XX(a), the Appellate Body declared the following:

(1) "China did not establish a connection between the exclusive ownership of the State in the equity of an import entity and that entity's contribution to public morals in China."[85] The same reasoning was likewise extended to the prohibition against foreign-invested enterprises from engaging in importing;[86]

(2) China had not met its burden of proof to show that a certain (unsubstantiated) State plan that would supposedly indicate the total number, structure, and distribution of publication import entities, would indeed contribute to the protection of public morals in China by feasibly enabling content review;[87]

> challenged measure is "necessary"—that is, "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"—then a panel should find that challenged measure "necessary" within the terms of Article XIV(a) of the GATS.
>
> 311. If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative or, in other words, why the proposed alternative is not, in fact, "reasonably available." If a responding party demonstrates that the alternative is not "reasonably available," in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary" within the terms of Article XIV(a) of the GATS.

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶¶ 306–11.

83. Panel Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.712, WT/DS363/R (Aug. 12, 2009).

84. Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 255–68.

85. *Id*. ¶ 268.

86. *Id*. ¶¶ 276–77.

87. *Id*. ¶¶ 294–97.

(3) The "less restrictive means" element as part of the sequential weighing and balancing test of "necessity" in GATT Article XX(a), for this particular case,

> must be applied in the light of the specific obligation of the covered agreements that the respective measures infringes . . . [and that] the assessment of the restrictive effect to be taken into account in a particular case, may, in appropriate cases, *extend beyond an assessment of the restrictive effect on imported products,* as this assessment must be undertaken in the light of the measure at issue, the specific obligation of the covered agreements that the measure infringes, and the defence being invoked,[88]

and thus, who could engage in such trading was part of determining the least restrictive means.[89] The Panel had rightly identified a less restrictive means than the State-ownership requirement and the import prohibition on foreign-invested entities (*e.g.*, the State plan previously mentioned, had China sufficiently presented evidence to develop the actual contours of this alternative);[90] and

(4) China had failed to show that there were no other reasonably available means before it, such as for the Chinese government to itself uniformly conduct the content review. China had failed to show that this reasonably available means would cause such an "undue burden" (*e.g.*, financial, administrative burden, technical difficulties) upon it given the evidence submitted.[91]

Two matters stand out in *China—Publications and Audiovisual Products* from the interpretive practices of the Appellate Body, that did not feature in the Body's interpretation of the identically-worded "public morals exception" in GATS Article XIV(a) in *United States—Gambling Services*. First, the Appellate Body in *China—Publications and Audiovisual Products* acknowledged that, while GATT Article XX(a) did not provide any explicit guidance "on the question of whether, in assessing 'necessity,' a panel may take into account only the restrictive effect the measures have on imports of relevant products, or whether a panel may also consider the restrictive effect of the measures

88. *Id.* ¶ 306 (emphasis added).
89. *Id.* ¶ 308.
90. *Id.* ¶ 310.
91. *Id.* ¶¶ 327–32; 335.

on importers or potential importers,"[92] there may be cases where it would be appropriate to further differentiate restrictive impacts on international commerce. In *China—Publications and Audiovisual Products* the Panel had applied the "less restrictive means" test in the sequential weighing and balancing test of necessity for GATT Article XX(a) to consider two types of restrictive impact—first, a restrictive impact on the actual importation of the subject goods, and second, the restrictive impact of the measures on the right to trade of those who wish to engage in such importation in the future.[93] This was a nuance not found in *United States—Gambling Services*, where the Appellate Body simply identified, and did not elaborate on, two factors

> that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; *the other factor is the restrictive impact of the measure on international commerce.*[94]

The Appellate Body in *China—Publications and Audiovisual Products* deemed it valid to consider both the restrictive impact on *imports* as well as the rights to trade of *enterprises*, due to the particular content of China's obligations to grant the right to trade under its Accession Protocol to the WTO.[95]

Second, the Appellate Body in *China—Publications and Audiovisual Products* appeared somewhat unclear as to how it allocated the evidentiary burdens with respect to other "reasonably available means" or alternatives. It may be recalled that in *United States—Gambling Services*, the Appellate Body clearly stated that it was *not* the burden of the responding party to show that there were *no* reasonably available alternatives whatsoever.[96] Rather, it is only when the complaining party "raises a WTO-consistent alternative measure that, in its view, the responding party should have taken," that the "the responding party will [then] be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably

92. *Id*. ¶ 303.

93. *Id*. ¶ 300.

94. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 306 (emphasis added).

95. *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 307.

96. *Id*. ¶ 319.

available.'"[97]

Among its proposals for other "reasonably available alternatives" in *China—Publications and Audiovisual Products*, the United States proposed that the Chinese Government assume sole responsibility for conducting content review.[98] While the Panel found this proposal to be a reasonably available alternative, it is not entirely clear from the Panel's discussion that the burden of proof had at least been placed first on the United States to prove the feasibility of its proposal. In several instances it almost seems as if the Panel indulged in unverified assumptions about the efficiency and quality of China's administrative, institutional, and bureaucratic capabilities, as well as the supposed sufficiency of its domestic laws,[99] and that what proved decisive for the Panel was that China had failed to present sufficient evidence *in extenso* of the infeasibility or unreasonableness of the proposal.[100] The United States had mainly argued that the Panel already had ample evidence before it that China was capable of conducting some form of content review, such as those China was already conducting for films imported for theatrical release, electronic publications, and audiovisual products.[101] The Appellate Body endorsed the method taken by the Panel as the "appropriate" one for determining whether reasonably available means existed, but appeared quite silent on the quantum (and specificity) of proof that it ultimately required the United States to establish as the complaining party making the proposal, *vis-à-vis* China, as the responding party who supposedly was not obligated to furnish proof until the complaining party had been able to establish a WTO-consistent measure was a reasonably available alternative.[102] At a minimum, these differences in *China—Publications and Audiovisual Products* and *United States—Gambling Services* provides some telling insight as to the scope and breadth of the Appellate Body's discretion over the methodology it would adopt to interpret the "public morals" exception in GATT Article XX(a) and its identical counterpart, GATS Article XIV(a).

Beyond the development of legal tests of "necessity" in relation to the public morals exception in GATT Article XX(a), however, it is also

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97. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 311.

98. *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 312.

99. Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 7.888–7.891, WT/DS363/R (Aug. 12, 2009).

100. *Id*. ¶¶ 7.888–7.893.

101. *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 323.

102. *Id*. ¶¶ 327–32.

significant that there was hardly any discussion in *China—Publications and Audiovisual Products* on the State's regulatory freedom in relation to GATT Article XX(a). Rather, the Appellate Body dealt with the right to regulate in the context of interpreting the introductory paragraph 5.1 in China's Accession Protocol to the WTO (*e.g.*, "Without prejudice to China's *right to regulate* trade in a manner consistent with the WTO Agreement").[103] The Appellate Body held in *China—Publications and Audiovisual Products* that the Panel erred in omitting to resolve the issue of whether GATT Article XX applies to other agreements apart from the GATT such as paragraph 5.1 of China's Accession Protocol to the WTO, and determined to resolve the issue itself.[104] The Appellate Body then interpreted the phrase "right to regulate trade in a manner consistent with the WTO Agreement" to refer to two types of rights: (1) "rights that the covered agreements affirmatively recognize as accruing to WTO members, namely, the power of Members to take specific types of regulatory measures in respect of trade in goods when those measures satisfy prescribed WTO disciplines and meet specified criteria" (*e.g.*, WTO-consistent import licensing, SPS and TBT measures); and (2) "certain rights to take regulatory action that derogates from obligations under the WTO Agreement – that is, to relevant exceptions."[105] The Appellate Body ultimately interpreted China's right to regulate as that which is "protected under the introductory clause of paragraph 5.1. *only if it is consistent with the WTO Agreement*."[106]

This interpretation of the right to regulate would spur another attempt to export GATT Article XX to agreements not covered by GATT. In *China—Raw Materials*,[107] China unsuccessfully attempted to invoke GATT Article XX as a defense to its export duties found inconsistent with paragraph 11.3 of its Accession Protocol,[108] contending that its right to regulate trade to promote conservation and health is an individual "inherent right" not dependent on the terms of its Accession Protocol.[109] While the Appellate Body acknowledged that the Preamble to the WTO Agreement lists various objectives, "including '*raising standards of living*,' '*seeking both to protect and preserve the environment*,' and '*expanding the production of and trade in goods and services, while allowing trade in goods and services, while allowing for*

103. *Id*. ¶ 205.

104. *Id*. ¶ 215.

105. *Id*. ¶ 223.

106. *Id*. ¶ 230 (emphasis added).

107. *See generally* Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012).

108. *Accession of the People's Republic of China,* WT/L/432, Nov. 23, 2001.

109. *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 300.

the optimal use of the world's resources in accordance with the objectives of sustainable development,'" such that the WTO Agreement "reflect(s) the balance struck by WTO Members between trade and non-trade-related concerns,"[110] the Appellate Body nevertheless declined to find that the Preamble to the WTO Agreement provided any guidance on the issue of the applicability of GATT Article XX to other agreements not covered. The Appellate Body thus delimited the possible scope of using GATT Article XX as public policy and public interest defenses, since, following this 2012 ruling in *China—Raw Materials*, GATT Article XX exceptions would not apply as legal bases for States to invoke their rights to regulate and spaces of regulatory freedom under non-GATT agreements.[111]

There are a myriad of other examples from the Appellate Body's jurisprudence, which demonstrate the breadth of its methodological and evidentiary discretion when it comes to developing legal and evidentiary tests for the application of health exceptions under GATT Article XX(b),[112] domestic policy exceptions under GATT Article XX(d),[113] and environmental conservation exceptions under GATT Article XX(g).[114] Neither may it be said that the jurisprudence of the

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110. *Id*. ¶ 306.

111. *See* Danielle Spiegel Feld & Stephanie Switzer, *Whither Article XX? Regulatory Autonomy under Non-GATT Agreements after China – Raw Materials,* 38 YALE J. INT'L L. ONLINE 17–30 (2012), *available at* http://www.yjil.org/docs/pub/o-38-feld-switzer-whither-article-xx.pdf (last accessed Feb. 1, 2013).

112. *See among others* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, ¶ 161, WT/DS135/AB/R (Mar. 12, 2001). Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶ 7.479-7.480, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011). Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 7.98, WT/DS332/R (June 12, 2007). Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, ¶¶ 7.67–7.69, WT/DS392/R (Sept. 29, 2010). Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 7.306–7.309*,* WT/DS406/R (Sept. 2, 2011). Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75 DS10/R – 37S/200 (Nov. 7, 1990). Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 7.209–7.210, WT/DS246/R (Dec. 1, 2003). Panel Report, *United States – Restrictions on Imports of Tuna*, ¶¶ 5.26–5.27, DS21/R-39S/155 (Sept. 3, 1991).

113. *See among others* Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶¶ 157, 161, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000). Appellate Body Report*, Mexico – Tax Measures on Soft Drinks and Other Beverages*, ¶ 69, WT/DS308/AB/R (Mar. 6, 2006). Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, ¶ 6.13, WT/DS345/R (Feb. 29, 2008). Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, ¶ 5.2.2.3. L/6253-35S/163 (Feb. 2, 1988).

114. *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶ 355–56. *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* ¶¶ 128–29. Appellate Body Report*, United States – Standards for Reformulated and Conventional Gasoline*,

WTO Appellate Body and the dispute settlement panels demonstrate full unanimity in their conceptions of "public interest" in the GATT Article XX or GATS Article XIV exceptions, the spaces of regulatory freedom acceptable under each exception, as well as in their methods for determining the "necessity" of a State's trade-restrictive measure in relation to the asserted "public interest" objective.[115] Rather, what stands clearly from both the WTO legal texts themselves, as well as the "soft" sources of WTO law (as seen in the Appellate Body decisions and reports of dispute settlement Panels), is that they are pliable on the question of States' trade-restrictive measures taken in the exercise of regulatory freedom to vindicate the public interest. This question was purposely anticipated in the drafting of GATT Article XX and GATS Article XIV exceptions.[116] Arguably, the issue of a State's regulatory freedom to vindicate the public interest, which could also result in non-conformity with trade liberalization obligations, was part of the shaping of WTO law since its inception.

Thus, even without direct incorporation of international human rights instruments, WTO law possesses an inherent suppleness to accommodate and reconcile a State's right to regulate for human rights.[117] It is also acknowledged to have greater structural and institutional potential than bilateral and regional trade agreements to achieve the aims of human rights protection.[118] From this standpoint, it

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at 18, WT/DS2/AB/R (Apr. 29, 1996).

115. *See* Tenu Avafia, *Does the WTO's Dispute Settlement Understanding Promote Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW 259–71 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

116. *See* STEFAN ZLEPTNIG, NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS AND TBT AGREEMENTS, ch. 4 (2010); DESIERTO, *supra* note 34, ch. 5.

117. Marceau, *supra* note 14, at 779–88.

118. HARRISON, *supra* note 14, at 180–81 .

> [A]lthough there are almost 300 bilateral and regional trade agreements which contain some kind of explicit human rights clause, this does not mean that the clauses within those agreements ensure a holistic human rights approach to the agreements in question, based on acceptable international norms and standards. There is a big difference between a trade agreement that contains a human rights clause, and agreements that systematically ensures the protection and promotion of human rights in all aspects of the obligations created by those agreements . . . A world trading system helps to ensure that trading rules are not decided by power politics or 'aggressive unilateralism'. Rules help to bind all governments, including the most powerful, to act according to established and agreed principles and regulations. Adherence to such a rule-based system is generally beneficial from a human rights perspective, as it benefits smaller and more vulnerable States (whose populations human rights are most likely to be violated) as opposed to power-based diplomacy where more powerful States dominate.

is conceivable that the interaction between WTO law and human rights law has been described as one anchored on "coordination," rather than conflict, tending towards the "accommodation of human rights interests by the WTO."[119] Most importantly, in achieving such coordination, one cannot deny the central role of WTO organs, especially the WTO dispute settlement system, which enables such interpretive "cooperation" in the first place.[120] As I show later in Part II.B.1, the particular mandates and functional competences of the WTO political and legal organs afford them much latitude to purposely develop WTO law with consideration for a State's regulatory freedom to pursue and defend public interests and human rights concerns. But first, the following section discusses the contrast of the "sunburst" scattered law-making trajectory of the international investment treaty regime.

2. Investment Law

Unlike WTO law, the investment treaty system[121] is comprised of a defense and "automized"[122] network of thousands of bilateral and regional international investment agreements (IIAs). While a few IIAs are negotiated within the context of broader inter-State trade negotiations,[123] for the most part many of the current investment treaties were separately concluded by states according to their own foreign policy agendas, economic priorities, and political programs.[124] Long before the controversial collapse of multilateral negotiations in 1997 in regard to the proposed Multilateral Agreement on Investment (MAI),[125]

Id.

119. Peter Hilpold, *Human Rights and WTO Law: From Conflict to Coordination*, 45 ARCHIV DES VÖLKERRECHTS 4, 484, 509, 513 (2007).

120. Joost Pauwelyn, *Cooperation in Dispute Settlement: Human Rights in WTO Dispute Settlement*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 52, at 205–31.

121. Stephan Schill has been the foremost proponent of viewing the network of international investment agreements as leading towards a genuine multilateral system. *See* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 65–117 (2009).

122. Anna Joubin-Bret et al., *International Investment Law and Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, *supra* note 38, at 19.

123. *See* Diane A. Desierto, *Development as an International Right: Investment in the New Trade-Based IIAs*, 3 TRADE L. & DEV. 296 (2011).

124. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT. L. & POL'Y 157 (2005).

125. *See* Eric Neumayer, *Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD Negotiatons*, 46 WIRTSCHAFTSPOLITISCHE BLÄTTER 618 (1999). Trebilcock and Howse have also described the political dynamics that took over the MAI negotiations and ultimately led to their breakdown.

> By May 1997, agreement had been reached between the negotiators on many

States had already been concluding IIAs on a bilateral basis, beginning with the first bilateral investment treaty (BIT) concluded by Germany

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> elements of the basic architecture of the MAI [Multilateral Agreement on Investment], including MFN and National Treatment. However, important differences of view between countries were surfacing with respect to the relationship of the MAI to environmental and labour standards and cultural policies. As well, considerable disagreement existed concerning whether and how investment incentives should be disciplined, the result being that incentives were simply not dealt with in the draft. At the same time, however, a vigorous public debate was beginning in OECD countries such as Canada, the United States and Australia concerning the impact of the MAI on the democratic regulatory state in general, and on environment, labour rights and cultural protection more specifically. Canadian activist groups were at the forefront of bringing the MAI negotiations into public view. In January 1997, when no public version of the negotiating text was available, Canadian activists obtained a confidential version, and began circulating it to like-minded groups, using the internet as an effective dissemination tool. In April 1997, accounts of the MAI began to appear in the popular press, and governments were placed on the defensive to justify their negotiating positions to the public at large. Some of the groups in question had unsuccessfully challenged the Canada-US FTA and the NAFTA, often making grossly exaggerated and hypothetical claims about the damage likely to flow from these agreements to the welfare state. With the MAI, their approach was shrewder and more careful. They linked a more general critique of globalization driven by corporate interests with a highly plausible analysis of specific provisions of the draft MAI, or omissions from it, as well as a critique of the way it was negotiated. While many groups took different and overlapping positions, the thrust of the overall attack is well expressed by Tony Clarke and Maude Barlow:
>
> We do not wish to leave the impression that we reject the idea of a global investment treaty. We are well aware that transnational investment flows have been accelerating at a rapid pace and that there is a need to establish some global rules. But the basic premise on which the draft versions of the MAI have been crafted is, in our view, largely flawed and one-sided. It expands the rights and powers of transnational corporations without imposing any corresponding obligations. Instead, the draft treaty places obligations squarely on the shoulders of governments . . . Meanwhile the MAI says nothing about the rules that transnational corporations must follow to respect the economic, social, cultural, and environmental rights of citizens.
>
> The secrecy surrounding the negotiations and the usual cloak-and-dagger behavior by foreign ministries when faced by early enquiries about the course of the negotiations gave *prima facie* credence to a conspiratorial view of the whole undertaking. The fact, noted above, that the draft MAI did not contain an environmental or health and safety exception even comparable to that existing in the 1947 GATT lent credibility to the notion that only the interests of capital were reflected in the Agreement.

See TREBILCOCK & HOWSE, *supra* note 13, at 458–60.

and Pakistan in 1959 and entering into force in 1962.[126]

The progressive march of investment treaty texts (and their underlying bargaining histories) gives tangible evidence of the ideological shifts that accompanied the evolving global economic order, from the postcolonial emergence of new capital-importing States and the initial dominance of capital-exporting States in North-South treaty negotiations to the recent rise of emerging market players and developing countries as new capital-exporters in more complex South-South and South-North configurations.[127] Ernst-Ulrich Petersmann describes the "first generation" of BITs as those that were concluded from 1959 until around 1969 between countries of the capital-exporting and developed North and the capital-importing and developing South, and whose standards of protection were minimally designed to reduce "the legal insecurity resulting from the post-colonial disagreements on the customary international 'minimum standard' for the protection of foreign property and the payment of 'full, prompt, and effective compensation' in case of expropriation of foreign property."[128] He describes the "second generation" of BITs (treaties concluded from 1969 until about 2003) as reflecting a

> more "common form" . . . based on uniform objectives, structures and standard clauses providing also for investor-state arbitration . . . [t]he increasingly comprehensive legal and judicial protection of foreign investments was also due to increasing recognition that "FDI-led industrialization" tended to promote more competitive industries than the widespread policies of 'infant industry protection' since the 1960s.[129]

It is the third, or the "new" generation of BITs (concluded from 2003 onward) that, in Petersmann's view, already acknowledges "the need for 'rebalancing' [of] the private and public interests involved in foreign investments . . . clarifying the state's rights and duties to regulate and protect public interests."[130]

Given the tremendous diversity of IIA texts, it would be impossible

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126. U.N. Conference on Trade and Dev., The Entry Into Force of Bilateral Investment Treaties (BITs), IIA Monitor No. 3 (2006), at 3, *available at* http://www.unctad.org/en/Docs/webiteiia20069_en.pdf.

127. *See* Kate Miles, *International Investment Law: Origins, Imperialism and Conceptualizing the Environment*, 21 COL. J. INT'L ENVTL. L. & POL'Y 1 (2010); VANDEVELDE, *supra* note 42, at 19–74; Ahmad Ali Ghouri, *The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration, and International Investment Law*, 14 INT'L ARBITRATION L. REV. 189 (2011).

128. PETERSMANN, *supra* note 19, at 289–90.

129. *Id.* at 290.

130. *Id.*

to identify all the treaty provisions that trigger the issue of a State's regulatory freedom to pursue public interest or human rights concerns.[131] What is clear, thus far, is that host State defenses anchored on regulatory freedom to ensure compliance with human rights have not made much headway yet in investment arbitral jurisprudence,[132] usually due to the lack of development of the argument by the State concerned,[133] or the fact that *amicus* submissions have not yet succeeded in speaking directly and in depth to the precise legal and factual issues of an investment arbitration when they put forward arguments based on human rights and the public interest.[134] In *Suez v. Argentina,* for example, after a thirty-page *amicus* submission that generally discussed the significance of the rights to water and to health in the arbitration, the arbitral tribunal simply observed that Argentina "was subject to both international obligations, *i.e.* human rights obligations and treaty obligations, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive."[135] While host States have generally raised the issue of State regulatory freedom to pursue public interest or human rights concerns as a defense in numerous

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131. *See* Suzanne A. Spears, *Making Way for the Public Interest in International Investment Agreements*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., 2011); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037 (2010).

132. *See* Diane A. Desierto*, Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses*, 9 MANCHESTER J. INT'L ECON. L. 162 (2012) [hereinafter Desierto, *Calibrating Human Rights*]; Diane A. Desierto*, Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises*, 10 TRANSNAT'L DISP. MGMT. 1 (2013) [hereinafter Desierto, *Conflict of Treaties*].

133. Desierto, *Calibrating Human Rights*, *supra* note 132; Desierto, *Conflict of Treaties*, *supra* note 132; *see* Siemens AG v. Argentina, Award, ICSID Case No. ARB/02/8 (2007).

> [T]he "tribunal notes the reference made by Argentina to international human rights law ranking at the level of the Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law. This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, prima facie, bears any relationship to the merits of this case.

See also Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82, 89–90 (Pierre-Marie Dupuy et. al. eds., 2009).

134. *See* Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200 (2012).

135. Suez v. Argentina, Decision on Liability, ICSID Case No. ARB/03/19 (2010), ¶ 262.

investment treaty arbitrations[136] involving alleged breaches of different treaty standards, such as indirect expropriation[137] or the fair and equitable treatment standard,[138] ultimately the success (or failure) of these defenses turned on the arbitral tribunals' interpretation of the IIA standards involved.[139] This has spurred newer IIAs to include substantive standards that could facilitate a host State's policy flexibility, such as: (1) "in accordance with host State law" clauses;[140] (2) stabilization clauses;[141] (3) exceptions clauses or "measures not precluded" clauses;[142] (4) the investment definition clause or similar

136. Although there are cases involving other states such as Unglaube v. Costa Rica, Award, ICSID Case No. ARB/08/1 (2012) (involving an expropriation finding arising from regulatory actions taken by Costa Rica to create an ecological zone protecting the endangered leatherback sea turtles and their nesting sites), as well as Tecnicas Medioambientales Tecmed v. Mexico, Award, ICSID Case No. ARB (AF)/00/2 (2003) (also involving an expropriation finding in relation to a Mexican government agency's Resolution ordering closure of a landfill for environmental reasons), the cases involving the Argentina financial crises of 2000–2002 are probably the most famous examples of failed attempts to justify social protection measures on the basis of human rights, public policy, or public interest reasons. For a list of cases, *see infra* note 159.

137. *See* U.N. Conference on Trade and Dev., Expropriation, UNCTAD Series on Issues in International Investment Agreements II (2012), at 78–90 (surveying State assertions of their right to regulate, as seen in both investment jurisprudence and treaty practices), *available at* http://unctad.org/en/docs/unctaddiaeia 2011d7_en.pdf.

138. U.N. Conference on Trade and Dev., Fair And Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II (2012), at 68–77 (surveying the "legitimate expectations" element in the FET standard and State assertions of the right to regulate in investment jurisprudence), *available at* http://unctad.org/en/docs/unctaddiaeia2011d5_en.pdf.

139. For a more optimistic assessment of human rights-inclusive interpretation of IIA standards, see Susan L. Karamanian, *Human Rights Dimensions of Investment Law*, *in* HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 236 (Erika De Wet & Jure Vidmar eds., 2012).

140. Christoph Schreuer & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 1079, 1095 (Ulrich Fastenrath et al. eds. 2011) [hereinafter FROM BILATERALISM TO COMMUNITY INTEREST]; Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 133, at 59–60.

141. On the argument that foreign investors and host states effectively contract around the risk of changes in the applicable regulatory framework to the investment, see Sam Foster Halabi, *Efficient Contracting Between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT'L L. & BUS. 261 (2011). Note that an arbitral tribunal has ruled that stabilization clauses "do not 'cap' damages for the purposes of valuing the Claimants' rights, nor do they establish a ceiling of compensation beyond which the Claimants could not have legitimately expected to recover in the event of an expropriation." Kardassopoulos v. Ga., Award, ICSID Case Nos. ARB/05/18 & ARB/07/15 (2010), ¶ 485.

142. DESIERTO, *supra* note 34, at 167–70; U.N. Conference on Trade and Dev., The Protection of National Security in IIAs (2009), *available at* http://unctad.org/en/Docs/diaeia 20085_en.pdf.

treaty applicability provisions;[143] and (5) balance of payments provisions and other financial crises provisions.[144]

The "in accordance with host State law" clauses in IIAs (*e.g.*, treaty provisions that require that an investment be made "in accordance with host State law") have been put forward as possible gateways for international human rights treaties when the latter is incorporated in host State law.[145] However, this theory has not yet been tested in actual investment jurisprudence. Thus far, arbitral tribunals have tended to interpret these kinds of clauses in a circumscribed manner. For one, the "in accordance with host State law" clause does not require an investment's compliance with every host State regulation, administrative issuance, or law—it generally refers to those species of host State law that are of such fundamental importance that they must be included in the due diligence to be conducted by the investor and the host State.[146] While there is a line of arbitral awards that narrowly identifies host State's corporate registration requirements as the only "law" contemplated by this clause,[147] there are also other arbitral awards

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143. *See* Desierto, *supra* note 123; *see also* Diane A. Desierto, *Deciding IIA Applicability: The Development Argument in Investment*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: AN INTEGRATIONIST PERSPECTIVE (Freya Baetens ed., 2013). For a list of cases, see *infra* note 163.

144. 2009 ASEAN Comprehensive Investment Agreement art. 16, Feb. 26, 2009; 2008 Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations art. 21; 2009 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea art. 11, June 2, 2009; 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China art. 11, Aug. 15, 2009.

145. From BILATERALISM TO COMMUNITY INTEREST, *supra* note 140; HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 133.

146. Fraport AG Frankfurt Airport Services Worldwide v. Philippines, Award, ICSID Case No. ARB/03/25 (2007), ¶ 396.

> When the question is whether the investment is in accordance with the law of the host State, considerable arguments may be made in favour of construing jurisdiction ratione materiae in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host State may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent legal counsel's legal due diligence report to flag that issue.

Id. On the other hand, a host state unsuccessfully attempted to argue the "non-resident" character of tax treatment in order to deny that an investment met the territorial requirement "in accordance with its laws and regulations." Societe Generale de Surveillance SA v. Philippines, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004), ¶¶ 99–112.

147. Veteran Petroleum v. Russia, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228 (2009), ¶¶ 20–21; Yaung Chi Oo Trading Pte v. Myanmar, 42 ILM 540

that suggest that the clause applies to other sources of law that are consistent with the teleological purposes of an IIA,[148] such as anti-dummy legislation, bribery laws, contractual fraud, and central bank regulations.[149] In order to avail of this clause to justify its exercise of regulatory freedom to pursue public interest or human rights concerns, the host State would have to show that its ongoing compliance with the mass of its international human rights obligations also belongs to those corpus of "fundamental" laws notified to the investor at the outset as necessary to qualify the investment as a covered or protected investment under the IIA.[150] This approach contains its own set of complexities, least of which is building the appropriate due diligence process and transparent information infrastructure[151] for the investor to be genuinely and timely notified of a host State's continuing international human rights obligations (including how the investment may or may not affect compliance with such obligations) in order to avoid any pretextual or trope assertions of human rights defenses by the host State during the life of the investment.[152]

Stabilization clauses have also not featured prominently in investment jurisprudence, although there is considerable literature advocating their inclusion in both foreign investment contracts as well as IIAs to ensure that host States' international human rights obligations are also deemed part of the investment regulatory framework.[153] IIA

(2003), ¶ 62; Siag v. Egypt, Decision on Jurisdiction, ICSID Case No. ARB/05/15 (2007), ¶¶ 198–201; Middle E. Cement Shipping & Handling Co. v. Egypt, Award, ICSID Case No. ARB/99/6 (2002), ¶¶ 131–38.

148. Salini Costruttori v. Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (2001), ¶ 46. This standard was expressly adopted by the arbitral tribunal in *Mytilineos Holdings v. Serbia and Montenegro*, Partial Award on Jurisdiction, UNCITRAL (2006), ¶ 152.

149. Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines, Award, ICSID Case No. ARB/03/25 (2007) (involving local anti-dummy legislation); World Duty Free Co. v. Kenya, Award, ICSID Case No. ARB/00/7 (2006) (involving local bribery laws); Inceysa Vallisoletane v. El Salvador, Award, ICSID Case No. ARB/03/26 (2006) (involving local contract principles against undue enrichment and fraud); Anderson v. Costa Rica, Award, ICSID Case No. ARB (AF)/07/3 (2010), ¶¶ 55–59.

150. Desierto, *Conflict of Treaties*, *supra* note 132, at 80.

151. *See* Markus W. Gehring, *Impact Assessments of Investment Treaties*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, *supra* note 38, at 145–70; Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573 (2011).

152. One is minded to recall a famous essay pointing out the broad abstractions involved in marshalling human rights arguments in trade law disputes, or assuming that dispute settlement tribunals will find human rights norms to be decisive in resolving trade disputes. Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651 (2002).

153. *See* Lorenzo Cotula, *Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses*, 1 J. WORLD ENERGY L. & BUS. 158 (2008); Sheldon Leader, *Risk Management, Project Finance and Rights-based Development*, *in* GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE

provisions "on the mutual obligation of parties to provide 'full protection and security' and to ensure 'fair and equitable treatment' of investments . . . may confer treaty status on the stabilization clauses in an investment contract."[154] Some recent innovations to the design of stabilization clauses expressly exempt from stabilization those changes in law, regulations, or policies, which are reasonably required to ensure that host States to meet international human rights obligations.[155] These are likewise incipient proposals untested thus far in investor-State arbitration.

Owing largely to the arbitrations involving measures taken by the Argentine government during its 2000–2002 financial crisis, arbitral tribunals in the past decade have had more occasions to engage in the interpretation of exceptions clauses or "measures not precluded" clauses.[156] What is immediately evident from the genre of exceptions clauses in IIAs is that they are not all similarly worded, with some reflecting detailed language resembling GATT Article XX and GATS

DEVELOPMENT 107, 121 (Sheldon Leader & David Ong eds., 2011).

> If lenders and borrowers are to create projects able to give adequate place to the avoidance of damage . . . it may be necessary at certain points to carve out exceptions to the classic non-recourse model . . . this might only be a realistic prospect if either the sponsor is required to help meet the company's shortfall in funds, or the lender relaxes its reimbursement schedule to make room for such delays. Negotiation among the parties, reflecting the impact of CSR would add this necessary element of flexibility to the positions . . .

Id.; Lorenzo Cotula, *Freezing the Balancing Act? Project Finance, Legal Tools to Manage Regulatory Risk, and Sustainable Development*, *in* GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT, *supra*, at 142, 144, 162 (observing that while "increasingly broad stabilization clauses tend to ensure a level of regulatory stability that far exceeds that accorded by international law under regulatory taking doctrine," while proposing two options for the construction and treatment of stabilization clauses to reflect sustainable development compliance—"(a) carefully limiting the scope of stabilization clauses; and (b) adopting an evolutionary approach to their application.").

154. Evaristus Oshionebo, *Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic, and Social Implications for Developing Countries*, 10 ASPER REV. INT'L BUS. & TRADE L. 1, 25 (2010). Although note that an arbitral tribunal expressly rejected viewing an IIA's fair and equitable treatment standard as bearing the same purpose as stabilization clauses specifically granted to foreign investors. *See* EDF (Servs.) Ltd. v. Romania, Award, ICSID Case No. ARB/05/13 (2009), ¶ 218.

155. *See also* Jernej Letnar Černič, *Corporate Human Rights Obligations Under Stabilization Clauses*, 11 GERMAN L.J. 210 (2010) (also arguing that beyond the interpretation of the stabilization clauses in light of the fundamental human rights obligations of corporate investors, such investor obligations be explicitly included in international investment agreements); *Full text of* BTC Human Rights Undertaking (2003), *available at* http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf.

156. DESIERTO, *supra* note 34, at 145–236 ch.5.

Article XIV,[157] while others tersely referring only to "essential security interests" without explicitly providing for the effect of the host State's invocation of such "necessary" measures on IIA obligations.[158] The Argentine arbitrations have, by and large, generally rejected Argentina's proposed theory that interpreted various exceptions clauses in Argentine BITs, (*e.g.*, resulting in the outright inapplicability of such treaties (and thus, preventing the existence of any treaty breach from arising) the moment the exception is invoked).[159] There has not yet been any arbitral jurisprudence where a host State has invoked an exceptions clause that is worded identically with (or clearly traces its drafting genealogy to) GATT Article XX or GATS Article XIV;[160] further, it is impossible to

157. 2004 Dominican Republic-Central America-United States Free Trade Agreement art. 10.9.3(c); 2005 United States/Uruguay BIT art. 8(3)(c); 1992 North American Free Trade Agreement art. 1106; 1994 Energy Charter Treaty art. 24(2)(b)(i); 2009 ASEAN Comprehensive Investment Agreement, Feb. 26, 2009 art. 17 [hereinafter ACIA]; *see, e.g.*, Clause III of the detailed Annex 1 (General and Specific Exceptions) to the 1997 Canada/Lebanon BIT art. XVII(2) & (3) of the 1996 Canada/Panama BIT art. XVII of the 1997 Canada/Thailand BIT art. XVII of the 1996 Canada/Barbados BIT art. XVII of the 1996 Canada/Ecuador BIT art. XVII of the 1996 Canada/Egypt BIT, Clause III of the detailed Annex I (General and Specific Exceptions) to the 1999 Canada/El Salvador BIT, Clause III of the detailed Annex I (General and Specific Exceptions) to the 1998 Canada/Costa Rica BIT, Clause III of the detailed Annex I (General and Specific Exceptions Special Provisions) to the 1997 Canada/Croatia BIT art. XVII of the 1995 Canada/Latvia BIT art. XVII of the 1996 Canada/Romania BIT art. XVII of the 1995 Canada/South Africa BIT art. XVII of the 1995 Canada/Trinidad and Tobago BIT art. XVII of the 1994 Canada/Ukraine BIT, Clause III in the detailed Annex 1 (General and Specific Exceptions Special Provisions) to the 1997 Canada/Uruguay BIT, Clause II of detailed Annex to the 1996 Canada/Venezuela BIT, and Article XVII of the 1997 Canada/Armenia BIT]; *see, e.g.*, non-conforming measures under Article 16 of the 2002 Japan/Korea BIT art. 15 of the 2003 Japan/Vietnam BIT, and Article 18 (General and Security Exceptions) of the 2008 Japan/Lao People's Democratic Republic BIT).

158. For a survey of these types of treaty language, see Katia Yannaca-Small, *Essential Security Interests under International Investment Law*, *in* INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESTMENT IN A CHANGING WORLD (2007), *available at* http://www.oecd.org/investment/investmentpolicy/40243411.pdf.

159. *See, e.g.,* LG&E Energy Corp. v. Argentina, Decision on Liability, ICSID Case No. ARB 02/1 (2006), ¶¶ 213–66; Sempra Energy Int'l v. Argentina, Decision on Argentina's Request for Annulment of the Award, ICSID Case No. ARB/02/16 (2010), ¶¶ 106–223; CMS Gas Transmission Co. v. Argentina, Award, ICSID Case No. ARB/01/8 (2005), ¶¶ 315–92; Enron Corp. v. Argentina, Award, ICSID Case No. ARB/01/3 (2007), ¶¶ 303–39; Cont'l Cas. Co. v. Argentina, Award, ICSID Case No. ARB/03/9 (2008), ¶¶ 219–85; BG Grp. Plc. v. Argentina, Final Award, Ad hoc (UNCITRAL) (2007), ¶¶ 361–444; Nat'l Grid Plc. v. Argentina, Award, Ad hoc (UNCITRAL) (2008) ¶¶ 205–62; Suez v. Argentina, Decision on Liability, ICSID Case No. ARB/03/19 (2010), ¶¶ 249–71; Total S.A. v. Argentina, Decision on Liability, ICSID Case No. ARB/04/1 (2010), ¶¶ 482–85; El Paso Energy Int'l Co. v. Argentina, Award, ICSID Case No. ARB/03/15 (2011), ¶¶ 552–670; Impregilo S.p.A. v. Argentina, Final Award, ICSID Case No. ARB/07/17 (2011), ¶¶ 336–60; Metalpar S.A. SA v. Argentina, Award on the Merits, ICSID Case No. ARB/03/5 (2008), ¶¶ 208-11.

160. *Continental Casualty v. Argentina* involved a measures not precluded clause (Article XI of the Argentina-United States BIT) that did not in any way resemble GATT Article XX in

forecast for now if investment arbitral tribunals would, in the future, be able to construe their mandates, methodologies, and arbitral competences as liberally as the WTO Appellate Body and dispute settlement panels have done insofar as the interpretation of the GATT Article XX and GATS Article XIV exceptions. Such being the case, the ultimate usefulness of exceptions clauses as the treaty vehicle for ensuring States' regulatory freedom to pursue human rights or public interest concerns still remains very much a question for treaty draftsmanship.

Turning to the definition of "investment", as well as other provisions that could carve out treaty applicability, one finds similar dissonance in investment arbitral jurisprudence on the requisite criteria of "investment," and whether the same should involve a requirement that the supposed investment make a "contribution to the economic development of the host state."[161] I have discussed elsewhere,[162] the majority of arbitral tribunals thus far have preferred to regard this aspect as a mere feature, and not a definitive criterion or threshold requirement to establish the existence of an investment.[163] In practice, however, many tribunals have found that "contribution to a host State's development" is a relatively easy standard for investors to satisfy,[164] so

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the least, but the tribunal in that one case strangely saw fit to use GATT Article XX and WTO jurisprudence interpreting GATT Article XX to interpret Article XI of the Argentina-U.S. BIT. *See* Diane A. Desierto, *Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827 (2010).

161. Salini Costruttori SpA v. Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (2003), ¶ 52.

> [D]octrine generally considers that investment infers: contributions, a certain duration of the performance of the contract and a participation in the risks of the transaction . . . In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

Id.

162. Vandevelde, *supra* note 124.

163. Bureau Veritas v. Paraguay, Decision on Objection to Jurisdiction, ICSID Case No. ARB/07/9 (2009), ¶¶ 82, 83, 94, 96; Pantechniki SA Contractors & Engineers v. Albania, Award, ICSID Case No. ARB/07/21, (2009), ¶¶ 36, 43, 38; Fakes v. Turkey, Award, ICSID Case No. ARB/07/20 (2010), ¶ 111; Alpha Projektholding GMBH v. Ukraine, Award, ICSID Case No. ARB/07/16 (2010), ¶¶ 312–13; Consorzio Groupement LESI v. Algeria, Decision on Jurisdiction, ICSID Case No. ARB/05/3 (2006), ¶¶ 72–73; Phoenix Action Ltd. v. Czech Republic, Award, ICSID Case No. ARB/06/5 (2009), ¶¶ 114–15; Malicorp Ltd. v. Egypt, Award, ICSID Case No. ARB/08/18 (2011), ¶ 113; Global Trading Resource Corp. v. Ukraine, Award, ICSID Case No. ARB/09/11 (2010); RSM Prod. Corp. v. Grenada, Award, ICSID Case No. ARB/05/14 (2009), ¶¶ 244, 264; Lemire v. Ukraine, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18 (2010), ¶ 273.

164. For the few awards that denied the existence of a covered investment under an IIA,

long as some linkage—no matter how attenuated—could be shown between the investment and a favorable economic outcome in the host State.[165]

IIA practices further show how States differentiate between aspects of social protection and the public interest for which they design relative policy flexibility (*e.g.*, non-applicability of IIA standards to certain measures), as opposed to absolute policy flexibility (*e.g.*, complete inapplicability of the entire IIA). Many IIAs show that States favor relative policy flexibility for most public policy areas,[166] and rarely reserve absolute policy flexibility except for key sovereign functions such as taxation matters.[167]

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see Malaysia Historical Salvors v. Malaysia, Award on Jurisdiction, ICSID Case No. ARB/05/10 (2007), ¶¶ 123–24; Joy Mining Mach. Ltd. v. Egypt, Award on Jurisdiction, ICSID Case No. ARB/03/11 (2004), ¶ 57; Mitchell v. Democratic Republic of the Congo, Decision on the Application for Annulment of the Award, ICSID Case No. ARB/99/7 (2006), ¶ 33.

165. Consortium RFCC v. Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/6 (2001), ¶ 65; Bayindir Insaat Turizm Ticaret ve Sanayi v. Pakistan, Decision on Jurisdiction, ICSID Case No. ARB/03/29 (2005), ¶ 137; Toto Costruzioni Generali v. Lebanon, Decision on Jurisdiction, ICSID Case No. ARB/07/12 (2009), ¶ 86; Kardassopoulos v. Ga., Decision on Jurisdiction, ICSID Case No. ARB/05/18 (2007), ¶¶ 116–17; Helnan Int'l Hotels v. Egypt, Decision of the Tribunal on Objection to Jurisdiction, ICSID Case No. ARB/05/19 (2006), ¶ 77; Saipem S.P.A v. Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07 (2007), ¶ 101; Jan de Nul v. Egypt, Decision on Jurisdiction, ICSID Case No. ARB/04/13 (2006), ¶ 92; Noble Energy Inc. v. Ecuador, Decision on Jurisdiction, ICSID Case No. ARB/05/12 (2008), ¶ 132; Ceskoslovenska Obchodni Banka v. Slovakia, Decision on Objections to Jurisdiction and Admissibility, ICSID Case No. ARB/97/4 (2011), ¶ 378; Societe Generale v. Dominican Republic, Award on Preliminary Objections to Jurisdiction, LCIA Case No. U.N. 7927 (2008), ¶¶ 16, 30.

166. *See* 1998 United States/Bolivia BIT, art. II(2)(b) (on intellectual property); 1982 United States/Egypt BIT, Protocol Clause 4 (on ownership of real estate); 1992 North American Free Trade Agreement art. 1108 (Reservations and Exceptions); 2004 Dominican Republic-Central America-United States Free Trade Agreement art. 10.9(3)(b) (making some IIA provisions inapplicable to intellectual property, competition laws, procurement, among others); 2005 United States/Uruguay BIT art. 8(3) (identical to Article 10.9(3) above); 2006 Canada/Peru BIT art. 9(5) (removing public procurement, sovereign subsidies/loans/insurance, and public retirement pension/social security systems from the coverage of national treatment and MFN obligations in the IIA); 2009 Canada/Czech Republic BIT art. IV(2) (removing sovereign subsidies, grants, and government-supported loans from national treatment and MFN obligations); 2010 Canada/Slovakia BIT art. IV(2) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 2007 Hungary/Azerbaijan BIT art. 3(3) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 2007 Hungary/Jordan BIT art. 3(3) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 1994 United States/Jamaica BIT art. II(9) (which does not apply MFN obligations to advantages accorded by either State to third-country investors under free trade or customs unions agreements or GATT).

167. *See* 2009 Canada/Jordan BIT art. 10(6) ("The provisions of this Agreement shall not

Interestingly, balance of payments and financial crises provisions in new IIAs probably represent the clearest instances to date of the direct incorporation of provisions from WTO law into investment law. Newer generations of IIAs contain language purposely identical to GATT Article XII and GATS Article XII (provisions in international trade law that authorize States to impose certain restrictions in order to safeguard their balance of payments position).[168] Recent investment agreements concluded by the Association of Southeast Asian Nations (ASEAN)—a region particularly alert to currency risks and capital flight after its experience with the 1998 Asian financial crisis— all contain extensive provisions authorizing States to take temporary "measures to safeguard balance of payments," such as restrictions on transfers of capital.[169] These provisions appear more detailed (and are worded in a more expansive and self-judging manner) than other IIAs that only recognize States' rights to equitably exercise sovereign powers to temporarily

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apply to investments in cultural industries."); 1988 China/New Zealand BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 1999 Argentina/New Zealand BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 1985 China/Singapore BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 2002 Spain/Bosnia and Herzegovina BIT art. 12(2) ("The treatment granted under this Agreement shall not apply to tax matters."); 1995 Czech Republic/Singapore BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 1993 Poland/Singapore BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 1995 Russian Federation/Hungary BIT art. 11(2) ("The provisions of this Agreement shall not apply to taxation matters."); 1993 Russian Federation/Denmark BIT arts. 11(2) & (3) ("This Agreement shall not apply to the Faroe Islands and Greenland . . . The provisions of this Agreement shall not apply to taxation."); 1999 Slovenia/Singapore BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 2002 Spain/Jamaica BIT art. 12(2) ("The treatment granted under this Agreement shall not apply to tax matters."); 1995 Singapore/Pakistan BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 2005 Uganda/Belgium-Luxembourg Economic Union BIT art. 4(4) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 1995 Sweden/Russian Federation BIT art. 11(2) ("The provisions of this Agreement shall not apply to taxation matters, except as follows: Article 4, 6, 8, and 9 may apply to taxes imposed by a Contracting Party but only if such taxes have an effect equivalent to expropriation."); 1997 Hungary/Singapore BIT art. 5(2) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . ."); 2004 China/Uganda BIT art. 3(5) ("The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .").

168. General Agreement on Tariffs and Trade art. XII (Restrictions to Safeguard the Balance of Payments); General Agreement on Trade in Services art. XII (Restrictions to Safeguard the Balance of Payments). *See* Chantal Thomas, *Balance of Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT'L L. REV. 1249, 1255–61 (2000).

169. *See supra* note 144.

limit transfers during exceptional balance of payments difficulties. United Kingdom BITs, for example, often put a cap on the period for imposing restrictions and the extent of such restrictions, while stipulating a mandatory minimum amount to be transferred annually.[170] Hungarian BITs tend to use more general language focusing on standards of equitableness, non-discrimination, and good faith.[171] Czech BITs focus on assessing restrictive measures from international standards of non-discrimination, equitableness, and good faith rather than specific contours of restrictions.[172] Italian BITs do not specify the exact terms of what should comprise host States' restrictions to protect their balance of payments position, other than to prescribe that such measures should conform to international legal standards of equitableness, non-discrimination, and good faith,[173] similar to the characteristics of Mexico BITs.[174] Netherlands BITs stress the importance of a restriction's consistency with the International Monetary Fund's rules on transfer restrictions,[175] while Australian BITs confine their treaty language to simply recognizing States' inherent rights "in exceptional balance of payments difficulties, to exercise equitably and in good faith powers conferred by its law"[176] to restrict outgoing capital transfers. Canadian BITs favor affording host States

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170. 1987 United Kingdom/Jamaica BIT art. 4(2)(b); 1987 United Kingdom/Antigua and Barbuda BIT art. 6(1); 1990 United Kingdom/Argentina BIT art. 6(4); 1988 United Kingdom/Benin BIT art. 6; 1988 United Kingdom/Grenada BIT art. 6(1); 1985 United Kingdom/Haiti BIT art. 6; 1987 United Kingdom/Hungary BIT art. 7(2); 1981 United Kingdom/Malaysia BIT art. 5; 1986 United Kingdom/Malta BIT art. 6(1); 1986 United Kingdom/Mauritius BIT art. 6; 1990 United Kingdom/Morocco BIT art. 7; 1987 United Kingdom/Poland BIT art. 6(1); 1989 United Kingdom/Tunisia BIT art. 6; 1991 United Kingdom/Turkey BIT, Article 6(1).

171. 2007 Hungary/Azerbaijan BIT arts. 13(2)(a) & (b); 2007 Hungary/Jordan BIT arts. 13(2)(a) & (b).

172. 1998 Czech Republic/Costa Rica BIT art. 6(4); 1995 Czech Republic/Philippines BIT, Clause 3 of the Protocol; 2002 Czech Republic/Mexico BIT. Article 6(5).

173. 1993 Jamaica/Italy BIT art. 6(1)(c); 2004 Italy/Yemen BIT art. VI(4); 2004 Italy/Nicaragua BIT art. VI(4).

174. 2005 Australia/Mexico BIT art. 9(4); 1998 Austria/Mexico BIT art. 7(6); 1998 Belgium-Luxembourg Economic Union/Mexico BIT art. 6(6); 2000 Denmark/Mexico BIT art. 6(5); 1999 Finland/Mexico BIT art. 7(4); 2000 Greece/Mexico BIT art. 7(4); 2007 India/Mexico BIT art. 8(4); 2005 Iceland/Mexico BIT art. 6(4); 1999 Italy/Mexico BIT art. 6(4); 2000 Republic of Korea/Mexico BIT, Ad. Article 6 of the Protocol; 1998 Netherlands/Mexico BIT, Ad. Article 4 of the Protocol; 2000 Sweden/Mexico BIT art. 6(4); 2006 Trinidad & Tobago/Mexico BIT art. 8(3); 2006 United Kingdom/Mexico BIT art. 8(4).

175. 2002 Netherlands/Yugoslavia BIT art. 5(3); 2003 Netherlands/Korea BIT, Clause 1 of the Protocol; 1985 Netherlands/Philippines BIT art. 7(1); 1991 Netherlands/Jamaica BIT art. 5(4); 2002 Netherlands/Namibia BIT Ad. art. 5(a) of the Protocol; 1984 Netherlands/Sri Lanka BIT art. 7.

176. *See* 1992 Australia/Indonesia BIT art. VII(1); 1994 Australia/Lao People's Democratic Republic BIT art. 9(1).

more flexibility to respond to balance of payments crises.[177] German BITs, by contrast, tend to contain more specific language on restructuring payment terms after the termination of the balance of payments crises.[178] To date, the IIA balance of payments provisions (*e.g.*, mirroring language from GATT Article XII) have not yet been interpreted by any investment arbitral tribunal.

The foregoing topographic survey of IIA standards shows that both treaty language and the interpretation of States' regulatory freedom to pursue human rights or public interest concerns remain differentiated and nonlinear. Unlike the core set of WTO agreements (and its subsidiary legal sources or WTO soft law), interpretation of IIAs has to be conducted on a piecemeal (and often insular) basis, according to the terms of the IIA at issue before a tribunal at a given point in time, for a

177. *See, e.g.*, Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments, Can.-Slovk., art. IX(3), July 20, 2010, http://unctad.org/sections/dite/iia/docs/bits/Canada_slovakia_new.pdf; Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, Can.-Lat., art. XVII(4), May 5, 2009, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_latvia.pdf; Agreement Between the Government of Canada and the Government of Romania for the Promotion and Protection of Investments, Can.-Rom., art. XVII(4), May 5, 2009, *available at* http://unctad.org/sections/dite/iia/docs/bits/canada_romania.pdf; Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments, Can.-Czech, art. IX(3), May 6, 2009, *available at* http://unctad.org/sections/dite/iia/docs/bits/canada_czech%20republic.pdf; Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Protection of Investments, Can.-Hung., art. VII(2), Oct. 3, 1991, *available at* http://unctad.org/sections/dite/iia/docs/bits/canada_hungary.pdf; Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Protection of Investments, Can.-Pol., art. VII(3), Apr. 6, 1990, *available at* http://unctad.org/sections/dite/iia/docs/bits/canada_poland.pdf.

178. *See, e.g.*, Agreement Between the Federal Republic of Germany and the Republic of Ghana for the Promotion and Reciprocal Protection of Investments, Protocol, Ger.-Ghana, cl. 4, Feb. 24, 1995; Treaty Between the Kingdom of Lesotho and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Lesotho, cl. 5, Nov. 11, 1982, *available at* http://unctad.org/sections/dite/iia/docs/bits/germany_lesotho.pdf; Treaty Between St. Lucia and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-St. Lucia, art. 5(2), Mar. 16, 1985, *available at* http://unctad.org/sections/dite/iia/ docs/bits/germany_saintlucia.pdf; Treaty Between the Federal Republic of Germany and the Kingdom of Swaziland Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Swaz., cl. 5(b), Apr. 5, 1990, *available at* http://unctad.org/sections/dite/iia/docs/bits/germany_swaziland.pdf; Treaty Between the Federal Republic of Germany and the Republic of Namibia Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Namib., cl. 5(c), Jan. 21, 1994; Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Nepal, cl. 5, Oct. 20, 1986, *available at* http://unctad.org/sections/dite/iia/docs/bits/germany_nepal_gr_eng.pdf; Agreement Between the Federal Republic of Germany and the People's Republic of Bangladesh Concerning the Promotion and Reciprocal Protection of Investments, Protocol, Bangl.-Ger., cl. 4(c), May 8, 1981, *available at* http://unctad.org/sections/dite/iia/docs/bits/germany_bangladesh.pdf.

particular dispute. Short of the direct incorporation of provisions from WTO law, it is perilous to assume that IIA treaty drafters and negotiators indeed intend future arbitral tribunals to use WTO law as some kind of *travaux preparatoires* to interpret IIA standards. After all, interpretation of treaty text according to its terms always antecedes any attempt at recourse to supplementary means of interpretation.[179] Where IIA texts do not lend themselves to ambiguity, or are at least susceptible of interpretation according to their own terms, it is neither necessary nor legitimate to contrive at using WTO law and jurisprudence as proxies for interpretation.

IIAs remain central to the applicable law in investor-State dispute settlement.[180] Admittedly, in the absence of parties' choice of law, international law may also form part of the law applicable to an investor-State dispute under Article 42(1) of the ICSID Convention.[181] While the potential overlap between IIA norms and other rules of international law, such as international human rights treaty and customary norms, has received much scholarly attention,[182] using

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179. Vienna Convention on the Law of Treaties, arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331; Mahnoush H. Arsanjani & W. Michael Reisman, *Editorial Comment: Interpreting Treaties for the Benefit of Third Parties: The 'Salvors' Doctrine' and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT'L L. 597, 600 (2010).

> The Vienna Convention's rule in Article 31 thus focuses, through several different lenses, on the text of the instrument and events that follow rather than precede it, as the critical grist for the interpretive exercise . . . . [T]he language of Article 32 is facultative and contingent and looks largely to pre-text rather than post-text events . . . . [T]his recourse may be exercised only where Article 31's application (1) "leaves the meaning ambiguous or obscure"; or (2) "leads to a result which is manifestly absurd or unreasonable"; or (3) is undertaken to "confirm the meaning resulting from the application of article 31."

180. *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 610–11 (2001).

181. 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42, cl. 1, Mar. 18, 1965, 575 U.N.T.S. 159 [hereafter ICSID Convention]; Emmanuel Gaillard & Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REV. 375, 379–81 (2003); *see* W. Michael Reisman, *The Regime for* Lacunae *in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV. 362, 380 (2000); *see generally* Annie Leeks, *The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach*, 65 U. TORONTO FAC. L. REV. 1 (2007).

182. U.N. Conference on Trade and Development, *IIA Monitor No. 1: Latest Developments in Investor-State Dispute Settlement*, 15, UNCTAD/WEB/DIAE/IA/2009/7 (2009) (by Luke Eric Peterson), *available at* http://unctad.org/en/Docs/webdiaeia20097_en.pdf; Ursula Kriebaum, *Aligning Human Rights and Investment Protection*, TRANSNAT'L DISP. MGMT., Jan. 2013, at 1; *see, e.g.*, Marc Jacob, *International Investment Agreements and Human Rights*, INEF RESEARCH PAPER SERIES 5 (Mar. 2010), http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf; James D. Fry, *International Human Rights Law*

Article 31(3)(c) of the Vienna Convention on the Law of Treaties[183] to integrate human rights in IIA interpretation[184] has not yet been applied in practice in investor-State arbitrations.

B. *Authoritative Decision-Makers and Interpretive Communities in WTO Law* Vis-à-vis *Investment Law*

The preceding section outlined key differences in the bases of obligation in WTO law and investment law, as well as some nonlinear interpretations of the public interest and human rights ensuing from each regime. The following subsections briefly show the contrast between the authoritative decision-makers and interpretive communities in WTO law and investment law, and why the former's centralized legal and political organs are functionally better-situated than the latter to achieve harmonized and coordinated interpretation of States' regulatory freedom to pursue public interest and human rights concerns.

1. WTO Law

The mandates and functions of legal and political institutions at the WTO, I submit, contribute to making the system quite amenable to the coordination of trade law rules with the human rights and public interest obligations of the Member States. This is not to say that the system is

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in Investment Arbitration: Evidence of International Law's Unity, 18 DUKE J. COMP. & INT'L L.77 (2007).

183. RosInvest Co. UK Ltd. v. Russian Fed'n, SCC Case No. V079/2005, Award on Jurisdiction, ¶ 39 (Arb. Inst. Stockholm Chamber Com. 2007), http://opil.ouplaw.com/view/10.1093/law:iic/315-2007.case.1/IIC315(2007)D.pdf; Yukos Universal Ltd. v. Russian Fed'n, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶¶ 260, 309 (Perm. Ct. Arb. 2009), http://www.encharter.org/fileadmin/user_upload/document/Yukos_interim_award.pdf; Veteran Petroleum Ltd v. Russian Fed'n, PCA Case No. AA 228, Interim Award on Jurisdiction & Admissibility, ¶¶ 260, 309 (Perm. Ct. Arb. 2009), http://www.encharter.org/fileadmin/user_upload/document/Veteran_interim_award.pdf; Hulley Enters. Ltd. v. Russian Fed'n, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, ¶¶ 260, 309 (Perm. Ct. Arb. 2009), http://www.encharter.org/fileadmin/user_upload/document/Hulley_interim_award.pdf; Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶¶ 207–08 (Int'l Center Settlement Investment Disp. 2007), http://www.encharter.org/fileadmin/user_upload/document/Kardassopoulos.pdf; Berschader & Berschader v. Russian Fed'n, SCC Case No. V079/2005, Award, ¶ 95 (Arb. Inst. Stockholm Chamber Com. 2007), http://italaw.com/sites/default/files/case-documents/ita0079_0.pdf; Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 90 (Int'l Ctr. Settlement Inv. Disp. 2009), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171_En&caseId=C5.

184. *See generally* Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678, 691–702 (Christina Binder et al. eds., 2009).

ipso facto ideal for ensuring that Member States simultaneously comply with their international human rights obligations as well as their trade obligations, and neither do I take the position that the WTO should be radically transformed into a human rights organization.[185] (To recall, WTO Secretary-General Pascal Lamy had called for "coherence" between WTO law and human rights law,[186] not "co-optation" of one by the other. One can be just as wary of creating a "human rights imperium,"[187] as with the encroachment or "acquisition" of human rights by WTO law[188]). Rather, my lens of observation is limited to the phenomena of the system of governance and adjudication in the WTO, which, at the very least, appears arguably conducive to democratized, consultative, centralized, and transparent decision-making on the spaces of States' regulatory freedoms to pursue human rights and public interest concerns. The approach largely subscribes to Joel Trachtman's fairly agnostic and functionalist theory of "constitutional economics" to analyze the WTO—scrutinizing constitutional functions and processes within a system to ascertain how they maximize individual preferences.[189] In my view, the deepening and regularizing dialogue on Member States' compliance with human rights obligations alongside WTO obligations is, in large part, attributable to the capacity of non-State actors as well as Member States to engage the issue systematically

185. Armin von Bogdandy famously cautioned that if the European Union were to be "focused on progressive human rights policy" it would "easily endanger the European constitutional set-up between the Union and the Member States without any real need for protecting human rights, at least as they are traditionally understood." Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1337 (2000).

186. Pascal Lamy, Dir.-Gen., Towards Shared Responsibility and Greater Coherence: Human Rights, Trade, and Macroeconomic Policy (Jan. 13 2010), http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm.

187. Michael Barnett put forward a critical comparison between the evolution of the human rights movement and humanitarianism, with the historical concept of empire. "Empires are branded as illegitimate because of their authoritarian qualities, but humanitarian governance is hardly a paragon of democratic rule . . . . [T]he legitimacy of humanitarian governance does not depend on a process of deliberation, dialogue, or even consent . . . . Humanitarianism has become a big business, and increasingly aid agencies are administered by executive offices that focus on the bottom line and market share. As humanitarian governance has grown, it has become more centralized, more distant from those it wants to help . . . . In the typical humanitarian case, the ruling class is made up of well-to-do foreigners, and local populations largely provide security, support, and menial labor in a way that is reminiscent of earlier empires." MICHAEL BARNETT, EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM 221–22 (2011).

188. *See* Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 843 (2002).

189. Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 631–33 (2006).

through different levers of WTO governance.[190] That it has not always been completely successful in doing so is a subject left to Part IV of this Article.

The political organs of the WTO collectively contribute to the WTO's core functions under Article III of the WTO Agreement, namely:[191] (1) the facilitation of the implementation, administration, and operation of the WTO Agreement, the multilateral and plurilateral trade agreements; (2) providing the forum for negotiations of new agreements among its Members concerning their multilateral trade relations; (3) administer the Dispute Settlement Understanding (DSU); (4) administer the Trade Policy Review Mechanism (TPRM); and (5) coordinate with other global economic institutions such as the International Monetary Fund, the World Bank, and affiliated agencies. Nothing within this spectrum of functions, on its face, is itself prohibitive to the consideration of the public interest or human rights by the Member States. Implementation of the WTO Agreements and other multilateral or plurilateral agreements calls for "further legislative or regulatory action—on the national or international level—which is necessary to give practical effect to WTO obligations."[192] Inimitably, States advocating increased regulatory freedom to pursue public interest or human rights concerns through measures otherwise deemed restrictive of trade may articulate the matter within any of the foregoing functions of the member-driven WTO, either through its participation in the political processes of the WTO organs and bureaucracy, or through the legal and adjudicatory processes of the dispute settlement system.

Article IV of the WTO Agreement outlines the institutional structure of the WTO and its key political organs: the Ministerial Conference (composed of all Member States meeting at least once every two years); the General Council, which conducts the day to day functions of the Ministerial Conference when the latter is not in session, and also acts as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB); the three sectoral councils (Council for Trade in Goods, Council for Trade in Services, and Council for TRIPS) which oversee

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190. *See* Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes, and Possible Strategies*, 24 HUM. RTS. Q. 1, 49–50 (2002). Susan Ariel Aaronson has estimated that about 75% of the world's governments now participate in preferential trade agreements (facilitated under the WTO) that contain human rights provisions. Susan Ariel Aaronson, *Human Rights*, *in* PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK 443, 443 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011).

191. Agreement Establishing the World Trade Organization art. III, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

192. Armin von Bogdandy & Markus Wagner, *Article III WTO Agreement: Functions of the WTO*, *in* WTO: INSTITUTIONS AND DISPUTE SETTLEMENT 28, 31 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds., 2006).

the implementation of the GATT, GATS, and TRIPS; and other specialized councils, committees, and groups as created by the Ministerial Conference (such as the Trade Negotiations Committee, Committee on Trade and Development).[193] The WTO Secretariat discharges "exclusively international" responsibilities and administrative duties to implement instructions solely from the WTO.[194]

Various issues have been mediated and debated within this framework in regard to States' regulatory freedom to pursue trade-restrictive measures due to human rights considerations,[195] spanning issues such as economic embargoes or sanctions against States committing egregious human rights violations,[196] process and production mechanisms (PPMs) which seek to restrict or ban trade of goods that have been manufactured or produced through human rights violations,[197] voluntary and mandatory labeling schemes disclosing social or environmental processes or inputs used for production,[198] among others. In 2007, Susan Ariel Aaronson observed that the contemporary political processes of negotiations, trade policy reviews, and WTO waiver decisions and Ministerial Conference discussions and practices already reflect the reality that "WTO members increasingly seek to reconcile their trade and human rights objectives."[199] Her survey of years of WTO practices significantly revealed that: (1) accession applications frequently include questions on rule of law and the compliance with human rights by the applicant States;[200] (2) the WTO had already issued its first waiver specifically to protect human rights

193. Marrakesh Agreement, *supra* note 191, art. IV.

194. *Id.* art. VI.

195. *See generally* CASSIMATIS, *supra* note 55, at 289.

196. *See* Buhm-Suk Baek, *Economic Sanctions Against Human Rights Violations* (Cornell Law School Inter-University Graduate Student Conference, Paper No. 11, 2008), http://scholarship.law.cornell.edu/lps_clacp/11 (arguing that economic sanctions can be an effective enforcement tool to stop human rights violations in third States); *see* Daniel Halberstam & Eric Stein, *The United Nations, The European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13 (2009) (arguing that the legality of UNSC economic sanctions—particularly their compatibility with international human rights—can still be determined by regional courts and international tribunals); *see* Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. U. J. INT'L HUM. RTS. 153 (2007) (criticizing the general ineffectiveness of economic sanctions, while at the same time admitting the possibility of their limited or strategic use, so long as they do not contravene pre-existing WTO obligations).

197. *See* CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTION METHODS (PPMS) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS 20–30 (2011).

198. *See generally* Jessica M. Karbowski, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT'L L. 727 (2009); *see also* Carlos Lopez-Hurtado, *Social Labelling and WTO Law*, 5 J. INT'L ECON. L. 719 (2002).

199. Susan Ariel Aaronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD TRADE REV. 413, 415 (2007).

200. *Id.* at 424–26.

(*e.g.*, the Kimberley Process Certification Scheme to prevent trading in conflict diamonds);[201] (3) human rights concerns were increasingly being litigated in the dispute settlement system through GATT Article XX exceptions;[202] (4) trade policy reviews conducted by the TPRB systematically engage questions of social and environmental impacts of, and human rights considerations in, Member States' trade policies;[203] and (5) trade negotiations under the Doha Round increasingly reflect the prioritization of human rights obligations as the premise of the global development agenda.[204] Other scholars confirm various aspects of this evolving phenomenon of accommodation and coordination of human rights in the political organs and processes of the WTO system.[205]

Perhaps the best indication of some institutional coordination of human rights and WTO law might stem from the General Council, which doubly acts as the Dispute Settlement Body (DSB) in adopting reports of dispute settlement panels and the Appellate Body.[206] One can plausibly expect that the increased DSU litigation of human rights and public interest concerns over the past decade has not only brought these issues to the forefront of awareness of the same representatives of the Member States in the General Council (who, in turn, act as the DSB as required under the DSU), but more to the point, that such *cyclical* referrals of Appellate Body interpretations of the GATT Article XX exceptions and other WTO law provisions that involve the issue of States' regulatory freedom to implement (ordinarily) trade-restrictive measures to protect human rights and public interest priorities, would also conceivably inform the Council's political decision-making in light of the ongoing jurisprudential precedents crystallizing from the dispute settlement system.[207] The DSB does not only adopt panel and Appellate

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201. *Id.* at 428. Note that another well-known WTO waiver was issued to enable access to essential medicines by suspending patent protections under TRIPS. Decision of the General Council, *supra* note 61.

202. Aaronson, *supra* note 199, at 430–31.

203. *Id.* at 434–38.

204. *Id.* at 442–44.

205. Christopher Butler, Comment, *Human Rights and the World Trade Organization: The Right to Essential Medicines and the TRIPS Agreement*, U. PA. J. INT'L L. & POL'Y, 2007, at 1, 1–2; Abadir M. Ibrahim, *International Trade and Human Rights: An Unfinished Debate*, 14 GER. L.J. 321, 334–36 (2013); *see* Marie-Claire Cordonier Segger, *Effective Implementation of Intersecting Public International Law Regimes: Environment, Development, and Trade Law*, *in* PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION 213, 231–47 (Teruo Komori & Karel Wellens eds., 2009).

206. On the multi-functional nature of the General Council, see VAN DEN BOSSCHE, *supra* note 73, at 235–38.

207. *See* Barbara Marchetti, *The WTO Dispute Settlement System: Administration, Court, or Tertium Genus?*, 32 SUFFOLK TRANSNAT'L L. REV. 567, 572–73 (2009) ("The Dispute Settlement Body (DSB) plays a crucial role in the decision-making process of both the panel and the Appellate Body. This body is nothing more than the General Council in a different guise.

Body reports, but is also tasked to maintain surveillance of the implementation of rulings and recommendations, authorize suspension of concessions and other obligations under the WTO covered agreements, and inform the relevant WTO Councils and Committees of related developments arising from disputes under the WTO-covered agreements.[208] It is precisely due to these broad powers that the DSB is widely known to be "a political institution"[209] that has demonstrated a generally positive and successful ability to ensure Member States' compliance with WTO dispute settlement rulings.[210]

Moreover, it must also be emphasized that the WTO Appellate Body apprehends a deep, but also careful sense of its unique judicial function and influential constitutive role within the WTO system.[211] In practice, the Appellate Body has been able to look to the practice of other courts and tribunals in the course of its own interpretation of trade standards only because its mandate and the relative porousness of the applicable procedural law in particular cases enabled it to do so.[212] The distinction

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Beyond its panel establishing power, it has the authority to adopt and supervise the panel's decisions and recommendations, and to authorize the suspension of concessions and other obligations of the WTO. In this way, the dispute resolution taken by the adjudicatory bodies, temporarily excluded from the Members negotiation circuit and given to third and neutral judicial bodies, comes back to the decision-making power of the contracting parties."). Holger Hestermeyer has analyzed the possibilities for deploying the legal argument on the right to health and the right of access to medicines through the WTO dispute settlement mechanism, along with the political developments that culminated with the decision to amend the TRIPS agreement to enable access to essential medicines through compulsory licensing. *See generally* HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2007).

208. Understanding on Rules and Procedures Governing the Settlment of Disputes art. 2(1) –2(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

209. Karen Kaiser, *Article 2 DSU: Administration*, *in* WTO: INSTITUTIONS AND DISPUTE SETTLEMENT 277, 279 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds., 2006).

210. *See generally* Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date,* 10 J. INT'L ECON. L. 397 (2007).

211. *See* Peter van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System* 37 (Maastricht Fac. L., Working Paper No. 2005/1, 2005), http://www.worldtradelaw.net/articles/vandenbosscheab.pdf; Mitsuo Matsushita, *The Dispute Settlement Mechanism at the WTO: The Appellate Body – Assessment and Problems*, *in* OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 507, 530 (Amrita Narlikar et al. eds., 2012).

212. VAN DAMME, *supra* note 16, at 163, 209–10.

> Understanding the judicial function of Appellate Body Members means appreciating that the DSU and other procedural rules developed in the WTO may not be the only sources of their powers. International procedural law may provide other powers or restrict the exercise of existing ones . . . . The Appellate Body is amenable to such principles in the absence of any (contrary) rules in the DSU and its Working Procedures, and any contrary will of the

of its role within the WTO system is such that the Appellate Body's interpretations are deemed to

> effectively allocate decision-making authority to market mechanisms, to political or administrative processes at the national or international levels, or to itself . . . [when it] must determine the amount of deference to show to national and local regulations that affect foreigners . . . it shapes the operation of [] second-order governance mechanisms.[213]

It is thus impossible to discount the normative pull that Appellate Body decisions on GATT Article XX have had on the WTO political organs' understanding and engagement of human rights in WTO law and governance.[214] WTO legalism, at least in this sense, inevitably influences the future course of WTO politics and policy-making.

Finally, one cannot overlook a key democratizing feature of the WTO, which is the consultative facility made for intergovernmental and non-governmental organizations (NGOs) to engage with the WTO under Article V of the WTO Agreement.[215] Despite recurring criticisms

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> disputants. General principles of procedural law, if proven to exist, apply if there are no more specific WTO rules. When deciding that such principles exist and apply, the Appellate Body often does not justify their application on the basis of principles of treaty interpretation. It becomes a matter of the applicable law, not of treaty interpretation. The creative function of the Appellate Body then lies in the expansion of the mandate to apply only WTO law, whether procedural or substantive, and less in the norm-creating function as such . . . . The assertion and exercise of inherent powers is illustrative of this maturing but equally self-enforces the Appellate Body's early decision to function as a court or tribunal. That decision was not inevitable, but perhaps its consequences were. In part, the evolution of procedural law in the WTO is the result of a dialectic relationship between consent-based powers and inherent powers. Increasingly, the consent of parties forces the Appellate Body to source procedural powers from outside the DSU and on an ad hoc basis, and to look at the practice of other courts and tribunals.

Id.

213. Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, *in* POWER IN GLOBAL GOVERNANCE 130, 140 (Michael Barnett & Raymond Duval eds., 2004); *see also* Sol Picciotto, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance* (U.C. London Sch. Pub. Pol'y, Working Paper No. 14, 2005), http://www.ucl.ac.uk/spp/publications/downloads/spp-wp-14.pdf.

214. *See* Ingo Venzke*, Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, *in* INTERNATIONAL JUDICIAL LAWMAKING, *supra* note 27, at 179, 213–14; *see generally* Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT'L L. 171 (1998); *see generally* John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?*, 98 AM. J. INT'L L. 109 (2004).

215. Article V of the Agreement states: "1. The General Council shall make appropriate

of the width of (and the perceived democratic deficit in) NGO participation in WTO processes and policy-making,[216] it remains an undeniable fact that NGOs have been able to strategically engage the WTO throughout various areas of trade policy-making and agenda-setting.[217] NGOs are able to observe plenary sessions and ministerial conferences, obtain information (albeit under certain limits) on trade issues under consideration at the WTO, and have been able to influentially debate and strategically push their particular advocacies on WTO Member States, such as those on enforcing labor rights, protecting the right to health and enabling access to essential medicines through compulsory licensing as an exception to TRIPS obligations.[218]

It is through this complex dynamic of formal institutions vested with broad global governance powers, generally centralized adjudication under a unique judicial function with constitutive and systemic impacts, and regular State and non-State actor involvement in trade policy and interpretation that one can appreciate the coordination of the trade-human rights dialectic within the WTO system. While one can easily critique the quality or success of this dialogue depending on one's perspective on WTO history, there are at least entrenched and embedded formal and informal mechanisms for ensuring interpretive continuity and the repeated public auditing of the issue of States' regulatory freedom to pursue trade-restrictive measures to fulfill human rights obligations or public interest concerns. As will be shown in the next section, the authoritative decision-making processes and actors in the international investment system nowhere approximate this dynamic.

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arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO. 2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." Marrakesh Agreement, *supra* note 191, art. 5.

216. *See* Mark Mattner, *Understanding NGO Participation in the WTO: History, Nature, and Implications for Developing Countries*, 2003 TRANSNAT'L ASS'N 132, 138–40.

217. Seema Sapra, *The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-State Actors*, 11 OR. REV. INT'L L. 71, 105 (2009) ("NGOs already play an important role informally and have a significant agenda-setting impact . . . . Now that NGOs are already actively involved in trade negotiations, the more important question might no longer be whether NGOs should participate, but what influence do NGOs have and how is it being exercised."); Julio A. Lacarte, *Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective*, 7 J. INT'L ECON. L. 683, 685 (2004); Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 451–52 (1998); *see generally* Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); *see generally* Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 128–43 (1998).

218. *See* Shamima Ahmed, *The Impact of NGOs on International Organizations: Complexities and Considerations*, 36 BROOK. J. INT'L L. 817, 827–28 (2010).

2. Investment Law

Investment treaty negotiations, compliance monitoring, and interpretation of IIA standards are not, by any means, institutionally or formally centralized. To reiterate, States have, for the most part, historically concluded their own investment treaty programs independently and usually without having to follow the route of multilateral negotiations.[219] As discussed in Part II.A.2, IIA standards reflect considerable textual diversity, albeit tending to contain common legal standards of protection and dispute settlement provisions that enable investors to directly sue host States for IIA breaches.[220] Because each IIA must be taken according to its own terms, it is difficult to generalize that IIAs all possess identical institutional or structural features for monitoring IIA compliance, establishing recourse to dispute settlement procedures, or standardizing IIA interpretations of States' spaces of regulatory freedom[221] between arbitral tribunals in investor-State arbitration and the actual States Parties to the IIAs.

Unlike the coordinative processes between political and legal organs of the WTO, there are no formal institutions in international investment law that could centralize and coordinate foreign investment policy-making undertaken by all States, with the IIA interpretations emerging from a constantly growing corpus of investor-State arbitral jurisprudence. While investment arbitral tribunals usually observe a sense of precedent,[222] this is not formally required of them within the

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219. *See, e.g.*, Investment Agreement for the COMESA Common Investment Area, May 23, 2007, 33 I.L.M. 1067; North American Free Trade Agreement, ch. 11, Dec. 17, 1992, 32 I.L.M. 289; The Dominican Republic – United States - Central America Free Trade Agreement, ch. 10, Aug. 5, 2004, 119 Stat. 462; ACIA, *supra* note 157; *see generally* Alireza Falsafi, *Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate*, 36 SYRACUSE J. OF INT'L L. & COMM. 43 (2008).

220. Stephan Schill has long demonstrated the emergence of a "multilateralized" system from the universe of bilateral treaties. Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*, 2 TRADE L. & DEV. 59, 61 (2010).

221. On vast literature involving the question of investment arbitral tribunals' degree of deference to domestic judicial review findings, see *generally* Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor State Arbitration*, 15 J. INT'L ECON. L. 223 (2012); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of New Public Law Approach*, 52 VA. J. INT'L L. 57 (2011); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); Rahim Moloo & Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, Y.B. INT'L INV. L. & POL'Y 2011–2012 ch.13 (Karl P. Sauvant ed., forthcoming 2014).

222. Schill, *supra* note 221, at 79–83; *see also* August Reinisch, *The Role of Precedent in ICSID Arbitration*, 2008 Austrian Arbitration Y.B. 495, 497–98; W. Mark C. Weidemaier,

terms of their arbitral function or mandate. The consent of the disputing parties—a foreign investor and the host State—determines and shapes the jurisdiction of the investment arbitral tribunal.[223] In the particular case of arbitration administered through the 1965 Convention on the Settlement of Investments Disputes Between States and Nationals of Other States (otherwise known as the ICSID Convention),[224] the jurisdiction of the arbitral tribunal depends upon the fulfillment of the requirements in Article 25 of the ICSID Convention—written consent, either through direct agreement of the parties, national legislation of the host State that enables investor recourse to ICSID arbitration, or an IIA between the host State and the investor's State of nationality that provides for consent to ICSID jurisdiction.[225]

Unlike the extended litigation procedures in the WTO, there is no counterpart standing body (like the Dispute Settlement Body) that ensures the enforcement of ICSID arbitral awards. While the ICSID Convention makes it obligatory for all States Parties to the ICSID Convention recognize and enforce ICSID awards,[226] there is no international body or organ that oversees the practical procedures for enforcement of ICSID awards—rather, as with the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards,[227] it is the party seeking enforcement that must submit the ICSID award to the local court or authority charged with enforcement of ICSID awards in the State concerned.[228] Excluding Argentina's particular circumstances and its current policy of non-payment in around forty pending or concluded arbitrations,[229] enforcement of ICSID awards has been reported to be fairly successful.[230]

Toward A Theory of Precedent in Arbitration, 51 WM. & MARY L. REV. 1895, 1914–16 (2010).

223. On the primary principle of consent in international arbitration, see Weidemaier, *supra* note 222, at 1907.

224. *See generally* CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY (2009) [hereinafter ICSID COMMENTARY].

225. ICSID Convention, *supra* note 181, art. 25. *See also* Christoph Schreuer, *ICSID: Consent to Arbitration,* PROJECT ON DISPUTE SETTLEMENT IN INTERNATIONAL TRADE, INVESTMENT AND INTELLECTUAL PROPERTY (Mar. 11, 2003), http://unctad.org/en/Pages/DITC/DisputeSettlement/Project-on-Dispute-Settlement-in-International-Trade,-Investment-and-Intellectual-Property.aspx?Pu=21,5.

226. ICSID Convention, *supra* note 181, art. 54.

227. U.N. Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958.

228. Note that initiating the investment arbitration through ICSID (as opposed to ad hoc arbitration under UNCITRAL arbitration rules), has been observed by some as *not* necessarily a predictive indicator of future enforcement success. *See* Freya Baetens, *Enforcement of Arbitral Awards: 'To ICSID or not to ICSID' is NOT the Question*, *in* THE FUTURE OF ICSID, JURIS ARBITRATION SERIES, 211, 212 (Todd Weiler & Ian Laird eds., 2013).

229. *Id.* at 214–15.

230. Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, *in* ENFORCEMENT OF

Ongoing developments, nevertheless, do show that States are increasingly trying to address the issue of their regulatory freedom to pursue public interest or human rights concerns through a variety of structural approaches in their IIAs, such as: (1) ad hoc joint decision mechanisms; (2) treaty-based institutional commissions; (3) inter-State consultative mechanisms; (4) incorporation of other subject matter-specific treaties (*e.g.*, environmental, labor, human rights); and (5) inter-State bilateral appellate mechanisms to review arbitral awards under the IIA's investor-State dispute settlement mechanism, or the outright omission of investor-State dispute settlement mechanisms under the IIA.[231] The ad hoc joint decision mechanism is a relatively recent device in the newer generations of IIAs, and it may be utilized in the future to enable States to control the interpretation of an IIA so that States continue to retain sufficient policy flexibility to respond to domestic public interest and regulatory objectives.[232] As seen from Article 30(3) of the U.S. Model Bilateral Investment Treaty (BIT),[233] States Parties to an IIA reserve the right to issue a "joint decision" declaring their interpretation of any provision of the IIA, which would be binding on any present or future arbitral tribunal constituted under the IIA's dispute settlement mechanism. The States Parties may issue the joint decision interpreting an IIA standard (such as, for example, the fair and equitable treatment standard) at any stage, with or without reference to pending investor-State disputes, and with or without reference to contemporaneous interpretations by other international tribunals of the same IIA standard contained in other IIAs. Other joint decision mechanisms are present in Article 30(3) of the 2005 United States-Uruguay BIT,[234] Article 30(3) of the 2008 United States-Rwanda

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ARBITRAL AWARDS AGAINST SOVEREIGNS, 131, 136 (R. Doak Bishop ed., 2009).

231. For a recent general survey on approaches for States to control the interpretation of their IIAs, see United Nations Conference on Trade and Development (UNCTAD), *Interpretation of IIAs: What States Can Do*, IIA Issues Note No. 3, 1, 5–8 (Dec. 2011), *available at* http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf.

232. *See* Diane A. Desierto, *Joint Decisions by States Parties: Fair Control of Tribunal Interpretations?,* KLUWER ARBITRATION BLOG (June 8, 2012), http://kluwerarbitrationblog.com/blog/2012/06/08/joint-decisions-by-state-parties-fair-control-of-tribunal-interpretations/.

233. Article 30(3) of the U.S. Model BIT states: "A joint decision of the Parties, each acting through its representative designated for the purpose of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision." United States Model BIT, U.S.-(X), art. 30(3), 2012, *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

234. Article 30(3): "A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru.,

BIT,[235] Article 29(2) in relation to Article 18(2) of the 2007 India-Mexico BIT,[236] Article X(6) of the 2009 Canada-Czech Republic BIT,[237] Article 27(3) of Chapter 11 (Investment) of the 2010 ASEAN-Australia-New Zealand Free Trade Agreement.[238]

While these mechanisms openly permit States Parties to the IIA to agree on any interpretation of IIA provisions that would prevail over any arbitral tribunal, they problematically do not refer to international law as the Parties' guiding principles when deciding on any future agreed interpretation of the IIA. Neither do the joint decision mechanisms provide for any internal control or guidance for the States Parties when their interpretation frontally collides with an arbitral tribunal's legal interpretation of an IIA standard, issued by arbitrators in observance of their fundamental duties to maintain independence and impartiality. There has not yet been an occasion to resolve the potential jurisdictional tension between arbitral tribunals' exercise of their competences to interpret and apply the IIA to concrete investor-State disputes, and how States Parties to the IIA might strategically wield the joint decision mechanism to minimize or avoid liability under the IIA

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art. 30(3), Nov. 4, 2005, S. TREATY DOC. NO. 109-9 [hereinafter United States/Uruguay BIT].

235. Article 30(3): "A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 30(3), Feb. 19, 2008, S. TREATY DOC. NO. 110-23.

236. Article 29(2):

> The Contracting Parties agree to consult each other on having a joint interpretation on Article 7 [Expropriation] in accordance with paragraph 2 of Article 18 ["An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section."] of this Agreement at any time after the entry into force of this Agreement.

Agreement Between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments, Mex.-India, art. 29(2), May 21, 2007, *available at* http://www.unctadxi.org/templates/DocSearch.aspx?id=779.

237. Article X(6): "An interpretation of this Agreement agreed between the Contracting Parties shall be binding on a Tribunal established under this Article." Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, Can.-Czech, art. X(6), Nov. 15, 1990, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN_Czech_Ad_e.asp.

238. Article 27(3) of Chapter 11: "A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, art. 27(3), Feb. 29, 2009, *available at* http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf.

by controlling the latter's ultimate interpretation at any stage of a given investor-State dispute.

Treaty-based institutional commissions or inter-State consultative bodies, on the other hand, pose less of a danger of undue interference with arbitral tribunals' competences in specific pending investor-State disputes. While the IIA interpretations of treaty-based commissions are generally binding on arbitral tribunals, they are nevertheless issued presumably with a more institutional view of the interpretation's consequences for the future implementation, oversight, and supervision of the IIA. A treaty-based institutional commission also has the advantage of entrenching regular consultations and dialogue between the States Parties to the IIA, and thus may be said to have a more long-term view of the IIA's implementation when it issues an interpretation, as opposed to an ad hoc joint decision mechanism which may be triggered purposely only to affect the outcome of specific pending investor-State disputes. One example of such a treaty-based institutional commission is the North American Free Trade Agreement (NAFTA) Free Trade Commission,[239] which was set up as an institution composed of cabinet-level representatives from the three contracting States, with the specific powers to "supervise the implementation" of the treaty,[240] "oversee its further elaboration,"[241] and "resolve disputes that may arise regarding its interpretation or application."[242] The Free Trade Commission issued Notes of Interpretation in 2001,[243] although admittedly it has since been criticized for the seeming *de facto* amendment of NAFTA treaty provisions as a result of the Notes.[244] Other IIAs that establish institutional commissions authorized to undertake IIA interpretation binding upon future arbitral tribunals include: Article 10.22(3) of the 2004 Dominican-Republic-Central America-United States Free Trade Agreement (DR-CAFTA),[245] Article 40(3) of the 2006 Canada/Peru BIT,[246] Article 40(2) of the 2009

239. North American Free Trade Agreement (NAFTA), art. 2001 (The Free Trade Commission), Dec. 17, 1992, IC-MT 002; *see also* Jeswald Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 456 (2010).

240. NAFTA, *supra* note 238, art. 2001(2)(a).

241. *Id.* art. 2001(2)(b).

242. *Id.* art. 2001(2)(c).

243. *See NAFTA: Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA FREE TRADE COMMISSION, July 31, 2001, http://www.sice.oas.org/tpd/nafta/Commission/CH11 understanding_e.asp.

244. *See* Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOC'Y INT'L. L. PROC. 251, 255–57 (2003).

245. Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA 2004), art. 10.22, Aug. 5, 2004, IC-MT 012.

246. Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru., art. 40(3), Nov. 14, 2006, IC-BT 014.

Canada/Jordan BIT,[247] and Article X(6) of the 2010 Canada/Slovakia BIT.[248]

In contrast to ad hoc joint decision mechanisms and treaty-based institutional commissions, inter-State consultation mechanisms in an IIA have the least potential for disrupting arbitral independence and impartiality in handling investor-State disputes. They are not likely to affect the substantive content of an IIA, but rather, could serve as a structural device to facilitate continuing communications between States Parties to the IIA. This structural device could be particularly useful for States Parties to transparently articulate and make of record any ongoing regulatory and public interest concerns that could affect the future implementation of the IIA. Examples of these include Article 12 of the 1996 Greece/Chile BIT,[249] Article 12 of the 1989 Netherlands/Ghana BIT,[250] Article VIII of the 1993 Spain/Philippines BIT,[251] Article XI of the 1997 Denmark/Philippines BIT,[252] Article 43 of the 2009 ASEAN Comprehensive Investment Agreement,[253] Article VIII of the 1995 Czech Republic/Philippines BIT,[254] Article 8 of the 1985 Netherlands/Philippines BIT,[255] Article VIII of the 1999 Philippines/Pakistan BIT,[256] Article 7 of the 1997 Germany/Philippines BIT,[257] and Article 29(1) of the 2007 India/Mexico BIT.[258]

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247. Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, Can.-Jordan, art. 40(2), June 28, 2009, IC-BT 1154.

248. Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments, Can.-Slovk., art. X(6), July 20, 2010, IC-BT 1533.

249. Agreement Between the Government of the Republic of Chile and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Chile-Greece, art. 12, July 10, 1996, IC-BT 1475.

250. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana, Neth.-Ghana, art. 12, Mar. 31, 1989, IC-BT 938.

251. Agreement on the Reciprocal Promotion and Protection of Investments between the Republic of the Philippines and the Kingdom of Spain, Phil.-Spain, art. VIII, Oct. 19, 1993, 1842 U.N.T.S. 91, IC-BT 1369.

252. Agreement Between the Government of the Republic of the Philippines and the Government of the Kingdom of Denmark Regarding the Promotion and Reciprocal Protection of Investments, Phil.-Den., art. XI, Sep. 26, 1997, IC-BT 893.

253. ACIA, *supra* note 157, art. 43.

254. Agreement Between the Republic of the Philippines and the Czech Republic for the Promotion and Reciprocal Protection of Investments, Phil.-Czech, art. VII, Apr. 5, 1995, IC-BT 592.

255. Agreement Between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, Neth.-Phil., art. 8, Feb. 27, 1985.

256. Agreement Between the Government of the Republic of the Philippines and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investment, Phil.-Pak., art. VIII, Apr. 23, 1999, IC-BT 668.

257. Agreement Between the Republic of the Philippines and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, Phil.-Ger., art. 7, Apr. 18,

Alternatively, some IIAs include language that purposely cross-references other treaty obligations involving social protection, human rights, or public interest objectives. Article 18(2) of the 2002 Austria/Malta BIT, for example, specifically provides that the application of the European Convention on Human Rights "shall not be excluded."[259] Clause 1 of the Protocol to the 1998 Japan/Pakistan BIT prohibits the interpretation of the treaty in a way that would derogate from intellectual property rights agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, "and other treaties concluded under the auspices of the World Intellectual Property Organization."[260] Article 5(3) of the 2004 Belgium-Luxembourg Economic Union/Serbia and Montenegro BIT reaffirms the States' Parties "commitments under international environmental agreements."[261] While Article 12 of the 2005 United States/Uruguay

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1997, IC-BT 123.

258. Mexico/India BIT 2007, *supra* note 236, art. 29(1).

259. Article 18 (2): "The application of the European Convention on Human Rights shall not be excluded." Agreement between the Republic of Austria and Malta on the Promotion and Mutual Protection of Investments (Austria/Malta BIT 2002), Austria-Malta, art. 18(2), May 29, 2002, IC-BT 1425.

260. Protocol, Clause 1:

> Nothing in the Agreement shall be construed so as to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which they are parties, including Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization, and other treaties concluded under the auspices of the World Intellectual Property Organization.

Agreement between Japan and the Islamic Republic of Pakistan Concerning the Promotion and Protection of Investment, Japan-Pak., Protocol Clause 1, Mar. 10, 1998, IC-BT 655. *See also* Agreement between Japan and the People's Republic of Bangladesh Concerning the Promotion and Protection of Investment (Japan/Bangladesh BIT 1998), Japan-Bangl., Protocol Clause 1, Nov. 10, 1998; Agreement between Japan and Mongolia Concerning the Promotion and Protection of Investment (Japan/Mongolia BIT 2001), Japan-Mong., Protocol Clause 1, Feb. 15, 2001; Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, S. Kor.-Japan, Protocol Clause 1, Mar. 22, 2002.

261. Article 5(3): "The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their national legislation." Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and Serbia and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.-Serb. & Mont., art. 5(3), Mar. 6, 2004. *See also* Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Republic of the Sudan, on the other hand, on the Reciprocal Promotion and Protection; of Investments, Bel.-Lux.-Sudan, art. 5(3), Nov. 7, 2005; Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the Reciprocal

BIT holds that "it is inappropriate to encourage investment by weakening or reducing the protections afforded in *domestic* environmental laws,"[262] Articles 13(1) and 13(2) of the same treaty make references to "*internationally* recognized labor rights."[263] Other IIAs tend to provide rules governing the application of other international agreements along with the IIA, usually calling for the application of the "more favorable" provision to the States Parties without indicating the criteria for determining the "favorability" of the applicable agreement. Examples of these types of references to the application of other treaties include: Article 11 of the 1993 Slovenia/Slovakia BIT,[264] Article 10 of the 1994 Hungary/Bulgaria BIT,[265] and Article 13(1) of the 1994 Czech Republic/United Arab

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Promotion and Protection of Investments, Bel.-Lux.-Eth. art. 5(3), Oct. 26, 2006; Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Guatemala on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.- Guat., art. 13(3), Apr. 14, 2005; Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Great Socialist People's Libyan Arab Jamahiriya, on the other hand, on the Reciprocal Promotion and Protection of Investments , Bel.-Lux.- Libya, art. 5(3), Feb. 15, 2004; Agreement between the Belgo-Luxembourg Economic Union and the Republic of Mauritius on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.-Mauritius, art. 5(3), Nov. 30, 2005; Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Government of the Republic of Peru, on the other hand, on the Reciprocal Promotion and Protection of Investments Bel.-Lux.-Peru, art. 5(3), Oct. 12, 2005.

262. United States/Uruguay BIT, *supra* note 234, art. 12(1).

263. *Id.* arts. 13(1), 13(2).

264. Agreement on Reciprocal Investment Protection and Promotion between the Republic of Slovenia and the Slovak Republic (Slovenia/Slovakia BIT 1993), IC-BT 1522 (1993), art. 13(1):

> When any matter is treated simultaneously by this agreement and some other international agreements of which the two parties hereof are signatories, or the matter is governed by the general international law, then the most favourable provisions shall apply to both parties hereof and their respective investors, on a case-by-case basis.

Id.

265. Article 10:

> Should national legislation of the Contracting Parties *or present or future international agreements* applicable between the Contracting Parties or other international agreements entered into by both Contracting Parties contain regulations, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.

Agreement Between the Republic of Bulgaria and the Republic of Hungary on Mutual Promotion and Protection of Investments (Hungary/Bulgaria BIT 1994), Bulg.-Hung., art. 10, June 8, 1994. *See also* Agreement between the Czech Republic and the Republic of Bulgaria for

Emirates BIT.[266] Apart from these modes of referring to other applicable treaties, current IIAs seldom contain language that explicitly integrates international human rights treaties, environmental, or labor agreements as part of subsisting obligations to be observed alongside IIA obligations.

Finally, it should be stressed that the ICSID arbitration system does not contain any full-blown appeals procedure to review arbitral awards' factual and legal findings, instead providing for limited annulment procedures in Article 52 of the ICSID Convention.[267] States Parties tend to rely on the "self-contained"[268] dispute settlement system under the ICSID Convention, and thus rarely contemplate building any bilateral appellate mechanism into their IIAs. The 2005 United States/Uruguay BIT provided for the possibility of creating such a bilateral appellate mechanism,[269] but none of the other IIAs concluded by the United States contain such a provision. Unlike this unusual practice, IIAs would usually state that an arbitral award "shall not be subject to any appeal or remedy other than those provided for in [the ICSID] Convention."[270] In this sense, carving out a bilateral appellate

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the Promotion and Reciprocal Protection of Investments (Czech Republic/Bulgaria BIT 1999), Czech-Bulg., art. 11, Mar. 17, 1999.

266. Article 13(1):

> Where a matter is governed simultaneously both by this Agreement and by other international agreements to which both the Contracting States are parties or general principles of law commonly recognized by both Contracting States or domestic law of the host State, nothing in this Agreement shall prevent either Contracting State or any of its investors who own investments in the territory of the other contracting State from taking advantage of whichever rules are the more favourable to their case.

Agreement between the Government of the United Arab Emirates and the Government of the Czech Republic for the Promotion and Protection of Investments (Czech Republic/United Arab Emirates BIT 1994), U.A.E.-Czech, art. 13(1), Nov. 23, 1994.

267. *See generally* ICSID COMMENTARY, *supra* note 224, at 890–1095.

268. *See* Organisation for Economic Cooperation and Development (OECD), *Improving the System of Investor-State Dispute Settlement: An Overview*, 183, at 185 in OECD, INTERNATIONAL INVESTMENT PERSPECTIVES (2006 ed.), *available at* http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/40079647.pdf.

269. United States/Uruguay BIT, *supra* note 234, Annex E (Possibility of a Bilateral Appellate Mechanism): "Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism." *Id.*

270. *See, e.g.*, Agreement between Federal Republic of Germany and the Republic of Indonesia concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Indon., art. 10(3), May 14, 2003; Agreement between the Kingdom of Saudi Arabia and the Belgo-Luxembourg Economic Union concerning the Reciprocal Promotion and Protection of Investments, Saudi Arabia-Belg.-Lux., art. 10(3)(b), Apr. 4, 2001; Agreement between the

mechanism from the investor-State dispute settlement mechanism under the IIA, well outside of the self-contained dispute settlement procedures in the ICSID system, problematically introduces more uncertainty over the future enforceability of arbitral awards issued under the IIA.[271] Nonetheless, a State may also choose to ensure that it has full policy flexibility by altogether omitting any provision that establishes an investor-State dispute settlement mechanism in the IIA. This structural omission insulates the host State from investors' direct recourse to investor-State arbitration, thereby diminishing the possibility that the host State could be held liable to pay compensation for IIA breaches against investors. Moreover, investors would be forced to seek legal remedies from local courts of the host State, or apply with their respective home States to exercise diplomatic protection over their claims. While removing the investor-State dispute settlement mechanism from an IIA would thus make it much easier for a host State to implement policy changes at its own wherewithal in the future, it would also correspondingly increase regulatory risks for foreign investors. This is best illustrated in the Australian Government's April 2011 announcement that it would reject any investor-State dispute settlement mechanism from its IIAs.[272]

As seen in the foregoing, the institutional limitations and diversity of IIA texts within the investment law system impedes coordinated law-making towards uniform interpretations of States' regulatory freedom to pursue human rights and public interest concerns, unlike in WTO law. Apart from being a matter of text and structure, I further submit that this is also an ontological issue involving competing ideologies unique to each treaty regime. In the following Part III, I present the ideological and thematic differences that have respectively arisen in WTO law and investment law on States' regulatory freedoms to pursue (ordinarily)

Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments, Den.-Zim., art. 9(3)(b), Oct. 25, 1996.

271. Other scholars have referred to the need for an authoritative centralized appellate mechanism that would generate consistent jurisprudence and avoid normative fragmentation. *See* Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration,* 6 LOY. U. CHI. INT'L REV. 173, 180–81 (2008); Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, 57 ESSAYS IN TRANSNATIONAL ECONOMIC LAW 38–40 (2006), *available at* http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf (last accessed Jan. 10, 2013).

272. Kyla Tienhaara & Patricia Ranald, *Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors*, INVESTMENT TREATY NEWS- INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (July 12, 2011), *available at* http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/.

non-conforming or non-compliant measures within each regime to comply with human rights and public interest concerns. Using the "necessity" cases in GATT Article XX jurisprudence as an example, I show why the deeper ideological considerations of market access and trade policy adjustment in these particular cases additionally militate against simply transferring the "weighing and balancing" tests developed by the WTO panels and Appellate Body into the interpretation of "necessity" exceptions in investment treaties that have no traceable drafting history or linkage with GATT Article XX.

III. TWO VISIONS OF REGULATORY FREEDOM TO ACHIEVE PUBLIC POLICY AND HUMAN RIGHTS OBJECTIVES

When a State asserts its regulatory freedom against international regulation or oversight, it is actually re-articulating Hans Kelsen's classic problem on the sovereignty of the state: "the problem of the sovereignty of the national legal order in its relation to the international legal order."[273] The seeming Gordian knot between national law and international law cannot be disentangled simply by arguing that one is superior to the other. What was more critical, in Kelsen's view, was to appreciate the "difference of two systems of reference. One of them is firmly connected with the legal order of one's own state or national legal order; the other is firmly connected with the international legal order. Both systems are equally correct and equally legitimate,"[274] and ultimately, it would be a matter of *policy* or "political considerations"[275] rather than hard positivist legal science to assign priorities between one and the other. The same reasoning may be analogized in characterizing the issue of States' regulatory freedom asserted in WTO law *vis-à-vis* international investment law. While States commonly seek to assert policy space and regulatory freedom in both treaty regimes, the assertions are addressed to different questions and frames of reference. The contours of States' regulatory freedom and policy spaces that are accepted and understood in WTO law would thus very likely prove quite different from those sought in international investment law.

A. *Clarifying Frames of Reference: WTO Law*

Regulatory freedom in WTO law is addressed to issues of market access, non-discrimination, and the restoration of the economic equilibrium expected from trade liberalization commitments under the

273. Hans Kelsen, *Sovereignty and International Law*, 48 GEO. L.J. 627, 628 (1960).
274. *Id.* at 639.
275. *Id.* at 640.

WTO agreements.[276] WTO law purposely delineates between a State's justifiable exercise of regulatory freedom, from protectionist measures designed to circumvent commitments under the WTO Agreements. These trade agreements purposely accept that a margin of domestic regulatory freedom must continue to be maintained both as a matter of economic efficiency (assuming asymmetric information on world markets, technologies, consumer preferences, and all other exogenous factors that cannot be anticipated in designing the trade agreement), as well as to build in a "safety-valve" precaution against unforeseeable contingencies that could disrupt the anticipated or forecasted terms of trade.[277] The criteria for determining the lawfulness of the State's assertion of regulatory freedom, however, differs across the various provisions of the WTO covered agreements. The State's justifiable exercise of regulatory freedom could be manifested in different ways. It may be asserted to permit the State to implement an ordinarily trade-distorting or trade-restrictive non-conforming measure, in order to promote and advance specific public or non-trade aims accepted within the sphere of the agreements—such as the exceptions enumerated in GATT Article XX or GATS Article XIV.[278] Not every domestic regulatory measure of a State that might pose some obstacle to trade, however, will require legal justification: "Articles II, III, and XI . . . [of] the GATT restricts itself to establishing a non-discrimination regime for internal regulation and internal taxation, under which only *de jure* and *de facto* discriminatory measures need to be justified under pertinent GATT exceptions."[279]

Regulatory freedom may also be justifiably invoked to permit a State

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276. Vranes, *supra* note 52, at 956–57,

> Determining the GATT's impact on national regulatory autonomy, in particular, requires a legal analysis of two "triangular" relations' in the GATT agreement: regarding regulatory measures in general, the principal confines of national regulatory autonomy are demarcated by the triangle which consists of Article XI (General Elimination of Quantitative Restrictions), Article III (National Treatment), and Article XX (General Exceptions). As respects taxation, these borderlines are drawn by the triangular relationship between Articles II (concerned with further border measures, namely customs duties, and all other duties and charges "imposed on or in connection with importation"), Article III (National Treatment) and Article XX (General Exceptions).

Id.

277. *See* PETROS C. MAVROIDIS ET AL., THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO 466–71 (2008).

278. *See* Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an 'Aim and Effects' Test*, 32 INT'L LAW 619, 621 (1998).

279. Vranes, *supra* note 52, at 962.

to recalibrate or reschedule performance of its trade liberalization commitments, when certain domestic constituencies or sectors cannot yet meet the terms of competition brought by opening up to foreign market access, or when the State's level of economic development itself requires a longer timeframe to comply with trade liberalization commitments. Examples of this may be gleaned from the emergency safeguards measures in GATT Article XIX, the Agreement on Safeguards, Article 5 of the Agreement on Agriculture, and Article 6 of the Agreement on Textiles and Clothing,[280] as well as various provisions on special and differentiated treatment for developing countries.[281] Finally, a State's regulatory freedom may justify it to monopolize regulatory oversight (or in some cases, directly supply) certain public goods according to its own legislative or political agenda, and in keeping with its own economic programming and social protection objectives,[282] such as GATS Article I:3(b) (which recognizes

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280. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (Emergency Action on Imports of Particular Products); *see* Agreement on Safeguards art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Agreement on Safeguards].

> [A] Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Id.; Agreement on Agriculture art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Agreement on Agriculture] (Special Safeguard Provisions); Agreement on Textiles and Clothing art. 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Agreement on Textiles and Clothing] [see "transitional safeguards" in Article 6(1)].

281. On special and differential treatment (SDT) provisions, see Subsidies and Countervailing Measures (SCM) Agreement art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter SCM]; Agreement on Trade Related Aspects of Intellectual Property Rights arts. 65.2 & 65.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter TRIPS]; Agreement on Technical Barriers to Trade arts. 12.4, 12.6 & 12.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter TBT]; The WTO Agreement on the Application of Sanitary and Phytosanitary Measures arts. 10.1, 10.2, 10.4 & 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter SPS]. *See also* Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, World Bank, Oct. 2004, *available at* http://www.ycsg.yale.edu/focus/gta/operationalizing.pdf (proposals for transparency and specificity of SDT provisions and monitoring mechanisms for SDT provisions).

282. Joel Trachtman & Gabrielle Marceau, *TBT, SPS, and GATT: A Map of the WTO Law on Domestic Regulation*, 36 J. WORLD TRADE 811 (2002).

"services supplied in the exercise of governmental authority"[283]) and Article 2.2 of the TBT Agreement (which acknowledges that technical regulations shall not be more trade-restrictive than necessary to fulfill certain "legitimate objectives," such as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment).

The inherent flexibility and accommodation built into the WTO agreements makes it clear that States already contemplate inevitable and continuing tensions between domestic regulations and legislation with their duties to fulfill all trade obligations under the WTO. This is evidenced by the particular text of the WTO agreements that purposely preserve State regulatory freedom for certain identified public policy or public interest areas and human rights concerns, as well as in the organic structure and competences of its interpretive institutions (*e.g.*, the Appellate Body and the dispute settlement panels under the DSU). Ensuring the continued flexibility of the WTO Agreements toward delineating lawful exercises of State regulatory freedom, from covert or openly protectionist measures, is an interpretive function deliberately entrusted to the panels and the Appellate Body under the DSU. The breadth of their interpretive authority well explains how GATT jurisprudence has correspondingly "evolved" to "encompass protective discrimination" or "hidden discrimination" that would "represent an innocuous disparate impact on trade, unrelated to protection."[284]

The "weighing and balancing" methodology of the Appellate Body and the dispute settlement panels axiomatically reflects both the functional mandates of these tribunals, as well as the fundamental flexibility explicitly maintained in the Agreements to uphold State regulatory freedoms exercised for public policy, public interest, or human rights objectives. Because not every internal regulation or domestic measure of a State that could have some possible or forecasted impact on trade automatically rises to the level of an unjustified trade distortion or trade restriction, it is understandable that the Appellate Body and the dispute settlement panels devised certain legal tests to differentiate purely protectionist discriminatory measures, from those that had the cloak of WTO protection for State regulatory freedom. It is further comprehensible that these legal tests would leave considerable margin of appreciation[285] for the design of a measure *vis-à-vis* proposed

283. On the lack of clarity or definition in regard to this standard, see Robert Howse & Elisabeth Tuerk, *The WTO Negotiations on Services: The Regulatory State up for Grabs*, 9 CANADA WATCH 1–2 (Sept. 2002).

284. Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute*, *in* TRADE AND HUMAN HEALTH AND SAFETY 77–117 (George A. Bermann & Petros C. Mavroidis eds., 2006).

285. MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 14 (2003)

reasonable alternative measures. This uniquely-textured standard of review of the Appellate Body and the dispute settlement panels is a particular "procedural instrument and, *in addition to* substantive treaty rules and other procedural techniques developed by panels and the Appellate Body, shapes the jurisdictional competence of the WTO adjudicating bodies vis-à-vis WTO members."[286]

The fact-intensive and context-specific "weighing and balancing" methodology of the Appellate Body and the dispute settlement panels also enables the management and allocation of the burden of proof, when either tribunal has to compare a challenged State measure with other possible (or less trade-distorting) alternatives.[287] More to the point, this method is entirely appropriate to the internal design logic underlying the remedies system of the DSU, where directing the violating Member State to bring its measure "in conformity" with the Agreements is the "ultimate remedy."[288] The remedy prescribed under the DSU for a State's domestic measures that distort the achievement of the ideal general economic equilibrium[289] in fully liberalized international trade[290] is to adjust that State's policies in a manner that would correct the trade distortion. To this end, the panel or the Appellate Body issues a recommendation "that the Member concerned bring the measure into conformity with that agreement," and may additionally "suggest ways in which the Member concerned could implement the recommendations."[291] As stressed by the Panel in *United States – Section 301 Trade Act*,[292] however, there could be any number of ways, short of or apart from changing an offending domestic statute, to remove the trade-distorting effect of the inconsistency between the challenged State measure and the State's WTO obligations.[293] After adoption of the panel or Appellate Body report, the DSB then oversees

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("the notion of standard of review defines the *margin of appreciation* which panels and the Appellate Body grant national authorities in enacting and enforcing their obligations under the WTO agreements. Panels respect this margin before they are prepared to declare a national measure inconsistent with WTO law . . .").

286. *Id.*

287. *See* MICHELLE T. GRANDO, EVIDENCE, PROOF, AND FACT-FINDING IN WTO DISPUTE SETTLEMENT 212–15(2009).

288. R. RAJESH BABU, REMEDIES UNDER THE WTO LEGAL SYSTEM 136 (2012).

289. JACOB L. MOSAK, GENERAL EQUILIBRIUM THEORY IN INTERNATIONAL TRADE 180 (1944).

290. *See* Donald R. Davis & David E. Weinstein, *International Trade as an 'Integrated Equilibrium': New Perspectives,* 90 EMPIRICAL TESTING OF TRADE THEORIES: AEA PAPERS AND PROCEEDINGS 2, 150–54. (2000).

291. DSU art. 19.1.

292. Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

293. *Id.* ¶¶ 7.101–7.104.

compliance (or keeps "surveillance"[294]) by the Member State concerned with its recommendation and ruling, either through withdrawal or modification of the challenged measure.[295] It is only when a Member State fails to comply with the recommendation or ruling that the complaining State could either initiate negotiations to obtain compensation from the non-complying State,[296] or impose countermeasures through discriminatory suspension of WTO concessions.[297]

This is precisely why Appellate Body and dispute settlement panels could afford to interpret the GATT Article XX "necessity" provisions using a "least restrictive means" test.[298] By the time the tribunal undertakes a detailed analysis of the asserted GATT Article XX justification, it has already reached a preliminary conclusion that the State's challenged measure is already inconsistent or non-conforming with GATT obligations, and the respondent State's challenged measure must thus be adjusted or reformed to bring it into GATT compliance. At that point, then, the respondent State assumes the burden of proving—after the complaining Member State shows that a "reasonably available" alternative exists—that the challenged measure was the "least restrictive means" employed to accomplish the public interest objective specified in the GATT Article XX justification.

Andrew Mitchell and Caroline Henckels have argued that the above method of reasoning "might well improve the decision making process of investment tribunals."[299] However, they also (rightly) concede that the WTO jurisprudence on "necessity" tests are laden with numerous ambiguities: (1) "the role of the assessment of the importance of the measure's objective in WTO necessity analysis is still not entirely clear;"[300] (2) "the 'aptness' standard in WTO law is still somewhat embryonic and is yet to be fully clarified;"[301] (3) "[WTO analysis] requires detailed consideration of whether the respondent could actually adopt the proposed alternative, taking into account its resources and technical capacities;"[302] and (4) "[the] significant general difficulty with the WTO weighing and balancing test is its opacity. The test has been expressed in a number of different ways and *indeed seems to change*

294. DSU art. 21.6.

295. MOSAK, *supra* note 289, at 159 (citing *Argentina – Hides and Leather* (*Article 21.3*)).

296. DSU art. 22.2; *see* MOSAK, *supra* note 289, at 198–200 (on the rare resort to compensation due to problems of its voluntariness, prospective application, form through trade concessions and not money).

297. MOSAK, *supra* note 289, at 193.

298. *Supra* text accompanying notes 80 & 83.

299. Mitchell & Henckels, *supra* note 3, at 47.

300. *Id.* at 46.

301. *Id.* at 49.

302. *Id.* at 51.

each time it is articulated . . . ."[303] If this level of ambiguity and methodological inconsistency already subsists in the context of centralized, cyclical, and repeat adjudication by the WTO Appellate Body, one is left to wonder how the demonstrated dangers of this "weighing and balancing" proposal could somehow be avoided by dispersed and diversely-constituted investment arbitral tribunals with limited mandates to resolve particular one-off investment disputes. Andrew Mitchell and Caroline Henckels celebrate the "sophistication" of WTO jurisprudence, but omit to discuss how exactly an investment arbitral tribunal gets from point A (*e.g.*, finding the GATT Article XX necessity test applicable despite vastly different treaty texts, as well as GATT Article XX's evident differences with the customary norm of necessity under Article 25 of the Articles of State Responsibility), to point B (*e.g.*, reaching a decision on the host State's right to regulate well in accord with treaty interpretation rules and within the confines of the arbitral function). Opening the door to investment arbitral tribunals to this process of reasoning in its adjudication—in the absence of a comparable centralized adjudication system and a Member State-driven Dispute Settlement Body that ultimately determines, monitors, and oversees the adjustment of a respondent State's challenged measure to bring it to GATT compliance—is inviting license for arbitral overreach. It will not necessarily yield just legal outcomes, as tribunals would have to engage in extensive *ex post* scientific and technical assessments of the legislative/administrative design and public policy objectives of the host State's challenged measure, and then ascertain whether it was indeed "least restrictive" given other "reasonably available" alternatives. This is a ponderous slippery slope that only depends on the arbitrator's self-restraint as a precarious limit.

B. *Checking Criteria for Comparator Applicability: Investment Law*

Within the investment treaty regime, the State can assert its regulatory freedom to vindicate public interest or human rights concerns within the interpretation of the primary norm asserted to constitute the treaty breach (*e.g.*, interpretation of the IIA standard of treatment alleged to have been violated such as fair and equitable treatment or indirect expropriation).[304] It may also attempt to assert the issue to

303. *Id.* (emphasis added).

304. *See* Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard* in, 10 MAX PLANCK Y.B. U.N. L. 609–80, (Armin von Bogdandy & Rüdiger Wolfrum eds., 2006); RONALD KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 158–59 (2011); ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, 'INDIRECT EXPROPRIATION' AND THE 'RIGHT TO REGULATE' IN INTERNATIONAL INVESTMENT LAW (2004), *available at* http://www.oecd.org/investment/internationalinvestmentagreements/

establish an independent first-order defense (*e.g.*, "necessity" as a circumstance precluding wrongfulness under Article 25 of the Articles of State Responsibility, "non-precluded measures" under an IIA provision, or the notion of regulatory freedom as an independent customary norm of international law).[305] It may also assert the issue contextually, as an alternative defense to equitably mitigate or substantially reduce the ultimate value of compensation that it must pay for incurring liability through the IIA breach.[306] Regulatory freedom can be deployed as an argument for host States in various *ratione materiae* within an investment dispute precisely because of the nature of investment treaty texts and the formulation of substantive standards therein, the remedy designed under the investor-State dispute settlement mechanism, and the mandate of an investment arbitral tribunal convened only upon the consent of the parties.

Unlike WTO law which looks to provide a system of legality and adjudication to restore the economic equilibrium and terms of trade anticipated from trade liberalization commitments by eliminating or reforming trade-distorting State measures, the investment treaty regime operates to provide a predictable legal environment that guarantees anticipated investment returns to the investor alongside the macroeconomic gains received by the host State, considering risks identified at the establishment of the investment, as well as building in other risk premia to capture other risks that could materialize beyond the contemplation of the host State and the investor. The mechanism for restoring disruptions to the economic equilibrium of foreign market access in WTO law is primarily adjustment or elimination of a State's challenged measure; while the mechanism for restoring disruptions to the anticipated flow of investment returns given assumed risks is a

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305. Davies, *supra* note 4. *See also* Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47–98, 33 (1996).

> [T]he only logically satisfying and empirically validating position to take on the source of human rights norms is that they derive from provisions in treaties. But people who are prisoners of the Contract Paradigm are disabled from taking such a position. I can only hope that with the passage of time this Paradigm, like the Sovereignty Paradigm, will gently erode . . .

Id.

306. Siemens AG v. Argentina, Award & Separate Opinon, ICSID Case No. ARB/02/8, Feb. 6, 2008; Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises*, 44 GEO. WASH. INT'L L. REV. 473 (2012); SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 330–38 (2009).

"price" mechanism[307] to remediate the loss of expected or agreed returns (*e.g.*, compensation (either treaty-stipulated, as in the case of "prompt, adequate, and effective compensation" for expropriations),[308] or as a form of reparations under customary norms of international responsibility for breach of treaty provisions other than expropriation[309]).[310]

Moreover, the dispute between States in a WTO proceeding arises from mutually and multilaterally agreed trade liberalization commitments that are jeopardized by unjustified State measures that alter the terms of competition and result in inefficient trade; while the dispute between an investor and a host State arises from a pre-existing contractual setting, the non-performance of certain obligations by the host State or the investor in their established relationship within the jurisdiction of the host State, and the ensuing unjustified change in the forecasted returns from investment. While not every breach of a foreign investment contract will amount to an actionable breach of an IIA standard of protection,[311] acts of the host State toward the investment

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307. Note recent literature critiquing the *quantum* reached by investment tribunals through the "price" mechanism, and arguing conceptual and methodological reconsideration. *See* Desierto, *supra* note 306; Mavluda Sattorova, *Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies*? (Jan. 2013) (unpublished Ph.D. thesis), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=mavluda_sattorova&sei-redir=1&referer (last accessed Feb. 1, 2013).

308. For early doubts expressed concerning the supposed universality of the Hull formula, see Oscar Schachter, *Compensation for Expropriation (Editorial Comment)*, 78 AM. J. INT'L L. 1 (1984); Frank G. Dawson & Burns H. Weston, *'Prompt, Adequate, and Effective': A Universal Standard of Compensation?,* 30 FORDHAM L. REV. 727, 757 (1962).

> Far from being a 'rule' of international law in the extensive deprivation context, the demand for 'full' or 'prompt, adequate and effective' compensation would appear to be little more than a preference assumed for bargaining purposes – an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy.

Id.

309. *See* RIPINSKY & WILLIAMS, *supra* note 306, at 88–110.

310. Alan Sykes authoritatively proved that the private right of action for money damages in investment law is the appropriate efficient enforcement mechanism to signal that the State/capital importer will not engage in injurious practices against the capital exporter, while trade policy adjustment and the threat of withdrawal of trade concessions (authorized countermeasures) is the most efficient way to ensure compliance with government to government commitments in WTO law. *See* Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. (2005), *reprinted in* ECONOMICS OF PUBLIC INTERNATIONAL LAW 446–81 (Eric A. Posner ed., 2010).

311. *See* Duke Energy Electroquil Partners & Electroquil SA v. Ecuador, ICSID Case No. ARB/04/19, Award of Aug. 12, 2008, ¶ 345.

> Establishing a treaty breach is a different exercise from showing a contract

that extend beyond the zones of permissible treatment defined under an IIA are what give rise to the host State's international responsibility to a third-party beneficiary of the IIA, (*e.g.*, the investor). The ultimate question for a State asserting its regulatory freedom to vindicate public interest or human rights concerns is thus whether its measures taken under the aegis of regulatory freedom exceed the risk parameters and anticipated returns as understood by both the host State and the investor *at the time of the establishment of the contract*.

Most importantly, there is a markedly different *temporal* dimension to an investment tribunal's analysis of legally-actionable State disruptions to the economic equilibrium protected by investment treaties that contrasts with that undertaken by the DSU, the Appellate Body and dispute settlement panels in WTO law, and this difference shapes the nature of remedial measures taken by adjudicatory bodies. WTO analysis of regulatory measures will tend to focus on its prospective effects or impacts on market access, and remedies will be prescribed on the basis of that prospective assessment. In WTO tribunals' analysis of GATT Article XX exceptions, the relevant issue for determination is whether, at *Time 1*, a State's challenged regulatory measure is inconsistent with a Member State's GATT obligations (*e.g.*, causes or results in an actionable trade-distortion or foreign market access restriction). If so, then, at *Time 1 + n*, the issue is whether the regulatory measure can be redesigned or calibrated toward achieving GATT consistency. At *Time 1 + n*, what matters for the DSU is to monitor the respondent State's implementation of the challenged measure to ensure that the latter is brought to conform with GATT and thereby immediately stop the injurious effects of the trade-distortion. If the redesign or withdrawal of the trade-distorting measure cannot be accomplished, then compensation by way of trade concessions (as a "second-best" alternative to avoid future damage from the continued existence of the measure) is a temporary option.[312] In the event of a respondent State's further recalcitrance or non-compliance, counter-measures may be authorized by the DSB in the form of authorizing WTO Members to suspend concessions or observance of other obligations toward the recalcitrant State.[313]

In investment treaty arbitration, however, once the primary liability

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> breach. Subject to the particular question of the umbrella clause, in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contract breach, in other words a violation which the State commits in the exercise of its sovereign power.

Id.

312. BABU, *supra* note 288, at 193–202.

313. *See* DSU, art. 22.1.

of a host State is established for breach of an IIA standard of protection, the only issues left for the tribunal to resolve are whether a customary norm of necessity lawfully suspended the duty to perform the contemplated IIA standard of protection, or whether there is a specific provision in the IIA itself that would operate to excuse the host State from the second-order consequences (*e.g.*, the duty to compensate as a form of reparations) flowing from having incurred primary liability due to breach of the IIA. There is no room for an investment tribunal to calibrate a State's regulatory measure *ex post* to restore a loss of market access or prevent further injury from loss of market access—the host State's regulatory measure is simply taken as a given operative fact that must be assessed either in determining the existence of primary liability or the scope of second-order consequences arising after such primary liability is established. The analysis of a State's regulatory measure is therefore retrospective, and remedies are likewise prescribed with a view to ameliorating a past injury (not anticipating future losses to the investment). At *Time 1*, an investment tribunal determines whether an investment treaty breach has occurred and a State then puts forward its defense of regulatory freedom. The tribunal then has to work backwards, and determine whether the risk parameters and anticipated returns at *Time 1-n* were justifiably or unlawfully distorted by the State's challenged regulatory measure (*e.g.*, an actionable injury that engages international responsibility exists). If it finds that there is indeed actionable injury triggering international responsibility, the investment tribunal would have to prescribe compensation that approximately remedies the loss incurred in *Time 1-n*.[314]

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314. Although there are cases involving other states such as *Unglaube and Unglaube v. Costa Rica*, Award, ICSID Case Nos. ARB/08/1 and ARB/09/20, May 16, 2012 (which involved an expropriation finding arising from regulatory actions taken by Costa Rica to create an ecological zone protecting the endangered leatherback sea turtles and their nesting sites), as well as *Tecnicas Medioambientales Tecmed SA v. Mexico*, Award, ICSID Case No. ARB (AF)/00/2, May 29, 2003 (also involving an expropriation finding in relation to a Mexican government agency's Resolution ordering closure of a landfill for environmental reasons), the cases involving the Argentina financial crises of 2000–2002 are probably the most famous examples of failed attempts to justify social protection measures on the basis of human rights, public policy, or public interest reasons: LG & E Energy Corp v. Argentina, Decision on Liability, ICSID Case No. ARB/02/1/3, Oct. 2006, paras. 213–66; Sempra Energy International v. Argentina, Decision on Argentina's Application for Annulment of the Award, ICSID Case No. ARB/02/16, June 29, 2010, paras. 106–223; CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/0108, Apr. 25, 2005, paras. 315–92; Enron Corporation and Ponderosa Assets, LP v. Argentina, Award, ICSID Case No. ARB/01/3, May 22, 2007, paras. 303–39; Cont'l Cas. Co. y v. Argentina, Award, ICSID Case No. ARB/03/9, Sept. 5, 2008, paras. 219–85; BG Group PLC v. Argentina, Final Award, Ad hoc (UNCITRAL), Dec. 24, 2007, paras. 361–444; National Grid PLC v. Argentina, Ad hoc (UNCITRAL), Nov. 3, 2008, paras. 205–62; Suez v. Argentina, Decision on Liability, ICSID Case No. ARB/03/19, July 30, 2010, paras. 249–71; Total SA v. Argentina, Decision on Liability, ICSID Case No. ARB/04/1, Dec. 21, 2010, paras. 482–85; El

This is where the proposed application of the "least restrictive means" test in GATT Article XX "necessity" jurisprudence into investment arbitration turns on its head. Andrew Mitchell and Caroline Henckels extolled the "sophisticated" analytical value of setting up a comparison of a host State's regulatory measures (as the supposed "least restrictive means") with proposed "reasonable alternatives," similar to what the Appellate Body and dispute settlement panels have done in "necessity tests" for GATT Article XX.[315] But they did not show how this method of reasoning could be replicated by an investment tribunal that mainly has to decide the existence of an IIA or treaty breach, and the quantum of compensation to remedy loss from the breach. Comparing a State's regulatory measure with other "reasonably available alternatives" makes sense for a WTO tribunal that has to decide on altering the contours of that measure to bring it to full conformity with GATT commitments and the Member States' multilateral expectations of market access. But comparing a host State's regulatory measure with a plethora of other macroeconomic acts that it could or should have taken at *Time 1-n* does nothing for the assessment of primary liability, except to introduce a heightened level of subjectivity in, and arbitrary scrutiny of, the host State's "treatment" of an investment and whether the same falls within the bounds of permissible treatment defined under the IIA. Given the universe of possible policy options and the propensity for hindsight or "black swan" reasoning often employed by economists,[316] more than likely an arbitral tribunal would be swamped by the parties with competing analyses by their respective expert economists, leading to at least some preponderance that "reasonably available alternatives" exist. Rather than afford a feasible defense to a State (presumably the purpose behind the Mitchell and Henckels' proposal), the likely outcome would be quite similar to how investment tribunals have dealt with the virtually impossible requirement in the customary norm of necessity in Article 25

Paso Energy International Company v. Argentina, Award, ICSID Case No. ARB/03/15, Oct. 27, 2011, paras. 552–670; Impregilo SpA v. Argentine Republic, Final Award, ICSID Case No. ARB/07/17, June 21, 2011, paras. 336–60; Metalpar SA and Buen Aire SA v. Argentina, Award on the Merits, ICSID Case No. ARB/03/5, June 6, 2008, paras. 208–11; Siemens AG v. Argentina, Award and Separate Opinion, ICSID Case No. ARB/02/8, Feb. 6, 2007, paras. 79 & 354.

315. Mitchell & Henckels, *supra* note 3, at 56–57.

316. Metaphor originated by Nassim Nicholas Taleb to describe a surprising (and unexpected) event found to have had massive effects, which is subsequently rationalized (often wrongly or inappropriately) with the benefit of hindsight. *See* NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE FRAGILITY (2d ed. 2010). Paul Krugman has also acknowledged the difficulty of formally modeling international economic crises. *See* Paul Krugman, *The International Aspects of Financial Crises*, *in* THE RISK OF ECONOMIC CRISIS 85–134 (Martin Feldstein ed., 1991).

of the Articles of State Responsibility that the measure taken was the "only way for the State to safeguard an essential interest against a grave and imminent peril."[317] Under the Mitchell and Henckels proposal where investment arbitral tribunals would have full sway to "weigh and balance" the host State's regulatory measure and proposed alternatives at hindsight (and even with the fiction of "margin of appreciation"), it would be more likely that a host State would be unable to bear the additional evidentiary burden of showing that other alternatives to the challenged regulatory measures were not realistically available at *Time 1-n.* Neither is the evidentiary burden clearly explicated for the claimant investor that posits "other reasonable alternatives" (whether regulatory measures or macroeconomic policies) that the host State could or should have taken to avoid injury to the investment. Much of this line of analysis sweepingly induces an arbitral tribunal to engage in more speculative and hindsight armchair reasoning on host States' macroeconomic policies and the design of government regulations that could have avoided or diminished injury or loss to the value of the investment, in order to resolve the questions of the existence of an IIA breach, and the level of compensation required to redress such breach. This analysis is suited to WTO tribunals that have to issue recommendations to calibrate, withdraw, or adjust a respondent State's regulatory measure to prevent further trade distortions or unjustifiable market access restrictions against other WTO Member States, but it makes no sense whatsoever for investment tribunals tasked with providing compensatory redress for IIA breaches.

Interestingly, the recent UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) acknowledges the complexities of designing language for public policy exceptions in IIAs,[318] and one of its suggested options is patterned after GATT Article XX language in IIA treaties. This has already been concretely followed in recent treaty practice, specifically the 2009 ASEAN Comprehensive Investment Agreement (ACIA), Article 17 (General Exceptions) which is a replica of GATT Article XX/GATS Article XIV exceptions. Although this provision has not yet been tested by an arbitral tribunal, several interpretive difficulties could already be anticipated for an investment arbitral tribunal tasked to apply this provision. Would the tribunal defer to a host State's (self-judged) invocation of the public policy objective specified in the enumerated exceptions, and if so, to what extent will

317. On the evidentiary hurdles to meet the "only way" requirement in Article 25 of the Articles of State Responsibility, see *Enron Corporation and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Decision on Application for Annulment, ¶¶ 368–77 (July 30, 2010); EDF Int'l SA v. Argentina, ICSID Case No. ARB/03/23, ¶¶ 1171–72 (June 11, 2012).

318. *See* IPFSD text on suggested options for designing such exceptions in http://www.Investmentpolicyhub.unctad.org/Views/Public/content.aspx?sid=3.

this deference affect its standard of review for the exception-based defense? If the tribunal will not defer to the self-judged assessment of a host State, what *onus probandi* would it assign to a host State invoking, for example a "public morals" exception? If the investment tribunal were to apply the "least restrictive means" test to establish the necessity of a host State measure, would it mean that it would first make a preliminary finding that the host State measure breaches the IIA, and afterwards require the host State to prove its exception as opposed to some kind of "reasonably available alternative" under the "weighing and balancing approach"? (As already discussed, this method of reasoning contains its own set of evidentiary complications). Finally and most importantly, what effect on a State's international responsibility is intended by the phrase "*nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures*"[319]—does it result in the inexistence of any primary breach due to the wholesale inapplicability of a treaty (*e.g.*, an effect of treaty inapplicability that is not borne out by WTO jurisprudence on GATT Article XX, but which is unique to the *Continental Casualty* interpretation[320]), or does it affect the second-order consequences of primary breach (*e.g.*, mitigation or reduced damages)? While one can understand the function of GATT Article XX as a State's residual defense seeking to permit the continuity of the measure notwithstanding its possibly trade-distorting or market access-restricting impact (and notably after the WTO tribunal already finds that measure to be non-compliant or inconsistent with GATT), one is not too sure about what treaty effects will be generated from a GATT Article XX-type provision in an IIA that says utterly nothing about preventing a treaty breach from arising, preventing a treaty from being applicable, or preventing international responsibility from attaching. The only effect that could be literally read from the phrase "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures" is that the Agreement will literally NOT be construed or interpreted to prevent a Member State from adopting or enforcing such measures. But at *Time 1*, when an arbitral tribunal has to deal with a host State that has already enforced the regulatory measure that causes economic injury to an investment or a breach of an IIA standard of protection in *Time 1-n*, what is still there to prevent? How would a "weighing and balancing" approach then serve any realistic purpose to afford host States a genuine defense against a primary breach when the evidentiary burden is increased? Clearly, there is a need to scrutinize the actual functional criteria for making investment tribunals use WTO law

319. ACIA, *supra* note 157, art. 17(1).
320. Desierto, *supra* note 15, at 882–93.

as a relevant comparator in investment law.

The literature on the WTO law *qua* investment law proposition has not yet reached a point where the premises, policies, and methods of comparisons between both regimes have been fully and transparently disclosed.[321] Rather, the proposition has often been argued from the standpoint of either supposedly shared normative or genealogies or teleologies between treaty texts (*e.g.*, "necessity," "most favoured nation treatment," "national treatment"),[322] glowing descriptions of the settled interpretive processes within WTO adjudication,[323] or by arguing the negative consequences of keeping both WTO law and investment treaty regimes "separate."[324] But each of these approaches have been inadequate to justify the *function* of the comparison or transposition of WTO law into investment law interpretation. First, while shared normative genealogies, teleologies, or common *travaux* might prove true in some IIAs (especially for those negotiated within or alongside free trade agreements[325]), there has not been any empirical validation of the latter for the entire constellation of IIAs—at least enough to say that the WTO law *qua* investment law proposition can indeed be generalized to all IIAs. Second, celebrating WTO interpretive methods, as previously shown, does not address the crucial question of how to validly apply or transplant them into investment treaty interpretation—whether it would be through a "broad" (albeit questionable) construction of the investment arbitral mandate or a demonstrable textual or contextual nexus with the IIA standard within the system of unitary interpretation in VCLT Article 31. Finally, listing some negative consequences that could arise from keeping both treaty regimes separate, without discussing how these consequences overpower any perceived or actual gains from distinct treaty regime design and institutions, unfortunately misses out on the rest of the analysis necessary in an actual cost-benefit equation.[326] If the WTO law *qua* investment law proposition is to be accepted as the public policy tool for resolving contended "legitimacy" issues on the right to regulate in international investment law, clearly we need more well-developed criteria before we seek to turn our investment arbitrators into full-scale

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321. *Supra* note 3.

322. *Supra* note 3; *see also* Robert Howse, *The Relevance of WTO Law and Jurisprudence to Investor-State Dispute Settlement* (Notes for Panel Discussion), INVESTMENT TREATY FORUM-BRITISH INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW (Sept. 9, 2011), *available at* http://www.biicl.org/files/5638_robert_howse.pdf).

323. Mitchell & Henckels, *supra* note 3.

324. Broude, *supra* note 25.

325. *See* Diane A. Desierto, *'For Greater Certainty': Balancing Economic Integration and Investor Protection in the New ASEAN Investment Agreements*, 8 TRANSNAT'L DISP. MGMT. 5 (2011).

326. *See* ROBERT J. BRENT, APPLIED COST-BENEFIT ANALYSIS 6–9 (2d ed. 2006).

comparativists.

A basic method in comparative law that might prove to be of some use in making this determination, although not without its detractors,[327] is the "functional method" in comparative law.[328] The basic principle of all comparative law, according to this method, is "functionality"—all other rules which determine from the choice of laws to be compared, the scope of the undertaking, and the creation of the system of comparison are to be determined according to functional terms—"[functionality] rests on what every comparatist learns . . . that the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results."[329] Some of the basic premises of the functional method are the following: (1) there is a relationship between concept and function, such that "[r]ules, which have functions or purposes, are framed in terms of concepts . . . unless concepts are themselves defined in terms of the purposes that the rules serve, they become 'doctrinal abstractions' that are obstacles to understanding the rules;"[330] (2) the meaning of "function" or "purpose" is "the end served by a rule . . . an end which accounts for its structure and its contribution to the behavior of a larger structure of which it is a part: the legal system . . .;"[331] and (3) even when there are

> deeper universal values that all societies share . . . these values are expressed in different ways. It does not follow that the legal systems of all societies . . . face the same problems. Problems that have been solved by jurists in some societies . . . have been solved elsewhere in other ways . . . .[332]

Applying this method of functionality, especially in this Part III, it should be evident that the spaces for commonality of treaty functions, adjudicatory functions, remedial functions, and institutional functions, for WTO law and investment law, respectively, appear much more diminished than others might intuitively assume. There are historical as well as policy reasons for the emergence of these distinct treaty systems, and in particular, the remedial measures within these systems.

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327. Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, 339–82 (Mathias Reimann & Reinhard Zimmermann eds., 2007). It has also been described as a "chimera, in both the theory and practice of comparative law." *See* PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 339 (1999).

328. *See* CRUZ, *supra* note 327, at 230; James Gordley, *The Functional Method*, *in* METHODS OF COMPARATIVE LAW 107–19 (Pier Giuseppe Monateri ed., 2012).

329. CRUZ, *supra* note 327, at 230-31.

330. Gordley, *supra* note 328, at 110.

331. *Id.* at 114.

332. *Id.* at 118.

Thus far, we have examined the WTO law *qua* investment law provision from a somewhat microscopic lens of treaties, constitutive decision-making processes, institutional structures and interpretive communities, and the subject-matter addressees of a State's regulatory freedom in each regime. The following Part IV attempts a brief critical historical analysis to explore the state of human rights compliance facilitated by, or accomplished under the auspices of, the WTO system (including reform areas that remain in progress), to further examine the plausibility of using WTO law as the "public policy toolbox" for the international investment treaty regime.

IV. HUMAN RIGHTS AS A WORK IN PROGRESS: THE UNCERTAIN SUCCESS OF WTO LAW'S POST-NEOLIBERAL PUBLIC POLICY PARADIGM

A. *Viewing Human Rights in the WTO as a Sociological Project*

It would be well-nigh impossible for this Part to capture the complete record of human rights compliance facilitated by the WTO (or otherwise) in nearly thirty years of its institutional existence. Indeed, the narratives of engagement of human rights in trade (and vice-versa) have been anything but linear, to the point that one can only characterize the WTO as having achieved an uncertain success in the area of facilitating human rights compliance, and ensuring that trade policies and actions of Member States do not inhibit, prevent, or impede fulfillment of their human rights obligations.[333] Andrew Lang has observed that

> [d]uring any particular historical period, both the trade and human rights regimes represent a contingent compromise between the partisans of each perspective – a compromise which evolves over time as their relative influence changes . . . each regime is composed of complex and layered social phenomena . . . classical liberalism represents only one strand in the complex and contested ideological foundations of the trade regime.[334]

He finds that the "normative orientation" of the WTO system is significantly influenced by "collective purposes" and "shared ideologies

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333. Jeff Waincymer valuably discusses the significance of interdisciplinary approaches from law, economics, political science, and philosophy to fully assess the status and prospects of the trade and human rights debate in the WTO. *See* Jeff Waincymer, *The Trade and Human Rights Debate: Introduction to an Interdisciplinary Analysis*, *in* THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS, 1–38 (Sarah Joseph et al., eds. 2009).

334. LANG, *supra* note 49, at 57–58.

which animate that regime at any particular point in time," so much so that "major re-orientations of the trade regime may not be possible without sustained contestation and destabilization of dominant ideas relating to the objectives of the regime, the purposes it serves, and the causal pathways by which it contributes to the achievement of those purposes."[335] The rise of, and resistance to, neoliberal thought in each respective regime accompanied the legal relationship between trade and human rights—in ways that reflect the legal tensions as "interventions into the political struggles *internal* to each regime."[336]

There is much that persuades in the above sociological lens for viewing the (at times institutionally-conflicting[337]) dialectic between WTO law and human rights. Certainly the body of analytical studies and experts' reports from the United Nations Office of the High Commissioner for Human Rights (OHCHR) that explores the trade-human rights linkage and implications over the past decade often articulated many concrete political and social protection concerns, concordantly with its call for WTO Member States to design comprehensive compliance of their international human obligations alongside trade liberalization commitments.[338] The bulk of these reports and studies define the key pillars of the "human rights-based approach to trade," summarized by the OHCHR as: (1) "respecting the principle of non-discrimination" by ensuring that individuals and groups are

335. *Id.* at 58.

336. *Id.* at 59.

337. One need only recall the WTO's public complaint in 2000 to the U.N. High Commissioner for Human Rights Mary Robinson regarding an expert study issued by the OHCHR on the human rights implications for globalization, and the exchanges that ensued between both institutions thereafter. *See* Someshwar Singh, *UN Human Rights Commissioner Responds to the WTO*, THIRD WORLD NETWORK (Aug. 29, 2000) http://twnside.org.sg/title/responds.htm. Institutional frictions, however, have smoothened over a decade since then. *See* Statement of U.N. High Commissioner for Human Rights Navanathem Pillay to the WTO Public Policy Forum, "Doing it Differently: Reshaping the Global Economy" (Geneva, Sept. 16, 2010) *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?News ID=10346&LangID=E.

338. *See* Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization, E/CN.4/2005/41, 23 Dec. 2004; Mainstreaming the right to development into international trade law and policy at the World Trade Organization, E/CN.4/Sub.2/2004/17, June 9, 2004; The right of everyone to the enjoyment of the highest attainable standard of physical and mental health—Mission to the World Trade Organization, E/CN.4/2004/49/Add.1, Mar. 1, 2004; Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization, E/CN.4/2004/40, Jan. 15, 2004; Human rights and trade, Submission to the 5th WTO Ministerial Conference, Cancun, Mexico, Sept. 10–14, 2003; Human rights, trade and investment, E/CN.4/Sub.2/2002/9, June 25, 2002; Globalization and its impact on the full enjoyment of human rights, E/CN.4/2002/54, Jan. 15, 2002; The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, E/CN.4/Sub.2/2001/13, June 27, 2001.

protected against overt discrimination in multilateral trade processes, as well as by ensuring that they are not excluded from deliberations or policy-making in trade; (2) "promoting popular participation" in the development of trade rules and policies through democratic consultative processes not just reserved for States but also for individual and group constituencies impacted by trade; (3) using "human rights impact assessments" to monitor the potential and real impacts of trade rules and policies on the enjoyment of human rights by individuals and groups; (4) "promoting accountability" in trade liberalization processes for individuals to have recourse, particularly on the justiciability of economic, social, and cultural rights; (5) "ensuring the promotion of corporate social responsibility initiatives" for standard practices of traders and investors; and (6) "encouraging international cooperation and assistance" that enables poorer countries to adjust to the trade process and benefit from its reform.[339]

Depending on perspective, one can either view WTO as having the ability to facilitate compliance with international human rights treaties,[340] and conversely, as ineffective in curtailing human rights violations of WTO Member States.[341] As previously discussed, Susan Ariel Aaronson noted in 2007 that there was already significant progress in the political and policy "seepage" of human rights (and a human rights consciousness) into the WTO decisions of the political organs as well as the legal/adjudicatory system under the DSU.[342] The current deadlock on substantive human rights, development, and public policy issues in the Doha Round might be enough for some to indict the WTO system for its paralysis or vulnerabilities to multilateral stalemate when it comes to addressing deeper issues of income inequalities, deficits in meaningful social participation and opportunities for enabling human rights capabilities.[343] At best, this lends a picture of the WTO

339. *See Globalization-Trade and Investment*, http://www.ohchr.org/EN/issues/Globalization/Pages/Globalizationindex.aspx (last visited Jan. 10, 2013).

340. *See generally* Marceau, *supra* note 14; Stephen Joseph Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT'L L. 2, 219–31 (2004); Pascal Lamy, *Trade and Human Rights Go Hand in Hand*, Speech of the WTO Director-General (Sept. 26, 2010), *available at* http://www.wto.org/english/news_e/sppl_e/sppl172_e.htm; Robert Howse & Ruti G. Teitel, *Beyond the Divide: the International Covenant on Economic, Social and Political Rights and the World Trade Organization*, *in* THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS 39–68(Sarah Joseph et al. eds., 2009).

341. *See* Dean Dalke, *Enforcing Human Rights through the WTO: A Critical Appraisal*, *Occasional Papers in International Trade Law and Policy*, 58 CARLETON UNIV. (2004); Virginia A. Leary, *The WTO and the Social Clause: Post-Singapore*, 8 EUR. J. INT'L L. 118 (1997).

342. Aaronson, *supra* note 199.

343. *See* Andreas Blüthner, *Trade and Human Rights at Work: Next Round Please . . .?*, *in* AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO 335–73 (Harald Hohmann ed., 2008); Ruth Bergan, *WTO Fails the Poorest – Again*, GUARDIAN (July 29, 2011), http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/29/wto-doha-fails-poo

system as a work in progress on the trade and human rights debate, where its policies and governance framework assuredly remains subject to reform.[344] What these also ultimately convey, for purposes of scrutinizing the WTO law *qua* investment law proposition, is that the WTO gridlock on these issues, borne out of its own institutional, ideological, and political experiences, neither inspires its emulation or replication in the dispersed, decentralized, and diffuse investment treaty regime.

B. *Human Rights Impact Assessments and Interdisciplinarity*

What is of more interest (and in my view also a more realistically feasible common gateway between WTO law and investment law to effectuate human rights compliance in international investment law),[345] for purposes of getting a more substantial and empirically-based perspective of WTO impacts on human rights compliance for future operational design of State policies and regulations, is the visible trend towards mainstreaming the use of human rights impact assessments (HRIAs) of trade-related policies.[346] While there is a growing body of scholarly literature that accepts the use of HRIAs, elaborates on their possible design, and explains methods for conducting them in relation to trade and development policies,[347] there is little as yet published that reports actual operational findings from HRIAs of WTO policies.[348] But

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rest-countries.

344. *See* REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE pt. I (Ernst-Ulrich Petersmann & James Harrison eds., 2005) (WTO Negotiators and Academics Analyse the Doha Development Round of the WTO: Overview and Summary of the Book).

345. Bruno Simma & Diane Desierto, *Bridging the Public Interest Divide: Committee Assistance for Investor-Host State Compliance with the ICESCR*, 10 TRANSNAT'L DISP. MGMT. 1 (2013); Diane A. Desierto, *Sovereign Policy Flexibility for Social Protection: Managing Regulatory Risks in IIAs*, Report to the Mauritius International Arbitration Conference (Dec. 2012).

346. *See* Ibrahim Salama, *Human Rights Impact Assessments of Trade-Related Policies*, *in* SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW 217–55 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

347. *See* Fabiane Baxewanos & Werner Raza, *Human Rights Impact Assessments as a New Tool for Development Policy?* (OFSE, Working Paper No. 37, 2013), *available at* http://www.oefse.at/Downloads/publikationen/WP37_Human_Rights.pdf; James Harrison, *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*, unpublished paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements (Geneva June 23–24, 2010), *available at* http://www2.warwick.ac.uk/fac/soc/law/chrp/projectss/humanrightsimpactassessments/harrison_background-hria_2010.pdf.

348. *See* Berne Declaration, Canadian Council for International Co-operation & Misereor (2010). *Human Rights Impact Assessments for Trade and Investment Agreements*, Report of the Expert Seminar (June 23–24, 2010), *available at* http://www.ccic.ca/what_we_do/Report_

there are some incipient examples of HRIA analysis already filtering somewhat into the analysis of trade agreements, such as the 2011 issuance of the U.N. Special Rapporteur on the Right to Food, Olivier de Schutter, prescribing Guiding Principles on human rights impact assessments of trade and investment agreements;[349] Canada's first official HRIA report in May 2012 on the impact of the Free Trade Agreement between Canada and the Republic of Colombia;[350] and the WTO's own public policy efforts in 2009 to conceptualize and implement a system of HRIAs for trade agreements.[351] James Harrison and Alessa Goller have pointed out problems of methodology, measurement, information reliability and data verifiability that afflict many HRIA proposals.[352] In a 2012 EJIL article, Philip Alston and Colin Gillespie proposed adapting open-source technologies to diversify and cross-verify the information gathering processes on human rights compliance.[353]

There are likewise counterpart developments within the U.N. system for the establishment of statistical and empirical databases to track State compliance with human rights, specifically including economic, social, and cultural rights. In 2006, the U.N. Office of the High Commissioner for Human Rights prepared a Report ("Indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework") in response to the requests of chairpersons of the various human rights treaty bodies.[354] The High Commissioner stressed the particular utility of setting up quantitative indicators for the task of treaty monitoring:

HRIA-seminar_2010_eng%5B1%5D.pdf; Saskia Bakker et al., *Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)*, 1 J. HUM. RTS. PRAC. 436 (2009).

349. Report of the Special Rapporteur on the right to food, Olivier de Schutter, Addendum: Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5, Human Rights Council (Dec. 19, 2011), *available at* http://www.bilaterals.org/IMG/pdf/A.HRC.19.59.Add.5_English.pdf.

350. *See* Annual Report Pursuant to the Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia (May 15, 2012), *available at* http://www.codev.org/wp/wp-content/uploads/2012/05/DFAIT_CCFTA_HR.pdf.

351. *See* WTO Public Forum 2009, *Global Problems, Global Solutions: Towards Better Global Governance*, at 60–64 (WTO 2010), *available at* http://www.wto.org/english/res_e/booksp_e/public_forum09_e.pdf.

352. James Harrison & Alessa Goller, *Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?*, 8 HUM. RTS L. REV. 587 (2008).

353. Philip Alston & Colin Gillespie, *Global Human Rights Monitoring, New Technologies, and the Politics of Information*, 23 EUR. J. INT'L. L. 1089 (2012).

354. Report on Indicators for Monitoring Compliance with International Human Rights Instruments, HRI/MC/2006/7 (May 11 2006), *available at* http://hrbaportal.org/wp-content/files/2006_Article_English.pdf.

> [I]n the context of the ongoing reform of the treaty bodies in general, and the Reporting procedure in particular, it has been argued that the use of appropriate quantitative indicators for assessing the implementation of human rights – in what is essentially a qualitative and quasi-judicial exercise – could contribute to streamlining the process, enhance its transparence, make it more effective, reduce the Reporting burden and above all improve follow-up recommendations and concluding observations, both at the committee, as well as the country, levels.[355]

The High Commissioner distinguished human rights "indicators" (*e.g.*, "specific information on the state of an event, activity, or an outcome that can be related to human rights norms and standards, that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights"),[356] from "benchmarks" (*e.g.*, "indicators that are constrained by normative or empirical considerations to have a predetermined value"), which the Committee on Economic, Social and Cultural Rights particularly favors.[357] Indicators may be quantitative or qualitative.[358] In defining the conceptual framework for human rights indicators, the High Commissioner drew attention to several methodological matters:

> First, there is a need to anchor indicators identified for a human right in the normative content of that right, as enumerated in the relevant articles of the treaties and related general comments of the committees. Secondly, it is necessary to reflect cross-cutting human rights norms or principles (such as non-discrimination and equality, indivisibility, accountability, participation and empowerment) in the choice of indicators. Thirdly, the primary focus of human rights assessment (and its value-added) is in measuring the effort that the duty-holder makes in meeting his/her obligations – irrespective of whether it is directed at promoting a right or protecting it. At the same time, it is essential to get a measure of the "intent or acceptance of" human rights standards by the State party, as well as the consolidation of its efforts, as reflected in appropriate "outcome" indicators. While such a focus recognizes an implicit linkage between the intent of a State party, its efforts in meeting those commitments and the consolidated outcomes of those efforts, the linkage may not

355. *Id.* para. 3.
356. *Id.* para. 7.
357. *Id.* para. 12.
358. *Id.* para. 8.

> always translate into a direct causal relationship between indicators for the said three stages in the implementation of a human right. This is because human rights are indivisible and interdependent such that outcomes and the efforts behind the outcomes associated with the realization of one right may, in fact, depend on the promotion and protection of other rights . . . . [S]uch a focus in measuring the implementation of human rights supports a common approach to assessing and monitoring civil and political rights, as well as economic, social and cultural rights . . . the adopted framework should be able to reflect the obligation of the duty-holder to *respect, protect,* and *fulfill* human rights.[359]

The High Commissioner then laid out a sequence for developing the conceptual framework defining indicators for substantive human rights: (1) identifying the "attributes" of a right ("limited number of characteristic attributes that facilitate the identification of appropriate indicators for monitoring the implementation of the right"[360]); (2) defining the configuration of *structural indicators* (*e.g.*, "the ratification/adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned"[361]), process indicators (*e.g.*, "relat[ing] State policy instruments to milestones that become outcome indicators, which in turn can be more directly related to the realization of human rights . . ."[362]), and *outcome indicators* (*e.g.*, "attainments, individual and collective, that reflect the status of realization of human rights in a given context . . . often a slow-moving indicator, less sensitive to capturing momentary changes than a process indicator"[363]); (3) developing sources and data-generating mechanisms (*e.g.*, socioeconomic and administrative statistics, events-based data on human rights violations[364]); and (4) imposing criteria for the selection of quantitative indicators (*e.g.*, "relevant, valid and reliable," "simple, timely and few in number," "based on objective information and data-generating mechanisms," "suitable for temporal and spatial comparison and following relevant international statistical standards," and "amenable to disaggregation in terms of sex, age and other vulnerable or marginalized population segments"[365]).

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359. *Id.* para. 13.
360. *Id.* para. 14.
361. *Id.* para. 17.
362. *Id.* para. 18.
363. *Id.* para. 19.
364. *Id.* paras. 24 & 25.
365. *Id.* para. 26.

Using the *structure-process-outcome* indicators framework, the High Commissioner has since drawn up lists of illustrative indicators on civil and political rights as well as economic, social and cultural rights, and subjected such indicators to a comprehensive validation process before international experts, members of global academia, non-governmental organizations, international organizations, and national level policy-makers.[366] Among the ICESCR rights covered in the list of illustrative indicators are the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate food, the right to adequate housing, the right to education, the right to social security, the right to work, and the right to freedom of opinion and expression.[367] The High Commissioner had also previously issued a Handbook for National Human Rights Institutions on the implementation of the ICESCR.[368] Notably, in 2012, the Office of the U.N. High Commissioner for Human Rights issued its consolidated volume, "Human Rights Indicators: A Guide to Measurement and Implementation,"[369] which further developed the *structure-process-outcome indicators* conceptual framework for determining State compliance with international human rights treaties, particularly the ICESCR.

While the nascent state of the HRIAs thus far has not lived up to the promise of their contribution to the assessment and strategic design of WTO reforms, this is at least one promising area that could yield a broader and more reliable base of information for characterizing the success or failure of the WTO in facilitating human rights compliance by its Member States. It would also aid towards enabling more human rights-compliant and consistent trade and investment policy-making by States in the future.

V. MEDIATING THE ICESCR: A HEURISTIC FOR FUNCTIONAL DECISION-MAKING IN WTO LAW AND INVESTMENT LAW

The preceding Parts II, III, and IV laid out my contextual policy arguments against the automatic reception of WTO law into investment law to address the latter's public policy quandaries. In the following

366. U.N. Office of the High Commissioner for Human Rights, *Rep. on Indicators for Promoting and Monitoring the Implementation of Human Rights*, para. 2, U.N. Doc. HRI/MC/2008/3 (June 6, 2008).

367. *Id. see* annexes to the Article.

368. U.N. Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, U.N. Doc. HR/P/PT/12, U.N. Sales No. E.04.XIV.8 (2005).

369. U.N. Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, U.N. Doc. HR/PUB/12/5 (2012).

subsections, I contrast some differences in the proposed use of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) to justify State regulatory freedoms in WTO law and investment law. Perhaps more than any other human rights treaty, ICESCR obligations stand to shape and directly affect the content and substance of a State's social protection agenda. States are more than likely to find that public policy objectives, for which they seek to maintain regulatory freedom in either WTO law or investment law, are already mirrored within ICESCR obligations. To give a concrete example of the limits to the WTO law *qua* investment law proposition (or the supposed usefulness of WTO law to public policy issues in investment law), I point out how there have been material differences in the mediation of the ICESCR in WTO law (which reflects much of the same public policy objectives asserted to justify a State's regulatory freedom), as opposed to international investment law. These differences will endure, I submit, so long as the design of treaty texts and the composition of the epistemic and interpretive communities I described in Part II, remain divergent between the WTO treaty regime and the investment treaty regime.

A. *ICESCR and WTO Law*

The record and practice of WTO law has shown that, despite the interpretive openness of WTO treaty texts to public policy objectives and the broad judicial function wielded by the Appellate Body and the dispute settlement panels, the ICESCR has not figured significantly within the nearly thirty-year *acquis* of WTO law and jurisprudence, although a few Member States (notably, Mauritius and Brazil) have specifically invoked the ICESCR to justify State regulatory freedom to protect non-trade concerns.[370] I suggest that this is less about the actual salience of the ICESCR to a WTO litigation, than it is a trend exhibiting a more conservative tendency on the part of States against putting the ICESCR into practice to lend substantive content to public policies already textually-referred to in WTO treaty provisions, such as GATT Article XX, GATS Article XIV, SPS Agreement Articles 2.1 and 2.2, TBT Agreement Article 2.2. This view accords with Holger Hestermeyer's recent findings on the possible uses of the ICESCR

370. *See* Caroline Dommen, *Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law*, *in* INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 121, 127 (Frederick M. Abbott et al. eds., 2006) (citing Brazil's leadership efforts in having a WTO resolution adopted on access to essential medicines against pandemics such as HIV/AIDS, and Mauritius' reference to the ICESCR to support its position that the WTO Agreement on Agriculture should allow recognition of non-trade concerns.).

within the WTO political organs and the DSU.[371] Acknowledging that the overwhelming majority of WTO Member States are also parties to the ICESCR, in his investigation of WTO law and practice, Hestermeyer found that: (1) the WTO itself is not bound by the ICESCR even if its Member States are individually bound; (2) the ICESCR's role in WTO dispute settlement is limited since it cannot be directly enforced or applied by the panels or the Appellate Body given their jurisdictional competences under the DSU, but that the ICESCR may be used to interpret WTO treaty norms in accordance with "customary rules of interpretation of public international law" permitted under Article 3.2 of the DSU; (3) in practice, States have not been lodging arguments based on the ICESCR when they avail of the extended litigation process under the DSU, preferring instead to specify WTO treaty norms that already refer to public policy objectives; and (4) except for a few instances involving labor rights and health rights, the political organs of the WTO have rarely referred to economic, social and cultural rights in their decisions.[372]

Certainly, such observations regarding WTO law and jurisprudential practices do not yet confirm the possibilities for using the ICESCR in WTO practices that Robert Howse and Ruti Teitel have hypothesized, finding that "the [WTO] treaties themselves have been structured in many ways so as to ensure that the means adopted in the WTO to achieve economic goals are not inconsistent with the human purposes and values intrinsic to the norms in the ICESCR."[373] Compatibilities between the Preamble to the WTO Agreement and Article 2(1) of the ICESCR,[374] for example, teleologically support the human security notion embedded in the ICESCR, which creates a "normative floor for the interpretation and application of the WTO treaties . . ."[375] While they concede hurdles to the interpretation of WTO treaty provisions that specifically build in policy flexibilities (*e.g.*, GATT Article XX), Howse and Teitel carefully demonstrate that States' regulatory freedoms in WTO law to vindicate ICESCR obligations could be harnessed through

371. Holger P. Hestermeyer, *Economic, Social, and Cultural Rights in the World Trade Organization: Legal Aspects and Reality*, pt. 3, http://www.boletinderecho.udp.cl/docs/Paper Hestermeyer.pdf (last visited Jan. 10, 2013).

372. *Id.*; on the salience of the ICESCR to the WTO, see Fons Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations*, 11 MAX PLANCK Y.B. U.N. 359, 359–90, 372–75 (2007).

373. *Hestermeyer*, *supra* note 371; Howse & Teitel, *supra* note 340, at 7. The position resembles a famous 2000 policy paper: Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, *in* HUMAN RIGHTS IN DEVELOPMENT YEARBOOK: THE MILLENNIUM EDITION 51, 52–82 (Hugo Stokke & Arne Tostensen eds., 2001).

374. Howse & Teitel, *supra* note 340, at 42–43.

375. *Id.* at 47.

programmatic adjustments of trade policies in ways that functionally operationalize ICESCR rights to work, health, and food.[376]

While one can readily concur with Howse and Teitel that the ICESCR could usefully furnish substantive guidance to WTO dispute settlement panels and the Appellate Body regarding the "normative floor" or interpretive baseline to give meaning to economic, social, and cultural rights to "health," "labor," environmental protection, and other public policies already textually-referenced in WTO treaty provisions such as GATT Article XX, GATS Article XIV, SPS Agreement Articles 2.1 and 2.2, TBT Agreement Article 2.2, it is indeed curious, as Holgermeyer found in his survey, that States have not been marshalling ICESCR-based arguments in the WTO dispute settlement process, and that likewise, tribunals have not been independently referring to the ICESCR for purposes of treaty interpretation. It is quite possible that this is a phenomenon that could have arisen due to early difficulties in framing the ICESCR-based justification within the context of litigated issues in a trade dispute. Over a decade ago, Jose Alvarez pointed out several difficulties in setting up the ICESCR-driven interpretation of trade treaty norms within the framework of a WTO litigation as the authoritative method of interpretation:[377] (1) the ICESCR is not a treaty that subordinates WTO treaties, in the sense of normative hierarchy provided for in Article 103 of the U.N. Charter;[378] (2) the ICESCR does not speak to the issue of NGO participation within the WTO (which, at that time, was the immediate policy debate);[379] (3) *lex specialis* rules militate against automatically applying human rights norms to avail of treaty-based remedies;[380] and (4) the lack of precision of ICESCR obligations that make their application in adjudicatory settings difficult.[381] To the extent that States have preferred to hew more closely to WTO treaty language and the body of DSU jurisprudence interpreting such language, the present dearth of ICESCR references is quite understandable.

However, it is also possible that States have had some difficulty in marshalling ICESCR-based arguments in trade disputes over the last thirty years, precisely because the substantive content of ICESCR rights was still in the process of development by the Committee on Economic, Social, and Cultural Rights (hereafter, the "Committee") at the same time. Unlike other human rights treaty monitoring bodies in the U.N.

376. *Id.* at 50–68.

377. Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime,* 7 WIDENER L. SYMP. J. 1, 5 (2001).

378. *Id.* at 6–7.

379. *Id.* at 8.

380. *Id.* at 9–10.

381. *Id.* at 11–12.

system, the Committee[382] is a creation of the Economic and Social Council—the latter being the actual body specifically designated under the ICESCR to conduct treaty monitoring, manage the State reporting process, and issue recommendations to the General Assembly on measures taken and progress made to achieve compliance with the ICESCR.[383] The Committee has thus far issued only 21 General Comments between 1989 to 2009, with those most pertinent to the interpretation of public policy objectives in WTO treaties (such as the right to take part in cultural life,[384] the right to work,[385] non-discrimination[386] and equal rights to enjoy all economic, social and cultural rights,[387] right to water,[388] right to highest attainable standard of health[389]) issued only within the last decade. Neither has it been able to develop its own "jurisprudence" through an inter-State or individual communications or complaints mechanism. The Optional Protocol to the ICESCR, which creates that precise mechanism for individuals or groups asserting violations of their ICESCR rights, was only concluded by General Assembly resolution in 2008,[390] and entered into force only on February 5, 2013 after having achieved the tenth ratification (from Uruguay) necessary for the Optional Protocol to enter into force.[391] One thus cannot rule out the future possibility of State recourse to the ICESCR, especially as the Committee takes on a broader function in providing authoritative guidance, not just in the State reportage system but now adjudicating issues that apply the ICESCR in the individual communications procedure. In any event, using the ICESCR in multiple avenues in WTO law is a matter of framing the former properly into the

382. ESCOR Res. 1985/17, U.N. Doc. E/RES/1985/17 (May 28, 1985).

383. International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) arts. 18–19 [hereinafter ICESCR].

384. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 21, U.N. Doc. E/C.12/GC/21 (2009).

385. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 18, U.N. Doc. E/C.12/GC/18 (2005).

386. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 20, U.N. Doc. E/C.12/GC/20 (2009).

387. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 16, U.N. Doc. E/C.12/2005/3 (2005).

388. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 15, U.N. Doc. E/C.12/2002/11 (2002).

389. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 14, U.N. Doc. E/C.12/2000/4 (2000).

390. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

391. *See* Statement, Assistant Secretary-General Ivan Simonovic, Deposit of the 10th instrument of ratification of the OP-ICESCR (Feb. 5, 2013), http://www.ohchr.org/Documents/HRBodies/CESCR/ASGStatement10thRratification.doc.

latter, from interpretively testing the permeable public policy language in the WTO treaties and agreements,[392] to plumbing the numerous sources of WTO law which include not just WTO treaties but also acts of WTO organs (including waivers and decisions of specialized WTO committees, Ministerial Conference or General Council interpretations of WTO agreements, and DSB adoptions of Appellate Body and panel reports) as well as the canonical sources of general international law.[393] As rightly observed in a report to the Economic and Social Council, "[t]he WTO Agreements do not say anything about the type of policies which a government may wish to implement to bring about the fulfillment of human rights . . ."[394]

B. *ICESCR and Investment Law*

Similar to WTO law, the ICESCR has not yet been invoked in investor-State disputes as an independent justification for a State's exercise of regulatory freedom, or for the framing of host State policies under an IIA. Mediating the ICESCR into investment law will not be framed in the same way as shown in the previous section in WTO law. Unlike WTO law that has treaty texts, sources of law, and an interpretive and institutional *acquis* that could be harnessed to infuse ICESCR-based substantive and interpretive content to the public policy language in WTO treaties and the acts of the WTO political organs, the international investment law system, as demonstrated in Part II, does not have these textual and institutional gateways.

In other works,[395] I have shown several limitations to, and prospects of, using the ICESCR as an independent normative defense against international investment treaty obligations: (1) a host State prioritizing the ICESCR obligation over an investment treaty obligation finds little practical utility in the *lex posterior* rule on conflict of treaties codified in Article 30 of the Vienna Convention on the Law of Treaties; (2) using the ICESCR as a "relevant rule of international law" within Article 31(3)(c) of the Vienna Convention Law of Treaties could apply in "legality clauses," where it can be shown that the ICESCR is part of the corpus of host State laws that should be complied with to qualify an "investment" as one covered by the protections of an investment treaty;

392. *See, e.g.*, exceptions clauses in GATT, art. XX,; SPS arts. 2.1–2.2; TBT Agreement art. 2.2; and the safeguard provisions in GATT arts. VI, XII, XVIII, XIX, XXVIII, & XXV.

393. PAUWELYN, *supra* note 74, at 40–51, 459–60.

394. Hoe Lim, *Trade and Human Rights: What's at Issue?* (Working paper submitted to ESCOR on Substantive Issues Arising in the Implementation of the IESCR: International Consultation 'Economic, Social and Cultural Rights in the Development Activities of International Institutions' Organized in Co-operation with the High Council for International Cooperation, U.N. Doc. E/C.12/2001/WP.2) (Apr. 10, 2001).

395. *See generally supra* note 132.

and (3) in a situation (such as an economic crisis) where neither the ICESCR obligation nor the investment treaty obligation can be performed completely without undermining or imperiling the other, the authoritative decision-maker has to embrace the "principle of political decision" and clarify its decision-making calculus to assess which "breach" it would incur given the consequences of international responsibility arising from the breach of either obligation, the institutional and political dynamics of relevant internal and external constituencies, as well as the community expectations unique to the host State. A political decision to "breach" an investment treaty obligation to provide compensation, for example, could be better managed if that State's authoritative decision-makers could accurately forecast the commercial and political risks of the arbitral process, the likelihood of economic recovery and its estimated duration, and the margins of tolerance of the domestic and international political elites for a host State deliberately choosing this breach.

Given the diffuse (and mostly unreformed or amended) language of international investment agreements (IIAs), the diversity of its communities of law-appliers, and the lack of a centralizing political organ (such as the WTO) that could facilitate dialogue on ICESCR compliance within the design of IIAs, I anticipate that much of the efforts (at least in the short-term) towards designing IIAs with a view to ensuring ICESCR compliance would very likely be unilateral (at best regional) initiatives, set in accordance with the negotiation timetables of individual States, their respective political preferences and foreign policy agendas, and the nature of their current level of ICESCR compliance as ascertained under the State reporting process facilitated by the Committee. To this end, Bruno Simma and I have recommended that the Committee take on a more involved role in aiding unilateral State efforts to maintain ICESCR compliance alongside the design and implementation of their IIAs: (1) the Committee could extend technical assistance to States negotiating or designing IIAs, model investment contracts, template prospectuses, terms of reference and other significant due diligence documentation for foreign investment contracts; (2) the Committee could assist host States in designing an ICESCR impact assessment method that could be applied during the negotiation process between foreign investors and host States; (3) the Committee could contribute its legal analysis as a distinct kind of *amicus* to investor-State arbitrations that involve complex public interests and ICESCR rights; (4) the Committee could contribute its fact-finding reports in the investor-State arbitral process, insofar as ICESCR-related conduct of host States and/or investors are concerned (and with the Optional Protocol to the ICESCR having entered into force on February 5, 2013, the Committee has the functional capacity to

conduct such fact-finding); and (5) the information available under the Committee's State reporting process and periodic review could be made accessible to determine and anticipate the State's institutional capacities and resource constraints insofar as ICESCR compliance is concerned, leading to a better understanding of the risk parameters of an investment.[396]

I have also proposed recently[397] that the ICESCR might be strategically deployed in a contextual manner—to redefine the regulatory risks of an investment in ways that are more in accord with a State's economic and social realities and institutional constraints. I showed how the due diligence process can be revised to identify areas of host State policy flexibility that should already be anticipated during the life of an investment as part of ICESCR compliance, especially with host States' ICESCR compliance increasingly being susceptible to empirical investigation and inclusion in investors' regulatory risk assessments. The assessment of regulatory risks in the due diligence process should also consider the actual ICESCR impacts on specific forms of investment. I also contended that the ICESCR may have an interpretive function for IIA standards of treatment where a textual nexus is established, and in the alternative, the ICESCR may also have a significant adjusting impact to the process of valuing compensation.[398] Finally, I have also submitted that where an investor's home State is a party both to the ICESCR as well as to an IIA, such State assumes counterpart duties to ensure the extraterritorial application of the ICESCR, including in particular the duty to ensure that its (natural or juridical) nationals do not act in ways that cause other States to violate the fundamental obligation to "respect," "protect" or "fulfill" ICESCR rights. Even if they do not participate in the investor-State dispute settlement mechanism, home States still have significant roles to play in voluntarily ensuring ICESCR compliance within the international investment treaty system, by continuing to exercise some oversight authority over the conduct of their nationals in other States. Regulatory predictability does not equate to static host State regulations, and investors cannot easily assume that legislation and regulations at the time of the establishment of an investment will remain, and be implemented in, completely the same manner, in perpetuity. The ordinary workings of government recognize adaptation, amendment,

396. Simma & Desierto, s*upra* note 345, at 4–6.

397. Desierto, *supra* note 345, at 92–114.

398. For new proposals to recast the valuation process, see Desierto, *supra* note 306; for a new mathematical model recasting the Capital Asset Pricing Model used in investor-State arbitrations to take into account ICESCR compliance, see Diane A. Desierto & Desiree A. Desierto, *Investment Pricing and Social Protection: A Proposal for an ICESCR-Adjusted Capital Asset Pricing Model*, 28 ICSID REV. 405 (2013).

and change, and what is most important is to establish a legal framework within which the investor can adequately, sufficiently, and transparently track and predict such regulatory changes as would affect the investment. It is in this light that I propose that the expected policy uncertainty arising from host States' compliance with dynamic ICESCR obligations be embraced, and framed uniquely, for international investment law.

CONCLUSION: RESTRAINING A FORCED JOINDER

There will always be a seductive resonance to having a unifying "principle of systemic integration"—the idea that "[r]eference to other rules of international law in the course of interpreting a treaty is an everyday, often unconscious, part of the interpretation process."[399] Some years ago, then-President of the International Court of Justice Dame Rosalyn Higgins cautioned that "we should not exaggerate the phenomenon of fragmentation," and said that she was "skeptical" that the invocation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties "is the overall answer to systemic fragmentation," because it "brings with it as many problems as it resolves."[400] This caution holds true for the proposition that WTO law is somehow always instructive for investment law, especially for the latter's issues on State regulatory freedom to vindicate public policies. Caution is justified—even inevitable—given the contemporary reality of how States thus far have chosen to bind themselves to observe different types of conduct across various spheres of international economic relations. Left unproven, the assumption that States intend economic transactions governed in one sphere to be equally, identically, or similarly governed for another economic transaction, and that they also intend their agents (courts, tribunals, political bodies) to look beyond the immediate rules States establish to govern a particular economic transaction, can wield havoc and instability to functional decision-making processes that have been purposely designed and built into distinct treaty systems. Not only is this a question of "fit," but more importantly, it is a question of "outcome." Grafting WTO law into investment law does not ensure that the public policy problems in the latter would indeed be successfully resolved.

At this point, it should also be clear that mere normative or transactional resemblance does not provide satisfactory criteria for

399. Campbell Mclachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 280 (2005).

400. Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench,* 55 INT'L & COMP. L.Q. 791, 796, 803–04 (2006).

transposing WTO law into investment law. As this Article has shown, the public policy language in WTO treaties, and corresponding DSB interpretations, collectively evolved according to a specific internal logic that bridges a "non-trade concern" (*e.g.*, human rights compliance) to a trade liberalization and market access objective. This logic developed in tandem with sociological and ideological shifts within the WTO community—expectations of State regulatory freedom, as such, are shaped by what the WTO Member States have negotiated amongst themselves, and what public policy issues WTO Member States have also been pressed to respond to within the political levers of the WTO institutional machinery. Waivers for establishing a certification process for conflict diamonds and for enabling access to essential medicines through compulsory licensing represent hard-fought political battles within the WTO system, but they do not encompass the full range of human rights concerns that States may harbor when they seek to defend their policy spaces. As such, what States may understand by "necessity" in relation to a domestic policy measure asserted against a market access commitment, is not automatically what they may understand when they design a "necessary measure or measure not precluded" for an investment transaction within their own jurisdiction. The institutional and interpretive complexity in WTO law has to be fully grasped and engaged, to enable one to draw feasible, transparent, and acceptable criteria for the latter's effective infusion into investment law to accomplish a shared objective of human rights compliance. The responsibilities of treaty negotiators, State policy-makers, law-appliers, and other authoritative decision-makers demand no less than a sustained effort to wed doctrinal rigor with our political sensibilities.

To date, the WTO law *qua* investment law proposition remains a forced joinder of treaty regimes and institutions that does not serve the broader objective of reaching better-considered defenses that uphold a State's regulatory freedom to vindicate public policy or human rights concerns. At best, the proposition gives us a straw argument that may appear to contribute policy analysis, but ultimately paralyzes us from thinking more laterally and deeply on the actual reform processes and suitable proposals for international investment law to accommodate and fully engage public policy and human rights alongside investment obligations. It should be a sobering reality that human rights and public policies in the trading system remain very much a work in progress, and advocates themselves concede that their strategic success depends on their effective understanding and creative use of WTO institutions, processes, interests, and constituencies. That is one analogy we can helpfully adopt as we design and tailor our public policy solutions for States, individuals, and groups in the diverse, diffuse, and dispersed international investment system.

JUST WAR AND THE ROMAN CATHOLIC LIFE ETHIC

Marvin Lim[*]

INTRODUCTION

Among mainstream religious and secular political groups, the Roman Catholic Church takes one of the firmest positions on protecting human life. Responding to what Pope John Paul II called the global "culture of death" that has developed since the mid-20th century,[1] the

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1. In his famous cyclical *Evangelium Vitae* ("The Gospel of Life"), Pope John Paul II described the "culture of death" as

Church's Canon Law and Catechism state that issues such as abortion, euthanasia, capital punishment, and war demand a consistent application of moral principles valuing the sanctity of each and every human life, above all other considerations.[2] These principles forbid the intentional ending of lives, especially of innocent people, in all but the most limited circumstances.[3] Influential American Cardinal Joseph Bernardin notably dubbed the Church's position as a "consistent ethic of life."[4]

Modern just war theory, which effectively originated in the Church with St. Augustine and St. Thomas of Aquinas, is one embodiment of the Church's broader consistent life ethic. Like its positions on abortion, euthanasia, and capital punishment, the Church firmly curbs the circumstances in which people can morally engage in this activity.[5] Beyond discussing principles exclusive to the unique circumstance of war, often the Church has explicitly connected its ethical positions on war with its position on other issues where life's sanctity is also at stake. Beyond the Church's formal Canon Law and Catechism, one of the most notable examples is the famous 1983 pastoral letter on war and peace authored by the U.S. Conference of Catholic Bishops (USCCB).[6] In the midst of making significant attempts to steer the Church's position against nuclear weapons, this statement deftly connected war to

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> a war of the powerful against the weak: a life which would require greater acceptance, love and care is considered useless, or held to be an intolerable burden, and is therefore rejected in one way or another. A person who, because of illness, handicap or, more simply, just by existing, compromises the well-being or life-style of those who are more favoured tends to be looked upon as an enemy to be resisted or eliminated. In this way a kind of "conspiracy against life" is unleashed.

John Paul II, *Evangelium Vitae,* CATHOLIC-PAGES.COM (Mar. 25, 1995), ¶ 12, *available at* http://www.catholic-pages.com/documents/evangelium_vitae.pdf.

2. *See Catechism of the Catholic Church*, STGABRIELPARISH.CA (2d ed.) pt. 3, § 2, ch. 2, art. 5, *available at* http://stgabrielparish.ca/gallery.2/documents/ [hereinafter *Catechism*]. *See infra* Part I for discussion.

3. *See id.*

4. Cardinal Joseph Bernardin, *A Consistent Life Ethic: An American-Catholic Dialogue*, PRIESTS FOR LIFE (Dec. 6, 1983), *available at* http://www.priestsforlife.org/magisterium/bernardingannon.html; *see also* Sidney Callahan, *The Consistent Life Ethic*, 2 U. ST. THOMAS L.J. 272 (2005); John L. Carr, *The Consistent Life Ethic: A Look Back, A Look Around, A Look Ahead*, 2 U. ST. THOMAS L.J. 256 (2005) (exploring the history of this ethic); J. Stephen Cleghorn, *Respect for Life: Research Notes on Cardinal Bernadin's "Seamless Garment*," 28 REV. RELIGIOUS RES. 129, 138–39 (1986); Susan Frelich Appleton, *Unraveling the "Seamless Garment": Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 294 (2005); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

5. *See supra* note 2 and accompanying text.

6. U.S. CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE (19th ed. 2000) [hereinafter USCCB].

the Church's anti-abortion stance, distinguishing unintended loss of innocent life during war from intended killing of a fetus.[7]

Despite the Church's own attempts to connect its position on war to other issues, outside scholarship on the Church's just war doctrine, whether praising or criticizing this doctrine, has done little to analyze it within the context of the Church's broader consistent life ethic. Similarly, analysis of the Church's position on issues like abortion has done little to connect these issues systematically to just war theory, even as scholarship has often compared the Church's positions on abortion, euthanasia, and capital punishment.[8] Such analysis is especially important in light of the fact that, as the Church itself concedes, just war principles like "proportionality" and "discrimination," though definite in theory, are difficult to apply in practice.[9] Consequently, existing scholarship misses the potential for the Church's broader life ethic to inform somewhat nebulous just war principles.

Even more importantly, this scholarship has failed to appreciate that, within the twentieth and twenty-first centuries, and particularly since the advent of global terrorism and emerging military technologies, the Church's liberal application of just war theory has potentially threatened the harmony between just war doctrine and its broader life ethic—an ethic that has become more restrictive despite a similar emergence of technologies that arguably improve bioethical and other life-and-death decisions outside the warfare context. In particular, the Church has arguably sanctioned many military actions that, though technically adhering to just war principles, contravene principles found in its doctrine on other issues where life is at stake. Beyond any implications these inconsistencies might have for the Church specifically, they highlight a much broader sociopolitical and legal tension between an enduringly popular theory of international warfare and the strictures placed on the human right to life in non-warfare contexts.

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7. *Id*. ¶¶ 285–89. The pastoral letter states that

> even justifiable defense against aggression may result in the indirect or unintended loss of innocent human lives. This is tragic, but may conceivably be proportionate to the values defended. Nothing, however, can justify direct attack on innocent human life, in or out of warfare. Abortion is precisely such an attack.

Id. ¶ 286.

8. One exception is a piece by Mary C. Segers, which notes the "inconsistency gap" between the USCCB's qualified position on nuclear deterrence versus its unqualified rejection of abortion as morally impermissible. Mary C. Segers, *The Catholic Bishops' Pastoral Letter on War and Peace: A Feminist Perspective*, 11 FEMINIST STUD. 619 (1985). *See supra* note 2 and accompanying text.

9. *See, e.g.*, USCCB, *supra* note 6, ¶¶ 98, 184 (conceding that concepts such as these are "difficult criterion to apply").

Recognizing this gap in the literature, this Article will argue that the Church's actual application of just war doctrine has indeed contravened its broader, otherwise extremely robust ethic of life. This Article makes this argument by proceeding in three parts. Part I introduces the Church's doctrine on life, as expressed most explicitly in its Canon Law on Sanctions and its Catechism on the Fifth Commandment ("Thou shalt not kill"). Part II explores three specific areas in which the Church's application of just war doctrine clashes with principles located in its broader life ethic. Finally, Part III discusses the implications of these inconsistencies for the Church's future development of its just war doctrine and its broader life ethic, with an eye toward how to harmonize the two. It recognizes that the Church is all but certain to continue adhering broadly to its positions on certain issues like abortion. Nevertheless, there remain ways for these positions and applications of just war theory to converge. Doing so, the Church can better legitimize its seemingly over-formalistic principles.

I. THE ROMAN CATHOLIC CHURCH'S POSITION ON LIFE

The most basic expression of the Church's position on life, including on just war doctrine, is located in its Code of Canon Law on Sanctions, which enumerates punishment for infractions of the Canon.[10] As Canon 1397 states, "A person who commits a homicide or who kidnaps, detains, mutilates, or gravely wounds a person by force or fraud is to be punished."[11] The Code defines exceptions to this provision, of which Canon 1323 is most salient: excepted from punishment for violation of 1397 is "a person who acted within the limits of due moderation against an unjust aggressor for the sake of legitimate self-defense or defense of another."[12] How the Church interprets this provision forms the crux of its doctrine on just war and other life issues.[13]

The Catechism of the Catholic Church, in its article on the Fifth Commandment, provides more content to the Canon and encapsulates the Church's broad position on life.[14] From its very first line, this Article strongly stresses the sacredness of life:

> Human life is sacred because from its beginning it involves the creative action of God and it remains forever in a special relationship with the Creator, who is its sole end. God alone is the

10. 1983 CODE cc.1311–99.

11. *Id.* c. 1397.

12. *Id.* c. 1323.

13. One other Canon is worth mentioning here: Canon 1398, which states that "[a] person who actually procures an abortion incurs a *latae sententiae* excommunication." *Id.* c. 1398.

14. *See Catechism*, *supra* note 2.

> Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being.[15]

The principle of the inviolability of life informs the Church's position with respect to specific issues such as war, homicide, torture, abortions and sterilizations, capital punishment, and even organ transplantation, all of which are addressed in the article on the Fifth Commandment.[16] At the same time, the Church recognizes moral distinctions between these different issues, allowing for life-taking more permissively in some circumstances than in others. With this in mind, this Part illuminates the Church's position on four of these issues in particular: abortion, euthanasia, capital punishment, and war. It explores the principles that exemplify how the Church unifies its positions under a consistent life ethic. At the same time, it explores the principles that show how the Church makes subtle ethical distinctions between various circumstances where life is at stake.

A. *Abortion and Euthanasia*

Flowing from its declaration that life is inviolable "from its beginning until its end" and that intentionally taking innocent life is absolutely impermissible, the Church assumes a rigid stance on abortion and euthanasia.[17] Addressing abortion specifically, the Catechism states: "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life."[18]

The Church's position on abortion tracks the principles of St. Thomas of Aquinas's double-effect doctrine, which distinguishes between intended good effects of an action and unintended but foreseen evil effects of the same action.[19] An action that has both types of effects may be licit if it meets four principles:

> The immediate action itself must be good or indifferent. It must not be intrinsically evil.
>
> The foreseen evil effect itself must not be intended.

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15. *See id.* ¶ 2258.
16. *See id. passim*.
17. *Id.*
18. *Id*. ¶ 2270 (citation omitted).
19. Thomas Aquinas, *Summa Theologiae*, IIa–IIae Q. 64, art. 7 [hereinafter *Summa*].

> The intended good effect must not be an effect of the evil, but produced directly by the immediate action.
>
> The intended good effect must be commensurate with the foreseen evil effect.[20]

With respect to the first criterion, the Catechism states: "Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable."[21] Pope John Paul II's historic encyclical *Evangelium Vitae ("The Gospel of Life*"), which describes in greater depth the history of the Church's "unchanged and unchangeable" position, states further:

> The moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder and, in particular, when we consider the specific elements involved. The one eliminated is a human being at the very beginning of life. No one more absolutely innocent could be imagined. In no way could this human being ever be considered an aggressor, much less an unjust aggressor. . . .[22]

"This doctrine is based upon the natural law and upon the written Word of God"—and "[n]o circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit, since it is contrary to the Law of God which is written in every human heart, knowable by reason itself, and proclaimed by the Church."[23] Even if one is not personally confident that a fetus is a human being, the Church argues:

> [W]hat is at stake is so important that, from the standpoint of moral obligation, the mere probability that a human person is involved would suffice to justify an absolutely clear prohibition of any intervention aimed at killing a human embryo. Precisely for this reason, *over and above all scientific debates and those philosophical affirmations to which the Magisterium has not expressly committed itself*, the Church has always taught and continues to teach that the result of human procreation, from the first moment of its existence, must be guaranteed that unconditional respect which is morally due to the human being in

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20. T.A. CAVANAUGH, DOUBLE-EFFECT REASONING: DOING GOOD AND AVOIDING EVIL 26 (Oliver O'Donovan ed., 2006).

21. *Catechism*, *supra* note 2, ¶ 2271.

22. *Evangelium Vitae*, *supra* note 1, ¶ 58.

23. *Id.* ¶ 62.

his or her totality and unity as body and spirit.[24]

With respect to the other double-effect criteria, the Church acknowledges the difficulties faced by women contemplating abortion. However, it ultimately argues that "[d]irect abortion, that is to say, abortion willed *either as an end or a means*, is gravely contrary to the moral law."[25] Abortion cannot be intended as the end in itself (the second criterion), nor as a means toward another end (the third criterion), such as a mother's desire "to protect certain important values such as her own health or a decent standard of living for the other members of the family" or to ensure a good quality of life for the yet-unborn baby itself.[26] As the *Evangelium Vitae* states, "these reasons and others like them, however, serious and tragic, can never justify the deliberate killing of an innocent human being."[27] Thus, abortion also can never meet the fourth criterion.

At the other end of the lifespan, the Church rejects euthanasia and assisted suicide for very similar reasons. This longstanding stance begins from the proposition that suicide itself is a "gravely evil choice," one that "so radically contradicts the innate inclination to life" and "represents a rejection of God's absolute sovereignty over life and death."[28] Thus, euthanasia and assisted suicide themselves are gravely immoral acts (the first criterion).[29] Furthermore, "an act or omission which, of itself or by intention, causes death in order to eliminate suffering constitutes a murder gravely contrary to the dignity of the human person and to the respect due to the living God" (the second and third criteria).[30] "What really happens in this case is that the individual is overcome and crushed by a death deprived of any prospect of meaning or hope."[31]As the Church states:

> Even when not motivated by a selfish refusal to be burdened with the life of someone who is suffering, euthanasia must be called a false mercy, and indeed a disturbing "perversion" of mercy. True "compassion" leads to sharing another's pain; it does not kill the person whose suffering we cannot bear [the fourth criterion, as well as the first again].[32]

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24. *Id.* ¶ 60 (emphasis added).
25. *Catechism*, *supra* note 2, ¶ 2271 (emphasis added).
26. *Evangelium Vitae*, *supra* note 1, ¶ 58.
27. *Id.*
28. *Id.* ¶ 66.
29. *See Catechism*, *supra* note 2, ¶¶ 2270–83.
30. *Id.* ¶ 2277.
31. *Evangelium Vitae*, *supra* note 1, ¶ 15.
32. *Id.* ¶ 66.

B. *Capital Punishment*

The Catechism of the Church also takes a strong stance against capital punishment. However, this position differs from abortion and euthanasia in one crucial respect: it does not consider capital punishment an intrinsically evil act. "Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor."[33] The Catechism justifies the immediate action of self-defense as such:

> Love toward oneself remains a fundamental principle of morality. Therefore, it is legitimate to insist on respect for one's own right to life . . . . Nor is it necessary for salvation that a man omit the act of moderate self-defense to avoid killing the other man, since one is bound to take more care of one's own life than of another's.[34]

The Catechism further states that "[l]egitimate defence can be not only a right but a grave duty for someone responsible for another's life."[35] It is notable that these propositions remain true even "though [the aggressor himself] may not be morally responsible because of a lack of the use of reason."[36] Thus, because capital punishment has the potential purpose of self-defense, it is not an intrinsically evil act.

Nevertheless, over the course of its history and particularly since the mid-twentieth century,[37] the Church has come to restrict severely when capital punishment may be used even for this purpose. As the Catechism states, "[If] non-lethal means are sufficient to defend and protect people's safety from the aggressor, [then] authority will limit itself to such means."[38] "Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime . . . the cases in which the execution of the offender is an absolute necessity are very rare, *if not practically nonexistent*."[39] Should any circumstance exist where capital punishment is proportionate and necessary, it could

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33. *Catechism*, *supra* note 2, ¶ 2267.

34. *Id*. ¶ 2264. As the *Evangelium Vitae* confirms, "the intrinsic value of life and the duty to love oneself no less than others are the basis of a true right to self-defense." *Evangelium Vitae*, *supra* note 1, ¶ 55.

35. *Catechism*, *supra* note 2, ¶ 2265.

36. *Evangelium Vitae*, *supra* note 1, ¶ 55.

37. *See, e.g.*, E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION (2003).

38. *Catechism*, *supra* note 2, ¶ 2267.

39. *Id.* (emphasis added).

meet the other criteria of double-effect beyond being an intrinsically good or neutral action. The preservation of life, not the killing of the aggressor would be the intended good (second criterion), and that good would be produced by the immediate action, not any evil effect of that action (third criterion).[40] However, in current practice, such circumstances may be few.

C. *Just War*

Developed by Catholic theologians St. Augustine and St. Thomas of Aquinas, traditional just war theory continues to form the backbone of the Church's Catechism on war. The Catechism lays out "strict conditions for legitimate defense by military force,"[41] conditions that perfectly track the *jus ad bellum* principles of just war doctrine:

> The damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain. [just cause]
>
> All other means of putting an end to it must have been shown to be impractical or ineffective. [last resort]
>
> There must be serious prospects of success. [probability of success]
>
> The use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modem means of destruction weighs very heavily in evaluating this condition. [macro-proportionality][42]

Although not explicitly within its Catechism, the Church has also adopted the *jus in bello* principles of just war doctrine in other writings. In particular, Church doctrine requires that any given military action intentionally target only combatants (discrimination) and are waged only if foreseen non-combatant injuries do not clearly exceed the anticipated military advantage (micro-proportionality).[43]

These principles are similar to those the Church has adopted in other areas of its life ethic. Just cause dovetails with the idea that, as with capital punishment, the legitimate self-defense rationale saves war from being an intrinsically evil action that violates the first criterion of

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40. *See Summa*, *supra* note 19, Q. 64, art. 7.
41. *Id.*
42. *Catechism*, *supra* note 2, ¶ 2309.
43. *See, e.g.*, USCCB, *supra* note 6.

double-effect.[44] In fact, similar to capital punishment, the Church states that self-defense in the context of war is not only a right, but a duty, one that includes a "duty to impose *on citizens* the obligations necessary for national defense."[45] Proportionality, both in the *jus ad bellum* and *jus in bello* sense, complements the proportionality prong of the double-effect doctrine, as do last resort and probability of success.[46] Finally, discrimination complements the prohibition of the intentional killing of innocent people either as a means or ends, as seen in applications of the remaining prongs of double-effect to abortion and euthanasia.[47]

Despite parallels between the Church's just war principles and principles within other parts of its life ethic, a stark difference remains: unlike with abortion, euthanasia, and even capital punishment, the Church has a long history of condoning rather than condemning war. While morally permissible instances of even capital punishment (and certainly abortion and euthanasia) are "practically non-existent,"[48] the Church has continued to sanction multiple wars even into the late twentieth and twenty-first centuries.[49] On the one hand, this stark difference does not necessarily lead to the conclusion that the Church's just war doctrine is inconsistent with its broader life ethic. There may be subtle distinctions between the different types of actions that justify variations in ethical positions. On the other hand, beyond the greater leeway that the Church's written doctrine gives to war, the Church itself has conceded that there is significant difficulty in interpreting this doctrine in real practice.[50] The question thus arises: in actually applying its doctrine on just war, has the Church potentially contravened its broader life ethic, as exemplified by its stricter stances on other actions where lives are at stake?

II. CHURCH-BACKED WARS: INCONSISTENCIES WITH THE CHURCH'S BROADER LIFE ETHIC

Having laid out the Church's doctrine, this Part explores the tensions between the Church's application of just war theory and its broader life ethic. It focuses on the Church's application of specific just war principles—just cause, proportionality and last resort, and discrimination—and examines how this application is inconsistent with the various principles laid out by the double-effect doctrine.

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44. *See supra* text accompanying note 33.
45. *Catechism*, *supra* note 2, ¶ 2310 (emphasis added).
46. *See supra* note 20 and accompanying text.
47. *See id.*
48. *See supra* text accompanying note 39.
49. *See infra* Part II.
50. *See supra* text accompanying note 9.

A. *Applications of Just Cause Versus Doctrine on Intrinsically Good/Evil Acts*

The first tension between applications of the Church's just war doctrine and its broader life ethic is the Church's expansive recognition of just cause, which, as this section establishes, has sanctioned military action even when aggression has not placed lives physically at stake. The Church recognizes a right and even a duty of self-defense.[51] Based upon the argument that self-love is a fundamental principle of morality, this right and duty entails that self-defense, including waging war for this purpose, is not an intrinsically evil action in the immediate sense.[52] In comparison, the Church considers abortion and euthanasia as intrinsically evil actions. It explicitly rejects the argument that maternal health and, notably, quality of life and suffering could make abortion/euthanasia intrinsically good or even neutral actions.[53] According to the Church, the sanctity and priceless value of life is inviolate, regardless of variations in actual quality of life. Again, "[n]o circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit."[54]

Analyzing these doctrines in aggregate, it seems clear that war in the name of self-defense must be waged only if actual, physical life—and not a particular quality or way of life—is at stake. Unless they themselves are engaging in grave practices that contravene the sanctity of life (*e.g.*, genocide),[55] in turn negating their right to self-defense, sovereignties need not justify self-defense on the basis that they have a

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51. *See supra* text accompanying note 35.

52. *See supra* text accompanying notes 34-35; John Paul II, *Veritatis Splendor* (Aug. 6, 1993), ¶ 80, *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html (describing intrinsically evil actions as those that "*per se* and in themselves, independently of circumstances, are always seriously wrong by reason of their object").

53. *See supra* text accompanying note 32.

54. *Evangelium Vitae*, *supra* note 1, ¶ 62. The Vatican has also stated:

> The first right of the human person is his life. He has other goods and some are more precious, but this one is fundamental — the condition of all the others. Hence it must be protected above all others. It does not belong to society, nor does it belong to public authority in any form to recognize this right for some and not for others: all discrimination is evil, whether it be founded on race, sex, color or religion. It is not recognition by another that constitutes this right. This right is antecedent to its recognition; it demands recognition and it is strictly unjust to refuse it.

John Paul II, *Declaration on Procured Abortion* (Nov. 18, 1974), ¶ 11, *available at* http://www.vatican.va/roman_curia/congregateons/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html.

55. *See Catechism*, *supra* note 2, ¶ 2309 ("damage inflicted by the aggressor . . . must be lasting, grave, and certain").

morally "good" way of life socially, economically, politically, or even spiritually speaking. To require such a justification, or similarly to allow one nation to wage war out of concern for the other nation's quality of life, would contravene the principles of intrinsic good/evil so robustly established in the Church's doctrine on abortion and euthanasia. For the purposes of establishing just cause, it is both sufficient and necessary that another sovereignty engaged offensively in aggression that threatens the lives of the aggrieved nation.

Despite these principles, the Church has deemed causes as "just" throughout the twentieth century, even when arguably only a particular quality or way of life was at stake. The Church has particularly sanctioned numerous wars against communist entities, as motivated predominantly by the anti-religionism of communism rather than any physical threat.[56] The most noteworthy of such conflicts is the Spanish Civil War, which pitted Franco's Nationalists against Republicans.[57] The war arose in the context of the rise of anti-clerical laws supported by Republicans. These laws nationalized Church properties, heavily restricted Catholic schools and teachers, and banned public manifestations of Catholicism.[58] The measures against Catholic education particularly antagonized the Church, education being an area that, as Pope Pius XI's 1929 encyclical declared, "belongs preeminently to the Church" in order that it may teach "moral truth."[59]

It is telling that, when full-fledged war broke out in 1936 after a series of tit-for-tat assassinations between both sides,[60] the Church did not advocate for peace between the two. Instead, among the Spanish Catholic Church, it actively and materially supported the pro-Catholic Nationalists, "mobilizing the mass of peasants and the middle classes and channeling them into professional and political right wing organisations."[61] According to the Benedictine writer Father Hilari Raguer:

> Nearly the entire hierarchy of the Spanish Church, and nearly all the prominent among the laity, not only did nothing to restrain

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56. "The Church has rejected the totalitarian and atheistic ideologies associated in modem times with 'communism' or 'socialism.'" *See id.* pt. 3, § 2, ch. 2, art. 7, ¶ 2425 (under doctrine of the Seventh Commandment, "You shall not steal").

57. *See* ANTONY BEEVOR, THE BATTLE FOR SPAIN: THE SPANISH CIVIL WAR 1936–1939 (2d ed. 2006).

58. *See* MARY VINCENT, CATHOLICISM IN THE SECOND SPANISH REPUBLIC: RELIGION AND POLITICS IN SALAMANCA, 1930–1936, at 121 (1996).

59. Pius XI, *Divini Illius Magistri* (Dec. 31, 1929), *available at* http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121929_divini-illius-magistri_en.html.

60. *See* BEEVOR, *supra* note 57.

61. VICTOR M. PEREZ-DIAZ, THE RETURN OF CIVIL SOCIETY: THE EMERGENCE OF DEMOCRATIC SPAIN 128 (1993).

> the conflict but spurred it on by joining almost en bloc one of the two sides, the side that ended by being the victor, and by demonizing whoever was working for peace.[62]

The Spanish Bishops even issued a joint pastoral letter on July 1, 1937, defending Franco's fascists against the communist movement, arguing that "the Communist Revolution . . . was, above all, anti-divine. So the cycle of secularist legislation of the Constitution of 1931 closed with the destruction of all that was connected with God."[63] As scholar Mary Vincent has argued, through this particular action, the "Church was to become the most importance source of legitimation for the rebellious generals, justifying the rising as a crusade against godlessness, anarchy, and communism."[64]

In sanctioning war where there was no one clear aggressor, the Church circumvented its own principles for ascertaining a just cause. On the one hand, the Church was undoubtedly a victim under the pre-Civil War Republican regime and its severe anti-clerical laws. During the war, one cannot deny the massacre and execution of many clergy, particularly (though not exclusively) those who backed the Republicans.[65] Furthermore, under Pope Pius XI, the Vatican itself did not act in a way that could clearly be interpreted as intending to support Franco's military actions.

On the other hand, it is clear that the Spanish Catholic Church's support of Franco's Nationalists—as opposed to any call for peace delivered to both sides, neither of whom could claim to be the sole aggrieved party at any point during the conflict—was motivated not for the purposes of self-defense in the physical sense. Instead, this support must be attributed to the Church's desire to defend religious freedom, and more particularly the Church's place in Spanish civil society. One of Pope Pius's few public communications on the war reinforced this desire, even if unintentionally: he simultaneously expressed a desire for a peaceful end to the conflict and condemned communism, the latter action fueling Franco propaganda.[66] Though protecting religious freedom is universally important, this principle falls outside the boundaries of just cause when considering the Church's doctrine against

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62. HILARI RAGUER, GUNPOWDER AND INCENSE: THE CATHOLIC CHURCH AND THE SPANISH CIVIL WAR 209 (2001).

63. Catholic Bishops of Spain, Joint Letter of the Spanish Bishops to the Bishops of the Whole Word (July 1, 1937); *see also* Letter from Enrique Pla y Deniel, Bishop of Salamanca, The Two Cities (Sept. 30, 1936) (claiming that Aquinas's conditions for a just war had been met because the conflict was a crusade to reestablish civil order, hierarchical government, and Christian civilization).

64. *See* VINCENT, *supra* note 58, at 248.

65. *See supra* text accompanying note 60.

66. RAGUER, *supra* note 62, at 82.

killing for the sake of particular quality or way of life.

Even into the twenty-first century, the Church has continued to highlight its role as victims in the war. In 1971, the Spanish Church fell short of a sufficient vote among its clergy to accept formally a statement that would "humbly recognize and ask pardon that [they] did not know how, when it was necessary, to be true ministers of reconciliation in the midst of our people torn by a fratricidal war."[67] In more recent years, both Pope John Paul II and Benedict XVI together have beatified hundreds, but not all executed clergy during the war, inciting criticism that they did not beatify clergy who were in opposition to Franco's Nationalists.[68] In response to such criticism, the Vatican has argued that the beatifications were not about taking sides, but about recognizing those who died for their religious beliefs.[69] Nevertheless, the continuum of history of the Spanish Church and the Vatican's actions alike create a strong inference that the Church did, and continues, to see the Spanish Civil War as a just defense of ideology and religion.

Several subsequent examples exist where one could reasonably accuse the Church of supporting military action—and, in some cases, failing to support military action—for ideological, rather than physical defense purposes. For example, after the Japanese had infamously staged the so-called Manchurian Incident to give them a pretext for invading China in 1931,[70] the Church not only ignored diplomatic pleas from the Chinese to speak out against the unjust aggression, but also publicly recognized the state that Japan had established in the occupied area of China.[71] Indeed, both Pope Pius XI and his successor Pius XII consistently reaffirmed their support of the newly established Japanese state, and one Archbishop Zannini even sent a pastoral letter directly to Chinese Catholics asking them to be neutral on the invasion.[72] Unsurprisingly, some scholars have attributed the Vatican's response to their anti-communist ideology, given the Communist Party's rapid growth in China at this time.[73]

The Church, and particularly the USCCB, also supported the anti-communist cause of the American presence in the Vietnam War.[74]

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67. FRANCES LANNON, PRIVILEGE, PERSECUTION AND PROPHECY 114 (1987).

68. *See A Complete Listing of the 498 Spanish Martyrs Beatified by Pope Benedict XVI October 2007*, *available at* http://www.conferenciaepiscopal.es/index.php/conferencia-episcopal-espanola/secretaria-general/oficina-causa-santos.html.

69. *See Vatican Beatifies 498 Spanish Civil War Victims*, ABC NEWS AUSTRALIA, Oct. 29, 2007, *available at* http://www.abc.net.au/news/2007-10-28/vatican-beatifies-498-spanish-civil-war-victims/2589528.

70. YAN KEJIA, CATHOLIC CHURCH IN CHINA 86–89 (2004).

71. *See id.*

72. *See id.*

73. *See id.*

74. The Vatican remained relatively silent on the issue. In 1965, Pope Paul VI issued an encyclical calling implicitly for peace in Vietnam, but interestingly this provoked a response

Though recognizing "that citizens of all faiths and of differing political loyalties honestly differ among themselves over the moral issue involved in this tragic conflict," the USCCB's 1966 letter on "Peace and Vietnam" ultimately stated that it was "reasonable to argue that [American] presence in Vietnam is justified."[75] Trumpeting the anti-communist cause, Cardinal Spellman, Military Vicar to Catholics in the Armed Forces, opined that Vietnam was "a war for civilization. Certainly it is not a war of our seeking. It is a war thrust upon us. We cannot yield to tyranny."[76]

Even when American Catholic support for the war dimmed, it was generally not on grounds that fighting communism was an insufficiently just cause, but that the costs of doing so in Vietnam had become too high.[77] As the U.S. Catholic Bishops stated in 1971 when it officially withdrew support for the war: "At this point in history, it seems clear to us that whatever good we hope to achieve through continued involvement in this war is now outweighed by the destruction of human life and of moral values which it inflicts."[78]

Even entering the late twentieth century, the Church continued to imply that fighting particular ideologies could suffice as a just cause, even in the absence of physical life-threatening aggression. This trend defied those who argue that the Church's just war doctrine has actually become more restrictive since the Second Vatican Council in the 1960s, an argument that is accurate if limited to considering wars of physical aggression without ideological implications.[79]

For example, in his World Day of Peace message in 1982, Pope John Paul evoked the language of traditional aggression to characterize

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from Catholic anti-war activists, who believed that Vietnam revolutionaries against America were fighting guerilla warfare for a just cause, in contrast to the Americans themselves. *See* MARC JASON GILBERT, THE VIETNAM WAR ON CAMPUS: OTHER VOICES, MORE DISTANT DRUMS 97 (2001).

75. Raymond J. Crowley, *Urge 'Climate of Peace': Prelates Back Moves in Viet*, SARASOTA J., Nov. 21, 1966, at 34.

76. David Lawrence, *In Defense of Cardinal Spellman's Stand*, LEWISTON DAILY SUN, Jan. 4, 1967, at 4, *available at* http://news.google.com/newspapers?nid=1928&dat=19670104&id=Lmgg AAAAIBAJ&sjid=1GYFAAAAIBAJ&pg=3283,280187.

77. In 1971, the American Catholic hierarchy officially withdrew its support for the war. In their Resolution on Southeast Asia, the bishops stated:

> It is our firm conviction, therefore, that the speedy ending of this war is a moral imperative of the highest priority. Hence, we feel a moral obligation to appeal urgently to our nation's leaders and indeed to the leaders of all the nations involved in this tragic conflict to bring the war to an end with no further delay.

U.S. CONFERENCE OF CATHOLIC BISHOPS, RESOLUTION ON SOUTHEAST ASIA (1971).

78. *Id.*

79. These arguments arise partly from Pope John XXIII's encyclical *Pacem in Terris*. *See* John XXIII, *Pacem In Terris* (Apr. 11, 1963).

communists in the Cold War, despite the "cold" nature of that conflict: he spoke of the "false peace of totalitarian regimes," arguing that "plans based on aggression, domination, and the manipulation of others lurk in human hearts . . . in spite of certain declarations or manifestations of a pacifist nature."[80] Similarly, while the USCCB's 1983 pastoral letter opposed nuclear war and nuclear weapons-based deterrence as inappropriate means of self-defense, it argued that nations continued to have a moral duty "to protect and preserve those key values of justice, freedom and independence which are necessary for personal dignity and national integrity."[81] In stressing these values, the USCCB affirmed the Church's implicit stance that anti-ideology is sufficient to constitute a just cause, as separate from physical security and basic existence.

Since the fall of Soviet communism, the Church has had comparatively fewer opportunities to show whether it still supports war against particular ideologies or ways of life. As the next section will further discuss, the wars it has supported have been limited to situations where life and physical security were unavoidably at stake, such as wars of humanitarian intervention and wars against terrorism.[82] Yet, there is little evidence to show that the Church has changed its position on the inclusiveness of just cause. Commencing in 1992, the Bosnian War is a more current example of the Catholic Church likely interpreting "just cause" as inclusive of religious freedom. Among other factional lines in this civil conflict following Yugoslavia's breakup, the war involved a conflict between Serbians and Croatians, the latter of whom were predominantly Catholic.[83] Akin to the Spanish Catholic Church during the 1920s, numerous scholars have accused the Croatian Catholic Church of propagating Croatian ethnic and religious nationalism in the lead up to the war, which in turn contributed to the violence.[84] As one scholar has characterized its role, the Church was guilty of portraying Croats as "quasi-immaculate" while portraying the Serbs as "the

80. John Paul II, *Message of His Holiness Pope John Paul II for the Celebration of the Day of Peace* (Jan. 1, 1982), *available at* http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_19811208_xv-world-day-for-peace_en.html.

81. *See* USCCB, *supra* note 6, ¶ 175.

82. *See infra* Part II.B; *see also* U.S. Conference of Catholic Bishops, The Harvest of Justice is Sown in Peace, Nov. 17, 1993, *available at* http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-harvest-of-justice-is-sown-in-peace.cfm (arguing that it is the duty of countries to engage in humanitarian intervention to correct gross abuses of human rights).

83. *See generally* LAURA SILBER & ALLAN LITTLE, THE DEATH OF YUGOSLAVIA (1996).

84. Alex J. Bellamy, *The Catholic Church and Croatia's Two Transitions*, 30 REL., STATE. & SOC. 45, 50 (2002) (citing scholars who describe the wars "as ethnoreligious in character," are "adamant that by propagating ethnic Croatian exclusivism the Catholic Church contributed to the spiral of violent," and argue "that the Catholic Church should be blamed for presenting the political, social and national conflicts in the former Yugoslavia as centuries-long conflicts between essentially opposed human types, types of cultures and civilizations.").

incarnation of evil."[85]

Others have argued that, while some in the Church did attempt to propagate such views, Church leadership largely did not, refusing to call upon Catholic Croats to vote for the Croatian regime in power and criticizing atrocities committed by Croats.[86] Nevertheless, other wartime actions reinforced the perception that the Church implicitly encouraged faith-motivated violence. One in particular is a speech that Pope John Paul II gave in 1994 during his first pastoral visit to Zagreb, Croatia. In a speech made while ethnic and religious tensions were high, the Pope lionized the controversial Croatian Cardinal Stepinac, who led the Croatian resistance against communism during post-World War II Titov regime, but who also incurred the wrath of many Serbians who have long believed that "Stepinac personifies nothing less than Croatian collaboration with the Nazis through his support for the brutal Ustasha fascist regime, which murdered as many as 700,000 Serbs, Jews, and Gypsies at the Jesenovac concentration camp during World War II."[87]

As one scholar has claimed, the Pope's actions may be seen as "a vestige of his myopic anti-communism,"[88] akin to the Church's consistently unapologetic position on the Spanish Civil War.[89] As another counterargument, others have pointed out that the Pope also spoke of peace during his speech, sending "a kiss of peace" to the Serbian leadership while encouraging Croatian Catholics to become "apostles of a new concord between peoples."[90] Nevertheless, one scholar argued that even a middle ground reading of this speech is problematic:

> Cardinal Stepinac himself can hardly be blamed for strife in the 1980s, but the violence the Pope denounced can still be read back into the Cardinal's actions. By standing up to one form of

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85. *See id.* (citing Srdan Vrcan, *Religion and Churches and the Post-Yugoslav War*, *in* RELIGION AND NATIONALISM 63–64 (J. Coleman & M. Tonka eds., 1995)).

86. *See* Bellamy, *supra* note 84, at 50.

87. P.H. Liotta & Anna Simons, *Thicker than Water? Kin, Religion, and Conflict in the Balkans*, PARAMETERS (Winter 1998).

88. As Liotta and Simons state,

> Any invocations of the Cardinal are thus charged with meaning, and like the video image of a Serbian priest ritually blessing Arkan's Tigers, the Pope's alignment with Stepinac sends all sorts of signals. One way to view the Pope's refusal to set foot in Yugoslavia until he could pray at the tomb of Stepinac in Zagreb Cathedral is as a vestige of his myopic anti-communism. Perhaps he really did forget the Church's wider historical role in the Balkans.

See id.

89. *See supra* notes 67–69 and accompanying text.

90. SABRINA PETRA RAMET, BALKAN BABEL: THE DISINTEGRATION OF YUGOSLAVIA FROM THE DEATH OF TITO TO CIVIL WAR 281 (1996).

> repression having lent his support to another, Cardinal Stepinac prefigures a classic set of Balkan contradictions.[91]

Yet other actions have contributed to the perception that the Church implicitly approved faith-motivated violence during the Bosnian War—such as its recognizing Croatia before the European Union itself did so.[92] Most recently, Carla del Ponte, the chief war crimes prosecutor in the Hague, insisted that the Church was sheltering a top Croatian war crimes suspect, General Ante Gotovina, and that the Vatican was refusing to cooperate (though the Vatican strongly refuted this charge).[93]

The Church's actions during the Bosnian War are certainly open to interpretation, much more so than its actions during the Spanish Civil War, the Manchurian Incident, or the Vietnam War. On the one hand, some figures in the Catholic Church, including Pope John Paul II during portions of his speech, may have denounced the conflict in general terms. On the other hand, several aspects of both the Croatian Catholic Church's and papal actions lend credence to the idea that the Church continues to support war for ideological or religious reasons, even in the post-Cold War era.

The Church's alleged support for violence in the name of ideology and religion even resurfaced during the 2013 ascendency of Argentina's Cardinal Jorge Bergoglio to Pope Francis. During this ascendency, some questioned then-Bergoglio's role in the "Dirty War" between Argentina's communist state and anti-communist guerillas in the 1970s.[94] At an early point during the war, Bergoglio was the provincial of the Society of Jesus in Argentina, a position through which, according to his accusers, Bergoglio purposefully identified communist-leaning priests for the anti-communist junta to target.[95] On the one hand, the evidence for Bergoglio's personal active involvement or even tacit compliance with any violence during the war is dubious.[96] On the other

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91. *See* Liotta & Simons, *supra* note 87, at 31.

92. *See id*. at 32.

93. Del Ponte earlier told British newspaper the *Daily Telegraph* she believed Gen Gotovina was "hiding in a Franciscan monastery and so the Catholic Church is protecting him." "I have taken this up with the Vatican and the Vatican totally refuses to co-operate with us," as she stated. The Church retorted that Ponte had not proven any of her claims. *War Crimes Chief Accuses Vatican*, BBC NEWS, *available at*: http://news.bbc.co.uk/2/hi/europe/4263426.stm. Eventually, Gotovina was found in December 2005 in Spain. *Top Croatian War Crimes Fugitive Apprehended in Spain*, CNN NEWS (Dec. 8, 2005), *available at* http://edition.cnn.com/2005/US/12/08/thursday/index.html?iref=allsearch.

94. Jon Lee Anderson, *Pope Francis and the Dirty War*, NEW YORKER (Mar. 15, 2013), *available at* http://www.newyorker.com/online/blogs/comment/2013/03/pope-francis-jorge-bergoglio-argentina-dirty-war.html.

95. *See id.*

96. *See id.*

hand, the Argentine Catholic Church's role in the junta's anti-communist campaign is less debatable, with at least some within the Church definitively giving active support to this violent ideological campaign.[97]

Though ultimately concerning a conflict from decades ago, this minor controversy about the recently-elected Pope underscores the difficulty of concluding that the Church has made a clean break from its past on this issue. The Church has appeared to back away from more vocal, explicit support of ideological or religious freedom-based violence. Nevertheless, its contemporary reticence to take a stronger stance against such violence, combined with its past history, show that its interpretation of "just cause" in war is at least more permissive than what other post-Cold War rhetoric might indicate. This doctrine has been clear to condemn wars of aggression and territorial conquest, as well as to restrict the permissiveness of even wars of pure physical self-defense. However, the Church has been far less unequivocal on its position with respect to wars where physical self-defense may be mixed with ostensible ideological or religious defense. Until the Church more explicitly clarifies that it does not consider these reasons to be "just causes," its calls for anti-communism and its varying degrees of support for ethno-religious nationalism in Spain, Vietnam, Argentina, and Bosnia create a reasonable inference that the Church does have a more expansive understanding of "just cause"—if not on paper, then in fact.

As Pope Pius XII expressed in his Christmas Message in 1948, the purpose of peace is "the protection of goods of humanity, inasmuch as they are gifts of the Creator."[98] Given its support of war for purposes even outside of self-defense, it is apparent that the Church defines these goods broadly to include values such as religious freedom, democratic independence, and other traditionally liberal principles. However noble those principles are, they fall outside of the theoretically limited justification for self-defense. Instead, they fall precisely into more expansive considerations of quality and ways of life, considerations that are strictly prohibited in other areas of the Church's life ethic.

B. *Comparing Proportionality/Last Resort in Just War to Other Life Issues*

The second tension between applications of the Church's just war doctrine and its broader life ethic is the inconsistency between what it considers proportionate military action and proportionate actions in other life-and-death circumstances. In the context of abortion and euthanasia, the Church's position on proportionality is clear, dovetailing

97. *See id.*
98. Pius XII, Christmas Message of 1948 (Dec. 24, 1948).

with its position on the intrinsically evil nature of these acts:[99] even "serious and tragic [circumstances] can never justify the deliberate killing of an innocent human being."[100] Thus, "no evaluation of costs can outweigh the value of the fundamental good which we are trying to protect, that of human life."[101] The Church does recognize that abortion is often a decision made under difficult, even extreme circumstances. Nevertheless, nothing is so extreme as to justify the even more extreme action of taking a life:

> [P]erhaps in quite a considerable number of cases, by denying abortion one endangers important values to which it is normal to attach great value, and which may sometimes even seem to have priority. We do not deny these very great difficulties. It may be a serious question of health, sometimes of life or death, for the mother; it may be the burden represented by an additional child, especially if there are good reasons to fear that the child will be abnormal or retarded; it may be the importance attributed in different classes of society to considerations of honor or dishonor, of loss of social standing, and so forth . . . [But] the damage to moral values is always a greater evil for the common good than any disadvantage in the economic or demographic order.[102]

Undergirding this position on abortion/euthanasia is the Church's belief not only that human life is sacred even when weak and suffering,[103] but also that human beings are incapable of making such evaluations without being motivated by exaggerated panic and anxiety, even if they have otherwise good intentions.[104] As Pope John Paul II stated:

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99. *See supra* text accompanying note 23.

100. Congregation for the Doctrine of the Faith, *Clarification on Procured Abortion* (July 11, 2009) [hereinafter *Clarification on Procured Abortion*], *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documetns/rc_con_cfaith_doc_20090711_aborto-procurato_en.html.

101. John Paul II, *Address of John Paul II to the Participants in the International Congress on "Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas"* (Mar. 20, 2004) [hereinafter *Life-Sustaining Treatments*].

102. *Declaration on Procured Abortion* (Nov. 18, 1974), ¶¶ 14, 18.

103. *See also* John Paul II, *Familiaris Consortio* (Nov. 22, 1981) [hereinafter *Familiaris Consortio*], *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html; *Evangelium Vitae*, *supra* note 1, ¶ 63 ("And yet the courage and the serenity with which so many of our brothers and sisters suffering from serious disabilities lead their lives when they are shown acceptance and love bears eloquent witness to what gives authentic value to life.").

104. *See Familiaris Consortio*, *supra* note 103, ¶ 30.

> Some ask themselves if it is a good thing to be alive or if it would be better never to have been born; they doubt therefore if it is right to bring others into life when perhaps they will curse their existence in a cruel world with unforeseeable terrors . . . The ultimate reason for these mentalities is the absence in people's hearts of God, whose love alone is stronger than all the world's fears and can conquer them."[105]

Because of this fear, the Church is concerned that "acknowledging that increasing and decreasing levels of quality of life, and therefore of human dignity, can be attributed from an external perspective" will lead to "a discriminatory and eugenic principle" motivated by nefarious considerations, such as group exclusion or material mentality.[106] On this subject, the Church has recognized that scientific and technical progress, while offering "the hope of creating a new and better humanity," also "causes ever greater anxiety regarding the future."[107] "[O]ne thinks, for example, of a certain panic deriving from the studies of ecologists and futurologists on population growth, which sometimes exaggerate the danger of demographic increase to the quality of life."[108] Discussing the dangers of "presum[ing] to measure the value of a human life only within the parameters of 'normality' and physical well-being, thus opening the way to legitimizing infanticide," the Church makes a slippery slope argument.[109]

The Church also emphasizes that people are incapable of making definitive, non-speculative quality of life determinations, even if such determinations were morally permissible. After the Terri Schiavo case brought the issue of life-sustaining treatments for those in "persistent vegetative states" to the political foreground, Pope John Paul II argued that even significant advances in medical technology could not definitively establish that patients in this condition no longer possessed biological and psychological characteristics that have universally defined basic quality of life:[110]

> [I]t is not possible to rule out a *priori* that the withdrawal of nutrition and hydration, as reported by authoritative studies, is the source of considerable suffering for the sick person, even if we can see only the reactions at the level of the autonomic nervous system or of gestures. Modern clinical neurophysiology and

105. *Id.*
106. *Life-Sustaining Treatments*, *supra* note 101, ¶ 5.
107. *See Familiaris Consortio*, *supra* note 103, ¶ 30.
108. *Id.*
109. *Evangelium Vitae*, *supra* note 1, ¶ 63.
110. *See Life Sustaining Treatments, supra* note 101.

> neuro-imaging techniques, in fact, seem to point to the lasting quality in these patients of elementary forms of communication and analysis of stimuli.[111]

Thus, the Church distrusts human decision-making about quality of life even when based on advanced technology. Reinforcing the Vatican's position, the USCCB argued that Schiavo was merely a person who had "cognitive disabilities" and who was unable to feed herself, retaining "every ounce of her human dignity and deserv[ing] respect and care."[112] Regarding the removal of Schiavo's feeding tube, the USCCB stated that "it was not a right to remove medical treatment that was granted, but an order that Terri Schiavo be made to die."[113]

The Church's position on proportionality and capital punishment draws upon similar principles, even as it does not deem capital punishment an intrinsic evil. As Part I discussed, the instances in which capital punishment would be a proportionate self-defense mechanism are "very rare, if practically non-existent."[114] The Church states that alternatives such as life sentences without parole are sufficient to protect society.[115] As with its position on abortion and euthanasia, what undergirds this position on capital punishment is the idea that one cannot predict what a person might contribute to society in the future, particularly if they take corrective actions.[116] As the USCCB states, "We cannot know whether God has a purpose for a person's life, even one who has committed a terrible crime and must spend his or her life behind bars."[117] Implicit is that one cannot consider the future quality of life of a criminal offender, and that doing so would be an impermissibly speculative exercise.

When one analyzes these principles in tandem with the Church's just war doctrine, it becomes clear that principles such as proportionality

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111. *Id.*

112. Cathy Cleaver Ruse, *Terri Schiavo Case Reveals How We Treat Disabled Americans*, LIFENEWS.COM (Mar. 24, 2005), *available at* http://archive.lifenews.com/bio841.html.

113. Cathy Cleaver Ruse, *Terri Schiavo and the Echoes of Abortion*, USCCB (Mar. 31, 2005), *available at* http://old.usccb.org/prolife/publicat/lifeissues/033105.shtml.

114. *See supra* text accompanying note 39.

115. USCCB, *What is the Catholic Church's Position on the Use of the Death Penalty*, *available at* http://old.usccb.org/deathpenalty/questions_answers.shtml.

116. *But cf. Summa*, *supra* note 19.

> The fact that the evil ones, as long as they live, can be corrected from their errors does not prohibit the fact that they may be justly executed, for the danger which threatens from their way of life is greater and more certain than the good which may be expected from their improvement.

Id.

117. *See supra* note 115 and accompanying text.

and last resort must be read narrowly. The Church's consistent opposition to the idea that one can make definitive calculations about the value of people's lives should guide military actions. On the one hand, a principle such as macro-proportionality in the military context—that is, calculating whether the good to be gained is worth the destruction of war, including the loss of innocent lives—is an inherently abstract exercise. In its 1983 pastoral letter, the USSCB admitted that applying these principles is difficult and potentially imprecise, even notwithstanding "the ease with which nations and individuals either assume or delude themselves into believing that God or right is clearly on their side."[118] On the other hand, this uncertainty is precisely another reason to allow the Church's broader life ethic to guide a narrow application of just war principles in practice. Because the Church frowns heavily upon speculative calculations about the value of people's lives, military actions should be strictly limited to those that confer demonstrably ample advantages, while causing demonstrably limited destruction, particularly in the way of innocent lives.

In reality, however, just war principles have been applied more broadly than would be consistent with the Church's broader life ethic. The Church's sanctioning of wars into the twenty-first century establishes this proposition. The Bosnian War is the first example of the Church's implicitly broader reading of proportionality and last resort.

In a speech from January 1994, Pope John Paul II urged "all forms of action aimed at disarming the aggressor" in Bosnia.[119] The Pope emphasized that, while "all military aggression is judged to be morally wrong, [l]egitimate defense, by contrast, is viewed as admissible and sometimes obligatory."[120] Other remarks by the Vatican appeared to indicate support for selective military strikes, with Vatican spokesman Joaquin Navarro-Valls speaking specifically in the language of proportionality by declaring that "it is not the same thing to bombard Belgrade or a mountaintop where some soldiers have placed a mortar."[121]

In supporting such action, however, the Church may have read the principle of last resort too broadly. At the time, American diplomatic peacekeeping efforts in Bosnia had infamously stalled for two years, undercutting more aggressive European efforts to end the conflict through less violent means, such as dividing Bosnia into semi-

118. *See* USCCB, *supra* note 6, ¶ 94.

119. Alan Cowell, *Pope Seeks a Disarming of "Aggressor" in Bosnia*, N.Y. TIMES (Jan. 13, 1994), *available at* http://www.nytimes.com/1994/01/13/world/pope-seeks-a-disarming-of-aggressor-in-bosnia.html.

120. *Id.*

121. *Id.*

autonomous regions along ethnic lines.[122] Casting a shadow on Bill Clinton's presidency, these bumpy diplomatic forays raise the question of whether the Vatican's ostensible sanctioning of military action in January 1994 is reconcilable with its position on last resort.

At that time, more diplomatic efforts may still have been possible, in contrast to the outright military response (*i.e.*, NATO military strikes) that catalyzed the end of the war in mid-1995.[123] On the one hand, likely few would disagree that the United States stepped in very late in Bosnia. On the other hand, earlier efforts might have proven even less violent, simultaneously preventing the loss of life that occurred during 1994 and 1995 when there was effectively diplomatic and military inaction. In turn, the timing of the Vatican's greater support to military action raises questions as to its position on what qualifies as last resort.

Beyond the Church's sanctioning of humanitarian intervention as in Bosnia, an even clearer example of how it interprets proportionality and last resort is its response to the post-September 11 war on terrorism. Its support of the American military efforts in Afghanistan immediately following September 11 seemed particularly to contravene a narrow reading of proportionality *vis-à-vis* the Church's broader life ethic. Though Pope John Paul II did not issue a public statement explicitly supporting America's decisions to invade Afghanistan, by all accounts he privately and publicly (if implicitly) signaled support for this decision.[124] Publicly, a papal spokesperson told the media that the Vatican "would understand" if President Bush were to use force.[125] While the spokesperson was careful to argue that the Church had not necessarily given a "green light" to the use of force, he carefully characterized any such action as "not a matter of an attack, but of active prevention against a threat that has already manifested itself in the horror of a few weeks ago."[126] The Vatican's top ecumenical official similarly stated, "Every country must defend itself in a just manner. Something has to be done, or else we will all become hostages of these terrorists."[127] Finally, in 2002, a few months after the military campaign in Afghanistan had begun, the Pope's annual message for the World

122. *See* Elaine Sciolino, *The Clinton Record: Foreign Policy, Bosnia Policy Shaped by U.S. Military Role*, N.Y. TIMES (July 29, 1996), *available at* http://www.nytimes.com/1996/07/29/us/the-clinton-record-foreign-policy-bosnia-policy-shaped-by-us-military-role.html?page wanted=all&src=pm.

123. *See id.*

124. *Vatican Signals Wider, Qualified Support for U.S. Military Action*, AMERICA: THE NAT'L CATH. WKLY. (Oct. 8, 2001), *available at* http://www.americamagazine.org/content/article.cfm?article_id =1073 [hereinafter *Vatican*].

125. John L. Allen Jr., *Mixed Messages on Force Abound During Papal Trip*, NAT'L CATH. REP. (Oct. 5, 2001), http://natcath.org/NCR_Online/archives2/2001d/100501/100501k.htm.

126. *Id.*

127. *See Vatican*, *supra* note 124 and accompanying text.

Day of Peace stressed the existence of "a right to defend oneself against terrorism,"[128] a statement that stands in contrast to the frequent and very explicit condemnation of the Pope in the Iraq War only two years later.[129] In fact, as both wars proceeded simultaneously, Catholics would frequently draw a contrast between the unjustness of the Iraq War and the continuing necessity of military action in Afghanistan.[130]

Support among the USCCB and individual American Cardinals was even more explicit and overwhelming. The USCCB officially stated that "[m]ilitary force may be justified in Afghanistan," though iterating that just war criteria such as proportionality must guide U.S. actions.[131] The President of the USCCB personally expressed regret for the use of force, but ultimately praised President Bush for carrying out "a wise, just and effective response."[132] Other cardinals, including those of Chicago, Detroit, New York, and Philadelphia, expressed that U.S. bombings were a "military necessity."[133] As one cardinal stated, the administration should be

> commended for the manner in which this war has been conducted so far. The formation of an international coalition, the shared intelligence and coordinated efforts of national and international law enforcement agencies and the steps undertaken to cut off the terrorists' financial resources are all part of a well-conceived and effective plan.[134]

Condemnation of the war among the Catholic community appeared limited to very few, most prominently the Catholic peace organization Pax Christi USA, which implored "leaders to focus their creative energies on a renewed commitment to building an international order based on . . . justice rather than might."[135]

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128. Pope John Paul II, *Message for the World Day of Peace 2002* (Jan. 1, 2002), *available at* http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_ 20011211_xxxv-world-day-for-peace_en.html.

129. Pope John Paul II, *Address to the Diplomatic Corps*, Jan. 13, 2003, *available at* http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jp-ii_spe_ 20030113_diplomatic-corps_en.html.

130. *See, e.g.*, Russell Shaw, *War in Afghanistan May No Longer Be Just*, OSV DAILY TAKE, *available at* http://www.osvdailytake.com/2010/08/shaw-war-in-afghanistan-may-no-longer.html.

131. USCCB, *Pastoral Message: Living with Faith and Hope After September 11* (Nov. 2001) *available at* http://www.usccb.org/ issues-and-action/human-life-and-dignity/september-11/a-pastoral-message-living-with-faith-and-hope-after-september-11.cfm.

132. *Bombs: A One-Size-Fits-All Response*, NAT'L CATH. REP. (Oct. 19, 2001), *available at* http://natcath.org/NCR_Online/archives/101901/101901p.htm.

133. *Id.*

134. *Cardinal Bevilacqua Tells President Bush the War is Just* (Oct. 16, 2001), *available at* http://www.americancatholic.org/News/JustWar/usbishops_terrorism.asp.

135. Pax Christi USA, Official Statement on the Bombing of Afghanistan (Oct. 9, 2001),

On its face, America's Church-sanctioned military efforts might seem to have been an ethically adherent response to the violence undertaken by the September 11 terrorists and al-Qaeda. However, these efforts become problematic when seen through the lens of the Church's broader life ethic. Several aspects of the military response seem to contradict proportionality and last resort when the Church's broader life ethic is used to interpret these principles. For example, some have criticized the swiftness of the military response. On one hand, though the United States attempted diplomacy with the Taliban government in Afghanistan, the Taliban consistently rebuffed American requests to provide them access to al-Qaeda bases in Afghanistan.[136] On the other hand, Church-backed American military efforts began less than a month after September 11 took place.

As a useful comparison, the Church condemned America's actions during the 1991 Gulf War in large part because of the Church's beliefs that war was not yet the last resort, though more than five months had elapsed since Iraq had invaded and annexed Kuwait.[137] Among others during the Gulf War, then-President of the USCCB Archbishop Pilarcyzk expressed "fear that . . . moving beyond the deployment of military forces in an effort to deter Iraqi aggression to the undertaking of offensive military action could well violate [just war] criteria, especially the principles of proportionality and last resort."[138] Given a life ethic that values utmost certainty before life is taken, even for gravely urgent causes, the Church's position in the Gulf War appears much more in line with Church doctrine than its implicit position that the United States had exhausted all possible non-military options in less than one month with respect to Afghanistan.

An even greater problem with the Church's sanctioning of America's military response is not only the timing of that response, but the degree of uncertainty involved in determining proportionality at the outset. The September 11 terrorist attacks were horrific. Furthermore, because of the nature of terrorism, there was naturally a possibility of violent terrorist attacks at some point in the future. For these reasons, one might argue that the military response was both proportionate and a last resort. Yet, as the USCCB has stated in the context of capital punishment, the self-defense test must be "whether society has

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available at http://paxchristiusa.org/2011/01/16/statement-pax-christi-usa-official-statement-on-the-bombing-of-afghanistan/.

136. *Bush Rejects Taliban Offer to Hand Bin Laden Over*, GUARDIAN (Oct. 14, 2001), http://www.theguardian.com/world/2001/oct/14/afghanistan.terrorism5.

137. *See* Laurence W. Jones, The Persian Gulf War: A Case Study in Just War Theory (May 4, 1998) (Master of Theology, thesis, Duke University), app. D, at 109-13, Letter from Archbishop Pilarczyk to President Bush (Nov. 15, 1990) (on file with Defense Technical Information Center).

138. *Id.*

alternative ways to protect itself, not how terrible the crime was."[139] More importantly, both the potential benefits and costs of invading Afghanistan were difficult to assess with any degree of certainty. Because terrorism is unlike a conventional war between two sovereignties, instead involving a diffuse network of aggressors located in many sovereignties, it was uncertain to what degree uprooting al-Qaeda specifically in Afghanistan would repel any threats of aggression. For example, while al-Qaeda was undoubtedly responsible for the September 11 attacks, it was difficult to pinpoint when, and even with certainty if, it would strike again in the future.

The difficulty of conceptualizing the degree to which invading Afghanistan would achieve America's self-defensive goals dovetails with the difficulty of comprehending the costs of such an invasion. On the one hand, American military officials made assurances that the means of war employed would minimize casualties, particularly American casualties and Afghani civilian casualties.[140] For example, the military limited its actions to targeted aerial strikes on known al-Qaeda and Taliban compounds, at least at the beginning of the war.[141] On the other hand, while certainly limiting American soldier casualties, limiting on-the-ground military presence made it more difficult simultaneously to know both *ex ante* how many Afghani civilians' lives were at risk and *ex post* how many of these lives had been taken by American military action.[142] The infamous Qalaye Niazi incident on December 29, 2001 exemplified this problem. There, the United States aerially bombed what they claimed to be a known al-Qaeda-Taliban compound in Qaloye Niazi, citing secondary explosions that occurred after the bombing as proof of this claim.[143] However, the Qalaye Niazi village elder claimed that civilians had merely been ordered by retreating Taliban troops to store ammunition at this site, which included housing for ten families of farmers.[144] Ultimately, 52 civilians died, many of whom were merely visiting the village for a wedding.[145]

Aside from highlighting the difficulties of cost calculation, this incident highlights the moral complexities of relying heavily on allies for military intelligence, without sufficient supplementation of forces on the ground. As Pax Christi argued:

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139. *See* USCCB, *supra* note 115.

140. *See Rumsfeld: Operation Aims to Clear the Skies*, CNN.com (Oct. 7. 2001), http://www-cgi.cnn.com/2001/US/10/07/ret.attack.pentagon/.

141. *Id*.

142. *See also Group of Catholics Calls Terrorism Battle Immoral*, WASH. TIMES (Dec. 27, 2001), http://www.washingtontimes.com/news/2001/dec/27/20011227-034315-5010r/.

143. *See* Rory Carroll, *Bloody Evidence of U.S. Blunder*, GUARDIAN (Jan. 6, 2002).

144. *Id*.

145. *Id.*

> The Pentagon goes to extraordinary lengths to avoid noncombatant casualties within the limits it places on itself in order to avoid putting U.S. military personnel at risk. And it is precisely this qualifier that puts into question the morality of the U.S. bombing campaign in Afghanistan . . . The choice to bomb the village instead of sending troops into the village was a deliberate and intentional choice that put at risk innocent women, children, and men.[146]

Pax Christi continues:

> The fact that many of these villages were nothing more than a few dozen small buildings make their bombing even more incomprehensible. The deployment of an overwhelming number of ground forces on such a small asset would most likely have resulted in the quick departure of any enemy soldiers without a great deal of resistance. But I suppose that allowing the enemy to escape would be unacceptable to our military planners.[147]

In the end, Qalaye Niazi was far from an anomaly with respect to civilian casualties: estimates of these casualties up to January 1 year alone ranged from 1000 to 4000.[148]

This Article is far from the first to analyze how post-September 11 warfare makes it difficult to interpret and apply traditional just war principles such as proportionality.[149] Given these difficulties, it may not be surprising that, while various Catholic authorities invoked just war theory to support their contention that military action in Afghanistan was morally principled, few, if any, were able to specify precisely how the war (or specific military actions) fit into that theory. For example, while the USCCB issued a statement stating that "special attention must

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146. TOM CORDARO, THE CALCULUS OF KILLING THE INNOCENT: CASUALTY AVERSION & THE PRINCIPAL OF NONCOMBATANT IMMUNITY (2001), *available at* http://storage.paxchristi.net/SD1E02.pdf.

147. *Id.*

148. Murray Campbell, *Thousands of Afghans Likely Killed in Bombings*, COMMON DREAMS (Jan. 3, 2001), *available at* http://www. commondreams.org/headlines02/0103-01.htm.

149. *See, e.g.*, Marjorie Cohn, *Bombing of Afghanistan is Illegal and Must Be Stopped*, JURIST (Nov. 6, 2001); Joseph L. Falvey, Jr., *Reflections on Just Wars and Just Warriors*, 47 J. CATH. LEGAL STUD. 343 (2008) (discussing varying responses by Catholic officials to the 2003 Iraq War); Ronald J. Rychlak, *Just War Theory, International Law, and the War in Iraq*, 2 AVE MARIA L. REV. 1 (2004) (arguing for an alteration of the scope of just war principles post-September 11); George Weigel, *The Just War Tradition and the World After September 11*, 51 CATH. U. L. REV. 689 (2002) (same); William Joseph Wagner, *As Justice and Prudence Dictate: The Morality of America's War Against Terrorism—A Response to James V. Schall, S.J.*, 51 CATH. U. L. REV. 35 (2001); *see also* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 236–38 n.50 (2004) (discussing shift in Catholic doctrine).

be given to developing criteria for when it is appropriate to end military action in Afghanistan," in the end, no authority ever explicitly proffered such criteria.[150] How just war theory should respond to the uncertainty of the nature of terrorism was (and is) an issue remaining unspecified.[151]

What has not been discussed before is how America's response to September 11, and particularly the Church's support for the invasion of Afghanistan, flouts the Church's broader life ethic. As others have done, one could argue that traditional just war principles must change to accommodate the changing nature of war. However, this proposition becomes much more difficult to accept when considering that those just war principles operate in the background of a broader life ethic. The Church spurns attempts to make speculative judgments about life in other contexts. Therefore, any alteration or relaxation of just war principles cannot fully yield to the fact that terrorism itself has an inherently uncertain nature. For example, to the extent that the Church adopts the position that technology and science only speculatively establish that patients in persistent vegetative states live a certain quality of life, the Church cannot then allow overly speculative calculations in decisions to fight war. This is especially true when potential alternatives exist to make calculations less provisional, such as on-the-ground troop presence, even when those alternatives entail additional costs. After all, in other areas of its life ethic such as PVS and capital punishment, the Church requires the pursuit of all viable alternatives despite their costs before permitting the extinguishment of life.

With the rise of technologies such as unmanned aerial drones even since the beginning of the Afghanistan War, the Church must reconcile these positions with its positions on war now more so than ever. Later in the Afghanistan War, the U.S. military increased its use of these drones in part because of the belief that, with the greater precision they provide, they could minimize civilian casualties.[152] Nevertheless, as others have argued, the greater ease with which these mechanisms can be deployed could actually increase the number of raids and consequently the civilian casualty rates.[153] For example, a Human Rights Watch report on civilian casualties in Afghanistan argued that most civilian casualties did not occur in planned airstrikes on Taliban

150. USCCB, *Pastoral Message: Living with Faith and Hope After September 11* (2001), *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/september-11/a-pastoral-message-living-with-faith-and-hope-after-september-11.cfm.

151. At the time that this Article is being published, the Catholic Church still has failed to put forth a just war doctrine in order to respond to the reality that terrorism creates a lot of uncertainty, thus potentially changing the rules of war.

152. Ben Kiernan & Taylor Owen, *Roots of U.S. Troubles in Afghanistan: Civilian Bombing Casualties and the Cambodian Precedent*, ASIA-PACIFIC J. (June 28, 2010), *available at* http://www.japanfocus.org/-ben-kiernan/3380.

153. *Id*.

targets, but rather in the more fluid rapid-response strikes.[154] One U.S. military report found that "inaccurate and unprofessional" reporting by the drone operators has been responsible for a not insignificant number of civilian casualties.[155]

Thus, the Church's distrust of technology in other contexts entails that, at least to some extent, it must distrust technology claimed to limit the cost of war, particularly given that such technology has indeed proven to be fallible. In the abortion and assisted suicide context, the Church argues that technology has been employed to reduce the body to "pure materiality" and to "simply a complex of organs, functions and energies to be used according to the sole criteria of pleasure and efficiency."[156] Consequently, the Church must also speak out against the use of technology to shield the military and the greater public from the erroneous notion that civilian suffering has been minimal. Furthermore, to the extent that the Church worries that even people with good intentions will make decisions about abortion/euthanasia in exaggerated fear and anxiety, creating a slippery slope of what is considered morally permissible, so it must worry that people under the threat of terrorism will do the same.

Beyond abortion and assisted suicide, what might best show the internal inconsistencies of the Church's life ethic might be its stance on capital punishment. Like war and unlike abortion or assisted suicide, this practice is not considered intrinsically evil. In accord with this idea, the Church leaves open the possibility that capital punishment may be necessary in "very rare" circumstances.[157] Although not explicitly qualifying what qualifies as such a circumstance, Pope John Paul II's reference to "steady improvements in the organization of the penal system" indicates that capital punishment might be permissible in instances where, because of a country's primitive infrastructure, a penal system cannot securely keep those who have committed murder.[158] This doctrine on capital punishment is still restrictive, disallowing the death penalty even when people have been proven to be grave threats and there is the alternative of a penal infrastructure that, however otherwise rudimentary, can still reasonably secure these threats. This stands in contrast to the Church's application of just war theory, where it has sanctioned military action even when the extent of the threat of particular targets is arguably less well-known (as compared to proven murderers) *and* when there are alternative on-the-ground options that could save more civilian lives.

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154. *Id*.
155. *Id*.
156. *Evangelium Vitae*, *supra* note 1, ¶ 23.
157. *See supra* text accompanying note 39.
158. *Evangelium Vitae*, *supra* note 1, ¶ 56.

C. *Comparing Discrimination in Just War to Intent/Foresight in Other Life Issues*

The third tension between applications of the Church's just war doctrine and its broader life ethic is the Church's relatively permissive stance on intentional versus foreseen killing, in contrast to the restrictive stance on this issue it applies elsewhere in its life ethic. In the context of assisted suicide, the Church permits palliative care, or pain management. However, it restricts the possibility of recasting certain medical actions leading to death as palliative care, arguing that such actions violate double-effect doctrine. Persistent vegetative states are again an important example. The Church forbids the removal of medically-assisted nutrition and hydration from these patients "who can reasonably be expected to live indefinitely if given such care."[159] Such care becomes optional only when "they cannot reasonably be expected to prolong life or when they would be excessively burdensome for the patient or [would] cause significant physical discomfort."[160] In other words, only if there is certainty beyond reasonability that life cannot be prolonged does removal of medical care not constitute a means or end of intentional killing, but rather a means or end of palliative care in itself. Even if a doctor or family member reasonably believes that they are respecting life's boundaries by removing care and have no intention to kill but instead to engage in palliative care, they implicitly violate the Church's doctrine if they do so without greater certainty that life cannot be prolonged by such care.

The Church's position on abortion with respect to intent and foresight is even more restrictive. On the one hand, the Church does allow for some medical treatments intended to preserve the health of the mother so long as the treatment is not abortive in itself, because such treatment would entail that abortion is technically used neither as a means or an end.[161]

> If, for example, saving the life of the future mother, independently of her condition of pregnancy, urgently required a surgical procedure or another therapeutic application, which would have as an accessory consequence, in no way desired or intended, but inevitable, the death of the fetus, such an action

159. USCCB, *Ethical and Religious Directives for Catholic Health Care Services* ¶ 58 (2009). *See also Life-Sustaining Treatments*, *supra* note 101, ¶ 4 ("the administration of water and food, even when provided by artificial means, always represents a natural means of preserving life, not a medical act").

160. *Id.*

161. *Cf. supra* note 20 and accompanying text.

could not be called a direct attack on the innocent life.[162]

On the other hand, the Church interprets this exception extremely narrowly. Thus, it does not permit some medical treatments that could be classified as self-defense, that is producing death not by an evil effect, but directly by the immediate action of self-defense.[163] As scholar Susan T. Nicholson points out, the Church would permit a woman in early pregnancy with cervical cancer to have a hysterectomy, though without the hysterectomy the fetus would otherwise develop normally, or a woman to remove her fallopian tubes if a fetus was growing there instead of her uterus.[164] In both cases, the procedure is directed not at the fetus itself, but a particular part of the anatomy. However, the Church would not permit a craniotomy in the case of a woman in a prolonged obstructed labor, who will die unless an operation is performed in which the head of the unborn fetus is crushed, even if the craniotomy is not performed the fetus will also likely die.[165] Yet, one may cast this instance as the narrowing of the fetus's head—and not the death of the fetus, in and of itself—that is the means to the end of the mother health, with the death of the fetus only foreseen as an evil effect that is not itself the means.[166] "That the narrowing of the head and not the death of the fetus is the means to this end is demonstrated by the fact that the fetus would not be killed should it somehow survive the force applied to its skull and be removed alive from the birth canal."[167] Nor would the Church permit abortion for a woman in early pregnancy suffering from chronic hypertension associated with severe renal insufficiency, even if there is a reasonable likelihood that she will die because of the demands placed on her by the pregnancy and the chances of the fetus's survival is slight either way.[168]

Perhaps best showing the restrictiveness of the Church's ethic is its official position on the case of Angela Carder, one at the intersection of both end-of-life and beginning-of-life.[169] In 1987, twenty-six weeks into her pregnancy, an earlier bout of cancer (Ewing's sarcoma) was

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162. *See Clarification on Procured Abortion*, *supra* note 100.

163. *See Summa*, *supra* note 19 ("Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor.").

164. Susan T. Nicholson, *The Roman Catholic Doctrine of Therapeutic Abortion*, *in* FEMINISM AND PHILOSOPHY 387, 387–88 (M. Vetterling-Braggin et al. eds., 1977).

165. *Id.* at 388.

166. *Id.* at 392.

167. *Id.*

168. *Id.*

169. *See* Terry E. Thornton & Lynn Paltrow, *The Rights of Pregnant Patients:* Carder Case *Brings Bold Policy Initiatives*, HEALTHSPAN (Jan. 31, 1991), *available at* http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/the_rights_of_pregnant_patients_carder_case_brings_bold_policy_initiatives.php.

discovered to have metastasized to Carder's lungs.[170] Her plan was to begin radiation and chemotherapy immediately, regardless of the risks to the fetus.[171] Disagreeing with her choice and believing (but not unanimously) that she had only days to live, her doctors refused to treat her cancer despite her insistence, instead inserting an oral feeding tube and administering sedatives to delay her death and increase her fetus's chance of development.[172] Concerned that she had not elected to have a C-section, the doctors obtained a court order for one, aided by the testimony of a neonatologist (but not Carder's own) that the fetus had a 60% chance of survival.[173] Despite Carder's pleas that she did not want that procedure done, it was performed anyway.[174] Ultimately, neither the baby nor Carder survived beyond days after the procedure.[175] Throughout, and as expressed by the amicus curiae brief it filed in support of the doctors, the USCCB argued that "the decision to save [Carder's] unborn child properly recognized . . . the futility of improving A.C.'s situation."[176] The USCCB asserted that Angela's legally recognized interest in her "own health and well-being" could not "have been promoted by [Carder]."[177]

Analyzing these ethical positions in tandem with the conceptualization of discrimination in just war theory, there is little articulable reason to apply the concepts of intent and foresight any less restrictively. As the Carder example shows, not only must empirical uncertainty err on the side of preserving life—even at substantial, grave sacrifice—but one should also not be able to recast the taking of life as collateral consequences that are neither means nor ends. First, analogizing from the PVS context, there must be a substantial deal of certainty as to who qualifies as combatants and non-combatants before engaging in military action, subjective individual intent aside. Second, there must be some limit as to the moral permissibility of arguing that a military action that kills non-combatants has this effect only collaterally—that is, not part and parcel as a direct means to self-defense—just as the Church implicitly adopts the position that the narrowing of a fetus's head is part and parcel of the means of fetal killing to save a mother's life.

Nevertheless, as the Church's sanctioning of the American initial military efforts in Bosnia, Afghanistan, and Libya demonstrate,

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170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Brief for U.S. Catholic Conference as Amicus Curiae Supporting Appellees, *In re* A.C., 573 A.2d 1235 (D.C. 1990) (87–609).
177. *Id*.

contemporary applications of just war principles are inconsistent with the broader life ethic's conceptualization of discrimination. For example, during the Bosnian War, the NATO strikes mostly focused on military sites, such as munitions storage sites, heavy weapons, and air defense in the vicinity of safe areas, or what the military deemed as having only "medium" risk of collateral damage if attacked.[178] This strategy was likely responsible for the relatively minimal casualties incurred by either side, military and civilians included. However, NATO also targeted many "joint use" sites, including key bridges, as well as sites located in or next to civilian dwellings, such as barracks and radio relay towers.[179]

On the one hand, NATO had a clear, deliberate plan in place to minimize civilian casualties in these instances of military action. For example, it did not strike sites located adjacent to civilian dwellings unless it had precluded that an errant weapon would cause unintended harm, and targets were often hit so late at night as to minimize the likelihood that even military personnel would be hurt.[180] On the other hand, from an *ex ante* perspective, the strategy to target deliberately and knowingly both joint use and civilian-adjacent sites highlights the potentially minimal gap that actually exists between intent and foresight. Regardless of the efforts used to minimize civilian casualties, that these sites could be targets at all exemplifies the difficulty in extricating these concepts from each other.

Similar criticisms can be leveled at the Church-sanctioned military campaigns in Afghanistan and Libya.[181] Military efforts in Qalaye Niazi, Afghanistan resulted in civilian deaths that may have been avoided with greater on-the-ground presence, providing a greater degree of discrimination between combatants and non-combatants.[182] Organizations such as Pax Christi USA have further criticized the campaign for targeting infrastructure, such as civilian power plants, that was ostensibly critical to sustaining large non-combatant populations.[183] As one scholar states, Secretary of Defense Donald Rumsfeld's claims that the United States was "focused totally on military targets . . . depend[ed] upon accepting that U.S. attacks against the main telephone exchange in Kabul, the electrical grid in Kandahar, and the hydroelectric power station adjacent to the Kajaki dam constituted

178. *See* ROBERT C. OWEN, OPERATION DELIBERATE FORCE: A CASE STUDY ON HUMANITARIAN CONSTRAINTS IN AEROSPACE WARFARE 62 (2001), *available at* http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Owen2001.pdf.

179. *Id.* at 63.

180. *Id*. at 65.

181. *See supra* Part II.B.

182. *Id.*

183. *See* Pax Christi USA, *supra* note 135.

legitimate military targets."[184]

The 2011 NATO bombing campaign in Libya, supported by Church officials particularly in the United States, is similar in these regards. Although the USCCB was not as consistently vocal in its support of this campaign as compared to Afghanistan, it stated that the campaign "appeared to meet" the just cause criterion, furthermore directly "recognizing [that] serious efforts are being made to avoid directly targeting civilians."[185] Though Vatican support was less robust, Pope Benedict XVI did not condemn the attacks until well after U.N. Security Council-backed bombings had started,[186] merely expressing "fear and trepidation" about the situation until then.[187] Yet, the same moral questions regarding discrimination arise as they did in Afghanistan. For example, how much better could efforts to avoid killing civilians have worked with traditional on-the-ground presence?[188] Even just in the opening days of the attack, one might legitimately question the military's decision to target Moammar Gadhafi's compound, which contained apparatuses crucial to the dictator's command and control over Libyan forces, but which also contained residential facilities where non-combatants were usually housed.[189] Given that NATO itself admitted that the nighttime timing of many attacks made it difficult to ascertain civilian deaths *ex post*,[190] one could further inquire as to whether attempts to ascertain potential deaths *ex ante* could have been sufficient. As with the military campaign Afghanistan, it is undeniable that NATO took many steps to avoid harming civilians, often not damaging civilian infrastructure useful to the Libyan government.[191] The *New York Times* pointed out:

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184. Nicholas J. Wheeler, Protecting Afghan Civilians from the Hell of War (2001), *available at* http://essays.ssrc.org/10years after911/protecting-afghan-civilians-from-the-hell-of-war/#fn-251-24.

185. USCCB, *Letter to Thomas E. Donilon, National Security Advisor* (Mar. 24, 2011), *available at* http://old.usccb.org/sdwp/international/callafrica/2011-03-24BishopHubbardto NationalSecurityAdvisor.pdf.

186. *See* John Thavis, *Pope Calls for Suspension of Fighting in Libya*, CATH. HERALD (Mar. 28, 2011), *available at* http://www.catholicherald.co.uk/news/2011/03/28/pope-calls-for-suspension-of-fighting-in-libya/.

187. Francis X. Rocca, *Pope Benedict Stays Neutral on Libya Attacks*, RELIGIOUS NEWS SERVICE (Mar. 21, 2011), *available at* http://www.huffingtonpost.com/2011/03/21/pope-neither-condemns-end_n_838737.html

188. *See supra* Part II.B.

189. *See* CNN Wire Staff, *Coalition Targets Gadhafi Compound*, CNN (Mar. 21, 2011), *available at* http://edition.cnn.com/2011/WORLD/africa/03/20/libya.civil.war/index.html.

190. Mark Townsend, *Operation Odyssey Dawn Commences to End Gaddafi Onslaught on Benghazi*, GUARDIAN (Mar. 19, 2011), *available at* http://www.guardian.co.uk/world/2011/mar/19/operation-odyssey-dawn-tomahawks-libya.

191. C.J. Chivers & Eric Schmitt, *In Strikes on Libya by NATO, An Unspoken Civilian Toll*, N.Y. TIMES (Dec. 17, 2011), *available at* http://www.nytimes.com/2011/12/18/world/africa/scores-of-uninten ded-casualties-in-nato-war-in-libya.html?pagewanted=all&_r=0.

> While the overwhelming preponderance of strikes seemed to have hit their targets without killing noncombatants, many factors contributed to a run of fatal mistakes. These included a technically faulty bomb, *poor or dated intelligence and the near absence of experienced military personnel on the ground who could help direct airstrikes*. The alliance's apparent presumption that residences thought to harbor pro-Qaddafi forces were not occupied by civilians repeatedly proved mistaken, the evidence suggests, *posing a reminder to advocates of air power that no war is cost- or error-free*. NATO's response to allegations of mistaken attacks had long been carefully worded denials and insistence that its operations were devised and supervised with exceptional care. Faced with credible allegations that it killed civilians, *the alliance said it had neither the capacity for nor intention of investigating and often repeated that disputed strikes were sound*.[192]

Naturally, one can argue that intentionally not placing more troops on the ground saved American soldiers' lives in both Afghanistan and Libya. Nevertheless, principles of intent and foresight in other areas of life ethic have never abrogated the need for certainty in ensuring that innocent lives cannot somehow be spared, regardless of subjective intent, even when actual physical self-defense is at stake. The example of persistent vegetative states may not be perfectly analogous because of the absence of self-defensive goals in that instance. However, some cases of abortion to save the mother's life may be instructive. In the circumstance of a woman in prolonged obstructed labor, even though the mother will certainly die without a craniotomy (a self-defensive purpose), that the fetus has even a slim chance of survival even if the mother dies leads to the Church's position that a craniotomy is morally illicit because it is intentional killing.[193] This position stands even if the doctor or the mother herself wholeheartedly believes that she merely foresees, not intends the fetus's death.

This example points to another problem in the Church's applications of discrimination, beyond its contravention of the idea that uncertainty when life is at stake must err on the side of preserving life. In particular, the Church's application of discrimination in war is inconsistent with the idea, pervasive in abortion, that one can seldom conceptualize killing innocents as a foreseen collateral consequence, rather than an intended means or end in itself. In the craniotomy example, one is prevented from arguing that the death of the fetus was actually a

192. *Id*. (emphasis added).
193. *See* Nicholson, *supra* note 164.

collateral consequence, and that the narrowing of the fetus's head *per se* was the means toward the end of maternal health. Applying this level of stringency to the war context, one should not permissively be able to argue that killing non-combatants is a collateral consequence instead of inextricably part of the direct means of achieving self-defense, which would make the military action in question illicit. When a military relies on so-called surgical strikes without sufficient on-the-ground verification of who is a combatant and who is not, it arguably loses the opportunity to argue that any non-combatant death is merely a collateral consequence. In other words, militaries should not be able to escape the stringency of double-effect distinctions, as seen in the abortion examples, by deliberately intending to preserve uncertainty.

Putting moral formalism aside, it is difficult to see why a situation like a medically necessary craniotomy or the case of Angela Carder is, for practical purposes, any different from the few situations where the Church deems abortion to meet the discrimination requirement. Putting moral formalism aside, it is difficult to see why large, foreseen, and potentially avoidable collateral consequences in war themselves meet this requirement. If such unforgiving consequences are to be justified by the discrimination requirement, interpretations of this concept must be more internally coherent.

III. RECONCILING JUST WAR THEORY AND THE CHURCH'S CONSISTENT LIFE ETHIC

Given the inconsistencies between the Church's applications of just war principles and the principles found elsewhere in its life ethic, the question arises: Can these principles be reconciled, and, if so, how? That the Church seeks a harmonious life ethic, inclusive of its applications of just war doctrine, seems evident particularly given how it organizes its official Catechism on the Fifth Commandment,[194] as well as how other Church documents consistently connect doctrine on one practice to reinforce its doctrine on other practices.[195] Yet, given the numerous inconsistencies addressed in Part III, it is unclear if and how such a harmonious life ethic is actually possible.

This Part explores the possibility of reconciling the challenges faced in applications of just war theory *vis-à-vis* the Church's broader life ethic. Across the topics of just cause, proportionality, and discrimination, this Part explores several possibilities for better harmonization. First, the complexities of applying just war principles in practice might call for an alteration of the Church's broader life ethic,

194. *See* Part I.
195. *Id*.

which might become more permissive with respect to practices that the Church has heavily restricted. Second, the Church might impose tighter thresholds for meeting the criteria for just war, in accordance with the Church's strict treatment of life in other contexts. Third, the Church might proffer a more comprehensive explanation for why war, given its nature and purposes, merits the more permissive treatment it appears to receive compared to other matters where life and death is at stake. Ultimately, this Part finds that the Church is unlikely to proffer a plausible explanation for why war should be treated so differently compared to other issues. Instead, even while the Church is unlikely to abandon wholly its position on other issues, there may be ways for these positions and just war theory to converge. Because the Church seeks a harmonious life ethic, and in order to buttress the moral force of its principles, it should consider taking steps to reconcile the various doctrines.

A. *Just Cause*

The Church does not restrict the just cause of self-defense to circumstances when human lives are physically at stake, implicitly allowing the defense of means, ways, and qualities of life to qualify as a sufficiently good justification.[196] Yet, though this position is inconsistent with the Church's broader position that considerations of quality of life cannot justify killing, it is all but absolutely certain that the Church will not alter this broader position. The Church will not abandon its centuries-long tradition of regarding abortion and euthanasia as intrinsic evils even when they are based on well-intended quality of life considerations.[197] Instead, imposing a more restrictive understanding of just cause is the more pragmatic, realistic alternative. This alternative would entail that the Church sanctions war only if truly existential threats are at hand.

At the same time, though this may be a more realistic alternative, restricting just cause only to truly existential threats may be equally problematic. First, the question arises of what precisely counts as an existential threat. For example, the self-defense rationale traditionally allows countries to fight against aggressors. Yet, to avoid the spilling of any blood on either side, one might argue that the aggrieved country could simply surrender and put up no resistance. Thus, at least a few might argue that that this scenario does not pose a situation where life and death were truly at stake. Second, while it has not been pressed on this issue since the end of the Cold War, the Church seems unlikely to relinquish its stance that defending way-of-life concepts such as

196. *See supra* Part II.A.
197. *Id.*

religious freedom and independence is a just cause even if through violence. A counterargument might be found in the context of the ongoing Arab-Israeli conflict. With regards to this conflict, though the Church invites Christians "to understand this religious attachment [by Israelis to claimed land] which finds its roots in Biblical tradition," it states that the "existence of the State of Israel and its political options should be envisaged not in a perspective which is in itself religious, but in their reference to the common principles of international law."[198] Nevertheless, where not merely religious land, but a religious lifestyle is threatened, as in the Spanish Civil War or more broadly with communism, the Church's history reveals its position more clearly.

A third alternative would be for the Church to make a distinction between taking life in the name of defending a society's religious freedom as a way of life, and taking life in cases of abortion and euthanasia for the sake of not inflicting suffering and an abject quality of life. Here, the Church also faces difficulties. First, the Church would naturally argue that religious freedom and the Catholic religion specifically in general are necessary for human flourishing, while practices such as abortion and euthanasia are not. However, one might counter that, rather than taking others' lives to defend one's religion, resisting non-violently or even sacrificing one's own life for religion protects religious freedom more strongly. The Church's long tradition of martyrdom of Catholics without arms, inclusive of those clergy who were massacred in the Spanish Civil War, supports the idea that such self-sacrificial behavior reinforces the communal strength of religion, perhaps even more so than taking up arms does.[199]

Second, while one might attempt to stress that one scenario involves non-innocent aggressors while the other involves innocent human beings, the Church's doctrine does not actually consider "innocence" in making distinctions between good or neutral acts and evil acts. What makes self-defense morally permissible is that one is upholding one's own life and that the killing of other person—whether guilty or innocent—is not technically the means of achieving this end, but a collateral consequence of the immediate action of defending one's own life.[200] In other words, it is an issue of discrimination/intent, not just cause. As underlined in its argument against capital punishment that even non-innocent individuals have purpose in life and may be able to reform, the Church does not assume the position that non-innocent and

198. Commission for Religious Relations with the Jews, *Notes on the Correct Way to Present the Jews and Judaism in Preaching and Catechesis in the Roman Catholic Church* (Mar. 6, 1982), *available at* http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/relations-jews-docs/rc_pc_chrstuni_doc_19820306_ jews-judaism_en.html.

199. *See supra* Part II.A.

200. *See, e.g.*, *supra* text accompanying note 162 (saying nothing about innocence).

innocent individuals have differing moral worth.[201] Therefore, distinguishing between innocent people and non-innocent aggressors does little to reconcile the problem.

With these difficulties in reconciling principles, what becomes clear is that the Church must above all address why some forms of corporal, psychological, or spiritual suffering—but not others—merits the taking of life. Again, the Church is all but absolutely certain not to change its position on issues like abortion or euthanasia. Still, it must consider why the abject pain and suffering that these practices often inflict on other people is of a kind that people must withstand, even as they need not withstand suffering arising from the absence of other goods.

While the Catholic Church's doctrine addresses this argument to some degree, it potentially downplays or mischaracterizes certain issues. For example, it largely presents pregnant women's concerns for the well-being of their families and potential child as abstract economic or demographic concerns, rather than largely a concern that a child might be subject to sustained, agonizing, and in real practice, insurmountable indignities through a lifetime.[202] Unsurprisingly, some of the idealistic solutions it offers—for example, a redistribution of resources to ensure the well-being of pregnant women's families[203]—may miss the practical realities of these problems, potentially rendering many people to suffer while these solutions slowly (or never) take effect.[204] Even when the Church most directly addresses these realities—for example, when it argues that no degree and length of potential pain justifies abortion or assisted suicide—its argument that

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201. *See supra* text accompanying note 116.

202. *See supra* note 102 and accompanying text.

203. As the *Evangelium Vitae* states:

> The ways of solving the population problem are quite different. Governments and the various international agencies must above all strive to create economic, social, public health and cultural conditions which will enable married couples to make their choices about procreation in full freedom and with genuine responsibility. They must then make efforts to ensure greater opportunities and a fairer distribution of wealth so that everyone can share equitably in the goods of creation. Solutions must be sought on the global level by establishing a true economy of communion and sharing of goods, in both the national and international order.

Evangelium Vitae, *supra* note 1, ¶ 91.

204. One example might be adoption. According to some statistics, over 400 million "abandoned children live on their own on the streets of hundreds of cities around the world. They subsist hand to mouth. They struggle just to survive the day." *Statistics on Abandoned Children*, INTERNATIONAL STREET KIDS, *available at* http://www.internationalstreetkids.com/statistics.php (last visited Mar. 30, 2014). Yet even the most generous estimates of the number of Americans actively interested in adoption are only above 1 million. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1166 n.5 (1991).

pain is an existence that all persons must bear, and even something that brings meaning to life, is difficult to comprehend "by reason itself" for the many persons experiencing indignities that shock the conscience (for example, malnourished children who lack basic human necessities, and terminally ill persons who wish to die in a non-traumatic way).[205]

The Church's reverence of life is noble. However, it also underscores not only classically difficult ethical questions (*e.g.*, is someone better off living in abject suffering than being killed), but also new ones emphasized by its views on just cause doctrine in war. As Pope John Paul II stated in 1982, "people[] have a right and even a duty to protect their existence and freedom."[206] Why freedom, in addition to existence? Why is it better to fight to live freely, at the cost of human lives including potentially one's own, than to live in bondage, at the cost of no life? That the Church implicitly believes that there are certain principles beyond life itself that are worth defending requires that they have a more comprehensive vision for why other principles are excluded. Only by presenting such a vision can the Church truly reconcile "just cause" doctrine across its life ethic.

B. *Proportionality/Last Resort*

In contradiction to its rigid position against attempting to make valuations of life in other areas, the Church sanctions war even when there is great uncertainty as to whether the benefits to the proffered just cause doctrine outweigh the cost of human destruction. On the one hand, given two conflicting realities—that the Church is unlikely to change its broader life ethic, but that the nature of threats like terrorism makes speculative calculations all but necessary—it seems unlikely that either just war doctrine or the Church's broader life ethic can begin to converge. On the other hand, arguing that war and self-defense inherently require more permissive standards of conduct than other contexts is a problematic option as well.

Regarding the argument that war and self-defense require more permissive standards, the context of war might actually exacerbate, rather than mitigate the concerns that the Church has elsewhere in its life ethic. For example, the Church limits speculative valuations of life in abortion and euthanasia because of the belief that humans are incapable of making such decisions without exaggerated anxiety and

205. These arguments interact in complex ways with the concepts of consciousness and autonomy, the former argument potentially justifying abortion versus infanticide (*e.g.*, because of the importance of present human experience as compared to future potential), and the latter argument potentially justifying assisted suicide versus infanticide.

206. *See* John Paul II, *supra* note 80, ¶ 12.

fear.[207] Yet these fears are arguably greater precisely when one's own life and autonomy seem physically and imminently at stake, which is far less the case when people consider practices like euthanasia.[208] Though the Church was staunchly opposed to the 2003 Iraq War, this war shows exactly human's capacity to wage war based on unfounded fear.[209]

Where there are even more compelling reasons and evidence to wage war against terrorism, human beings may ironically continue to be prone to disproportionate responses, all while the Church sanctions those responses. Thus, although the nature of security threats like terrorism may counsel acceptance of a greater degree of uncertainty than tradition would dictate, the leeway cannot be too great. Otherwise, doctrine would too greatly enter the territory of the specific ends justifying the particular means. Just as the Church recognizes the slippery slope of legitimizing practices like assisted suicide, so it must recognize the same slippery slope of legitimizing more permissive practices of war.

Furthermore, any attempt to argue that self-defensive war requires inherently more permissive standards would somehow have to distinguish why some abortions such as craniotomies are impermissible even when a mother is not just speculatively likely, but scientifically certain to die without this procedure—that is, even when a procedure is undoubtedly used for self-defense.[210] Otherwise, significant dissonance will continue to exist between standards of war, where uncertainty about self-defensive benefits is insufficient to bar action, and the rest of the Church's life ethic, where uncertainty about self-defensive benefits (*e.g.*, that treatment would prolong Angela Carder's life) may be sufficient to bar action that would harm another person.[211]

What the Church appears to be left with is to attempt making war ethic and its broader life ethic converge, at least to some extent. Though it is certainly difficult to apply such abstract principles as proportionality, it can no longer be enough for the Church to concede this point (as the USCCB did in 1982) without making more explicit distinctions that would guide military actions, particularly in an era of uncertain threats. Above all, this would involve defining the extent of good faith effort that military efforts must make to obtain all of the information they can, to mitigate speculative applications of principles like proportionality. How much should militaries be able to rely solely on aerial assaults, whether manned or unmanned? Must militaries risk

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207. *See supra* Part II.B.

208. *See id.* (though granted, there are exceptions, what with the history of eugenics experiments).

209. *See* John Paul II, *Address to the Diplomatic Corps* (Jan. 13, 2003).

210. *See* Nicholson, *supra* note 164, at 388.

211. *Supra* text accompanying notes 169–77.

on-the-ground presence in order to gain better intelligence about the benefits and costs of war? If not what, why is this not a violation of broader life ethic?

C. *Discrimination*

In contrast to the Church's generally restrictive stance on the issue of intent and foresight, it has a much more permissive stance on these principles with respect to war. Unlike with other inconsistencies, this tension may have the greatest likelihood of resolution by the Church altering its broader life ethic, at least to a small extent. With the ultimately narrow and rare issue of an abortion by craniotomy, for example, the Church might be willing to recognize that the killing of a fetus is a collateral consequence, rather than a means in itself, of a self-defensive end goal.[212]

The Church might adopt this position particularly considering the presence of certainty in the grim outcomes of the mother and child absent performance of the craniotomy procedure. When analyzing these prongs of the double-effect doctrine, arguably there is little moral difference between this procedure and a hysterectomy.[213] Perhaps what undergirds the Church's position is that certain procedures are more brutal and affronting of life than others—but this is true of much of war, a reality that technology often exacerbates instead of ameliorates.[214] These abortion scenarios are undoubtedly ones where the sef-defense rationale applies. So, it is difficult to see why a mother cannot claim that a craniotomy is morally equivalent to a military action that kills innocent non-combatants only foreseeably. By making small changes to its broader life ethic, the Church can begin to reconcile the problem posed by uncertain threats like terrorism to the requirement that military actions distinguish between combatants and non-combatants.

Despite this potential for moderately altering the Church's positions to make it more consistent with applications of just war principles, the Church must still take care to avoid permissive standards for meeting discrimination in war. On the one hand, it is impractical to require that military actions be restricted to those where there is a high level of certainty that innocent civilians will not be killed even unintentionally. On the other hand, the Church must still address the extent to which military leaders have a responsibility to lessen uncertainty about potential harm to combatants and non-combatants. Just as objective certainty, and not an individual's subjective intent, matters in the scenario of deciding whether to remove medical care from a person in a

212. *Cf.* Nicholson, *supra* note 164, at 388.
213. *Cf. id.*
214. *See supra* Part II.B.

persistent vegetative state, so the Church must be careful to let unmitigated uncertainty about combatants and non-combatants allow military actions to escape the discrimination requirement. Therefore, even while the Church might loosen intent requirements in other area of its doctrine, it should simultaneously consider requiring military actions to meet a high threshold for meeting discrimination. From a practical standpoint, this might require military actors to take more action on the ground, despite its risks, before conducting aerial assaults. Such a potential moral requirement is particularly crucial when manned aerial assaults morph more and more into unmanned assaults, as they appear to be doing, further removing the military from non-combatants on the ground.

Even more than the principles of just cause doctrine and proportionality, the principle of discrimination demonstrates the chasm between the just war doctrine of the Church and the rest of its consistent life ethic. In this realm, the end result of its moral formalism entails that even some mothers with the most compelling of legitimate self-defense claims must die, along with their fetuses. Meanwhile, militaries can take scores of civilian life in incident after subsequent incident with moral immunity, as they appeared to do in the opening salvos of Afghanistan. Such inconsistencies pose the greatest challenge to the Church's claims that its doctrine on life is not merely justified by faith, but knowable by reason, entailing that even those who do not subscribe to Catholic faith should reach the same moral conclusions. These inconsistencies also fuel popular criticism about extensive focus on issues like abortion by Christians, compared to somewhat less importance on other similarly life-and-death issues.[215] Ultimately, it is understandable that the Church must draw moral and ethical lines somewhere, even strong ones. However, where those lines are inconsistent with one another, a purportedly consistent life ethic loses much of its moral force – and consequently its public support.

CONCLUSION

For whatever inconsistencies might exist between the Church's applications of just war doctrine and its consistent life ethic, the Church still arguably has a restrictive view of war. Indeed, some have criticized the Catholic Church's position on post-Cold War just war theory as being too restrictive. George Weigel argues, for example, that the Church's restrictive default position has been on display since

215. *See, e.g.*, Thomas L. Friedman, *Why I am Pro-Life*, N.Y. TIMES (Oct. 27, 2012), *available at* http://www.nytimes.com/2012/10/28/opinion/sunday/friedman-why-i-am-pro-life.html.

September 11, criticizing the Church (despite its support for military action in Afghanistan) for its warnings about "violence begetting violence – as if a proportionate and discriminate use of military force in a just case were the moral equivalent of turning a plane into a weapon of mass destruction."[216] In this statement, Weigel propounds a much broader reading of proportionality and discrimination than the Church itself would.[217]

Despite this criticism, however, the Church's applications of just war are actually not restrictive enough when they are compared to the entirety of the Church's life ethic. On the one hand, Pope John Paul II might especially be lauded for restricting the moral permissiveness of war in certain instances. On the other hand, any shift must be evaluated in light of the fact that he also restricted the permissiveness of other actions, like abortion, assisted suicide, and capital punishment. For whatever shift occurred with respect to just war, the shifts in the other aspects of Catholic life doctrine went much further, as encapsulated in the landmark *Evangelium Vitae*.

No matter how precisely the Church chooses to re-conceptualize its life ethic, there will likely have to be two broad steps. First, it must articulate more clearly its just war policies *ex ante*. Particularly in an age of changing technology, it is no longer sufficient for the Church merely to concede that it is difficult to apply certain principles like proportionality; make statements in ostensibly tentative support for military action without specifically explaining its reasoning; then bring the full force of Vatican or USCCB condemnation only *ex post*. Such is not the path the Church takes with respect to other issues, like abortion. So it should not be the path it takes with actions that even more people agree are an afront to human life.

Second, the Church must give greater consideration as to the counterarguments to its positions on issues concerning the rest of its life ethic. As exploration of these issues shows, even the most restrictive positions on life are qualified and narrowed by concepts like intent and innocence. These concepts certainly are morally relevant. However, the Church must give deeper and more explicit consideration as why other concepts, such as stage of life, consciousness, suffering, or dignity are not—particularly since the Church emphasizes that illicitness of acts like abortion are not only "contrary to the Law of God," but also somehow "knowable by reason itself."[218] In succinct terms, the answer to the question of why suffering exists, already eluding generations of philosophers and public intellectuals, is a question only complicated by

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216. George Weigel, *The Just War Tradition and the World After September 11*, 51 CATH. U. L. REV. 689, 694 (2002).

217. *Id.*

218. *Evangelium Vitae*, *supra* note 1, ¶ 62. (emphasis added).

these issues.

This Article has attempted to illuminate problems with the Catholic Church's applications of just war theory and its broader life ethic. It finds that, while the Church's reverence for the sanctity of life places it in a unique and noble category of mainstream organizations, this reverence is threatened by these problems of inconsistency. By identifying these problems, this Article goes beyond existing scholarship, which has often identified problems with the Church's just war applications, but not *vis-à-vis* broader life ethic that can simultaneously illuminate—and constrain—these applications. While there are many different ways to reconcile these positions, some are less viable and helpful than others. In any case, particularly as the world has entered a world with uncertain threats, it is clear that the Church must give greater reflection to these issues.

ESSAY

REVISITING THE IDEA OF PROVISIONAL MEASURES IN THE WTO DISPUTE SETTLEMENT MECHANISM

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> Unlike most of the "procedural" reforms being considered in this conference, reforms seeking to broaden the remedies available in WTO dispute settlement proceedings cannot be regarded as "technical" issues. Because remedial measures directly affect the level of enforcement pressures applied to governments in violation of WTO obligations, changes in this area confront the central issue of how strong the WTO member governments want their legal system to be.[1]

I. INTRODUCTION

In 1995, the Uruguay Round of Multilateral Trade Negotiations made a unique contribution to the multilateral trading system in the process of creating the WTO: the dispute settlement mechanism (DSM). Founded on the notion that a strong dispute settlement mechanism with sound enforcement mechanism was essential to the functioning of the new multilateral trading institution, the DSM has rightly been hailed as its crown jewel; as the backbone of the WTO. Indeed, the continued usage and confidence reposed by Members of the WTO in resolving trade disputes stands testimony to the success and pivotal importance of the DSM.[2]

However, the DSM has also drawn flak for having certain inadequacies. Members and scholars have identified certain drawbacks and shortcomings in certain aspects. Some of the shortcomings that have been discussed are: the lack of a standing panel,[3] the absence of remand authority with the Appellate Body,[4] Remedies, which form the

1. *See generally* Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, *in* IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES 345–76 (Friedlweiss & Jochemwiers eds., 2000), *available at* http://www.worldtradelaw.net/articles/hudecremedies.pdf.

2. For a recent note on the functioning of the WTO dispute settlement mechanism, see generally H.E. Mr. Yonov Frederick Agah, *WTO Dispute Settlement Body Developments in 2010: An Analysis*, 4 TRADE L. & DEV. 241 (2012).

3. Debra Steger, *Establishment of a Dispute Tribunal in the WTO in* TRADE AND DEVELOPMENT SYMPOSIUM: PERSPECTIVES ON THE MULTILATERAL TRADING SYSTEM 3 (2011), *available at* http://ssrn.com/abstract=2065448.

4. Joost Pauwelyn, *Appeal without Remand: A Design Flaw in the WTO Dispute*

backbone of the DSM; the final *astras* that a Member may invoke to enforce its rights against a violating Member state have also been subject to a certain level of criticism. Some of these shortcomings have come to be identified in the course of its functioning; some come to light when the DSM is compared to a domestic adjudicatory system.

In the context of remedies, a subtle difference that distinguishes the WTO DSM from most domestic adjudicatory systems is the absence of provisional measures[5] available to Members in the DSM. Concerns about the lack of provisions for provisional measures in the DSU have been raised by the WTO's Members in the DSU review negotiations. One of the very first Members to suggest the incorporation of provisional measures in the DSU was Mexico.[6] The problem of the lack of provisional measures was succinctly identified by Mexico: "the fundamental problem of the WTO dispute settlement system lies in the period of time during which a WTO-inconsistent measure can be in place without the slightest consequence."[7] Mexico very correctly identified the absence of provisional remedies as a "fundamental problem" in the WTO dispute settlement system. Mexico further stated: "There is currently no mechanism available for a Member challenging a WTO-inconsistent measure to recover the losses resulting from that measure. Illegal measures may be in place for more than three years before a complaining party can obtain compensation or suspend concessions or other obligations."[8]

Mexico's proposal was evaluated by several other WTO Members who had an overall positive response in subsequent deliberations. According to Malaysia, the concept of provisional measures warranted further debate and elaboration and that "the concept was not completely alien for many Members who had been involved in arbitration or any other adjudication process at international and national levels."[9] Observations on the need for prompt settlement of disputes and the probability of suffering damages while awaiting conclusion of the dispute settlement process were appreciated by the United States.[10]

Settlement and How to Fix It, ICTSD DISPUTE SETTLEMENT AND LEGAL ASPECTS OF INTERNATIONAL TRADE ISSUE PAPER NO. 1, at 4, *available at* http://ictsd.org/i/publications/11301/.

5. The term "provisional measures" is a broad term and encompasses different types of measures including preliminary injunctions, attachment of property, etc. However, for the purposes of this paper, I am primarily basing my Essay on preliminary injunctions.

6. Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, at 2, TN/DS/W/23 (Nov. 4, 2002).

7. *Id*. at 1.

8. *Id*.

9. Special Session of the Dispute Settlement Body, *Minutes of the Meeting*, at 2, TN/DS/M/15 (June 4, 2004).

10. *Id.* at 3.

India made a very important recommendation: the need to clarify the terms "urgency," "serious harm or injury" and an indication be given as to who would determine their occurrence.[11] According to Thailand, a system of provisional measures would enhance the credibility of the dispute settlement system and also the WTO as a whole.[12] In addition to ideas of the WTO Members on the need for provisional measures, it would be interesting to note that the WTO itself has been forthcoming in this regard and has acknowledged the absence of provisional measures as a weakness in its online training module.[13]

In this Essay, I revisit the idea of equipping the WTO DSM with provisional measures. Though the idea of provisional measures is not novel, a limited amount of scholarship[14] has been generated on the topic of provisional measures when compared to other topics in WTO dispute settlement such as retaliation and the reasonable period of time for implementation. Even on the political front, not much deliberation has taken place since Mexico's proposal for provisional measures during the DSU review negotiations. With the DSU review negotiations having been stalled, it is uncertain as to when any further discussions on the topic of provisional measures would emerge in the near future. Nonetheless, in light of the increasing number of disputes at the WTO—a testimony to the notion that WTO Members repose their faith and confidence in the WTO DSM—it would be ideal to keep alive discussions on the need to continue strengthening and reforming the DSM. In this Essay, I advocate the need to incorporate provisional measures in the WTO DSM. This article aims at justifying the need to incorporate provisional measures at the WTO DSM.

The structure of this Essay is as follows: before discussing the justifications for incorporating provisional measures at the DSM, I present a brief overview of the nature, purpose and working of provisional measures in the context of domestic dispute settlement mechanisms in Part II. In Part III, which is the crux of this Essay, I

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11. *Id*.

12. *Id*.

13. *12.3 Strengths and Weaknesses*, World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s3p1_e.htm. The absence of provisional measures has been identified as a weakness of the DSM by certain scholars as well. *See, e.g.*, Ernst-Ulrich Petersmann, *Ten Years of the WTO Dispute Settlement System: Past, Present, and Future*, 3 J. INT'L L. & POL'Y 1, 6 (1996).

14. In comparison to the scholarship on other aspects of WTO dispute settlement, there are few works that have focused specifically on the topic of provisional measures at the WTO DSM. *See, e.g.*, Georges A. Cavalier, *A Call for Interim Relief at the WTO Level: Dispute Settlement and International Trade Diplomacy*, 22 WORLD COMPETITION 103–39 (1999). A very recent article which addressed the problem of the absence of provisional measures to a certain extent is Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 Geo. WASH. L. REV. 102–58 (2011).

present three arguments to justify the incorporation of provisional measures at the WTO DSM. The first justification is that provisional measures at the WTO DSM can ensure security and predictability in the world trading system. In the absence of provisional measures, a Member's rights and interests are affected by the adverse actions of the violating Member. The absence of provisional measures highlights how the DSM is incapable of preserving a particular Member's rights in the course of a dispute, thus undermining the WTO's security and predictability objectives. I provide a theoretical justification to incorporating provisional measures at the WTO DSM.

In the second Part, I provide a second justification for provisional measures predicated on the need to protect the rights of private businesses underlying the world trading system. Though it is States as Members of the WTO who enforce rights and obligations at the WTO, the primary purpose of the WTO's existence is to support and facilitate private business interests. My second justification, therefore, is that with an objective to protect the underlying business interests of non-State actors, there should be some form of provisional measures at the WTO.

I present the third argument for incorporating provisional measures in Part II. The DSM under the WTO stands in stark contrast to the DSM under the GATT. The judicialized nature of the WTO DSM and the remedies under it has undoubtedly contributed to the effectiveness of setting disputes in the multilateral trading system. I argue that equipping the WTO DSM with provisional measures would further contribute to its effectiveness and strengthen the DSM. Rather than a justification as such, I present a comparative perspective on the need for provisional measures by comparing the WTO DSM with other international dispute settlement mechanisms such as the International Court of Justice, the COMESA, and international investment arbitration. The objective is to encourage WTO Members to incorporate provisional measures at the DSM.

In order to demonstrate the practical utility of provisional measures at the WTO DSM and the negative externalities due to the lack of provisional measures at the WTO DSM, I discuss certain cases to highlight this deficiency. I present this discussion in Part IV of this Essay before concluding in Part V.

II. A BRIEF OVERVIEW OF PROVISIONAL MEASURES AS A REMEDY IN DOMESTIC DISPUTE SETTLEMENT

A. *Nature and Purpose of Provisional Measures*

In order to appreciate the need for provisional measures at the WTO, it is imperative to understand the nature of provisional measures and how it works in domestic dispute settlement. Impressing the need and nature of provisional measures upon government officials who occupy the negotiating is essential since these officials who are part of their government bureaucracy would not easily understand and otherwise be convinced of the need for provisional measures and aim at resolving a given trade dispute in hand through diplomatic channels prior to resorting to the adversarial method.

Provisional measures is primarily a restraining relief that is sought by one of the parties to the dispute (usually the plaintiff) against the other party (usually the defendant) from taking certain actions which may be adverse to the interests of the plaintiff and may prejudice adjudication of the suit.

To cite from Indian jurisprudence on the subject, the Honorable Supreme Court of India has in the judgment of *Zenit Mataplast P. Ltd. v. State of Maharashtra and Ors.*[15] expounded:

> 23. Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is, to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.

B. *How Provisional Measures Work*

In a typical domestic suit, provisional measures are sought for the plaintiff before the stage of litigation reaches final hearing or even before the stage of leading evidence in some cases. In certain instances, provisional measures are sought even before notice of the suit is served upon the defendant by the court (*ex-parte*) at the time of the first hearing. Provisional measures are often sought in property disputes to prevent the creation of third party rights by the defendant in the suit property, the absence of which may adversely affect the rights of the

15. Mataplast P. Ltd. v. Maharashtra, (2009) 10 S.C.C. 388 (India).

plaintiff and otherwise be prejudicial to the suit. Provisional measures are also sought in intellectual property disputes where the plaintiff seeks a motion from the court to restrain the defendant from committing breach of the impugned IPR.

There are three basic principles which govern the grant of provisional measures: irreparable harm or injury; balance of convenience; existence of a prima facie case. In a typical suit where provisional measures are being prayed for, the plaintiff has to establish the following factors for the grant of provisional measures.

1. Existence of a Prima Facie Case

One of the very first conditions to be established by the plaintiff is the existence of a prima facie case to justify the grant of provisional measures. By the facts and circumstances of the case, the plaintiff has to convince the court that the grant of provisional measures are imperative. At this stage, the court is not required to evaluate in detail the merits of the case and is required to only examine the facts of the dispute on the face of it and arrive at a conclusion that provisional measures are required. According to *Black's Law Dictionary*, the term *prima facie* means "*at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.*"[16]

2. Irreparable Harm or Injury

The most important ground to be proven by the plaintiff is to demonstrate that irreparable harm and injury would be caused to the plaintiff due to the actions by the defendant if such relief were not granted by the court to the plaintiff till the disposal of the suit. Such injury or harm has to be irreparable (*i.e.*, it should be such that the injury or harm complained of would be *irreversible* if immediate relief was not granted). Preservation of the rights of the plaintiff till final adjudication is the underlying objective.

3. Balance of Convenience

The principle governing the grant of provisional measures are balance of convenience. In this, the plaintiff is required to provide that the balance of convenience lies in the plaintiff's favor for the grant of provisional measures. The need for provisional measures are to protect the plaintiff against injury by violation of the plaintiff's right till the final adjudication of the matter. However, it would be inequitable if the

16. BLACK'S LAW DICTIONARY 1189 (6th ed. 1990).

grant of provisional measures are only considered keeping in view of the plaintiff's rights. Sufficient consideration has to also be given to the defendant rights. To cite from Indian jurisprudence again, the Honorable Supreme Court of India in *Gujarat Bottling Co. Ltd. v. Coca Cola Company*[17] stated:

> The need for such protection has . . . to be weghed [sic] against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies.[18]

The grant of provisional measures significantly depends on the facts and circumstances of the particular dispute. Moreover, the above principles are not exhaustive and in certain cases a defendant may cite suppression of material facts or misrepresentation, or unclean hands to defend a claim for provisional measures.

III. JUSTIFICATIONS FOR INCORPORATING PROVISIONAL MEASURES AT THE DSM

A. *A Theoretical Justification for Provisional Measures at the WTO DSM: Ensuring Security and Predictability*

My primary theoretical argument for provisional measures in the WTO DSM is that the absence of provisional measures undermines the security and predictability of the multilateral trading system. I base my argument on two aspects of the WTO DSM: the delayed resolution of disputes which when coupled with the insufficiency of remedies at the WTO DSM is inimical to the DSM.

1. WTO Dispute Settlement: Ensuring Security and Predictability in the World Trading System

One of the drawbacks of the GATT was that it was not designed to achieve the twin objectives of security and predictability in the world trading system. This was remedied to a large part by the creation of the WTO. Thus, one of the centrally avowed objectives of the WTO is to ensure "security and predictability in the world trading system."[19] These

17. Gujarat Bottling Co. v. Coca Cola Co., (1995) 5 S.C.C. 227 (India).
18. *Id*.
19. Edwini Kessie, *Enhancing Security and Predictability for Private Business Operators*

objectives are present, at least as a principle, in much of the WTO legal text. For instance, a Member is legally prohibited from arbitrarily changing its tariff commitments made in its respective Schedule of Concessions.[20]

The objectives of security and predictability are also sought to be achieved by the WTO's backbone, the DSM, and are specifically stated in Article 3 of the DSU. The primary objective of the DSU as stated in Article 3.2 is to ensure security and predictability in the world trading system. The DSU has also identified *promptness* in resolving disputes as a further objective of the DSM.[21] In this regard, one can say that the DSU's putative objective would be to preserve the rights of WTO Members.[22] Indeed, the aim of any dispute settlement mechanism would be to facilitate legal certainty[23].

In a commentary on Article 3 of the DSU, Peter-Tobias Stoll explains the concepts of security and predictability.[24] Stoll insightfully points out that security and predictability could be considered the very purpose of law as such.[25] He further explains the terms "security" and "predictability." According to Stoll, "security can be understood as a state of affairs in which one can rely on the ability of a legal and institutional system to take care of one's rights and interests."[26] In explaining predictability, Stoll points out that predictability adds a dimension of time, and "indicates that the conditions, rules and rights set up in the present will also be valid and enforceable in the future."[27] Stoll further cites the discussion by the panel in *US—Section 301 Trade Act* on the importance of "security and predictability" which states:

> Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the

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Under the Dispute Settlement System of the WTO, 34 J. WORLD TRADE 1, 2 (2000).

20. *Id.* at 3.

21. Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 4 (2008), *available at* http://ssrn.com/abstract=1140452.

22. Virachai Plasai, *Compliance and Remedies Against Non Compliance Under the WTO System: Toward a More Balanced Regime for All Members*, ICTSD DISPUTE SETTLEMENT AND LEGAL ASPECTS OF INT'L TRADE ISSUE PAPER NO. 3, at 1, 44 (2007).

23. Kofi Oteng Kufuor, *From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes*, 31 J. WORLD TRADE 117, 117 (1997).

24. MAX PLANCK INST. FOR COMPARATIVE PUBLIC LAW AND INT'L LAW, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO INSTITUTIONS AND DISPUTE SETTLEMENT 286 (Rudiger Wolfrun et al. eds., 2006).

25. *Id*.

26. *Id*.

27. *Id*.

> Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself.[28]

I argue that the lack of provisional measures during dispute settlement proceedings due to the delayed resolution of disputes and the insufficiency of remedies renders the DSM less secure and predictable for the DSM's participants than it would otherwise be.

2. Delayed Resolution of Disputes and the Insufficiency of Remedies: Twin Aspects of the DSM That Undermine its Security and Predictability

The nature of the system of settlement of disputes prescribed under the DSU is unique. The DSU places subtle emphasis on prompt compliance with the provisions of the covered agreements; prompt settlement of the issues at hand and a non-confrontational approach towards settlement of disputes by parties. Under the DSU, the stated primary objective is usually to secure the prompt withdrawal of measures complained of if they are found to be inconsistent with the provisions of any of the covered agreements.[29]

In case consultations under Article 4 of the DSU fail and both parties are not able to arrive at a MAS, the dispute proceeds to be heard by a panel. Upon final adjudication of the dispute by the panel, and in case of an appeal, by the Appellate Body, the report is circulated within the DSB and then adopted by the DSB. The defending member is then required to implement the rulings of the panel/AB within a reasonable period of time, which is determined in accordance with the provisions of Article 21 of the DSU. In the event the panel/AB rulings are not implemented within a reasonable period of time, the respondent Member may be required to provide mutually agreed compensation to

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28. Panel Report, *United States-Sections 301–310 of the United States Trade Act 1974* ¶ 7.75.

29. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO ANALYTICAL INDEX: DISPUTE SETTLEMENT UNDERSTANDING art. 3.7, *available at* http://www.wto. org/english/res_e/booksp_e/analytic_index_e/dsu_02_e.htm. It is clarified that article 3.7 only uses the term "withdrawal." However, according to article 3.3 the "prompt settlement" of disputes is described as essential. Hence a combined teleological interpretation would lead one to believe that prompt withdrawal of non-compliant measures is essential.

the complainant Member. However, Article 22.1 of the DSU particularly describes compensation as a voluntary and temporary measure, placing compliance as the primary objective. If there is no compensation forthcoming, then Article 22.2 provides that the complaining WTO Member may seek authorization from the DSB to suspend the application of concessions and other obligations under the WTO agreements to the defending Member (*i.e.*, retaliation).

It is thus clear that it is a long drawn battle for the complaining member to avail of any relief before the conclusion of the dispute settlement stage. Even after the panel/AB ruling is adopted, it may be several months before the defending Member implements the rulings and recommendations of the panel/AB. Even the measure of compensation has been couched in discretionary terms. If there is no compensation forthcoming, then the complaining member has to first seek authorization from the DSB to retaliate. Even after this authorization, the complaining Member may be forced to resort to arbitration if the defending Member objects to the level of suspension proposed, or claims that the proper principles have not been followed.

The remedies prescribed in the DSU are prospective in nature. There is no scope of undoing what has already been done; the DSU just does not contain provisions for the same. From a plain theoretical perspective, it would thus appear that the defending Member may be left 'relief-less' for a very long period of time. Before being tempted into advocating the reform of the DSU timelines and thereby being drawn into a different trajectory, the purpose of my comment above is to highlight the same aspect of the DSM again—that the complaining Member could be left without any remedy till the very end of the DSM process, and the defending Member could choose to be in violation of the provisions of the covered agreements till the stage of retaliation. Again, the insufficiency of remedies in itself is not the sole problem; insufficiency of remedies is linked to the delayed resolution of disputes. It is therefore necessary to place the insufficiency of remedies in the context of delayed resolution of disputes to understand how the same undermine the security and predictability of the DSM.[30] Resolving disputes according to the timelines envisaged and mandated in Article 20 of the DSU has not been adhered to in most cases. The DSM in practice has taken more time than that prescribed under Article 20. I discuss this aspect below.

Since its inception, the DSM has merited deep interest in its functioning. Numerous studies have been taken to understand how the

30. This point of view has been advanced from a practitioner's perspective as well. *See generally* Jacques H.J. Bourgeois, *Some Reflections on the WTO Dispute Settlement System from a Practitioner's Perspective*, 4 J. INT'L ECON. L. 145–54 (2001).

WTO DSM has worked in practice. Among the several empirical studies undertaken, some scholars have carried out studies to understand the efficiency in terms of duration it has taken for the WTO DSM to settle disputes. I discuss some of these findings arising from certain empirical inquiries below.

Henrik Horn, Louise Johannesson, and Petros C. Mavroidis have produced some interesting descriptive statistics on the WTO DSM covering the years from 1995-2010.[31] In their study, the authors have identified that the duration of the panel stage of the dispute settlement process has taken 14.7 months as against the statutory time line of the 6 months. The appellate process, which is expected to have taken 60 days, has taken a close to 3 months to conclude.

Similar findings have been arrived in a recent and significant study conducted by Rachel Brewster where she finds that "the time required for WTO dispute settlement has expanded dramatically and the remedy gap is far wider than the designers of the system seem to have anticipated."[32] In her article, Rachel Brewster has estimated the average time taken for the completion of the dispute resolution process for three time periods (1995-1999; 2000-2004; 2005-2009) since the establishment of the DSM. These are some of the key findings of Brewster's study:[33]

(1) the average time for completing the dispute resolution process where there was no appeal was 14 months (1995-1999), 16.1 months (2000-2004), and 17 months (2005-2009); and

(2) the average time for completing the dispute resolution process where there was an appeal was 16.7 months (1995-1999), 19.6 months (2000-2004), and 24.9 months (2005-2009).

With regard to the compliance panel stage, Brewster finds that:[34]

(1) the average time for completing the dispute resolution process where there was no appeal was 5.1 months (1995-1999), 9.9 months (2000-2004), and 9.5 months (2005-2009); and

(2) the average time for completing the dispute resolution process where there was an appeal was 7.8 months (1995-1999), 12.1 months (2000-2004), and 17 months (2005-2009).

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31. Henrik Horn et al., *The WTO Dispute Settlement System 1995–2010: Some Descriptive Statistics*, 45 J. WORLD TRADE, 1107–38 (2011).

32. Brewster, *supra* note 14, at 112.

33. *Id.* at 119.

34. *Id*.

Brewster's study finds that there is a trend towards longer periods of time for completing each stage of the dispute settlement process.[35]

It thus appears that the DSU suffers from a "design flaw." Indeed, although the DSM was designed to ensure that the dispute settlement process operated in a time-bound manner, the above studies show that the DSM has in practice worked differently. Indeed, there are several disputes which have taken a long time to be settled; the most prominent example being the battle in the skies between the European Union and the United States over subsidies granted to domestic aircraft manufacturers.

Though the negotiators during the Uruguay Round might not have anticipated deviations from the timelines prescribed in the DSU, it would be important to note that the DSU is conspicuously silent in case of non-adherence to the time-period for the panel process.[36] To better understand the debilitating effect of the delayed resolution of disputes, it is thus important to understand the shortcomings in the prospective nature of the remedies at the DSM. As one commentator puts it:

> The exclusively prospective nature of WTO remedies provides an additional incentive for delay. A losing party faces no penalty for dragging out the implementation process. For instance, since panels do not award money damages, they cannot charge interest (which acts as an incentive to comply and compensates the victim for delayed implementation). Nor does the WTO system allow for provisional remedies, which could encourage compliance and protect the complaining Member from some of the harm caused by delay.[37]

It appears that the the problem of duration can be attributed to two types of factors: those inherent in the dispute system itself, such as the long period of time set under the DSM and those factors caused deliberately by the losing party to the dispute.[38] The remedy of retaliation is available to a limited extent and risks being ineffective at such a late stage in the dispute resolution process.[39] In light of these factors, I emphasize the need for provisional measures for the broader

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35. *Id*.

36. *See generally Gabrielle Marceau, NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison*, 31 J. WORLD TRADE 44 (1997).

37. Brooks E. Allen, *The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, *in* PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION 281–310, 291 (Michael E. Schneider & Joachim Knoll eds., 2011).

38. Mark Clough, *The WTO Dispute Settlement System—A Practitioner Perspective*, 24 FORDHAM INT'L L.J. 252–74, 271 (2000).

39. *Id*.

benefit of the DSM and the WTO's Members, because provisions for provisional measures would discourage dilatory tactics by a violating member by preceding the final relief that would be awarded at the end of dispute settlement process. In this regard, William Davey cites that "[t]he possibility of provisional relief would have a very beneficial effect in giving both parties an interest in the speedy resolution of cases."[40]

3. WTO Law as a Law of Expectations

To further justify my argument for provisional measures for private business interests, I look to Chios Carmody's classification of a theory of WTO law as a law of expectations. In his seminal work *A Theory of WTO Law*,[41] Carmody postulates WTO law to be a law of expectations:

> The starting point of a theory of WTO law is the realization that the principal aim of the WTO Agreement is the protection of expectations. An example is a concession by the United States to grant a certain tariff on textiles. The tariff is not about textile imports *today*. Rather, it is a promise by the U.S. government to treat textile imports in a certain way *in the future*. That promise gives security to textile producers and exporters in foreign countries that their goods will encounter a predictable kind of treatment when entering the U.S. In effect, the tariff serves as a basis for upstream decisions about investment, production and exports. Producers and exporters may decide to invest in certain machinery, or use certain inputs, or locate their manufacturing in certain countries. Whatever the outcome, many decisions will turn on the expectations created by the U.S. tariff.
>
> As to whom these expectations belong, it might be thought that expectations arising from WTO concessions or commitments are the 'property' of the country or countries that actually negotiate them. After all, those countries would be the ones most directly involved in the negotiations and would be the most likely to benefit. But as I will demonstrate, that is not at all the way in which expectations have been interpreted under the WTO Agreement. By virtue of the fact that the promises made under the treaty give rise to complex interactions that cannot be neatly disaggregated, it becomes effectively impossible to sort out whose expectations arise from the operation of the treaty or who

40. WILLIAM J. DAVEY, ENFORCING WORLD TRADE RULES: ESSAYS ON WTO DISPUTE SETTLEMENT AND GATT OBLIGATIONS 94 (2006).

41. Chios Carmody, *A Theory of WTO Law*, 11 J. INT'L ECON. L. 527–57 (2008).

should be compensated when they are breached.[42]

Carmody makes a simple yet effective point: WTO Members *expect* each other to behave along the lines committed by them in the WTO framework. This expectation is from a theoretical perspective, an expectation of security and predictability in the multilateral trading system.

B. *Protecting the "Private" in WTO Dispute Settlement Through the Remedy of Provisional Measures*

One of the arguments I present to justify provisional measures in the DSU is the need for protecting private business interests in the world trading system. After all, the role of governments is merely to facilitate trade and establish the governing framework of international trade, whereas trade in itself is carried out by private business entities. Sungjoon Cho illustrates this point lucidly in the following words:

> The WTO system exists not merely for the intergovernmental welfare between and among Members, but also for the interests of the system's microparticipants such as consumers, producers or farmers. In this regard, the rule of law in the WTO as a collective, communal remedy . . . can eventually serve the welfare and interests of individual economic players through securing the stability and predictability of the WTO system.[43]

Private parties, or non-Members, do not have any rights of action in the WTO dispute settlement system. Needless to say, private parties do not have the right to intervene in the proceedings of the DSM at any given stage. However, certain panels and the AB in certain cases, by interpreting the provisions of Article 13 of the DSU, have in effect accorded recognition to private party interests by allowing the submission of non-State *amicus curiae* briefs. However, the treatment of amicus curiae submissions has not been uniform across cases, and in certain cases, amicus curiae submissions have treated in a constricted fashion by the panels and the AB.[44] Thus private business interests are entirely dependent on the approach taken by their respective national governments at WTO and at the DSM in achieving favourable outcomes

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42. *Id*. at 542 (emphasis included).

43. Sungjoon Cho, *The Nature Of Remedies In International Trade Law*, 64 U. PITT. L. REV. 763, 799 (2004).

44. For a recent perspective on amicus curiae briefs in WTO dispute settlement, see Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4 TRADE L. & DEV. 19 (2012).

in a given situation.

The main reason cited by scholars and practitioners against participation of private parties or non-State actors in the WTO DSM is that the WTO is primarily an inter-governmental organization. Being an inter-governmental organization, critics have rejected calls for private rights of action at the WTO DSM. In this Part, I do not intend to evaluate this claim; rather I stress that the absence of private participatory rights in the process apart from submission of *amicus curiae* briefs makes provisional measures an important tool to safeguard the interests of private parties. Edwini Kessie highlights this point succinctly in the following words:

> "[p]rivate business operators will be content with the dispute settlement system of the WTO, if they were able to get effective decisions within a reasonable period of time. Reforms should concentrate on . . . making available remedies which would be effective in compelling respondent Members to cease their violations of the WTO Agreements."[45]

My argument of "security and predictability" in section A is thus closely inter-related to my argument of incorporating provisional measures to protect the interests of the private sector. In essence, security and predictability in the WTO can be construed to refer to the objectives of security and predictability which the WTO is meant to afford to private business interests. Private business interests expect a framework in which their business can be conducted without any immediate and unforeseen disruptions.

C. *WTO DSM as the World Trade Court: A Comparative Perspective to "Encourage" The WTO to Consider Provisional Measures*

The DSM under the WTO has been likened to a world trade court. Indeed, the imbibing of several court-like features to the DSM has judicialized the system of dispute resolution under the WTO. As Schoenbaum puts it, the WTO DSM now functions very much like a court of international trade.[46] In fact, this is the very reason why the DSM has actually been successful over the many years. My third argument is thus based on the idea that further judicialization of the DSM will contribute to its further success: equipping the DSM with more features from the domestic adjudicatory system will add to its

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45. Edwini Kessie, *Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO*, 34 J. WORLD TRADE 1, 11 (2000).

46. Thomas Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for* Reform, 47 INT'L & COMP. L.Q. 647, 648 (1998).

effective functioning. To support the idea of equipping the DSM with provisional measures it would be interesting to examine other international dispute settlement mechanisms where provisional measures exist.

The system of provisional measures is a significant feature in other international dispute settlement mechanisms. Notable examples include the International Court of Justice, the COMESA and most importantly investment arbitration mechanisms. In this Part, I briefly explore the existence of provisional measures in other international dispute settlement fora.

1. International Court of Justice

The ICJ was established as a successor to the Permanent Court of Justice which functioned under the aegis of the erstwhile League of Nations. On a theoretical model, the International Court of Justice could be seen to represent a successful judicialization of international dispute settlement mechanisms between States. This "world court," has been equipped with several court-like features, though some operate in a different fashion when compared to the WTO dispute settlement mechanism.

In the context of differences between the WTO DSM and the ICJ, one difference in terms of remedies which distinguishes the ICJ and the DSM is that the ICJ is equipped with powers to grant provisional measures to complaining States. Article 41 of the Statute of the ICJ under which the ICJ is established empowers the ICJ to indicate "any provisional measures which ought to be taken to preserve the rights of the respective party."[47] Since its establishment in 1945, the ICJ has decreed[48] provisional measures in a number of cases, the most famous being in *Germany v. United States of America* (*LaGrand*). *La Grand* was a dispute between Germany and the United States which centered on the execution of two brothers- Karl La Grand and Walter La Grand convicted and sentenced to death for the murder of a bank manager in the state of Arizona.[49] Being German nationals, it was Germany's contention that the brothers should have been informed about their right to consular assistance under Article 36(1) of the Vienna Convention on Consular Relations,[50] or their arrest and detention should have been notified to the German Consulate.[51] However, neither of the brothers

47. Statute of the International Court of Justice, art. 41, Oct. 24, 1945, 33 U.N.T.S. 993.

48. *Id*. (stating that the Court can *indicate* provisional measures) (emphasis added).

49. LaGrand (Germany v. United States of America), Memorial of the Federal Republic of Germany, vol. 1, 1999 I.C.J. 1, ¶¶ 1.01, 2.01 (Sept. 16) [hereinafter Germany's Memorial].

50. *Id*. ¶ 1.01.

51. *Id*. ¶ 2.01.

were aware of these rights, nor were they informed by their attorneys or the state.[52] The German consulate became aware of the slated executions of the La Grand brothers only in June 1992. After a series of appeals, the execution of the La Grand brothers was confirmed. German diplomatic efforts in stopping the execution of the brothers were ineffective. On February 24, 1999, Karl LaGrand was executed by administration of a lethal injection.

After a series of appeals, and clemency pleas, and after exhausting all domestic remedies to prevent the execution of the remaining brother Walter La Grand, Germany in a final attempt, on March 2, 1999 brought an Application before the ICJ and requested indication of provisional measures against the execution of Walter LaGrand. In its Application, Germany alleged that the USA had violated the provisions of the Vienna Convention in arresting and sentencing to death the La Grand brothers, inter-alia, other allegations. Since Walter La Grand had already been executed on February 24, 2009, Germany sought relief from the ICJ, pending the final judgment that the United States take all measures at its disposal to ensure that Walter La Grand was not executed pending the final decision in these proceedings, also sought that the United States inform the Court of all the measures which it has taken in implementation of provisional measures.

The ICJ passed an Order[53] allowing Germany's Application and unanimously decreed that the US take all measures at its disposal to ensure that Walter La Grand was not executed pending the final decision in the proceedings before the ICJ and inform the Court of all the measures it had taken in implementation of the Order.[54] The Court had also directed the Government of the United States to transmit the Order to the Governor of the State of Arizona.[55] In allowing the Application, the ICJ noted that in a request for the indication of provisional measures, the ICJ need not finally satisfy itself of its jurisdiction on the merits of the case, and could indicate provisional measures if the provisions invoked by the Applicant appeared to *prima facie* afford a basis on which the jurisdiction of the Court might be founded.[56] The ICJ also noted that the slated execution of Walter La Grand on March 3, 1999 would cause irreparable harm to the rights claimed by Germany in the particular case (if a stay on the execution was not granted).[57] Citing the provisions of Article 75(1) of the Rules of

52. *Id.* ¶ 2.03.

53. LaGrand (Germany v. United States of America), Order, 1999 I.C.J. 9, 9 (Mar. 3) [hereinafter ICJ Order].

54. *Id.* ¶ 29.I(a).

55. *Id.* ¶ 29.I(b).

56. *Id.* ¶ 13.

57. *Id.* ¶ 24.

the Court, the ICJ recognized that the circumstances of the case required it to *proprio motu* indicate provisional measures as a matter of the greatest urgency.[58]

However, in a most regrettable decision,[59] the United States did not pay heed to the unanimous Order issued by the 14 judges of the ICJ, and the State of Arizona proceeded to execute Walter La Grand.

Germany's Application for a stay of Walter La Grand's execution was one of grave urgency and should have been heeded by the United States and its institutions. However, the purpose of discussing the La Grand decision is not to be drawn into a debate as to the merits of the decision or the legitimacy of the U.S. action. Rather, the purpose has been to highlight the imperative need for provisional measures in the WTO DSM. Of course, disputes before WTO panels do not involve the execution of individuals. Nonetheless, situations of urgency—if not grave and irreparable harm and injury exist which may prejudice the participants of the DSM if there was not scope for provisional measures at the DSM.

Other ICJ decisions which warrant interest in the context of the ICJ's indication for provisional measures include an Application by Georgia in the midst of the South Ossetian conflict with Russia where a prayer for indication of provisional measures was made and was granted by a narrow margin of 8:7 judges.

2. COMESA

A prominent pan-African economic institution in Africa, the Common Market for Eastern and Southern Africa (COMESA) was established in December 1994 by the COMESA Treaty to replace a preferential trade area which had existed from the earlier days of 1981 between Eastern and Western African economies.[60] Currently consisting of 19 member states, the COMESA was established as an organisation of free independent sovereign states and aims at achieving "economic prosperity through regional integration."[61]

A salient aspect of the COMESA is the establishment of a COMESA Court of Justice under Article 7 of the COMESA Treaty. Having its seat at Khartoum, the Court of Justice has been expressly recognized as the backbone of the COMESA system.[62] The provisions governing the

58. *Id*. ¶ 26.

59. Germany's Memorial, *supra* note 49, ¶ 1.04.

60. *Overview of COMESA*, COMESA, http://about.comesa.int/index.php?option=com_content&view=article&id=75&Itemid=106.

61. *Id*.

62. *COMESA Court of Justice*, COMESA, http://about.comesa.int/index.php?option=com_content&view=article&id=83:comesa-court-of-justice&catid=43:institutions&Itemid=133.

functions and jurisdiction of Court are contained in Chapter Five of the COMESA Treaty (Articles 19 to 44).[63]

An important power that has been conferred upon the Court is the prerogative under Article 35 of the COMESA Treaty to grant interim orders and/or any other directions which the Court "considers necessary or desirable."[64] Couched in broad terms, the Court, in instances of urgency is empowered to "order temporary withdrawal of an offending measure, or even grant an injunction against the implementation of the measure to particular goods, before the determination of its legality in accordance with the [COMESA] Treaty."[65] One commentator cites that "in disputes between Kenya and Egypt, there were instances where traders were caught unaware by measures implemented by either country and would transport their goods only to be turned away at the borders."[66] What is more interesting is that the right of action under the COMESA Treaty has not been limited to Member States alone, rather right of action has been made available any legal and natural person who is a resident in a Member State under Article 26 of the COMESA Treaty.[67]

The purpose of discussing the provisions for provisional measures under COMESA, is to highlight the point that there exists a regional trade treaty that has recognized the need for provisional measures in the dispute settlement process. Particular emphasis should be placed that the Court of Justice is based in third world. That there exists a DSM in the third world which contains provisional measures should encourage the WTO's Members and assuage concerns because of which Members may be circumspect of introducing provisional measures in the WTO DSM.

3. Investment Arbitration

The third dispute settlement mechanism for discussion is international investment arbitration or investor-State arbitration convened under the aegis of bilateral investment treaties. Primarily initiated by investors, investment arbitration has come to be recognized as a preferred though controversial route in seeking redressal of grievances against host states in respect of their investments under the applicable BIT. Most investment arbitrations are determined before

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63. *Id*.

64. Maurice Oduor, *Resolving Trade Disputes in Africa: Choosing Between Multilateralism and Regionalism: The Case of COMESA and the WTO*, 13 TUL. J. INT'L & COMP. L. 177, 207 (2005).

65. *Id*.

66. *Id*.

67. *Id*. at 202.

either an ad-hoc arbitration tribunal or are initiated under an institution such as the ICSID.

Given the nature of investment disputes, requests for provisional measures by the claimant-investor are quite common. The grant of provisional measures by the tribunal is facilitated by the presence of provisional measures in most governing frameworks such as the ICSID and the UNCITRAL.

According to Article 47 of the ICSID Convention, the investment tribunal so formed may recommend any provisional measures to be taken to preserve the specific rights of either party if it considers that the circumstances so require, except as the parties otherwise agree.[68] Under Rule 39(1) of the ICSID Arbitration Rules, any party may at any time during the proceedings request provisional measures for the preservation of its rights.[69] Interestingly, under Rule 39(3), the tribunal may on its own initiative recommend provisional measures or recommend measures other than those requested for.[70]

IV. EXAMPLES OF DISPUTES THAT NECESSITATE THE NEED FOR PROVISIONAL MEASURES

In order to understand the practical utility of, and the negative externalities associated with, the lack of provisional remedies at the DSM, it would be pertinent to discuss certain GATT/WTO disputes. I discuss two disputes in this Part: *E.U.-Seizure of Generic Medicines* and *Norway — Trondheim Toll Ring*. I do not debate the merits of these disputes or discuss the jurisprudence of these disputes in detail; I instead present the brief facts and highlight those circumstances which necessitate the need for provisional measures at the DSM.

A. *E.U.-Seizure of Generic Medicines*

A dispute of recent times in the WTO's history is the *E.U.-Seizure of Generic Medicines*. Besides having hit the headlines for reigniting the debate on protection of IPR in trade versus developing country access to medicines, the sudden seizure of consignments of millions of rupees worth of drugs headed from India to Brazil underscored the need for provisional measures at the DSM. The seizures of several consignments of drugs manufactured by major Indian pharmaceutical including companies such as Dr. Reddy's and Aurobindo Pharma by Dutch

68. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 47, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159.

69. *Id.*

70. *Id.* r. 39(3).

customs authorities on grounds of alleged patent infringement alarmed both Indian and Brazilian interests. In India's request for consultations, India had pointed out that around 19 consignments of generic drugs in transit through the Netherlands had been seized by customs authorities in 2008 and 2009, with 16 consignments originating in India.[71] The seized consignments were either destroyed or returned to India.[72] In keeping with the spirit of the DSU, India's request for consultations resulted in a continued negotiations that saw the issue being resolved by way of a mutually accepted solution between the EU and India in July 2011.[73]

However, the incident raised its ugly head again in January 2012 when Dutch customs authorities again seized 29 consignments of Indian generic medicines headed to South America.[74] Covering the recurrence of the seizures in January 2012, the *Business Standard* reported:

> Domestic drug makers, who were relieved after the European Union assurance in July 2011 to end the seizure of Indian generic drugs in transit, were in for a shock last month when Dutch authorities seized 29 cartons of medicines destined to South America from India.
>
> Timely intervention of Pharmaceutical Export Promotion Council (Pharmexcil) and the Ministry of Commerce ensured that the cartons, shipped by Mumbai based Ajantha Pharma, got cleared within two weeks, but the recurrence of the seizure has shaken the confidence level of Indian drug exporters.[75]

Though the incident was resolved by way of an MAS in July 2011 between the India and the EU, the sudden seizure of the drug consignments—both in 2009 and 2011—clearly undermined the security and predictability of the world trading system. Both Indian and South American trade interests were affected by the impugned measures significantly and quickly. The presence of provisional measures would have enabled India to initiate proceedings to receive immediate relief

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71. Request for Consultations by India, *European Union and a Member State – Seizure of Generic Drugs in Transit*, WT/DS408/1**,** (May 19, 2010), http://www.worldtradelaw.net/cr/ds408-1%28cr%29.pdf.

72. *Id*.

73. Press Release, Press Information Bureau, Government of India, *India EU Reach an Understanding on Issue of Seizure of Indian Generic Drugs in Transit* (July 28, 2011), http://pib.nic.in/newsite/erelease.aspx?relid=73554.

74. Joe C. Mathew, *Dutch Customs Seize Indian Drugs in Transit, Industry Frets*, BUS. STANDARD (Jan. 23, 2012), http://www.business-standard.com/article/companies/dutch-customs-seize-indian-drugs-in-transit-industry-frets-112012300081_1.html.

75. *Id*. (emphasis added).

from the world trade court.

B. *Norway—Trondheim Toll Ring*

The *Norway — Trondheim Toll Ring*[76] dispute dates back to the days of the GATT. The *Norway—Trondheim Toll Ring* is a dispute based on the provisions of the Agreement on Government Procurement.[77] Cause of action arose in March 1991 when the Norwegian Public Roads Administration announced that the toll ring planned for the city in Trondheim would be based on an electronic toll collection system and that a contract had been concluded with a Norwegian company, Micro Design relating to parts of this system.[78] The contract was characterized as a research and development contract[79] and foresaw a budget of around 28.5 million Norwegian Kronor.[80]

No tender notice was issued for the electronic toll system contract nor were any tenders or offers invited from companies other than Micro Design.[81] A complaint was brought on this reason before a GATT panel by United States, in whose view Norway had failed to conduct the procurement in compliance with its obligations under the GPA.[82] According to the United States, the single tendering of the procurement could not be justified under any of the provisions of the GPA and Norway had also failed to meet the general requirement of Article II:1 that the products and suppliers of other GATT contracting parties be accorded treatment no less favourable than that accorded to domestic products and suppliers (*i.e.*, national treatment).[83]

The United States requested the panel to find that Norway had violated its obligations under the GPA in the conduct of the procurement of toll collection equipment for the city of Trondheim and requested the panel to recommend that Norway take the necessary measures to bring its practices into compliance with the GPA with regard to this procurement.[84] An important aspect of this dispute is that the United States also requested the panel to recommend that Norway negotiate a MAS with the United States that took into account the lost opportunities in the procurement of American companies which were

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76. Report of the Panel, Norway – Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R (May 13, 1992), GATT B.I.S.D. 40S/319 (1992) [hereinafter Panel Report].

77. *Id*.

78. *Id*. ¶ 2.1.

79. *Id*.

80. *Id*. ¶ 2.2.

81. *Id*. ¶ 2.5.

82. *Id*. ¶ 3.1.

83. *Id*. ¶ 3.1(i),(ii).

84. *Id*. ¶ 3.2.

willing and eager to bid for the contract.[85]

An important submission made by the United States was that in requesting the panel to recommend that Norway negotiate a MAS, the United States clarified that it was not asking the panel to recommend "retroactive compensation."[86] The United States submitted that the GPA, unlike other trade agreements did not deal with trade flows, but rather with events; the opportunity to bid in public contracts.[87] If a contracting party decided to ignore the tenets of the GPA in a particular case, the purpose of the GPA would be nullified.[88] "In such cases, a standard panel recommendation that the offending Party bring . . . its rules and practices into conformity with its obligations would not, by itself, be a sufficient remedy, and would not provide a sufficient deterrent effect, especially if it were felt that it would not be appropriate to order that procurements be annulled and recommenced."[89]

The Panel found that the single tendering of the contract by the Norwegian Public Roads Administration was violative of the provisions of the GPA.[90] The Panel "concluded that Norway had not complied with its obligations under the Agreement in the conduct of the procurement,"[91] including the national treatment principle.[92]

After its findings, the Panel then turned its attention to the recommendations that the United States had requested.[93] In regard to the U.S. request that the Panel recommend that Norway take the necessary measures to bring its practices into compliance with the Agreement with regard to the Trondheim procurement, the Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past.[94] According to the Panel, the only way that Norway could bring the Trondheim procurement into line with its obligations under the GPA would be to recommend that Norway annul the toll contract awarded to Micro Design and recommence the procurement process.[95] The Panel did not consider it appropriate to make such a recommendation. According to the Panel, recommendations of this nature had not been within customary practice in dispute settlement under the GATT system and the drafters of the GPA had not made

85. *Id*. One of the prospective bidders for the Trondehim electronic toll system was an American company called Amtech.

86. *Id*. ¶ 3.33.

87. *Id*.

88. *Id*.

89. *Id*.

90. *Id*. ¶ 4.14.

91. *Id*.

92. *Id*. ¶ 4.15.

93. *Id*. ¶ 4.17.

94. *Id*.

95. *Id*.

specific provision that such recommendations be within the task assigned to panels under standard terms of reference.[96] Moreover, the Panel considered that in the case under examination such a recommendation might be disproportionate, involving waste of resources and possible damage to the interests of third parties.[97]

The determination of the panel against the recommendations sought by the United States was justified on sound logic. The Panel correctly determined that it was not empowered under the GATT/GPA to recommend retroactive relief nor would it be efficient (to recommend) that Norway take steps that took into account the lost opportunities in the procurement of American companies, which were willing and eager to bid for the contract. It is not the purpose of this paper to go into a detailed evaluation of this case or the Panel report on the relief sought by the United States. Instead, I highlight how the lack of provisional measures in the GATT DSM caused irreparable injury and harm to the United States. It is more important to note that injury and harm was caused to American private companies that were interested in bidding for the electronic toll system. Retroactive relief in such a case would have been clearly inefficient as the Panel has correctly noted. Hence, it is argued that if there was a system of provisional measures it would serve the GATT system and its participants better.

V. CONCLUSION

The WTO's DSM is what makes it work; it is what oils the wheels of international trade. The DSM has indeed delivered commendable results since its inception in 1995. However, rather than allowing complacence to creep in, WTO Members must sustain attention on identifying weaknesses in the system and continue efforts to strengthen the DSM which has been identified as the WTO's cornerstone.

Indeed, the smooth functioning of the DSM risks being undermined if it does not adjust to the realities of the world trading system. Security and predictability, which are the putative objectives of the DSM, risk being compromised if a violating Member is allowed to prolong violations of WTO law without the risk of any sanctions till the conclusion of the adjudicatory process, and more so if lengthy deviations from timelines envisaged in Article 23 of the DSU process become the norm, rather than the exception.

Reform of the DSM is imperative. Remedies need to be revisited. The system of remedies in the DSM is not a matter of concern just for the trading nations, but most importantly for the private business

96. *Id*.
97. *Id*.

interests, who are the underlying microparticipants of the multilateral trading system. After all, it is not governments who trade, but private business interests. Accordingly, I have argued for a need for provisional measures in the DSM given the absence of private rights of action in the DSM.[98] Edwini Kessie highlights this point very well: "It is highly unlikely that private business operators will have access to the dispute settlement system of the WTO in the short to medium term. However, this should not prevent the adoption of measures that will enhance security and predictability for them."[99]

The views put forth in this Essay may be criticized for being too idealistic, and ignoring the practical realities of the functioning of the international trading system. Furthermore, with provisional measures having unfortunately been given the back seat in the current DSU negotiations since provisional measures find no space in the Chairman's draft DSU text of 2008, one might call the proposal for provisional measures at this stage anachronistic. However, for the various justifications that I have attempted to provide in this Essay, it is earnestly hoped that there might be another opportunity of discussing provisional measures in the negotations on reforming the WTO dispute settlement mechanism.

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98. Alberto Alemanno emphasizes:

> As private business operators bear most of the economic costs of non-compliance, there is an increasing pressure for a more direct involvement of these parties in the Dispute Settlement System mechanism. The challenge is therefore to find a way to accommodate their interests within the current settlement system, without reducing the discretion WTO Members enjoy in the implementation of the reports.

Alberto Alemanno, *Private Parties and WTO Dispute Settlement System*, *in* 2 ESSAYS ON THE FUTURE OF THE WORLD TRADE ORGANIZATION 245, XXVIII (Julien Chaisse & Tiziano Balmelli eds., 2008), *available at* http://ssrn.com/abstract=1095705.

99. Kessie, *supra* note 19, at 11.