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TABLE OF CONTENTS

NOTES

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Utilizing Arbitration To Resolve WTO Trade Disputes: A Useful Alternative but One That Cannot Outweigh the Need for a Functioning WTO Appellate Body

Theodore Ryan*

Introduction

Over the last 25 years, the World Trade Organization ("WTO") has been "the only global international organization dealing with the rules of trade between nations" and is a prime example of the globalization movement.[1] The WTO has been an integral part of the global trade system since its establishment in 1995.[2] The WTO's primary goal has been to "ensure that trade flows smoothly, predictably and [as] freely as possible" between Members.[3] However, to achieve this goal, there must be an avenue to resolve trade disputes that inevitably develop between WTO Members.[4]

The WTO has many pillars, but one of its "core activities" is the resolving of trade disputes between Members.[5] When WTO Members have a dispute amongst themselves regarding WTO agreements, such as the 1994 General Agreement on Tariffs and Trade ("GATT"),[6] they look to the WTO's Dispute Settlement of Understanding ("DSU").[7] The United States ("U.S."), a WTO Member since its inception, has brought 124 trade disputes to the WTO, has been a respondent to 156 trade disputes and has been a third party to 163 trade disputes.[8] To put that into perspective, since its establishment in 1995, the WTO's Dispute Settlement Body ("DSB")[9] has had 600 disputes brought to it and has issued rulings on 350 of those disputes.[10]

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1. *The WTO,* WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited May 8, 2020).
2. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].
3. *The WTO*, *supra* note 1.
4. *Id.*
5. *Dispute Settlement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited May 8, 2020).
6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].
7. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
8. *Disputes by Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited May 8, 2020).
9. DSU, *supra* note 7, at art. 2.1.
10. *Dispute Settlement*, *supra* note 5.

WTO Members begin by attempting to resolve the trade dispute through consultations with each other.[11] If they are unable to resolve the trade dispute through consultations, a WTO Panel ("Panel") is established.[12] The establishment of a Panel is requested by one of the disputing WTO Members under Article 6 of the DSU.[13] Once established, the Panel examines the trade dispute and will issue a report if the disputing WTO Members cannot settle "out of court."[14] After the Panel publishes its report, the disputing WTO Members may appeal to the WTO Appellate Body.[15] Once there, a panel of three Appellate Body Members, referred to as Appellate Body Judges, will either "uphold, modify, or reverse the legal findings and conclusions of the [P]anel."[16] The DSB will then consider whether to adopt the report, to which the disputing WTO Members must comply.[17]

Since its inception, the appointment of judges to the Appellate Body has typically been "apolitical and a smooth process."[18] Additionally, Appellate Body Judges may be and have been reappointed for one additional term.[19] However, beginning in May 2016, under the Obama administration, the U.S. blocked the reappointment of Appellate Body Judge Chang of South Korea.[20] This was the first instance of the U.S. blocking the reappointment of a non-American judge on the Appellate Body and was a sign of things to come.[21] The U.S.'s trend of blocking appointments and reappointments of judges to the Appellate Body is truly a bipartisan issue as it continued well into the Trump administration's tenure and continues today in the Biden administration.[22] As of February 2021, there were currently no judges on the Appellate Body.[23]

Since its creation, the WTO has long been a thorn in the side of the U.S., regardless of the political party of the administration in power. Starting in 2018, the Trump administration continued where the Obama administration left off and continued blocking the appointment and

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11. DSU, *supra* note 7, at art. 4.5.

12. *Id.*

13. *Id.* at arts. 6.1–6.2.

14. *The Panel Process*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (last visited May 8, 2020).

15. DSU, *supra* note 7, at art. 17.2.

16. *Appellate Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited May 8, 2020).

17. *Id.*

18. *See* Gary Clyde Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, PETERSON INST. FOR INT'L ECONOMICS. (June 13, 2011, 5:00 PM), https://www.piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system.

19. DSU, *supra* note 7, at art. 17.2.

20. Statement by the United States at the Meeting of the WTO Dispute Settlement Body, WORLD TRADE ORG., (May 23, 2016), https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf.

21. *United States Blocks Reappointment of WTO Appellate Body Member*, 110 AM. J. INT'L L. 573, 576 (2016) [hereinafter *U.S. Blocks Reappointments*].

22. Tom Miles, *U.S. blocks WTO judge reappointment as dispute settlement crisis looms*, REUTERS (Aug. 27, 2018), https://www.reuters.com/article/us-usa-trade-wto-idUSKCN1LC19O; Bryce Baschuk, *Biden Picks Up Where Trump Left Off in Hard-Line Stances at WTO*, BLOOMBERG (Feb. 22, 2021), https://www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto.

23. *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Feb. 17, 2021).

reappointment of Appellate Body Judges.[24] This became a major issue for the WTO, considering that the Trump administration first blocked reappointments in 2018, leaving only three judges on the Appellate Body.[25] The U.S. stated that it would continue to block the reappointments of current Appellate Body Judges indefinitely.[26] These holdups reached a critical stage in December 2019 when the terms of two of the three remaining Appellate Body Judges expired, decreasing the number of judges on the Appellate Body from three to one.[27] With only one judge remaining, the Appellate Body no longer had a quorum and could not hear any appeals.[28] This was made even worse with the one remaining Appellate Body Judge's term expiring in November 2020.[29] The U.S. essentially paralyzed the WTO's dispute mechanism system and put a halt to an international forum in existence for the last 25 years.

While the Appellate Body cannot currently hear appeals of Panel reports, those Panels can still function and issue reports. But this raises a serious problem. Besides WTO trade disputes that have already been appealed and are currently pending, any new case a Panel issues a report on has the potential to be appealed. This is problematic when there is no end in sight to the paralysis at the Appellate Body. This is especially true now with the ongoing COVID-19 pandemic. While global trade has rebounded since the beginning of the pandemic in 2020, COVID-19 has continued to devastate many WTO Members economies.[30] This is taking time and energy away from solving the paralysis at the Appellate Body. WTO Members were only recently able to elect a new Director-General of the WTO on February 15, 2021, after a six-month vacancy of the position.[31] There must be some other avenue WTO Members can take to resolve WTO trade disputes in the meantime.

Thankfully, there are several alternatives available. But only one of these alternatives is both effective and practical for the time being. This crisis has led other WTO Members like the European Union ("EU") and China to circumvent the paralyzed Appellate Body with the establishment of a separate "Shadow Appellate Body," known as the Multi Party Interim Appeal Arbitration Arrangement ("MPIA").[32] This is possible through Article 25 of the DSU.[33] However, this solution is one that can only be temporary. The establishment of the MPIA, while a creative method for dealing with the Appellate Body's paralysis, cannot correct

24. Brandon J. Murrill, *WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?*, CONG. RES. SERV. at 2, (Dec. 16, 2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10385.

25. *Id.*

26. *Id.*

27. Jamey Keaton & Paul Wiseman, *World trade without rules? US shuts down WTO appeals court*, ASSOCIATED PRESS NEWS, (Dec. 9, 2019), https://apnews.com/8e0accfe7fb3fc10b97c87c2b7e00cd8.

28. DSU, *supra* note 7, at art. 17.1.

29. *Appellate Body Members*, *supra* note 23.

30. César A. Hidalgo, *How COVID-19 has affected trade, in 8 charts*, WORLD ECON. FORUM. (Nov. 6, 2020), https://www.weforum.org/agenda/2020/11/how-covid-19-has-reshuffled-international-trade/.

31. *WTO Director-General*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/dg_e/dg_e.htm.

32. *Statement by the E.U. and 16 other WTO Member States Ministers at the World Economic Forum* (Jan. 24, 2020), https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf.

33. DSU, *supra* note 7, at art. 25.

the impact left by the absence of a functioning Appellate Body. This problem requires all WTO Members to come to the table and negotiate reforms necessary to restore "the jewel in the crown of the WTO[.]"[34]

Part I of this note will discuss the history behind the current standoff at the WTO and why the U.S. is blocking the appointment and reappointment of judges to the Appellate Body. Part II will analyze the several alternatives to the Appellate Body available to WTO Members and those alternatives' feasibilities. Finally, Part III will discuss why utilizing arbitration under Article 25 of the DSU is the best alternative available to WTO Members, but one that cannot replace the Appellate Body or the necessary reform that is required to end its paralysis.

I. The Current Status of the WTO Appellate Body

Since December 2019, the Appellate Body has been unable to hear any appeals due to a lack of quorum, which requires a minimum of three judges.[35] The Appellate Body is customarily made up of seven judges, but as of April 2021, has none.[36] The current situation began several years ago with the U.S.'s intervention into the reappointment of Appellate Body Judges, which is normally a straightforward affair.[37] Over the last 20 years, the U.S. has made other WTO Members aware of its complaints against the Appellate Body and what it viewed as an overreach of its original function.[38] Although many WTO Members have had similar concerns regarding the Appellate Body, no other WTO Members are in favor of the U.S.'s actions.

A. Overview of the Appellate Body

Before the WTO was established in 1995, the GATT was drafted in 1947 to deal with tariffs and trade between the signatory States.[39] Over the years, signatories to the GATT have had several rounds of negotiations where States would agree on amendments to the GATT.[40] The Uruguay Round was the final round of negotiations regarding the GATT and established the WTO in 1995 through the signing of the Marrakesh Agreement.[41] Although the WTO ultimately incorporated the GATT, it still exists along with several other agreements and governs the rules of the WTO.[42]

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34. Andrea Shalal, *Incoming WTO head warns 'vaccine nationalism' could slow pandemic recovery*, REUTERS, (Feb. 15, 2021), https://www.reuters.com/article/us-trade-wto-nigeria-idUSKBN2AF1QM.

35. Murrill, *supra* note 24.

36. *Appellate Body Members*, *supra* note 23.

37. *U.S. Blocks Reappointments*, *supra* note 21.

38. ROBERT E. LIGHTHIZER, UNITED STATES TRADE REPRESENTATIVE REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION, at 1, (2020) [hereinafter USTR Appellate Body Report].

39. GATT, *supra* note 6.

40. *GATT Bilateral Negotiating Material by Round*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm (last visited May 8, 2020).

41. Marrakesh Agreement, *supra* note 2.

42. *See id.*

Another agreement that governs the rules of the WTO is the DSU.[43] The DSU establishes and sets out the rules and procedures of the DSB to deal with trade disputes between WTO Members.[44] It allows for the establishment of Panels to hear trade disputes between WTO Members regarding WTO agreements such as the GATT.[45] If a Panel issues a report, the parties to the trade dispute may appeal.[46] If a Panel report is appealed, it is brought to the WTO's Appellate Body, a body normally consisting of seven judges.[47] Each appeal will be heard by a quorum made up of three judges.[48] The WTO's dispute mechanism system is available to WTO Members and thus does not allow for private parties.[49] Additionally, the WTO's dispute mechanism system applies to trade disputes brought under WTO agreements, usually the GATT.[50]

Since its establishment, the WTO has been the international forum for Members to consult and receive binding rulings on trade disputes regarding the GATT and other WTO agreements. These rulings are usually in the form of retaliatory tariffs and can lead to the adversarial WTO Members coming to an out-of-court agreement in order to avoid the DSB from adopting Panel and Appellate Body reports.[51] If anything, the WTO has been beneficial to global trade and has led to increased globalization of WTO Members. It is an important part of the global trade system but does have many warranted critiques from WTO Members.[52] The WTO is at a make-or-break moment in its history and may not survive without necessary and long-lasting reforms.

B. The Paralysis of the Appellate Body's Functions

The U.S. has had issues with the WTO since its establishment in 1995. However, many of the U.S.'s complaints against the WTO are specifically about its dispute mechanisms system, especially the Appellate Body.[53] The U.S.'s ire against the Appellate Body began in the mid-2000's with the Appellate Body report in *U.S.-Zeroing*.[54] In that case, the Appellate Body determined that the U.S.'s actions were inconsistent with its obligations under both the "Anti-

43. *See generally* DSU, *supra* note 7.

44. *Id.* at arts. 1, 2.1.

45. *Id.* at art. 6.

46. *Id.* at art. 17.

47. *Id.* at art. 17.1.

48. *See id.*

49. *See id.* at art. 6.

50. *Id.* at art. 1.1.

51. *See id*. at art. 19.

52. Terence P. Stewart et al., *Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard*, 8 GLOBAL TRADE & CUST. J. 390, 399 (2013).

53. USTR Appellate Body Report, *supra* note 38.

54. Appellate Body Report, *United States-Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr. 18, 2006) [hereinafter *US-Zeroing*].

Dumping Agreement" and the GATT.[55] Afterward, the U.S. took an "unusual approach" in writing two communications to other WTO Members.[56] These communications reflected the U.S.'s anger and "serious legal objection" to the Appellate Body report.[57]

The U.S.'s belief that the Appellate Body was "overreaching" was evident when the reappointment of an Appellate Body Judge was up for consideration in 2016.[58] The reappointment of judges to the Appellate Body requires a consensus of WTO Members, creating a situation where a single Member can effectively block reappointments indefinitely.[59] Under the Obama administration, the U.S. blocked the reappointment of South Korean Judge Seung Wha Chang to the Appellate Body in May 2016.[60] This trend continued with the Trump administration, who saw an opportunity to cripple the dispute mechanisms system of the WTO.[61] The continued blocking of reappointments and appointments has led to an understaffed Appellate Body which is unable to hear any appeals.[62]

Only in the last couple of years have we seen the effects of the U.S.'s blockade. After the blocking of the reappointment of South Korean Judge Seung Wha Chang in 2016, the Appellate Body was left with three judges, just enough for a quorum.[63] Once the U.S. made the decision to continue its blockade, it subsequently blocked the reappointment of the three remaining Appellate Body Judges whose terms were expiring. It was only a matter of time before the Appellate Body was rendered nonfunctioning. That time came and went when two of the three remaining Appellate Body Judges' terms expired in December 2019.[64] This left the Appellate Body with no quorum and a single judge whose term expired in November 2020.[65]

As of February 2021, there are fourteen appeals pending at the Appellate Body, six while the Appellate Body had a bare minimum quorum but was too understaffed, and eight after the Appellate Body lost its quorum.[66] Under Article 16.4 of the DSU, any Panel decision that is appealed by a party to the dispute, in turn, halts the adoption of that report.[67] The report by

55. *Id.* at 99.

56. Roger P. Alford, *Reflections on US - Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196, 220 (2006).

57. *Id.*

58. *U.S. Blocks Reappointments*, *supra* note 21, at 573.

59. *Id.* at 574.

60. *Id.* at 573.

61. Aaron Seals, *Dismantling the WTO: The United States Battle Against World Trade*, 28 U. MIAMI BUS. L. REV. 199, 204 (2019).

62. *Id.*

63. DSU, *supra* note 7, at art. 17.1.

64. Terrance P. Stewart et al., *WTO Appellate Body Impasse – How and Why*, CURRENT THOUGHTS ON TRADE, https://currentthoughtsontrade.com/2020/01/30/wto-appellate-body-impasse-how-and-why/ (last visited May 8, 2020).

65. *Appellate Body Members*, *supra* note 23.

66. Peter Ungphakorn, *Technical note: Appeals 'into the void' in WTO dispute settlement*, TRADE B BLOG (Feb. 13, 2021), https://tradebetablog.wordpress.com/technical-note-appeals-into-the-void-in-wto-dispute-settlement/.

67. DSU, *supra* note 10, art. 16.4.

the Panel shall not be "considered for adoption" until after the appeals process is completed.[68] All pending appeals and any future Panel reports that are appealed will essentially be stuck in "the void."[69] If no judges are appointed to the Appellate Body soon, the backlog of cases will continue to grow into the foreseeable future, putting a strain on the WTO's dispute mechanism system as well as WTO Members ability to receive a fair ruling regarding trade disputes.

C. The Reasons Behind the U.S.'s Blockade of Appellate Body Judges

Since the inception of the Appellate Body, the U.S. has raised several concerns. One main concern is that Appellate Body Judges "continue serving on cases they have been assigned to after their terms have expired."[70] The U.S. has also been concerned with the Appellate Body's consistent violation of the "90-day rule for appeals" laid out in DSU Article 17.5.[71] However, one of the most substantial issues the U.S. has had with the Appellate Body is that it believes that the Appellate Body overreaches the scope of its powers.[72] The U.S. believes that the Appellate Body should simply be correcting any "egregious errors" a Panel may potentially make in its report.[73]

D. WTO Members Response to the U.S.'s Blockade

Since the U.S. blockade has been ongoing for the last several years, there have been talks between WTO Members and the U.S. on proposals to get the ball rolling. The EU came out with two separate proposals in 2018 to amend the DSU, specifically Article 17.[74] These proposals would have touched on many of the U.S.'s complaints against the Appellate Body. In addition, the first proposal had the backing of eleven other WTO Members, including China and India.[75] Unfortunately, the U.S. rejected both proposals saying that they did not go far enough to address its concerns.[76]

Although it is true that the EU's proposals did not touch upon all of the U.S.'s concerns, they did discuss reforms for many of the U.S.'s main concerns. However, the U.S. rejected these proposals because the U.S. is in an incredibly strong position compared to most WTO Members. The U.S. can indefinitely hold up the appointment of judges to the Appellate Body with

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68. *Id.*

69. Ungphakorn, *supra* note 66.

70. USTR Appellate Body Report, *supra* note 38.

71. *Id.*

72. *Id.*

73. *Id.* at 120.

74. World Trade Organization, Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WTO Doc. WT/GC/W/752 (Nov. 26, 2018) [hereinafter EU Proposal Part 1]; World Trade Organization, Communication from the European Union, China and India to the General Council, WTO Doc. WT/GC/W/753 (Nov. 26, 2018) [hereinafter EU Proposal Part 2].

75. EU Proposal Part 1, *supra* note 74.

76. Christopher Hyner & King & Spalding LLP, *The United States Rejects the European Union's Proposal to Reform the WTO Dispute Settlement Process*, JDSUPRA (Jan. 17, 2019), https://www.jdsupra.com/legalnews/the-united-states-rejects-the-european-96544/.

little downside. The U.S. is the biggest economy in the world with over $2 trillion worth of imports and over $1 trillion worth of exports.[77] Additionally, the U.S. is a party to several Bilateral Investment Treaties ("BIT") and Free Trade Agreements ("FTA"). This allows the U.S. to circumvent the WTO by utilizing the dispute mechanisms of these various FTAs, whereas private investors can utilize the dispute mechanisms of various BITs. The U.S. can indefinitely hold out, which would lead to one of two outcomes: either all of its concerns are addressed, or the Appellate Body continues to be nonfunctioning. Either scenario is a win in the U.S.'s playbook, regardless of the administration in power.

II. Alternative Options Available to WTO Members

Unless the U.S. makes a complete 180 and decides to drop its opposition to the appointment and reappointment of judges to the Appellate Body, the remaining WTO Members have to decide how they will move forward.[78] Inevitably, there will be other trade disputes that come up regarding the GATT. Although the U.S. may not involve itself, the other WTO Members need a way to resolve those future trade disputes. Thankfully, there are several alternatives to the WTO's dispute mechanism system that can currently be utilized by WTO Members, although some are far more realistic than others.

A. Declining to Appeal WTO Panel Reports

One important fact to look at is that not all Panel reports are appealed.[79] Further, not all disputes brought to the WTO's dispute mechanism system will end up getting a Panel report since disputing Members may decide to withdraw the dispute and resolve it amongst themselves. Alternatively, the disputing WTO Members can agree amongst themselves not to appeal a Panel report, no matter the outcome.[80] However, this seems unlikely, as WTO Members would most likely "prefer to wait for a ruling before taking any further steps," so this alternative is not very realistic.[81]

B. Utilizing the Dispute Mechanisms of FTAs

Any WTO Member that is also a party to a FTA could utilize that very agreement's dispute mechanism to resolve disputes amongst other WTO Members that are parties to that FTA. Although the WTO's dispute mechanism system has exclusive jurisdiction over WTO agreements such as the GATT, many FTAs incorporate the language of the GATT.[82]

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77. *United States*, OBSERVATORY OF ECON. COMPLEXITY, https://oec.world/en/profile/country/usa/ (last visited May 8, 2020).

78. *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited May 8, 2020).

79. *Dispute Settlement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited May 8, 2020).

80. DSU, *supra* note 7, at art. 6.

81. Wolfgang Weiss, *Life After the WTO Appellate Body: The Case for More Flexible Dispute Handling*, BORDERLEX (Jan. 23, 2020), https://borderlex.eu/2020/01/23/life-after-the-wto-appellate-body-the-case-for-more-flexible-dispute-handling/.

82. *Id.*

However, many of these dispute mechanisms overlap with the WTO's dispute mechanism system.[83] In those situations, the disputing WTO Members can utilize what was agreed to in the FTA in order to determine which forum is available.[84] The parties to a FTA can agree to give forum preference to either the WTO's dispute mechanism system or the trade agreement's dispute mechanism system.[85] The parties can even agree that the choice of forum is up to the "claimant to decide which forum is preferred."[86] Additionally, if there is a "fork-in-the-road" clause to decide where to bring the claim, a forum preference for the WTO's dispute mechanism system could be temporarily lifted due to the paralysis at the Appellate Body.[87]

Regardless, there are some major limits that affect the likelihood of this being a viable alternative. The dispute mechanism of a FTA can be limited in what they cover and "there is no guarantee of consistency in panel decisions."[88] This is not an option that WTO Members can rely on, especially small States in disputes with larger and wealthier States.

C. Arbitration Under Article 25 of the DSU

Additionally, the DSU does offer some alternatives to the DSB.[89] One of these alternatives is currently being implemented by several WTO Members.[90] Article 25 of the DSU allows WTO Members to use "expeditious arbitration within the WTO as an alternative means of dispute settlement."[91] This option can "facilitate the solution of certain disputes that concern issues that are clearly defined by both parties."[92] The parties in question must agree on the procedures to be followed and must alert all other WTO Members of its use.[93]

The EU has stepped into the void left by the Appellate Body and has begun utilizing Article 25 of the DSU to create an "interim appeal arbitration process," referred to as the MPIA.[94] The EU released a WTO communication that was subsequently notified to the DSB, with 16 other WTO Members indicating that they will be utilizing this alternative measure while the Appellate Body is nonfunctioning.[95] Through Article 25 of the DSU, all WTO Members taking part have agreed to allow for appeals of Panel reports in disputes among participating

83. Victor Crochet, *Dispute Settlement Mechanisms in Free Trade Agreements,* TRADELAB (Sept. 21, 2016), https://www.tradelab.org/single-post/2018/03/02/Dispute-Settlement-Mechanisms-in-Free-Trade-Agreements.

84. *Id.*

85. *Id.*

86. *Id.*

87. Weiss, *supra* note 81.

88. *Id.*

89. DSU, *supra* note 7, at arts. 5, 25.

90. *Id.* at art. 25.

91. *Id.* at arts. 10, 25.1.

92. *Id.* at art. 25.1.

93. *Id*. at art. 25.2.

94. Weihuan Zhou, *Phase One's Dispute Settlement Mechanism a Poor Alternative to WTO Appellate Body*, HINRICH FOUNDATION (Jan. 30, 2020), https://hinrichfoundation.com/trade-research/global-trade-research/thought-leadership/phase-ones-dispute-settlement-mechanism-a-poor-alternative-to-wto-appellate-body/.

95. Communication, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, WTO Doc. JOB/DSB/1/Add.12 (Mar. 27, 2020) [hereinafter MPIA].

Member States, in the form of an MPIA.[96] The WTO Members have also made it clear that this would only be utilized when the Appellate Body becomes "fully functional," and that any WTO Members may join the MPIA.[97] This is a very clever move by the EU. It is essentially showing leadership while isolating the U.S. on the international stage since it would not be joining this process. This is the alternative that has received the most attention since the paralysis of the Appellate Body.

D. Good Offices, Conciliation, and Mediation Services Under Article 5 of the DSU

The DSU also offers further alternatives to resolve trade disputes. Article 5 of the DSU can essentially be seen as the mediation option to Article 25 of the DSU's arbitration option.[98] Article 5 is beneficial to those who want the negotiations to be confidential and those that enjoy the flexibility of this option.[99] This option also leaves open the possibility of seeking the establishment of a Panel if mediation efforts fail to resolve the dispute.[100] These mediation services can be requested at any time and terminated likewise.[101] If a party to the dispute wants to terminate the mediation services, then they "may proceed with a request for the establishment of a [P]anel."[102] However, one of the downsides to this option is that if it is utilized, it does not "automatically ensure compliance with WTO law."[103] This option would shift what once was a dispute settlement system in the "direction of diplomatic negotiations, as under the GATT 1947."[104] Although a very "diplomatic" option, it is in no way a viable replacement for the Appellate Body.

III. Utilization of Arbitration Under Article 25 of the DSU Is the Best Alternative Available But Cannot Replace Necessary Reform

A. Benefits of the MPIA

The MPIA established by the EU, China, and other WTO Members is the best alternative to the WTO Appellate Body at this time. The EU, China, and several other WTO Members agreed to utilize Article 25 of the DSU only for appeals that would normally go to the Appellate Body; Panels would still issue reports on trade disputes at the lower level.[105]

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96. *Id.*

97. *Id.*

98. DSU, *supra* note 7, at arts. 5, 25.

99. *Id.* at art. 5.

100. *Id.*

101. *Id.*

102. *Id.*

103. Weiss, *supra* note 81.

104. *Id.*

105. William Alan Reinsch, Jack Caporal & Jonas Heering, *Article 25: An Effective Way to Avert the WTO Crisis?*, CENTER FOR STRATEGIC AND INT'L STUDIES (Jan. 24, 2019) https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis.

The appeals process itself can easily be copied from the Appellate Body into an arbitral format. The WTO Members utilizing Article 25 of the DSU would have to agree on the arbitration process.[106] This choice would mean that the U.S., who would be against the utilization of the MPIA, would not be permitted to prevent other WTO Members from utilizing it.[107]

Additionally, the current situation gives other world powers, particularly the EU and China, "a chance to lead."[108] The MPIA has a substantial portion of the world's largest economies agreeing to arbitrate appeals of Panel reports.[109] It is in the EU's and other participating WTO Members best interest to get as many other WTO Members as possible on board with the MPIA. The MPIA will have a panel of three trade experts, from a pool of ten, hearing appeals and following WTO rules and procedures.[110] It is a great example of WTO Member States banding together. Unfortunately, they would be banding together essentially against another WTO Member.[111]

It has become clear that the U.S. will not be participating in the MPIA. The main concern then should be whether the U.S. will sit idly by or potentially leave the WTO entirely.[112] For now, it seems that this is mostly just political talk, as former U.S. Trade Representative Robert Lighthizer stated in the 2020 Trade Policy and 2019 Annual Report that the U.S. "values the WTO and is working diligently within the organization to find solutions."[113]

There is a benefit, albeit in a negative way, for the U.S.'s non-participation within the MPIA. If the U.S. receives a favorable report from a Panel, which it does for 87% of the claims it brings to the WTO, then that can be appealed by the other parties to the dispute.[114] This is a flaw in the U.S.'s plan, especially considering that other WTO Members are utilizing the MPIA. The U.S., which again receives a favorable Panel report a whopping 87% of the time, may now see itself unable to enforce these favorable reports if the other parties appeal.[115] This is because, as stated above, under Article 16.4, once a Panel report is appealed, this prevents the

106. DSU, *supra* note 7, at art. 25.2.

107. *Id.*

108. Barry Eichengreen, *Trump's 'America First' Policy Offers Beijing and Brussels a Chance to Lead*, THE GUARDIAN (Feb. 12, 2020), https://www.theguardian.com/business/2020/feb/12/trump-america-first-policy-offers-beijing-and-brussels-a-chance-to-lead.

109. Bryce Baschuk, *EU Joins 15 Nations to Forge End-Run Around Trump's WTO Block*, BLOOMBERG (Mar. 27, 2020), https://www.bloomberg.com/news/articles/2020-03-27/eu-joins-15-nations-to-forge-end-run-around-trump-s-wto-block.

110. *Id.*

111. *Id.*

112. Bryce Baschuk, *Pandemic's Economic Toll Sparks New Call in U.S. to Abolish WTO*, BLOOMBERG (May 7, 2020), https://www.bloomberg.com/news/articles/2020-05-07/pandemic-s-economic-toll-sparks-new-call-in-u-s-to-abolish-wto.

113. ROBERT E. LIGHTHIZER, 2020 TRADE POLICY AND 2019 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at 8, (2020) [hereinafter USTR Trade Policy and Annual Report].

114. Henrietta Reily, *By the Numbers: Here 's How "Badly" the WTO Treats the U.S.*, AXIOS (Jul. 07, 2018), https://www.axios.com/by-the-numbers-wtos-treated-the-united-states-very-badly-1530622593-14ba45da-e0da-462f-974e-f8792a086177.html.

115. *Id.*

adoption of that report until the appeals process is complete.[116] This leaves the U.S. in a bind, especially considering that all other WTO Members are against the U.S.'s actions in blocking the reappointment and appointment of Appellate Body Judges.

Additionally, this puts the U.S. in a poor position on the world stage, especially considering the creation of future trade agreements with other WTO Members. Those future trade agreements could potentially circumvent the DSB with alternative dispute mechanisms if agreed to by the parties. However, many WTO Members may now be incredibly wary that the U.S. will sabotage the dispute mechanisms of current and future trade agreements.

Currently, the U.S. is negotiating three major trade agreements with the United Kingdom ("UK"), Japan, and the EU.[117] These three major U.S. trading partners, especially the EU, may see the U.S.'s current efforts regarding the Appellate Body's paralysis as something of a future threat. Furthermore, this can be true of trade agreements that the U.S. is currently a party to. The U.S. recently completed the implementation of the United States-Canada-Mexico Agreement ("USMCA") earlier this year.[118] This is essentially an updated version of the North American Free Trade Agreement ("NAFTA") of 1994.[119] Even when WTO Members are also parties to the same FTA, they may still bring cases to the WTO, as Mexico did regarding a soft drink tax against U.S. high fructose corn syrup producers.[120] NAFTA was in effect and included a dispute mechanism, but the case was still brought to the WTO.[121] This shows that WTO Members may want to bring their future trade disputes with the U.S. to the WTO rather than going through the trade agreement's dispute mechanism.

This option may complicate current and future trade negotiations and lead WTO Members to second-guess what the U.S. will do when there is a potential trade dispute. This outcome could be beneficial to the WTO Members utilizing the MPIA and may push the U.S. to come to the negotiating table.

B. Negatives to the MPIA

Although there are many positives to the utilization of the MPIA there are also several negatives. The main concern is, of course, how many WTO Members will join the MPIA. As of now, the MPIA includes WTO Members with large economies such as the EU, China, Brazil, and Canada.[122] However, other WTO Members with large economies such as South Korea, Japan, and India, have not yet joined the MPIA.[123] This make-up may change when the MPIA

116. DSU *supra* note 7, at art. 16.4.

117. USTR Trade Policy and Annual Report, *supra* note 113, at 6–7.

118. *Id.* at 1.

119. Ana Swanson & Jim Tankersley, *Trump Just Signed the U.S.M.C.A Here's What's in the New NAFTA*, N.Y. TIMES (Jan. 29, 2020), https://www.nytimes.com/2020/01/29/business/economy/usmca-deal.html.

120. Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 2006).

121. *Id.*

122. Baschuk, *supra* note 109; *see generally* Caleb Silver, *The Top 20 Economies in the world*, INVESTOPEDIA (Dec. 24, 2020), https://www.investopedia.com/insights/worlds-top-economies/.

123. Baschuk, *supra* note 109; Silver, *supra* note 122.

begins hearing appeals to Panel reports, but for now, it is a concern that several high-profile WTO Members are not involved. It is important to point out, though, that if any Panel report is not appealed, the report is adopted. Many WTO Members may simply wait to see if the standoff at the Appellate Body is resolved before deciding whether to join the MPIA.[124]

As stated above, the U.S. will not be a part of the MPIA. This factor becomes an issue considering that the U.S. is the WTO Member with the largest economy in the world.[125] Essentially, any WTO Member with a trade dispute against the U.S. will have that case stuck in limbo if the U.S. appeals a Panel report.[126] And the U.S. has shown that it *will* resort to this tactic.[127] The Biden administration is taking a similar tact, and there likely will not be a simple solution to the issues at the Appellate Body for quite some time.

Recently, the U.S. has utilized its favorable position by announcing its intention to appeal a Panel report that was favorable to India.[128] This has effectively put the case into limbo as the Appellate Body is unable to hear any appeals without a quorum.[129] India has no choice but to proceed with "good faith efforts" to resolve the dispute, but beyond that, it has few options other than to wait until the Appellate Body is functioning again.[130] The U.S. does not even need to file a notice to appeal; it only has to alert the DSB that the U.S. will be appealing.[131]

Further, the U.S. has stated that it would not comply with "certain" Panel and Appellate Body reports.[132] One in particular is a trade dispute regarding Canada and lumber exports.[133] The U.S. claimed that the Appellate Body Judges were not "valid."[134] The U.S. believed that the third panelist and only remaining judge on the Appellate Body, Judge Hong Zhao, was too close to the Chinese government.[135] Although there was a quorum at the Appellate Body when it first heard the appeal, there was no longer quorum when the Appellate Body report was circulated.[136] The two other Appellate Body Judges, Judge Ujal Bhatia and Judge Thomas Gra-

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124. DSU *supra* note 7, at art. 16.4.

125. Silver, *supra* note 122.

126. *See* DSU *supra* note 7, at art. 16.4.

127. *See generally United States Notifies Decision to Appeal Compliance Panel Ruling in Steel Dispute with India*, WORLD TRADE ORG. (Jan. 16, 2020), https://www.wto.org/english/news_e/news20_e/ds436oth_17jan20_e.htm.

128. *Id.*; Joint Communication from India and the United States, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO. Doc. WT/DS436/22 (Jan. 16, 2020) [hereinafter *Joint Communication India/U.S.*].

129. DSU, *supra* note 10, at art. 17.1.

130. *See Joint Communication India/U.S.*, *supra* note 128.

131. See *id.*

132. Appellate Body Report, *United States—Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/AB/R (Feb. 6, 2020) [hereinafter *U.S. - Supercalendered Paper*]; Bryce Baschuk, *U.S. Says WTO's Appellate Body Is Invalid, Balks at Compliance*, BLOOMBERG (Apr. 22, 2020, 6:10 AM), https://www.bloomberg.com/news/articles/2020-04-22/u-s-says-wto-s-appellate-body-is-invalid-balks-at-compliance.

133. *U.S. - Supercalendered Paper, supra* note 132.

134. *Id.*

135. Sarah Martinson, *US Slams WTO Appellate Body Judge for Chinese Gov't Ties*, Law 360 (Mar. 5, 2020, 8:43 PM), https://www.law360.com/articles/1250520/us-slams-wto-appellate-judge-for-chinese-gov-t-ties.

136. *Id.*

ham, had their terms expire in December 2019, before the report was issued in February 2020.[137] Both judges still coauthored the ruling with remaining Appellate Body Judge Hong Zhao.[138]

The dispute with the report was another step against the WTO by the Trump administration, which has stated that the WTO was "BROKEN."[139] This was a recurring theme in the Trump administration throughout its four years. President Trump had even threatened to withdraw from the WTO several times.[140] Under the Biden administration, the current tensions between the U.S. and China will likely cause this issue to continue.

C. The Next Steps WTO Members Must Take

The other WTO Members, besides the U.S., should simply continue to utilize Article 25 of the DSU as the current Appellate Body chaos stems not only from the U.S.'s protectionist policies but from trade disputes.[141] The EU and other WTO Members have established that the MPIA and any other WTO Members may join them.[142] This option is incredibly beneficial since the world is dealing with the current COVID-19 pandemic, which is draining resources from the WTO and its Members.[143] For now, the best option for WTO Members is to wait and see what next steps the new Director General of the WTO will take. Either way, the U.S. will likely have to make, eventually, some concessions, which could lead to a resolution to the paralysis at the Appellate Body.

In addition, WTO Members can continue working on reforms to the WTO and its Appellate Body. The EU's proposals address many of the U.S.'s concerns on the Appellate Body.[144] For example, the EU's proposed reforms regarding the appointment and reappointment of Appellate Body Judges discusses limiting the judges to a single term but expanding that term to as much as eight years.[145] This proposed reform was made in the hopes of giving the Appellate Body Judges more independence, but it likely does not go far enough to resolve U.S. concerns.[146]

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137. *Id.*

138. *Id.*

139. Adam Behsudi, *Trump Ramps Up Attack Against WTO*, POLITICO (July 26, 2019, 4:07 PM), https://www.politico.com/story/2019/07/26/trump-world-trade-organization-1623192.

140. Jonathon Swan, *Scoop: Trump's private threat to upend global trade,* AXIOS (Jun. 29, 2018), https://www.axios.com/trump-threat-withdraw-wto-world-trade-organization-f6ca180e-47d6-42aa-a3a3-f3228e97d715.html.

141. Seals, *supra* note 61.

142. MPIA, *supra* note 95.

143. Robert Azevêdo, *Trade Set to Plunge as COVID-19 Pandemic Upends Global Economy*, WORLD TRADE ORG., https://www.wto.org/english/news_e/pres20_e/pr855_e.htm (last visited May 8, 2020).

144. *See* EU Proposal Part 1, *supra* note 74; *see also* EU Proposal Part 2, *supra* note 74.

145. EU Proposal Part 2, *supra* note 74.

146. *Id.*

The Appellate Body is seen as the WTO's "Supreme Court" and should look to longer terms or even life terms for its judges.[147] In comparison, the International Court of Justice ("ICJ") has nine-year terms for its judges.[148] The best option is to seek longer terms for Appellate Body Judges. If there are any future disputes over the appointment or reappointment of judges, the increased terms will give WTO Members more time to resolve the dispute and avoid the paralysis of the Appellate Body.

Further, besides increasing the length of the terms for Appellate Body Judges, the number of judges on the Appellate Body should be increased as well. This option is also included within the EU proposal, as it advocates for an increase from seven judges to nine judges on the Appellate Body.[149] Increasing the number of judges on the Appellate Body is a good start but increasing that number further would be beneficial. The ICJ has a grand total of fifteen judges.[150] This option, again, would increase the length of time the Appellate Body can work if a WTO Member were to block the appointment or reappointment of judges. As stated above, each appeal requires a quorum of three judges to work. This would greatly benefit the number of appeals that can be heard and ruled on at one time by the Appellate Body.[151]

Additionally, an increase of judges from seven to nine will improve the "geographical balance of the Appellate Body."[152] When the WTO was established in 1995, there were originally sixty-five Members.[153] As of 2019, the WTO has 164 Members and 23 Observer Members.[154] Russia, a large country of more than 100 million people, only recently became a WTO Member in 2012.[155] Furthermore, past Appellate Body Judges have mainly been from the U.S., Australia, New Zealand, Japan, Brazil, India, China, and the EU.[156] Out of the twenty-four current and former judges on the Appellate Body, only eight have been from other WTO Members.[157] Since its establishment, the WTO has always had a representative from the U.S., the EU, and Japan on the Appellate Body.[158] This was an "unwritten tradition" even though "any WTO Member can nominate a judge to the Appellate Body.[159] Compared to the ICJ, out of the fifteen judges currently serving, six are from States other than the U.S., Australia, New

147. *Cf.* U.S. Const. art. III, § 1.

148. *Members of the Court*, INT'L COURT OF JUSTICE, https://www.icj-cij.org/en/members (last visited May 8, 2020).

149. EU Proposal Part 2, *supra* note 74.

150. *Members of the Court*, *supra* note 148.

151. DSU, *supra* note 7, art. 17.1.

152. EU Proposal Part 2, *supra* note 74.

153. Kimberley Amadeo, *How Does a Country Become a WTO Member?*, THE BALANCE (Nov. 19, 2020), https://www.thebalance.com/how-does-a-country-become-a-wto-member-3306362.

154. *Id.*

155. *Russian Federation and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/russia_e.htm (last visited May 8, 2020).

156. *Appellate Body Members*, *supra* note 23.

157. *Id.*

158. Hufbauer, *supra* note 18.

159. *Id.*

Zealand, Japan, Brazil, India, China, and the EU.[160] This would be incredibly beneficial for the legitimacy of the WTO Appellate Body and its 164 Members since the Appellate Body is not very reflective of the vast diversity of WTO Members.

Another U.S. concern regarding the EU proposal is what happens to judges currently working on Panel appeals whose terms are expiring.[161] The U.S. has stated that they will not abide by the adopted Appellate Body report in *United States-Countervailing Measures on Supercalendered Paper from Canada* because two of the Appellate Body Judges that co-authored the paper had their terms expire prior to the completion of the appeals process.[162] The EU's proposed reform would alleviate that concern and allow Appellate Body Judges currently working on an appeal to continue working even if their term expires.[163] This would prevent WTO Members from using this situation as a justification to not abide by adopted Appellate Body reports and would give Appellate Body Judges an ample amount of time and resources to complete their reports.

Finally, another issue that the EU proposal touches on that is incredibly beneficial to keeping the Appellate Body independent is removing the "part-time" from the Appellate Body Judge job title.[164] This would solve any issues questioning the Appellate Body Judges independence, considering that this is a major U.S. concern.[165] The *United States-Countervailing Measures on Supercalendered Paper from Canada* report was coauthored by Appellate Body Judge Hong Zhao of China.[166] When not at the WTO, Appellate Body Judge Hong Zhao serves as Vice President of an "international trade and economic policy institute affiliated with China's Ministry of Commerce."[167] The U.S. has claimed that her work at this institution means that she is unable to fairly rule on any appeals at the WTO.[168] Whether this policy institute is an independent organization separate from the Chinese government is up for debate. Although it has been "independent" since 1997, it does receive funds from the Chinese government.[169] Either way, adopting this amendment into the DSU would solve the issue of WTO Members questioning the independence of an Appellate Body Judge.

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160. *Current Members*, INT'L CT. OF JUST., https://www.icj-cij.org/en/current-members (last visited May 8, 2020).

161. EU Proposal Part 2, *supra* note 74.

162. *See generally U.S. - Supercalendered Paper*, *supra* note 132.

163. EU Proposal Part 2, *supra* note 74.

164. *Id.*

165. Baschuk, *supra* note 108.

166. *U.S. - Supercalendered Paper*, *supra* note 132; *Appellate Body Members*, *supra* note 22.

167. Sarah Martinson, *US Slams WTO Appellate Judge for Chinese Gov't Ties*, LAW 360 (Mar. 5, 2020, 8:43 PM), https://www.law360.com/articles/1250520/us-slams-wto-appellate-judge-for-chinese-gov-t-ties.

168. *Id.*

169. *Id.*; Doug Palmer, *U.S Dismisses "Invalid" WTO Appellate Body Ruling*, POLITICO (Apr. 23, 2020, 5:32 PM), https://www.politico.com/newsletters/morning-trade/2020/04/23/us-dismisses-invalid-wto-appellate-body-ruling-787082.

Conclusion

Is there any hope for the WTO? At this point, the organization appears to be on shaky ground. Although the WTO has several issues, the rest of the world keeps moving forward. Global trade is still occurring, whether or not the Appellate Body is functioning. While negotiations are ongoing regarding future reforms of the Appellate Body, trade disputes must be resolved as they come. The DSB is still an important safety net for all WTO Members, especially for small and developing States.

However, if the Appellate Body is unable to function, those smaller WTO Members will be left at the mercy of the larger WTO Members who can weather a standoff due to their vast wealth and economic power. This power is especially true of the U.S., as the WTO Member with the biggest economy in the world. That is why arbitration through Article 25 of the DSU should be utilized as an alternative by WTO Members for the time being. However, it is important to note that this cannot replace the Appellate Body in the long run and is only a temporary solution. The WTO Members must band together and pressure the U.S. to come to the negotiating table in order to come to an agreement so that the Appellate Body can start functioning again. It is important to start the process now in the hopes of enacting necessary reforms to prevent WTO Members from paralyzing the Appellate Body in future disputes.

Imprisoning Human Rights: Immigration Detention Centers as a Crime Against Humanity

Damyre Benjamin*

Introduction

Picture this. You wake up. You go to shower, but all you have are wet wipes.[1] You crave a warm meal, but all you have are cold meals. Your back starts to hurt. You look for somewhere to lay down, only to remember that where you are is so crowded there is barely any space to stand, let alone room to sit down.[2] You feel a bit ill, but you are unable to see a doctor.[3] In fact, you have not seen anyone outside of your vicinity for quite some time. Neither have you called anyone. This is when you remember: you are not home. In fact, you have not been in a home for weeks, maybe even months. Instead, you are in an immigration detention center. These are some of the conditions of immigration detention centers around the world.

Given the influx of immigrants, refugees, and asylum seekers in places worldwide, there has been a rise in the use of immigration detention centers.[4] But not every detention center is created equal. Immigration detention centers intended to hold individuals who have entered a country without documentation have now become more akin to prison for immigrants. Immigration detention systems that were once aimed to have temporary holding units now operate long-term holding cells.[5] Also, these facilities frequently house children, sometimes even separating them from their parents.[6]

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1. Zolan Kanno-Youngs, *Squalid Conditions at Border Detention Centers, Government Report Finds*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html.

2. *Id.*

3. *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47 (2010).

4. *See* INTERNATIONAL DETENTION COALITION, *IDC Strategic Plan 2020-2022: Rights-Based Migration Without Immigration Detention*, (July 3, 2020), https://idcoalition.org/news/idc-strategic-plan-2020-2022/.

5. *See, e.g.*, Stephanie J. Silverman, *Immigration Detention in America: A History of its Expansion and a Study of its Significance* 4 (Univ. of Oxford Ctr. on Migration, Pol'y and Soc'y, Working Paper No. 80, 2010), https://www.academia.edu/1154976/Immigration_Detention_in_America_A_History_of_its_Expansion_and_a_Study_of_its_Significance.

6. *See generally* Michael Garcia Bochenek, *US: Family Separation Harming Children, Families*, HUMAN RIGHTS WATCH (July 11, 2019. 3:00 AM), https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families.

Typically, individuals are held in immigration detention facilities for indefinite periods of time in small holding cells with no access to sanitary supplies, places to shower, or even simply a place to wash their hands.[7] Due to numerous immigrants, refugees, and asylum seekers, individuals sometimes have to sleep on concrete floors or stand for days because there is not enough space.[8]

Conditions such as these lead to many questions concerning the usage of such immigration detention facilities and their relation to human rights. Does such confinement violate international human rights? This is the foundation of this research. This note explores whether immigration detention facilities could constitute a crime against humanity under international criminal law.

With an inquiry such as this, a look into the 1967 Protocol Relating to the Status of Refugees (the "Protocol"), the Rome Statute of 1998 (the "Rome Statute"), the Convention Against Torture (the "CAT"), and other international agreements is useful. Some nations, such as the United States ("U.S."), have signed these agreements but later opted not to ratify.[9] Recently, crimes against humanity have been understood to encompass governments' purposeful actions against civilian populations during war or times of peace, which then cause great suffering.[10] This suffering includes both arbitrary detention and cruel imprisonment.[11] Article 7 of the Rome Statute defines crimes against humanity to include "'deportation or forcible transfer of population' and 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.'"[12]

This research will argue that the current state of detention centers constitutes a crime against humanity. Part I will provide some background on the history of immigration detention centers in different parts of the world and how the centers have been used. Then, this note will discuss crimes against humanity by looking at international criminal law along with the Rome Statute, which provides the framework for international criminal law, including the definition of crimes against humanity. It will then discuss crimes against humanity by examining the CAT, the Protocol, and other international instruments.

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7. Elliot McLaughlin, *At Detention Facilities, Migrant Children Plead for Basics: Food, Medicine, Soap and a Bit of Solace*, CNN (June 27, 2019), https://www.cnn.com/2019/06/27/us/migrant-children-detention-stories/index.html.

8. *See* Richard Gonzales, *Migrant Children Moved From Border Patrol Center After Outcry,* NPR (June 24, 2019), https://www.npr.org/2019/06/24/735552011/migrant-children-moved-from-border-patrol-center-after-outcry; Elliot Spagat, *Jarring Images of Border Cells Surface Ahead of July 4*, ABC NEWS (July 3, 2019), https://abcnews.go.com/US/wireStory/sites-states-eyed-permanent-child-detention-centers-64117813.

9. J. Mauricio Gaona, Opinion, *Is the U.S. Committing Crimes Against Humanity on its Southern Border?,* N.Y. DAILY NEWS (July 5, 2019, 3:27 PM), https://www.nydailynews.com/opinion/ny-oped-crimes-against-humanity-southern-border-20190705-ttwha2f43nefbdyx7ozmabadii-story.html.

10. *Id.*

11. *Id.*

12. Stephanie Anderson, *Australia's Detention Centres a Crime Against Humanity, Says Submission before ICC*, ABC NEWS (Feb. 14, 2017, 2:16 AM), https://www.abc.net.au/news/2017-02-14/offshore-detention-centres-crime-against-humanity-icc/8270028.

Part II will discuss Australian immigration detention issues. In 2017, a group of international criminal and refugee law scholars made a Communication (the "Communication") to the Office of the Prosecutor of the International Criminal Court ("ICC") arguing that the Australian government participated in "'maintaining and authorizing [the] detention camps'" and so it "'do[es] have [a] responsibility under the ICC'" for its use of offshore detention centers.[13] Specifically, the Communication suggested the offshore detention centers could constitute a crime against humanity.[14] Along with that argument came the issue that the government was attempting to "contract-out the detention facilities, and thereby avoid responsibility."[15] This note will utilize the Communication's argument that offshore centers are a crime against humanity and expound on it to analyze whether both offshore and onshore detention centers could constitute a crime against humanity under the acts of improper deportation or forcible transfers and imprisonment or severe deprivation of physical liberties. This section will conduct case studies on detention centers in both Australia and the U.S. to analyze if such facilities meet the requirements under article 7 of the Rome Statute.

Finally, Part III will evaluate whether Sweden's detention centers constitute a crime against humanity. Interestingly, Sweden's detention facilities are arguably less dire. Thus, this note will argue that this makes it a great candidate to create a model for other countries to follow to lessen their chances of committing crimes against humanity. The note will demonstrate that improving conditions will not necessarily prevent countries from violating the improper deportation or forcible transfer acts under the Rome Statute. However, improving conditions may prevent countries from violating the acts of imprisonment or severe deprivation of physical liberties. If governments can improve their detention centers' conditions to match or surpass conditions in Sweden, these governments could be on their way to operating centers free of Article 7 violations.

Part I

I. Background

Although immigration detention centers have only recently been coming into the limelight more frequently, several nations have used these types of facilities for quite some time. In the U.S., for instance, Ellis Island was the earliest federal immigration detention center.[16] The center detained approximately 12 million immigrants during its decades of operation before

13. *Id.*

14. *Id.*

15. TENDAYI E. ACHIUME ET AL., COMMUNIQUÉ TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT UNDER ARTICLE 15 OF THE ROME STATUTE: THE SITUATION IN NAURU AND MANUS ISLAND: LIABILITY FOR CRIMES AGAINST HUMANITY, (Stan.) (Feb. 14, 2017), https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/Communiqu%C3%A9-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf.

16. Silverman, *supra*, note 5.

finally closing in 1954.[17] At Ellis Island's closing, Immigration and Nationalization Services declared it would no longer use detention as a means of dealing with the influx of immigrants.[18]

Detention centers have also been used throughout the European Union and the Commonwealth.[19] For instance, the United Kingdom also started enforcing detentions under the Immigration Act of 1971.[20] "Although Immigration Act powers are administrative in name, they are clearly 'criminal-justice-like' in nature, and yet they remain virtually unconstrained by the procedural safeguards considered necessary to prevent abuses of power within the criminal justice system."[21] Similarly, in Australia, the government started enforcing mandatory detention of both adult and child migrants who arrived undocumented beginning in 1994.[22]

There are several international instruments in place that intertwine with the effects of immigration detention centers. For example, the Protocol deals primarily with refugees or those seeking refugee status.[23] The Protocol applies to individuals who became refugees from events occurring after 1951.[24] Thus, the prohibitions on how states can treat refugees apply to current refugees.[25] This includes a refugee's rights to free movement, public relief, assistance, movable and immovable property, and housing, which were previously provided for in the United Nations Convention Relating to the Status of Refugees.[26] The provision of these rights are directly contradicted by how refugees are generally treated in immigration detention centers today.

Another instrument relating to the rights of individuals in detention centers is the CAT.[27] Articles 10, 16, and 17 specifically address refugees and individuals in detention facilities. For example, Article 10 instructs each party to the CAT to educate and inform individuals, such as law enforcement, military personnel, or medical personnel, on the "prohibition against torture" of "any individual subjected to any form of arrest, detention or imprisonment."[28] This prohibition applies to the treatment of immigrant detainees. Article 16 specifically provides that each

17. *Id.* at 4–5.

18. Arthur C. Helton, *The Imprisonment of Refugees in the United States*, 9 IN DEFENSE OF THE ALIEN 130, 130–31 (1986).

19. Kay Hailbronner, *Detention of Asylum Seekers*, 9 EUR. J. MIGRATION & L. 159, 159 (2007).

20. Leanne Weber, *Down That Wrong Road: Discretion in Decisions to Detain Asylum Seekers Arriving at UK Ports*, 42 HOW. J. CRIM. JUST. 248, 249 (2003).

21. *Id.* at 249.

22. Alexander J. Wood, *The "Pacific Solution": Refugees Unwelcome in Australia*, 9 HUM. RTS. BRIEF 22, 23 (2002).

23. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

24. *Id.*

25. *Id.*

26. *See generally* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

27. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 113, S. Treaty Doc. No. 100-20 (1988) (entered into force June 26, 1987) [hereinafter Convention Against Torture].

28. *Id.* at art. 10.

State should prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[29] Moreover, the Convention provides that each state should constantly be "review[ing] interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."[30]

Furthermore, Article 7 of the Rome Statute is the framework for international criminal law.[31] 120 states adopted the Rome Statute on July 17, 1998, and it was later ratified by 60 states by July 1, 2002.[32] The Rome Statute is the enabling statute that allows the ICC to prosecute violations of international criminal law, including crimes against humanity. Article 7 of the statute defines what constitutes a crime against humanity.[33] Crimes against humanity include the deprivation of certain human rights that likely overlap with circumstances individuals undergo when forced to remain in detention centers.[34] They also include wrongs committed as part of a widespread or systematic attack directed against any civilian population.[35] This includes acts such as murder, extermination, enslavement, deportation or forcible transfer of population, and torture.[36] Article 7 also explains that crimes against humanity can include "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[37]

The Office of the Prosecutor for the ICC independently investigates and prosecutes crimes like these and more on an international scale.[38] Other crimes include "genocide, war crimes, . . . and the crime of aggression."[39] In total, the ICC has heard 27 cases.[40] Nonetheless, the ICC is not the only international court of its kind which prosecutes crimes against humanity. For example, both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") exist to prosecute similar crimes.[41]

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29. *Id.* at art. 16, ¶1.
30. *Id.* at art. 11.
31. *See generally* The ICC, INT'L CRIM. CT., https://www.icc-cpi.int/about (last visited May 8, 2020).
32. *Id.* at 6.
33. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3, 90 (entered into force July 1, 2002) [hereinafter Rome Statute].
34. *See, e.g.,* Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME (July 12, 2019, 2:01 PM), https://time.com/5623148/migrant-detention-centers-conditions/.
35. Rome Statute, *supra* note 33.
36. *Id.*
37. *Id.* ¶ 1(k).
38. INT'L CRIM. CT., *supra* note 31.
39. *Id.*
40. *Id.*
41. William Thomas Worster, *Deporting Dreamers as a Crime against Humanity*, 33 EMORY INT'L L. REV. 367, 371 (2019).

Part II

II. Operations of Immigration Detention Centers Violate the Rome Statute – Case Studies

A. Australia

Australia has enforced mandatory detention of refugees and asylum-seekers since 1994.[42] For example, one facility, Woomera, had about 2,000 people in detention but only had 40 showers and about 40 toilets in all its years of operation.[43] Visits from attorneys and National Governmental Organizations are mostly not allowed at detention centers.[44] Additionally, during scorching summer days, many detainees are forced to wait outside for food.[45] As for the children, the case is not that different.[46] Children suffer some of the same inhumane treatment as adults.[47] They, like the adults, are not allowed visits from family, friends, religious figures, or attorneys.[48] Also, children aged 12 years and older are not provided education while detained.[49] The harsh conditions cause many detainees to go on hunger strikes, to self-harm, and to commit other dangerous acts.[50]

In Australia, as with some other nations, the detention centers do not stop at the border. Australia has what is known as offshore detention centers.[51] Offshore detention centers are facilities operated by a state outside its borders.[52] According to the "UN and other observers, [Australia has] implemented an offshore detention and resettlement scheme violating core human rights of one of the world's most vulnerable populations."[53] This is Australia's way of limiting the number of asylum-seekers and refugees on the mainland.[54] The offshore detention centers are located on the Manus and Nauru islands.[55] Like the individuals detained in the detention centers on the mainland, individuals detained in the offshore centers also suffer in

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42. Wood, *supra* note 22, at 23.
43. *Id.* at 25.
44. *Id.*
45. *Id.*
46. *See generally id.*
47. *Id.*
48. *Id.*
49. *See id.* at 25.
50. *Id.* ("Refugee protests against these conditions have included hunger strikes, setting fire to buildings, swallowing poisonous substances, and breaking windows. Refugees, including children, have sewed their lips shut in protest, cut themselves, and threatened to otherwise harm or even kill themselves.").
51. *See* ACHIUME ET AL., *supra* note 15, at 9 ("[T]he Australian government relies on offshore processing . . .").
52. *See, e.g.*, Claire Henderson, *Australia's Treatment of Asylum Seekers*, 12 J. INT'L CRIM. JUST. 1161, 1174 ("Australia has simply exported its own regime of mandatory and indefinite detention" to offshore facilities).
53. *Id.*
54. *See id.*
55. *Id.* (As of 2017, "[a]pproximately 1246 asylum seekers and refugees are currently held on Manus Island, and on Nauru . . .).

unclean and overcrowded places.[56] Individuals suffer from "inadequate access to food, water and medical treatment; and extensive mental suffering of detainees."[57] Detainees there also suffer harmful physical and verbal abuses.[58] There, detention security staff have been known to rape individuals in the detention centers.[59] Many times, the inhumane detention has not only caused individuals to self-harm, as it does with individuals in the mainland detention centers, but has also caused individuals to become clinically depressed or, even worse, commit suicide.[60]

B. United States

Unfortunately, Australia is not an outlier; the U.S. has a similar operation. In the U.S., most migrants are detained for periods longer than three months.[61] Detention centers in the U.S. exhibit similar issues as the ones in Australia. Similar to Australian detention centers, detention centers in the U.S. lack sufficient visitation hours.[62] Detention centers also lack proper ventilation, "functioning showers and toilets".[63] Facilities also suffer from "overcrowding," "lack of adequate telephone access," and "clean quarters."[64] Furthermore, individuals are often not provided with adequate medical care.[65] "Over 100 detainees have died in custody since 2003, often due to neglect of their health needs."[66]

As with Australia, the U.S. has, at times, operated its own offshore immigration detention centers. Many of the efforts to prevent asylum seekers and refugees from entering the mainland have been performed by the U.S. Coast Guard.[67] For the 2019 fiscal year, the U.S. Coast Guard reported interdicting 3,603 migrants.[68] The U.S. also "promot[es] detention practices in other neighb[o]ring countries" inevitably aiding detention operations there.[69] One infamous area where the U.S. once operated an offshore immigration detention center is Guantánamo

56. *See id.*

57. *Id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 257 (2013). "At least fifteen percent and up to forty-eight percent of asylum seekers remained in detention for longer than 90 days." *Id.*

62. Kalhan, *supra* note 3.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *United States Immigration Detention Profile,* GLOBAL DETENTION PROJECT, https://www.globaldetentionproject.org/countries/americas/united-states#country-report (last visited Feb. 11, 2020).

68. U.S. COAST GUARD, ANNUAL PERFORMANCE REPORT: FISCAL YEAR 2019 3 (2020), https://www.uscg.mil/Portals/0/documents/budget/FY19-USCG-APR.pdf?ver=2020-05-20-113137-970.

69. United States Immigration Detention Profile, *supra* note 67.

Bay Detention Camp ("Guantánamo Bay").[70] In recent years, the Trump administration had even posed the idea of revamping the use of detaining migrants there.[71] Arguably, Guantánamo Bay is what inspired Australia's own offshore detention system.[72]

Due to the influx of refugees from Haiti and Cuba in the early 1990s, the U.S. created the migrant facility in Guantánamo Bay, Cuba.[73] Like its Australian counterpart, Guantánamo Bay's legal materials were lacking and "outdated."[74] It also had "restrictive visitation policies" similar to onshore facilities currently in the U.S.[75] Furthermore, the refugee camps there were surrounded by "barbed wire and guard towers."[76] There was not enough drinkable water and nutritious food available for the detainees.[77] The children were also not provided with any education or recreational activity.[78] Overall, when used as a detention center for refugees and asylum seekers, the conditions in Guantánamo Bay have been dire.

C. Analyzing Crimes Against Humanity and Detention Centers

Determining whether a crime against humanity has been committed is a multilayered analysis. A crime against humanity encapsulates any of the listed acts in Article 7 (a)-(k) such as murder, torture, or persecution.[79] For the purposes of this note, we will mainly be focusing on acts in Article 7(d), "deportation or forcible transfer of population[,]" and (e), "imprisonment or other severe deprivation of physical liberty," which violates international fundamental rules.[80] When performing the analysis for whether there has been a deportation or forcible transfer of a population, the elements are: (1) "forced displacement of the persons concerned by expulsion or other coercive acts from the area[,]" (2) "in which they are lawfully present[,]" and (3) "without grounds permitted under international law[.]"[81] Also, the perpetrator must have been "aware of the factual circumstances that established the lawfulness of such presence."[82]

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70. *Id.*

71. Caitlin Dickerson, *ICE Faces Migrant Detention Crunch as Border Chaos Spills Into Interior of the Country*, N.Y. TIMES (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/us/immigration-detention.html?auth=link-dismiss-google1tap. In early 2019, "Department of Homeland Security officials looked at housing migrant children at Guantánamo Bay. . .."; *Id.*

72. United States Immigration Detention Profile, *supra* note 67.

73. *Id.*

74. Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" And Why They Deserve More*, 111 COLUM. L. REV. 1833, 1868 (2011).

75. *Id.*

76. Kate Jastram, *The Kids before Khadr: Haitian Refugee Children on Guantanamo: A Comment on Richard J. Wilson's Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo*, 11 SANTA CLARA J. INT'L L. 81, 89 (2012).

77. *Id.*

78. *Id.* at 90.

79. Rome Statute, *supra* note 33, at art. 7.

80. *Id.*

81. *Id.* ¶ 2(d). *See also* Worster, *supra* note 41, at 384.

82. *Elements of Crimes*, *Article 7 (1) (d) Crimes Against Humanity of Deportation or Forcible Transfer of Population*, INT'L CRIM. CT, https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf (last visited May 8, 2020).

When analyzing whether there has been imprisonment or severe deprivation of physical liberties, the elements are (1) the perpetrator imprisoned or severely deprived one or more person's physical liberty, (2) "the gravity of the conduct" violated "fundamental rules of international law[,]" and (3) "the perpetrator was aware of the factual circumstances that established the gravity of the conduct."[83] In addition to performing the analysis for the relevant committed acts, we need to analyze whether each act was "part of a widespread or systematic attack directed against any civilian population" and if the perpetrator had "knowledge of the attack[.]"[84] Having knowledge "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization," just that the perpetrator "intended to further such an attack."[85] Also, a widespread attack should be interpreted as a plan or policy for the attack.[86] Therefore, a listed act along with the intent is what constitutes a crime against humanity under the Rome statute.

D. Are Australian Immigration Detention Centers Permissible under the Rome Statute?

1. Deportation or Forcible Transfer of a Population

When it comes to Australia, the issue of deportation is apparent. It is most clear when examining offshore detention centers. First, we need to look at whether there are deportations or some forcible acts of displacement which exist to satisfy that element of a crime against humanity. For example, with offshore detention centers in Australia, detaining individuals there is arguably forcible within the meaning of Article 7.[87] The scholars who drafted the Communication to the ICC argued that the Australian government is forcibly displacing individuals because the individuals in Nauru and Manus Islands are not voluntarily staying there.[88] These immigrants are trying to immigrate or flee to Australia, but the Australian government is preventing them from doing so by detaining the immigrants on islands outside of Australia's jurisdiction before they can even reach the mainland. Another example of forcible displacement by coercive acts is when Australia forcibly removes individuals from the mainland to offshore detention centers or removes individuals from their homes into mainland detention centers.[89]

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83. *Id.* at art. 7(1)(e) ¶ 1–3.

84. Rome Statute, *supra* note 33, at art. 7.

85. *Elements of Crimes*, *supra* note 82, at art. 7(2).

86. *Id.*

87. ACHIUME ET AL., *supra* note 15, at 88.

88. *Id.* (discussing "'forcible' in this narrow sense of the terms, as well as being more widely coerced and involuntary. As explained by the ICTY, 'the displacement of persons is only illegal where it is forced, i.e., not voluntary.'") (citing Prosecutor v Simić, Tadić, & Zarić, TC II, Case No. IT-95-9-T, ¶ 125 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 17, 2003)).

89. *E.g.*, Ben Doherty, *Small town rallies after asylum seeker family carried off in dawn raid,* THE GUARDIAN, (Mar. 11, 2018), https://www.theguardian.com/australia-news/2018/mar/12/small-town-rallies-after-asylum-seeker-family-carried-off-in-dawn-raid (Australian Border Force raided a Sri Lankan family of asylum seekers whose visas expired the day before).

Additionally, many of the individuals being detained in Australia are being displaced after being somewhere lawfully, which again meets the standard for violating the rule against deportation or forcible transfer.[90] For example, in regard to the offshore centers, the scholars who drafted the Communication argued that "the presence of travelers moving through maritime space mustn't be regarded as different in nature to any other kind of presence."[91] Although there are more nuances involving maritime law, generally, the individuals were in the waters lawfully when trying to reach Australia in the same way as someone who was simply passing by.[92] "Freedom of navigation is 'the starting principle under international law and domestic law does not extend a sufficient legal basis' to interfere with it."[93] The asylum seekers were there legally, and Australia is not permitted to interfere with their presence.[94] Those waters are not the sovereign territory of any state.[95] Therefore, arguably, the individuals being detained have a lawful presence in those waters which is being undermined by these forcible transfers.

Now, some researchers of the operations of offshore Australian detention centers have found that it is unlikely that individuals entering other countries without visas, or seeking asylum, are there legally.[96] For example, some are of the view that just because one is seeking asylum does not make that person's presence automatically lawful.[97] Nonetheless, a case can still be made for individuals removed from their Australian homes and placed in detention centers.[98] For instance, there are other researchers who argue that certain international criminal courts have found lawful presence to exist when an individual owns a home or lives somewhere legally.[99] One researcher looked at "lawful residence in a home" and its relation to a person's community and cultural integration.[100] For example, the ICTY in *Popopvic* held that "'the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally'" and not a lawful residency requirement.[101] Meaning, as opposed to lawful presence being defined by domestic laws, it could also be that a person who lives in their home legally (*i.e.*, not squatting or without a landlord's approval) could have a lawful presence under the Rome Statute.[102]

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90. Rome Statute, *supra* note 33, at art. 7.

91. ACHIUME ET AL., *supra* note 15, at 88.

92. *Id.*

93. *Id.* at 89 (quoting Tanja Aalberts & Thomas Gammeltoft-Hansen, *Sovereignty at sea: the law and politics of saving lives in mare liberum*, 17 J. OF INT'L. L. & INT'L. REL. 439, 452 (2014)).

94. *Id.* ACHIUME ET AL., *supra* note 15.

95. *Id.*

96. Henderson, *supra* note 52, at 1177. ("[I]t is doubtful that asylum seekers without visas would be 'lawfully present' in this area.")

97. *Id.*

98. Worster, *supra* note 41, at 387.

99. *Id.*

100. *Id.*

101. *Id.* at 386–87.

102. *Id.*

In Australia's case, there have been raids of individuals in their own homes. Individuals who have lived there their whole lives can suddenly be forced to into a detention center. For example, a married couple who fled Sri Lanka sought asylum in Australia.[103] Years later, after the couple had children, they were removed from their home.[104] The family was being deported by plane back to Sri Lanka, when the plane was forced to land, and consequentially the Australian government placed them in a detention center.[105] In this example, the family was already culturally integrated, having deeply established their lives and started a family in Australia.[106] Additionally, they were physically removed from their lawful home.[107] Therefore, cases like this one could be argued to be lawful presence, using the ICTY precedent as persuasive case law.[108]

Regarding the third prong of the analysis for the forcible displacement or deportation, absent of a permitted ground, it is easy to argue that Australia is a sovereign state that has a right to deport non-citizens. However, international law only permits the deportation of refugees and asylum seekers under "strict limitations."[109] The scholars in the Communication based their arguments on Article 13 of the International Covenant on Civil and Political Rights ("ICCPR") to convey that the Australian government was not following the guidelines for deporting asylum seekers.[110] For example, asylum seekers are deported in large groups without judicial review for reasons unrelated to national security.[111] Additionally, the Protocol also states that individuals in the seas should be treated sympathetically.[112] Instead, Australia is capturing the individuals and detaining them offshore without any regard for their refugee status. Therefore, the operation of Australian offshore detention centers are equivalent to deportations or forcible transfers.

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103. Rachael Bongiorno, *Australia detained this family on a remote island — alone*, THE WORLD (Mar. 24, 2020, 11:15 AM), https://www.pri.org/stories/2020-03-24/australia-detained-family-remote-island-alone.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See id.*

108. *Id.*

109. ACHIUME ET AL., *supra* note 15, at 90.

110. *Id.* ("Expulsions are effectively collective in nature as all intercepted individuals are summarily deported to the detention centres. In addition, individuals are not permitted to have their case reviewed before a competent authority but are summarily deported.").

111. *Id.* (Explaining that these "collective and arbitrary deportations [are] based on exceptional national security grounds").

112. 1967 Protocol, *supra* note 23, at art. 11. (Stating, "[i]n the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment . . .").

2. Imprisonment or Severe Deprivation of Physical Liberty in Violation of International Law

Using its detention centers, Australia imprisons and deprives individuals of physical liberties in violation of international law fundamentals. For example, asylum seekers are imprisoned because they are forcibly kept in the detention centers, sometimes as long as 500 days.[113] People in the high security centers are kept in "single separation units" that are "restrictive and prison-like."[114] Many of the detained individuals in Nauru "live" in tents.[115] These are not rooms where they can freely move about as they wish.[116] These environments in many ways are equivalent to prisons.

The next inquiry is whether this conduct violated fundamental rules of international law.[117] Arguably, it has. For instance, tents and prison-like units are not decent housing as described in the Protocol.[118] Additionally, detainees are severely deprived of physical liberties through the conditions discussed earlier.[119] Here, detainees are not provided with adequate food, recreational activities, visits, and legal counsel. For example, the medical care, if offered, is so minimal that there have been times when asylum seekers needed to be medically evacuated from Nauru to mainland Australia.[120] This demonstrates that these individuals are not provided public relief and assistance regarding these issues, which goes against the provisions in the 1967 Protocol.[121] Individuals, including children, are often handcuffed even though they have never been known to be violent.[122] "Restrictions relating to excursions, personal items and external visits are applied on a blanket basis, regardless of whether they are necessary in a person's individual circumstances."[123] These individuals are not permitted to freely move about.

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113. Edward Santow, *Risk management in immigration detention (2019)*, AUSTL. HUM. RTS. COMM'N (June 18, 2019), https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019 ("[T]he average length of immigration detention in Australia is currently close to 500 days—a period that is many orders of magnitude greater than almost any other developed country. In general, the risks to human rights increase the longer a person is held in immigration detention.").

114. *Id.*

115. AMNESTY INT'L, *Australia: Appalling abuse, neglect of refugees on* Nauru, (Aug. 2, 2016, 11:39 AM), https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/ (emphasis added) ("About one-third of the 1,200 refugees and asylum seekers on Nauru remain in the tents, people interviewed said.").

116. *See id.*

117. Rome Statute, *supra* note 33, at art. 7.

118. *See generally* 1967 Protocol, *supra* note 23; *see also* 1951 Convention, *supra* note 26.

119. *See* Wood, *supra* note 22, at 23; *see also* ACHIUME ET AL., *supra* note 15, at 5.

120. AMNESTY INT'L, *Close Australia's hidden detention camps*, https://www.amnesty.org/en/get-involved/take-action/stop-abuse-two-thousand-people-in-nauru-manus-island/ (last visited May 9, 2020).

121. *See generally* 1967 Protocol, *supra* note 23.

122. Jonathon Hunyor, *Australia's immigration detention system is cruel and damaging by its very nature*, The GUARDIAN (Oct. 27, 2019, 10:34 PM), https://www.theguardian.com/commentisfree/2019/oct/28/our-immigration-detention-system-is-cruel-and-damaging-by-its-very-nature. ("[H]andcuffing has become a routine practice for transfers between centres and, alarmingly, for off-site medical appointments. This includes transfers for torture and trauma counselling, [and] in private doctors' waiting rooms . . .").

123. Santow, *supra* note 113.

These examples show how the Australian government is imprisoning and depriving asylum seekers of their physical liberties in its detention centers in violation of international criminal law.

3. Australian Government's Knowing, Widespread, Systematic Commission of These Acts

When determining whether an act constitutes a crime against humanity, the Rome Statute states that even when multiple forbidden acts occur, one still needs to prove that this was a widespread, systematic commission of the acts of which the State was aware.[124] In the case of Australia, the authorities do have knowledge of this widespread, systematic attack because they have been alerted to it many times.[125] For example, in 2019 the Department of Home Affairs issued a response to some of the ongoing issues in the detention centers.[126] In the Communication, the scholars argued that the act is widespread and systematic against a civilization within the meaning of Article 7 because "[t]hrough legislative, judicial, and executive schema, individuals associated with the Australian government developed and implemented a policy against refugees and asylum seekers."[127] For example, "Australian law requires the detention of all non-citizens who are in Australia without a valid visa (unlawful non-citizens)."[128] Therefore, by detaining individuals in the detention centers in a way that was both widespread and a systematic commission of the acts, the Australian detention centers likely are a crime against humanity within meaning of Article 7 of the Rome Statute.

E. Would U.S. Immigration Detention Centers be Permissible Under the Rome Statute?

1. Deportation or Forcible Transfer of a Population

For the analysis of whether the U.S. committed the act of deportation or forcible transfer of a population within violation of Article 7, we once again need to determine if the U.S. forcibly displaces people through expulsion or other coercive acts.[129] Arguably, the U.S. deports and forcibly displaces asylum-seekers similarly to the Australian government with its own off-

124. Rome Statute, *supra* note 33, at art. 7(1) ("For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.").

125. AMNESTY INT'L, *supra* note 115. (Explaining "The Australian Human Rights Commission (AHRC), the Office of the United Nations High Commissioner for Refugees (UNHCR), a Senate Select Committee, and a government-appointed independent expert have each highlighted many of these practices, and called on the government to change them.").

126. *See generally* AUSTL. GOV'T. DEP'T OF HOME AFF., *Home Affairs Response to The Australian Human Rights Commission (AHRC) Risk Management In Detention Report – 2019*, HUMANRIGHTS.GOV.AU, https://www.humanrights.gov.au/sites/default/files/home_affairs_response_ahrc_risk_report2019.pdf (last visited May 9, 2020).

127. ACHIUME ET AL., *supra* note 15, at 60.

128. AUSTL. HUM. RTS. COMM'N, *Australia's Immigration Detention Policy and Practice*, HUMANRIGHTS.GOV.AU, https://www.humanrights.gov.au/our-work/6-australias-immigration-detention-policy-and-practice (last visited May 9, 2020).

129. Rome Statute, *supra* note 33, at art. 7.

shore detention centers.[130] Using the Communication's analysis as an example, starting in the 1980's the U.S. forcibly transferred Haitians and Cubans attempting to enter the U.S. to Guantánamo Bay.[131] Similar to the individuals in Nauru and the Manus islands, the individuals detained in Guantánamo Bay were not there voluntarily.[132] They were seeking asylum or refugee status in the U.S., but the U.S. Coast Guard interfered with their ability to do so by stopping them while *en route* to the U.S. and detaining them in Guantánamo Bay.[133]

When it comes to the second prong of whether they were lawfully present, depending on the circumstances, many of the individuals were lawfully present before being detained. For example, the refugees were "intercepted on the high seas and held offshore."[134] As stated before, the Protocol, which the U.S. is party to, states that individuals have a right to move and attempt to seek asylum and that right should not be interfered with.[135] As with Australia, when the individuals attempted to come into the U.S., they were held there in Guantánamo Bay.[136] By interdicting the migrants in the water before their arrival, the U.S. government was violating both the Protocol and the lawful presence prong in the Rome Statute because these individuals were lawfully present.

Further, the U.S. has increasingly used Immigration Customs and Enforcement ("ICE") agents to remove individuals from their homes and place them in mainland detention as a step towards likely deportation. The U.S., like Australia, has detained individuals who were lawfully present within the definition of lawfully living in their home.[137] For example, on Labor Day 2006, ICE officials raided several homes and trailer parks in Stillmore, Georgia.[138] These individuals were not squatting, nor were they inhabiting the homes illegally.[139] These individuals were living in their homes legally and were forced out by ICE and arrested.[140] Therefore, applying the ICTY and the lawful presence argument again, individuals who have been removed from their homes and detained in this way could argue that they were forcibly deported or transferred despite them having lawful presence.

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130. Jastram, *supra* note, 76 at 83. "The past decade of furious legal battles over enemy combatants imprisoned at Guantanamo has obscured its origins as a detention site for asylum seekers from the Caribbean." *Id.*

131. *Id.* ("thousands of children whose only "crime" was to seek asylum were held captive on the naval base to prevent their onward journey to the United States.").

132. *See id.*

133. *See id.*

134. Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 140 (1994).

135. 1967 Protocol, *supra* note 23.

136. Koh, *supra* note 134, at 143. (discussing how the U.S. would not allow entry to several individuals "who could establish a credible fear of political persecution to the United States, the Coast Guard instead began detaining them . . .").

137. *See* Worster, *supra* note 41, at 387.

138. Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 315–16 (2009) ("Witnesses reported seeing ICE officials breaking windows and entering homes through floorboards.").

139. *Id.*

140. *Id.*

In relation to deporting or forcibly displacing individuals without permitted grounds, the argument again parallels why Australian's operation of its immigration detention centers are likely unlawful under that prong. Once again, international law only allows deportation of refugees under certain circumstances.[141] For example, Article 12 of the ICCPR, which the U.S. is also a party to, prevents someone from being "arbitrarily deprived of the right to enter his own country."[142] Some researchers note that nationality is not a requirement for a country to be one's "own country."[143] Further, researchers have recognized that the ICCPR has previously changed the provisions from "country of which he is a national" to "his own country."[144] The ICCPR follows the logic of the Human Rights Committee in that the scope of "own country" encapsulates more than mere nationality. Using that rationale, the ICCPR recognizes that one who may have "special ties to or claims in relation to a given country, cannot be considered to be a mere alien."[145]

Further, the Human Rights Committee explained that this protects "stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence."[146] Some examples are "Dreamers," who arrived in the U.S. as minors, are in the U.S. residing in a home or apartment legally, have culturally integrated, and have these special ties to the U.S. For instance, if a person has lived in the U.S. for most of their life, went to school in the country, attended a place of worship, and worked, that person has more of a relationship with the U.S. than to their place of nationality.[147] They were just born in that other country. Hence, removing such a person from their home and placing them in detention and then deporting them is arguably part of an act of arbitrarily depriving them of an opportunity to gain citizenship in such a place of residence. Therefore, the U.S. is deporting individuals without permitted grounds by violating the ICCPR through the use of detention centers.

2. Imprisonment or Severe Deprivation of Physical Liberty in Violation of International Law

The U.S., like Australia, is depriving individuals of physical liberties in ways that violate international law fundamentals by using detention centers. For example, the 1967 Protocol provides that refugees should be treated to free movement, housing, and public relief and assistance.[148] Additionally, Article 16 of the CAT prohibits "acts of cruel, inhuman or degrading treatment or punishment" even if it is not torture in the formal sense when it is done by an offi-

141. ACHIUME ET AL., *supra* note 15, at 90.

142. International Covenant on Civil and Political Rights, art. 12(4) *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

143. Worster, *supra* note 41, at 389 ("The terms of the ICCPR are applicable to all persons, because the relevant article of the ICCPR, Article 12, was not limited to nationality, as the other of the ICCPR articles were.").

144. *Id.*

145. *General Comment 27, Freedom of Movement*, U.N. GAOR, Hum. Rts. Comm., 67th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999), https://www.refworld.org/pdfid/45139c394.pdf (last visited May 9, 2020) [hereinafter Gen. Comment 27].

146. *Id.*

147. *See* Worster, *supra* note 41, at 391.

148. 1967 Protocol, *supra* note 23, at art. 4.

cial or in an official capacity.[149] The U.S. government imprisons people like asylum seekers and refugees by keeping them detained. Individuals are often "imprisoned for months before getting a hearing and sometimes years before a decision."[150] Some are even kept in actual prisons.[151] This means housing is not adequate for the purposes of international law. In these detention centers, individuals are deprived of physical liberties because asylum seekers experience "physical violence, the use of restraints, and substandard medical care."[152] This is the type of cruel and degrading treatment the CAT prohibits states from doing. Moreover, the people detained are not granted easy access to telephones to communicate.[153] All this being said, detention centers in the U.S. are a means of severely depriving individuals of physical liberties inconsistent with international law by imprisoning them in violation of the Protocol and the CAT.

3. U.S. Government's Knowing, Widespread, Systematic Commission of These Acts

Again, the next step is determining if the U.S.'s commissions of these acts is widespread and systematic and that the government has knowledge of these acts.[154] Similar to the Australian government, the U.S. government has been made aware of the issues arising out of the operation of its detention centers on numerous occasions.[155] For example, the U.S. government had knowledge of what took place in Guantánamo Bay because in the 1990s, for instance, this facility was "part of a conscious 'buffer zone' strategy adopted by the U.S. government to prevent refugees from reaching U.S. territory and asserting rights under U.S. law."[156] Additionally, it is currently the U.S. government's policy to stop those types of individuals from entering U.S. territory.[157] This permits the U.S. Coast Guard to "stop and board vessels" and "apprehen[d]" and "detai[n]" undocumented migrants.[158] Thus, this is a widespread and systematic act against a civilization because, in the U.S., this was also done through an executive scheme multiple times by the government. It was an attack against refugees and asylum seekers coming through the Central American area, and it still is today. Therefore, the U.S.'s detention center operations are a widespread systematic commission of acts of which it has knowledge.

149. Convention Against Torture, *supra* note 27, at art. 16.

150. *The Nightmarish Detention of U.S. Immigrants*, AMNESTY INT'L, https://www.amnestyusa.org/the-nightmarish-detention-of-us-immigrants/ (last visited May 9, 2020).

151. *Id.* (Stating that "[o]n any given night, Immigrations and Customs Enforcement (ICE) warehouses more than 30,000 immigrants in prisons and jails . . .").

152. *Id.*

153. *Id.* (Stating, "sometimes they cannot even make a simple phone call to obtain documents that would prove they should go free.").

154. *See* Rome Statute, *supra* note 33, art. 7.

155. AMNESTY INT'L, *supra* note 150. "Investigative news reports have exposed a litany of human rights abuses in the detention facilities . . ."*Id.*

156. Koh, *supra* note 134.

157. *Alien Migrant Interdiction,* U.S. COAST GUARD, https://www.pacificarea.uscg.mil/Our-Organization/District-11/Response-Division/LE/Migrants1/(accessed/ (last visited May 8, 2020). "Under Executive Order 12807 (1992) and in support of USC Title 8, the USCG migrant interdiction policy is designed to interdict undocumented migrants prior to landfall in the United States." *Id.*

158. *Id.*

Part III

III. Proposal: A Condition-Focused Model

Some may argue that countries sometimes have no choice but to detain individuals coming in as a form of immigration management. Each sovereign nation has a right to control immigration to their state.[159] Furthermore, with offshore detentions for countries like Australia and U.S., these detentions are not necessarily happening on the country's soil. Other sovereigns like Manus and Cuba are allowing these detention centers to operate in their nation. Therefore, those governments should at least be held liable too.

However, when looking at Australia's offshore detention centers, for example, researchers have noticed that "there is every indication that these states have been heavily influenced by the Australian government."[160] Additionally, the United Nations High Commissioner for Refugees ("UNHCR") even notes that "the 'significant de facto control exercised by Australian officials and contractors on Manus Island reinforce, that 'legal responsibility under international law for the care and protection of all transferees from Australia to [Papua New Guinea] . . . remain with both contracting States equally.'"[161] This means that the operations of the detention centers are not solely Australia's responsibility. Both territories could be culpable, but that does not remove the probability that Australia could be prosecuted for such operations. If that is taken to be true, the same can be said for the U.S.'s offshore detention centers. Despite being physically located in Cuba, the U.S. operated Guantánamo Bay.[162] After all, it is U.S. officers controlling the facilities, not Cuban officers. Thus, the U.S. could arguably be culpable as well.

Regardless, there is a solution that could both help and also try to address these issues. Realizing the difficulty of maintaining the flow of immigrants, if countries wish to continue using detention centers, they can practice improving conditions. They should work on making immigrants feel less like they are being criminally detained. Countries that have managed to operate detention centers with more humane conditions arguably could fall short of committing a crime against humanity.

A. Sweden

An example of a nation with fairly reasonable conditions in its immigration detention facilities is Sweden.[163] Not to be mistaken, Sweden, like many other countries all over the globe, has also toughened its policies in response to the increasing number of immigrants

159. Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT'L L. 327, 327 (1949). "Two principles follow from that rule: the first recognizes the competence of the state to regulate the admission of aliens at will . . . But it also means the reverse, namely that a state is free to admit anyone it chooses to admit . . ." *Id.*

160. Henderson, *supra* note, 52 at 1174.

161. *Id.*

162. Koh, *supra* note 134.

163. 11 ch. 1–5 § UTLÄNNINGSLAGEN (Svensk författningssamling [SFS] 2005:716) (Swed.), https://www.government.se/49cf71/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf.

attempting to cross through Swedish borders.[164] However, it still has maintained limitations in its use of detention centers.[165] Sweden has five detention centers which are managed by the Swedish Migration Agency ("SMA").[166]

In these facilities, individuals are "provided with food and other basic necessities, a daily allowance of approximately 2.5 euros, and access to the [i]nternet."[167] Additionally, they are also provided with access to free medical care.[168] While there, immigrants are also supplied with items for recreational activity such as playing cards or pool.[169] The SMA also provides detainees with "almost unlimited access to internet."[170] They are allowed to use cell phones with no cameras.[171] The detention staff in these facilities can help the immigrant detainees with "contacting lawyers or the police [and] booking interpreters."[172] Nonetheless, the conditions in the Swedish detention centers are somewhat of an anomaly to Sweden's counterparts in Europe as well as the rest of the world.

B. Are Swedish Immigration Detention Centers Permissible Under the Rome Statute?

1. Deportation or Forcible Transfer of a Population

When looking at the issue of deportation, Sweden likely participates in the deportation or forcible transfer of a population. Recall, under Article 7, this "means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[173] When it comes to whether Sweden's government forcibly displaced immigrants by coercive acts by using detention centers, the answer is yes. For example, similar to Australia, in Sweden, the SMA's mission is to seize individuals attempting to come into the country and prevent them from coming in without proper authorization.[174] Second, on the issue of lawful presence, the country, performs raids of

164. Magdalena Bjerneld, Carina Källestål, & Soorej J. Puthoopparambil, *Quality of life among immigrants in Swedish immigration detention centres: a cross-sectional questionnaire study*, GLOBAL HEALTH ACTION (July 17, 2015), https://www.tandfonline.com/doi/pdf/10.3402/gha.v8.28321?needAccess=true.

165. *Id.*

166. *Id. See generally* 11 ch. 2 § UTLÄNNINGSLAGEN (SFS 2005:716) (Swed.).

167. Bjerneld et al., *supra* note 164.

168. *Id.*

169. *Id.*

170. *Immigration Detention in Sweden: Increasing Restrictions and Deportations, Growing Civil Society* Resistance, GLOB. DET. PROJECT (July 2018), https://www.globaldetentionproject.org/immigration-detention-in-sweden-increasing-restrictions-and-deportations-growing-civil-society-resistance.

171. *Id.* (Quoting, "[m]obile phones without a camera are allowed and detainees are provided with a phone in case they do not have their own.").

172. *Id.*

173. Rome Statute, *supra* note 33, at art. 7.

174. *The Mission of the Migration Agency*, SWEDISH MIGRATION AGENCY, https://www.migrationsverket.se/English/About-the-Migration-Agency/Our-mission.html (last visited May 9, 2020).

workplaces like some other countries.[175] It then follows logically that the forcible displacements of someone detained after being apprehended in a raid was likely in violation of international law, such as the ICCPR and the Protocol.[176] The individuals taken into custody are being removed from places where they have lawful presence under international law. All in all, Sweden's use of detention centers could be violating the Rome statute when it comes to deportation or forcible transfers.

2. Imprisonment or Severe Deprivation of Physical Liberty in Violation of International Law

Nonetheless, Sweden starts to stray from the norms of its counterparts when it comes to treatment within detention centers. When it comes to whether Sweden participates in the "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law," simply put, the Swedish are imprisoning people by placing them in detention centers.[177] This is because the SMA is "imprison[ing] one or more persons when they do this."[178]

On the issue of whether the "gravity of the conduct was . . . in violation of fundamental rules of international law," however, it is less clear.[179] Sweden is distinct in that individuals held in its detention centers are treated better than individuals in locations in other areas like the U.S. and Australia. Individuals are provided with adequate food, recreational activities, visits, and legal counsel.[180] For example, "[d]etainees have access to an outdoor yard for at least three hours each day, and they can move freely within the centres themselves."[181] There are not as many issues of deprivation of fundamental rights of international law that would violate provisions in the CAT and the Protocol.[182] When it comes to the Protocol, for instance, individuals are provided with decent housing. Families are typically left together in their own room.[183] The SMA also provides them with public relief and assistance through the food they are given and the cash stipend, although minimal, that they receive.[184]

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175. *See* Johan Ahlander & Mansoor Yosufzai, *Sweden intensifies crackdown on illegal immigrants*, REUTERS (July 3, 2017, 2:05 AM), https://www.reuters.com/article/us-sweden-immigration-crackdown/sweden-intensifies-crackdown-on-illegal-immigrants-idUSKBN19Y0G8.

176. *See generally* ICCPR, *supra* note 142; *see also* 1967 Protocol, *supra* note 23.

177. Rome Statute, *supra* note 33, at art. 7.

178. *Elements of Crimes*, *supra* note 82, at 5.

179. *Id.*

180. Bjerneld et al., *supra* note 164.

181. GLOB. DET. PROJECT, *supra* note 170, at 19.

182. *See generally* Convention Against Torture, *supra* note 27; 1967 Protocol, *supra* note 23.

183. *The use of detention and alternatives to detention in the context of immigration policies in Sweden*, SWEDISH MIGRATION AGENCY, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/27a-sweden_detention_study_august2014_en.pdf (last visited May 9, 2020).

184. Bjerneld et al., *supra* note 164.

Regarding the CAT, the SMA is not intentionally causing the detainees physical harm.[185] However, there is still room for improvement when it comes to healthcare.[186] For example, according to a 2016 study, only one center had a doctor visiting consistently.[187] Also, there is no mental health staff at any of the centers.[188] However, the study found the Märsta detention center handles things a bit differently. For example, it made an arrangement with a local detention center for a doctor to visit once a week and a nurse three times a week.[189] The number of permitted doctor visits are also flexible to accommodate the increasing number of detainees who express the need.[190] Overall, the conditions in Swedish detention centers fall short of constituting a crime against humanity under the act of deprivation of physical liberties, but there is still progress to be made.

Although Sweden also fails when it comes to the act of deportation and forcible displacement, it arguably survives the act of not depriving physical liberties more than several other countries. Essentially, by improving the conditions of detention centers globally to better than those in Sweden, governments could prevent their operations of detention centers from amounting to a crime against humanity under the act of severe deprivation of physical liberties. Improving living conditions, providing access to health care, and making space for individuals to physically move around is a way to not be committing such egregious violations as happens with many other detention centers.

Conclusion

Operations of immigration detention centers likely constitute crimes against humanity within the meaning of the Rome Statute under the acts of deprivation of physical liberties, and deportations and forcible transfer. The operation of an immigration detention center can constitute an act of severe deprivation of physical liberties as prohibited by the Rome statute. When looking at the U.S. and Australia as examples of immigration detention systems, it is apparent that there are issues, such as deprivation of access to proper nourishment, medical care, and housing all while the government is aware, that make the operations of those centers more likely to constitute a crime against humanity.

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185. Convention Against Torture, *supra* note 27, at art. 1 ¶ 1. Torture is when "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for . . . punishing . . . or intimidating or coercing him . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.*

186. GLOB. DET. PROJECT, *supra* note 170, at 19. "A 2016 study by the Faculty of Medicine in Uppsala on the health of immigration detainees in Sweden highlighted the problematic shortcomings, saying that they are a critical deficiency of the overall Swedish immigration detention regime." *Id.*

187. *Id.* ("The study highlighted that detainees' access to health care is significantly restricted and that in only one centre did a doctor regularly visit the detainees, (once a week for half a day).").

188. *Id.* at 19–20.

189. *Id.* at 21.

190. *Id.*

Additionally, immigration detention center operations can be equivalent to deportation or forcible transfer. When looking at each country's usage of house and work raids and summary deportations, these all also likely make operations of these centers a crime against humanity. Moreover, the use of migrant interdiction in the seas around the countries to place individuals in offshore centers also falls under this act as prohibited by the Rome Statute.

Now, this note recognizes that it may not be entirely plausible to eliminate detention centers completely. There needs to be areas to hold the overflow of individuals like those seeking asylum. Nonetheless, although dealing with the act of deportation or forcible transfer is difficult, countries can still improve by not committing acts that severely deprive individuals of their physical liberties. When it comes to possible alternatives, Sweden's immigration detention operation could likely be a valuable example. Sweden's aim of treating the individuals in detention centers humanely is reflected in their conditions. Allowing families to stay together in one room, permitting time for recreational activity, allowing visits from people including legal counsel, and providing adequate food are just some examples of how Swedish centers differ from many other centers around the globe.

However, there are still issues that arise. For one, Sweden's system is not perfect. Like the U.S. and Australia, Sweden detains individuals who likely have lawful presence through worksite sweeps and home raids regardless of their nationality. Thus, as stated before, acts of deportation or forcible transfer are still being perpetrated. Additionally, the healthcare supplied at its centers are inadequate. At most centers, doctors' visits are not as frequent as they should be. There are no mental health staff at the centers even though being detained can cause detrimental effects to one's mental health. Thus, in that regard, Sweden should not be used as a model. Nonetheless, the country's Märsta detention center exemplifies how healthcare conditions at detention centers can be improved.

In conclusion, due to the globalized world and various issues in various nations, governments have had to find ways to handle the ongoing influxes of individuals trying to come into their nations. This is especially difficult for smaller nations or nations experiencing financial hardships. Nevertheless, this is not an excuse for the deprivation of human rights. Individuals should not be imprisoned simply for trying to better their lives. Therefore, adopting some of the conditions of Sweden's detention centers would be helpful to making it feel less prison-like and more like temporary housing. Overall, the experiences of the individuals in detention centers are more than enough reason to improve the systems in ways that do not constitute a crime against humanity against some of the very people already fleeing from such crimes.

China, Hong Kong, and the Foreign Offender's Ordinance: How Proposed Amendments to Hong Kong's Extradition Laws Threatened International Human Rights

Daniel J. Alvarez*

I. China's Recent History of Encroachment Upon Hong Kong Law

In October, 2015, five individuals, Gui Minhai, Cheung Chi-ping, Lam Wing-kee, Lui Por, and Lee Bo were employees at a Hong Kong-based bookstore named Causeway Bay Books (the "Causeway Bay Booksellers").[1] The store specialized in the publication of scandalous books highlighting the private lives and power struggles of China's Communist Party leaders.[2] By the end of the year, all five of the Causeway Bay Booksellers would disappear one by one.[3] On October 17, 2017, Gui Minhai, a Swedish national, was reportedly visited at his apartment in Pattaya, Thailand, by a Chinese-speaking man.[4] The two left together in Minhai's car, and Minhai's whereabouts remained unknown for three months thereafter.[5] Lam Wing-kee, Lui Por, and Cheung Chi-ping went missing while in mainland China, with Wing-kee later claiming he was handcuffed, blindfolded, and taken on a 13-to-14-hour train ride to Ningbo City.[6] Lastly, Lee Bo, a British national, disappeared from Hong Kong on December 30, 2015.[7]

The five men eventually resurfaced months later in mainland China, publicly declaring over state media that they had traveled there voluntarily.[8] Minhai, for example, claimed in a January 17, 2016, interview on China Central Television that he had returned to the mainland to "face justice over an alleged drunk driving accident that took place in 2003."[9] In reality, however, the five men were forcibly removed to mainland China in connection with allegedly delivering over 4,000 banned books across the Chinese border since October 2014.[10]

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1. Ng Kang-Chung, et al., *A Hong Kong bookseller revealed explosive details about his 8-month detention in mainland China*, BUSINESS INSIDER (June 16, 2016, 7:20 PM), https://www.businessinsider.com/hong-kong-bookseller-describes-abduction-torture-in-mainland-china-detention-2016-6.
2. Stella Tsang & James Pomfret, *Missing HK booksellers say arrested for sales of banned books in China*, REUTERS (Feb. 29, 2016, 1:44 PM), https://www.reuters.com/article/us-hongkong-booksellers/missing-hk-booksellers-say-arrested-for-sales-of-banned-books-in-china-idUSKCN0W20LC
3. Kang-Chung, et al., *supra* note 1.
4. *Id.*
5. Thomas E. Kellogg, *News of a Kidnapping: The Gui Minhai Case and China's Approach to International Law*, 41 FORDHAM INT'L L. J. 1215, 1221 (2018).
6. Kang-Chung, et al., *supra* note 1.
7. Kellogg, *supra* note 5.
8. Kang-Chung, et al., *supra* note 1.
9. Kellogg, *supra* note 5, at 1222.
10. Kang-Chung, et al., *supra* note 1.

The Causeway Bay Booksellers ordeal shed light on several violations of domestic and international law committed by the Chinese authorities. For example, after being abducted from his own apartment, Minhai was held for two years without access to an attorney, a charge, or a trial, which is illegal under Chinese law.[11] He was released in October 2017, only to be kept under heavy surveillance with limited ability to contact friends and family outside of China.[12] In 2018, Minhai was detained by Chinese authorities for a second time, for allegedly disclosing state secrets, and has since disappeared again.[13] Furthermore, because Minhai was a citizen of Sweden, China's actions violated several provisions outlined under international law, including an obligation to notify Sweden of Minhai's detention, and to allow Swedish diplomatic representatives access to their own foreign nationals; Chinese authorities did neither.[14] The treatment of the five Causeway Bay Booksellers raised concerns within Hong Kong, with Lam Wing-kee warning the citizens of Hong Kong, "[I]t can happen to you too."[15]

The case of the Causeway Bay Booksellers is only one prominent example of international human rights violations that have been committed by China in the context of extradition. This incident involved the often-tumultuous relationship between Hong Kong and China and the latter's common practice of entering foreign nations without permission or cooperation from that nation's government in order to remove a wanted individual. Citizens of Hong Kong have long been wary of this practice by China, and as recently as 2019, these concerns have captured the attention of the international community.

In February 2019, the Hong Kong government proposed an amendment to the Fugitive Offenders Ordinance ("FOO"), which would allow China, for the first time, to remove wanted individuals from Hong Kong and transport them back to mainland China to face criminal charges. The proposed amendment resulted in mass protests by Hong Kong citizens who feared that the Chinese government would utilize this bill to freely apprehend individuals from Hong Kong without due process and subject them to potential human rights violations in mainland China. Although the amendment has since been repealed, the protests have persisted, transforming into a pro-democracy movement that has captured the attention of the entire globe.

This article will argue that the proposed amendments to the FOO posed a great threat to international human rights laws of due process in the extradition context. The proposed amendment will be compared with the *Model Treaty on Extradition* ("Model Treaty") put forth by the United Nations ("UN"), as well as extradition ordinances and processes of other nations, in order to demonstrate how the FOO amendment jeopardizes the "One Party, Two Systems" policy between China and Hong Kong and severely impairs the latter's ability to prevent its citizens from being subjected to internationally recognized due process and human rights violations, including torture, inhuman treatment, and state-sponsored abductions. This article will also argue that international human rights treaties, such as the Universal Declaration of Human

11. Thomas E. Kellogg, *The Strange and Sad Case of Gui Minhai*, THE DIPLOMAT (Jan. 31, 2018), https://thediplomat.com/2018/02/the-strange-and-sad-case-of-gui-minhai/.

12. Kellogg, *supra* note 5, at 1225.

13. *Id.*

14. Kellogg, *supra* note 11.

15. Kang-Chung, et al., *supra* note 1.

Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"), suggest that there are inherent due process protections in all international criminal procedure mechanisms, including extradition treaties and ordinances. These treaties, which ordinarily would not have bound China to its provisions, have since become binding on all nations through customary international law.

II. Background

A. Hong Kong, China, and the United Kingdom

The current situation in Hong Kong has roots that date back well over a century. In August 1842, the United Kingdom ("U.K.") and the Emperor of China signed the Treaty of Nanking, ending the first Opium War, and China ceded Hong Kong Island to the British.[16] After a second Opium War broke out in the 1850s, China agreed to cede the territory of Kowloon, directly adjacent to Hong Kong Island, to the U.K. under the Convention of Peking in 1860.[17] In 1898, China agreed to lease the region surrounding the Kowloon peninsula and the surrounding islands, known as the New Territories, to the British for 99 years.[18] Throughout the next century, the U.K. transformed the colony into a trading outpost and business hub.[19] Nearly a century later, in 1985, as the lease between the U.K. and China was drawing to a close, representatives from both countries agreed on the Sino-British Joint Declaration, declaring that Hong Kong would be returned to China on June 30, 1997, under a policy of "One Country, Two Systems."[20] That same year, the Basic Law Drafting Committee drew up Hong Kong's Basic Law, which was approved by China's National People's Congress.[21] Finally, on June 30, 1997, Hong Kong was returned to China after being ruled by the U.K. for 156 years.[22]

B. One Party, Two Systems Policy

The "One Party, Two Systems" policy, first proposed during negotiations between the U.K. and China in the 1980s, is the defining characteristic of the Hong Kong-China relationship. The policy is a major reflection of the tensions between Hong Kong and China that began in the 20th century and continued to grow ever greater to the present day. After China turned to communism in 1949, their ideological and political differences resulted in China becoming isolated for the second half of the 20th Century, remaining open only to other com-

16. *CHRONOLOGY: Timeline of 156 Years of British Rule in Hong Kong*, REUTERS (June 27, 2007, 6:11 PM), https://www.reuters.com/article/us-hongkong-anniversary-history/chronology-timeline-of-156-years-of-british-rule-in-hong-kong-idUSSP27479920070627.

17. *Id.*

18. *Id.*

19. Alvin Y. So, *"One Country, Two Systems" and Hong Kong-China National Integration: A Crisis-Transformation Perspective*, 41 J. CONTEMP. ASIA 99, 101 (2011).

20. CHRONOLOGY: Timeline of 156 years of British rule in Hong Kong, *supra* note 16.

21. *Id.*

22. *Id.*

munist nations.[23] However, the Chinese economy began to improve towards the 1980s, due in part to the implementation of various economic reforms.[24] As a result of the strengthening economy, China's desire to reclaim the lost territories of Taiwan, Macao, and Hong Kong grew. Indeed, this reclamation was one of the main goals of the Chinese government following its establishment in 1949.[25]

During this same time period, the colonial Hong Kong government enacted several policy decisions that effectively distanced the region from the mainland and reflected a growing anti-Communist sentiment felt by natives of Hong Kong towards China. First, Hong Kong strengthened the border between Hong Kong and mainland China in order to prevent Chinese refugees from entering following the Communist Revolution that took place in 1949.[26] Next, Hong Kong restructured its economy to focus primarily on the global market through the sale of exports, in contrast to the Chinese economy, which remained fragile during its period of isolation.[27] Finally, Hong Kong banned the Chinese Communist Party from operating within the region and the importance of the Chinese language was downgraded in favor of English.[28] Hong Kong during this time ultimately developed a distinct identity from China, as the two nations were now politically, socially, economically, and culturally separated.[29] Because of these deep divisions, there were concerns regarding the reunification process that would inevitably begin towards the end of the 20th century, as the U.K.'s lease of Hong Kong and the New Territories was set to expire in 1997. It was clear that a solution needed to be implemented.

It became evident that, because China had returned to a capitalist economy, there was little need to maintain Hong Kong's colonial status, and China no longer desired to renew the lease with Great Britain.[30] Furthermore, because the lease was set to expire in the next decade, many were reluctant to commit to long-term investments in the region.[31] In 1982, British Prime Minister, Margaret Thatcher, met with Deng Xiaoping to re-negotiate the Hong Kong lease, and it was during this meeting that the phrase "One Country, Two Systems," was first mentioned.[32] Xiaoping argued that this system would allow the two systems, China's socialist and Hong-Kong's capitalist systems, to co-exist within the same country.[33] China had already utilized a similar system regarding Taiwan, stating that "Taiwan may become a special adminis-

23. Guiguo Wang & Priscilla M. F. Leung, *One Country, Two Systems: Theory Into Practice*, 7 PACIFIC RIM L. & POL'Y J. 279, 281 (1998).

24. *Id.*

25. *Id.* at 281–82.

26. So, *supra* note 19, at 101.

27. *Id.* at 101; Wang & Leung, *supra* note 23.

28. So, *supra* note 19, at 102.

29. *Id.* at 100.

30. *Id.* at 102.

31. *Id.*

32. CHRONOLOGY: Timeline of 156 years of British rule in Hong Kong, *supra* note 16.

33. Wang & Leung, *supra* note 23, at 283.

trative region with a high degree of autonomy which means that the existing social system, economic system, and life-style of Taiwan will remain unchanged, and so will Taiwan's economic and cultural relationship with other countries."[34]

After two years of negotiation, 1984 saw the finalized version of the "One Country, Two Systems," platform. Hong Kong would be able to keep its capitalist system separate from China's communist system and retain a high degree of autonomy in running its economic, cultural, and political affairs and could keep its own police, military, currency, and institutions.[35] It would also keep its own courts and laws.[36] Mainland authorities agreed not to interfere with Hong Kong affairs, except with those concerning foreign policy.[37] The government of Hong Kong would be elected by the citizens of Hong Kong, and China would not send any officials to run the Hong Kong government.[38] Lastly, this system of "One Country, Two Systems," was to remain unchanged for 50 years following 1997.[39] The Sino-British Joint Declaration was signed in 1984 between China and the U.K., setting July 1, 1997, as the date when Hong Kong would be handed back to China.[40] The declaration further stated that on the transfer date, Hong Kong would officially become a Special Administrative Region of China ("HKSAR"). [41]

C. The Present-Day Foreign Offenders Ordinance

In drafting the Basic Law of Hong Kong, the Basic Law Drafting Committee included a provision known as the FOO. Ratified in March of 1997, the FOO's primary function was to establish a process by which the HKSAR could administer extradition requests from other nations, including nations that the HKSAR has extradition agreements with.[42] As it stands in April 2021, the FOO covers 46 different violent and commercial crimes with a possible sentence of at least one year.[43] Individuals who have committed one of the listed crimes can be extradited by governments with which the HKSAR has an extradition agreement.[44] Additionally, the FOO allows the HKSAR to enter into special extradition agreements with any other government, so long as the Legislative Council passes specific legislation that creates a special extradition arrangement with that nation.[45] However, the existing FOO does not allow the HKSAR to enter into special extradition agreements with China, Macau, and Taiwan.[46]

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34. *Id.* at 282.
35. So, *supra* note 19, at 104.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. MICHAEL F. MARTIN, CONG. RESEARCH SERV., IF11248, HONG KONG'S PROPOSED EXTRADITION LAW AMENDMENTS 2 (2019).
43. *Id.*
44. *Id.*
45. *Id.*
46. *See id.*

According to the last colonial governor of Hong Kong, Chris Patten, China was intentionally excluded from the FOO because its judicial and legal systems did not meet international standards.[47] The exclusion could also be attributed to China's ongoing poor track record of protecting individual due process rights,[48] as evidenced by the seizing of the Causeway Bay Booksellers without cooperating with the proper authorities. This year, the World Justice Project's 2020 Rule of Law Index ranked China 88th out of 128 countries regarding rule of law performance, 12th out of 15 in the East Asia and Pacific Region.[49] However, in excluding China entirely from the FOO, although China has repeatedly violated international extradition customs and human rights laws in the past, the law theoretically does afford individuals with the ability to flee to Hong Kong for protection from prosecution for crimes allegedly committed in China. In 2019, however, proposed amendments to the FOO placed these protections in jeopardy.

D. The Proposed Foreign Offenders Ordinance Amendments

In February 2018, Chan Tong-kai was arrested in Hong Kong for the murder of his girlfriend while the two were vacationing in Taiwan.[50] Hong Kong did not have an extradition treaty with Taiwan, and Hong Kong police could not charge him with a murder committed in Taiwan, so Chan Tong-kai was convicted on minor money laundering charges—for using his girlfriend's after her death—and sentenced to 29 months in prison.[51] The Chief Executive of Hong Kong, Carrie Lam, utilized Chan Tong-kai's case as a justification to propose amendments to Hong Kong's FOO, which would enable Hong Kong to transfer criminal suspects like him to places like Taiwan with which there was no extradition treaty.[52]

In reality, the amendments that were proposed to the FOO granted much greater power to China over the affairs of Hong Kong and posed a threat to the One Country, Two Systems Policy that has been in place since 1997. The new amendment would effectively change the HKSAR's extradition process regarding nations with which it does not have an extradition agreement.[53] While under the current FOO, Hong Kong must ask the Legislative Council to grant permission for such extradition requests, the new amendment would create a "special surrender arrangement," eliminating approval from the Legislative Council.[54]

In addition to the removal of Legislative Council permission, the FOO amendment would stifle Hong Kong's ability to prevent China from extraditing its citizens. The amendment would effectively exclude the Legislative Council from exercising any role in the extradi-

47. *Id.*

48. Thomas E. Kellogg, *Hong Kong's Proposed Extradition Law and International Human Rights: Legalized Kidnapping?*, LAWFARE (June 6, 2019, 3:53 PM), https://www.lawfareblog.com/hong-kongs-proposed-extradition-law-and-international-human-rights-legalized-kidnapping.

49. WORLD JUST. PROJECT, RULE OF LAW INDEX 2020 (2020).

50. *See* Daniel Victor & Tiffany May, *The Murder Case That Lit the Fuse in Hong Kong*, NEW YORK TIMES (June 15, 2019), https://www.nytimes.com/2019/06/15/world/asia/hong-kong-murder-taiwan-extradition.html.

51. *Id.*

52. *Id.*

53. MARTIN, *supra* note 42.

54. *Id.*

tion process, instead granting the Chief Executive sole power to handle extradition requests.[55] Additionally, the bill will prevent Hong Kong courts from inquiring about the individual's human right to a fair trial, nor would they be able to learn whether the accused was ultimately found guilty or not in a Chinese court once extradited.[56] Furthermore, Hong Kong courts are not explicitly empowered by the FOO to deny an extradition request if it believes that the individual's right to a fair trial is at risk.[57] According to MK Tam, the director of Amnesty International Hong Kong, "the courts will have very little power to reject any extradition request."[58] As a result, the amendment would allow China to extradite individuals from Hong Kong with very limited restraint with regards to 37 types of violent and commercial crimes with sentences of three years or more.[59]

The introduction of the FOO amendments sparked outrage throughout Hong Kong. As early as March 2019, thousands of civilians began marching in the streets of Hong Kong to protest the proposed extradition bill.[60] As the crowds continued to grow, Chief Executive Lam remained determined to push the legislation through.[61] By June, millions of civilians were protesting on a regular basis, resulting in the shutdown of government offices and the indefinite delay of the proposed bill.[62] The protests continued throughout the year, despite Lam claiming the bill was completely dead and a "total failure."[63] It was too little, too late, as the protests surpassed the repeal of the bill and have since morphed into a movement for democracy and the enforcement of international human rights.

Although the proposed amendments to the FOO appear to be completely repealed, the bill was nevertheless an attempt by the Chinese government to infringe upon the basic international human right to due process. As a result, as well as the long and troubling history of illegal extradition that China has undertaken in recent memory, the international community should consider taking steps to curtail this concerning behavior.

III. Customary International Law and *Jus Cogens*

International law is derived from two primary sources: (1) treaties created amongst nations and (2) custom.[64] Under the Vienna Convention on the Law of Treaties ("Vienna Convention"), "the consent of a state to be bound by a treaty may be expressed by signature,

55. Kellogg, *supra* note 48.

56. *Id.*

57. *Id.*

58. Kate Mayberry, *Hong Kong's controversial extradition bill explained*, AL JAZEERA (June 11, 2019), https://www.aljazeera.com/news/2019/06/explainer-hong-kong-controversial-extradition-bill-190610101120416.html.

59. MARTIN, *supra* note 42.

60. *Timeline: Key dates in Hong Kong's Protests*, REUTERS (Oct. 1, 2019, 6:09 PM), https://www.reuters.com/article/uk-china-anniversary-timeline/timeline-key-dates-in-hong-kongs-protests-idUSKBN1WG3XK.

61. *Id.*

62. *Id.*

63. *Id.*

64. Jordan J. Paust, *Basic Forms of International Law and Monist, Dualist, and Realist Perspectives*, *in* BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW – MONISM & DUALISM 244–265, 244 (Marko Novakovic ed., 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293188.

exchange of instruments, ratification, acceptance, approval or accession, or by any other means if so agreed."[65] However, while treaties are generally agreements made among individual states, customary international law is law that is universally obligatory on all nations.[66] According to the *Restatement (Third) of Foreign Relations* Section 102, "customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[67] In summary, customary international law is created when (1) there is a general and widespread adherence to a certain practice over a period of time, (2) which has instilled a sense of legal obligation on participating nations, known as *opinio juris*.

What once was an international agreement, such as a multilateral treaty, can later become binding customary international law for the entire international community. When determining what can be considered customary international law, courts look to several different sources. Article 38 of the Statute of the International Court of Justice, which is the main judicial arm of the UN, grants the Court power to apply treaties, general principles of law, subsequent state practice, and the judicial decisions and the teachings of highly qualified publicists when determining customary international law.[68] Furthermore, Article 31 of the Vienna Convention, of which China is a party, states that treaties are to be interpreted in (1) accordance with its ordinary meaning, (2) the context behind the treaty, and (3) any subsequent practice and agreements between its parties regarding the interpretation and application of the treaty.[69]

Over the last couple of decades, legal scholars have increasingly viewed treaties themselves to be sources of customary international law.[70] Law professors Gary L. Scott and Craig L. Carr from the University of Washington, for example, have argued that parts of multilateral treaties that are "generalizable beyond the particulars of the treaty can serve as a source of customary international law," provided that (1) the treaty is accepted by a sufficient number of states in an international system; (2) among the parties to the treaty, there are a significant number of those states whose interests are most affected by the treaty; and (3) the treaty provisions are not subject to reservations by the accepting parties.[71]

Two United States ("U.S.") Supreme Court cases, *The Scotia* and *Paquete-Habana*, provide examples of how nations develop a sense of *opinio juris*. In *The Scotia*, an American ship collided at night with a British ship on the high seas, which according to the Supreme Court, is an area governed by international law.[72] The British accused the American vessel of failing to show colored lights, which is required by both British and American law.[73] However, the Supreme

65. Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter *Vienna Convention*].

66. *Id.*

67. Restatement (Third) of the Foreign Relations Law of the United States § 102 (AM. LAW INST. 1986).

68. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

69. *Vienna Convention*, *supra* note 65, at art. 31.

70. Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENVER J. INT'L L. & POL'Y 71, 72 (1996).

71. *Id.*

72. The Scotia, 81 U.S. 170, 170, 180 (1871).

73. *Id.* at 170.

Court found that the regulations found in both sets of law had already ripened into customary international law and was thus binding on all nations.[74] Similarly, in *Paquete-Habana*, two fishing boats, the *Paquete-Habana* and the *Lola*, were captured off the coast of Cuba by the U.S. during the Spanish-American War.[75] The boats' cargo, consisting only of freshly caught fish, were seized, and the boats were auctioned off by the U.S.[76] The owners of the two boats sued the U.S. for allegedly violating customary international law preventing the capture of fishing boats as prizes of war.[77] Relying on numerous bilateral treaties dating back to the 15th century, as well as a long history of common practice, the Supreme Court determined that this practice, originally a form of usage between members of treaties, had evolved into custom and the U.S. was found liable.[78]

The concept of *jus cogens* is within the same vein as customary international law. Austrian law professor, Alfred von Verdross, explained *jus cogens* as certain preemptive norms that are so unethical that they cannot be derogated from via the will of parties to a treaty.[79] In other words, rules of *jus cogens* are rules of general international law that bind all states and cannot be contradicted by treaty law or by any other rules of international law.[80] The prohibition against torture and inhuman treatment is one such *jus cogens* norm and is found in numerous international human rights treaties, including both the UDHR and ICCPR.[81] It is also the primary subject of several UN treaties, including the *UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture)*, the *European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment*, and the *Inter-American Convention to Prevent and Punish Torture*.[82] Because torture and inhuman treatment is considered an internationally recognized *jus cogens* norm, states have an inherent obligation to ensure that human beings are not subjected to such treatment through legal means.

IV. International Extradition and Human Rights

The modern concept of international law did not begin to take shape until the mid-20th century. Although there were some earlier attempts to establish certain international law standards, such as the creation of the League of Nations following World War I, it was not until the conclusion of World War II that the international community began to work towards establishing the concept of international law that we recognize today. One major area of international law that saw widespread development during the 20th century was that of extradition. Extradition is commonly recognized as the process by which one state requests and obtains the return

74. *Id.* at 188.

75. The Paquete Habana; The Lola, 175 U.S. 677, 678 (1900).

76. *Id.* at 679.

77. *Id.*

78. *Id.* at 686–712.

79. Alfred von Verdross, *Forbidden Treaties in International Law: Comments on Professor Garners' Report on "The Law of Treaties,"* 31 AM. J. INT'L L. 571, 571–72 (1931).

80. Chittella Venkata Ramana, Changing Dimensions of Extradition: A Study with Special Reference to Law, Practice and Experiences of India 233 (2013) (unpublished Ph.D thesis, Andhra University) (on file with the Shodhganga thesis database).

81. *Id.* at 232.

82. *Id.* at 233.

of a person from a different state in order for that person to be prosecuted for a crime that individual committed against the law of the requesting state.[83] It is also commonly viewed as a form of legal assistance between states in criminal matters, with every single extradition being regarded as an agreement under international law.[84] For these reasons, the use of extradition treaties and statutes became increasingly important.

Historically, the process of extradition has been governed by statutes and treaties.[85] Indeed, the use of extradition agreements dates back thousands of years, as there is evidence of a treaty from 1280 B.C. between the Egyptian Pharaoh, Ramses II, and the Hittite King, Hattusili III, which contained a provision "relating to the return of fugitive offenders."[86] However, it was not until the 19th Century, with the advent of modern transportation technology, that formal extradition agreements became commonplace.[87] The main purpose of extradition agreements is ultimately to both formalize and standardize the extradition practice, as well as to protect human rights and support joint efforts by states to combat crime.[88] Although the practice of extradition and the use of both statutes and treaties between nations go far to help combat crime, extradition also impacts the liberty of the individual being sought by the requesting nation.[89] According to Professor John Quigley, "human rights law is relevant to extradition law in that among the human rights norms binding on states are prohibitions against prolonged arbitrary detention and against torture or cruel, inhuman, or degrading treatment of punishment."[90] As a result, "extradition has long been accompanied by a range of intended restrictions and safeguards expressed to balance the interests of the requested person."[91] Many of these protections have been reflected within various UN conventions and doctrines pertaining to the practice of extradition, as well as through regional conventions and the extradition laws of some of the world's major powers.

Through both the creation of human rights doctrines and subsequent state practice via individual state extradition statutes and treaties, various human rights protections have ripened into customary international law within the context of extradition. Among these protections that have risen to the level of custom through these doctrines and statutes are provisions requiring requesting states to adhere to strict procedures in order to retrieve a wanted fugitive, which include communicating with the requested state, the submission of required documents, and

83. Charles Colquhoun, *Human Rights and Extradition Law in Australia*, 6 AUSTL. J. HUM. RTS. 101, 101 (2000).

84. Sharia Anjum, A Study of the Law of Extradition: The Indian Context 4 (2013) (unpublished Ph.D. thesis, Aligarh Muslim University) (on file with the Shodhganga thesis database).

85. Artemio Rivera, *Probable Cause and Due Process in International Extradition*, 54 AM. CRIM. L. REV. 131, 132 (2017).

86. Peter D. Sutherland, *The Development of International Law of Extradition*, 28 ST. LOUIS UNIV. L. J. 33, 33 (1984).

87. Rivera, *supra* note 85, at 132.

88. *Id.*

89. Gavan Griffith & Claire Harris, *Recent Developments in the Law of Extradition*, 6 MELB. J. INT'L L. 33, 38 (2005).

90. John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. COM. REG. 401, 416 (1990).

91. Griffith & Harris, *supra* note 89, at 37.

the presentation of *prima facie* evidence in order to establish grounds for extradition.[92] Additionally, an extradition is void if the individual sought would be subjected to inhuman treatment, such as torture, or they would not be guaranteed basic due process rights within the requesting state.[93] Thus, in order to ensure such protections are in place, requested states are to be allowed full authority to review extradition requests and prevent extraditions if any of the fugitive's human rights are at risk.[94] The FOO amendment, however, made it highly unlikely for individuals to adequately challenge extradition requests by removing the Legislative Council from the process and drastically limiting the Hong Kong court system's power.[95]

A. The International Bill of Human Rights

Since the end of World War II, a growing body of international law has been developed to address violations of basic international human rights.[96] The UN has since developed a body of international legislation that has become known as the International Bill of Human Rights, which contains two extremely important human rights doctrines, the UDHR and the ICCPR.[97] Both of these international doctrines contain basic due process protections that have since become a part of customary international law.

The first piece of legislation to be enacted into the International Bill of Human Rights was the UDHR, of which 50 Member States to the UN participated in its creation.[98] Adopted on December 10, 1948, as Resolution 217, the document according to the UN, is meant to "complement the UN Charter with a road map to guarantee the rights of every individual everywhere."[99] The UDHR devotes several articles towards universal due process standards, with Articles 6 through 11 focusing primarily on the civil and political rights of all human beings in any context.[100] Among the rights listed in the UDHR, Article 11 stipulates that "everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."[101] Article 10 stipulates that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of

92. *See infra* Section IV.B.

93. *Id.*

94. *Id.*

95. Kellogg, *supra* note 48.

96. Frans Viljoen, *International Human Rights Law: A Short History*, UNITED NATIONS, https://www.un.org/en/chronicle/article/international-human-rights-law-short-history (last visited June 12, 2021).

97. *Fact Sheet No. 2 (Rev. 1) The International Bill of Human Rights,* OHCHR, https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf (last visited June 12, 2021).

98. *Universal Declaration of Human Rights: History of the Document*, UNITED NATIONS, https://www.un.org/en/sections/universal-declaration/history-document/index.html (last visited Apr. 9, 2020) [hereinafter *UDHR*].

99. *Id.*

100. *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 6,* OFF. OF THE HIGH COMM'R OF HUM. RTS, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23878&LangID=E (last visited Apr. 9, 2020).

101. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

any criminal charge against him."[102] Finally, Article 9 of the UDHR guarantees that "no one shall be subjected to arbitrary arrest, detention, or exile."[103] As it stands in April, 2021, every state that is a member of the UN has signed on to the UDHR, with China being one of the original 48 nations to ratify the treaty in 1948.[104]

The UDHR was never intended by its framers to be a binding legal document, but this sentiment has gradually changed throughout the rest of the 20th century.[105] John Humphrey, who was one of the principal drafters of the UDHR, stated that "the Declaration has been invoked so many times both within and without the UN that lawyers are now saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states."[106] Humphrey's view has been shared by many other scholars in the field of international law, consistently arguing that the UDHR's constant reference and reaffirmance by both international and domestic courts has essentially made the UDHR a part of customary international law, and thus binding its provisions on all nations of the world. Indeed, the UDHR has been directly referred to in the constitutions of Germany, France, Libya, and other nations.[107]

In 1966, the ICCPR was adopted by the United Nations General Assembly ("UNGA") and became enforceable in 1976.[108] Unlike the UDHR, the ICCPR was intended by the framers to be enforceable upon ratification by a party state.[109] Much like the UDHR, however, the ICCPR contains numerous due process protections that would be jeopardized by the proposed FOO amendments, especially in Articles 9 and 14, which outline the international standards of criminal due process.[110] Article 9(2), for example, states that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."[111] Furthermore, Article 9(3) guarantees to everyone the right to be promptly brought before a judge and to be entitled to a trial within a reasonable time.[112] Finally, Article 9(4) establishes an international right to *habeas corpus* review of their deten-

102. *Id.*

103. *Id.*

104. *United Nations – Universal Declaration of Human Rights*, YOUTH FOR HUMAN RIGHTS, https://www.youthforhumanrights.org/what-are-human-rights/universal-declaration-of-human-rights/introduction.html (last visited Apr. 9, 2020); Global Citizenship Commission, The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World 30 n.1 (Gordon Brown ed., Open Book Publishers 2016).

105. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 289, 318–19 (1995).

106. *Id.* at 323.

107. James W. Skelton, *Standards of Procedural Due Process under International Law vs. Preventive Detention in Selected African States*, 2 HOUS. J. INT'L L. 307, 310 (1980).

108. *Summary: International Covenant on Civil and Political Rights (ICCPR)*, CANADIAN CIVIL LIBERTIES ASSOCIATION (Oct. 27, 2015), https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/.

109. Hannum, *supra* note 105, at 319.

110. *See generally,* International Covenant on Civil and Political Rights art. 9, 14, Dec. 9, 1966, S. Exec. Doc. No. E., 95-2, 999 U.N.T.S. 171 [hereinafter *ICCPR*].

111. *ICCPR* at art. 9.

112. *Id.*

tion.[113] In addition to the protections of Article 9, Article 14 makes it abundantly clear that the bare minimum protections of due process are to apply in the determination of *any* criminal charge brought against an individual.[114] Among the protections found with Article 14 are the rights to be promptly informed of charges, communication with counsel of their choosing, and the right to a fair and public hearing by a competent, independent, and impartial tribunal.[115]

Since being opened for signature in 1966, the ICCPR has also arguably ripened into customary international law, with 173 state parties of the UN have both signed and ratified the ICCPR, thus voluntarily binding themselves to its provisions.[116] Additionally, the ICCPR is also often cited, along with the UDHR, as being extremely important human rights doctrines by both individual countries and scholars. Even if the ICCPR is not yet currently considered a part of customary international law, Article 18 of the Vienna Convention on the Law of Treaties, of which China is a party, provides that, if a state has signed a treaty or has exchanged instruments which constitute a treaty's ratification, acceptance, or approval, or if the country has expressed its consent to be bound, it "is obligated to refrain from acts which would defeat the object and purpose of the treaty."[117] Thus, even if it is determined that the ICCPR is not customary international law, China would still be bound to refrain from committing acts that would prevent individuals from benefitting from the guarantees found within the ICCPR.

The International Bill of Human Rights established the basic framework for international due process laws and protections and has since ripened into customary international law through its adoption by a vast majority of the world's nations, as well as through the opinions and writings of scholars. The plain language of both the UDHR and ICCPR make it clear that the rights of due process located within its provisions apply to *all* criminal proceedings, thus guaranteeing that any individual sought to be extradited must be awarded basic due process protections during and after extradition. However, the FOO's language, in not allowing Hong Kong to effectively protect its population through its own legal system, strips away the due process protections guaranteed to everyone in Hong Kong through the International Bill of Human Rights. The lack of protections leaves anyone in Hong Kong potentially vulnerable to arbitrary detention and extradition back to China, and, in turn, especially vulnerable to other potential human rights abuses in that requesting state.

The International Bill of Human Rights, however, is not the only international doctrine that sets out basic due process protections. The international community has since adopted several other doctrines and treaties that set out due process protections specifically in the context of extradition, all of which could trace their protections back to the provisions first established in the International Bill of Human Rights.

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113. *Id.*

114. *Id.* at art. 14.

115. *Id.*

116. *Status of Treaties: International Covenant on Civil and Political Rights,* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en (last updated Apr. 9, 2020, 1:49 PM).

117. Vienna Convention, *supra* note 65, at art. 18.

B. The UN Model Treaty: Protections and Procedures

In 1990, the UNGA adopted the Model Treaty, which set forth multiple extradition protections and procedures that have since found their way into both other United Nation conventions and the extradition laws of individual countries.[118] The doctrine was adopted by the UNGA through a consensus,[119] which means no Member State found a provision in the resolution that was so disagreeable as to warrant a full vote.[120] The Model Treaty imposes "clear and concise obligations, and contains acceptable safeguards for the requesting state (to whom extradition cannot be arbitrarily refused), the requested state (which maintains sovereignty and rights to protect persons wanted and nationals from unacceptable detention or treatment), and the person wanted (who has ample opportunity to have his or her particular circumstances examined)."[121] In doing so, the Model Treaty took the due process protections that were originally created in the International Bill of Human Rights and applied them directly to the practice of extradition. Indeed, the UNGA adopted the Model Treaty taking into account the "need to respect human dignity and recalling the rights conferred upon every person involved in criminal proceedings, as embodied in the [UDHR] and the [ICCPR]."[122] The Model Treaty also helped consolidate various extradition due process protections and procedures into law that have been adopted by various states, while also respecting the individual sovereignty of the state in which the wanted fugitive is located. In addition to the adoption of the Model Treaty, the international community has also enacted several other multilateral treaties containing very similar extradition protections. Among these are the *United Nations Convention against Transnational Organized Crime* ("Organized Crime Convention"), which currently has 190 States Parties,[123] and the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* ("Narcotics Convention"), which has 191 States Parties.[124]

It has been generally regarded by international law scholars that no person can be extradited without the submission of *prima facie* evidence demonstrating that individual's guilt.[125] Thus, the Model Treaty set out to formalize this general principle by setting forth a standardized procedural model for extradition. In addition to the requirements that the extradition request be submitted in writing and that all required documents are to be transmitted through

118. Griffith & Harris, *supra* note 89, at 34.

119. *Voting Data: Model Treaty on Extradition: resolution/adopted by the General Assembly*, UNITED NATIONS DIGITAL LIBRARY (Dec. 4, 1990), https://digitallibrary.un.org/record/282277?ln=en.

120. *How Decisions are Made at the UN*, UNITED NATIONS, https://www.un.org/en/model-united-nations/how-decisions-are-made-un (last visited Apr. 9, 2020).

121. *Revised Manual on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters: Part One*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, 4 (2004), https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf [hereinafter *Revised Manual*].

122. G.A. Res. 45/116, Model Treaty on Extradition (Dec. 14, 1990) [hereinafter Model Treaty].

123. *Status of Treaties: United Nations Convention Against Transnational Organized Crime,* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&clang=_en (last updated Apr. 9, 2020, 1:49 PM).

124. *Status of Treaties: United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6&clang=_en (last updated Apr. 9, 2020, 1:49 PM).

125. Anjum, *supra* note 84, at 9.

diplomatic channels, Article 5(a) of the Model Treaty sets forth mandatory accompaniments for all extradition requests.[126] The Revised Manual on the Model Treaty on Extradition summarizes the requirements of Article 5(a) as follows:

> The request must contain (1) a precise description of the person sought; (2) a copy of the applicable legal provisions (or a statement of the relevant law) [and] a statement of the penalty that can be imposed for the offence; (3) proof of the enforceable sentence or of the warrant of arrest (as the case requires) and any other documents having the same force; (4) and an exposition of the facts for which extradition is requested (including a description of the acts or omissions constituting the alleged offense and an indication of the time and place of its commission).[127]

Once a requested State is in receipt of the required information, under Article 8 that State still has the authority to request additional information if it feels that there is not enough *prima facie* evidence against the wanted individual.[128] A requested State is also to be granted the freedom to deal with an extradition request pursuant to its own procedures.[129] Finally, upon the requested State granting extradition, the parties are obligated, without delay, to arrange for the transfer of that individual within a reasonable time as specified by the requesting State.[130]

In addition to outlining procedures for extradition, Article 3 of the Model Treaty sets forth various methods in which extradition would be automatically deemed illegal, even if both States agreed to engage in the transfer of the wanted fugitive.[131] Article 3(g) of the Model Treaty, for example, provides if a judgment of the requesting State has been rendered *in absentia*, or if the wanted fugitive has not been awarded sufficient notice of that trial or an opportunity to arrange a defense, extradition is automatically void.[132] Furthermore, Article 3(e) provides a mandatory refusal of extradition if, under the laws of either State, the individual would be immune from prosecution, including as a result of the State's applicable statute of limitations.[133] Notably, Article 3(f) directly invokes the ICCPR, and states that a mandatory stay of extradition would be granted if the wanted individual "has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, Article 14."[134] Finally, Article 3(f) further provides for a mandatory stay of extradition if the wanted individual would be subjected in the requesting State to torture or cruel, inhuman, or degrading treatment.[135]

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126. Model Treaty, *supra* note 122, at art. 5.
127. *Revised Manual*, *supra* note 121, at 31–32.
128. Model Treaty, *supra* note 122.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

Where Article 3 sets forth factors that would automatically void an extradition, Article 4 grants requested States the authority to unilaterally challenge or void an extradition request of individuals within their borders.[136] Article 4(a), for example, states that a requested state is under no obligation to extradite its own nationals.[137] This provision refers to the customary international law rule that States reserve the right to not extradite its own nationals to the requesting State.[138]

Various States, such as France, Germany, and Italy, have adopted this rule, while other nations, such as the U.K., have yet to adopt this principle.[139] Additionally, Article 4(b) provides that "if the competent authorities of the requested [S]tate have decided either not to institute or to terminate proceedings against the person for the offense in respect of which extradition is requested," the requesting State can refuse to extradite the fugitive.[140] This Article essentially states that a requested State can decide not to pursue any action against the fugitive, regardless if they are a national of that State or not, and cannot be compelled to do so by the requesting State.

Both Articles 3 and 4 address and reject one of the principal obstacles in applying human rights norms to extradition: the Rule of Non-Inquiry.[141] Traditionally, this rule prevented courts that heard extradition cases from inquiring into the procedures or treatment that would be utilized on the extradited fugitive.[142] However, like Article 3(f), Article 4(d) of the Model Treaty allows for an optional hold on extradition if the requested State, despite the requesting State's assurance that the fugitive would not be facing the death penalty or any other form of inhuman treatment or torture, believes otherwise that the fugitive would be vulnerable to such practices.[143] It is often suggested that the UNGA was adamant on ensuring the protection of human rights regarding extradition, which explains its decision to include these obstacles.[144] Many States have begun to stray away from the Rule of Non-Inquiry and have allowed courts to inquire into the practices and procedures of other States,[145] a right which is now enshrined within the Model Treaty on Extradition. The aforementioned provisions in the Model Treaty are crucial in order to ensure that the individual sought to be extradited would be free from due process violations and inhumane treatment in the requesting State. In order to prevent this from happening, a government must be allowed to inquire into the judicial methods of that foreign State, which is something that the FOO amendments effectively prevent both the Hong Kong court system and the Legislative Counsel from effectively policing.

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136. *Id.*

137. *Id.*

138. Anjum, *supra* note 84, at 18.

139. *Id.* at 19.

140. Model Treaty, *supra* note 122.

141. Ramana, *supra* note 80, at 254.

142. *See id.*

143. *See* Model Treaty, *supra* note 122.

144. Ramana, *supra* note 80, at 256.

145. *Id.*

V. International Extradition Case Law

In the context of extradition, courts from around the world have inquired into and upheld the importance of human rights law in the extradition process, with many concluding that individuals sought for extradition have fundamental human rights to due process and to be free from inhuman treatment in the requesting State, protections guaranteed in the International Bill of Human Rights, the Model Treaty, regional conventions, and individual State statutes. These decisions afford a strong argument that the practice of extradition is firmly entrenched within the concept of human rights law.

The European Court on Human Rights ("ECHR"), which hears cases under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("European Convention"), has on several occasions withheld extradition on the grounds that removal would subject the wanted individual to human rights violations, most notably in the case of *Soering v. United Kingdom*.[146] There, the U.S. requested the extradition of Jens Soering, a German national, to Virginia to face charges of capital murder.[147] Upon the U.K. granting the extradition request, Soering appealed to the ECHR, to which the U.K. is a party.[148] The ECHR cited to Article 3 of the European Convention and held that Contracting Parties are not absolved "from responsibility . . . for all and any foreseeable consequences suffered outside their jurisdiction."[149] In other words, a Contracting Party to the European Convention cannot extradite a person if the wanted individual's international human rights would be jeopardized. Here, the ECHR viewed extradition to Virginia's death row would, "if implemented, give rise to a breach of Article 3" thus violating international human rights law.[150]

Individual courts in many European States have historically allowed their courts to conduct a form of judicial inquiry into the requesting State's practices as part of the extradition process.[151] French courts, for example, have refused to extradite individuals when there was a possibility that the requesting State would subject the individual to human rights violations.[152] In the case of *In re Lujambio-Galdeano*, the Conseil d'Etat, France's highest legal tribunal, held that "it would not extradite to a requesting state whose judicial system did not respect basic human rights."[153] In *Soering*, the government of Germany, appearing before the ECHR, is also on record as having declared that "German courts hold that extradition should be denied where inhuman or degrading treatment is anticipated in the requesting [S]tate."[154] Additionally, the

146. Quigley, *supra* note 90, at 418–19.

147. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at ¶ 14 (1989).

148. Quigley, *supra* note 90, at 418.

149. *Soering*, 161 Eur. Ct. H.R. at ¶ 86.

150. *Id.* at ¶ 111.

151. Ramana, *supra* note 80, at 256.

152. Quigley, *supra* note 90, at 422.

153. *Id.*

154. *Id.* at 421.

Supreme Court of Ireland refused to extradite two men that had escaped from prison in the U.K. on the ground that there was a "probable risk that they would be beaten if they were returned to that prison."[155]

In the U.S., the case of *Ahmad v. Wigen* saw the U.S. District Court for the Eastern District of New York contemplate whether the extradition of the defendant, a West Bank Arab and naturalized citizen of the U.S., back to Israel for murder would constitute a violation of human rights.[156] The defendant argued that his extradition would result in torture during interrogation and would be jailed in "indecent" facilities.[157] The District Court examined the Landau Report, which contained evidence that force was routinely used to extract confessions.[158] However, despite this evidence, the District Court reasoned that such procedures would be unlikely used against the defendant because two other individuals recently extradited to Israel were not subjected to such treatment, and that the defendant was not being sought for information of terrorist activities, which is the top priority for the interrogations.[159] However, despite the District Court's holding, it nevertheless cited heavily towards the *Soering* decision and concluded that a judge in an extradition proceeding "should determine the nature of treatment probably awaiting petitioner in a requesting [State] to determine whether he or she can demonstrate probable exposure to such treatment as would violate universally accepted principles of human rights."[160]

On appeal, the Second Circuit Court held that it is a function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.[161] Furthermore, the Second Circuit held that the Secretary of State has never once directed extradition when there were legitimate human rights concerns in the requesting State, nor did it believe that such an extradition would occur in the future under such circumstances.[162] Although the Second Circuit later held that only the executive branch can deny extradition on humanitarian grounds,[163] the decision nevertheless indicates the importance of adequately inquiring into possible violations of human rights upon the defendant's arrival in the requesting State.

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155. *Id.* at 423.

156. Ahmad v. Wigen, 726 F. Supp. 389, 394 –95 (E.D.N.Y. 1989).

157. *Id.* at 409.

158. *Id.* at 416.

159. *Id.* at 417.

160. *Id.* at 410.

161. Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990).

162. *Id.*

163. *Id.*

VI. Extradition Procedures and Protections in the United States and United Kingdom

The extradition statutes of both the U.S. and U.K. follow similar extradition procedures and feature similar protections to multiple UN treaties and conventions. Both States are parties to the International Bill of Human Rights, the Organized Crime Convention, the Narcotics Convention, and were consenting parties to the Model Treaty. They are also both parties to the Convention Against Torture.

In the U.S., the extradition of individuals who are wanted abroad is governed by 18 U.S.C. Sections 3181 and 3184. Generally, extradition can only be granted pursuant to a treaty with another State,[164] of which the U.S. currently has over 100.[165] When a foreign State wishes the return of a fugitive from the U.S., a federal magistrate court reviews the request.[166] The magistrate will then decide if the crime is covered in the extradition treaty with the requesting State, whether the offense is one recognized by U.S. law, if the person identified is, in fact, the suspect identified by the requesting State, and if the requesting State has presented sufficient *prima facie* evidence of probable cause to believe that individual committed the offense.[167]

Under U.S. law, a fugitive sought to be extradited is afforded several protections. After an extradition is approved by the magistrate court, the fugitive to be extradited can file for a writ of *habeas corpus* to block extradition based on several factors, which according to Justice Holmes' holding in *Fernandez v. Phillips*, consist of whether the magistrate had jurisdiction, whether the offense charged was within the extradition treaty, and whether there was any evidence warranting reasonable grounds for a guilty verdict.[168] However, case law has demonstrated that "victims" of extradition orders have generally received broader *habeas corpus* reviews, notwithstanding the limitations of *Fernandez*.[169] In the decision of *Hooker v. Klein*, for example, the Ninth Circuit held that the "admission of evidence proffered by the fugitive at an extradition proceeding is left to the sound discretion of the court, guided of course by the principle that evidence of facts contradicting the demanding [State's] proof or establishing a defense may properly be excluded."[170] U.S. law further provides that a fugitive cannot be extradited for several reasons, including if the fugitive is a national of the asylum State, and that State does not extradite nationals, the crime is not one that allows for extradition, the statute of limitations has run in the asylum State, or the fugitive has already been prosecuted in the asylum State, or another State, for the same conduct as the requested extradition.[171]

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164. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL, § 9–15.100 (2018), https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters [hereinafter, *Justice Manual*].

165. Jonathan Masters, *What is Extradition?*, COUNCIL ON FOREIGN RELATIONS (Last updated Jan. 8, 2020, 7:00 AM), https://www.businessinsider.com/hong-kong-bookseller-describes-abduction-torture-in-mainland-china-detention-2016-6; *see also* 18 U.S.C. Chapter 209 – Extradition, https://2009-2017.state.gov/documents/organization/71600.pdf.

166. Quigley, *supra* note 90, at 402.

167. *Id.*

168. Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

169. *See, e.g.*, Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978).

170. *Id.* at 1369.

171. *Justice Manual*, *supra* note 164, at § 9–15.600.

Lastly, the executive branch of the U.S. has the authority to prevent extradition over human rights concerns. According to the *Restatement (Third) of the Foreign Relations Law*, a State may refuse extradition if that State has substantial reason to believe that the individual would not receive a fair trial or would suffer other human rights violations in the requesting State.[172] "The requested [S]tate retains an interest in the fate of a person it has extradited as well as the probable fate of those whose extradition is sought."[173] Thus, extradition treaties imply some discretion to the requested State to not extradite an individual for certain cases.[174] Indeed, Congress has historically refused to enter into extradition treaties with States such as Russia, China, North Korea, and Iran, whose human rights records have concerned the U.S.[175]

In the U.K., extradition laws are governed by the Extradition Act of 2003 and the royal prerogative, or British common law.[176] The Extradition Act separates States into Category 1 and Category 2 territories.[177] Extraditions to Category 1 territories, which consists of a list of European countries and subject to the authority of the National Crime Agency, follow the process outlined in the European Arrest Warrant System.[178] All other States are considered Category 2 territories, and extraditions to these States are overseen by the U.K. Central Authority.[179] In both scenarios, an initial hearing is to be held where the fugitive's identity is confirmed, the fugitive is informed of the procedures for extradition and is given a chance to consent, and, if the fugitive does not consent, a date is set for an extradition hearing.[180] At the extradition hearing, a judge will determine if the fugitive's conduct amounts to an extraditable offense and if there are any bars to extradition.[181] Among these bars are the statute of limitations, whether extradition request was the result of improper motivations, and whether the extradition would be incompatible with the fugitive's human rights.[182]

The extradition mechanisms currently in use by both the U.S. and the U.K. are just two examples of extradition laws that help guarantee the due process rights that are proscribed by the international community through the International Bill of Human Rights, the Model Treaty, and other UN conventions. These extradition mechanisms ensure that all individuals maintain fundamental rights of due process that are present throughout much of the world. They also ensure that extradited individuals are not subjected to human rights abuses in the requesting State by allowing individuals to challenge their extradition, or allowing a requesting

172. RESTATEMENT (THIRD) FOREIGN REL. L. U.S. § 476 cmt. h (AM. L. INST. 1986).

173. *Id.* at ch. 7, subchapter B, intro. note.

174. *Id.* at § 475 cmt. g.

175. *Id.* at ch. 7, subchapter B, intro. note.

176. *Extradition: Processes and Review*, UK.Gov (Last updated Feb. 24, 2021), https://www.gov.uk/guidance/extradition-processes-and-review.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. CROWN PROSECUTION SERVICE, *Extradition*, CPS (Last updated May 12, 2020), https://www.cps.gov.uk/legal-guidance/extradition.

State to deny extradition on humanitarian grounds. The FOO, on the other hand, completely stripped the ability of either the Legislative Council or the Hong Kong courts from inquiring into the wanted individual's due process protections in the requesting State.

VII. Lack of Due Process Protections and State-Sponsored Abductions

The absence of any relevant extradition protections within the FOO could ultimately lead to an increased rate of State-sanctioned abductions by the Chinese government of individuals currently residing in Hong Kong. Without any adequate judicial or executive review procedures to extradition standing between individuals in Hong Kong and the Chinese government, the latter would essentially have free-reign to enter Hong Kong and arrest individuals without question, even though Hong Kong, pursuant to the "One State, Two Systems" policy, was ultimately allowed to maintain its autonomy over its own courts and judicial proceedings. The practice of State-sponsored abductions, while still practiced in several States, has gradually been viewed by the international community as an illegal practice in violation of customary international law.[183] Indeed, most countries historically have held the view that there is no duty to extradite absent a treaty or statute.[184]

In South Africa, the case of *State v. Ebrahim* saw the State adopt a view in which the Court there believed was more akin to international law standards.[185] There, the appellant, who was South African by birth, had been convicted of sabotage while a member of the military wing of the African National Congress.[186] After serving his sentence, the appellant was restricted from leaving the magistrate's district but was still able to flee the country to Swaziland.[187] Six years after his escape, he was forcibly abducted from Swaziland and taken back to South Africa after being bound, blindfolded, and gagged.[188] At his trial, the appellant argued that the actions taken by South Africa violated international law against forcible abductions.[189]

The Supreme Court of South Africa found that the actions of the government agents who entered Swaziland to return the appellant back to South Africa was in violation of South African law, reasoning that crime is contagious, and if the government itself becomes a lawbreaker, this would breed contempt for the law: "To declare that in the administration of the criminal law the end justifies the means, to declare that the government may commit crimes in order to secure the conviction of a private criminal, would bring terrible retribution."[190] Although the

183. Ruth Wedgwood, *The Argument Against International Abduction of Criminal Defendants: Amicus Curiae Brief Filed by the Lawyers Committee for Human Rights in United States v. Humberto Alvarez-Machain* 6 Am. U. J. Int'l L. & Pol'y 537, 566 (2011).

184. Stephanie A. Ré, *"The Treaty Doesn't Say We Can't Kidnap Anyone"—Government Sponsored Kidnapping As a Means of Circumventing Extradition Treaties*, 44 WASH. U. J. URB. & CONTEMP. L. 265, 266 (1993).

185. State v. Ebrahim, 1992 (2) SALR 553 (a), *translated in* 31 Int'l L. Materials 888, 896 (1992) (S. Afr.).

186. *Id.* at 890.

187. *Id.*

188. *Id.*

189. *Id.* at 892.

190. *Id.* at 898 (citing Olmstead v. United States, 277 U.S. 438, 484–85 (1928) (Brandeis, J., dissenting)).

South African Supreme Court based its decision on a different interpretation of its own laws, the decision has been viewed by scholars as being an indicator of a customary rule prohibiting State-sponsored abductions.[191]

Shortly after *Ebrahim*, the Supreme Court of Zimbabwe strongly condemned the State-sponsored abduction practice as well.[192] In *State v. Beahan*, the Court held that "in order to promote confidence in and respect for the administration of justice and preserve the judicial process . . . a court should decline to compel an accused person to undergo trial in circumstances where his appearance . . . has been facilitated by an act of abduction."[193] The Court continued by explaining that this goes directly against international ethical norms, for abduction is illegal under international law.[194] Anything short of this would, as argued by the court in *Ebrahim*, encourage contempt for the law in order to secure convictions.[195]

The U.K. has also condemned the practice in *Regina v. Horseferry Road Magistrates' Court*, also known as *Ex parte Bennett*.[196] There, the defendant, a citizen of New Zealand, was alleged to have committed crimes in England in connection with the purchase of a helicopter.[197] After he was traced back to South Africa by British police, he was forcibly returned to England in lieu of an extradition treaty between the two States.[198] The defendant claimed he had been kidnapped from South Africa as a result of collusion between the police departments of both States.[199] There was no attempt by either party to utilize the extradition process to secure the defendant's return to England.[200] There, four of the five judges ruled in the defendant's favor and found that English courts can review a case where the police ignored formal extradition procedures and illegally seized a wanted fugitive.[201] Lord Bridge of Harwich, in the majority, found that if it is demonstrated that an individual was brought in before a State's jurisdiction solely through violations of international law and the laws of another State, "to hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is . . . an insular and unacceptable view."[202] The decision of the court in *Bennett* can thus be viewed as a further example of States turning against the practice of State-sponsored abductions without due process as being a violation of international human rights laws.

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191. Stephan Wilske & Teresa Schiller, *Jurisdiction over Persons Abducted in Violation of International Law in the Aftermath of* United States v. Alvarez-Machain, 5 UNIV. CHI. L. SCH. ROUNDTABLE 205, 221 (1998).

192. *Id.*

193. *Id.* (quoting State v. Beahan 1992 (1) SACR 307 (A) (S. Afr.)).

194. *Id.*

195. *Id.*

196. *See generally* Regina v. Horseferry Road Magistrates' Court (*Ex parte Bennett*) [1994] 1 AC (HL) 42.

197. *Id.* at 51.

198. *Id.*

199. *Id.*

200. *Id.*

201. Wilske & Schiller, *supra* note 191, at 218.

202. *Ex parte Bennett* [1994] 1 AC (HL) at 67.

The aforementioned decisions by courts around the world suggest that there is a growing consensus that the practice of entering a foreign State without permission to extradite a wanted individual is not only a violation of State sovereignty, but it is also a violation of that individual's international due process rights. The efforts by China to influence the government of Hong Kong to pass the FOO should be condemned as a clear attempt to promote a practice that is increasingly being frowned upon by the international community.

VIII. Conclusion

The recent attempt by China to induce Hong Kong to enact the proposed amendments to the FOO was an attempt to further circumvent international due process protections guaranteed by international law. The Hong Kong government has previously pointed to the role of its courts in reviewing extradition requests as "a key procedural safeguard."[203] The government has also reiterated its commitment to observing the provisions of international conventions, stating that these agreements apply to Hong Kong through its Basic Law.[204] However, the FOO amendments that were proposed in 2019 severely jeopardized established human rights norms in the context of extradition by not granting Hong Kong courts explicit power to deny extradition on grounds of potential violations of due process and *jus cogens* norms, and by removing the Legislative Counsel's ability to enter into special extradition agreements with nations with which Hong Kong does not have an extradition treaty.

Because of these provisions, the proposed FOO amendments were in contradiction with internationally recognized extradition principles and protections prominently featured in numerous multilateral treaties and the statutes and extradition treaties of individual states. In addition to potentially eroding Hong Kong's autonomy under the "One Party, Two Systems" policy by allowing Chinese authorities to remove individuals without Hong Kong's cooperation, the FOO amendments would have also made it extremely difficult for Hong Kong to ensure that an individual being extradited to China would not be subjected to violations of due process rights or *jus cogens* norms found within the International Bill of Human Rights, the Model Treaty on Extradition, and other UN Conventions. The Model Treaty, international case law, and individual extradition statutes from around the world all suggest the existence of a custom which allows a requested state the ability to deny an extradition on grounds of potential human rights violations. Finally, without adequate power to intervene, there would be very little standing in the way of Hong Kong citizens being potentially subjected to more frequent occurrences of state-sponsored abductions.

Given China's repeated violations of human rights, as well as the severe consequences that this amendment would have had on international human rights law, the citizens of Hong Kong have since decided to mount extremely large and passionate protests which have successfully

203. Kellogg, *supra* note 48.

204. Ng Kang-Chung, *Hong Kong will observe obligations under global treaties, minister says, amid outcry over C.Y. Leung's comments on UN torture convention*, S. CHINA MORNING POST (Jan. 19, 2016, 12:00 AM), https://www.scmp.com/news/hong-kong/politics/article/1902702/hong-kong-will-observe-obligations-under-global-treaties.

gained the attention of the entire world. It is now up to the international community to utilize the legal tools in its possession in order uphold their promises of human rights and due process to the world.

Investment Disputes and Trade Disputes: Never the Twain Shall Meet?

Kabir A.N. Duggal*

I. Introduction

One of the most challenging tasks in dealing with any system where two separate bodies of law are implicated, as often occurs in international law, is determining what should be done when an action is condoned by one body and condemned by another. The body of treaties under the umbrella of the World Trade Organization ("WTO"), which addresses cross-border activities in goods, services, intellectual property and more, and the international rules set out in investment treaties, which address cross-border investment activities, have similar goals of deterring actions that are discriminatory against foreign actors or otherwise arbitrary and of creating a more stable and effective international economy.

However, as they are separate bodies of law developed to meet different, specific needs, WTO/trade law and investment treaty law may treat the same situation very differently, even contradictorily. This article explores how some WTO-approved actions, including retaliatory measures taken against a trading partner found to have breached its own obligations, could give rise to investment treaty arbitration claims of unfair and inequitable treatment and discrimination.

First, this article explores examples of how the same actions can implicate obligations under both investment treaty and trade agreements and how the two regimes differ in the mechanisms set up to address such disputes. Then, this article will consider how the trade regime under the WTO agreements allows certain anti-liberal and purposefully discriminatory actions in some situations, followed by how such actions may run afoul of investment treaty guarantees of nondiscriminatory and nonarbitrary treatment. Finally, this article surveys how some investment treaty tribunals have treated questions of trade obligations and actions when those became issues under investment treaties and what those decisions may tell us about how challenges to actions explicitly permitted under the trade regime might be challenged under the investment treaty system.

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II. The International Economic Law Regime: Same Regulation May Give Rise to Parallel Obligations Under Trade and Investment Regimes

A policymaker often has to consider several competing interests when adopting a regulation in the economic arena. The policymaker will have to consider, *inter alia*, both its trade and investment obligations to ensure that it may not run afoul of binding commitments. Complicating that consideration is the fact that it is possible that the same underlying facts can give rise to both trade and investment disputes. A good illustration of such parallel proceedings is Australia's tobacco packaging experience. In 2011, Australia enacted a tobacco plain packaging ("TPP") law towards restricting "the appeal of tobacco products, increasing "the effectiveness of health warnings on the retail packaging," and reducing "the ability of the retail packaging of tobacco products to mislead consumers."[1] The TPP law "prohibits logos, brand imagery, colours and promotional text other than brand and product names in a standard colour, position, font style and size appearing on tobacco packaging."[2] This law (and other related acts and legislations with similar purposes) resulted in WTO disputes being initiated by several countries in 2012 and 2013,[3] arguing, *inter alia*, that the law imposed "significant trademark restrictions."[4] Several countries initiated consultations with Australia, including Indonesia,[5] Ukraine,[6] Honduras,[7] the Dominican Republic,[8] and Cuba.[9] Several third-party States participated in the disputes as well.[10] In June 2018, a WTO Panel ("Panel") issued its report dismissing all the arguments, and in August 2018, the WTO Dispute Settlement Body ("DSB")

1. *See Australia Tobacco Plain Packaging Act 2011* (Cth) s 3(2) (Austl.).
2. *WTO Disputes – Tobacco Plain Packaging*, AUSTRALIAN GOV'T DEP'T OF FOREIGN AFF. & TRADE (Oct. 2018), https://www.dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/wto-disputes-tobacco-plain-packaging.
3. *See id.*
4. *See, e.g.*, Request for Consultations by Ukraine, *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS434/1 (Mar. 13, 2012).
5. *See* Request for Consultations by Indonesia, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS467/1 (Sept. 20, 2013).
6. *See* Request for Consultations by Ukraine, *supra* note 4.
7. *See* Request for Consultations by Honduras, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/1 (Apr. 10, 2012).
8. *See* Request for Consultations by the Dominican Republic, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WTO Doc. WT/DS441/1 (July 23, 2012).
9. *See* Request for Consultations by Cuba, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WTO Doc. WT/DS458/1 (Aug. 28, 2018).
10. *See DS 467: Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm (last visited Apr. 18, 2021) (listing the following countries: Brazil; Canada; China; Cuba; European Union; Guatemala; Honduras; India; Japan; Korea, Republic of; Malaysia; Mexico; New Zealand; Nicaragua; Norway; Oman; Philippines; Russian Federation; Chinese Taipei; Thailand; Turkey; Ukraine; United States; Uruguay; Zimbabwe; Dominican Republic; Peru; Singapore; Argentina; Chile; Malawi; Nigeria; Ecuador).

adopted the Panel's report.[11] In arriving at the decision, the Panel noted that "it is undisputed that the objective of the TPP measures relates to public health protection and more specifically to the protection of public health in relation to the use of tobacco products in Australia."[12] Australia also provided a depiction of the operation of the TPP measures,[13] which led the Panel to observe that the objective pursued by Australia by TPP measures was "to improve public health by reducing the use of, and exposure to, tobacco products."[14]

At the same time, Australia's actions also gave rise to an investor-state dispute on June 22, 2011 when Philip Morris Asia Limited ("Phillip Morris") initiated a United Nations Commission on International Trade Law ("UNCITRAL") arbitration against Australia.[15] Phillip Morris alleged the TPP law implicated indirect expropriation, full protection and security, fair and equitable treatment, and unreasonable impairment provisions of the Australia-Hong Kong Treaty.[16] This dispute was ultimately dismissed as being inadmissible; as a result, the tribunal did not engage with the merits of the dispute.[17] But, in a similar investment treaty case initiated by Phillip Morris against Uruguay for its TPP regulations, the majority of the tribunal dismissed the case and made similar findings to those of the Panel in the Australia dispute, although it did not refer to the Panel decision.[18] For example, the tribunal noted "that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health."[19]

The key takeaway here is that the same underlying facts can give rise to parallel trade and arbitration disputes, although the jurisprudence does not tend to draw on each other. This is not to suggest that the two regimes are similar or identical. Indeed, the regimes are set up with several critical differences, such as the nature of the dispute, treaty obligations, remedies, nature of the decision-makers, and the ability to appeal.[20] The same underlying facts give rise to parallel trade and investment disputes, and the two regimes do not clash with one another. On the

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11. *See Australia – Tobacco Plain Packaging (DS435, 441, 458, 467)*, WORLD TRADE ORG. 186 (2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds467sum_e.pdf.

12. Reports of the Panels, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 7.213, WTO Docs. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS67/R (June 28, 2018).

13. *Id.* ¶ 7.233, fig. 11.

14. *Id.* ¶ 7.233.

15. *See* Philip Morris Asia Ltd. v. Commonwealth of Australia, PCA Case Repository No. 2012-12, Notice of Claim (2011).

16. *See id.*, ¶¶ 44–47.

17. Philip Morris Asia Ltd. v. Commonwealth of Australia, PCA Case Repository No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 588 (2015) ("[T]he initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection . . . [T]he Tribunal is precluded from exercising jurisdiction over this dispute.").

18. Philip Morris Brands S.à.r.l. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award ¶ 590 (July 8, 2016).

19. *Id.* ¶ 307.

20. *See* Giorgio Sacerdoti, *Trade and Investment Law: Institutional Differences and Substantive Similarities*, JERUSALEM REVIEW OF LEGAL STUDIES, Volume 9, Issue 1, June 2014, p.1.

rare occasions that the same facts have been implicated in an investment treaty and WTO events, the decision-makers of the two regimes either ignored those in the other or recognized their examination of the issue in passing, as seen in the Australia tobacco disputes discussed above.

III. WTO-Approved Actions Which Could Give Rise to Treaty Claims

While the international trade and investment regimes thus far have acted mainly like ships passing in the night, with at most a few brief flashes of a signal lamp to indicate awareness of the other's presence, there is a much more concerning possibility that the two could find themselves on a collision course, with one sanctioning an action while the other condemns it. A set of claims could arise when an action that is undertaken as legal and permissible under one regime gives rise to potential claims under another regime. As discussed below, in certain instances the WTO agreements allow actions to be taken that are purposefully contrary to the general economic liberalization goals the WTO is intended to foster, such as when a WTO Member is permitted to increase import tariffs discriminatorily against another WTO Member in retaliation for some other action. Such actions could also violate principles, such as equal treatment, under investment treaty regimes, which may not be concerned over whether the act is condoned under the trade regime.

A. An Introduction to the WTO Regime

Like investment agreements in Bilateral Investment Treaties ("BIT") and Free Trade Agreements ("FTA"), the various treaties under the aegis of the WTO are intended to foster economic growth.[21] These treaties seek to address impediments in trade in goods under the General Agreement on Tariffs and Trade ("GATT")[22] and General Agreement on Trade in Services ("GATS"),[23] intellectual property protection under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"),[24] technical trade barriers under the Agreement on Technical Barriers to Trade ("TBT"),[25] and health and safety measures under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS").[26] Each of these agreements seeks to lower barriers to the efficient flow of international trade. For example, under GATT, signatories agree to limit tariffs to specific "bound" levels for goods from other

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

22. Marrakesh Agreement. The GATT predates the WTO itself, signed in 1947 and in effect until overhauled during the Uruguay Round of negotiations from 1986 to 1994, when the Marrakesh Agreement created the WTO and updated the GATT as one of the WTO's central documents. *Id.* The 1994 GATT is Annex 1A to the Marrakesh Agreement. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

23. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

24. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

25. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1868 U.N.T.S. 120 [hereinafter TBT].

26. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 493 [hereinafter SPS].

signatories,[27] while under TBT, the technical standards that may be placed on imports (such as labeling requirements) must be non-discriminatory and not be used to create unnecessary barriers to trade.[28]

Connecting the obligations undertaken under the various WTO agreements is the Dispute Settlement Understanding ("DSU").[29] The DSU is labeled as "a central element in providing security and predictability to the multilateral trading system," by allowing the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member[.]"[30]

Under the DSU, a WTO Member can request the establishment of a Panel to determine whether actions taken by another Member are inconsistent with the obligations undertaken under one of the other WTO agreements.[31] The DSU requires that the two Members first seek a mutually agreeable solution via consultations.[32] Typically, however, the dispute is elevated by the request of the complaining party to a dispute before a Panel.[33] Panels typically have three members drawn from an established list of experienced panelists that have been proposed by the WTO Secretariat.[34] After various rounds of submissions and hearings,[35] the Panel issues its views in a report, including recommended steps for the Member to take to come back into compliance with its treaty obligations.

A Panel report can be appealed by either Member (or both on different points) to the WTO Appellate Body.[36] Three members of the standing seven-member Appellate Body are then appointed (via rotation) to hear the arguments of the Members for and against the Panel report and then issue an Appellate Body report, which may contain the same or different pro-

27. GATT, *supra* note 22, at art. III(3).

28. TBT, *supra* note 25, at art. 2.2.

29. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

30. *Id.* at arts. 3.2–3.3.

31. *Id.* at arts. 6.1–6.2.

32. *Id.* at art. 4.2.

33. *The process – Stages in a typical WTO dispute settlement case*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm (last visited Apr. 18, 2021). Under the DSU, the respondent Member can veto the creation of a Panel at the DSU meeting when the request is first made, but at the second meeting where the Panel is requested, a consensus vote (including the consensus of the Member that just requested the Panel) would be required to block the formation of the Panel. *Id.*

34. DSU, *supra* note 29, at arts. 8.1–8.6.

35. *Id.* at art. 9. Challenges by different Members to the same action(s) of the respondent Member may be consolidated and heard by a single Panel; sometimes, other Members will participate as third parties in the dispute and have an opportunity to submit their views on the issues even if not directly harmed by the challenged action. Third parties do not have the ability to appeal a Panel report. *Id.* at art. 17.4.

36. *Id.* at art. 17.1.

posed steps toward compliance.[37] Once an un-appealed Panel or final Appellate Body report is issued, the report is adopted by the Membership as a whole and "unconditionally accepted by the parties to the dispute," unless the Membership by consensus rejects the report.[38] As a practical matter, that required consensus to reject a report gives the successful party to the dispute a veto over the non-adoption of the DSU decision.

While the DSU may state that the parties "unconditionally accept" the outcome of a dispute before the DSB, that is often not what occurs in practice and a Member may decline to take the steps put forth by the report to bring itself into what the Panel and/or Appellate Body viewed as its obligations.[39] Alternatively, the Member may make what it sees as sufficient changes to its practice to align itself with the obligation in question,[40] but the opposing Member believes those changes insufficient.[41] The complaining Member can then negotiate with the other Member for compensation (a rare occurrence in practice)[42] to offset the damage it suffered through the breach, or, after an established negotiating period, the Member can request authorization from the DSB to suspend its own obligations under the WTO agreements to the nonconforming Member in retaliation.[43]

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37. *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Apr. 18, 2021). Appellate Body members serve for a four-year term. *Id.* Due to concerns it raised over certain Appellate Body decisions and its views of their conflict with what Members agreed to in the underlying WTO treaties, since 2016 the United States blocked the appointment of new Appellate Body members, seeking to compel consideration of changes to the DSU process. *See, e.g.*, *Statements Delivered to the General Council by Ambassador Dennis Shea*, U.S. MISSION TO INT'L ORGS. IN GENEVA (Oct. 15, 2019), https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/ (explaining the U.S.' position). On December 10, 2019, two of the final three Appellate Body member's terms ended, making it impossible for any new three-person appellate panel to be formed; thus, no new appeals can be taken up until this matter is resolved and new members are appointed. *Id.*

38. DSU, *supra* note 29, at art. 17.14; *see also id.* at art. 16.4 (stating that a Panel report shall be adopted unless notification of an appeal is made).

39. *See id.* at art. 17.14.

40. *Id.* at art. 21.3–21.4 (The non-compliment Member is given a "reasonable period of time" to take the necessary steps). That reasonable period can be set under the DSU in various ways, including by an arbitrator agreed to between the parties or appointed by the DSB.

41. *The Process – Stages in a typical WTO dispute settlement case 6.7 Implementation by the "losing" Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s7p1_e.htm (last visited Apr. 18, 2021). The suggested steps in a Panel report may be fairly vague, simply recommending that a Member "bring itself into compliance with its obligations," so a Member may view the steps it has taken as sufficient, but the ambiguity in the Panel directions may still leave open the opposite conclusion to be reached by the Member challenging its compliance. *Id.*

42. DSU, *supra* note 29, at art. 22.1–22.2 (stating that compensation is voluntary on the part of the Member that has been found not to be in compliance and providing a window of only 20 days for compensation to be agreed to and determined before the opposing Member can request to suspend its obligations instead).

43. *Id.* at art. 22.1.

B. Permissible Retaliation Under WTO law May Implicate Obligations Under Investment Treaties

Under the DSU, retaliation can take many forms. The most common form of retaliation is the suspension of tariff rate concessions, which is, in effect, an increase in the tariff rates on select imported products from the noncompliant Member, intended to be equal in value to the economic harm done by that noncompliance to the complaining Member.[44]

The DSU sets out general principles for the complaining Member to follow in fashioning retaliation.[45] Foremost, retaliation should be targeted at the same "sector" of the agreement of which the violation occurred.[46] Sectors have various definitions in the different WTO agreements. For example, under the GATS, a "Sectoral Classification List" groups services into sectors such as, *inter alia*, "Business Services," "Communication Services," and "Tourism and Travel Related Services."[47] Under TRIPS, intellectual property rights are grouped into sectors depending on which section of the agreement that right relates to.[48] In contrast, all traded goods are grouped into one sector under GATT.[49] That means, for example, that a violation of obligations undertaken toward business services under the GATS should primarily be retaliated against by the suspension of the same or other obligations related to trade-in business services.

However, the DSU also recognizes that same-sector retaliation would not be ideal in all situations, as it could be ineffective against a Member with no outbound trade flows in the same sector to the complaining Member,[50] or retaliatory action in the identical sector could be harmful to the retaliating Member.[51] For example, after Antigua obtained a favorable DSU decision under GATS against the United States ("U.S.") for its treatment of Antigua's online gambling services, Antigua asserted that suspension of its GATS obligations to the U.S. would

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44. *The Process – Stages in a typical WTO dispute settlement case 6.10 Countermeasures by the prevailing Member (suspension of obligations)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm (last visited Apr. 18, 2021).

45. DSU, *supra* note 29, at art. 22.3.

46. *Id.* at art. 22.3(a).

47. *See* GATT Secretariat, *Services Sectoral Classification List*, MTN.GNS/W/120 (May 21, 1991).

48. *See* DSU, *supra* note 29, at art. 22.3(f)(iii).

49. *Id.* at art. 22.3(f)(i) ("'[S]ector' means . . . with respect to goods, all goods").

50. *Id.* at art. 22.3(b). For example, one Member takes actions violative of its obligations towards another member providing financial services to those living within the first Member's borders but has no meaningful international financial industry of its own for the other Member to take retaliation on.

51. *Id.* For example, if a Member were dependent on imported goods, raising tariffs to retaliatory levels would harm its citizens without benefiting a domestic industry producing products that would compete with those imports.

be futile due to the major disparity in the sizes of their economies and would only harm Antigua's workers dependent on trade-in services.[52] Instead, Antigua sought to "cross-retaliate" by suspending its obligations to recognize U.S. intellectual property rights under TRIPS.[53]

The DSU directs that cross-retaliation be undertaken, if possible, first under a different sector of the same agreement; then, if that is not "practicable or effective, and that the circumstances are serious enough," retaliation can be undertaken under a different agreement.[54] Members are directed to "take into account" the importance of trading in the sector where the violation occurred as well as "the broader economic consequences" of retaliation.[55]

The request for retaliation, both the manner to be undertaken, and the amount of retaliation sought is automatically granted by the DSU as a body unless rejected by consensus (giving the complaining Member veto power over the rejection of its request).[56] However, the Member being retaliated against has the right to challenge the amount, though not the method, of retaliation and request an arbitrator settle the amount.[57] The arbitrator can examine claims that the proposed method of retaliation is not allowed under the WTO agreements or that the principles for selecting the method of retaliation have not been followed, but the complaining party effectively has the ability to autonomously choose among any allowable method of retaliation.[58]

Retaliation recently regained the focus of the trade world when, in October 2019, DSU arbitration authorized the U.S. to retaliate against the European Union ("EU") in the amount of USD 7.5 billion, the largest retaliation ever authorized.[59] This dispute (stretching over a decade with multiple decisions for and against both sides) concerned the EU's subsidization of Airbus' airliner production and its effects on the U.S.' Boeing sales.[60] While announcing that it

52. *See* United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services. Recourse to Arbitration by the United States under Article 22.6 of the DSU, WTO Doc. WT/DS285/ARB, Decision by Arbitrator, ¶¶ 4.109–4.110. (Dec. 21, 2007).

53. *Id.* To date, Antigua has not sought DSU approval for suspending any obligations against the United States, and the two nations continue negotiations over a possible settlement. *See* Simon Lestor, *The WTO Gambling Dispute: Antigua Mulls Retaliation as the U.S. Negotiates Withdrawal of its GATS Commitments*, 12 AM. SOC'Y OF INT'L L. 5 (2008). Similarly, in a dispute over U.S. subsidies to its cotton growers, Brazil proposed retaliation on a list of U.S. goods and additional cross-retaliation suspending U.S. pharmaceutical, chemical and biotechnology patents. *See Brazil details retaliation on U.S. copyright, patents*, REUTERS.COM (Mar. 15, 2010), https://www.reuters.com/article/us-brazil-usa-trade/brazil-details-retaliation-on-u-s-copyright-patents-idUSTRE62E2HK20100315 (deterred retaliation by an agreement between the United States and Brazil with a payment made to Brazil's cotton industry).

54. DSU, *supra* note 29, at arts. 3(b)–(c).

55. *Id.* at arts. 22.3(d)(i)–22.3(d)(ii).

56. *Id.* at art. 22.6.

57. *Id.* at arts. 22.6–22.7 ("The arbitrator . . . shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.").

58. *See id.* at art. 22.7.

59. *See*, *e.g.*, *Press Release, U.S. Wins $7.5 Billion Award in Airbus Subsidies Case*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Oct. 2, 2019) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/us-wins-75-billion-award-airbus.

60. *Id.*

would continue to negotiate a possible settlement precluding retaliation,[61] the U.S. released a list of goods it proposed to increase tariffs on for imports from the EU.[62] Those increased tariffs included 10% additional duties on aircraft, the subject of the dispute, but also 25% duties on a variety of agricultural products and others, such as cheese, mussels, olive oil, pork, certain hand tools, industrial microwave ovens, single-malt whiskies, and wines.[63] Shortly after the amount of retaliation was approved by the DSU arbitrator, the U.S. raised the tariffs as proposed.[64]

The U.S.' retaliation against the EU demonstrates, as does Antigua's proposed retaliation against the U.S. to an even greater extent, how retaliation specifically approved under the DSU can reach far beyond the products or services actually in dispute and discriminatorily impact wholly unrelated goods or services, as well as the businesses that provide and trade in them. Such discriminatory impact—with a business that trades in a good wholly unrelated to the services or intellectual property that is in dispute being "punished" by the outcome of that dispute—can raise questions about the basic fairness of such actions against what are essentially nonplayers in the dispute. That seems to be the reaction of many to the U.S.' retaliation with France's Economy Minister responding to the U.S.' tariff increase by announcing that Europe was ready to retaliate ("in the framework of course of the WTO") against the U.S.' retaliation.[65]

Indeed, the WTO itself stated that retaliatory "suspension of obligations takes place on a discriminatory basis only against the Member that failed to implement."[66] Retaliatory measures are discriminatory because they are in direct violation of the underlying WTO principle of like treatment of all other WTO Members.[67] When retaliatory measures are taken, one other Member is singled out for less favorable treatment. A step is taken back from the goal of economic liberalization, with the purpose of causing sufficient economic harm to the nonconforming Member to induce its compliance with the DSU decision.

Moreover, the possibility of cross-retaliation, and even the treatment under DSU Article 22.3(f)(i) of all traded goods as a single sector and the significant autonomy granted to the retaliating Member under the DSU to determine how it will retaliate and what obligations in what sectors it will target, opens many additional discriminatory possibilities.[68] Hypothetically,

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61. *Id.*

62. Initiation of Investigation; Notice of Hearing and Request for Public Comments: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 15,028 (Apr. 12, 2019).

63. *Id.*

64. Notice of Determination and Action Pursuant to Section 301: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 54,245 (Oct. 9, 2019).

65. *U.S. Slaps New Tariffs on European Wine, Whiskey, Planes and Much More*, CBSNEWS (Oct. 18, 2019), https://www.cbsnews.com/news/us-tariffs-on-european-goods-airbus-planes-wine-cheese-whiskey-much-more-today-2019-10-18/.

66. *The Process – Stages in a typical WTO dispute settlement case 6.10 Countermeasures by the Prevailing Member (Suspension of Obligations)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm (last visited Apr. 18, 2021).

67. *Id.*

68. *See* DSU, *supra* note 29, at art. 22.3(f)(i).

an Irish whiskey distiller may have had nothing to do with the fight between the U.S. and the EU over subsidization of their individual aircraft industries, but any U.S. business that the distiller has may now be impacted by that fight. If the Irish whiskey distiller set up a distributor subsidiary in the U.S. to sell its single malt to U.S. bars, that investment will have been negatively impacted with higher input costs than its competitors selling Kentucky bourbon.

An even more discriminatory impact could occur and yet still be consistent with the DSU and other WTO agreements if a Member decided to cross-retaliate across agreements. For example, again hypothetically, a dispute over sanitary requirements of genetically modified crops under SPS could lead to a retaliatory suspension of recognition of intellectual property rights under TRIPS. A production studio with a local distributing arm could see the rights to its movies taken and sold for the use of third parties, a concern with Antigua's proposal to suspend its TRIPS obligations to the U.S. That foreign-invested film distributor would have had no relation to the underlying dispute over genetic modifications and no reason to foresee that the host nation would target its intellectual property and choose those rights to suspend and, under the DSU, would have no recourse to challenge that suspension. But because that economic lever might be the most effective to move an entirely unrelated dispute, it could be left bearing the entire injury intended to catch the attention of its parent's home government and face what could be the effective expropriation of its intellectual property for use as ammunition in a trade dispute. Notably, in November 2019, China was authorized to retaliate against the U.S. in a dispute over U.S. practices in antidumping proceedings against China, in the amount of $3.6 billion, opening the possibility of another case of purposeful discriminatory action to be taken against goods and U.S. exporters that had nothing to do with the antidumping cases.[69]

C. Other WTO-Consistent Actions May Also Implicate Obligations Under Investment Treaties

In addition to retaliation under the DSU, the WTO agreements allow other actions intentionally contrary to the principles of economic liberalization and nondiscrimination. Such actions may be seen as pressure valves that allow WTO Members flexibility to deal with economic and political pressures that are caused in increasing trade liberalization. For example, the Agreement on Safeguards[70] allows Members to act in response to a surge of imports of a certain good that discriminate against importers of that good for the benefit of domestic producers,

69. *See, e.g.*, *WTO Says China Can Slap $3.6 Billion in Tariffs on U.S. Imports*, ASSOCIATED PRESS (Nov. 1, 2019), https://fortune.com/2019/11/01/china-wto-us-antidumping-case-china-wins-3-6-billion-trade-tariffs. However, as noted above, as of December 2019, the U.S. successfully blocked all new appointments to the Appellate Body, thereby reducing the number of Appellate Body members below the necessary three to hear any new appeals of Panel reports. Without a functioning Appellate Body, any Member found in violation by a Panel need only make the motions to appeal the decision and place the decision in limbo until the Appellate Body resumes function. Practically, that means that no future Panel or Appellate Body decisions will create new opportunities for retaliation until something changes the current status quo. *See supra* note 37.

70. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154. Similar actions were allowed in the pre-WTO GATT as "escape clauses." Krzysztof J. Pelc, *Seeking Escape: The Use of Escape Clauses in International Trade Agreements*, 53 INT'L STUD. Q. 349 (2009).

including increasing tariffs and establishing import quotas.[71] Such actions are intended to give the domestic industry injured by the surge in import competition a short time to adjust to the new economic reality and is to be of a limited period.[72] While typical safeguard actions are intended to be equally discriminatory against imports, regardless of source, the accession protocols China agreed to when it became a WTO Member in 2001[73] provided Members the ability to apply safeguard measures specific to China up until 2013.[74] In 2018, the U.S. issued safeguard orders on washing machines and solar panels, with tariffs increasing to as high as 50% on imports of those products.[75]

The U.S. also announced "national security safeguard measures" by increasing duties on imported steel to 25% and imported aluminum to 10%, with the justification that strong domestic steel and aluminum industries are necessary to supply the U.S.' national defense needs.[76] The U.S. has argued that Article XXI of the GATT permits such actions, though they may be discriminatory against imports and contrary to other WTO obligations.[77] That Article states that WTO obligations shall not be construed to prevent Members from taking any action considered necessary "for the protection of its essential security interests," including matters "directly or indirectly for the purpose of supplying a military establishment."[78] While nine DSU panels have been established to review challenges from various Members against the U.S.'

71. Agreement on Safeguards, Apr. 15, 1994, Art. 2.

72. *See* Agreement on Safeguards, *supra* note 70, at art. 7.

73. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, Morocco, 15 Apr. 1994), THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994). When a new Member seeks to join the WTO, it negotiates the terms under which it will join, both multilaterally with the Membership and individually with Members. The results of both sets of negotiations are included in the accession protocol that binds the new member and may add obligations not undertaken by pre-existing Members. *See* World Trade Organization, Ministerial Decision of 10 November 2001: Accession of the People's Republic of China, WTO Doc. WT/L/432.

74. *See* World Trade Organization, Ministerial Decision of 10 November 2001: Accession of the People's Republic of China, WTO Doc. WT/L/432 (2001). (This concession was given in the bilateral negotiations between China and the United States).

75. *See Fact Sheet, Section 201 Cases: Imported Large Residential Washing Machines and Imported Solar Cells and Modules*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Jan. 22, 2018), https://ustr.gov/sites/default/files/files/Press/fs/201%20FactSheet.pdf.

76. *See* Proclamation No. 9705: Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 8, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/; Proclamation No. 9704: Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11,619 (Mar. 8, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/.

77. *See WTO members raise concerns over US tariffs on steel and aluminum at Goods Council*, WORLD TRADE ORG. (Mar. 23, 2018), https://www.wto.org/english/news_e/news18_e/good_23mar18_e.htm (explaining how various trading partners discriminated against by the U.S. tariffs have responded with retaliatory tariffs, that are in turn discriminatory against U.S. products, and the U.S. has claimed that such unilateral retaliation outside the DSU is itself inconsistent with the WTO).

78. GATT, *supra* note 22, at art. XXI(b)(ii).

national security safeguards,[79] the argument exists that such import-discriminatory measures are consistent with WTO obligations.[80] Additionally, the current U.S. safeguards on steel and aluminum are not applied equally to all trading partners, with Mexico and Canada released from the action and others (such as exemptions granted to Brazil, South Korea, and Argentine in return for quantitative limitations) receiving individual treatment.[81]

Like retaliation, other actions of current newsworthiness due to the Trump administration's willingness to routinely use them are specifically, or perhaps arguably, WTO consistent actions that are nevertheless discriminatory and for the purpose of reversing steps of economic liberalization, specifically to benefit domestic industry members at the expense of competing importers and foreign exporters. Such actions have been argued to be politically necessary "safety valves" that ultimately promote the international economic liberalization regimes as a whole;[82] regardless of intent, these provisions, like retaliation under the DSU, allow nations to target individual economic actors—typically, those tied to foreign interests—while remaining within the WTO structure.

IV. WTO-Consistent Discrimination Versus Investment Treaty Guarantees of Nondiscrimination

While discriminatory retaliation and safeguarding actions may be permissible under the WTO agreements, the same actions may not find the same excuse under applicable investment treaties. As a hypothetical, take a cheesemaker in the Czech Republic who found a receptive market in the U.S. and set up a U.S. subsidiary to import and distribute Czech cheese. When the U.S. retaliation against the EU in the Airbus dispute increased that distributor's costs by 25% because that cheese was a product of the Czech Republic, the question arises if that treatment violates the Czech-U.S. BIT's guarantee of treatment "on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable."[83] The Czech investment could claim that its treatment is less favorable than cheese pro-

79. *See Panels established to review US steel and aluminum tariffs, countermeasures on US imports*, WORLD TRADE ORG. (Nov. 21, 2018), https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm. The Panels for complaints by Mexico and Canada were terminated when those nations reached agreement with the United States to remove the additional tariffs for imports from Mexico and Canada. *See* Panel Report, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS551/R (July 11, 2019); Panel Report, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS550/R (July 11, 2019).

80. Whether other recent U.S. Section 301 actions that placed increased tariffs on hundreds of billions of dollars of Chinese imports and China's unilateral response with tariffs targeting U.S. imports could be found to be WTO compliant is beyond the scope of this paper, so are not separately addressed here (the U.S. has argued that the Chinese actions it is targeting with these tariffs are beyond the scope of the WTO while China has claimed that the U.S. actions are WTO inconsistent, though the issue has not brought before the WTO at the time of this drafting).

81. *See* CONG. RESEARCH. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (Apr. 2, 2019), https://fas.org/sgp/crs/misc/R45249.pdf.

82. *See*, *e.g.*, AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND GATT: ECONOMICS, LAW AND POLITICS 323 (Springer 2018).

83. Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investments, Czech-U.S., art. II.1., Oct. 22, 1991, S. TREATY DOC NO. 102-31.

ducers in Wisconsin or of importers of cheese from New Zealand, solely due to its relationship to the Czech Republic. A claim under the BIT's guarantee of fair and equitable treatment may also be brought, as a Czech cheese importer is being punished because an aircraft producer headquartered in the Netherlands received improper benefits.[84] Neither cheese nor the Czech Republic may have been connected to the Airbus dispute, but they were arbitrarily selected for retaliation.[85] The importer could also argue that it had legitimate expectations that the tariff rates it would face to bring Czech cheese into the U.S. would remain at the bound rates the U.S. set in its WTO obligations, not jump suddenly by 25%. A tribunal applying the legitimate expectations concept of fair and equitable treatment[86] could find that arbitrary selection of that investor's chosen line of business for retaliation violates that principle and thus demands compensation. This is not to suggest or imply that an investor would ultimately prevail in any action but the very likelihood of two claims itself could undermine the international economic regime as an unintended consequence.

Historically, actions that were found to be discriminatory in a similar manner were found to violate investment treaty protections. As discussed in more detail below, an International Centre for Settlement of Investment Disputes ("ICSID") tribunal in *Cargill v. Mexico* reviewed certain actions taken by Mexico against the use of imported corn syrup from the U.S. with the avowed purpose of pressuring the U.S. to comply with what Mexico saw as U.S. trade obligations.[87] That tribunal found that placing additional burdens on "a few foreign producers in an attempt to persuade another nation to alter its trade practices to be manifestly unjust."[88] The tribunal frowned on the discriminatory intent of such actions, where certain importers "were then forced to bear the entire burden of" the host's retaliatory measures, finding "this willful targeting, by its nature, to be a manifest injustice."[89]

Cargill is a particularly interesting decision with regard to the question of investment treaty actions against WTO-compliant retaliation, as it not only touched on the relationship between trade and investment regimes but also on the damages awarded for actions taken against imported products. The tribunal measured damages as the value of lost cash flows to the investment, calculated at the market share lost to the investment (due to the retaliatory measures) times the price the tribunal calculated it would have obtained for its imported corn syrup[90] but also added compensation for "upstream" losses to the U.S. company that was

84. *Id.* at art. II.2(a) ("Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.").

85. *Cf.* CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 290 (May 12, 2005) ("Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.").

86. *See, e.g.*, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003) (fair and equitable treatment "requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.").

87. *See* Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009).

88. *Id.* ¶ 299.

89. *Id.* ¶ 300. One difference that could be important between the issue in *Cargill* and any possible claims against WTO-approved retaliation as in the Airbus or Antigua disputes is that Mexico's measures regarding imported corn syrup were rejected not only by the investment treaty tribunal as permissible trade countermeasures, as discussed below, but also by the Panels. *See id.* ¶¶ 300, 420–29.

90. *Id.* ¶¶ 445–47.

unable to sell corn syrup to its Mexican subsidiary.[91] If followed in a case challenging WTO retaliation, the reasoning in *Cargill* could increase damages beyond the additional tariffs that were required due to retaliation.

V. How Have Investment Tribunals Treated WTO-Related Arguments?

Most parties and tribunals in investment disputes tend to not engage with trade disputes. However, there are a few significant investment disputes that have addressed trade-related arguments, either by arguing that the actions were permissible under trade law or by looking at trade law jurisprudence for similarly situated provisions. Some of these disputes are discussed below.

A. Investor-State Tribunals Do Not Engage With GATT/WTO Jurisprudence Even for Similarly Situated Provisions

Investor-state tribunals do not look at trade jurisprudence for resolving similarly situated provisions.[92] Indeed, provisions of non-discrimination, national treatment, and most-favored-nation treatment exist generally under both investment and trade law.[93] The underlying rationale for not engaging with the other regime is that each of these is a self-contained regime and therefore, recourse to other regimes is not desirable or appropriate.[94] This is despite the fact that the State may allege that the measures in question before an investment tribunal were permissible under appropriate trade rules.

For example, in *Cargill v. Mexico*, the Respondent imposed a 20% tax on soft drinks and other beverages that contained sweeteners other than cane sugar.[95] This meant that the presence of "any high fructose corn syrup ('HFCS') in a beverage was sufficient to trigger" this tax.[96] The arguments raised by both parties drew heavily on the obligations under the international trade regime. Mexico alleged that these measures were adopted because of, *inter alia*, the

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91. *Id.* ¶¶ 525–26. The tribunal discounted damages due to antidumping duties Mexico had in place on U.S. corn syrup prior to the measures challenged in *Cargill*, despite recognizing those antidumping duties were also illegal. *Id.* ¶ 455. However, the antidumping duties were not challenged before the investment treaty panel (*see id.* ¶ 449 ("Claimant . . . does not claim damages for the losses it incurred because of the antidumping duties")), and were "outside of the temporal jurisdiction of this Tribunal." *Id.* ¶ 297.

92. *See* Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 389 (Aug. 27 2009).

93. *See* Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶¶ 175–76, (Jul. 1 2004).

94. *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, U.N. Doc. A/61/10 (2006) ¶ 251, *reprinted in* [2006] 2 Y.B. INT'L L. COMM'N 175, U.N. Doc A/CN.4/SER.A/2006/Add. 1 ("Special ('self-contained') regimes as *lex specialis*. A group of rules and principles concerned with a particular subject matter may form a special regime . . . and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.").

95. *See Cargill, supra* note 87, at ¶ 100.

96. *Id.* ¶ 105.

U.S.' "failure to provide the required market access for [Mexican] sugar."[97] In response, the U.S. requested the establishment of a Panel to address the argument that Mexico's "antidumping duties violated the WTO Anti-Dumping Agreement" and there were two reports in 2000 issued by the WTO, both of which confirmed that Mexico's antidumping duties did not comply with GATT requirements.[98] In 2002, Mexico revoked its anti-dumping duties and reimbursed the Claimant for duties paid in 1997 and 1998.[99] The Claimant argued that the antidumping duties had a "non-tax related purpose" of "protecting the Mexican sugar industry"[100] and this violated the "national treatment" obligation in the North American Free Trade Agreement ("NAFTA") (Article 1102).[101]

Both parties agreed that there were two requirements for the national treatment clause: "that the investor or the investment be in 'like-circumstances' with domestic investors or their investments, and that the treatment accorded to the investor or the investment be less favourable than the treatment accorded to domestic investors or their investments."[102] The question before the tribunal was whether there was a relationship between "like circumstances" in Article 1102 with "like goods" as found under GATT.[103] According to the Claimant, the "like goods is an important component of 'like circumstances,'" while Mexico opposed this argument.[104]

The finding of the tribunal is interesting for two reasons. First, and significantly for the purposes of this article, the tribunal expressly stated that it is not expressly bound by the GATT understanding, even though national treatment has played such a pivotal role in the GATT jurisprudence:

> The Tribunal accepts that "like circumstances" in Article 1102 has to be interpreted on its own terms. Article 1102 requires that no less favourable treatment be provided when foreign investors and domestic investors are in "like circumstances". It does not refer to "like products" and there cannot be an automatic transfer of GATT law relating to "like products" to the Article 1102 term "like circumstances". If the drafters of NAFTA Chapter 11 had intended to equate "like circumstances" with "like products" they could have done so. In this respect, this Tribunal agrees with the tribunal in Methanex.[105]

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97. *Id.* ¶ 100.

98. *Id.* ¶ 102.

99. *Id.* ¶ 103.

100. *Id.* ¶ 109.

101. *Id.* ¶ 186; North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, Article 1102 ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.").

102. *Cargill, supra* note 87, at ¶ 189.

103. *Id.* ¶ 192.

104. *Id.*

105. *Id.* ¶ 193 (emphasis added).

However, the tribunal stated that "like goods" can be an "important component of 'like circumstances'" and concluded that HCFS and cane producers were in "like circumstances," stating in the Tribunal's view, "a measure affecting a particular industry designed to put pressure on the U.S. government will focus on those who are likely to be able to influence the U.S. government and, in this, there is no necessary relationship with economic circumstances."[106]

Because the treatment of the HCFS producers was indeed different from the cane producers, the tribunal found a breach of the national treatment obligation under NAFTA.[107] The critical fact remains that the tribunal was not persuaded by Mexico's arguments that the measures were adopted in reaction to the U.S.' failure to provide market access to Mexican sugar producers.[108] The Tribunal also refused to adopt GATT/WTO jurisprudence or engage meaningfully with GATT/WTO jurisprudence.[109] However, the decision seemed to give some indirect effect to WTO findings.

1. Investor-State Tribunals May Not Have Jurisdiction to Engage With GATT/WTO Jurisprudence

One reason why a tribunal may refuse to engage with the GATT/WTO jurisprudence may be the fact that an investment tribunal has limited jurisdiction and therefore cannot examine jurisprudence outside the regime.[110] Some tribunals have addressed this issue. For example, Mexico's defense of "countermeasures" under GATT/WTO law was discussed in great length in a related arbitration arising out of the same underlying facts referred above: *Archer Daniels v. Mexico*.[111] Mexico argued that the tax was adopted as a legitimate countermeasure "permissible under customary international law, as applied in the NAFTA setting."[112] The tribunal noted that Mexico's arguments drew heavily on GATT/WTO jurisprudence, although the tribunal noted it did not have jurisdiction to make any findings on that basis.[113] However, the tribunal noted that it had jurisdiction to make a finding under customary international law by looking at the ICJ judgment in the *Gab?íkovo-Nagymaros* case, which provided several cumulative con-

106. *Id.* ¶ 209.

107. *Id.* ¶¶ 219–20.

108. *Id.*

109. *Id.* ¶ 194.

110. *See* Grand River Enterprises Six Nations, Ltd. and others v. United States of America, UNCITRAL, Award, ¶ 71 (Jan. 12, 2011) ("This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.").

111. *See* Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/5, Award, ¶¶ 110–80 (Nov. 21, 2007).

112. *Id.* ¶ 110.

113. *Id.* ¶¶ 130–31 ("The Respondent argued at some length that the WTO Panel that examined the same Tax considered it to be a countermeasure . . . Yet the WTO tribunal found that the Tax, while a countermeasure, was inconsistent with Mexico's obligations under Article III of the GATT and had to be repealed, which was done as of December 31, 2006. The Panel reasoned that the Tax was not a valid countermeasure because the term ' . . . to secure compliance . . .' in Article XX (d) of the GATT does not apply to measures taken by a Member State in order to induce another Member to comply with obligations owed to it under a non-WTO agreement. Therefore, the Panel dismissed the countermeasure defense, not because the measure was in itself contrary to international law, but because Mexico could not resort in the WTO proceedings to a countermeasures defense in relation to the alleged breach by the United States of a non-WTO treaty, such as the NAFTA.").

ditions to be met.[114] The tribunal examined the negotiating history of the tax and found there was "insufficient evidence" that Mexico enacted the tax to comply with the U.S. obligations.[115] The only evidence was to protect the Mexican sugar industry.[116] Therefore, the tribunal concluded that Mexico "has neither proved that the Tax was enacted in response to the alleged U.S., breaches nor that the measure was intended to induce compliance by the U.S. with its NAFTA obligations."[117]

B. What Are the Options to Promote Greater Engagement Between the Two Regimes?

As noted above, a State has to meet its concurrent obligations covering both its trade obligations and investment obligations. However, it is possible that meeting obligations under one regime may give rise to claims under the other regime. The query therefore is how to mitigate such damages and what should a decision-maker do in such circumstances.

Indeed, if the decision of a government to prohibit certain activities (*e.g.*, the ban of certain industries or activities, including importing certain goods from certain countries), which may comply with trade regulations (*e.g.*, as a legitimate countermeasure) may give rise to claims of expropriation or breach of fair and equitable treatment. Further, as noted above, discriminatory measures that are permissible under trade law through retaliation may have the potential to run afoul of treaty obligations. Although the jurisprudence has not yet addressed these situations, it is likely that such situations will arise in the future as the number of disputes grows.[118] Moreover, where in the past major trade disputes mostly avoided reaching the retaliation stage,[119] the recent multi-billion dollars in retaliations set by the U.S. and China, if carried through and successful in instigating the actions sought from other WTO Members, may heighten interest in the use of retaliation by other WTO Members. It also increases the likelihood that a party impacted by retaliatory or other trade measures, and without any direct route to challenge their treatment, will seek relief via other means, including investment treaty arbitration. How an action sanctioned by one international economic regime and opposed by another should be resolved will be a complex and possibly messy dilemma.

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114. *Id.* ¶ 126 (quoting Gabcikovo-Nagumaros Project (Hung. v. Slovk.), 1997 I.C.J. 3, Judgment, ¶¶ 7, 55, 56 (Sep. 25, 1997)) ("In order to be justifiable, a countermeasure must meet certain conditions . . . In the first place it must be taken in response to a previous international wrongful act of another state and must be directed against that State . . . Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it . . . . In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question . . . [and] its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and . . .the measure must therefore be reversible.") (ellipsis and brackets in original).

115. *Id.* ¶ 149.

116. *Id.* ¶ 212.

117. *Id.* ¶ 151.

118. This could occur if the current impasse at the DSU is resolved, and new Panel reports are adopted by the DSU that give rise to new retaliatory measures.

119. As of 2018, only 15 WTO disputes reached the step of determining the amount of retaliation permissible. *See Dispute Settlement Activity — Some Figures*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited Apr. 18, 2021).

Recognizing the limitations on jurisdiction and/or the applicable law which may not permit wholesale importation of jurisprudence from the other regime, one option might be to facilitate engagement through interpretative techniques. For example, Article 31(3) of the Vienna Convention on the Law of Treaties ("VCLT") states that in interpreting the text of a treaty: "There shall be taken into account, together with the context: . . . (c) [a]ny relevant rules of international law applicable in the relations between the parties."[120] Therefore, a decision-maker in one regime could be inspired to look at prior or related decisions from other regimes. This does not imply that the regime is bound by decisions from the other regime, but a more careful engagement will permit a harmonious development of the law and prevent fragmentation.

Another option might be for the WTO to submit *amicus curiae* submissions to arbitral tribunals that are engaged in similar disputes. There is some precedent for this, albeit in a different context: for example, the European Commission submitted amicus briefs on issues that pertain to EU law to arbitral tribunals.[121] This can help an arbitral tribunal make a more informed decision. Further, parties in an investment dispute can be invited to submit expert opinions or witness testimony on parallel trade matters to comment on the trade dispute and potential impacts that it may have with the investment dispute.

As both regimes mature, the likelihood of conflict between the two will grow and a meaningful engagement between them will promote a harmonious development of the law.

VI. Conclusion

The WTO system was set up to use occasional antiliberal actions to pursue economic liberalizations, either by using retaliation to induce uncooperative members of that system into compliance or other means seen as beneficial to the overall goal. However, that view of allowing occasional reversal from the principal strategy of liberalization and nondiscrimination is not written into investment treaties, which contain no such provisions to allow discriminatory or retaliatory steps, particularly when those steps are taken against a party that had no role in the matter underlying retaliation. Investment treaties instead offer guarantees of consistent treatment to the individual party and offer compensation in the face of such inconsistent measures.

Such contradictory treatment of certain actions may not have been intended by the drafters of the various treaties, but the separate development of these two international economic legal systems could lead to a collision over such actions and tier outcomes. Policymakers, particularly those formulating retaliatory measures even approved by the WTO, should be cognizant of the possibility that such measures could be treated in a different light under different international obligations and may wish to consider whether such measures can be constructed to minimize the possibility of creating liability under other international obligations. Decision-

120. Vienna Convention on the Law of Treaties, art. 31(3), May 23, 1969, 1155 U.N.T.S. 331.

121. Carl Nisser & Gordon Blanke, *Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings*, 4 EUR. COMPETITION L. REV. 174, 176 (2006).

makers in both regimes, either as Panels or Arbitral Tribunals, may wish to consider and adopt interpretative techniques to facilitate greater harmonization of the law and permit both systems to grow together.

City of Aventura Police Officers' Retirement Fund v. Arison

70 Misc. 3d 234 (Sup. Ct., N.Y. Cnty. 2020)

The Supreme Court of New York granted Defendants' motion to dismiss a derivative lawsuit against Carnival plc – an English company – and Carnival Corporation's Directors because Plaintiff did not have requisite standing under the Companies Act under English law.

I. Facts & Procedure

The Court in *City of Aventura Police Officers' Retirement Fund* was faced with the "novel questions" as to "whether and under what circumstances, the shareholders of an English Company may bring a derivative action in New York Court."[1] To answer the question, the Court had to determine whether or not the English law surrounding shareholder standing in derivative claims were substantive or procedural and if New York or English law should be applied under the "internal affairs doctrine," which states that the jurisdiction where the company is incorporated "has the greatest interest in regulating [its] internal affairs and the law of that jurisdiction is applied to corporate matters."[2]

Plaintiff, the City of Aventura Police Officers' Retirement Fund, held American Depository Shares ("ADS") in Carnival plc., an English company.[3] Carnival Corporation and Carnival plc are part of a dual-listed corporation known as Carnival Corporation and plc (together, "Carnival").[4] Defendants are directors of Carnival.[5] Dual listing combines Carnival Corporation and Carnival plc's businesses and enables the two to act as a single economic entity with an identical executive team and board of directors.[6] Carnival plc remains incorporated in England and Wales, while Carnival Corporation is incorporated in Panama, giving them distinct legal identities.[7]

In December 2016, Princess Cruise Lines, Ltd. ("Princess"), a Carnival subsidiary, entered into a plea agreement in which it plead guilty to knowingly discharging waste into U.S. waters.[8] The plea agreement consisted of a $40 million fine, required Princess to establish an environmental program, and included a five-year probation.[9] In 2019, the U.S. brought an action against Princess for six probation violations, carrying $20 million in additional fines.[10] On October 23, 2019, Plaintiff brought a derivative action against Defendants on behalf of

1. City of Aventura Police Officers' Retirement Fund v. Arison, 70 Misc. 3d 234, 235 (Sup. Ct., N.Y. Cnty. 2020).
2. *Id.* at 239 (quoting complaint ¶ 12-14).
3. *Id.* at 235.
4. *Id.* at 236
5. *Id.* at 235.
6. *Id.* at 236.
7. *Id.* at 237.
8. *Id.* at 237–38.
9. *Id.* at 238.
10. *Id.* at 238–39.

Carnival plc, alleging that defendants breached their fiduciary duty to Carnival plc by allowing "serious violations of U.S. laws and U.S. federal court orders . . ." and damaging the financial health of the company.[11]

Plaintiff acknowledged that New York follows the internal affairs doctrine.[12] However, Plaintiff argued that the court should set aside this principle in the instant case and apply New York Law to avoid an "unjust result."[13] The Court began by addressing Plaintiff's standing under New York law. Under New York law, "'shareholders instituting a derivative action must demonstrate that they owned stock both when the lawsuit was brought and at the time of the transaction(s) of which they complain.'"[14] The Court held that Plaintiff satisfied the contemporaneous ownership requirement, "suing derivatively on behalf of nominal defendant Carnival plc, 'seek[ing] to vindicate Carnival plc's rights against its wayward fiduciaries.'"[15]

Defendant argued that Plaintiff lacked standing because it was not a shareholder in Carnival Corporation, an argument the Court found "unavailing."[16] The Court stated that Defendants relied on case law which called for the ownership of shares in the nominal defendant, which in the instant case was Carnival plc, not Carnival Corporation.[17] Alternatively, Defendants relied on *Sabo v. Carnival Corp.*, an 11th Circuit case which "analyzed the Carnival DLC entity's capacity to be sued, not the plaintiff's standing to sue on behalf of Carnival plc . . . ," a critical differentiation in the eyes of the Court.[18] Unlike standing, capacity "not concern the injury a party suffered, but whether the legislature invested that party with authority to seek relief in court." [19] The Court then distinguished the results of *Sabo* and the case at bar, noting that the *Sabo* plaintiffs failed to sue the various corporate components of Carnival DLC, unlike Plaintiff at bar who "chart[ed] a more familiar course for a derivative action, seeking to hold the board members of Carnival plc for harm they allegedly caused to Carnival plc."[20] The Court further explained that Defendants misinterpreted the purpose of standing, the focus of which is the "'party seeking to get [its] complaint before a [court] and not on the issues [it] wishes to have adjudicated.'"[21] "[T]he share-ownership rule focuses on whether the party seeking to sue derivatively possesses standing to do so, not on whether the derivative claims themselves show merit."[22]

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11. *Id.* at 239 (quoting complaint ¶ 11).
12. *Id.*
13. *Id.*
14. *Id.* at 240 (quoting Pessin v. Chris-Craft Indus. Inc., 181 A.D.2d 66, 77 (1st Dep't 1992)).
15. *Id.* (quoting complaint ¶ 11).
16. *Id.* at 241.
17. *Id.*
18. *Id.* (citing Sabo v. Carnival Corp., 762 F.3d 1330, 1332–1334 (11th Cir. 2014)).
19. *Id.* (quoting *In re* World Trade Ctr. Lower Manhattan Disaster Site Litig., 30 N.Y.3d 377, 384 (2017)). (internal quotations omitted).
20. *Id.*
21. *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)).
22. *Id.* at 241–42 (citing *In re* Facebook, Inc., IPO Derivative Litig., 797 F.3d 148, 159 (2d Cir. 2015)).

Defendants continued to argue that Carnival plc board members did not owe a fiduciary duty to oversee Princess and that "Plaintiffs claims 'belong[]' to Princess's parent, Carnival Corporation, not to Carnival plc."[23] The Court, unpersuaded by this argument, found Defendants' argument to be an attack on merits of Plaintiff's case, disguised as a challenge to their standing. The Court stated, "[t]he scope of Defendant's fiduciary duty to Carnival plc, not Plaintiff's undisputed status as shareholder of that entity, will determine whether Carnival plc has a cause of action."[24] The Court did not agree with Defendant's representation of Carnival Corporation and Carnival plc as two distinct companies, stating that on a practical level, "the two companies operate interdependently."[25] The Court reached this conclusion because of the companies' identical executive management and board of directors. Based on the arrangement, concluding otherwise "would not present a true and fair view of the economic realities of their operations."[26] Additionally, the Court found it notable that although "Princess is a Carnival Corporation subsidiary, the Plea Agreement . . . received authorization from the boards of both Carnival Corporation and Carnival plc . . . ."[27]

II. The Internal Affairs Doctrine

"'[U]nder the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation.'"[28] Under the doctrine, only one State should have regulatory authority over a company's corporate governance.[29] Adherence to multiple authorities over similar matters could result in conflicting demands on the company.[30] As such, the Court required Plaintiff to show it had standing under English law, which holds that the entity's place of incorporation governs the standing requirements."[31] However, the Court noted that a proper application of the internal affairs doctrine required the law to be substantive in nature; the procedure was to be "'governed by the law of the forum.'"[32] The Court proceeded to analyze whether or not English law governing standing in derivative actions was procedural or substantive in nature.[33] The Court explained that if the English rules were "substantive limitations," then Plaintiff's claims must be barred; however, if they were procedural in nature, those rules would not be applicable in New York courts.[34]

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23. *Id.* at 242 (citations omitted).
24. *Id.*
25. *Id.*
26. *Id.* (internal citations and quotations omitted).
27. *Id.*
28. *Id.* at 243 (quoting New Greenwich Litig. Tr., LLC v. Citco Fund Services (Europe) B.V., 145 A.D.3d 16, 22 (1st Dept. 2016) (citing Davis v. Scottish Re Group Ltd., 30 N.Y.3d 247, 250 (2020) (internal citations omitted)).
29. *Id.* (citation omitted).
30. *Id.* (citations omitted).
31. *Id.* (citations omitted).
32. *Id.* (Davis v. Scottish Re Group Ltd., 30 N.Y,3d 247, 252 (2017)).
33. *Id.* (citing Tanges v. Heidelberg N. Am., Inc., 93 N.Y.2d 48, 53 (1999)).
34. *Id.* at 244.

Plaintiff argued that the New York Business Corporation Law ("BCL") overrode the internal affairs doctrine on issues of standing in a derivative claim.[35] The Court disagreed with Plaintiff's argument, stating that the BCL acts as "a mere statutory predicate to jurisdiction," conferring jurisdiction to New York courts, but it did not require the application of New York law in such instances.[36] The Court also explained that the BCL was not a conflict of laws statute and did not require the application of New York law, but rather a statute that allowed for the application of New York's conflict of law rules.[37] The Court concluded that "the internal affairs doctrine requires the consideration and application of substantive English law to decide Plaintiff's standing to sue derivatively."[38]

III. Derivative Actions Under the Companies Act

The U.K. Companies Act 2006 ("Companies Act") is the controlling English law surrounding derivative claims brought on behalf of English, Northern Irish, Scottish, and Welsh companies.[39] Part 11 of the Companies Act governs derivative claims and proceedings by members and is divided into two chapters: Chapter 1 applies to English, Northern Irish, and Welsh companies, while Chapter 2 applies to Scottish companies.[40] First, the Companies Act defines a derivative claim as "a claim brought by a 'member of the company . . . in respect of a cause of action vested in the company, and . . . seeking relief on behalf of the company.'"[41] The Court explained that the Companies Act only allowed for a claim to be brought "'in respect of a cause of action arising from an actual or proposed act or omission involving negligence, breach of duty, or breach of trust by a director of the company.'"[42] Unlike New York law, the Companies Act did not require simultaneous ownership to bring a derivative action.[43] Finally, the Court explained that under the Companies Act, an action may only be brought under Chapter 1 or in pursuance of a court order in proceedings for protection members against unfair prejudice.[44]

The Companies Act defines a member as "a person who agrees to become a member of a company, and whose name is entered and registered in its register of members."[45] A company is defined as "a company incorporated in the [United Kingdom] under the Companies Act or predecessor legislation."[46] The membership requirement does not govern companies incorporated outside of the U.K. and Plaintiff did not argue that it was a member of Carnival plc nor

35. *Id.*
36. *Id.* (citations omitted).
37. *Id.* (citations omitted).
38. *Id.* at 245.
39. *Id.* at 245.
40. *Id.*
41. *Id.* at 245 (quoting Companies Act § 260(1)(a)-(b)).
42. *Id.* (quoting Companies Act § 260(3)).
43. *See id.* (citing Companies Act § 260(4)).
44. *Id.* (citing Companies Act § 260(2).
45. *Id.* at 246.
46. *Id.*

did it dispute that Plaintiff could not be a member under the Companies Act because it held Carnival plc shares in the form of ADS. Under the Companies Act, an ADS holder where the depository is the member, or the security interest holder, cannot bring a derivative claim.[47]

A. The Membership Requirement is a Substantive Bar to Plaintiff's Claims

"'Where there is disagreement as to the nature of a law, the law of the forum normally determines for itself whether a given question is one of substance or procedure.'"[48] When analyzing if a rule is substantive or procedural, the Court must look to "(i) 'the plain language of the rule,' (ii) whether the statute itself 'creates a right,' and (iii) 'general policy considerations.'"[49] Next, the Court assessed the statutory text to determine whether "foreign law regulates the substantive rights of foreign companies . . . or the procedural rules of a foreign forum."[50] The Court concluded that although certain sections of Chapter 1 of Part 11 of the Companies Act implied that the rules surrounding standing were procedural in nature, the granting of specific rights and claims for relief was incompatible with finding the rules to be purely procedural in nature.[51] The Court explained Plaintiff misrelied on *Scottish Re*, where "the statute focused on derivative actions brought in the Cayman Islands, not on derivative actions brought on behalf of Cayman Islands companies wherever they may be sued."[52] "The requirement that the derivative plaintiff be a 'member' is not tied to unique procedural trappings of foreign courts."[53] Finally, the Court noted that, generally, limits on a plaintiff's right to initiate derivative actions are a substantive matter.

B. Rights and Remedies

Next, the Court determined whether or not the membership requirement concerned a right or a remedy.[54] Here, the Court compared the statute of limitations to statutes of repose.[55] Under New York law, the Court explained that statutes of limitation are procedural in nature because while a plaintiff may lose their remedy, they do not lose their right.[56] Conversely, statutes of repose are triggered by an event, independent of the plaintiff's claim or injury, blocking legal action immediately.[57] As such, statutes of repose are considered substantive in nature.[58] The Court applied a similar rationale to derivative proceedings and inquired as to whether "[the plaintiff's] right to bring this action involves no more than compliance with procedural requirements extraneous to the substance of their claim, or whether it concerns the very nature

47. *Id.*
48. *Id.* at 247 (quoting *Scottish Re*, 30 N.Y.3d at 252).
49. *Id.* at 248 (quoting *Scottish Re*, 30 N.Y.3d at 255–56).
50. *Id.*
51. *Id.* at 249–50.
52. *Id.* at 249.
53. *Id.*
54. *Id.* at 250.
55. *Id.* at 251.
56. *Id.*
57. *Id.*
58. *Id.*

and quality of their substantive rights, powers and privileges as stockholders."[59] The Court concluded that the Companies Act "shaped the substantive rights of shareholders to sue derivatively on behalf of English Corporations."[60] "[T]he membership requirement [wa]s predicated on a fact independent from the plaintiff's particular claim to injury," preventing what may have been a cause of action from arising.[61]

IV. Policy Considerations

Finally, the Court discussed potential policy implications for such a decision. The Court's primary concern was inadvertently imposing an unnecessary burden on foreign courts and federal courts sitting in diversity jurisdiction.[62] The Court noted that concerns of efficiency should weigh in all matters of first impression; these concerns are heightened when the interpretation of foreign laws is implicated.[63] When such rulings are decided, they should be done to "'discourage forum shopping'" and invite "'judicial efficiency.'"[64] "Classifying the membership requirement as substantive imposes no additional burden on other courts, and at the same time discourages forum shopping."[65]

The Court addressed its final policy concern of international comity.[66] International comity is the doctrine by which one nation allows for another nation's legal acts within its domain, whether it be legislative or judicial acts.[67] Here, the Court noted that the English law has determined that a membership requirement to derivative actions was in the investment community's best interest.[68] "Imposing New York rules of shareholder standing . . . would undermine the limits embodied in the Companies Act definition of 'member' and would subject the company, its officers, and directors to litigation costs and risks that U.K. lawmakers seemingly sought to prevent."[69]

Accordingly, the Court granted Defendants' motion to dismiss and dismissed the Complaint in its entirety.

Sean Johannsen

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59. *Id.* (quoting Hausman v. Buckley, 299 F.2d 696, 701 (2d Cir. 1962).
60. *Id.* at 252.
61. *Id.*
62. *Id.*
63. *See id.*
64. *Id.* at 253 (quoting Tanges v. Heidelberg N. Am., 93 N.Y.2d 48, 58 (1999)).
65. *Id.*
66. *Id.* at 253.
67. *Id.*
68. *Id.*
69. *Id.*

SSI (Beijing) Co., Ltd. v. Prosper Bus. Dev. Corp.

2020 U.S. Dist. LEXIS 136699 (S.D.N.Y. July 30, 2020), *R. & R. Adopted*, 2020 U.S. Dist. LEXIS 161357 (S.D.N.Y. Sept. 3, 2020)

The United States District Court for the Southern District of New York granted Prosper's motion to compel SSI (Beijing) Company Ltd. to arbitrate and denied SSI Beijing's cross-motion to stay arbitration because SSI Beijing's assertion that the arbitration clause was invalid under Chinese law was not an internationally recognized defense to arbitration under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards.

I. Holding

Recently, in *SSI (Beijing) Co., Ltd. V. Prosper Bus. Dev. Corp.* in the United States District Court for the Southern District of New York, plaintiff SSI (Beijing) Company Ltd. ("SSI Beijing") asserted that its joint venture Cooperation Agreement's arbitration clause was "invalid under Chinese law because it fail[ed] to specify an 'arbitration institution' to oversee the arbitration, as required by Articles 16(2) and 18 of the Arbitration Law of the People's Republic of China" ("PRC").[1] Magistrate Judge Barbara Moses determined that such an assertion was ineffectual, as it was not an internationally recognized defense to arbitration under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention").[2] As a result, Judge Moses found that the arbitration agreement at issue was in fact enforceable and recommended that SSI Beijing be compelled to arbitrate.[3] Judge Moses' Report and Recommendation was adopted in full by District Judge Valerie Caproni on September 3, 2020.[4]

II. Facts and Procedure

SSI Beijing is a joint venture organized under the laws of the People's Republic of China.[5] It was formed in May 2006 by Prosper Business Development Corporation ("Prosper"), SSI Netherlands B.V., and China Guoan Culture & Media Investment Corporation ("Guoan").[6] Prosper is an Ohio corporation with its principal place of business in Ohio, while Guoan is a Chinese company with its principal place of business located in Beijing.[7] The joint venture was formed in order "'to create and grow a China-focused, Internet-based proprietary survey sample panel, and to provide market survey, consultancy, and related services to customers in China.'"[8]

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1. SSI (Beijing) Co., Ltd. v. Prosper Bus. Dev. Corp., N.A., 2020 U.S. Dist. LEXIS 136699, at **8–9 (S.D.N.Y. July 30, 2020), R. & R. Adopted, 2020 U.S. Dist. LEXIS 161357 (S.D.N.Y. Sept. 3, 2020).
2. *Id.* at *28.
3. *Id.* at *36.
4. *See SSI (Beijing) Co.*, 2020 U.S. Dist. LEXIS 161357, at *3.
5. *Id.*
6. *SSI (Beijing) Co.*, 2020 U.S. Dist. LEXIS 136699, at *3.
7. *Id.*
8. *Id.* at *4 (quoting Pet. ¶ 10).

On June 15, 2006, SSI Beijing, Guoan, and Prosper entered into a written Cooperation Agreement.[9] The Cooperation Agreement contained a Governing Law clause (Section 9(e)) which provided that the Cooperation Agreement's "'validity, interpretation and implementation . . . shall be governed by the published and publicly available laws of China but, in the event that there is no published and publicly available law in China governing a particular matter relating to this [Cooperation Agreement], reference shall be made to general international commercial practice.'"[10] The Cooperation Agreement also contained a Dispute Resolution Clause (Section 9(f)), which stated that if a conflict regarding performance arose, "a written request shall be submitted for binding arbitration in proceedings to be conducted in the State of Delaware."[11]

On June 11, 2019, Prosper alleged that SSI Beijing had breached the Cooperation Agreement.[12] Then, the parties agreed that if they would need to proceed to arbitration, they would do so in New York City, rather than the State of Delaware.[13] Next, the parties took "concrete steps towards arbitrating," and on August 17, 2018, "Prosper served its statement of claims on SSI Beijing and submitted it to the three-arbitrator panel," doing so "in accordance with the parties' negotiated schedule."[14] Despite these initiating steps, on September 7, 2018, "'SSI Beijing unilaterally informed the three-arbitrator panel that it would not proceed with the arbitration.'"[15]

On September 14, 2018, the same day that its statement of claims would have been due to the arbitration panel, SSI Beijing initiated the action.[16]

III. Analysis

A. Subject Matter Jurisdiction

First, SSI Beijing claimed that the Court had subject matter jurisdiction as a result of the Court's diversity jurisdiction, as established by 28 U.S.C. § 1332.[17] The Court found this to be incorrect, since "'[f]or diversity purposes, the citizenship of a joint venture is the citizenship of each of its members.'"[18] Since Prosper, a member of SSI Beijing, is a citizen of Ohio, the joint venture itself is also a citizen of Ohio.[19] Therefore, the parties were not considered diverse, and therefore were unable to meet the standards required by 28 U.S.C. § 1332(a)(1).[20]

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9. *Id.*
10. *Id.* at **4–5.
11. *Id.* at *5.
12. *Id.* at *6.
13. *Id.* at *7.
14. *Id.* at *8.
15. *Id.* (quoting Joint Ltr. at 3).
16. *Id.*
17. *Id.* at *17.
18. *Id.* (quoting Schiavone Constr. Co. v. City of New York, 99 F.3d 546, 548 (2d Cir. 1996)).
19. *Id.*
20. *Id.*

Second, SSI Beijing claimed that the Court had jurisdiction to hear the case because of federal question jurisdiction, pursuant to Chapter 1 of the Federal Arbitration Act ("FAA").[21] While Chapter 1 creates "'a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate,'" it does not, however, "'create any independent federal-question jurisdiction.'"[22] Therefore, a litigant who invokes Chapter 1 of the FAA must first "'satisfy the requirements of jurisdictional amount and diversity of citizenship, or demonstrate the existence of some other independent basis of subject matter jurisdiction, before the court may validly entertain an application for any remedy authorized by the statute.'"[23]

Despite the failed arguments given by SSI Beijing as to why the Court had jurisdiction to hear the dispute, Prosper invoked 9 U.S.C. § 203.[24] This provision gives "federal district courts original jurisdiction over any action or proceeding 'falling under the Convention.'"[25] In order for an agreement to fall under the Convention, and therefore fall within the jurisdiction of the federal courts, it must "'aris[e] out of a legal relationship . . . which is considered as commercial.'"[26] Courts in the circuit have established four "'jurisdictional prerequisites'" that must be met before an international arbitration agreement can be enforced under the Convention: "'(1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial, and (4) it cannot be entirely domestic in scope.'"[27] As the Cooperation Agreement at issue satisfied these four factors, the Court therefore found it had subject matter jurisdiction over the dispute.[28]

B. Venue

While there is no venue clause in the Cooperation Agreement and no mention of New York in particular, venue was appropriate.[29] Although the Cooperation Agreement had originally mentioned Delaware as the place of arbitration, the parties had since amended the Cooperation Agreement to designate New York "as the place of arbitration," rendering the venue appropriate under Section 204. [30] Furthermore, "the right to attack venue is personal to the parties and waivable at will."[31] Therefore, since neither party "raised any objection to venue in this district," and in fact both "affirmatively alleged that venue [was] proper here," any objections to venue had been waived.[32]

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21. *Id.*
22. *Id.* (quoting Odeon Capital Grp., LLC v. Ackerman, 149 F. Supp. 3d 480, 482 n.4 (S.D.N.Y. 2016).
23. *Id.* at **17–18 (quoting DaPuzzo v. Globalvest Mgmt. Co., L.P., 263 F. Supp. 2d 714, 722 (S.D.N.Y. 2003)).
24. *Id.* at *18.
25. *Id.* at *18 (quoting 9 U.S.C. § 203).
26. *Id.* (quoting 9 U.S.C. § 202).
27. *Id.* (citing Dumitru v. Princess Cruise Lines, Ltd., 732 F. Supp. 2d 328, 335 (S.D.N.Y. 2010) (quoting Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 92 (2d Cir. 1999))).
28. *Id.* at *19.
29. *Id.* at **19–20.
30. *Id.* at *20.
31. *Id.* (internal citation omitted).
32. *Id.*

C. Legal Standards Applicable to the Parties' Motions

Since the standard for granting a Rule 12(c) motion is identical to that of a Rule 12(b)(6) motion, "the court must accept all well-pleaded factual allegations in the Petition as true."[33] In addition, "the standard for granting a motion to compel or stay arbitration, or to enjoin an ongoing arbitration, is similar to the standard used to determine a summary judgment motion.[34] In the present case, there was no dispute over any of the factual issue that was material to the motions, nor was there any dispute that both sides of the litigation are "parties to, and bound by, the Cooperation Agreement."[35] As a result, the Court decided the cross-motions, rather than requiring any further court proceedings.[36]

D. Legal Standards Applicable to Disputes Arising Under the Convention and Its Implementing Legislation

The purpose of the Convention is "to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions," as well as "unify the standards by which agreements to arbitrate are observed."[37] In order to achieve this, the treaty requires "a court to compel arbitration of any dispute falling within the scope of the agreement pursuant to the terms of the agreement."[38]

A party to a treaty that resists arbitration is the one who bears the burden of proof in urging the court to "'find[] that the said agreement is null and void, inoperative, or incapable of being performed.'"[39] In order to be found as "null and void," an agreement must either (1) be "subject to an internationally recognized defense such as duress, mistake, fraud or waiver" or (2) "when it contravenes fundamental policies of the forum state."[40] Furthermore, these defenses to enforcement "are to be construed narrowly, so as not to undermine the goals of the Convention and the FAA."[41]

E. The Asserted Invalidity of the Parties' Arbitration Agreement Under Articles 16(2) and 18 of the PRC Arbitration Law is Not an Internationally Recognized Defense to Arbitration Under the Convention and the FAA

The only defense given by SSI Beijing to the enforcement of the arbitration agreement was its allegation that Section 9(f) of the Cooperation Agreement was "'invalid and unenforceable' under Articles 16(2) and 18 of the PRC Arbitration Law because it fails to specify an arbi-

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33. *Id.* at *21 (citing Hughes v. Lillian Goldman Family, LLC, 153 F. Supp. 2d 435, 439 (S.D.N.Y. 2001)).

34. *Id.* (internal quotation and citation omitted).

35. *Id.* at *22.

36. *Id.*

37. *Id.* at **22–23 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974)).

38. *Id.* at *23 (internal quotation and citation omitted).

39. *Id.* (internal citation omitted).

40. *Id.* at *25 (citation omitted).

41. *Id.* at *24 (citing Belship Navigation, Inc. v. Sealift, Inc., No. 95 Civ. 2748 (RPP), 1995 U.S. Dist. LEXIS 10541, at *6 (S.D.N.Y. July 28, 1995)).

tration institution."[42] Therefore, the Court decided whether it was required to "decline to enforce an arbitration agreement that the parties concededly made by applying the domestic arbitration laws of China, which . . . refuses to honor an 'ad hoc' arbitration agreement, instead insisting that the parties identify a sponsoring organization before their agreement will be honored."[43]

According to the Court, the first question that was addressed was, "whether the failure to specify an arbitration institution is an 'internationally recognized defense such as duress, mistake, fraud, or waiver,' that can 'be applied neutrally on an international scale.'"[44] The Court determined that it was not, as "Articles 16(2) and 18 of the PRC Arbitration Law do not relate to duress, fraud, mistake, waiver, or any similar defense."[45]

Furthermore, the Court stated that the "petitioner [had not] made any showing that the PRC Arbitration Law provisions it invokes are internationally recognized, or embody widely shared legal principles that can be applied neutrally on an international scale."[46] In fact, there was no evidence on record that suggested that any other signatory to the Convention, other than China, put such a requirement on parties who seek arbitration.[47] As a result, the Court recommended:

> [T]hat SSI Beijing's motion be denied, and Prosper's motion be granted, on the ground that petitioner has not interposed any internationally recognized defense to enforcement of the parties' arbitration agreement, nor any defense that can be applied neutrally on an international scale, and therefore has not raised, much less established, any defense cognizable under the Convention or its enabling legislation.[48]

F. *Motorola* Does Not Require a Different Result

According to the Petitioner, the rule established in *Motorola Credit Corp. v. Uzan* "governs here."[49] SSI Beijing argued that the Court should have been required to evaluate Section 9(f) of the Cooperation Agreement under domestic Chinese law.[50] The Petitioner alleged that it was "'settled law in this Circuit' that the law chosen by the parties to govern their contract necessarily governs all questions regarding the validity or enforceability of the relevant contract, 'including the validity of an agreement to arbitrate.'"[51]

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42. *Id.* at *26 (internal quotations and citation omitted).
43. *Id.*
44. *Id.* at **27–28 (internal quotations and citation omitted).
45. *Id.* at *28.
46. *Id.* (internal quotations and citations omitted).
47. *Id.* at **28–29.
48. *Id.* at *29.
49. *Id.* at **29–30 (citing Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004)).
50. *Id.* at *30.
51. *Id.* at *31 (quoting Motorola, 388 F.3d at 50)) (emphasis omitted).

However, the Court pointed out that the present case could be distinguished from *Motorola*, where the question at issue was a question "'of general applicability to contracts.'"[52] The present case, however, did not address whether the petitioner was a party to the Cooperation Agreement, but instead only questioned the validity of the arbitration clause found within.[53] Therefore, *Motorola* and its holding "d[id] not bear the weight that SSI Beijing place[d] on it," especially as the petitioner relied upon *dicta*.[54]

IV. Conclusion

Finding that the petitioner did not argue "any defense cognizable under the Convention or its enabling legislation," the Court recommended that SSI Beijing's cross-motion to stay arbitration be denied.[55] The Court found that the proper means of analyzing the validity of Section 9(f) should be "under federal law, which does not require that the parties to such an arbitration agreement identify an arbitration institution."[56] In doing so, the Court recommended that Prosper's motion to compel arbitration with SSI Beijing be granted.[57] This recommendation was adopted in full on September 3, 2020.[58]

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52. *Id.* at *33 (quoting FR 8 Singapore Pte. Ltd. v. Albacore Mar. Inc., 794 F. Supp. 2d 449, 454 (S.D.N.Y. 2010)).
53. *Id.* at *34.
54. *Id.* at *31.
55. *Id.* at *29.
56. *Id.* at *36.
57. *Id.*
58. *See SSI (Beijing) Co.*, 2020 U.S. Dist. LEXIS 161357, at *3.