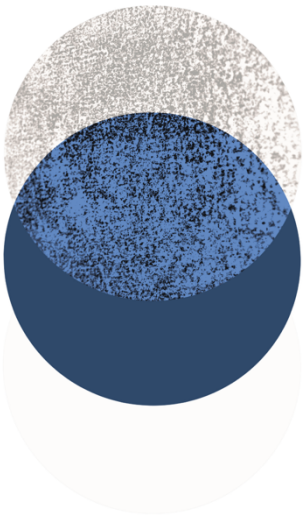

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Description of the book cover: The cover design shows the late Dean Merlin Magallona, who served as the 10th Dean of the UP College of Law from 1995–1999.

THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW

VOLUME 2022

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INTRODUCTION TO THE SPECIAL ISSUE

This Special Issue of the *Philippine Yearbook of International Law* (PYIL) honors the life and work of Dean Merlin M. Magallona (1934–2022), the leading Filipino expert and scholar in International Law at the time of his passing. Known to colleagues, students, and the wider legal community as author, mentor, and advocate of the Philippines' national interests, Dean Magallona's work helped shape Philippine discourse in International Law.

Merlin Magallona was a Professor of Law at the University of the Philippines, where he taught Public International Law, Legal Philosophy, and Legal History. He served as Dean of its College of Law from 1994–1999. He belonged to a generation of faculty members who dedicated themselves to the scholarly study of law, a rare breed in the Philippines during his time, of full-time professors dedicated to teaching, research, and publishing academic articles in learned journals. He preferred the term "social scientific" study of law, in contrast to the vocational, trade school approach designed to train law practitioners and which, to this day, is the favored approach in Philippine law schools. He published in both International Law and Constitutional Law, and especially their nexus in Philippine state practice in International Law.

In 2017, he played a key role in re-establishing the *Philippine Yearbook of International Law*, taking on the role of Editor-in-Chief. Under his leadership, the PYIL was relaunched as a space for serious and critical writing in International Law from a Filipino perspective. He continued to serve in this role until his passing, guiding the publication's editorial direction according to the highest standards.

This volume pays homage to this life of scholarship. It contains research articles engaging with Magallona's work, various tributes from Filipino international law practitioners and scholars, former students, and friends, and a bibliographic record of Magallona's publications.

The *Asian Journal of International Law* has recently published on the interface between Magallona's work as an International Law scholar and his life's passion as a Marxist ideologue (as *Ka* [Comrade] *Vidal*, his revolutionary *nom de*

guerre) and thinker[1] as reflected in both his International Law advocacies and his intellectual methodologies. Situating Magallona in his historical milieu, it must have been a lonely journey for him as a Marxist intellectual at the height of the Cold War and, even more perilously, when the Philippines was placed under martial law to eradicate the communist threat. It is difficult to imagine the professional isolation and intellectual marginalization that he had to endure, especially if one considers that he was doubly peripheralized, *first* by the predominantly pro-Western, pro-U.S. mainstream in Philippine public life in the 1960s when he began his career, and *second* by the schism within the ranks of Filipino Marxists, between the old Party (with whom Magallona had cast his lot) and the Maoist group. It is to the credit of Magallona that he kept the faith, in a manner of speaking, and thrived against these odds.

At the same time, it speaks well of International Law as a discipline that it provided Magallona the intellectual space to flourish his anti-imperialist beliefs, as well as the legal doctrines to pursue these norms, e.g., sovereignty, self-determination, and non-intervention. It gave him a legal platform to pursue his ideological agenda, *legal* in the dual sense of *juridical* (as in, through the lens of the law as a mode of analysis) and *not illegal* (legally aboveboard and not prohibited by martial law regulations). In International Law, Magallona found a discipline congenial to both the scholarly study of law and his Marxist beliefs.

Through this issue, we salute the breadth of his intellectual concerns, ranging from the philosophical foundations of legal order to the practical defense of national interest. Today, International Law has been thrust into the forefront of national debates, as the country struggles to secure its national territory and resources in the West Philippine Sea and as the victims of the so-called War on Drugs seek justice at The Hague. Magallona took part in laying down the groundwork not just for these specific advocacies but, in an even larger sense, for International Law as a framework for pursuing the values that we hold dear as a nation.

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[1] BAGULAYA JD, BAGARES RR. Hidden in Plain Sight: International Law and Marxist Praxis in the life and Works of Merlin M. Magallona. *Asian Journal of International Law*. 2024;14(2):235-267. doi:10.1017/S2044251323000450 .

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MERLIN M. MAGALLONA'S *JUS COGENS* THEORY

Rommel J. Casis

I. Introduction

As many of his former students would attest, one of Dean Merlin M. Magallona's favorite topics is the concept of *jus cogens* norms. This paper organizes and summarizes Magallona's ideas concerning *jus cogens* norms (collectively referred to as "Magallona's *jus cogens* theory"). This paper also compares and analyzes this theory in light of current developments, particularly the International Law Commission's "Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)" (Conclusions). It will be noted that many of Magallona's ideas, written decades before, find confirmation in the Conclusions.

II. The Draft Conclusions of the ILC

In 2014, the International Law Commission (ILC) began considering the topic of "*jus cogens*". In 2015, the ILC appointed Dire D. Tladi as Special Rapporteur for the topic. From 2016 to 2022, the ILC considered five reports of the Special Rapporteur. During this time, the ILC also considered the draft conclusions proposed, which were referred to a drafting committee. During this period, the ILC decided to change the title of the topic from "*jus cogens*" to "peremptory norms of general international law (*jus cogens*)." When completed, the ILC transmitted the draft conclusions to governments for comments and observations. The final draft had twenty-three draft conclusions and an annex containing a non-exhaustive list of peremptory norms. The ILC also issued commentaries to the Conclusions (Commentary), which further explained the Conclusions.

III. Analysis of Magallona's *Jus Cogens* Theory

A. Definition, Elements, and Nature of Jus Cogens

1. Definition

Magallona does not provide his own definition of *jus cogens* but adopts the definition provided by Article 53 of the Vienna Convention on the Law of Treaties (VCLT) (i.e., "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted"). The Conclusions also adopt this definition.[1]

From this definition, Magallona identifies two elements: 1) a norm of general international law, and 2) accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted. The Commentary also identifies the same elements.[2] In fact, these elements constitute Conclusion 4 (Criteria for the identification of a peremptory norm of general international law).

2. Elements

a. Norm of general international law

Magallona notes that the first element "requires that this norm should express the will of at least a broad majority of States as a rule binding on them."[3]

In contrast, the term "general international law" in the Conclusions "refers to the scope of applicability of the norm in question,"[4] such that it "must have equal force for all members of the international community."[5] Closer scrutiny of the Conclusions would reveal that what is required is that the *jus cogens* norm

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1 *See* Int'l Law Comm'n, Rep. on the Work of Its Seventy-Seventh Session, U.N. Doc. A/77/10, at 12 (2022) [hereinafter 'DC'].

2 *Id.* at 29 para. 3.

3 Merlin M. Magallona, International Law Issues in Perspective 11 (1996).

4 DC, *supra* note 1, at 31 para. 2.

5 *Id.* (quoting North Sea Continental Shelf, Judgment, 1969 I.C.J., at pp. 39–40, para. 63.)

must emanate from the three formal sources of law (i.e., treaties, customs, and general principles of law).[6]

Thus, while Magallona considers the requirement as referring to the number of states, the Conclusions refer to the source of the norm. However, the Conclusions do require that the peremptory be accepted and recognized by a large majority of states. But this requirement falls under the second element of "acceptance and recognition" and not under the first element of it being a norm of general international law.

But this rule on sources is consistent with Magallona's view that a *jus cogens* norm must either be a customary or conventional rule.[7] The Conclusions also identify customs and treaties as sources or bases of peremptory norms. But it indicates that "[c]ustomary international law is the most common basis."[8] On the other hand, "[t]reaty provisions and general principles of law may also serve as bases."[9] The Commentary explains that:

> The words "may also" are meant to indicate that while there is little practice to support the emergence of peremptory norms from these sources, the possibility of these other sources of international law forming the basis of peremptory norms of general international law (*jus cogens*) cannot be a priori excluded.

Thus, while the Conclusions recognize all formal sources under Article 38 as bases for peremptory norms, it admits that currently all peremptory norms are customary in nature.

b. Accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted

6 DC 5.2, *Id.* at 12.

7 Magallona, *supra* note 3, at 12.

8 DC 5.1, A/77/10, *supra* note 1, at 12.

9 DC 5.2, *Id.*

Magallona argues that a *jus cogens* norm must either be a universal one (i.e., "accepted as binding by all members of the international community"[10]) or "recognized by a great majority of States."[11] He interprets the phrase "as a whole" as being "intended to preclude the possibility that an objection on the part of any state may operate as a veto to the characterization of a norm as *jus cogens.*"[12] Thus, "universal consent or unanimity is not intended as a basis for the determination of a *jus cogens* norm."[13] This aligns with the Conclusions that require that the acceptance and recognition be made "by a very large and representative majority of States [is] required for the identification of a norm,"[14] and that "acceptance and recognition by all States is not required."[15]

Magallona's opinion that states may not object to the existence of a peremptory norm is also supported by the Conclusions, which provide that the persistent objector rule does not apply to peremptory norms.[16]

i. Magallona's Dilemma

Curiously, Magallona argues that despite the fact that "[a] dissenting state cannot stop the binding operation of a [*jus cogens* norm]…[t]his should not mean…that such norm binds the dissenting state against its will."[17] With this statement, Magallona seems to be suggesting the possibility of a persistent objector rule applying to a *jus cogens* norm. As previously noted, under the Conclusions, this is not the case.[18] The Commentary explains that the inapplicability of the persistent objector rule to peremptory norms "flows from both the universal application and hierarchical superiority of peremptory norms."[19]

However, Magallona elaborates on his view by stating:

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10 Magallona, *supra* note 3, at 12.

11 *Id.*

12 *Id.*

13 *Id.* at 13.

14 DC 7.2, *supra* note 1, at 12.

15 *Id.*

16 DC 14.3, *Id.* at 14.

17 Magallona, *supra* note 3, at 13.

18 DC 14.3, *supra* note 1, at 14.

19 *Id.* at 58 para. 10.

> Norms of international law are created by agreement of States and *jus cogens* norms are not in any way distinct in that respect. **It is not realistic**, however, to think **that a State would set itself apart from a *jus cogens* norm** which corresponds with the interests of the great majority of States. Its relations with the rest of the members of the international community may precisely operate through the acceptance of that *jus cogens* norm.[20] (emphasis supplied)

Analyzing this closely, it would seem that from Magallona's *legal* perspective, a *jus cogens* norm is a product of consent; it would necessarily follow that a State cannot be subjected to a *jus cogens* norm without its consent. But from his *political* or *realist* perspective, Magallona argues that no state would reject a *jus cogens* norm.

Magallona's dilemma is in reconciling his argument that *jus cogens* norms emanate from the consent of states and their universal applicability. In customary international law, this dilemma is resolved somewhat by the possibility of a state being a persistent objector. However, the possibility of a state being exempted from a customary rule does mean that universal application is only a general rule and not an absolute rule. In the case of *jus cogens* norms, the intention seems to be that universal application is an absolute rule. As the Commentary explains, both the universal application and hierarchical superiority of these norms demand that there be no exemption.

But *jus cogens* norms being universally applicable does not necessarily conflict with the argument that their existence is based on the consent of states.[21] The Conclusions provide that one of the essential characteristics of peremptory norms is that they "reflect and protect fundamental values."[22] These fundamental values are "particular values shared by the international community."[23] It may be argued that these fundamental values are shared by all states without objection.

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[20] Magallona *supra* note 3, at 13.

[21] It must be remembered that Magallona's insistence on this is intended to reject the notion that *jus cogens* norms emanate from natural law. Thus, if it is admitted that *jus cogens* norms are a product of the natural law perspective, then there would be no dilemma.

[22] DC 2, *supra* note 1, at 11.

[23] *Id.* at 18 para. 2.

ii. Consent to invalidate

Magallona further says that the second element "calls for the expression of their consent on the specific character of a general norm as *jus cogens* norm, i.e., as a norm accepted by them as restricting their treaty-making competence and having the effect of invalidating their agreements contrary to its mandate."[24] The Conclusions do not consider this as an element but a legal consequence of *jus cogens* norms. In fact, the Conclusions go beyond this. Treaties are not the only sources of law invalidated when in conflict with peremptory norms. Customary norms,[25] obligations created by unilateral acts,[26] and obligations created by acts of international organizations[27] that are in conflict with peremptory norms are also invalidated.

B. Magallona's Domestic Law Analogy

Magallona argues that *jus cogens* norms exist in the domestic legal system. He explains that "[i]n the general theory of law, every legal system is said to contain general norms of imperative character which the subjects of law cannot modify or set aside in their contractual relations."[28] *Jus cogens* "constitute the irreducible minimum principles in the legal system."[29] Thus, "the concept of *jus cogens* is identified with the concept of *ordre public* in municipal law, understood as the aggregate of fundamental norms on 'public policy and good morals.'"[30] The rationale for the preeminence given to *jus cogens* is the "superior interests of the community."[31]

The idea that domestic *jus cogens* norms consist of *irreducible minimum principles,* identified with the *aggregate of fundamental norms,* and involve *superior interests of the community* is comparable to the Conclusions when it states that peremptory norms "reflect and protect fundamental values of the international community."[32] The Commentary explains that the words *reflect* and

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[24] Magallona *supra* note 3, at 11.
[25] DC, *supra* note 1, at 14.
[26] *Id.*
[27] *Id.*
[28] Magallona *supra* note 3, at 3.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] DC, *supra* note 1, at 11.

protect "underline the dual function that fundamental values play in relation to peremptory norms."[33] Specifically, the word "reflect" means that fundamental values "provide …a rationale for the peremptory status of the norm [and] seeks to establish the idea that the norm in question gives effect to particular values."[34] Thus, the term provides for the nature of peremptory norms, while the word "protect" indicates the purpose of peremptory norms in relation to fundamental values. This implies that for every peremptory norm, there must be a fundamental value reflected and protected. Thus, it may be argued that Magallona's domestic law analogy used to justify the rationale of peremptory norms is reflected in the Conclusions.

C. Jus cogens in theory versus practice

Magallona recognizes that *jus cogens* has a history going as far back as Grotius and Vattel.[35] He notes, however, that:

> [W]hile a broad agreement among reputable publicists supports the view that such norms exist on the international plane, many of their *de lege ferenda* prescriptions on the nature of *jus cogens* norms are quite apart from the historical realities and practices of states and are not in keeping with the legal nature of the international community itself.[36]

He seems to be arguing that, despite the widespread acceptance of the existence of *jus cogens* norms in the international plane, historically, actual state practice and the nature of the international community of states do not conform to what *jus cogens* requires. Thus, while it is accepted in theory, it seems to be rejected in practice.

This apparent lack of practical application of the *jus cogens* concept is echoed in more recent scholarship. Shelton argues that the concept of a peremptory norm "is largely if not entirely a literary construct, a theoretical

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[33] *Id,* at 18 para. 2.

[34] *Id.*

[35] Magallona, *supra* note 3, at 4.

[36] *Id.*

proposal for what ought to be, rather than what was or is."[37] Thus, the only thing *jus cogens* provides is the "symbolic expression or declaration of societal values."[38]

It is true that there has been no treaty invalidated on the grounds of conflict with a peremptory norm. However, it may be argued that the absence of treaties being invalidated on the basis of being inconsistent with a peremptory norm is proof of the effectiveness of the concept. This is because this means that states do not enter into treaties conflicting with peremptory norms. Furthermore, there have been increasing references to peremptory norms in international courts, regional courts, national courts, States, and other actors.[39]

D. Problems with the municipal law analogy

Magallona argues that "[s]erious questions may precisely arise from an uncritical transference of *jus cogens* as a municipal law concept into international law."[40]

1. Overriding State Sovereignty

His concern is that the municipal law analogy may support "the existence of an international public order overriding state sovereignty, implying that …*jus cogens* could acquire validity as legal norms independent of the consent of the individual members of the international community."[41] The result would be "plac[ing] the concept of *jus cogens* along the thinking which rejects the juridical equality of States."[42] He objects to a situation where "a group or majority of States may dictate international-law rules upon the rest of the international community."[43]

International law, following the will of the majority, seems to be exactly what the Conclusions adopt. Conclusion 7 paragraph 2 provides that "Acceptance

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[37] Dinah Shelton, *Sherlock Holmes and the Mystery of Jus Cogens*, 46 Neth. Y.B. Int'l L., 24 (2016).

[38] *Id,* at 35.

[39] Hélène Ruiz Fabri, *Enhancing the Rhetoric of Jus Cogens*, 23, Eur. J. Int'l K., 1049, (2012); DC, *supra* note 1, at 16-17 para 2.

[40] Magallona. *supra* note 3, at 4.

[41] *Id,* at 4-5.

[42] *Id,* at 5.

[43] *Id.*

and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required."

Perhaps Magallona's concern can be addressed by the fact that *jus cogens* norms must reflect and protect fundamental values. As mentioned previously, one of the three essential characteristics of any *jus cogens* norm is that it must reflect and protect a fundamental value of the international community.

2. Argument for rejection

Magallona's other concern is that a "municipal law analogy has also been made a basis for rejecting international *jus cogens.*"[44] The argument is that "*jus cogens* could not yet mature in the field of international law because this concept 'presupposes the existence of an elective *de jure* order.'"[45] This *de jure* order is said to require "legislative and judicial machinery, able to formulate rules of public policy and, in the last resort, can rely on overwhelming physical force."[46] Thus, *jus cogens* can emanate from municipal law but not from international law because the latter lacks the structures that the former has.

Perhaps this concern can be addressed by the fact that the domestic law version of a *jus cogens* norm is only cited as an analogy in the process of explaining the reasonableness of the peremptory norm concept in international law. An analogy does not require perfect correspondence to be valid. Furthermore, there is no domestic *jus cogens* norm that is being transplanted into the international sphere. If that were the case, then looking into whether there are structures in international law similar to domestic law structures (that made the norm enforceable) may be necessary. But such is not the case. In fact, based on the list of peremptory norms annexed to the Conclusions, there is no indication of any *jus cogens* norm which originated from the domestic legal system.

3. Magallona's counterargument

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[44] *Id.*

[45] *Id.*

[46] *Id.* at n.9, quoting George Schwarzenberger & E.D. Brown, A Manual of International Law, 29–30 (6th ed. 1967).

Magallona addresses the said concerns by arguing that:

> The emergence of the concept of *jus cogens* in positive international law is by no means a *lex lata* transformation of this concept as understood in such abstract, logical or natural law sense, particularly in its strict municipal law analogy. It is rather defined by the peculiar nature of international law, i.e, by the condition that in the international legal order the subject (States) of law are themselves the creators of the law on the basis of sovereign equality.[47]

Magallona's argument is that *jus cogens* does not arise simply from natural law theorizing or copying from municipal law. *Jus cogens* norms exist because they are created by states. He concludes that "*jus cogens* norms are strictly inter-state law and reject a supranational source."[48]

As a result, *jus cogens* norms do not override sovereignty. Neither does the domestic law analogy cause any problems because the concept arises purely from the international legal system. This is further supported by the requirement that *jus cogens* norms must emanate from the three formal sources of law (i.e., treaties, customs, and general principles of law).

E. Jus Cogens based on the consent of states

1. Consensual nature

Contrary to the common view that the *jus cogens* concept is based on natural law, Magallona argues that it emanates from the positivist perspective. He states that "the process of identifying a general norm of international law as *jus cogens* is definitely a consensual mechanism."[49]

Magallona points out "[t]hat it is the agreement of States which invests a norm with peremptory character."[50] This agreement can be seen in the

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47 *Id.* at 6.
48 *Id.*
49 *Id.*
50 *Id.* at 11.

requirements or elements for the identification of *jus cogens* norms under the VCLT. This requirement is also seen in the Conclusions.[51]

As further proof of consensual nature of *jus cogens* norms, Magallona points to the dispute settlement procedure when the *jus cogens* nature of a norm is invoked to invalidate a treaty. This consensual nature is made evident by the fact that a treaty cannot be nullified even on the basis of conflict with a *jus cogens* norm without the consent of parties. This procedure is also found in the Conclusions.[52]

Thus, "[t]hat certain rules are normatively superior to others is brought about only by the concordance of wills of States themselves."[53]

2. Consent alone is insufficient

Despite its consensual nature, Magallona clarifies that a *jus cogens* norm does not arise simply by reason of the agreement of states.[54] Assume that treaty parties stipulate that "no derogation from that stipulation is to be permitted, with the intended result that another treaty which conflicts with that provision would be void."[55] Such a stipulation "does not lend *jus cogens* character to that treaty provision."[56] Magallona bolsters his argument by quoting the ILC: "It is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may…give it the character of *jus cogens.*"[57] In other words, there is more to a *jus cogens* norm than being non-derogable. This appears to be consistent with the Conclusions, as Conclusion 2 provides for the nature of *jus cogens* norms. Based on this conclusion, a *jus cogens* norm must have three essential characteristics. First, the norm must reflect and protect fundamental values of the international community. Second, the norm must be universally applicable. Third, the norm must be hierarchically superior to other rules of international law.

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51 DC, *supra* note 1, at 12.

52 DC 21, *Id.* at 15-16.

53 Magallona, *supra* note 3, at 29.

54 *Id.* at 11.

55 *Id.*

56 *Id.* at 11-12.

57 *Id.* at 12.

Magallona clarifies that in his view, the *particular nature of the subject matter* "does not refer to some jus naturalistic factors outside the consensual regime of states."[58] Instead, he says that the phrase is to be "interpreted as indicating the level of importance or special relevance by which the States regard the function of a particular norm of general international law."[59] Thus, he agrees with the idea of fundamental principles if these arise from the "importance" or "relevance" given to these principles by states, but not if they arise from natural law.

F. Identification of jus cogens

Magallona points out that "*jus cogens* norms are to be identified by the [s]tate[s] themselves in their actual experience of struggle and cooperation."[60] He adds that:

> [I]t is the intention of the International Law Commission (ILC) in drafting the Convention rule on *jus cogens* to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.[61]

Magallona agrees with this procedure, explaining that "the approach of the ILC emphasizes…more the fact that the identification of *jus cogens* norms is determined by the very real and concrete interests of States and therefore springs from necessity…and not from some abstract considerations extraneous to international life."[62]

The process of identifying *jus cogens* norms under the Conclusions supports Magallona's view. Under Conclusion 4, a *jus cogens* norm must comply with certain criteria. First, it must be a norm of general international law. Based on Conclusion 5, this means that the norm must be a custom, a treaty provision, or a general principle of law. All these formal sources of law require the consent of states. Furthermore, the second requirement under Conclusion 4 is that the norm

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58 *Id.*
59 *Id.*
60 *Id.* at 6.
61 *Id.*
62 *Id.* at 7.

must be accepted and recognized by the international community of States as a whole.

G. Multilateralism as a reason for the hierarchy of norms

Magallona notes that the development of multilateralism "as the most appropriate medium of achieving international cooperation"[63] has resulted in states prioritizing commitments in multilateral treaties over bilateral treaties. Thus, "States achieve agreement to structure their obligation into a hierarchy, thus upholding some norms or principles of law as superior to others."[64] Thus, he argues that the current state of the international community accepts the idea of hierarchy of norms and is ready to accept the concept of *jus cogens* norms.

This forms part of Magallona's *jus cogens* theory that the concept arises from the development of international law. He says that "the rise of *jus cogens* in positive international law goes hand-in-hand with the concrete historical development of the international society."[65] He adds:

> Conditions for the reception of international *jus cogens* have matured in the relations of states, not for reason of abstract rationality but out of concrete political interests and social or economic requirements involved in the struggle and cooperation of States, in the pursuit of solution to compelling problems of the moment.[66]

H. Effect of *jus cogens* norms

A. When a treaty is invalidated

Magallona identifies an apparent conflict in the VCLT when a treaty is invalidated under Article 53 for being in conflict with a *jus cogens* norm at the time of its conclusion. Under Article 71, states have a duty to "eliminate as far as possible the consequences of any act performed in reliance on any provision which

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[63] *Id.* at 8.
[64] *Id.* at 9.
[65] *Id.*
[66] *Id.*

conflicts with the peremptory norm."[67] He points out that these words "are susceptible to the interpretation that the provisions of an invalid treaty are separable and that the duty of the parties to eliminate the consequences of any act arising from the treaty may not extend to those provisions which are not directly affected by the illegality."[68] But this interpretation would conflict with Article 44 (5) which prohibits the separation of provisions of a treaty invalidated under Article 53. Magallona states that "together, …Article 71 and Article 44(5) would create an absurd situation: separable consequences from non-separable provisions of an illegal treaty."[69]

Magallona reconciles this conflict by clarifying that Article 71 does not mean separability but only that "some consequences arising from a treaty which is [invalidated by][70] Article 53 may be saved from the nullifying effect of a *jus cogens* norm."[71] He adds that the interpretation that "conflict with a *jus cogens norm* does not totally wipe out the consequences of a void treaty"[72] is supported by Article 69 (2)(b), which provides that "acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty." Applying this rule, Magallona concludes that these acts *performed in good faith* "should be deemed as valid and subsisting on the basis of a new agreement, expressly or tacitly made, which the parties may bring about as part of their effort to bring their mutual relations in line with the relevant *jus cogens* norm."[73] Thus, "[a]ny attempt to maintain the validity of these acts cannot be anchored on any of the provisions of the invalidated treaty."[74]

The question, however, is what if the parties to the invalidated treaty do not make an explicit agreement to preserve such good faith acts? Magallona suggests that the agreement can be tacit. But supposing the parties make no effort

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67 Article 71 (1) (a) VCLT.

68 MAGALLONA, *supra* note 3, at 15.

69 *Id.*

70 The original term used by Magallona was "illegal". The author believes this is not accurate because what is being discussed is a treaty with "illegal" and "legal" provisions, legality being determined by whether or not they conflict with a *jus cogens* norm. Thus, illegality pertains to the provisions and not to the entire treaty itself. So, it is more accurate to say that the treaty is invalidated or void but it is not necessarily illegal in its entirety.

71 MAGALLONA, *supra* note 3, at 16.

72 *Id.*

73 *Id.* at 16-17.

74 *Id.* at 17.

to preserve such consequences, there would be no tacit agreement, and the parties would be in breach of Article 71. But any compliance with Article 71 would automatically mean a new tacit agreement is created. This would result in a strange situation wherein the agreement is the result of the compliance rather than its cause. Perhaps the fiction of a new agreement is not necessary, since Article 71 itself is the basis of the obligation to preserve good faith consequences.

I. Procedure for invoking jus cogens norms

Magallona points out that "[a] *jus cogens* norm does not automatically invalidate a treaty conflicting with it. The Convention prescribes a particular procedure to be followed by a party to a treaty in establishing its invalidity."[75] He also cites Article 65 as outlining the procedure for invoking a *jus cogens* norm to invalidate a treaty.

Magallona's view that invalidating a treaty on the basis of conflict with a *jus cogens* norm is not automatic and is consistent with the Conclusions. Conclusion 21 requires that a State which invokes a *jus cogens* norm as a ground for the invalidity or termination of a rule of international law should do so by notify the other States concerned in writing.[76] The notice should also indicate the measure proposed to be taken with respect to the rule of international law in question.[77] But even after notice, the invoking state can only carry out the proposed measure if none of the other States "raises an objection within a period which, except in cases of special urgency, will not be less than three months."[78] In case there is an objection, the States concerned should first resolve the dispute under Article 33 of the UN Charter or later through the International Court of Justice or some other procedure entailing binding decisions.[79] Pending the resolution of the dispute, the invoking state cannot carry out its proposed measure.

Magallona further adds that "[t]he basic limitation in the effective enforcement of *jus cogens* norms in the regime of the law of treaties is that this

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75 *Id.* at 19.

76 DC 21 (1), *supra* note 1, at 81 par. 1.

77 *Id.*

78 DC 21 (2), *Id.* at 81.

79 DC 21 (3), *Id.* at 81.

ground of invalidity may be invoked only by the parties to the Convention."[80] Thus, "it is not possible for a third State (not a party to the treaty under question) to invoke the *jus cogens* ground in the attempt to establish its invalidity or bring about its termination."[81]

However, if Conclusion 21 is considered as binding, then the procedure is no longer limited to parties to the VCLT. Thus, even non-parties to the VCLT may be able to invalidate treaties on the ground of conflict with a *jus cogens* norm.

Magallona also laments that:

> The other basic limitation to invalidation or termination on [the] *jus cogens* ground is that the Convention in effect requires that this be established by the consent of the parties to the treaty in question. In fact, the serious implication of this consensual requirement is that in the event no agreement is reached by the parties to invalidate or terminate the treaty by authority of Article 53 or 64 of the Convention, it would seem that nothing can be done about the treaty in question of the part on the international community. Consequently, the treaty in conflict with the peremptory norm of international law would continue to subsist.[82]

This issue is resolved somewhat by the third paragraph of Conclusion 21. This paragraph provides that if, after applying Article 33 of the UN Charter:

> [N]o solution is reached within a period of twelve months, and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions, the invoking State should not carry out the measure which it has proposed until the dispute is resolved.

The referral to the International Court of Justice (ICJ) is not found in Article 65 of the VCLT. But the same problem identified by Magallona may arise because submission of the dispute to the court requires the consent of both

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[80] Magallona, *supra* note 3, at 19.

[81] *Id.*at 23.

[82] *Id.* at 22-23.

parties. It may be assumed that the invoking state would give its consent because it wasn't the treaty provision invalidated, and it cannot act until the issue is resolved. However, the objecting state must offer to bring the dispute to the ICJ. This state can simply not offer or refuse to bring the dispute to the ICJ, and the provision in question would remain in effect. But in the Commentary, the ILC explained that paragraph 3 is intended as a "submission of an unresolved dispute to judicial settlement of disputes."[83]

J. Effect of *jus cogens* norm on existing treaties

Magallona identifies a problem and questions "whether Articles 53 and 64 apply in a situation where the treaty in question has been concluded before the Convention's entry into force but the time of conflict between the treaty and a *jus cogens* norm comes after its entry into force."[84] Based on Article 4, the VCLT "applies only to treaties which are concluded by States after the entry into force of the [VCLT] with regard to such States." Magallona admits that a "plain application of the non-retroactivity rule in the Convention would seem to exclude such situation from the coverage of the Convention's rules on *jus cogens.*"[85] But he argues that:

> [T]his same situation could perfectly come within the normal operation of Article 64 at least: an existing treaty, validly concluded before the Convention's entry into force becomes void and terminates for the reason that it comes into conflict with a new *jus cogens* norm which emerges after the Convention comes into force.[86]

He quotes from the ILC Commentaries,[87] where it is stated that:

> Manifestly, if a new rule of that character – a new rule of *jus cogens* – emerges, its effect must be to render void not only future but *existing* treaties. This follows from the fact that a rule of *jus cogens,*

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[83] DC, *supra* note 1, at 83-84 par. 9.

[84] Magallona, *supra* note 3, at 24-25.

[85] *Id.*

[86] *Id.*

[87] Cited as "ILC Commentaries, p. 81."

> is an overriding rule depriving any act or situation which is in conflict with it of legality.[88]

Magallona suggests that "by 'existing treaties' the Commission …was referring to treaties already concluded before the convention enters into force."[89] He argues that "[i]t would be reasonable to interpret the Commission's view as meaning that existing treaties, *although concluded before the Convention's entry into force*, are affected by the invalidating force of a *jus cogens* norm."[90] He adds:

> In this case, the non-retroactivity rule in Article 4 does not relate so much to the fact that the treaty in question was concluded before the Convention's entry into force – which is the literal requirement of that article – as to the non-retroactive effect of a particular *jus cogens* norm on a treaty concluded before the Convention's entry into force. To determine the correct application of the non-retroactive rule under Article 4 in relation to Article 64, the relevant issue is *not* whether the treaty in question was concluded before or after the Convention's entry into force, but from what point of time after the Convention's entry into force should a *jus cogens* norm invalidate that treaty.

He seems to be suggesting that Article 4 does not prohibit the application of Article 64[91] to treaties concluded before the entry into force of the VCLT. Instead, Article 4 only affects the point in time when the *jus cogens* norm would invalidate the treaty.

Magallona buttresses his point by arguing that:

> On the basis of the nature of the *jus cogens* rule in Article 64, the more precise non-retroactivity rule applicable is not Article 4, but paragraph 2(b), Article 71, which provides, *inter alia*, that the termination of a treaty under Article 64 "does not affect any right,

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88 Magallona, *supra* note 3, at 25.

89 *Id.* at 26.

90 *Id.*

91 Article 64 proves: If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

> obligation or legal situation of the parties created by the execution of the treaty prior to its termination."

Hence, while under Article 53 the point of reference for the operation of the non-retroactivity rule is the date of the Convention's entry into force, under Article 64 it is the time of emergence of the *jus cogens* norm.[92]

Magallona's arguments are a radical interpretation of the VCLT, considering that it conflicts with the literal interpretation of Article 4 of the VCLT. His argument would require that the existence and effect of *jus cogens* norms are customary in nature and not solely depend on the VCLT. While this position lacked support at the time Magallona made the argument, the Conclusions now support it. In this sense, his arguments were ahead of his time.

K. Two categories of *jus cogens*

Magallona says that the use of the term "new" in Article 64 creates two categories of *jus cogens* norms: (1) those existing on the date of the Convention's entry into force which takes on binding force upon the entry into force of the Convention and (2) those which become *jus cogens* norms only sometime later after the Convention has entered into force.

He argues that:

> If the term "new peremptory norm of general international law" in Article 64 refers only to the second category, treaties existing at the time the Convention enters into force are not affected by the operation of that "new" *jus cogens* norm. Neither are those treaties affected by the application of Article 53, because they were concluded before the Convention comes into force. The result is that they continue to subsist despite their incompatibility with the *jus cogens* norms which come into effect as such upon the entry into force of the Convention. The lacunae may be so seriously broad as to nullify the whole rationale of introducing the concept of *jus cogens* into positive international law through the Convention. In effect, the former legal regime, in conflict with the *jus cogens* norms

[92] Magallona, *supra* note 3, at 26.

> at the time the Convention take effect, cannot be brought into conformity with the peremptory norms of the new international legal order.[93]

It is submitted that the inability of *jus cogens* norms to affect pre-VCLT treaties is the result of the Article 4 non-retroactivity rule. In this way, Magallona's arguments here go back to his objection to the interpretation that Article 4 prevents the application of Article 64 to pre-VCLT treaties. Magallona's solution to the problem, which he identified, is to consider as a new norm under Article 64, norms which existed upon the entry into force of the VCLT.[94] This would allow the invocation of Article 64 to "adjust" the pre-VCLT regime to conform to *jus cogens* norms.

It is submitted that what determines whether a norm is "new" in the context of Article 64 is not the entry into force of the VCLT but the entry into force of the treaty sought to be invalidated. Thus, a *jus cogens* norm is "new" in the context of Article 64 if it emerges after the treaty in question. If *jus cogens* norms are considered to have existed even prior to the VCLT[95] or are considered customary as the Conclusions suggest, then it is irrelevant that the treaty in question was concluded prior to the entry into force of the VCLT.

L. Modification of jus cogens norms

Magallona posits that "certain State practices, may develop contrary to an existing *jus cogens* norm and, in the absence of significant protest, broaden into a customary rule adhered to by the majority of States, thus gaining the status of a norm of general international law."[96]

However, under the Conclusions, this is no longer possible because a custom in conflict with a *jus cogens* norm cannot emerge. Conclusion 14 provides that "a rule of customary international law does not come into existence if it would

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93 *Id.* at 27.

94 *Id.*

95 In this view, the VCLT did not create *jus cogens* norms but only recognized and put into writing what had already existed. Similar to the declaratory and constitutive theory of recognition of states, the VCLT would only be declaratory and not constitutive in nature.

96 Magallona, *supra* note 3, at 28.

conflict with an existing peremptory norm of general international law (*jus cogens*)."

While this resolves the issue raised by Magallona, this rule raises another issue. How can existing *jus cogens* norms be modified? According to Conclusion 5, *jus cogens* norms must be sourced from customary international law (CIL), treaty provisions, or general principles of law. It also states that CIL is the most common basis or source. While treaty provisions and general principles of law "may also serve as bases", the ILC admits that "there is little practice to support the emergence of peremptory norms from these sources."[97] Thus, a new *jus cogens* norm that can modify an existing *jus cogens* norm (a "modifying norm") must first be a custom, treaty provision, or general principle of law. But as mentioned previously, a custom that is in conflict with an existing *jus cogens* norm can never emerge. If a modifying norm cannot even be a custom, how can it become a *jus cogens* norm to challenge an existing *jus cogens* norm? The same can be said for treaty provisions. Conclusion 10 provides that a treaty is void if, at the time of its conclusion, it conflicts with a *jus cogens* norm. It categorically states that "[t]he provisions of such a treaty have no legal force." Thus, how can a modifying norm from a treaty provision ever arise? The only possible option seems to be a modifying norm arising from general principles of law. Interestingly, the Conclusions do not provide for a rule invalidating a general principle of law for being inconsistent with the *jus cogens* norm.

IV. Conclusion

Magallona's *jus cogens* theory, written decades ago, appears for the most part consistent with the current thinking about the concept. Among the areas of alignment include:

- the definition of *jus cogens* norms;
- the source of *jus cogens* norms being custom or treaty;
- the requirement of acceptance and recognition;
- the inapplicability of the persistent objector rule;
- the elements of *jus cogens* norms; and
- the procedure for invalidating norms.

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[97] DC, *supra* note 1, at 33 par. 7.

Magallona's further contribution to *jus cogens* theory is his argument regarding the rationale or justification for the concepts. He argues against the popular notion that *jus cogens* norms are a natural law concept. He repeatedly stressed that the basis of *jus cogens* norms is the consent of states and is therefore consistent with the positivist framework.

Magallona's contribution to *jus cogens* theory remains despite the passage of time.

MULTILATERAL DISCIPLINES ON THE DOMESTIC REGULATION OF SERVICES: IMPLICATIONS FOR THE PHILIPPINES

Arnel Marcos Sanchez[1]

Abstract

The development of multilateral rules on the domestic regulation of services sectors has long been part of the unfinished business of the WTO under the General Agreement on Trade in Services (GATS). Article VI(4) of the GATS mandates WTO Members to negotiate new rules that would ensure that measures on trade in services relating to qualification requirements and procedures, licensing requirements and procedures, and technical standards are based on objective and transparent criteria, not more burdensome than necessary to ensure the quality of the service, and not in themselves a restriction on the supply of a given service.

The GATS, however, also recognizes WTO Members' right to regulate in the public interest, and it is this fundamental tension with the Article VI(4) mandate that has made the ensuing negotiations intractable. Since 1999, multilateral disciplines on domestic regulation of services have been on the negotiating table in the Working Party on Domestic Regulation (WPDR). Progress has been slow, however, and WTO Members were eventually unable to fulfill the GATS Article VI(4) mandate. The 11th WTO Ministerial Conference (MC11) in November 2017 eventually concluded without any multilateral

[1] I wish to express my sincere gratitude to ICC Judge Raul C. Pangalangan and Professor Elizabeth Aguiling-Pangalangan, whose encouragement during their visits to Geneva inspired me to document my insights on the domestic regulation of services in the WTO and publish in the Philippine Yearbook of International Law. I am also deeply grateful to Ambassador Manuel A.J. Teehankee, my former superior at the Philippine Permanent Mission to the WTO, whose vision and leadership in guiding the Philippines' participation in the Joint Initiative on Services Domestic Regulation helped shape the analysis presented in this paper. Finally, my thanks to Atty. Lorenz Dantes for his valuable and constructive comments on earlier drafts. The views expressed in this paper are solely mine, and do not necessarily reflect the official position of the Philippine Department of Foreign Affairs. All errors remain my own.

consensus on the draft negotiating text of the disciplines developed through the WPDR.

Frustrated by yet another Ministerial failure, Ministers from a number of developed and developing WTO Members pushed forward with a "Joint Statement" reiterating their commitment to advancing negotiations on Services Domestic Regulation. From 2018 to 2021, participants in the ensuing Joint Statement Initiative negotiated a new draft of the disciplines through a "plurilateral" process that had been criticized as circumventing the express multilateral mandate for negotiations of such disciplines under the GATS. These plurilateral disciplines on domestic regulation of services were embodied in a "Reference Paper" which was to be incorporated into the Schedule of Specific Commitments of the participating WTO Members.

The Reference Paper contains a set of rules, expressed through binding and non-binding provisions, that signatories commit to observe in their respective service measures of general application, measures relating to qualification requirements and procedures, licensing requirements and procedures, and technical standards, and authorizations of a supply of the service. Although most of the disciplines in the Reference Paper are procedural in nature and focus on ensuring transparency and predictability of the regulatory process, the obligations nonetheless impose restrictions on a WTO Member's regulatory sovereignty.

Upon joining the JSI-SDR, the Philippines committed to revising its schedule of specific commitments and incorporating the corresponding obligations in the Reference Paper. This Article will attempt to provide an analysis of the Philippines' obligations under the Reference Paper and implications of the disciplines on the Philippines' regulatory and policy space.

Introduction

"[*T*]*he deregulation policy reduces the role of the State in the management of the economy and thus enhances the power of private capital to determine the conditions of their operations in the economy; in other words, the curtailment of economic sovereignty.*"

- Dean Merlin M. Magallona[2]

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[2] Merlin M. Magallona, *The Philippines towards a Supranational Economic Order: The Context of GATT*, WORLD BULL., Sept.–Dec. 1994, at 11, 14.).

The exercise of economic sovereignty in a globalizing world is an ongoing struggle for developing countries such as the Philippines. Since joining the General Agreement on Tariffs and Trade (GATT) in December 1979, the ASEAN Free Trade Area (AFTA) in 1992, and the World Trade Organization (WTO) in 1995, as well as entering into a succession of free trade agreements (FTAs) starting with the ASEAN-China Free Trade Agreement (ACFTA) in 2004 and the Philippines-Japan Economic Partnership Agreement (PJEPA) in 2006, the Philippines has been firmly on the path of economic liberalization. These initiatives have, by and large, contributed to the Philippines' economic growth trajectory and facilitated its integration into the global economy. The Philippines has been able to participate in regional production and supply chains, leverage international investment and capital flows, and tap into a global consumer market of goods and services. But it comes with a price—Philippine economic sovereignty is bound by the rules of the game.

This situation would certainly not have sat well with the late Dean Merlin M. Magallona, arguably the Philippines' staunchest defender of a truly independent economic sovereignty. His writings not only showed a deep distrust of the so-called neoliberal economic agenda and the "Washington Consensus," but also expressed support for the New International Economic Order (NIEO), while sharply condemning the Philippine government's decision to join the WTO and most especially the PJEPA.[3] Dean Magallona was of the firm belief that the 1987 Constitution had set in stone a nationalist economic agenda that is fundamentally

[3] For an examination of the legal scholarship of Dean Magallona on the NIEO and his critique of neocolonial economic systems, *see* José D. Bagulaya & Romel R. Bagares, *Hidden in Plain Sight: International Law and Marxist Praxis in the Life and Works of Merlin M. Magallona*, 14 ASIAN J. INT'L L. 235, 235–267 (2024), https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/hidden-in-plain-sight-international-law-and-marxist-praxis-in-the-life-and-works-of-merlin-m-magallona/24817F87259B5DAA8EF9238C274AB234. *See also* Merlin M. Magallona, *Some Patterns of Political and Economic Developments in the ASEAN*, ASIAN STUD. J., Apr.–Aug.–Dec. 1981, at 1, 5–7, https://asj.upd.edu.ph/mediabox/archive/ASJ-19-1981/magallona.pdf; Merlin M. Magallona, Former Dean, University of the Philippines College of Law, Economic Nationalism and the National Treatment Clause: The Case of the Philippine Constitution vs. WTO Agreement (Jan. 22, 2023), in *Documentation of Proceedings of the National Conference on A Nation in Crisis: Agenda for Survival*, OMBUDSMAN WEBSITE (2003), at 27–32, https://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/01/Economic-Nationalism-Conference.pdf.

at odds with the Philippine government's efforts to open up the domestic economy to greater participation of foreign capital.[4]

Recent developments would make the Dean turn in his grave. Two announcements were made on 2 December 2021 that did not gain much media attention, but were of significance to the Philippines' economic sovereignty, as a Member of the WTO and participant in the multilateral trading system. First, the plurilateral negotiations on the Joint Statement Initiative on Services Domestic Regulation (JSI-SDR), which were launched after the failure of the 11th WTO Ministerial Conference (MC11) in 2017, were successfully concluded. Second, the Philippines became the 66th WTO Member to join the JSI-SDR and committed to adopting the Reference Paper on Services Domestic Regulation.

Disciplines on the domestic regulation of services are one of many remaining frontiers of multilateral rulemaking on international trade in services at the WTO. For more than 25 years, multilateral disciplines on domestic regulation have eluded the Membership since the entry into force of the General Agreement on Trade in Services (GATS), one of the multilateral trade agreements of the Uruguay Round that also set the mandate for the negotiation on domestic regulation. The closest that the WTO has come to an agreement was during the run-up to the 11th WTO Ministerial Conference (MC11), when the Working Party on Domestic Regulation (WPDR) presented a consolidated draft negotiating text that did not achieve Ministerial consensus.

Fifty-nine co-sponsors of that draft negotiating text were compelled to pursue separate plurilateral negotiations on disciplines on domestic regulation of services by launching a "Joint Statement Initiative," which had been criticized for circumventing the express multilateral mandate for negotiations of such disciplines under the GATS, and for further constraining Members' "right to regulate." The outcome of those discussions is embodied in a "Reference Paper"[5]

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[4] *See* Merlin M. Magallona, *Economic Nationalism and the National Treatment Clause: The Case of the Philippine Constitution vs. the WTO Agreement*, WORLD BULL., Jul.–Dec. 2001, at 72, 72–97 (analyzing the fundamental conflict between the national treatment principle and economic nationalism enshrined in the Philippine Constitution, conferring upon Filipino citizens preferential rights in the economy and in the use of natural resources).

[5] World Trade Organization, Joint Initiative on Services Domestic Regulation: Reference Paper on Services Domestic Regulation, WTO Doc. INF/SDR/1 (Sept. 27, 2021),

document that sets out procedural and substantive rules on the regulation of services that signatories such as the Philippines are expected to bind as part of their specific commitments under the GATS Agreement.

Although around 40 percent of the Membership eventually signed on to the Reference Paper shortly after the conclusion of the JSI negotiations, making it a plurilateral initiative that cannot be considered for adoption by the WTO as a new multilateral treaty,[6] the disciplines in the Reference Paper can be considered "multilateralized" upon their inscription as additional commitments in the Schedule of Specific Commitments of those WTO Members. Nonetheless, the "multilateral disciplines" on services domestic regulation as embodied in the Reference Paper thus emerged as the first negotiated multilateral outcome on trade in services in the WTO since 1997.[7]

This Article is an attempt to delve into the new disciplines on domestic regulation of services as set out in the Reference Paper, and the policy and legal implications for the Philippines going forward. Part I will provide an overview of the concept of domestic regulation of services in the WTO and how multilateral rulemaking thereon has progressed and evolved. Part II will briefly discuss the policy and regulatory environment for the regulation of services in the Philippines. Part III will take a deeper look into the important features of the Reference Paper, attempt to analyze the Philippines' commitments and implications for the regulation of services, and suggest how the Philippines can address any policy and implementation gaps and preserve regulatory space to promote the public interest.

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https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/SDR/1.pdf&Open=True .

6 Kadijatu Zainab Bangura & Abraham Zaqi Kromah, *An Overview of the WTO's Plurilateral Agreement on Services Domestic Regulation*, 17 GLOB. TRADE & CUSTOMS J. 177, 182 (2022), https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/17.4/GTCJ2022023.

7 Elena Bertola, Jaime Coghi, & Markus Jelitto, *Facilitating Services Trade Through the Adoption of Good Regulatory Practices: The New Reference Paper on Services Domestic Regulation*, 19 GLOB. TRADE & CUSTOMS J. 74, 74 (2024), https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.2/GTCJ2024001.

I. Domestic regulation of services in the WTO

A. The GATS and Multilateral Disciplines

The General Agreement on Trade in Services (GATS), the first multilateral trade agreement to cover trade in services, is one of the major achievements of the Uruguay Round. Its formation was inspired by essentially the same objectives as the General Agreement on Tariffs and Trade (GATT): improving trade and investment conditions through multilaterally agreed disciplines; stabilizing trade relations through policy bindings on a "Most-Favored Nation" (MFN) basis; and achieving progressive liberalization through subsequent rounds of negotiations.

WTO Members' universal acceptance of the GATS as part of their membership obligations is reflective of the economic importance of trade in services, which has become the most dynamic segment of international trade. Unlike trade in goods, where at-the-border measures in the form of tariffs and quotas are the main barriers to trade, trade in services is mainly affected by behind-the-border regulatory measures and domestic regulations in the service sector.[8] In part due to its unique and diverse characteristics across countries, the liberalization and regulation of services does not lend itself easily to the application of traditional trade policy instruments. Services sectors covering hotels, restaurants, hospitality, and personal services, for instance, have been customarily considered as purely domestic activities.[9] Services such as rail transport, energy, and telecommunications were considered in the realm of public utilities, given their strategic and infrastructural importance, and have been viewed as classical domains of full or close-to-full government ownership and control.[10] Services that involve health, education, and basic insurance services that

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8 WTO Secretariat – Trade in Services Division, Disciplines on Domestic Regulation Pursuant to GATS Article VI.4 1 (June 2011) (Briefing Paper), https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_bckgddoc_e.doc. *See* Aik Hoe Lim & Bart de Meester, *An Introduction to Domestic Regulation and GATS*, *in* WTO Domestic Regulation and Services Trade: Putting Principles Into Practice 1, 1 (Aik Hoe Lim & Bart de Meester eds., 2014); Panagiotis Delimatsis, *The Interaction Between GATS Articles VI, XVI, XVII and XVIII After the US – Gambling Case* 4 (NCCR Trade Regulation, Working Paper No. 2006/9).

9 WTO Secretariat – Trade in Services Division, A Handbook on the GATS Agreement [hereinafter GATS Handbook] 2 (2005).

10 *Id.*

have a strong public welfare component are considered in many countries to be governmental responsibilities and therefore should be tightly regulated.[11]

Multilateral disciplines on services regulations would require an approach that is different from the treatment of liberalization and market access on trade in goods. Such disciplines would have to complement the at-the-border rules on national treatment and market access as applied to foreign services and service suppliers and prevent the regulatory regime over services from nullifying the effectiveness of such non-discriminatory obligations. At the same time, the disciplines would extend behind-the-border to measures affecting both the service and the supplier of the service, unlike in the GATT, which is confined to the flow of goods.[12]

Domestic regulation of services has long been part of the unfinished business of the WTO under the GATS. WTO Members recognized that excessively lengthy, complex, or opaque licensing requirements and procedures, or the lack of objective or transparent criteria for qualification of other technical standards, could have distorting and trade-restrictive effects on services trade.[13] GATS negotiators acknowledged that a separate set of multilateral disciplines on domestic regulation would address a gap in the GATS rulebook. But as will be discussed in this paper, plurilateral efforts towards a new set of rules would eventually go beyond the scope of existing multilateral disciplines and commitments on services under the GATS.

The international legal framework on trade in services under the GATS has two main pillars: the framework agreement containing the general rules and disciplines, and the national "schedules" which list individual countries' specific commitments on access to their domestic markets by foreign suppliers. Three broad types of measures affecting trade in services are covered: (1) quantitative restrictions on entry and establishment (whether discriminatory or not) which are subject to market access disciplines under GATS Article XVI(2),[14] (2)

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[11] *Id.*

[12] Lim & de Meester, *supra* note 8, at 1.

[13] Bangura & Kromah, *supra* note 6.

[14] "2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

discriminatory measures modifying the conditions of competition in favor of domestic services suppliers, which are subject to national treatment obligations under GATS Article XVII, and (3) domestic regulations that are neither quantitative nor discriminatory in nature, which are subject to GATS Article VI.[15] The first two types of measures are subject to negotiations towards progressive elimination, while the third type—domestic regulations—are not.[16] This is because the GATS does not impose any *a priori* obligations to remove non-quantitative, non-discriminatory regulations in any service sectors.[17] Yet, these non-discriminatory regulations governing services sectors, which include licensing and qualifications requirements and technical standards, add an additional layer of complexity in an already vast universe of measures regulating services sectors and cross-border trade in services.[18]

B. Progressive Liberalization vs. The Right to Regulate

In the negotiations leading to the GATS, multilateral trade rulemaking ventured into areas of internal regulation never before recognized as trade policy,

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(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

15 *See generally* Lim & de Meester, *supra* note 8, at 1–8.

16 *See* General Agreement on Trade in Services [hereinafter GATS] art. XIX, Preamble (par. 2 & 3), April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1B, 1869 U.N.T.S. 183.

17 Laura Baiker, Elena Bertola, & Markus Jelitto, *Services Domestic Regulation – Locking in Good Regulatory Practices* 4 (WTO Economic Research and Statistics Division, Staff Working Paper No. ERSD-2021-14), https://www.wto.org/english/res_e/reser_e/ersd202114_e.pdf.

18 International Centre for Trade and Sustainable Development, *Negotiating Disciplines on Domestic Regulations in Services*, WTO: PATHS FORWARD, June 2018, at 1, 2.

raising one of the most difficult issues in international trade—the relationship between trade liberalization and domestic regulatory autonomy.[19] The development of multilateral disciplines on domestic regulation represents a collision of fundamentally competing priorities. At one end is the WTO's *raison d'etre* of trade liberalization, and relative to the GATS, progressive liberalization. The Preamble of the GATS provides that among the objects and purposes of the GATS is the establishment of "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization."[20] Under GATS Article XIX, WTO Members shall aim to achieve a "progressively higher level of liberalization" of trade in services through successive rounds of negotiations to provide effective market access for services.[21] The principle of progressive liberalization is reflected in the structure of the GATS, which contemplates that WTO Members undertake specific commitments through successive rounds of multilateral negotiations with a view to liberalizing their services markets incrementally, rather than immediately and completely at the time of the acceptance of the GATS.[22]

At the other end is the preservation of domestic regulatory autonomy generally, and under the GATS, the right to regulate and to pursue national policy objectives specifically. It is through regulation that governments pursue certain public policy objectives in regulating services trade, such as equitable access to services, consumer protection, job creation in disadvantaged regions, labor market integration of disadvantaged persons, reduction of environmental impacts and other externalities, macroeconomic stability, avoidance of market dominance and anti-competitive conduct, avoidance of tax evasion and fraud, among other examples.[23] As domestic regulation of services is at the core of a country's sovereignty and the ability of a state to pursue important public policy issues such as health and consumer protection, environmental concerns, and income

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19 Lim & de Meester, *supra* note 8, at 2.

20 Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [hereinafter *China – Publications and Audiovisual Products*], ¶ 7.1219, WTO Doc. WT/DS363/R (adopted Jan.19, 2010), *citing* GATS Preamble (par. 2).

21 Peter Van den Bossche, The Law and Policy of the World Trade Organization: Text, Cases, and Materials 481 (2nd ed. 2008).

22 Appellate Body Report, *China – Publications and Audiovisual Products*], ¶ 392–394, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010).

23 GATS Handbook, *supra* note 9, at 21.

redistribution,[24] governments across the development spectrum have at varying levels assiduously defended the right to regulate. Ensuring quality through regulation has a particular significance in the regulation of services, because the intangible and non-storable nature of the supply of a service entails some physical proximity and interaction between the service supplier and consumer; consumers frequently cannot appreciate the quality of the service until they have consumed it.[25] Governments resort to the use of regulations targeted at the service suppliers and not at the actual service, to ensure that service suppliers do not exploit information asymmetries,[26] in order to regulate the quality of the service provided.

The incongruence between these diametrically opposite but equally recognized values of multilateral trade in services is reflected in the Preamble to the GATS.[27] The first part of the Preamble of the GATS recognizes "*the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives*,"[28] which is reproduced in Section I, Paragraph 3 of the Reference Paper.[29] The second part of the GATS Preamble, meanwhile, takes into account the "*asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right*,"[30] which is also restated as Section I Paragraph 4 of the Reference Paper.[31] These Preambular clauses can be seen as giving a certain deference to WTO Members that is unique among other

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[24] Joost H.B. Pauwelyn, *Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 WORLD TRADE REV. 131, 135 (2005).

[25] WTO Secretariat – Trade in Services Division, *supra* note 8, at 1; Lim & de Meester, *supra* note 8, at 1.

[26] WTO Secretariat – Trade in Services Division, *supra* note 8, at 1.

[27] *See also* Bregt Natens & Jan Wouters, *The Scope of GATS and of its Obligations* 4–5 (Leuven Centre for Global Governance Studies, Working Paper No. 117, 2013), *citing* MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES 56 (2003).

[28] GATS Preamble (par. 4).

[29] World Trade Organization, *supra* note 5, at 2 (The Reference Paper states that "[m]embers recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet their policy objectives.").

[30] Kinda Mohamadieh, *Disciplining Non-discriminatory Domestic Regulations in the Services Sectors – Another Plurilateral Track at the WTO* 3 (Third World Network, Briefing Paper No. 103, 2019), https://ourworldisnotforsale.net/2019/TWN_103_services.pdf.

[31] "4. Members further recognize the existence of asymmetries with respect to the degree of development of services regulations in different countries, especially in the case of developing and least-developed country Members."

WTO agreements,[32] and an acknowledgement of the sovereignty-constraining character of such rules that fundamentally impinge on the right of governments to regulate. The Appellate Body seemed to have reaffirmed this deference in *China – Publications and Audiovisual Products*, holding that the "right to regulate" in the abstract is an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the WTO Agreement.[33] The implication is that provisions of the WTO Agreements that guarantee regulatory autonomy should be regarded as cornerstones of the basic WTO bargain rather than narrow exceptions.[34]

C. Negotiations on Domestic Regulation under GATS Article VI(4)

Article VI of the GATS provides the general framework for rules on the domestic regulation of services. It is, by design, however, incomplete. The GATS left room for WTO Members to further discuss substantive rules as part of the WTO's unfinished business on trade in services. GATS Article VI(4) sets the mandate for WTO Members to negotiate multilateral disciplines on domestic regulation:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:
>
> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.[35]

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[32] *See* Panagoitis Delimatsis, *Concluding the WTO Services Negotiations on Domestic Regulation – Walk Unafraid* (Tilburg Law and Economics Center, Discussion Paper No. DP 2009-032).

[33] Appellate Body Report, *China – Publications and Audiovisual Products*, *supra* note 22, at ¶ 222.

[34] Michael Trebilcock, Antonia Eliason, & Robert Howse, THE REGULATION OF INTERNATIONAL TRADE 497 (4th ed. 2013).

[35] GATS art. VI(4).

The negotiations towards disciplines on domestic regulation constitute the first serious attempt to concretize the GATS VI(4) mandate and how to achieve it in certain categories of domestic regulations relating to qualifications, licensing, and technical standards.[36] The Working Party on Professional Services (WPPS),[37] and later superseded by the Working Party on Domestic Regulation (WPDR),[38] was established by the Council for Trade in Services (CTS) pursuant to the GATS Article VI(4) mandate. The WPPS was tasked by the Ministers to come up with recommendations on the disciplines "necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of *professional services* do not constitute unnecessary trade barriers."[39] Initially focusing on the accountancy sector, the WPPS delivered on its mandate with the adoption of the *Accountancy Disciplines*, discussed in Part I.C.2.[40]

The *de jure* WTO body overseeing Article VI(4) negotiations on domestic regulation, the WPDR, replaced the WPPS with the mandate to "develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services."[41] Whereas the WPPS was tasked to recommend domestic regulation disciplines on a particular sector (professional services), the WPDR was mandated to negotiate a set of *horizontal* disciplines on domestic regulation that would be applicable across sectors, which was later reaffirmed at the Sixth WTO Ministerial Conference in Hong Kong, China in December 2005.[42] Although it took WTO Members, working through the WPPS and later the WPDR, more than two decades of negotiations before a complete draft of the horizontal disciplines on domestic

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[36] Delimatsis, *supra* note 32, at 5.

[37] World Trade Organization, Ministerial Decision on Professional Services [hereinafter Decision on Professional Services], WTO Doc. S/L/3, ¶ 1 (1995).

[38] World Trade Organization, Ministerial Decision on Domestic Regulation [hereinafter Decision on Domestic Regulation], WTO Doc. S/L/70, ¶ 1 (1999).

[39] Decision on Professional Services, *supra* note 37, at ¶ 1.

[40] *See* discussion *infra* Part. I.C.2.

[41] Decision on Domestic Regulation, *supra* note 38, at ¶ 2.

[42] World Trade Organization, Ministerial Declaration of 18 December 2005, WTO Doc. WT/MIN(05)/DEC, annex C, ¶ 5 (2005).

regulation was formally tabled at the 11th WTO Ministerial Conference in November 2017, some notable milestones were achieved during that period.

1. Telecoms Reference Paper

The first major regulatory milestone in multilateral trade negotiations did not even take place under the Article VI(4) mandate. Within three years after the entry into force of the GATS, market access commitments on telecommunications services, one of the three sector-specific services negotiations that continued after the conclusion of the Uruguay Round,[43] were undertaken by 69 WTO Members (including the Philippines) and annexed to the Fourth GATS Protocol.[44] Due to profound technological and structural changes taking place at the time in global telecommunications markets,[45] a number of Members were of the view that effective market access could be undermined through governmental measures not regulated by the GATS,[46] including anti-competitive measures and the abuse of market power, and that GATS rules were insufficient to obviate the effective nullification of such negotiated commitments.[47]

The solution was a set of regulatory principles and competition disciplines embodied in a "*Reference Paper Regarding Telecommunications Services*"[48] (hereinafter "Telecoms Reference Paper")—the first successful attempt to address the highly specific regulatory issues faced by services operators in the telecoms sector,[49] through negotiated provisions on competitive safeguards,

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43 The other two being maritime services and financial services.

44 Fourth Protocol to the General Agreement on Trade in Services, Apr. 16, 1997, 2061 U.N.T.S 209. *See also* WORLD TRADE ORGANIZATION, SPECIAL STUDIES – MARKET ACCESS: UNFINISHED BUSINESS POST-URUGUAY ROUND INVENTORY AND ISSUES 109–10, https://www.wto.org/english/res_e/booksp_e/special_study_6_e.pdf.

45 WORLD TRADE ORGANIZATION, *supra* note 44, at 110.

46 Hunter Nottage & Thomas Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, 9 J. INT'L ECON. L. 989, 1013 (2006).

47 WORLD TRADE ORGANIZATION, *supra* note 44, at 110.

48 World Trade Organization, Negotiating Group on Basic Telecommunications: Reference Paper on Telecommunications Services (1996), https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

49 International Centre for Trade and Sustainable Development, *supra* note 18, at 4, *citing Aaditya Mattoo & Pierre Sauvé Domestic Regulation and Trade In Services: Key Issues*, *in* DOMESTIC

interconnection arrangements, universal service obligations, licensing criteria, regulatory independence and the allocation of scarce resources.[50] Although the Telecoms Reference Paper was not developed through the process mandated by GATS Article VI(4), it was nonetheless instrumental in drawing upon domestic regulation principles in GATS Article VI, and in informing WTO Members in the negotiations on domestic regulation as mandated by GATS Article VI(4).[51] On its own, the Telecoms Reference Paper was not itself law,[52] but it provided WTO Members an innovative template to use as a basis for additional commitments that would only become legally binding on those that have inscribed the same in their GATS schedules. This template would later be used for additional commitments on domestic regulation under the JSI-SDR, as will be explained in Part III.A.2.[53] The legally binding nature of the Telecoms Reference Paper was such that it became a justiciable source of obligations under the WTO Dispute Settlement Mechanism, and was the subject of the first GATS dispute, *Mexico–Measures Affecting Telecommunications Services* (hereinafter *Mexico – Telecoms*).[54]

2. Accountancy Disciplines

A second milestone was the successful adoption of the *Disciplines on Domestic Regulation in the Accountancy Sector* (hereinafter "accountancy disciplines") by the WPPS, which was tasked by the CTS to focus on the accountancy sector "as a matter of priority"[55] in the development of multilateral disciplines.[56] The accountancy disciplines were envisioned as a possible prototype for GATS disciplines in other fields and even as a model for developing horizontal disciplines that would apply to all professional services.[57] Although the

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REGULATION AND SERVICE TRADE LIBERALIZATION 1, 4 (Aaditya Mattoo & Pierre Sauvé Domestic eds., 2003).

50 Council for Trade in Services, *Note by the Secretariat: International Regulatory Initiatives in Services*, WTO Doc. S/C/W/97, ¶ 12 (Mar. 1, 1999).

51 *Id.* at 3, *citing* Lee Tuthill, *The GATS and New Rules for Regulators*, 21 TELECOMMC'NS POL. 783, 783–798 (1997).

52 ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 136 (2nd ed. 2008).

53 *See* discussion *infra* Part. III.A.2.

54 *See* discussion *infra* Part. III.B.1.

55 Decision on Professional Services, *supra* note 37, at ¶ 2.

56 Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, WTO Doc. S/L/64 (Dec. 17, 1998).

57 Patricia J. Arnold, *Disciplining Domestic Regulation: The World Trade Organization and the Market For Professional Services*, 30 ACCT., ORG., & SOC'Y 299, 308 (2005).

accountancy disciplines were focused on non-discriminatory measures relating to licensing, qualifications, and technical standards that are not subject to scheduling under Articles XVI and XVII,[58] it also sets forth procedural innovations intended to facilitate cross-border trade in professional services and promote transparency and legal certainty in the process of securing a license. Three particular procedural innovations would later figure prominently in negotiations on the domestic regulation disciplines. Two of these innovations would become part of the JSI-SDR Reference Paper disciplines. First, under paragraph 5 of the accountancy disciplines, Members were required, for the first time, to explain upon request the specific objectives intended by their regulations, while in paragraph 6, Members were required, also for the first time, to provide an opportunity for trading partners to comment upon proposed regulations, and to give consideration to such comments.[59] The third innovation establishes a core element of the accountancy disciplines—the so-called "necessity test" for all applicable regulatory measures, i.e., the principle that regulatory measures shall not be more trade-restrictive than necessary to fulfill a specified legitimate objective,[60] which would subsequently become a thorny negotiating issue in the WPDR and will be discussed in the next section.[61]

It should be noted that the effectivity of the accountancy disciplines, its integration as part of the GATS *acquis*, and its applicability to Members would depend on two conditions, namely: the conclusion of the Doha Round of trade negotiations and the inscription of the disciplines as specific commitments on accountancy in the GATS schedules of Members.[62] As both conditions did not occur, the accountancy disciplines have not entered into force, and are thus not binding on Members. Nonetheless, some elements of the accountancy disciplines found their way into the discussions at the WPDR, informing the negotiating outcomes on the draft disciplines and the overall horizontal approach to domestic regulation of services.

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[58] Where such measures discriminate between foreign and domestic suppliers, whether formally or in fact, these would have to be scheduled as national treatment limitations. *See* WTO Secretariat – Trade in Services Division, *supra* note 8, at 3.

[59] Council for Trade in Services, *supra* note 50, at ¶ 9.

[60] *Id.*

[61] *See* discussion *infra* Part. I.C.3.

[62] World Trade Organization, Ministerial Decision on Disciplines Relating to the Accountancy Sector, WTO Doc. S/L/63, ¶¶ 1, 2 (1998).

3. 2017 consolidated draft text on Domestic Regulation

Finally, a consolidated draft text of the Disciplines on Domestic Regulation was elevated for the first time as a draft Ministerial document to the 11th WTO Ministerial Conference (MC11) in December 2017.[63] The 2017 consolidated draft text (hereinafter the "2017 WPDR text") was the amalgamation of a number of proposals submitted by WTO Members to the WPDR from 2016-2017, focusing on transparency, administration of measures, authorization, and development of measures. Those submissions carried forward only some elements of the 2009 Chair's Text[64]—the previous consolidated draft that had a number of provisions already agreed *ad referendum* by the WPDR delegates in 2011,[65] but had failed to gain enough traction at the WPDR to be included in the 8th WTO Ministerial Conference in December 2011. Ultimately, the 2017 WPDR text of the Disciplines on Domestic Regulation was not adopted by the Ministers at MC11 due to opposition from India and the African Group, both of whom believed that the 2017 WPDR text was a significant departure from the 2009 Chair's Text and from the GATS Article VI(4) mandate itself.[66] Despite not reaching the requisite Ministerial consensus, the 2017 WPDR text contains elements a great majority of which were also carried over into the Reference Paper adopted by the JSI-SDR, as discussed in Part III.[67]

Thus far, in the more than two decades of negotiations on the Article VI(4) mandate in the WPPS and the WPDR, a few observations on the evolution of the text of multilateral disciplines on domestic regulation of services can be made. First is the treatment of the so-called "necessity test" in the disciplines. Under the

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[63] World Trade Organization, Disciplines on Domestic Regulation [hereinafter Disciplines on Domestic Regulation], WTO Doc. WT/MIN(17)/7/Rev.2 (WT/GC/190/Rev.2) (Dec. 13, 2017); World Trade Organization, Disciplines on Domestic Regulation (Revised) [hereinafter Disciplines on Domestic Regulation (Revised)], WTO Doc. WT/MIN(17)/7 (WT/GC/190) (Dec. 1, 2017).

[64] Working Party on Domestic Regulation, *Informal Note by the Chairman: Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4*, WTO Doc. TN/S/36 (attachment) (Mar. 20, 2009).

[65] Working Party on Domestic Regulation, *Chairman's Progress Report: Disciplines on Domestic Regulation Pursuant to GATS Article VI.4*, WTO Doc. S/WPDR/W/45 (Apr. 14, 2011).

[66] *See* Comments by India on Co-Sponsors' Text on Disciplines on Domestic Regulation (WT/MIN(17)/7, WT/GC/190), *Disciplines on Domestic Regulation*, WTO Doc. WT/MIN(17)/19, JOB/GC/168 JOB/TNC/70, JOB/SERV/276 (Dec. 5, 2017).

[67] *See* discussion *infra* Part. III.

chapeau of GATS Article VI(4), the disciplines shall ensure that measures "do not constitute *unnecessary barriers to trade in services*," while paragraph (b) ensures that requirements should "*not* [be] *more burdensome than necessary* to ensure the quality of the service." The concept of a "necessity test" in WTO law is well-documented in the multilateral trade literature.[68] It would be recalled that a sector-specific necessity test was adopted by the WPPS as part of the accountancy disciplines,[69] but language on a *horizontal* necessity test has yet to be agreed upon by negotiators in the WPDR. The 2009 Chair's Text excludes any textual references to a necessity test despite express references to the mandate for such a test in GATS Article VI(4), reflecting fundamental disagreement among WTO Members on whether such provisions are to be made part of the disciplines. The Chair of the WPDR later acknowledged that the question of whether a normative standard in the form of a "necessity test" should be included in the disciplines is one of the most difficult issues in the negotiations in the WPDR.[70] In the run-up to MC11, proposed language on a necessity test was reintroduced in an early version of the 2017 WPDR text,[71] and was bracketed as placeholder language in the final version elevated to the Ministers at MC11.[72] The JSI-SDR Reference Paper did not, however, carry over the suggested language on a necessity test bracketed in the 2017 WPDR text, and completely omits any reference in the final version that was adopted in November 2021. This could be evidence of a shift away from strict disciplines as a necessity and towards a good regulatory practice approach, through disciplines that emphasize transparency, procedural fairness, and regulatory governance.[73] It

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[68] Gilles Muller, *The Necessity Test and Trade in Services: Unfinished Business?*, 49 J. OF WORLD TRADE, 951, 951–974 (2015); Panagiotis Delimatsis, *Towards a Horizontal Necessity Test for Services: Completing the GATS Article VI:4 Mandate*, *in* GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 370, 370–396 (Marion Panizzon, Nicole Pohl, & Pierre Sauvé eds., 2009); Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services – The Best is Yet to Come*, 19 EUR. J. INT'L L. 365, 365–408 (2008); Panagiotis Delimatsis, *Creating a Horizontal Necessity Test for Services*, *in* INTERNATIONAL TRADE IN SERVICES AND DOMESTIC REGULATIONS: NECESSITY, TRANSPARENCY AND REGULATORY DIVERSITY 166, 166–254 (2007).

[69] Council for Trade in Services, *supra* note 50, at ¶ 9.

[70] Working Party on Domestic Regulation, *supra* note 65, at ¶ 14.

[71] Based on a proposal from Chile, Hong Kong (China), Moldova, Peru, New Zealand, and Switzerland.

[72] *See* Disciplines on Domestic Regulation (Revised), *supra* note 63, at 7.

[73] Markus Krajewski, *Trading Away Public Policy Space? Assessing the Risk of Enhanced Domestic Regulation Disciplines in Trade and Investment Agreements for Public Interest Regulation*, EUROPEAN PUBLIC SERVICE UNION AND THE CHAMBER OF LABOUR VIENNA 9 (Nov. 2021), https://www.epsu.org/sites/default/files/event/files/EPSU%20AK%20Study%20Domestic%20Regulation%20FINAL_Layout_202111.pdf.

should be noted, however, that in Footnote 1 of Section 1, Paragraph 1 of the Reference Paper, further disciplines may be developed by Members pursuant to GATS Article VI(4), which does not rule out the inclusion of a necessity test in future meetings of the JSI-SDR, or in the event that the Reference Paper is multilateralized through the WPDR.

Second, the 2017 WPDR text reflected a shift in the approach to the negotiations of the disciplines specific to four of the five mandated areas under GATS Article VI(4), namely licensing requirements, licensing procedures, qualification requirements, and qualification procedures, by reframing them as part of the broader process of "*authorization to supply a service*."[74] The 2009 Chair's Text had initially contained separate provisions under the four mandated areas of GATS Article VI(4), which had common structural and textual elements. During the revival of WPDR negotiations in 2017, those common elements in the 2009 Chair's Text of a *procedural* nature related to the application and approval process of licensing and qualifications for the supply of a service were consolidated, ostensibly as part of an effort to simplify the approach to the draft text and expedite the negotiating process. These merged procedures include a single competent authority for license applications, submission of applications at any time, processing of applications within a reasonable timeframe, acceptance of authenticated copies in place of original documents, specific procedures in case an application is incomplete or rejected, prompt effectivity of a granted license or fulfilled qualifications, reasonable fees, and reasonably frequent intervals for examinations where required. It bears noting that the provisions in the 2009 Chair's Text on licensing and qualification requirements, which contain language of a more *substantive* nature, were not included in the 2017 consolidated draft text, and were not carried over to the Reference Paper. These and other procedural and transparency elements of the authorization to supply a service would become major features of the JSI-SDR Reference Paper, and will be taken up under Part III.D.1.[75]

Finally, one particular element of domestic regulation of services that was consistently on the table in the WPDR and embodied through draft language in the 2009 Chair's Text, the 2017 WPDR text, and in the JSI-SDR Reference Paper, is administrative rule-making—more specifically, the prior notice-and-comment

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[74] *See* discussion *infra* Part. I.C.

[75] *See* discussion *infra* Part. III.D.1.

and substantive requirements of any proposed law or regulation of services sectors. The basic elements of the prior notice-and-comment provisions were retained by and large in all three versions of the disciplines, with only minor textual variances. But this is far from indicating any general and broad support for such rules among WTO Members. To the contrary, notice-and-comment disciplines were one of the most controversial and extensively discussed issues within the WPDR, as discussions among delegates focused on the necessity and desirability of prior comment and consultation procedures and the appropriate level of detailed legal language to be drafted.[76] Developing countries initially voiced their opposition, decrying the additional administrative burden, particularly for sub-national levels of government that may lack sufficient technical or financial capacity to establish a prior notice-and-comment mechanism.[77] In addition, the 2017 WPDR text included disciplines on "*Development of Measures*," which is not found in the 2009 Chair's Text, but introduced for the first time proposed disciplines that go into the content of service measures. This will be discussed in greater detail in Part III.D.2.[78]

D. The Joint Statement Initiative and the Reference Paper

1. The Joint Statement Initiatives (JSIs)

The failure to reach a Ministerial consensus at MC11 on the 2017 WPDR text and on any of the draft negotiating texts circulated on all mandated issues compelled a number of WTO Members to issue Joint Ministerial Statements[79] to pursue separate negotiations on such issues with interested Members. Ministers representing 59 WTO Members,[80] including all 29 co-sponsors of the 2017 WPDR text,[81] issued the Joint Ministerial Statement on Services Domestic Regulation, in

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[76] Delimatsis, *supra* note 68, at 277.

[77] *Id.* at 278.

[78] *See* discussion *infra* Part. III.D.2.

[79] The Joint Ministerial Statements issued in MC11 are follows: Joint Ministerial statement - Declaration on the Establishment of a WTO Informal Work Programme for MSMES (WT/MIN(17)/58), Joint Ministerial Statement on Investment Facilitation for Development (WT/MIN(17)/59), Joint Statement on Electronic Commerce (WT/MIN(17)/60), and Joint Ministerial Statement on Services Domestic Regulation (WT/MIN(17)/61).

[80] Including all 27 Member States of the European Union.

[81] The original 29 co-sponsors of the 2017 WPDR Text are: Albania; Argentina; Australia; Canada; Chile; China; Colombia; Costa Rica; The European Union; Hong Kong, China; Iceland; Israel; Japan; Republic of Kazakhstan; Republic of Korea; Liechtenstein; The Former Yugoslav

which they committed to advance "negotiations on the basis of recent proposals as set out in WT/MIN(17)/7/Rev.2 and related discussions in the WPDR and future contributions by Members to deliver a multilateral outcome."[82] Shortly after MC11 concluded in December 2017, the signatories to the Joint Ministerial Statement on Services Domestic Regulation, convening as the "Joint Statement Initiative on Services Domestic Regulation" (JSI-SDR), continued text-based discussions over the course of three years.[83]

The literature is rife with commentary on what transpired at MC11—an unprecedented, highly publicized break with a fundamental consensus rule in multilateral trade negotiations that has been described as a "plurilateral approach."[84] The issue still divides delegations in Geneva, but with the "success" of the JSI-SDR, the meetings and activities of the other Joint Statement Initiatives (now referred to as "Joint Initiatives")[85] continue despite a lack of universal certainty on the legitimacy of any outcome that may result. To be sure, it would be entirely sensible to think that the level of difficulty in achieving consensus among

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Republic of Macedonia; Mexico; Republic of Moldova; Montenegro; New Zealand; Norway; Peru; The Russian Federation; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; Turkey; Ukraine; and Uruguay. Brazil, Indonesia, and Singapore later joined as part of the original signatories to the Joint Ministerial Statement on Services Domestic Regulation.

[82] World Trade Organization, Joint Ministerial Statement on Services Domestic Regulation, WTO Doc. WT/MIN(17)/61, ¶ 3 (2017).

[83] World Trade Organization, *supra* note 5. *See also* Press Release, World Trade Organization, Participants in Domestic Regulation Talks Conclude Text Negotiations, on Track for MC12 Deal (Sept. 27, 2021), https://www.wto.org/english/news_e/news21_e/serv_27sep21_e.htm.

[84] Americo B. Zampetti, Patrick Low, & Petros C. Mavroidis, *Consensus Decision-Making and Legislative Inertia at the WTO: Can International Law Help?*, 56 J. OF WORLD TRADE 1, 1–26 (2022); Hamid Mamdouh, *Plurilateral Negotiations and Outcomes in the WTO*, FRIENDS OF MULTILATERALISM WEBSITE (Apr. 16, 2021), https://fmg-geneva.org/7-plurilateral-negotiations-and-outcomes-in-the-wto/; Jane Kelsey, *Why the Joint Statement Initiatives Lack Legal Legitimacy in the WTO: A Response to Hamid Mamdouh, "Plurilateral Negotiations and Outcomes in the WTO,"* THE UNIVERSITY OF AUCKLAND LAW SCHOOL (Apr. 21, 2021), https://ourworldisnotforsale.net/2021/Kelsey_JSI_legitimacy.pdf; KINDA MOHAMADIEH, PLURILATERAL INITIATIVES AND THEIR INTERACTION WITH WTO RULES (2020), https://www.twn.my/title2/t&d/tnd44.pdf; Fiama Angeles, Riya Roy, & Yulia Yarina, *Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges*, GRADUATE INSTITUTE GENEVA (Dec. 2020), https://repository.graduateinstitute.ch/record/299033/files/WTO%20Capstone%20Final%20Report%20JSIs.pdf.

[85] *See* Informal Discussions: Joint initiatives, WORLD TRADE ORGANIZATION WEBSITE (n.d.), https://www.wto.org/english/tratop_e/jsi_e/jsi_e.htm.

164 veto-wielding WTO Members, on any one issue of the multilateral trading system, let alone a complex set of rules that would govern potentially US$ 1.6 trillion[86] worth of trade in services, is unimaginably high. Although the wisdom and legality of the JSI "plurilateral approach" and its consistency with WTO rules is beyond the scope of this paper, a reminder of the systemic and development implications of JSIs bears mentioning: "[a]ny attempt to introduce new rules resulting from the JSI negotiations into the WTO without fulfilling the requirements of Articles IX and X of the Marrakesh Agreement, will be detrimental to the functioning of rule based multilateral trading system. Such a step will. . . result in Members disregarding existing multilateral mandates arrived at through consensus in favour of matters without multilateral mandates."[87]

2. The Reference Paper on Services Domestic Regulation

The "text-based discussions" under the JSI-SDR culminated in the conclusion of the negotiations on 27 September 2021 on a draft *Reference Paper on Services Regulation* (referred to in this paper as "JSI-SDR Reference Paper" or simply "Reference Paper").[88] The Reference Paper is twelve pages long and is divided into three Sections: Section I (Sectoral Coverage and Scheduling Modalities, Development), Section II (Disciplines on Domestic Regulation), and Section III (Alternative Disciplines on Financial Services). Section I contains preambular provisions that include an express recognition of the right to regulate and to introduce new regulations on the supply of services to meet policy objectives. It also includes the obligation to inscribe the disciplines under Section II in the Members' GATS schedules as additional commitments, which shall be discussed in Part III.A.1. Section II is the essential core of the Reference Paper, setting forth the domestic regulation disciplines covering procedural, transparency, and a few substantive obligations as embodied in 22 paragraphs of text. The disciplines under Section II and Section III are nearly identical, except for two: (1) the obligation to avoid requiring the applicant for an authorization to approach more than one competent authority, and (2) the duty to support

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[86] Value of global trade in services as of July 2022. *See* Global Trade Update, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (July 2022), at 2, https://unctad.org/system/files/official-document/ditcinf2022d2_en.pdf.

[87] World Trade Organization, The Legal Status of 'Joint Statement Initiatives' and their Negotiated Outcomes, WTO Doc. WT/GC/W/819/Rev.1 ¶ 11 (2021).

[88] World Trade Organization, *supra* note 5. *See also* Press Release, *supra* note 83.

dialogues between competent bodies on issues relating to the recognition of professional qualifications, licensing, and registration.

The domestic regulations disciplines in the Reference Paper are considered "GATS+" because they build on and expand on the good governance provisions of the GATS,[89] based on the three core principles of transparency, legal certainty and predictability, and regulatory quality and facilitation.[90] To improve the transparency of regulatory processes, participating WTO members are required to publish and make available information required for compliance with authorization and regulatory decision-making processes to service suppliers in order.[91] The Reference Paper disciplines seek to achieve legal certainty and predictability of regulatory processes by requiring regulatory and procedural guarantees from competent authorities addressing applications for authorization of the supply of services.[92] Finally, signatories are expected to observe regulatory quality and facilitation, among others, ensuring centralized authorization procedures and disseminating good regulatory practices to facilitate service suppliers' ability to trade.[93]

II. Domestic Regulation of Services in the Philippines

The Philippines announced its intention to join the Joint Statement Initiative on Domestic Regulation of Services in a meeting of the JSI-SDR on 28 November 2021. On 2 December 2021, the Philippines formalized its participation in the JSI-SDR and joined 67 other WTO Members in adopting the *Declaration on the Conclusion of Negotiations on Services Domestic Regulation*,[94] including the Reference Paper on Services Domestic Regulation that was annexed to the Declaration.[95] As of September 2022, 70 WTO Members have signed on to the JSI-

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89 Bertola, Coghi, & Jelitto, *supra* note 7, at 77.

90 Bangura & Kromah, *supra* note 6, at 179.

91 *Id.*

92 *Id.*

93 *Id.*

94 World Trade Organization, Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WTO Doc. WT/L/1129 (2021), ¶ 1, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True .

95 World Trade Organization, Joint Initiative on Services Domestic Regulation: Reference Paper on Services Domestic Regulation, WTO Doc. INF/SDR/2 (Nov. 26, 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True

SDR Reference Paper,[96] and 67 WTO Members have submitted their "Pre-Finalization Schedule of Specific Commitments," including the Philippines.[97] In a press release on the announcement of the Philippines' participation in the JSI-SDR, it was highlighted that "services represent the driver of [the] economy, accounting for more than 60% of GDP and covering more than 55% of [the] labor force. . . . The Philippines expects that the disciplines will make it easier for . . . MSMEs to enter the global market, where they will stand to benefit from a higher-than-average trade cost reduction of up to 10 percent. Philippine firms, particularly those involved in transport and logistics, financial services, and knowledge-based professional services, will be in a better position to attract. . . investments, [and] allow MSMEs to pursue further integration into global services value chains, and support. . . economic recovery."[98] This move reflects a deliberate policy decision that is presumably aligned with the Philippine government's development strategy to enhance the competitiveness of its services sectors and integration into the global economy.[99]

The Philippines' services sectors comprise a diverse range of industries, from retail and business services to education and health, with some sectors serving as inputs in production, while others directly affect human capital development.[100] Given the diversity and breadth of its domestic services sectors, the Philippines' overall policy on trade in services is not subject to a horizontal or cross-cutting mandate by any single agency. There is no specific governmental entity that formulates an overall services policy applicable horizontally to the

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. *See also* Informal Discussions: Services Domestic Regulation, World Trade Organization Website (n.d.), https://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm; Press Release, Department of Foreign Affairs of the Philippines, PH at the Forefront of ASEAN in Facilitating Trade in Services in WTO (Dec. 3, 2021), https://dfa.gov.ph/dfa-news/news-from-our-foreign-service-postsupdate/29934-ph-at-the-forefront-of-asean-in-facilitating-trade-in-services-in-wto.

96 World Trade Organization, *supra* note 95.

97 World Trade Organization, Pre-Finalization Schedule of Specific Commitments (Philippines), WTO Doc. INF/SDR/IDS/PHL (2022) (Access to the contents of this document is restricted to WTO delegations.).

98 Press Release, *supra* note 95.

99 *See Services*, Department of Trade and Industry Website (n.d.), https://industry.gov.ph/category/services/.

100 Ramonette Serafica & Jean Colleen M. Vergara, *Regional Analysis of the Philippine Services Sector* i (abstract) (Philippine Institute for Development Studies, Discussion Paper, Series No. 2019-25), https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1925.pdf.

different agencies or oversees the implementation of services commitments across sectors. The National Economic and Development Authority (NEDA), the Philippines' central economic planning agency, has been serving as the *de facto* coordinator for GATS-related negotiating positions as Chair of the Inter-Agency Committee on Services.[101] The Department of Trade and Industry (DTI), meanwhile, has been chairing a fairly recent inter-agency body, the Philippine Working Group on Services (PH-WGS), which coordinates negotiating positions on services in the Philippines' free trade agreement (FTA) negotiations.

As far as the regulation of the services sectors is concerned, it is subject to the Philippine government's exercise of regulatory power and is administered through its rulemaking authority.[102] Because of the diversity of the services sectors and the legal mandates of agencies authorized to regulate such sectors, the Philippines' regulatory framework over services is decidedly more decentralized, in a way that line agencies handle trade issues for their respective sectors.[103] More specifically, under the Philippines' system of government, administrative agencies are bound by their respective charters or legal mandates to regulate the service sectors under their jurisdiction through administrative rulemaking.[104] This is because the rulemaking power of administrative agencies is itself a power delegated by Congress to implement the law, which they are entrusted to enforce within the confines of the granting statute, as required by the Constitution and its doctrine of non-delegability,[105] *potestas delegata non delegari potest.*[106] The legislative grant of quasi-legislative powers in the organic laws creating administrative agencies or substantive status usually takes the form of an

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[101] Trade Policy Review Body, T*rade Policy Review of the Philippines*, WTO Doc. WT/TPR/S/368/Rev.1, at 23 (Feb. 5, 2018), https://www.wto.org/english/tratop_e/tpr_e/tp468_e.htm.

[102] *See generally* UNCTAD Secretariat, Services, Development and Trade: The Regulatory and Institutional Dimension, Note by the Secretariat, at 11, Conference on Trade and Dev't, U.N. Doc. TD/B/C.I/MEM.4/11 (Mar. 9, 2016) https://unctad.org/system/files/official-document/c1mem4d11_en.pdf.

[103] Ramonette Serafica & Queen Cel Oren, *A Review of Philippine Participation in Trade in Services Agreements* 6 (Philippine Institute for Development Studies, Discussion Paper, Series No. 2021-43).

[104] Hector S. De Leon & Hector M. De Leon Jr., Administrative Law: Text and Cases 22 (7th ed. 2016).

[105] *Id.* at 78–80.

[106] *Echegarray v. Secretary of Justice*, G.R. No. 132601, Oct. 12, 1998, *citing Defensor-Santiago v. Commission on Elections*, G.R. No. 127325, Mar. 19, 1997.

authorization to issue the implementing rules and regulations (IRR), and may sometimes prescribe specific procedural requirements for its issuance, such as publication and public consultation.[107]

The reality, however, is that in a modern, globally-connected domestic economy, national regulators face the challenge of constantly adapting regulatory instruments and approaches to evolving market conditions and public policy needs.[108] Developing country governments often regulate in a less efficient manner, need to set up standards and regulatory arrangements from scratch, lack sufficient monetary resources, and have a deficit in competent human resources.[109] These challenges are symptomatic of the relationship between the level of development and regulatory burden that can also be seen as applicable to the Philippine experience.

The first step of regulatory reform in many countries is to cut administrative red tape and simplify rules and reporting requirements, with a view to facilitating business transactions and improving the overall business environment, an approach that the Philippines had adopted for improving the domestic regulatory environment as early as 2005.[110] One of these reforms, the 2007 Anti-Red Tape Act (Republic Act No. 9485), which created the Anti-Red Tape Authority or ARTA, broadly applied to most Philippine administrative agencies, but was limited to mandating fixed processing times instead of evaluating whether the regulatory requirements themselves remained appropriate—a narrow scope reflective of the operational realities of receiving government services in the Philippines at the time.[111] Despite these early reform efforts, regulatory quality remained poor, institutional capacity for regulation was weak, and the deliberative process of proposed improvements in existing regulation was lacking.[112]

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[107] Graciela Base, *Notice-and-Comment Rulemaking in Comparative Perspective: Some Conceptual and Practical Implications*, 15 ASIAN J. COMP. L., 95, 99 (2020).

[108] UNCTAD Secretariat, *supra* note 102, at 12.

[109] Juan A. Marchetti, *Developing Countries in the WTO Services Negotiations: Doing Enough?*, *in* WTO LAW AND DEVELOPING COUNTRIES 82, 118 (George A. Bermann and Petros C. Mavroidis eds., 2007).

[110] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT & ASIAN DEVELOPMENT BANK, REGULATORY IMPACT ASSESSMENT IN THE PHILIPPINES 24, 28–29 (2020).

[111] *Id.* at 29.

[112] Gilberto Llanto, *Regulatory Coherence: The Case of the Philippines*, *in* THE DEVELOPMENT OF REGULATORY MANAGEMENT SYSTEMS IN EAST ASIA: COUNTRY STUDIES 231, 231–239 (Derek Gil and Ponciano Intal, Jr. eds., 2016)

The Philippines began to enact structural reforms and follow a "good regulatory practice" approach on regulatory reform, which typically involves the design of objective, criteria-based, and transparent rules to promote efficiency and to lessen the scope for discretionary decision-making.[113] With the reconstituting of the Public-Private Sector Task Force on Philippine Competitiveness as the National Competitiveness Council (NCC) in 2011, and armed with a fresh and expanded mandate and authority, the NCC would shepherd the launch of *Project Repeal*—a program to encourage agencies to amend, repeal, consolidate, or delist irrelevant, unnecessary, and excessive regulations and institutionalize an evidence-based and systematic regulatory management system in the Philippines.[114] The conduct of regulatory impact assessments (RIA), an essential tool in the good regulatory practices toolbox,[115] began to be mainstreamed by the NEDA, acting in the absence of a government office that could initiate whole-of-government regulatory reform efforts.[116]

These and other related reform efforts[117] would culminate in the passage of the Ease of Doing Business and Efficient Government Service Delivery Act of 2018 (RA 11032, hereinafter "EODB Act"), amending the Anti-Red Tape Act. The EODB Act was notable for reinforcing the ARTA with an expanded mandate that includes reviewing proposed regulations of government agencies through the use of regulatory impact assessment and recommending policies, processes, and systems to improve regulatory management of agencies that process business permits and licenses.[118] The EODB Act also reconstituted the ARTA as a formal oversight body to assess the quality of regulations and make the conduct of regulatory impact assessment (RIA) a mandatory requirement.[119] As GATS disciplines on domestic regulation share objectives similar to those espoused by good regulatory

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[113] Lim & de Meester, *supra* note 8, at 9.

[114] Organization for Economic Cooperation and Development & Asian Development Bank, *supra* note 110, at 34.

[115] *See generally id.*

[116] *Id.* at 32.

[117] *See generally id.*

[118] Republic Act No. 11032 (Titled "An Act Promoting Ease of Doing Business and Efficient Delivery of Government Services, Amending for the Purpose Republic Act No. 9485, otherwise known as the Anti-Red Tape Act of 2007, and for other Purposes") [hereinafter "EODB Act"] (2017), sec. 17(f) & (g).

[119] Organization for Economic Cooperation and Development & Asian Development Bank, *supra* note 110, at 39, *citing* Republic Act No. 11032 (2017).

practices,[120] the question of whether these reforms are enough to align the Philippines' domestic regulatory regime on services with the GATS and with its commitments under the JSI-SDR Reference Paper will be discussed in Part III.

III. Analysis of the Philippines' Commitments under the Reference Paper

As one of the last[121] WTO Members to join the JSI-SDR before the conclusion of negotiations on the Reference Paper, the Philippines had agreed to formally participate in plurilateral negotiations on what was, for all intents, a final agreement, as the JSI-SDR participants had already closed text-based negotiations on 27 September 2021.[122] By committing to inscribe the Reference Paper disciplines on services domestic regulation in its GATS Schedule, the Philippines has bound itself to ensure compliance with the mandatory obligations. Although the Reference Paper disciplines on services domestic regulation by and large preserves the basic elements of the draft disciplines developed through the GATS Article VI:4-mandated WPDR process, the Reference Paper version poses certain challenges for the Philippines' regulatory regime for services. Part III of this Paper will focus on the main areas of the disciplines under Section II of the Reference Paper, identify the obligations that significantly impact the Philippines' domestic regulatory regime on services, and attempt to provide an analysis of the legal implications of incorporating the new JSI-SDR commitments and look into ways in which the Philippines can preserve any regulatory or policy space.

A. Mandatory Obligations Related to GATS Commitments

When WTO Members join the JSI-SDR and adopt the Reference Paper, whether as an original party or after the conclusion of the JSI negotiations on services domestic regulation, there are three main obligations that Members comply with to give the Reference Paper its legal effect: (1) inscribe the Reference

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[120] Lim & de Meester, *supra* note 8, at 9.

[121] The Philippines was the 66th (of 69) WTO Member to join the Joint Statement Initiative on Services Domestic Regulation upon the public announcement of the conclusion of negotiations on December 2, 2021. *See* Press Release, World Trade Organization, Negotiations On Services Domestic Regulation Conclude Successfully in Geneva (Dec. 2, 2021), https://www.wto.org/english/news_e/news21_e/jssdr_02dec21_e.htm; Press Release, *supra* note 95.

[122] Press Release, *supra* note 83.

Paper as additional commitments in their respective GATS schedules; (2) domestic regulation disciplines of the Reference Paper become conditional obligations as to the services sectors committed; and (3) such commitments shall be extended to other WTO Members and non-JSI participants on a Most-Favored Nation (MFN) basis.

1. Inscription of Reference Paper in the GATS Schedule

The obligation to inscribe the domestic regulation disciplines as additional commitments in each participating Members' schedule of specific commitments is mandatory for all participants to the JSI-SDR. Paragraphs 7 and 8, Section 1, of the Reference Paper provide:

> 7. Members *shall* inscribe the disciplines in Section II in their Schedules as additional commitments under Article XVIII of the Agreement.
>
> 8. The disciplines inscribed pursuant to paragraph 7 of this Section apply where specific commitments are undertaken. In addition, Members are encouraged to inscribe in their Schedules additional sectors to which the disciplines apply.[123] (Emphasis added)

Under GATS Article XVIII, "[m]embers may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding *qualifications, standards, or licensing matters*. Such commitments shall be inscribed in a Member's Schedule."[124] GATS Article XVIII itself does not entail any legal obligation; Members are not obliged to make additional commitments. It simply provides the legal basis for Members to negotiate and subsequently make specific commitments that fall outside the scope of the obligations on market access and national treatment.[125] GATS Article XVIII allows WTO Members to undertake additional commitments in areas such as qualifications, licensing, or standards—

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[123] World Trade Organization, *supra* note 95, at 2.

[124] GATS art. XVIII.

[125] Panagoitis Delimatsis, *Trade in Services in the WTO – Specific Commitments*, *in* ELGAR ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW 427, 430 (2017).

on a *voluntary* basis.[126] The process would depend solely on the acceptance by each individual member to incorporate the disciplines into their schedule.[127] Whether or not such specific commitments are to be undertaken and in what sectors is the outcome of negotiations between and among Members, which would still be up to the discretion of a WTO Member. Under GATS Article XX(1)(c), it is obligatory for each Member to set out in a schedule the specific commitments it decides to undertake under Part III of the GATS, which includes additional commitments under Article XVIII.[128]

The decision to make the act of inscribing the disciplines a binding obligation is a departure from the 2009 Chair's Text and the 2017 WPDR text. Unlike the Reference Paper, both versions do not make it a mandatory obligation to inscribe the disciplines as additional commitments. This is because there is no need to. As both negotiated texts represent the stillborn outcome of the discussions in the WPDR as mandated by GATS Article VI(4), the Members would not have used the Reference Paper approach, which means that the GATS Article XVIII need not be resorted to, and the disciplines would not have to take the form of additional commitments.[129]

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[126] Delimatsis, *supra* note 8, at 21.

[127] Aik Hoe Lim & Bart de Meester, *Addressing the Domestic Regulation and Services Trade Interface: Reflections on the Way Ahead*, *in* WTO Domestic Regulation and Services Trade: Putting Principles Into Practice, *supra* note 8, at 332, 349.

[128] "Article XX. Schedules of Specific Commitments.

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
   (a) terms, limitations and conditions on market access;
   (b) conditions and qualifications on national treatment;
   (c) undertakings relating to additional commitments;
   (d) where appropriate the time-frame for implementation of such commitments; and
   (e) the date of entry into force of such commitments.
2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.
3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

[129] It is surmised that had there been a successful conclusion to the GATS Article VI:4 negotiations on domestic regulation, the outcome would have taken the form of a standalone agreement (such as the Trade Facilitation Agreement or the Fisheries Subsidies Agreement), an Annex to the GATS, or a revision of the GATS itself.

The Reference Paper, on the other hand, was negotiated outside the GATS Article VI(4) mandated process, although it expressly refers to GATS Article VI(4) as its guiding objective.[130] Thus, making the inscription of the disciplines an express, legally binding obligation for JSI-SDR participants adds additional legal certainty that the participating Members give effect to the Reference Paper. If the inscription of the disciplines were voluntary, the Reference Paper would just be a common template or a Model Agreement for a set of rules and norms on the domestic regulation of services that WTO Members may *choose* to adopt or incorporate elements as part of their respective domestic legislation. It would have no legal status *per se* unless it was inscribed in the GATS Schedule of a WTO Member.[131] In this regard, the JSI-SDR Reference Paper follows a similar approach to the Telecoms Reference Paper,[132] except that, unlike the Telecoms Reference Paper, which allowed WTO Members to adopt only parts of it as additional commitments, it would seem that Members are expected to inscribe the entire Reference Paper.[133]

2. Domestic regulation disciplines as binding additional commitments in the GATS Schedule

The inscription of the domestic regulation disciplines in the Reference Paper as additional commitments in the specific schedules of commitments itself creates a set of legal obligations binding as to the services sectors committed thereunder. Under GATS Article XX(3), the Schedules will be attached to, and form an integral part of, the GATS.[134] Any additional commitments made, such as the disciplines on domestic regulation in the Reference Paper, will likewise become part of the GATS. Like tariff concessions in a WTO Member's Schedule, which are reciprocal and result from a mutually advantageous negotiation between importing and exporting Members, the concessions provided for in a GATS

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130 World Trade Organization, *supra* note 95, at 4 (sec. 1, ¶ 1).

131 *See* Nottage & Sebastian, *supra* note 46, at 1013.

132 World Trade Organization, *supra* note 48.

133 The Reference Paper gives Members the option to inscribe alternative disciplines in Section III for financial services (Section I, Paragraph 7) and to exclude the obligation to ensure non-discrimination between men and women in Paragraph 22 (d) of Section II and paragraph 19 (d) of Section III. *See* Krajewski, *supra* note 73, at 17.

134 GATS art. XX(3).

Schedule of Specific Commitments become part of the terms of the treaty,[135] including any additional commitments.

The binding nature of GATS Schedules is such that once commitments have been entered into, WTO members have to abide by them, under the principle of *pacta sunt servanda*.[136] The rules of interpretation for treaties and international agreements, as set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, that apply with respect to GATS schedules are the same as those applicable to the GATS itself.[137] Under the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), because schedules (including footnotes, headnotes, and attachments) are a record of legal commitments, nothing should appear in them that a Member does not intend to be legally binding.[138] Although the Scheduling Guidelines are not meant to be an authoritative legal interpretation of the GATS,[139] these are nonetheless instructive in helping WTO Members ensure clarity in the formulation of specific commitments, given the legal nature of the schedule.

Paragraph 8, Section I of the Reference Paper, however, adds that "[t]he disciplines inscribed pursuant to paragraph 7 of this Section apply where specific commitments are undertaken," which places the domestic regulation disciplines in the class of conditional obligations under the GATS. Paragraph 2 of Section II further limits the disciplines by excluding "any terms, limitations, conditions, or qualifications set out in a Member's Schedule pursuant to Articles XVI or XVII of the [GATS]" from the applicability of the Reference Paper commitments. Unlike

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[135] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* [hereinafter *US – Gambling*], ¶¶ 430–431, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005) ("This jurisprudence is relevant, mutatis mutandis, in respect of the GATS Schedules."), *citing* Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment*, ¶ 84, WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted June 22, 1998).

[136] Mitsuo Matsushita, et al., The World Trade Organization: Law, Practice, and Policy 592 (2017)

[137] Panel Report, *US — Gambling*, *supra* note 135, at ¶ 431; *See also* Delimatsis, *supra* note 125, at 428.

[138] Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services* (*GATS*), WTO Doc. S/L/92, ¶ 3 (Mar. 28, 2001).

[139] *See* Eric Leroux, *Eleven Years of GATS Case Law: What Have We Learned?*, 10 J. INT'L ECON. L. 749, 760, 765 (n.69) (2007) ("It is also a reminder that caution and precision must be used in the preparation of scheduling guidelines for any particular round of negotiations. While such guidelines are not binding, they will remain important tools for WTO adjudicatory bodies when trying to ascertain the correct meaning of specific commitments[.]").

in the market access provisions of the GATS, where every WTO member has to communicate *erga omnes partes contractantes* in its schedule both the sectors for which it grants market access and the "terms, limitations[,] and conditions" that may modify or "custom-tailor" the "standard package" of market access,[140] the terms, limitations, conditions, or qualifications on market access that a WTO Member specifies in its schedule of specific commitments will not apply to its additional commitments under the Reference Paper. This is also consistent with the interpretation of specific commitments under the 1993 and 2001 Scheduling Guidelines, which differentiate additional commitments as "undertakings" compared to the market access and national treatment commitments, which refer to "limitations."[141]

The inscription of the Reference Paper as part of a Member's specific schedule of commitments would necessarily require the modification of the Member's schedule. The revised GATS Schedules, which would include the Reference Paper domestic regulation disciplines as additional commitments, will only be given full legal effect after the certification process is completed—a necessary step in the revision process. In April 2000, the Council for Trade in Services adopted the Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (S/L/84), a set of detailed and more streamlined procedures for the inscription of new sectors or removal of existing limitations.[142] Paragraph 1 thereof states that

> Modifications in the authentic texts of Schedules annexed to the GATS not resulting from action under the procedures for the implementation of Article XXI of the GATS (modification of schedules) adopted by the Council for Trade in Services on 19 July 1999, which consist of new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments, shall take effect by means of certification.[143]

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[140] Mitsuo et al., *supra* note 136, at 586.

[141] *See* Council for Trade in Services, *supra* note 138.

[142] GATS HANDBOOK, *supra* note 9, at 18.

[143] Council for Trade in Services, *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments*, WTO Doc. S/L/84, ¶ 1 (Apr. 18, 2000).

In the WTO's dedicated webpage on Services Domestic Regulation, the next steps for the JSI-SDR participants would be to submit their draft schedules incorporating the disciplines for certification (S/L/84) by the end of 2022, subject to the completion of any required domestic procedures.[144]

Once a Member's revised GATS schedules are finalized, certified in accordance with the procedures, and have entered into force, they become binding for that Member.[145] Any further modifications to the schedule—including the withdrawal of any commitment—can only be done after three years have elapsed from the date on which that commitment entered into force.[146] When a Member notifies its intent to withdraw its commitment, any other Member whose benefits under the GATS are affected by such withdrawal can request negotiations on "compensatory adjustments," which shall also be extended on a "Most-Favored Nation" (MFN) basis.[147] What this means is simply that commitments undertaken in a GATS schedule, including additional commitments made, shall be "locked in." WTO Members that renege or backslide on any specific or additional commitments made and initiate the modification procedures under GATS Article XXI(1)(a) would have to enter into negotiations on compensation upon the request of any Member whose interests are affected by the backsliding.[148]

3. Extension of MFN to JSI and Non-JSI Members

The other important legal consequence of the Reference Paper is that while the obligations under the domestic regulation disciplines will become binding only on those WTO Members who inscribe them into their GATS schedules, such additional commitments will be applied to the rest of the WTO Membership on a "Most-Favored Nation" (MFN) basis, i.e., that services suppliers from all WTO members—even those who did not incorporate the disciplines as

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144 Informal Discussions: Services Domestic Regulation, *supra* note 95.

145 Delimatsis, *supra* note 125, at 428.

146 GATS art. XXI(1)(a).

147 GATS art. XXI(2)(a) & (b). The withdrawing Member would also have to comply with the Procedures for the Implementation of Article XXI adopted by the Council for Trade in Services on July 19, 1999. *See* Council for Trade in Services, *Procedures for the Implementation of Article XXI of The General Agreement on Trade in Services* (*GATS*), WTO Doc. S/L/80, ¶ 1 (Oct. 29, 1999).

148 It is not clear, however, how the negotiations for compensation would proceed if additional commitments were withdrawn.

additional commitments—will be able to equally benefit from them.[149] The MFN obligation under the GATS is contained in Article II, in which WTO members are obligated to accord unconditionally and automatically to any other WTO member treatment no less favorable than the treatment they accord to like services and like service suppliers from any other country. The MFN obligation is a general obligation which is, in principle, applicable across the board by all Members to all service sectors, including in sectors or sub-sectors where specific commitments have been undertaken.[150] In other words, additional commitments, which are made in a Member's schedule of *specific commitments*, must also be provided on a non-discriminatory basis, to the extent that no specific MFN exemptions have been taken.[151] As a Member's Schedule of Specific Commitments are an integral part of the GATS pursuant to Article XX(3) that reflects not only that Member's specific commitments, but collectively represent a common agreement among all WTO Members,[152] it should follow, going by the position of JSI-SDR participants, that any additional commitments introduced, such as the Reference Paper disciplines on domestic regulation, would have the same MFN status.

The implications of requiring MFN treatment in giving effect to the Reference Paper disciplines can be viewed in one of two ways. The JSI-SDR group that negotiated the Reference Paper disciplines on domestic regulation can be described as an "*MFN club*" arrangement—a group of countries that agree to take on additional commitments that go beyond existing WTO rules (WTO+) that bind only those that sign on to implementing them, while the benefits of which extend on a non-discriminatory basis to all WTO members.[153] The MFN principle is a binding constraint on the ability of a group of WTO Members to negotiate new rules so that the results of such negotiations that are scheduled cannot be applied

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[149] World Trade Organization, *Services Domestic Regulation: Rationale and Content, Potential Economic Benefits, and Increasing Prevalence in Trade Agreements*, WORLD TRADE ORGANIZATION WEBSITE (July 2022), https://www.wto.org/english/tratop_e/serv_e/sdr_factsheet_e_oct21.pdf.

[150] Matsushita et al., *supra* note 136, at 567, quoting Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.298, WTO Doc. WT/DS27/R/ECU (adopted on Sept. 25, 1997).

[151] Matsushita et al., *supra* note 136, at 613.

[152] Appellate Body Report, *US – Gambling*, ¶ 159, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

[153] Bernard Hoekman & Petros Mavroidis, *MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS*, 28 EUR. J. INT'L L. 387, 389 (2017).

in a discriminatory manner.[154] As mentioned in Part I.E.1, because the Reference Paper disciplines were the product of a deviation of a group of WTO Members from the fundamental consensus rule in multilateral trade negotiations,[155] the outcome cannot benefit only the Members of that group. If such an outcome would involve trade in goods under the GATT, the parties thereto must either pursue an Annex 4 plurilateral agreement or conclude preferential trade agreements (PTAs) with each other.[156] Unlike the GATT, however, the "flexibility" for "MFN clubs" is unique to trade in services under the GATS, as WTO Members are permitted under GATS Article XVIII to make additional commitments that complement the specific commitments on national treatment and market access, such as outcomes of negotiations among a subset of WTO Members.[157] At the same time, the non-reciprocal character of such an arrangement means that by signing on to the JSI-SDR Reference Paper, such a WTO Member agreed to undertake the obligations thereunder as additional commitments in its GATS Schedule, knowing fully well that the benefits from those commitments will be extended to non-JSI Members without extracting any reciprocal commitments from them.

Second is the issue of "*free riding*." A situation of "free riding" arises when, by virtue of the MFN treatment obligation, a country gets the benefits of the opening of other countries' markets without having itself opened its own market or made any concessions.[158] As applied to the Reference Paper disciplines on domestic regulation, "free riding" non-JSI members that did not sign on to the disciplines are spared the burden of ensuring compliance with the mandatory obligations and other bindings that result from its inscription into the JSI Members' GATS Schedule, but are assured that the disciplines would be applied to all WTO Members so as not to discriminate against them. Non-signatories would therefore not be obliged to undertake the necessary regulatory adjustments arising

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154 *See id.* at 403.

155 *See supra*, at Part I.E.1.

156 General Agreement on Tariffs and Trade [hereinafter GATT] art. XXIV, October 30, 1947, Marrakesh Agreement Establishing the World Trade Organization, annex 4, 1869 U.N.T.S. 183; Hoekman, supra note 154, at 403.

157 *Id* at 398.

158 Leroux, *supra* note 139, at 768.

out of the observance of the Reference Paper disciplines, but would have the same trade benefits accorded to the original signatories.[159]

In the GATT, the "free riding" problem was addressed by Article II:3 of the Marrakesh Agreement,[160] which recognizes the so-called Annex 4 Plurilateral Trade Agreements that are binding on WTO Members that have accepted them, but do not create rights or obligations for Members that have not, allowing signatories to discriminate against non-parties. Although there are only two out of four such Annex 4 Plurilateral Trade Agreements in force,[161] Article X:9 of the Marrakesh Agreement authorizes the WTO Membership, acting through the Ministerial Conference, to decide "exclusively by consensus" to add a "trade agreement" to the Annex 4 list, upon the request of the parties to that "trade agreement". It has been argued, however, that particular trade issues where negotiated policies or rules would be in the self-interest of WTO Members, independent of whether other Members do so, can be applied on an unconditional MFN basis, as these may be impervious to "free riding" concerns.[162] Thus, plurilateral agreements embodying forms of cooperation that are domain-specific, such as services domestic regulation, where the primary focus is not on liberalization or on constraining the use of discriminatory policies but in areas such as harmonization, good regulatory practices, and mutual recognition, would fall under this rubric.[163]

4. Mandatory obligations–implications for the Philippines

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[159] Charles F. Sabel & Bernard Hoekman, *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO,* Robert Schuman Centre for Advanced Studies, Global Governance Programme EUI Working Paper No. RSCAS 2019/10 (2019), https://scholarship.law.columbia.edu/faculty_scholarship/2304

[160] Marrakesh Agreement Establishing the World Trade Organization, Article II(3), 1869 U.N.T.S. 183.

[161] The Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. The other two Annex 4 Plurilateral Trade Agreements, the International Dairy Agreement and the International Bovine Meat Agreement, were terminated on 10 December 1997.

[162] Bernard Hoekman and Charles Sabel, *Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time*, Global Policy, Volume 12, Issue S3, (2021), at 51, https://scholarship.law.columbia.edu/faculty_scholarship/2746

[163] *Id.*

The Philippines' decision to join the JSI-SDR and sign on to the Reference Paper triggers a series of obligations that it is bound to comply with as a condition of its membership. First, it is duty-bound to inscribe the Reference Paper as additional commitments in its GATS schedule. The Reference Paper must be inscribed in full, except for either the Alternative Disciplines on Financial Services under Section III or the non-discrimination between men and women (or both). After the formalities of certification of the revised schedule (and presumably the Philippines' domestic requirements for entry-into-force) are completed, the disciplines on domestic regulation set forth in the Reference Paper would become Philippine services commitments under the GATS. The MFN obligation made sure that whatever the Philippines inscribes as additional commitments, including the Reference Paper disciplines, would be extended not only to other JSI-SDR participants, but also to the rest of the WTO membership on an MFN basis, significantly expanding the universe of beneficiaries of domestic regulatory reforms in services.

Nothing in the Reference Paper, however, requires that it shall be inscribed in all the services sectors already committed in the GATS schedule; this view is supported by the fact that the Reference Paper itself allows for an exception for financial services.[164] The Philippines has undertaken GATS commitments in 4 of the 12 sectors listed in the Services Sectoral Classification List, namely communications services, financial services, tourism and travel-related services, and transport services.[165] If the Philippines decides not to inscribe the Alternative Disciplines on Financial Services under Section III of the Reference Paper as it pertains to financial services, then a maximum of three out of four service sectors committed may be inscribed. It would be incumbent upon the Philippines to be judicious about the services sectors it decides to be subject to the additional commitments under the Reference Paper.

The extension of MFN treatment may also be viewed in relation to services, domestic regulation chapters, or provisions in free trade agreements (FTAs) of which the Philippines is a party. Preferential services trade between and among parties to FTAs or regional trading arrangements would be permitted as an exception to the GATS general MFN obligation if it conforms to the requirements

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[164] World Trade Organization, *supra* note 95, at 4 (sec. 1, ¶ 9).

[165] *See* GATS, *Philippines Schedule of Specific Commitments*, GATS/SC/70, 15 April 1994

under GATS Article V on "Economic Integration,"[166] which are modelled on GATT Article XXIV. Unless the services chapters of the Philippines' FTAs contain an "automatic MFN" clause, which extends services commitments made in other FTAs to the Philippines' FTA partners that benefit from such a clause, any FTA disciplines on services domestic regulation would not be applicable to non-parties on an MFN basis.

Another important difference is that the Philippines' FTA commitments on services domestic regulation do not follow the Reference Paper approach of inscribing the disciplines as additional commitments.[167] The relevant chapters of the Philippines' bilateral and regional FTAs on domestic regulation largely hew to general GATS language.[168] Some of its FTAs contain clauses that simply refer to the completion of GATS VI:4 negotiations in lieu of a full set of rules on services domestic regulation. The Regional Comprehensive Economic Partnership Agreement (RCEP), the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), the ASEAN Trade in Services Agreement (ATISA), and the Philippines-European Free Trade Association (EFTA) Free Trade Agreement include the Parties' commitment to review the results of the GATS Article VI:4 negotiations and, after inter-Party consultation, to bring the outcomes into effect by amending their domestic regulation provisions as appropriate.[169] It remains to be seen, however, whether the Reference Paper, which was negotiated and adopted outside the GATS Article VI:4 mandate,[170] would be covered by the review provisions.

B. Applicability of the WTO Dispute Settlement Mechanism

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[166] The agreement should have "substantial sectoral coverage", eliminates measures that discriminate against service suppliers of other countries in the group, and prohibits new or more discriminatory measures.

[167] See *infra* note 327.

[168] But the Philippines' FTA positions on administrative rulemaking as it relates to services domestic regulation has been evolving. *See infra* note 195.

[169] Regional Comprehensive Economic Partnership Agreement (RCEP), Article 8.15(4): Domestic Regulation, (2022); ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), Article 10(2): Domestic Regulation (2016); Philippines-European Free Trade Association (EFTA) Free Trade Agreement, Article 6.7(5): Domestic Regulation; Contra GATS Article VI(5); *See infra* note 327.

[170] See *supra* note 164.

One important legal implication of the disciplines on domestic regulation, as adopted under the Reference Paper, is the applicability of the WTO dispute settlement system. Embedding JSI outcomes into national schedules makes the provisions enforceable through the DSU. Although the GATS provides fertile ground for difficult and often sensitive interpretive issues to arise, Members have thus far not made extensive use of dispute settlement procedures to resolve services disputes.[171] Panels and the Appellate Body have nonetheless been increasingly sensitive to the right of Members to set and implement legitimate public policy objectives, as long as this is done within the parameters of non-discrimination and using those measures that are least damaging to the trade interests of other Members freely negotiated and agreed upon under the WTO Agreement.[172]

In the general dispute settlement provisions of GATS under Article XXIII, Paragraph 1 authorizes a Member to have recourse to the WTO Dispute Settlement Understanding (DSU) if another Member is failing to carry out its obligations or specific commitments.[173] DSU Article 1.1 further provides that the rules and procedures of the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 thereof—referred to as the "covered agreements"—which include the GATS. Thus, in accordance with GATS Article XXIII in relation to DSU Article 1.1, disputes relating to the interpretation of the GATS or the scope of the Schedule of Commitments of a WTO Member can be resolved exclusively through recourse to the DSU.[174]

1. Mexico – Telecoms

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[171] Eric H. Leroux, *From Periodicals to Gambling: A review of systemic issues addressed by WTO adjudicatory bodies under the GATS, in GATS and the Regulation of International Trade in Services*, Marion Panizzon, Nicole Pohl And Pierre Sauvé (eds.), Cambridge University Press (2008), at 237.

[172] Eric H. Leroux, *Twenty years of GATS case law: Does it taste like a good wine?, in Research Handbook on Trade in Services*, Pierre Sauvé and Martin Roy (eds.), (2016) at 201.

[173] William J. Davey, *Specificities of WTO dispute settlement in services cases, GATS and the Regulation of International Trade in Services,* Marion Panizzon, Nicole Pohl And Pierre Sauvé (eds.), Cambridge University Press (2008), at 277.

[174] Delimatsis, *supra* note 125, at 423.

This was affirmed by the panel in the *Mexico – Telecoms* dispute—the first panel proceeding in the WTO to deal solely with trade in services under the GATS:[175]

> The GATS constitutes an integral part of the WTO Agreement. As such, the GATS (including its annexes and schedules of specific commitments that are made an integral part of it under GATS Article XX:3) is one of the 'covered agreements' and is therefore subject to the Dispute Settlement Understanding (the "DSU").[176]

Mexico – Telecoms is pertinent to the JSI-SDR as it was the first dispute to consider the legal obligations of a "Reference Paper." As explained in Part I.B.1,[177] the Telecoms Reference Paper sets out common regulatory guidelines that Members should follow to support the transition of the telecommunications sector to a competitive marketplace and to guarantee effective market access and foreign investment commitments.[178] The U.S. had argued that by reason of Mexico's inscription of the entire text of the Telecoms Reference Paper into its GATS Schedule as an additional commitment, Mexico not only undertook the interconnection obligations of Section 2 of the Telecoms Reference Paper, but it also committed to the U.S. and all other WTO Members that it would abide by the strict terms and conditions contained in Section 2 thereof, pursuant to GATS Article XVIII.[179] Mexico did not specifically contest this point, essentially acknowledging that the Telecoms Reference Paper, which was embodied as Mexico's own version of the Reference Paper, is binding and justiciable under the DSU. The rulings as captured in the panel report demonstrates the power and broad scope of WTO disciplines on the regulation of trade in services[180] and shows

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[175] Panel Report, Mexico – Measures Affecting Telecommunications Services [hereinafter Mexico – Telecoms], ¶¶ 7.2, WTO Doc. WT/DS204/R (adopted Jun. 1, 2004).

[176] Id at ¶¶ 7.14.

[177] *See supra,* at Part I.B.1.

[178] Boutheina Guermazi, *Exploring the reference paper on regulatory principles,* South Centre, Geneva, (2005), https://www.wto.org/english/tratop_e/serv_e/telecom_e/workshop_dec04_e/guermazi_referencepaper.doc

[179] *See supra* note 175, at ¶¶4.3.

[180] Andrew W. Shoyer, *Lessons learned from litigating GATS disputes: Mexico – Telecoms, in GATS and the Regulation of International Trade in Services*, Marion Panizzon, Nicole Pohl And Pierre Sauvé (eds.), Cambridge University Press (2008), at 234

the reach of GATS disciplines and their potential impact on Members' policies and regulations.[181]

2. U.S. – Gambling

The dispute *U.S. – Gambling*[182] is also significant in considering dispute settlement vis-à-vis the legal commitments under the Reference Paper disciplines, as it had sparked a debate as to what should be the right balance between trade constraints, on one hand, and the autonomy of Members' service regulators, on the other.[183] In that dispute, the AB clarified the rationale behind the rule in the interpretation of a specific commitment in a GATS Schedule, comparing it with tariff commitments in the GATT:[184]

> In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind one Member, Schedules also represent a common agreement among all Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention."[185] (footnotes omitted)

3. Non-violation and situation complaints

A question arises as to the applicability of the Reference Paper domestic regulation disciplines of the so-called "non-violation" and "situation" complaints. Following GATT practice, the DSU allows a remedy for complaints concerning a nullification or impairment of benefits without an infringement of a WTO

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[181] Leroux, *supra* note 139, at 750.

[182] Appellate Body Report, US – Gambling, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

[183] Leroux, *supra* note 139, at 751.

[184] *See supra* note 182, at ¶¶ 159.

[185] *Id.*

obligation.[186] A non-violation dispute is described as it is coined—a dispute arises not out of a violation of the exact words of the agreement, but from a claim that the benefits of a WTO Member from the WTO agreements are being impaired or nullified. In accordance with GATT Article XXIII:1(b), DSU Article 26.1 authorizes a complaint against 'a measure' by a member even if such a measure does not conflict with any WTO agreement, if the complaining member considers that any benefit under a covered agreement is being nullified or impaired or the attainment of any objective of a covered agreement is being impeded as a result of the application of the measure.[187]

GATS Article XXIII:3 allows a non-violation complaint if a member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under the GATS is being nullified or impaired as a result of the application of any measure that does not conflict with the provisions of GATS. If the DSB finds a measure to have nullified or impaired a benefit accruing because of a specific commitment under GATS, the affected member shall be entitled to a mutually satisfactory adjustment, which may include modification or withdrawal of the measure. It should be stressed that, unlike GATT Article XXIII:1(b), GATS Article XXIII:3 authorizes recourse to a non-violation complaint only as regards the specific commitments of a Member made pursuant to Part III of the GATS, and not to the general obligations. As the specific commitments in a Member's GATS Schedule would include additional commitments made in accordance with GATS Article XVIII, it can be argued that the incorporated Reference Paper disciplines on services domestic regulation can be the subject of a non-violation complaint. Thus, even if a particular regulatory measure does not involve a textual breach of the mandatory provisions of the Reference Paper, if a WTO Member considers that the benefits from the Reference Paper are being nullified or impaired due to that regulatory measure, there would be recourse to a non-violation complaint.[188]

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[186] Matsushita, Mitsuo, Schoenbaum, Thomas J., Mavroidis, Petros C., Hahn, Michael, *The World Trade Organization: Law, Practice, and Policy* , Oxford International Law Library, 97, Oxford University Press.

[187] *Id.*

[188] *Id.* (As for the so-called 'situation' complaints, unlike GATT Article XXIII:1(c) which permits cases to be brought in the event of a nullification or impairment of the benefits from a covered agreement or any impediment of its objectives by "the existence of any other situation," i.e., besides a violation or non-violation situation, the GATS does not make any provision for such

4. Recourse of non-JSI-SDR Member

Can a WTO Member that did not inscribe the Reference Paper in its GATS schedule have recourse to WTO dispute settlement on the grounds that, in its view, its rights under the WTO agreements are impaired because it is precluded from enjoying the benefits of the Reference Paper (by reason of the extension of MFN)? It has been opined that insofar as a non-participating WTO member perceives a plurilateral agreement (loosely defined to include JSIs and the Reference Paper) to undercut its rights or negotiated concessions, such Member can invoke the DSU, leaving it to panels and the Appellate Body to make a determination whether such nullification has occurred.[189] Indeed, as to the alleged nullification or impairment of a benefit that a non-participating WTO Member could reasonably expect to accrue to it under a specific commitment made by another WTO Member participating in the JSI-SDR Reference Paper, this view is supported under GATS Article XXIII:3 as a legal consequence of the extension of MFN treatment.[190]

The applicability of non-violation disputes to the Reference Paper should be read with the standstill obligation in GATS Article VI:5(a), which prohibits Members from applying licensing and qualification requirements and technical standards that "nullify or impair such specific commitments," in a manner which: (1) does not comply with the criteria in Article VI:4, and (2) "could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made."[191] Note that GATS Article VI:5 imposes a resolutory conditional obligation "pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4," *i.e.*, Article VI:4 disciplines on domestic regulation, which shall be developed by the Council for Trade in Services through appropriate bodies it may establish. Strictly speaking, the Reference Paper disciplines on

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complaints. No Panels, however, have been called on to address 'situations' in the sixty-year history of the GATT/WTO.)

189 Hoekman, *supra* note 154, at 403.

190 *See supra* note 164.

191 See Graham Cook, *The legalization of the non-violation concept in the GATT/WTO system.*, WTO System, (Oct. 24, 2018). (GATS Article VI:5(a) blurs the conceptual distinction between violation and non-violation complaints in the context of licensing and qualification requirements and technical standards for service suppliers, as it transforms the traditional legal standard developed in the context of GATT non-violation complaints into a legal obligation that could give rise to a violation complaint no different from any other WTO obligation.)

domestic regulation, which were developed through the JSI-SDR and not through the GATS-mandated bodies, do not conform to this requirement. This would mean that the resolutory condition has not been fulfilled, which leads to the conclusion that GATS Article VI:5(a) is still in full force and effect, even if the relevant Reference Paper provisions would also enter into force after the certification process for the revised GATS Schedules is completed.

The Reference Paper itself does not have built-in provisions on dispute settlement. Thus, if another JSI participant is unable to comply with the binding obligation to inscribe the Reference Paper in a Member's specific schedules of commitments in order to give effect to the disciplines,[192] it would be unclear what will be the remedies available to other JSI-SDR participants. The Reference Paper, standing alone and uninscribed in a GATS Schedule, would not be considered among the WTO "covered agreements"[193] in which any dispute would be subject to the procedures under the WTO Dispute Settlement Mechanism. It is only when the Reference Paper disciplines are inscribed as additional commitments and the new Schedules of Specific Commitments are finalized through the certification process that these become an "integral part" of the GATS, which would make it justiciable under the WTO DSM. This point may still be tested, as new entrants Georgia, the United Arab Emirates, and Timor-Leste have recently announced their decision to join the JSI-SDR.[194]

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[192] *See supra* note 164.

[193] Dispute Settlement Understanding, Article 1, World Trade Organization, ("The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement."

[194] World Trade Organization, Georgia, *Timor-Leste and United Arab Emirates join initiative on services domestic regulation,* (Jun. 13, 2022), https://www.wto.org/english/news_e/news22_e/serv_13jun22_e.html. (It should be noted that Timor-Leste—the first least-developed country to join the JSI-SDR—made the announcement even if it has yet to complete its formal accession into the WTO.)

C. GATS+ Transparency Requirements: Multilateralizing Notice-and-Comment

The Reference Paper disciplines on domestic regulation contain new transparency requirements that build on the GATS Article III by enhancing transparency in measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services.[195] While GATS Article III addresses transparency at a multilateral and intergovernmental level, the transparency disciplines of the Reference Paper follow GATS Article VI, focusing on transparency in the "vertical relationship between the domestic regulatory authority and a private person, *i.e.,* the affected service supplier, in order to ensure effective market access by service suppliers."[196] The applicability of the GATS transparency obligations under Article III, which had only applied to "relevant measures of general application," is further extended to the authorization process by Section II, Paragraph 13 of the Reference Paper, and will be taken up in Part III.C.1.[197]

Covering six full paragraphs under the heading "*Opportunity to Comment and Information before Entry Into Force*"—making it the longest sub-section of the Reference Paper—transparency disciplines go beyond GATS Article III rules on transparency by setting multilateral disciplines on administrative due process in the domestic regulation of services. More importantly, it multilateralizes, for the first time, notice-and-comment requirements for laws and regulations that impact trade in services. The new notice-and-comment disciplines are contained in Paragraphs 14-17 of the Reference Paper:

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[195] Apart from the three paragraphs with mandatory provisions, three other paragraphs also contain transparency disciplines not found in the GATS, but are more permissive in their obligatory character and are couched in best endeavor language, namely: encouraging Members to provide advance publication of administrative rulings (Para. 15); explanation of purpose and rationale of proposed regulation (Para. 18); and reasonable time from publication to effectivity of regulation (Para. 19). All six paragraphs under the subsection, *Opportunity to Comment and Information before Entry Into Force* include a "best endeavor" qualifier, "to the extent practicable," which seeks to provide a certain level of flexibility in implementation. The provisions also takes into account the diversity of specific country approaches with the inclusion of the clause, "in a manner consistent with [the JSI-SDR Member's] legal system," which was further elaborated in footnote 13 of the Reference Paper.

[196] Panagoitis Delimatsis, International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity, Oxford University Press (2007), 269.

[197] *See infra,* at Part III.C.1.

Opportunity to Comment and Information before Entry into Force

> To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member shall publish in advance:
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> (a) its laws and regulations of general application it proposes to adopt in relation to matters falling within the scope of paragraph 1 of this Section; or
>
> (b) documents that provide sufficient details about such a possible new law or regulation to allow interested persons and other Members to assess whether and how their interests might be significantly affected.
>
> To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member is encouraged to apply paragraph 14 of this Section to procedures and administrative rulings of general application it proposes to adopt in relation to matters falling within the scope of paragraph 1 of this Section.
>
> To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member shall provide interested persons and other Members a reasonable opportunity to comment on such proposed measures or documents published under paragraphs 14 or 15 of this Section.
>
> To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member shall consider comments received under paragraph 16 of this Section.[198]

Paragraphs 14 to 17 can be distilled to two basic components. The "notice" component would refer to the *advance publication* requirement on laws and regulations proposed to be adopted in Paragraph 14, while the "comment" component in Paragraphs 16-17 would require Members to provide "interested

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[198] *Joint Initiative on Services Domestic Regulation: Reference Paper on Services Domestic Regulation*, WTO Doc. INF/SDR/2 (Nov. 26, 2021), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q%3A%2FINF%2FSDR%2F2.pdf.

persons" a reasonable *opportunity to comment* on proposed laws and regulations, and obliges Members to consider such comments. The obligations in Paragraphs 14-17 of the Reference Paper are subject to the flexibility clause, "[t]*o the extent practicable and in a manner consistent with its legal system for adopting measures*."

As the notice-and-comment disciplines in the Reference Paper become additional commitments in the GATS schedule of the Philippines, they must also be read together with the provisions of the GATS.[199] Both the advance publication and opportunity to comment requirement under Paragraphs 14-17 of the Reference Paper pertain to "*laws and regulations* of general application it proposes to adopt." "*Laws and regulations*" are considered "measures" under the GATS, which is defined for GATS Article III purposes as "any measure by a Member, whether in the form of a *law*, *regulation*, rule, procedure, decision, administrative action or any other form,"[200] and covers not just substantive law but also administrative issuances and rules.[201] Under this definition, "measures" in the form of "laws and regulations" would be subject to prior notice-and-comment requirements under the Reference Paper, but not a "*rule, procedure, decision, administrative action, or any other form*" under the rule of statutory construction *expressio unius est exclusio alterius*. At the same time, a GATS measure would also include measures taken by regional or local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.[202] Following this logic, it would seem that the Reference Paper's prior notice-and-comment requirements would apply to measures of local governments that are in the form of "laws and regulations."[203]

Meanwhile, the use of the term "*of general application*" is said to be modelled on the publication requirements of Articles X:1 and X:2 of GATT 1994, in

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[199] *See* Kinda Mohamadieh, *Reference Paper on Services Domestic Regulations: Overview of main content and regulatory implications*, Third World Network, (Nov. 2021), 10, https://www.twn.my/title2/briefing_papers/MC12/briefings/Reference%20paper%20on%20SDR%20TWNMC12BP%20Nov%202021%20Mohamadieh.pdf

[200] GATS Article XXVII(a)

[201] Nellie Munin, *Legal Guide to GATS,* Global Trade Law Series 31, Kluwer Law International, (2010), 61.

[202] GATS, Article I(3)(a). (The application of the GATS definition of "measures" including those taken by central, regional or local governments and authorities is also relevant in the context of the new notice-and-comment requirements.) *See infra* note 268.

[203] *See supra* note 133.

reference to the obligation to publish laws, regulations, judicial decisions, and administrative requirements in the GATT.[204] While WTO Panels and the Appellate Body have understood the concept "of general application" as being not limited in application to a specific individual case or economic operator, and could apply to a range of situations rather than being limited in their scope of application,[205] the language of Paragraphs 14-17 limits the concept to matters covered under Paragraph 1 of Section II, which is essentially the scope of the GATS Article VI:4 mandate.

1. Advance Publication

Paragraph 14 requires JSI-SDR Members to ensure advance publication of: (a) proposed laws and regulations of general application to be adopted on licensing requirements and procedures, qualification requirements and procedures, and technical standards, or (b) documents that provide sufficient details about the possible new law or regulation. The scope of Paragraph 14 is limited to sectors where specific commitments are made. Thus, to fall under the advance publication requirement: (1) it must be a law or regulation *proposed to be adopted*; (2) proposed law or regulation must be *of general application*; (3) the measures must be "relating to *licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services*;" (4) must be in the Member's *schedule of specific commitments*. The documents to be published in advance in (b), on the other hand, should be of such detail that it would "allow interested persons and other Members to assess whether and how their interests might be significantly affected."

The advance publication of proposed laws and regulations is a departure from the transparency requirements in the GATS. Under the GATS general transparency rule in Article III:1, which was by and large patterned after the GATT transparency provisions in Article X,[206] Members are required to promptly publish all measures of general application affecting trade in services, at the latest *by entry into force*.[207] In the Reference Paper, however, the status of the law or regulation is

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[204] Working Party on Domestic Regulation, "Measures of General Application," S/WPDR/W/47, (Feb. 9 2012), 2, 7.

[205] *Id*, at 7.

[206] Ala'i, *infra* note 291, at 2.

[207] Article III(1) second sentence would include international agreements that pertain to and affect trade in services.

that it is "proposed to be adopted," which means that even if the law or regulation has yet to enter into force, it should be published in advance to give a reasonable time for interested parties to comment. Once the law or regulation enters into force, the GATS transparency requirement in Article III:1 would be applicable, covering all measures affecting trade in services (including international agreements) regardless of whether specific commitments have been made or not.

2. Reasonable opportunity to comment and consider such comments

The second element of the notice-and-comment disciplines in the Reference Paper can be seen as a two-pronged obligation. First, Paragraph 16 obliges Members to provide "interested persons" a reasonable opportunity to comment on the proposed laws and regulations published in advance, as referred to in Paragraphs. 14 or 15, and second, Paragraph 17 requires Members to consider comments on the proposed laws or regulations. Although the obligations under both Paragraphs are mandatory, Members have the flexibility to implement the same "[t]o the extent practicable and in a manner consistent with its legal system for adopting measures."

As a binding transparency norm in the regulation of trade in services, prior notice-and-comment disciplines in the Reference Paper are new to the GATS. WTO Members were required under the GATS to respond promptly to requests by other Members for specific information on any of its measures of general application or international agreements affecting trade in services.[208] But Members are not under any GATS obligation to give notice of proposed laws and regulations affecting trade in services and receive comments from "interested persons" thereon, let alone to even consider such comments before the proposed measures are adopted. It should be noted, however, that a previous, "softer" version of the notice-and-comment requirement was introduced in the *Disciplines on Domestic Regulation in the Accountancy Sector*,[209] specifically Paragraph 6, in which Members, "[w]hen introducing measures which significantly affect trade in accountancy services, … shall *endeavour* to provide opportunity for comment, and give consideration to such comments, before adoption."

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[208] GATS, Article III(4).

[209] *See supra* note 56.

Notice-and-comment disciplines in other WTO Agreements, particularly those with a substantive focus on behind-the-border regulatory aspects of trade, may have informed the development of the notice-and-comment disciplines in the Reference Paper.[210] Similar provisions can also be found in the Technical Barriers to Trade (TBT) Agreement and the Sanitary and Phytosanitary (SPS) Agreement. When the content of a *proposed* technical regulation is "not in accordance with" or a *proposed* SPS regulation is "not substantially the same as" the content of an international standard,[211] and "may have a significant effect on trade,"[212] Members are required to allow other Members a "reasonable time" to submit comments on the proposed regulations in writing, discuss the comments "upon request," and are obligated to take the comments into account.[213] More recently, the 2017 Trade Facilitation Agreement contains an obligation to provide "traders and other interested parties" an opportunity to comment within an appropriate time period on the *proposed* introduction or amendment of laws and regulations of general application "related to the movement, release, and clearance of goods, including goods in transit," albeit subject to the similar implementation flexibilities, *i.e.,* "to the extent practicable and in a manner consistent with its domestic law and legal system."[214]

3. Prior notice-and-comment disciplines in free trade agreements

The Philippines' adoption of multilateral disciplines on prior notice-and-comment in the Reference Paper is not its first foray into more enhanced public participation rules. The Philippines had also subscribed to prior notice-and-comment disciplines in its bilateral and regional free trade agreements (FTAs). This present inquiry will focus on four Philippine FTAs: the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), the ASEAN Trade in Services Agreement (ATISA), the Regional Comprehensive Economic Partnership (RCEP), and the Philippines-Japan Economic Partnership Agreement (PJEPA), which is

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[210] Delimatsis, *supra* note 196, at 271-272.

[211] Agreement on Technical Barriers to Trade, Article 2.9.4., (1995). Under the TBT Agreement, the international standard must be "relevant."

[212] *Id.*

[213] *Id.*

[214] Trade Facilitation Agreement, Section I, Article 2, Paragraph 1.1, World Trade Organization, (2014).

notable for not only being the Philippines' first bilateral FTA, but also the first to successfully negotiate preferential public participation rules:[215]

> **Article 5**
> **Public Comment Procedures**
>
> The Government of each Party shall, in accordance with the laws and regulations of the Party, *endeavor to provide*, except in cases of emergency or of purely minor nature, a *reasonable opportunity for comments* by the public *before the adoption, amendment or repeal* of regulations of general application that affect any matter covered by this Agreement.216 (italics supplied)

While the PJEPA "public comment" disciplines applies to any matter covered by the Agreement, including domestic regulation of services, it is the weakest of the four FTAs because of its use of non-binding language ("endeavor to provide"), lack of an express advance publication requirement, adherence to the existing domestic legal framework for public comment, and the type of measures covered (regulations of general application). Years later, this approach would be nearly replicated in the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), except that a notice-and-comment regime was tailored specifically for the Trade in Services chapter: [217]

> **Article 11**
> **Transparency**
> **...**
> **Publication**
>
> Each Party shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force:
>
> (*a*) *all relevant measures of general application affecting trade in services*; and
>
> (b) all international agreements pertaining to, or affecting, trade in services to which a Party is a signatory.

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[215] Philippines-Japan Economic Partnership Agreement (PJEPA), Article 5, (2006).
[216] *Id.*
[217] ASEAN-Australia-New Zealand Free Trade Agreement, Article 11.2 and 11.5, (2009).

> ...
> To the extent provided for under its domestic legal framework, each Party *shall endeavour* to provide a *reasonable opportunity for comments* by interested persons of the Parties on measures referred to in Paragraph 2(a) *before adoption*.218 (italics supplied)

Three deviations from the Reference Paper are apparent. First, there is no specific advance publication requirement (which is also implied in the PJEPA). Second, the scope covers all relevant measures of general application affecting trade in services, not just the areas covered by the domestic regulation mandate in GATS Article VI:4. Finally, it is couched in best endeavor language. The ASEAN Trade in Services Agreement (ATISA), specifically Section IV, *Regulatory Obligations and Disciplines*, tracks the AANZFTA approach in not including an advance publication requirement and in setting a broad scope not limited to Article VI:4 areas, but takes it a step further by making the obligation mandatory, subject to a flexibility clause nearly identical to the Reference Paper, "[t]o the extent possible and provided for under its domestic legal framework:"[219]

> **Article 14**
> **Transparency**
> ...
>
> To the extent possible and provided for under its domestic legal framework, each Member State shall provide a *reasonable opportunity for comments* by interested persons of the Member States on any regulation of general application affecting trade in services that it proposes to adopt, amend or repeal, before its adoption and publication.[220] (italics supplied)

Of the three previously reviewed FTAs with prior notice-and-comment disciplines, the Regional Comprehensive Economic Partnership Agreement (RCEP)[221] has the version that is substantively closest to the Reference Paper in

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[218] *Id.*

[219] ASEAN Trade in Services Agreement, Article 14, (2020).

[220] Article 14, ASEAN Trade in Services Agreement, 7 October 2020

[221] As to RCEP, as of 20 September 2022 the ratification process has yet to be completed, as the deliberations at the Senate for its concurrence with the ratification are still ongoing. Only the Philippines and Myanmar have yet to complete domestic procedures for entry-into-force.

terms of its application to the areas covered by GATS Article VI:4 and its mandatory character. It is also arguably the most ambitious and high-standard compared to the previously mentioned FTAs. The prior notice-and-comment disciplines in the RCEP are set forth in two Articles: Article 17.3 on Publication and in Article 7 of Annex 8A on Financial Services. Article 17.3 reads:[222]

> **Article 17.3: Publication**
> …
>
> To the extent possible and practicable, each Party shall:
>
> (a) *publish in advance* any such laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement that it *proposes to adopt*; and
>
> (b) provide, where appropriate, interested persons and other Parties with a *reasonable opportunity to comment* on any such laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement. [223] (italics supplied)

Like the PJEPA, the notice-and-comment disciplines of Article 17.3 are under *General Provisions and Exceptions* (Chapter 17), making its application horizontal in nature and applicable to all RCEP Chapters. Thus, unlike AANZFTA and ATISA, the disciplines would apply to the entire Agreement, [224] including domestic regulation of services, which does not have public participation disciplines that are specific thereto.[225] The scope of the measures is broader than the Reference Paper as it applies to proposed "laws, regulations, procedures, and administrative rulings of general application with respect to any matter" under RCEP. The comment component is also mandatory, but it is subject to flexibilities in implementation, *i.e.*, "[t]o the extent possible and practicable" and "where

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[222] Regional Comprehensive Economic Partnership Agreement (RCEP), Article 17.3, (2022).

[223] Article 17.3, Regional Comprehensive Economic Partnership Agreement

[224] The RCEP's chapters on Customs Procedures and Trade Facilitation (Chapter 4), Sanitary and Phytosanitary Measures (Chapter 5), and Standards, Technical Regulations, and Conformity Assessment Procedures (Chapter 6), have public participation requirements that are comparable to the TFA, SPS, and TBT Agreements, respectively.

[225] *See supra* note 222, at Article 8.15.

appropriate," a more subjective standard compared to "under its domestic legal framework" in AANZFTA and ATISA, as well as the Reference Paper. Annex 8A on Financial Services contains a separate notice-and-comment paragraph:[226]

> **Annex 8A: Financial Services**
> Article 7: Transparency
> …
>
> To the extent practicable, each Party shall:
>
> (a) *publish* or make available to interested persons *in advance* any regulation of general application relating to this Annex that it *proposes to adopt*, and the purpose of such regulation; and
> (b) provide interested persons and other Parties with a *reasonable opportunity to comment* on such proposed regulation."[227]
> (italics supplied, footnote omitted)

The notice-and-comment provisions in Article 7 of the RCEP Financial Services Annex have the same elements as the horizontal notice-and-comment disciplines in Article 17.3, except for the following: (1) scope of the measures is limited to proposed regulations of general application on financial services; (2) the purpose of the proposed regulation is required to be disclosed; and (3) "interested persons" are defined in footnote 6, "[f]or the purposes of this Article, the Parties confirm their shared understanding that "interested persons" are persons whose direct financial interest could potentially be affected by the adoption of the regulations of general application." Parties are allowed an exception for measures that prevent deceptive and fraudulent practices or deal with the effects of a default on financial services contracts.[228] Attention is drawn to the counterpart domestic regulation disciplines in the Reference Paper, which are labelled as "Alternative Disciplines," and outlined in a separate Section in which Members have the option not to inscribe in their respective GATS schedules.[229] Should the Philippines decide to invoke this option, the prior notice-and-comment disciplines on financial services would still be applicable for the benefit of the RCEP Parties and their

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[226] *See supra* note 222, at Article 7, Annex 8A.
[227] Article 7, Annex 8A, Regional Comprehensive Economic Partnership Agreement.
[228] *See supra* note 222, at Article 8.
[229] *See supra* note 126.

respective "interested persons," giving them a clear preference compared to non-RCEP Parties.

Unlike the Reference Paper, the PJEPA, AANZFTA, ATISA, and RCEP did not use the approach of inscribing the disciplines in the schedule of specific commitments. Instead, the prior notice-and-comment disciplines were made part of the main text of their respective chapters on Trade in Services or as part of the General Provisions applicable to the entire Agreement. As far as those disciplines in the Trade in Services chapters are concerned, these were not part of either market access or national treatment. Such notice-and-comment provisions are thus considered as general obligations that are not subject to scheduling, and cannot be subject to carve-outs based on a schedule of MFN exemptions or non-conforming measures. The other main departure from the Reference Paper that is common to all four FTAs is that none of the public participation disciplines therein were specifically negotiated with a view to "ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services,"[230] but would inform and influence discussions at the JSI-SDR. What the Reference Paper requires that goes beyond any of the FTA versions is the obligation to "consider" the comments on the proposed law or regulation, subject to implementation flexibilities.

4. Prior notice-and-comment and Philippine administrative rulemaking

The public participation provisions of the Revised Administrative Code of 1987[231] are relevant to the advance publication and notice-and-comment requirements under the Reference Paper, and can be found in Section 9, Book VII, Chapter 2:

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[230] See supra note 169. (It should be noted that AANZFTA, ATISA, and RCEP obligates the Parties thereto to review the results of the conclusion of negotiations on GATS Article VI:4, and after consultation with the Parties, to revise or modify their respective FTAs accordingly in order to bring such disciplines into effect.)

[231] Exec. Order No. 292, (Jul. 25, 1987).

> SECTION 9. Public Participation. — (1) If not otherwise required by law, an agency shall, *as far as practicable*, *publish or circulate notices of proposed rules* and afford *interested parties* the opportunity to submit their views *prior to the adoption* of any rule.
>
> (2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.
>
> (3) In case of opposition, the rules on contested cases shall be observed."[232] (italics supplied)

On its face, Section 9 of the Revised Administrative Code does not reveal any fundamental inconsistency with the prior notice-and-comment disciplines of the Reference Paper. The basic components—publication and notice of proposed rules, the opportunity to comment by interested persons, submission of views prior to adoption, and even the flexibility, "as far as practicable"—are all present, except for the obligation to consider prior comments. Given the dilution of the mandatory character of the prior notice-and-comment disciplines in the Reference Paper, the absence of an express provision in the Revised Administrative Code on the consideration of prior comments would not fatally detract from the overall consistency of the Philippines' administrative public participation rules with the Reference Paper.

Nonetheless, the Philippines' decision to adopt Reference Paper disciplines on advance publication and notice-and-comment for the domestic regulation of services is consequential for the domestic regulatory regime. It represents the first time that the Philippine government agreed to binding multilateral commitments on what are, at its most rudimentary level, certain elements of U.S.-style administrative rulemaking. The prior notice-and-comment disciplines in the Reference Paper can be traced to the U.S. Administrative Procedures Act (APA),[233] which has been described as "one of the greatest inventions of modern government."[234] The APA requires that advance notice of proposed rulemaking be published in the U.S. Federal Register, that interested

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[232] Section 9, Book VII, Chapter 2, E.O. 292 series of 1987

[233] 5 U.S.C. §§ 551–559

[234] William D. Araiza, *Note, Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 Yale L.J. 669 (1989), at 672

persons be afforded the chance to submit comments concerning the proposed rule, consider those comments, and then publish the rule with a concise general statement of its basis and purpose.[235] The purpose of the APA notice-and-comment requirement is two-fold: "to give the public an opportunity to participate in the rulemaking process" and to allow the agency "to educate itself before establishing rules and procedures which have a substantial impact on those regulated."[236]

A number of hallmarks of U.S. administrative rulemaking and the APA notice-and-comment mechanism can be seen in the Reference Paper version. Under the APA, the "[g]eneral notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law,"[237] which corresponds with the advance publication requirement in Paragraph 14 of the Reference Paper. The APA requires that "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation,"[238] which pertains to Paragraph 16 of the Reference Paper. Finally, the APA mandates that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose,"[239] which aligns with Paragraph 17 of the Reference Paper.

The Philippines' prior notice-and-comment rules under the Revised Administrative Code is generally aligned with the basic tenets of U.S.-style administrative rulemaking. But a comparative analysis[240] of the public participation rules in the Revised Administrative Code with the more robust notice-and-comment requirements in U.S. administrative rulemaking under the APA revealed the clear limitations of the Revised Administrative Code.[241] Under

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[235] Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures,* 12 N.Y.U. J. Legis. & Pub. Pol'y 321 (2009), at 327. See also Araiza, *supra* note 234.

[236] Base, *supra* note 107, at 98, *citing* Texaco, Inc v Federal Power Commission, US Court of Appeals for the Tenth Circuit, 337 F.2d 253, (10th Cir. 1964).

[237] 5 U.S.C. §§ 553(b)

[238] 5 U.S.C. §§ 553(c)

[239] *Id.*

[240] *See* Graciela Base, *Notice-and-Comment Rulemaking in Comparative Perspective: Some Conceptual and Practical Implications*, 15 Asian J. Comp., 95, 99 (2020).

[241] Base, *supra* note 107, at 98.

the public participation requirements of the APA, *i.e.*, the publication of the proposed administrative rule or regulation, the opportunity for the general public to submit comments in writing, and the publication of the final rule 30 days before effectivity, is the established general rule.[242] In practice, U.S. courts "rigorously police agency compliance with the procedure"[243] and "have nullified administrative rules that dispensed with the notice-and-comment process without justifiable reason."[244] To be sure, there is no U.S.-style judicial system that will "rigorously police" the Philippines' implementation of the Reference Paper's notice-and-comment disciplines. But as discussed in Part III.B, the domestic regulation disciplines under the Reference Paper, including the new advance publication and notice-and-comment requirements, will be covered by the WTO Dispute Settlement Understanding (DSU), which renders any violation justiciable under the DSU.[245]

Philippine compliance with Section 9 of the Revised Administrative Code, on the other hand, is "practically discretionary on the part of the agency,"[246] and unless the right to public participation in administrative rulemaking is explicitly mandated in the agency's charter or otherwise by substantive law, such right will not be actionable,[247] rendering its practical application "largely [...] meaningless."[248] At the same time, the organic charter of the administrative agency or the relevant substantive law is usually silent with respect to other forms of issuances establishing a rule, such as orders, resolutions, or circulars that the agency may subsequently promulgate, which means that the Revised Administrative Code would apply by default.[249]

Despite the language of the Revised Administrative Code, the Philippine Supreme Court pronounced that "notice and hearing are not essential to the validity of administrative action where the administrative body acts in the exercise

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[242] *Id* at 98.
[243] *Id.*
[244] *Id.* at 108.
[245] See *supra,* at 187.
[246] Base, *supra* note 107, at 97.
[247] *Id.* at 98
[248] *Id.* at 110
[249] *Id.* at 100

of executive, administrative, or legislative functions,"[250] which had become the prevailing doctrine and was affirmed in subsequent cases.[251] While "notice-and-hearing" as understood in the context of an administrative agency's *quasi-judicial* functions is not essential in the discharge of that agency's *quasi-legislative* functions, it was cogently observed that "a variant of this process, that is, 'notice-and-comment' in administrative rulemaking, is recognized under the [Revised Administrative Code]. The effect of the doctrine is the perpetuation of the idea that no notice and hearing *of any kind* is essential in quasi-legislative proceedings."[252]

Perhaps due to the lack of specificity and substantive guidance in the Revised Administrative Code and the lack of clarity in its interpretation by the Supreme Court, regulatory reforms instituted by the Executive branch sought to integrate public consultation in the regulatory process, which necessarily entails the exercise of administrative rulemaking or quasi-legislative functions. In strengthening the mandate of ARTA, the EODB Act highlighted principles on the importance of stakeholder consultation, particularly as part of the process of RIA. Under Section 6(b), Rule III of the Implementing Rules and Regulations of the EODB Act, government agencies covered by the Act are now required to conduct consultations to ensure the quality of a regulation as part of the RIA process, and are to properly disseminate the results of the RIA as a "feedback and feedforward" mechanism.[253] While the Philippines has established good practice in these areas, a joint OECD and ADB study found that stakeholder consultation in the Philippine government still "tends to happen at a late stage, after the production of a draft law, rather than at a more nascent stage of policy development,"[254] which implies

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[250] *Id.* at 103, citing *Philippine Communications Satellite Corporation v. Alcuaz*, G.R. No. 84818, Dec. 18, 1989.

[251] See *id.* at 105, citing *Quezon City PTCA Federation, Inc. v. Department of Education*, where the Supreme Court reaffirmed the rule that '[n]otice and hearing are not essential when an administrative agency acts pursuant to its rulemaking power,' despite the fact that the assailed order was subject to the General Administrative Procedure regime because the statute granting rulemaking powers to the Secretary of Education does not require public consultations in the issuance of IRRs.

[252] *Id.* at 104

[253] Joint Memorandum Circular No. 2019-001, Series of 2019, The Implementing Rules and Regulations of Republic Act No. 11032 otherwise known as the "Ease of Doing Business and Efficient Government Service Delivery Act of 2018" (EODB Act) [hereinafter "EODB IRR"].

[254] Organization for Economic Cooperation and Development & Asian Development Bank, *supra* note 110, at 54–55.

that public participation in the administrative rulemaking process has not reached the level of standard operating practice in the Philippines.

5. Internationalizing notice-and-comment disciplines on services

One consequential implication of the Philippines' adoption of Reference Paper disciplines on advance publication and prior comment is that it would not only "multilateralize" U.S.-style notice-and-comment requirements, but it will also further "*internationalize*" the domestic regulation of services sectors.[255] The inscription of the Reference Paper disciplines on notice-and-comment in the Philippines' GATS schedule not only creates a binding MFN commitment applicable to all other WTO Members, but it would also extend the application of such disciplines to their respective service sectors and suppliers, assuring them of a voice in the national regulatory process.[256] The Reference Paper's obligation for JSI-SDR signatories to "consider" comments on proposed laws and regulations from interested persons applies as well to comments from foreign suppliers, subject to implementation flexibilities. This commitment implies that it would no longer be sufficient for a WTO Member's executive or legislative branch to take into account only the interests of domestic stakeholders in the development of laws and regulations on the matters covered by GATS Article VI(4).[257]

By giving foreign service suppliers a "reasonable opportunity to comment on the proposed laws and regulations published in advance," and whose comments shall be considered prior to the adoption of such laws and regulations, the Reference Paper effectively guarantees them a say not only in the administrative rulemaking, but also in the legislative process on matters affecting trade in services. To be sure, the public participation requirements in the legislative process are set by the 1987 Constitution itself,[258] and to give full effect to the Constitutional mandate, both Houses of Congress have established rules of procedure governing the conduct of committee hearings on proposed bills and other measures. Notably, under the Rules of the House of Representatives of the 18th Congress, Committees "shall undertake measures and establish systems to ensure that constituencies, sectors or groups whose welfare and interests are

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[255] Krajewski, *supra* note 73, at 27.
[256] *Id.*
[257] Mohamadieh, *supra* note 30, at 7.
[258] CONST. art. VI, §2.

directly affected by measures to be discussed are enabled to participate in these meetings or public hearings."[259]

As the obligation to accord foreign service suppliers from other WTO Members, including from developed countries with offensive interests in services exports, an opportunity to comment expands the universe of "voices" to be heard in domestic rulemaking, it may have a significant effect on regulatory policy space.[260] The risk of opening up the domestic rulemaking process on the regulation of services to foreign service suppliers of WTO Members with strong services export interests, who may exert undue pressure on regulators and possibly create the conditions for a "corporate capture" of the services regulatory regime, would certainly be elevated under the Reference Paper.[261] The organized lobbying and influence that can be wielded by foreign service suppliers, which may include multinational companies, could "tilt the balance in national regulatory and legislative processes away from national constituencies and development priorities."[262]

It has been argued, however, that allowing foreign service suppliers to comment on proposed services regulations and participate in the administrative rulemaking process would "inform the work of a benevolent regulatory authority seeking to set up efficient and least trade-restrictive regulatory measures, which could benefit from the collection of the views of all economic stakeholders, be they domestic or foreign."[263] Conversely, a counterintuitive view posits that where a strong culture of public participation is lacking, the consultation might end up being dominated by a few interest groups, rendering the agency vulnerable to corporate capture.[264]

6. Options for the Philippines in a multilateralized transparency regime

Efforts to improve domestic prior notice-and-comment rules go a long way in enhancing the ability of the general public to participate in domestic economic

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[259] Rules of the House of Representatives of the 18th Congress, available at https://www.congress.gov.ph/download/docs/hrep.house.rules.pdf.

[260] *See* Krajewski, s*upra* note 73.

[261] *Id.*

[262] Mohamadieh, *supra* note 30, at 11.

[263] Delimatsis, *International Trade in Services and Domestic Regulations, supra* note 68, at 266-267.

[264] Base, *supra* note 107, at 124.

governance. As the Philippines' existing public participation rules in the Revised Administrative Code are not as robustly implemented and have been watered down further by an inconsistent Supreme Court doctrinal ruling, the adoption of the Reference Paper could be an opportunity for the Philippine government to provide definitive clarity and give full effect thereto. But tethering these reforms to an international standard through binding international obligations could potentially place enormous strain on developing country governments, such as that of the Philippines, including subnational entities or local government units (LGUs).

One way forward is perhaps an obvious one—the Philippines would have to make full use of the built-in flexibility language where applicable in the Reference Paper. The flexibility clause "*to the extent practicable and in a manner consistent with its legal system for adopting measures*" qualifies a number of mandatory obligations, particularly the prior notice-and-comment disciplines in Paragraphs 14-17 of the Reference Paper. As far as administrative rulemaking on services sectors is concerned, the Philippines can maximize the use of such flexibilities by improving the public participation requirements of Section 9 of the Revised Administrative Code. The Philippine government can enact implementing rules that further clarify the applicability of Section 9 by providing clearer and more detailed requirements to guide administrative agencies in operationalizing the objectives of public participation.[265] Although their utility in downgrading some of the mandatory obligations to a more appropriate "best endeavor" type is limited, the Reference Paper flexibilities could still cushion the impact of its implementation and allow for some degree of regulatory flexibility. This flexibility can be particularly useful for LGUs, given the potential administrative and financial difficulties in operationalizing, let alone sustaining, a prior notice-and-comment mechanism in the near future.[266]

As the Reference Paper derives its legal status and the binding character of its obligations from its inscription into a GATS schedule, GATS rules and exceptions may also be applicable. The GATS grants two exceptions to the general obligation requiring transparency. First, Article III *bis* allows Members to deny providing confidential information, provided that its disclosure would impede law enforcement, or otherwise be contrary to the public interest, or would prejudice

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[265] *See id.,* at 106-107

[266] Delimatsis, *International Trade in Services and Domestic Regulations*, *supra* note 68, at 280.

the legitimate commercial interests of public or private enterprises. Second, GATS Article XIV *bis*, paragraph 1(a), exempts Members from providing information that they consider would be contrary to essential security interests.[267] For LGUs in particular, the last paragraph of GATS Article I(3)(a) provides that in fulfilling its obligations and commitments under the GATS, reasonable measures as may be available to WTO Members shall be taken to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.[268]

Ultimately, the enhanced transparency disciplines that would be applied to the administration of measures that affect trade in services, combined with the continued implementation of similar transparency rules in the Philippines' FTAs and the entry-into-force of the RCEP, would necessitate a systematic, whole-of-government approach to improving transparency and public participation in administrative rulemaking as an essential component of the regulatory reform process. Although the Reference Paper's GATS+ transparency disciplines and APA-based public participation rules would only be binding on the services sectors in the Philippines' GATS schedule, any domestic effort at improving transparency and public participation administrative rulemaking to conform to such enhanced standards would necessarily have to be applied to all services sectors. It would be costly, confusing, and burdensome to maintain two systems—one with a mandatory public participation process for services sectors where the Reference Paper is inscribed as additional commitments, and a second permissive one for all other services sectors subject to the regulator's discretion.

D. New Rules on Authorization for the Supply of Services

The Reference Paper provides for new disciplines on the authorization for the supply of services—an uncharted area of the GATS landscape before it was mapped by the Members of the JSI-SDR.[269] As explained in Part I.C, four of the five GATS Article VI(4) mandated issues, namely licensing requirements, licensing procedures, qualification requirements, and qualification procedures, were

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[267] *Id.*, at 268.

[268] GATS art. I(3)(a)

[269] *See supra*, at 12 describing the shift in the negotiations from individual disciplines on four of the GATS Article VI(4) mandated issues to a broader approach involving "authorization for the supply of a service."

bundled together as part of a broader process of "*authorization to supply a service*."[270] Unlike the Reference Paper, the GATS does not define "authorization for the supply of a service," although "supply of services" is defined in GATS Article XXVIII(b) as "including the production, distribution, marketing, sale and delivery of a service."

Existing GATS rules referencing authorization are sparse and provide limited guidance. Under GATS Article VI(3), Members shall ensure that their competent authorities provide an applicant seeking authorization for the supply of a service with information concerning the status of the application without undue delay, who shall be informed of the decision made by a WTO Member's competent authorities concerning the application within a reasonable period of time after its submission.[271] Outside GATS Article VI, the only other reference to authorization for the supply of a service is found in GATS Article VII, wherein a Member may recognize the education, experience, requirements, licenses, or certifications granted in a particular country in fulfilling the standards or criteria for the authorization (among others) of services suppliers,[272] but such recognition should not discriminate between countries or serve as a disguised restriction on trade in services.[273] The new disciplines on authorization for the supply of a service are decidedly more robust and purposely designed to augment the GATS. For instance, the duty of the competent authorities to provide information when requested and notify the applicant of the decision under GATS Article VI(3), which only applies to a Member's specific commitments, is reflected in Section II Paragraphs 7.b and 7.d. of the Reference Paper.

1. Procedural aspects of authorization for the supply of a service

Comprising half of the Section II disciplines, the procedural aspects of the authorization for the supply of a service are outlined in Paragraphs 4 to 8 of the Reference Paper, and focus more on facilitating and improving procedural certainty in the administrative process of securing authorizations for the supply of services. A WTO Factsheet explains that the Reference Paper disciplines have focused on measures that are "closely linked" to the process of authorization to

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[270] *See supra* note 74.
[271] GATS art. VI(3).
[272] GATS art. VII(1).
[273] GATS art. VII(3).

supply a service, to ensure that "opaque and complex authorization procedures" do not nullify existing market access and national treatment commitments.[274] Like other provisions of the Reference Paper, the disciplines on authorization for the supply of services also provide for built-in flexibilities, which can be summarized as follows:

PROVISION	NATURE OF COMMITMENT	FLEXIBILITY
Single competent authority for each application (Section II, Para 4)	mandatory	to the extent practicable/possible
Submission of application at any time throughout the year (Section II, Para 5)	mandatory	to the extent practicable/possible
Applications for authorization in electronic format (Section II, Para 6.a)	mandatory	best endeavor language
Accept copies of documents in place of original documents (Section II, Para 6.b)	mandatory	none
Indicative timeframe for processing of an application (Section II, Para 7.a)	mandatory	to the extent practicable/possible
Information on the status of the application without undue delay (Section II, Para 7.b)	mandatory	none
Ascertain without undue delay the completeness of an application (Section II, Para 7.c)	mandatory	to the extent practicable/possible
Ensure complete processing of application and the applicant is	mandatory	to the extent practicable/possible

[274] World Trade Organization, *Services Domestic Regulation: Rationale and Content, Potential Economic Benefits, and Increasing Prevalence in Trade Agreements*, at 2 (July 2022).

PROVISION	NATURE OF COMMITMENT	FLEXIBILITY
informed in writing of the decision (Section II, Para 7.d)		
Inform applicant of the incompleteness of an application, additional information needed to complete it (Section II, Para 7.e)	mandatory	to the extent practicable/possible
Inform applicant of the reasons for refection and the procedures for resubmission (Section II, Para 7.f)	mandatory	to the extent practicable/possible
Ensure authorization enters into effect without undue delay (Section II, Para 8)	mandatory	none
Examination at reasonably frequent intervals and reasonable period of time to request the taking (Section II, Para 10)	mandatory	none
Accept requests for examinations in electronic format and the use of electronic means in other aspects of the examination (Section II, Para 10)	permissive	to the extent practicable best endeavor language

Notwithstanding these built-in implementation flexibilities, the obligatory nature of a majority of the disciplines on authorization, coupled with the specificity of the procedural requirements to be observed and the highly detailed nature of the information required, could impose a significant administrative burden for Members with a nascent or underdeveloped administrative bureaucracy or do not have the resources to implement such

disciplines. Even for Members such as the Philippines, which has fairly recent legislation such as the EODB Act and a corpus of general administrative law that are generally aligned with the Reference Paper disciplines on authorization, the scope of the disciplines that start from before the application to the decision by the competent authorities and the robustness of the procedural requirements can still be a daunting task to execute fully. As these disciplines would apply only to those services sectors in a Member's GATS Schedule, it would behoove that Member's regulatory agencies to be extra vigilant and circumspect with respect to the administration of the procedural aspects of the granting of authorizations on the supply of services they regulate. This is further compounded by the fact that the disciplines would apply to not just central or national government agencies but also to regional and sub-level government units including local government.[275]

2. Development of measures relating to authorization for the supply of a service

The second subset of disciplines on authorization under the Reference Paper covers the rather prosaically termed "development of measures," set forth in Paragraph 22. Unlike the previously discussed Paragraphs on the procedural side of the authorization process, Paragraph 22 on the development of measures relating to authorization deals with standards of a substantive nature, *i.e.*, relating to the content of such measures.[276] The origins of Paragraph 22 can be traced to two separate textual proposals circulated to the WPDR in the first quarter of 2017.[277] A comparison of the two proposals reveals that some of the language was lifted from the domestic regulation chapters of the free trade agreements of the proponents.[278] It was also observed that certain phraseologies were based on text from the 2009 Chair's Text as well as the accountancy disciplines.

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[275] GATS art I(3)(a). Members, however, are not expected to take every possible step to prevent local governments from infringing the GATS, but only take reasonable measures. See Munin, *supra* note 201, at 67.

[276] Gabriel Gari, *Recent developments on disciplines on domestic regulations affecting trade in services: convergence or divergence*? COHERENCE AND DIVERGENCE IN SERVICES TRADE LAW, European Yearbook of International Economic Law, Rhea Tamara Hoffmann, Markus Krajewski (eds.)

[277] *Communication from Australia, Canada, Colombia, the European Union, Israel, Japan, and Mexico*, JOB/SERV/250 (Feb. 27, 2017); *Communication from Hong Kong, China, and New Zealand*, JOB/SERV/252 (Mar. 2, 2017).

[278] Notably Hong Kong (China) and New Zealand. See *infra* note 3, at 56.

The final text in Paragraph 22, which is nearly identical to the counterpart language in the 2017 WPDR text, is a patchwork of relevant text from various sources and combined under the broad rubric of Development of Measures. The text is as follows (footnotes omitted):

> 22. If a Member adopts or maintains measures relating to the authorization for the supply of a service, the Member shall ensure that:
>
> (a) such measures are based on objective and transparent criteria;
>
> (b) the procedures are impartial, and that the procedures are adequate for applicants to demonstrate whether they meet the requirements, if such requirements exist;
>
> (c) the procedures do not in themselves unjustifiably prevent the fulfilment of requirements; and
>
> (d) such measures do not discriminate between men and women.[279]

Of all the provisions of the Reference Paper, the disciplines on development of measures potentially carry the most intrusive impact on regulatory policy space,[280] save perhaps for the notice-and-comment provisions discussed in the preceding section. At the outset, the disciplines on development of measures under Paragraph 22 are mandatory. But unlike other provisions of the Reference Paper, the disciplines in Paragraph 22 are not attenuated by textual flexibilities or best endeavor language.

The chapeau of Paragraph 22 and (a) and (d) refer to *measures*, while (b) and (c) refers to *procedures*," but the GATS treatment of these terms might be pertinent to its practical scope and application. A "measure" has a broader meaning in the GATS, which defines it as one by a Member in the form of law,

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[279] Under Section I, Paragraph 9, Members may exclude Paragraph 22 (d) of Section II from the additional commitments to be scheduled in accordance with the Reference Paper.

[280] Mohamadieh, *supra* note 30, at 5.

regulation, rule, procedure, decision, administrative action or any other form.[281] At the same time, the chapeau of Paragraph 22 covers "measures *relating to* the authorization for the supply of a service." Taken together, one could interpret Paragraph 22 as applicable to a wide range of government acts and issuances, over matters that would only need some relation (direct or indirect) to the authorization to supply a service, significantly widening its scope. At the same time, the specific Paragraph 22(b) and (c) requirements for *procedures* on authorization, which would refer to the disciplines in Paragraphs 4-10 and 11-12 of the Reference Paper, could mean that such requirements are in addition to those for measures, of which procedures is a subset under the GATS definition of measures.

This distinction may also be particularly relevant for two other reasons. First, for purposes of examining the applicability of specific provisions of the GATS—and by extension the Reference Paper—a dispute settlement panel would have to determine the applicability of the provisions invoked by the complaining party as the basis for its claims with respect to the measures at issue."[282] If the measures covered by Paragraph 22 would impair any direct or indirect benefits accruing to another Member, WTO dispute settlement may be resorted to under DSU Article 3.3. Second, under the GATS, measures taken by WTO Members include not only national government agencies, but also "regional or local governments and authorities" as well as "non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."[283] The scope of Paragraph 22 is broader compared to the notice-and-comment requirements in Paragraphs 14-17, which are limited to proposed *laws and regulations* on authorization for the supply of a service.[284]

"[M]easures are based on objective and transparent criteria…" (Paragraph 22(a))

[281] GATS art. XXVII(a). See *supra*, at 30 for a similar discussion on the use of the GATS nomenclature vis-à-vis the application of "laws and regulations" to prior notice-and-comment requirements.

[282] Munin, *supra* note 201, at 61, citing Panel Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, supra *note* 20, at ¶ 7.1619.

[283] GATS Article I(3)(a)(i) and (ii)

[284] See *supra* note 281.

Paragraph 22 imposes substantive requirements for measures related to authorization for the supply of a service that should be compared with what GATS Article VI(4) requires. Paragraph 22(a) is essentially a reproduction of GATS Article VI(4)(a), although the latter's reference to "competence and the ability to supply the service" is relegated to a footnote.[285] Objectivity is a standard that is widely recognized and a multifaceted principle in other areas of WTO law. In dispute settlement for instance, under DSU Article 11, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[286] The objective standard is certainly essential in an adjudicatory process such as the WTO dispute settlement system, as the adjudicator is expected to approach the facts and the evidence before him without any bias or prejudice.

As far as a regulator is concerned, objectivity of the criteria it considers in the process of authorization to supply a service is just one of a number of values that guide its decision-making. An inflexible objectivity standard could conflict with considerations that are core to a regulatory process that may be deemed as non-objective, such as preserving historic or cultural values or those based on a public interest or public welfare standard, or could otherwise restrict a regulator's discretion to undertake the balancing required when there are multiple considerations in evaluating the environmental, economic, or community impact.[287] To be sure, structural safeguards must be in place to prevent abuse of a regulator's discretion that may be based on arbitrary and capricious considerations, and where such safeguards exist, any inquiry into the inconsistency of a given criteria with the objectivity standard under the pretext of the Reference Paper disciplines should be subordinate to such safeguards under the principle of exhaustion of local remedies.[288] At the same time, the objectivity standard in Paragraph 22(a), including that in GATS Article VI(4), should be read in conjunction with the prevailing view that GATS Article VI applies to non-

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[285] The complete text of Footnote 17 of Paragraph 22(a) reads: "Such criteria may include, *inter alia*, competence and the ability to supply a service, including to do so in a manner consistent with a Member's regulatory requirements, such as health and environmental requirements. Competent authorities may assess the weight to be given to each criterion."

[286] DSU, Art. 11, World Trade Organization.

[287] Mohamadieh, supra note 30, at 5.

[288] *See* Chittharanjan Felix Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2d ed. 2005).

discriminatory measures.[289] The structure of the GATS differentiates between measures that limit market access for foreign services and service suppliers and measures that are aimed at public policy objectives.[290] Thus, criteria that are considered non-objective but effectively discriminate against foreign suppliers in favor of domestic suppliers or among other foreign suppliers should be subject to GATS rules in Articles XVII and XVI, respectively.

Transparency is an established principle in WTO law and policy and an indispensable obligation in the GATS as in other WTO Agreements. GATS Article III largely follows GATT Article X in requiring publication of all relevant measures (including international agreements affecting trade in services), as well as additional transparency obligations on annual reports on changes to laws affecting trade in services, and the establishment of enquiry points.[291] Thus, transparency in the GATS is often referred to in terms of a Member's laws being open and publicly available.[292] Paragraph 22(a), however, requires that the *criteria* of measures relating to the authorization for the supply of a service are transparent. This effectively goes deeper than transparency requirements in the GATS, because it would entail going behind the curtain of such measures and requiring that the substance of the criteria be made available or accessible. The substance of such criteria could, in turn, be based on legitimate public policy objectives or subject to the discretion legally conferred upon or delegated to the regulator.

"[P]rocedures are impartial and adequate for applicants to demonstrate whether they meet the requirements, if such requirements exist…" (Paragraph 22(b))

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[289] See *supra* note 35.

[290] Simon Tans, *The GATS Approach Towards Liberalization: The Interaction Between Domestic Regulation, Market Access, National Treatment and Scheduled Commitments in the GATS*, CTEI Working Paper No. 2009-02, at 16 (2009), citing Patrick Low & Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under GATS,* in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 455 (Pierre Sauvé & Robert M. Stern eds., Brookings Inst. Press 2000).

[291] Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT'L ECON. L. 779, 779–802 (2008).

[292] Robert Stumberg, Memorandum to Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC), Note 70, at 18 (Feb. 12, 2008), available at https://www.iatp.org/sites/default/files/451_2_101603.pdf.

The reference to "impartial" procedures in the first part of Paragraph 22(b) would be consistent with the conditional obligation under GATS Article VI(1) to ensure that "measures of general application affecting trade in services are administered in a reasonable, objective, and *impartial* manner." The notion of impartiality in GATS Article VI:1 relates to the bias rule as an aspect of administrative due process.[293] In *China – Raw Materials*, "impartial" administration in the context of GATT Article X(3)(a) was taken to mean the application or implementation of the relevant laws and regulations in a fair, unbiased, and unprejudiced manner.[294] Paragraph 22(b), however, requires that the *procedures* must be impartial. This could be understood to mean that the authorization procedures must be impartial on their face, while GATS Article VI(1) requires that measures of general application, which incidentally may also include procedures,[295] be administered in an impartial manner. In any event, the obligation to ensure impartial procedures and impartial administration of measures of general application would only apply to sectors where specific commitments are undertaken.

The second part of Paragraph 22(b) imposes conditions on the fulfillment of requirements by applicants for authorization to supply a particular service. The reference to "requirements" should be understood in the context of the GATS Article VI(4) mandate on licensing requirements and qualification requirements. In the 2009 Chair's Text, "qualification requirements" were defined as substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service.[296] "Licensing requirements" are substantive requirements other than qualification requirements with which a natural or juridical person is required to comply in order to obtain, amend, or renew authorization to supply a service.[297] As these were understood in the 2009 Chair's Text, qualification and licensing requirements are of a substantive nature that goes

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[293] Andrew D. Mitchell & Tania Voon, *Reasonableness, Impartiality and Objectivity, in* WTO Domestic Regulation and Services Trade: Putting Principles Into Practice 65, 65–78 (Aik Hoe Lim & Bart De Meester eds., Cambridge Univ. Press 2014).

[294] *Id.* at 75, citing Panel Report on China - Raw Materials ¶ 7.694

[295] *See* Note by the Secretariat, *Measures of General Application in WTO Agreements*, Working Party on Domestic Regulation, WTO Doc. S/WPDR/W/47 (Feb. 9, 2011).

[296] World Trade Organization, *Disciplines on Domestic Regulation in the Accountancy Sector*, World Trade Organization Doc. RD/SERV/46/Rev.1 [hereinafter "2009 Chair's Text"], at 8 (2009).

[297] *Id.,* at 6.

into an applicant's competence or ability to comply with substantive requirements in order to supply a service, which in turn is consistent with the criteria under GATS Article VI(4)(a).

As to the "adequacy" of such procedures, GATS Article VI(6) obliges Members with specific commitments in their GATS schedules on professional services to provide for "*adequate procedures* to verify the competence of professionals of any other Member." Paragraph 22(b) however, does not distinguish between qualification procedures as applied to professional services or other qualification or licensing procedures; the implication is that Paragraph 22(b) seems to go beyond GATS Article VI(6) by extending its application to licensing procedures and other qualification procedures of services other than professional services in a Member's respective GATS schedule. Reference to *adequacy* can also be found in the WTO Anti-Dumping Agreement, which mandates authorities to "examine the accuracy and *adequacy* of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."[298] The Panel in *Guatemala – Cement II*,[299] faced with the question of whether an anti-dumping investigation was properly initiated, held that whether or not the evidence in an anti-dumping investigation is *adequate* is not the legal standard to be applied, but whether the evidence was *sufficient*, and did not provide any further analysis on the "adequacy" of the evidence. WTO Members have tabled proposals for an "accuracy and *adequacy* test," which, by-and-large, reflect their respective national practices and experiences on initiating anti-dumping investigations rather than proposing a concrete adequacy test.[300]

"[P]rocedures do not in themselves unjustifiably prevent the fulfilment of requirements …" (Paragraph 22(c))

Paragraph 22(c) appears to correspond to GATS Article VI:4(c), which provides that "in the case of licensing procedures, *not in themselves a restriction on the supply of the service*."[301] GATS Article VI(4)(c) connotes a "less trade restrictive"

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[298] WTO Agreement on Anti-Dumping, Article 5.3.

[299] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (Oct. 24, 2000).

[300] South Africa, *Paper on Article 5.3* – Accuracy and Adequacy, G/ADP/AHG/W/189 (Sept. 13, 2011); Colombia, *Paper on Article 5.3* – Accuracy and Adequacy, G/ADP/AHG/W/192 (Oct. 5, 2011); Jamaica, *Paper on Article 5.3* – Accuracy and Adequacy, G/ADP/AHG/W/196 (Apr. 11, 2013).

[301] GATS Article VI(4)(c)

standard that was not reiterated in Paragraph 22(c), which instead requires that authorization procedures do "*not in themselves unjustifiably prevent the fulfilment of requirements*." That language is similar to a provision in Annex III to Chapter 13 (Trade in Services) of the Hong Kong, China - New Zealand Closer Economic Partnership Agreement (HK-NZ CEPA),[302] the parties to which are two of the main proponents of a separate paragraph on Development of Measures.[303] Paragraph 12 of Annex III to Chapter 13 of the HK-NZ CEPA reads:

> **Licensing Procedures**
>
> Each Party shall ensure that licensing procedures, including application procedures and, where applicable, renewal procedures, are as simple as possible, are *not more burdensome than necessary to ensure that applicants fulfil or comply with the licensing requirements*, and do not in themselves constitute a restriction on the supply of services.[304] (italics supplied)

In the 2009 Chair's Text, alternative language that is much closer to the text of Paragraph 22(c) was also proposed in the merger of what was then separate draft language on licensing procedures and qualification procedures:

> Each Member shall ensure that licensing and qualification procedures for the purpose of obtaining authorization to supply a service are [simple,] reasonable, clear and relevant [to the underlying policy objectives], [taking into account the nature of the requirements to be met and the criteria to be assessed,] [and do not in themselves constitute a restriction on the supply of services]. [Members shall ensure that such procedures *do not in themselves unduly impede fulfilment of requirements*.][305] (italics supplied)

What is common in the above-cited provisions of the HK-NZ CEPA and the 2009 Chair's Text is the need for simplicity in the licensing and qualification

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[302] Hong Kong, China–New Zealand Closer Economic Partnership Agreement, Annex III, ¶ 3(b), Mar. 29, 2010.

[303] *See supra* note 78.

[304] *Supra* note 302.

[305] Chairman's Progress Report, Disciplines on Domestic Regulation Pursuant to GATS Article VI.4, S/WPDR/W/45 (Apr. 14, 2011).

procedures so as not to overburden the applicant and thus facilitate the process of obtaining an authorization to supply a service. The main difference is that the HK-NZ CEPA incorporates a "necessity test" (*i.e.*, "not more burdensome than necessary"), while the 2009 Chair's Text does not. It was explained in an annotation to the 2009 Chair's Text that:

> [t]he application for licensing and/or qualification shall be examined under existing procedures valid at the date of application. Members shall, as far as practicable, *not amend such procedures or issue new procedures in respect of pending application*s. In the event such procedures are required to be amended or replaced, the Member shall promptly inform all applicants and provide reasonable time to such applicants for adapting their applications to such amended/new procedures.[306] (italics supplied)

Given the divergent views among WTO Members on the "necessity test" in services domestic regulation that have proven to be irreconcilable over the course of the negotiations in the WPDR and even in the JSI-SDR,[307] the language of 2009 Chair's Text, part of which has been transplanted into Paragraph 22(c), would appear to provide an acceptable landing zone for JSI-SDR participants, even if it seems to have strayed from the original GATS Article VI(4)(c) language.

"[M]easures do not discriminate between men and women …" (Paragraph 22(d))

Paragraph 22(d) is based on draft language proposed by Canada, Chile, Colombia, Iceland, and Uruguay on gender neutrality in the development of measures relating to the authorization for the supply of services.[308] Strictly from a GATS perspective, Article VI(4) does not provide for a mandate for the negotiation of disciplines that, among others, would proscribe discrimination based on gender in the process of securing authorization for the supply of a service. Perhaps due to this, Paragraph 22(d) is covered by an exemption[309] that Members can avail of in

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[306] 202009 Chair's Text, at 23.

[307] *See supra* note 60.

[308] World Trade Organization, *Communication from Canada, Chile, Colombia, Iceland, and Uruguay – Gender Equality in Services Domestic Regulation*, World Trade Organization Doc. JOB/SERV/258 (May 8, 2017).

[309] Reference Paper, § I, ¶ 9.

order to exclude this discipline from the additional commitments to be inscribed in their respective GATS Schedules. Despite the absence of a Ministerial mandate for the adoption of gender neutrality in the domestic regulation of services in the Reference Paper, it was lauded as the first gender equality provision in a WTO-negotiated outcome.[310]

3. Other mandatory obligations relating to authorization

Three separate Reference Paper obligations linked to both the procedural and substantive aspects of measures relating to the authorization for the supply of a service deserve separate mention. The disciplines on *Authorization fees*, *Independence of competent authorities*, and *Enquiry points* pertain to key aspects of a regulator's functions—the power to set and impose fees, the authority to render decisions on applications for authorization, and the responsibility to respond to concerns of stakeholders. It should be noted that the provisions governing the three disciplines are couched in mandatory language, without any mitigating soft law commitments or implementation flexibilities.

Authorization fees

Paragraph 9, Section II of the Reference Paper requires that the authorization fees charged by a Member's competent authorities are "*reasonable*, *transparent*, based on *authority* set out in a measure, and do not in themselves *restrict the supply* of the relevant service" (italics supplied).[311] A footnote qualifies that fees for the use of natural resources, payments for auction, tendering, or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision are not covered by the provision. Although the GATS Article VI(4) mandate does not include a specific textual reference to negotiating disciplines on "authorization fees," fees to be charged to defray the cost of processing applications for a license or to comply with qualification requirements and technical standards could be considered as measures relating to such requirements and procedures.

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[310] World Trade Organization, DDG Ellard: "Deeds not words" as the WTO becomes more gender-responsive, WTO News (Jan. 27, 2022), https://www.wto.org/english/news_e/news22_e/ddgae_27jan22_e.htm.

[311] Reference Paper, § II, ¶ 9.

The requisites for authorization fees under Paragraph 9 of Section II would have to be unpacked here, *vis-à-vis* the Philippines' domestic legal requirements for the setting and levying of fees, charges, and rates. First, the Reference Paper requirement that authorization fees must be *reasonable* would be satisfied by DOF-DBM-NEDA Joint Circular No. 1-2013 dated 30 January 2013, or the Implementing Rules and Regulations (IRR) of Administrative Order No. 31 series of 2012 (IRR of A.O. No. 31), which directs all agencies and offices of the national government to rationalize the rates of fees and charges and to ensure that such rates are just and reasonable by maintaining a balance between recovering the costs of services rendered and the socio-economic impact of their imposition.[312] Paragraph 5 of the IRR of A.O. 31 even enumerates a non-exhaustive list of factors to be considered in coming up with just and reasonable revised rates, such as direct costs of rendering the service, the inflation rate, and the rates for comparable services, among others.[313]

Second, as far as *transparency* in the charging of authorization fees are concerned, the public participation provisions of the Revised Administrative Code of 1987 discussed in Part III.C require mandatory notice and hearing in the fixing of rates.[314] Section 9(2), Book VII, Chapter 2 provides that "[i]n the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon."[315] Paragraph 5.5 of the IRR of A.O. 31, however, provides that public hearing and stakeholder consultations be conducted on the proposed new or revised rates prior to approval "when required by the agency's charter or other applicable laws" or "where appropriate," and if not so mandated by law, shall be

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[312] Administrative Order No. 31, § 2 (Oct. 1, 2012) (Phil.).

[313] *See* DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 5(5.1-5.5) (Jan. 30, 2013).

[314] A "*rate*" is "any charge to the public for a service open to all and upon the same terms, including individual or joint rates, tolls, classifications, or schedules thereof, as well as commutation, mileage, kilometerage and other special rates which shall be imposed by law or regulation to be observed and followed by any person." See Revised Administrative Code, Book VII, Chapter 1, § 2(3), Exec. Order No. 292 (July, 25, 1987). "Fees and charges" are defined in the Implementing Rules and Regulations of Administrative Order No. 31, series of 2012, on the Rationalization of Rates and Fees and Charges, Increase in Existing Rates, and Imposition of New Fees and Charges, as "levies imposed on direct recipients of public goods and services by agencies and GOCCs in the exercise of their mandated regulatory and service delivery functions. See DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 4(c) (Jan. 30, 2013).

[315] Revised Administrative Code, Book VII, Chapter 2, § 9(2), Exec. Order No. 292 (July 25, 1987).

subject to the discretion of the head of agency.[316] As discussed in the preceding section, the prior notice and hearing in the fixing of rates under Section 9(2), Book VII, Chapter 2 of the Revised Administrative Code is mandatory, and this has been affirmed in a number of Supreme Court decisions.[317]

Third, there are enough domestic legal safeguards in Philippine law to adequately meet the requirement that the authorization fee must be based on the *authority* set out in a measure. The general legal basis for the authority to impose fees and charges is the Revised Administrative Code of 1987. Under Section 54, Chapter 12, Book IV of the Revised Administrative Code of 1987, the heads of bureaus, offices, and agencies, upon approval of the concerned department head, shall exercise the continuing authority to revise the rates of fees and charges to recover the costs of rendered services.

Finally, the Reference Paper requirement that authorization fees do not *per se* "restrict the supply of the relevant service" is an express reference to the "less trade restrictive" standard. The "less trade restrictive" standard is considered as one of the elements of a necessity test as it is applied in the GATS context,[318] and appears only once in the entire Reference Paper. Under a necessity test, the restrictive effect on the supply of a service cannot be assessed as such; it should be evaluated against an objective, *i.e.*, an assessment of the restrictive effect of a given measure against the objective pursued and the contribution to this objective.[319] There should be no other reasonably available alternative measure that is less trade-restrictive and that can fulfill the legitimate objective sought to be achieved by the contested measure.[320] In the context of authorization fees *per se*, however, the only other alternative to imposing a fee is to not impose a fee, which could not possibly be a viable alternative because the objective of fees and charges is to

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316 DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 5.5 (Jan. 30, 2013).

317 *See* Base, *supra* note 107 for a comprehensive analytical discussion on the evolution of Supreme Court jurisprudence on the notice-and-hearing requirements for rate-fixing.

318 *See* Delimatsis, *Determining the Necessity of Domestic Regulations in Services*, *supra* note 68 at 387–397.

319 Panagiotis Delimatsis, *Who's afraid of necessity? And why it matters*? in WTO Domestic Regulation and Services Trade: Putting Principles into Practice, (Aik Hoe Lim and Bart de Meester, eds.), Cambridge University Press (2014), at 108.

320 *See* Delimatsis, *Determining the Necessity of Domestic Regulations in Services*, *supra* notw 68 at 388.

account for the costs involved in the provision of the public service, or in this instance, the processing of the application for authorization.[321]

Independence of competent authorities

Under Paragraph 12, Section II of the Reference Paper, Members shall ensure that their respective "competent authorities reach and administer their decisions in a manner *independent* from any supplier of the service for which authorization is required" (italics supplied).[322] Foreign service suppliers seeking to supply their service in other jurisdictions typically want to be assured that decision-making by regulatory authorities on applications for authorization to supply a service is made independently from commercial interests or political influence. As a matter of principle, the independence of a regulator, much like that of an adjudicator, is an essential element of any regulatory regime that is based on the idea of the rule of law.[323] This is reflected in GATS Article VI:2(a), which obligates Members to maintain independent judicial, arbitral, or administrative tribunals or procedures for the prompt review of administrative decisions affecting trade in services.[324] Where such procedures are "not independent of the agency entrusted with the administrative decision concerned," GATS Article VI:2(a) requires that such procedures provide for objective and impartial review.[325]

The universality of the principle of an independent regulator or decisionmaker is also recognized in Philippine law. The Supreme Court held in *Ang Tibay v. Court of Industrial Relations* that in administrative proceedings or in the exercise of quasi-judicial functions, the administrative tribunal "or any of its judges … must act on its or his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision."[326] In the Philippines' FTAs, specifically the PJEPA, AANZFTA, ATISA, and RCEP, the language of GATS Article VI(2)(a) on the maintenance of

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[321] Administrative Order No. 31, § 2 (Oct. 1, 2012); DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 5.5 (Jan. 30, 2013).

[322] Reference Paper, § II, ¶ 12.

[323] *See* Chiara Giorgetti et al., *Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options*. 21 J. World Investment & Trade 441-474 (June 22, 2020).

[324] GATS art. VI(2)(a).

[325] GATS art. VI(2)(a).

[326] G.R. No. L-46496, Feb. 27, 1940.

independent administrative tribunals has been practically reproduced verbatim.[327] While not strictly part of the GATS Article VI(4) mandate, the discipline on independence of competent authorities adds an important element of administrative due process in the authorization for the supply of a service.

Enquiry points

Lastly, Paragraph 20, Section II of the Reference Paper enjoins Members to "maintain or establish appropriate mechanisms for responding to enquiries from service suppliers or persons seeking to supply a service."[328] The scope of the enquiries to be directed to the enquiry point would cover measures "relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services."[329] Paragraph 20, however, gives Members the option to address such enquiries through either the enquiry and contact points established under GATS Article III (Transparency) and Article IV (Increasing Participation of Developing Countries) or any other mechanisms as appropriate.[330]

GATS Article III(4) sets a mandatory requirement for WTO Members to establish enquiry points to respond promptly to requests for information from other Members regarding the measures covered by the general transparency requirement under GATS Article III(1), *i.e.*, "all relevant measures of general application which pertain to or affect the operation of [the GATS]" as well as "[i]nternational agreements pertaining to or affecting trade in services to which a Member is a signatory."[331] In the most recent WTO Secretariat compilation of notified enquiry and contact points as required under GATS Articles III:4 and IV:2, NEDA is still the Philippines' designated "Enquiry and Contact Point."[332]

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[327] PJEPA, Chapter 1, Article 7; AANZFTA, Chapter 8, Article 12(2); ATISA, Article 16.2(a); RCEP, Article 8.15.2.

[328] Reference Paper, § II, ¶ 20.

[329] Reference Paper, § II, ¶ 1.

[330] The obligation to designate contact points under GATS Article IV pertain to developed countries to facilitate developing countries' access to market information.

[331] GATS art. III(1).

[332] Council for Trade in Services, *Contact and Enquiry Points Notified to the Council for Trade in Services, Note by the Secretariat*, WTO Doc. S/ENQ/78/Rev.22 (Feb. 10, 1998), at 30.

Paragraph 20 of the Reference Paper, however, extends the GATS enquiry point requirement on requests for information directly from "service suppliers or persons seeking to supply a service." Compare this with the Philippines' FTAs, specifically the PJEPA, which contains a positive obligation to promptly respond to requests for information from "service suppliers of the other Party."[333] In the ATISA, Parties are also required to respond to enquiries from "interested persons of the Member States" on any relevant measure covered by the ATISA, but only "to the extent possible and required under its laws and regulations."[334] In other words, the PJEPA and ATISA confine the universe of "interested persons" or "service suppliers" to those from other signatories or parties to the FTA. The Reference Paper, however, does not qualify whether "service suppliers or persons seeking to supply a service" should come from JSI-SDR Members. Moreover, because of the MFN requirement and its inscription as an additional commitment in the GATS Schedule, service suppliers from other WTO Members who are not signatories to the JSI-SDR can address their enquiries to the enquiry and contact points to be designated under Paragraph 20. In any event, unlike the PJEPA (and to a lesser extent, the ATISA), the Reference Paper does not set a positive obligation for the designated enquiry or contact point to respond promptly to such enquiries.

4. Regaining regulatory sovereignty over authorization to supply services

With its adoption and subsequent inscription of the Reference Paper in its GATS schedule, the Philippines will be bound to observe the procedural and substantive disciplines in the process of "authorization for the supply of a service" in its domestic legal framework. As far as the procedural disciplines on the authorization for the supply of a service are concerned, there appears to be no fundamental inconsistency with the Philippines' applicable statutory and administrative framework. Just as no single government agency exercises a horizontal policy or regulatory mandate across the Philippines' services sectors, so too is there no single overarching national law or implementing regulation that sets domestic rules specifically on the authorization for the supply of a service.[335]

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[333] *See* PJEPA, Article 79.

[334] *See* ATISA, § IV, art. 14, ¶ 9.

[335] The Philippines' domestic legal and policy framework on trade in services and the regulation of services sectors is discussed in Part II. *See supra*, at 24.

Because of its ascribed policy objective to "reduce red tape and expedite business and non-business related transactions in government,"[336] the EODB Act of 2016 is arguably the statute that comes closest to an overarching legal framework that relates to the procedural aspects of authorization. Quite presciently, the EODB Act actually provides for a definition of "authorization" generally, which it describes as "the permission embodied in a document granted by an agency to a natural or juridical person who has submitted an application for government service in order to implement or sanction specific acts or to engage in a particular line of business. The authorization can take the form of a permit, a clearance, a license, a certificate of registration, accreditation, compliance, or exemption, or any similar document."[337] In those procedural areas where the EODB Act provides little or no guidance, the Revised Administrative Code of 1987 finds application. A non-exhaustive table of relevant provisions in the EODB Act of 2016, Revised Administrative Code of 1987, and other related laws and regulations that correspond to the procedural disciplines on authorization to supply a service is as follows:

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
Scope of the Disciplines Definition of "authorization" (Paragraph 3)	EODB IRR Rule I, Sec. 4(g)
Submission of Applications (for Authorization for the Supply of Services) One competent authority for each application for authorization (Paragraph 4)	EODB Sec. 4 (b). *Business One Stop Shop* (*BOSS*) EODB Sec. 11. *Streamlined Procedures for the Issuance of Local Business Licenses, Clearances, Permits, Certifications or Authorizations.*

[336] EODB Act, § 4(g).
[337] EODB IRR, Rule I, § 4(g)

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
	EODB Sec. 13. *Central Business Portal* (*CBP*)
Application Timeframes Permit submission of an application at any time throughout the year or allow a reasonable period to submit (Paragraph 5)	EODB Sec. 11(e): option to renew business permits within the 1st month of the year or the anniversary date of the issuance of the permit EODB Rule VII, IRR Section 7. *Adoption of Working Schedules to Service Clients*
Electronic Applications and Acceptance of Copies "endeavor" to accept electronic applications for authorization (Paragraph 6.a) accept copies of authenticated documents in place of original documents (Paragraph 6.b)	EODB Sec. 9 (e) Electronic Versions of Licenses, Clearances, Permits, Certifications or Authorizations; EODB Sec. 11 (b) (c) EODB IRR Rule VII Sec. 6. Electronic Versions of Licenses, Permits, Certifications or Authorizations
Processing of Applications Provide an indicative timeframe for processing of an application (Paragraph 7.a)	EODB Act Sec. 9 Accessing Government Services Sec. 9(a) Acceptance of Applications or Requests Sec. 9(b) Action of Offices

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
Provide without undue delay information concerning the status of the application (Paragraph 7.b) Ascertain without undue delay the completeness of an application (Paragraph 7.c) if application is complete, ensure that the processing of the application is completed and the application is informed in writing of the decision (Paragraph 7.d) if application is incomplete, inform the applicant of such fact, identify any additional information needed to complete the application or explain why it is incomplete, and provide an opportunity to provide additional information (Paragraph 7.e) if application is rejected, inform the application of the reasons therefor and the procedures for resubmission if applicable (Paragraph 7.f)	EODB IRR Rule VII Accessing Government Services Sec. 2 Acceptance of Applications and Requests Sec. 3 Action of Offices Administrative Code of 1987, Book VII, Sec. 17 Licensing Procedure EODB IRR Rule I, Sec. 4 (s): definition of "complete requirements" EODB Act Sec. 9 Accessing Government Services Sec. 9(a) Acceptance of Applications or Requests Sec. 9(b) Action of Offices EODB IRR Rule VII Accessing Government Services Sec. 2 Acceptance of Applications and Requests Sec. 3 Action of Offices EODB Sec. 9 (c) Denial of Application or Request for Access to Government Service; EODB IRR Rule VII, Sec. 4 EODB Sec. 10. Automatic Approval or Automatic Extension of License,

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
	Clearance, Permit, Certification or Authorization. Administrative Code of 1987, Book VII, Sec. 18 Non-expiration of License [with reference to any activity of a continuing nature]
Ensure approved authorization enters into effect without undue delay (Paragraph 8)	EODB Sec. 10. Automatic Approval or Automatic Extension of License, Clearance, Permit, Certification or Authorization. EODB IRR Rule VIII, Secs. 1-3

Although the procedural disciplines of the Reference Paper on the process of authorization manifest a discernible regulatory reform and administrative law element and a one-to-one correspondence with relevant provisions of the EODB Act, sector-specific deviations would have to be accounted for. For instance, Paragraph 5 of Section II of the Reference Paper requires Members to permit the submission of an application for authorization at any time throughout the year, or allow a reasonable period to do so. Although there is no uniform general restriction in the EODB Act or the Revised Administrative Code as to the point in time within a fiscal year when an applicant can submit an application, there could be divergences that are specific to the agency or to the LGU. This is understandable because of the institutional boundaries set by their respective organic charters, as well as the operational realities that agencies or LGUs are faced with, which is why implementation flexibilities such as "to the extent practicable" provide some regulatory breathing room. It would nonetheless be useful to take an inventory of such divergences by establishing a form of notification mechanism of procedural differences in various jurisdictions. This could also further improve transparency and better inform the transacting public. To that end, and because of its central role in overseeing the implementation of the EODB Act and in monitoring and evaluating the compliance of agencies covered by the Act,[338] the ARTA could serve

[338] EODB Act, § 17(c).

as the repository of information regarding the consistency of the agencies' and LGUs' authorization procedures with the Reference Paper's procedural disciplines on authorization to supply a service.

As far as the substantive aspects of the domestic regulation disciplines in the Reference Paper are concerned, Paragraph 22 comes closest to setting substantive standards on the contents of the regulation, procedure, or measure that has any relation to the process of authorization to supply a service. Disciplines on the development of regulations and substantive standards have the largest impact on domestic regulatory autonomy and public interest regulation.[339] Although the disciplines on development of measures fall short of requiring a "necessity test" that has been the subject of much tension throughout the negotiations under the WPDR, a rigorous application of such disciplines could still be intrusive enough to place limits on the right and ability of government agencies and LGUs to regulate. This is further compounded by the mandatory character of the obligation and the absence of any implementation flexibilities or best endeavor language that could afford some regulatory elbow room.

Given the possible effect of Paragraph 22 on regulatory policy space, and similar to the implementation of disciplines on prior notice-and-comment, the Philippines would have to exploit the flexibility afforded by the built-in transitional periods. Paragraph 10 of Section I of the Reference Paper states:

> **Development**
> *Transitional Periods for Developing Country Members*
>
> A developing country Member may designate specific disciplines for implementation on a date after a transitional period of *no longer than 7 years* following the entry into force of these disciplines. The scope of the designation may be limited to individual service sectors or subsectors. The transitional periods shall be inscribed in the respective Schedules of specific commitments. A developing country Member requiring an extended transitional period for implementation shall submit a request in accordance with relevant procedures. Members shall give sympathetic consideration to

[339] Krajewski, *supra* note 73, at 31. *See also* Mohamadieh, *supra* note 280.

> granting such requests, taking into account the specific circumstances of the Member submitting the request." (italics supplied)

Apart from being designated in the revised GATS schedule as subject to a transitional period for its implementation in accordance with the above provision, the disciplines under Paragraph 22 on development of measures can be limited to selected service sectors in the Philippines' GATS schedule. For instance, service sectors in the Philippines' GATS schedule with a mature regulatory framework or those whose regulatory agencies oversee a robust regulatory management system that observes good regulatory practices could be candidates for the application of Paragraph 22. As suggested in Part III.A.4, there is no requirement that the Reference Paper shall be inscribed in all the services sectors already committed in the GATS schedule.[340]

Another source of flexibility may be found in Section I, Paragraph 5 of the Reference Paper: "The disciplines shall not be construed to prescribe or impose any particular regulatory provisions regarding their implementation."

This paragraph suggests a degree of regulatory flexibility in implementing the Reference Paper disciplines, allowing governments to design their own regulatory frameworks tailored to their specific needs and priorities, and consistent with the WTO's recognition of the diversity in WTO Members' regulatory practices.[341] While the above paragraph primarily serves as an interpretative tool, its true utility may lie in preventing the misuse of the Reference Paper disciplines to easily challenge the substance or content of existing domestic regulations. The reality is that developing countries such as the Philippines still do not possess the institutional maturity or sophistication to adopt the regulatory approaches of developed countries, which often rely on standards or market-based criteria.[342] As far as the administrative or procedural aspects of the authorization to supply a service, the Reference Paper sets baseline minimum obligations of result, subject to any built-in flexibilities, which means countries can have some

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[340] *See supra* note 164.

[341] Bangura et al., *supra* note 6, at 180.

[342] South Centre, *Domestic Regulation of Services Sectors: Analysis of the Draft Negotiation Texts,* Analytical Note, SC/TDP/AN/SV/13 (Apr. 2011).

degree of freedom in the type of regulatory provisions to implement such obligations.

The substantive standards set by Paragraph 22 on the content of government measures related to the process of authorization to supply a service, when coupled with the prior notice-and-comment requirement under Paragraphs 14 to 17 for laws and regulations proposed for adoption, can be a powerful tool in the context of regulatory reform and improving the quality of regulation and delivery of public services. But it can also be used as an effective one-two punch to the government's ability to regulate services in the public interest. Large foreign service suppliers from advanced, services export-oriented countries are more cohesive, organized, and well-funded, and will not hesitate to invest their considerable resources in participating actively in regulatory decision-making to see that their commercial services interests are protected. The substantive standards outlined in Paragraph 22 will be accessible to foreign service suppliers to scrutinize and challenge the content of domestic measures relating to the authorization for the supply of a service, even when such measures are in pursuance of the public interest and other legitimate public policy objectives. One way to counterbalance this was to negotiate a "general exception clause" or a "public interest clause":

> Such a clause would need to fulfil the following objectives: First, it would need to give sufficient space for a variety of different concepts of public interest, without, however, leaving the concretisation of the term completely to the discretion of a Member state. This could be achieved by referring to key legal and policy documents of the Member state which establish the public interest. Second the clause would need to contain a clear definition of the concept of public interest to give relevant dispute settlement institutions clear guidance in how to apply the clause. Thirdly, the clause would need to be sufficiently legally binding. The clause would therefore need to be part of the relevant agreement, chapter or binding commitments. The clause should not be a mere interpretative guideline and therefore leave the determination of the scope of the agreement or its chapters in the hands of trade or investment tribunals deciding a specific dispute. (footnote omitted)[343]

[343] Krajewski, *supra* note 73, at 35.

A "general exception clause" or "public interest clause" can serve as a rebalancing device in the implementation of the Reference Paper disciplines on domestic regulation. While the Reference Paper echoes the GATS in the right to regulate and to introduce new regulations on the supply of services to meet national policy objectives,[344] the disciplines under Paragraph 22 could limit the exercise of that right in the event that the pursuit of certain national policy objectives, particularly those that conflict with the substantive standards under the Reference Paper. A "general exception clause" or "public interest clause" would clarify, for example, that in the implementation of Paragraph 22 of the Reference Paper, the Philippines shall give primary consideration to the covered measure's legitimate public policy objectives, if any, in line with the right to regulate services in the public interest. One useful formulation of the "general exception clause" or "public interest clause" has been suggested: "*Nothing in these Disciplines shall prevent* [the Philippines] *from developing, adopting, maintaining and implementing non-discriminatory measures regulating services in the public interest as defined by* [the Philippines]."[345]

Such a clause could be inscribed (contemporaneously with or separately from the Reference Paper) as an additional commitment in the Philippines' Revised GATS schedule. Under GATS Article XVIII, Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards, or licensing matters. In order to conform to GATS Article XVIII, the additional commitment must pertain to: (1) measures affecting trade in services, and (2) not subject to scheduling under Articles XVI or XVII. Although the 2001 Scheduling Guidelines state that additional commitments must be crafted as "undertakings" and not "limitations,"[346] the Appellate Body in *U.S. – Gambling* cautioned that the Scheduling Guidelines should only serve as "supplementary means of interpretation" consistent with Article 32 of the Vienna Convention on the Law of Treaties (VCLT).[347] In line with Article 31 of the VCLT, an ordinary language interpretation of GATS Article XVIII would not foreclose the inscription of a "general exception clause" or "public interest clause" as an additional

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344 Reference Paper, *supra* note 6, ¶ 3, § I; GATS pmbl. ¶ 4.

345 Krajewski, *supra* note 73, at 35.

346 *Supra* note 138, at 7.

347 US – Gambling, ¶¶ 175, 178, 196, WTO Doc. WT/DS285/AB/R (April 7, 2005).

commitment. As the JSI-SDR and its participants have cited GATS Article XVIII as the legal basis for inscribing regulatory principles set forth in the Reference Paper in their respective GATS schedules, so too can other WTO Members inscribe other additional commitments on that basis. If Paragraph 22 will be covered by the seven-year transitory period under Paragraph 10 of Section I, then the "general exception clause" or "public interest clause" can take effect upon the expiry of the transitory period.

Conclusion

The Philippines' decision to sign on to the JSI-SDR and adopt the domestic regulation disciplines in the Reference Paper could be rationalized by its progress in its internal regulatory reform efforts, the progressive evolution of domestic regulation rules in its FTAs, and by a general legal and administrative framework that is not fundamentally incompatible with the regulatory requirements of the Reference Paper. After more than 20 years of multilateral negotiations, three failed draft negotiating texts, and countless Member proposals, it took a bold and controversial move by 59 WTO Members to forge ahead with their own draft set of disciplines that was perhaps not as bad as initially thought:

> The Reference Paper is therefore clearly not as problematic from the perspective of domestic regulatory autonomy as some of the earlier drafts discussed in the WPDR and as the sets of domestic regulation disciplines in some free trade agreements which go significantly beyond the scope of the Reference Paper. It can therefore be questioned whether the Reference Paper is a continuance of these developments and in fact an attempt to lock-in the neoliberal trade agenda. However, the Reference Paper also clearly goes beyond "cutting red-tape" by including certain administrative, institutional and transparency requirements which would not only have an impact on administrative capacity and the institutional framework but could potentially also influence the actual contents of regulations."[348]

[348] Krajewski, *supra* note 73, at 34.

The last sentence of that quoted paragraph should give JSI participants some pause. Because, notwithstanding the transition periods, implementation flexibilities, and best endeavor language scattered throughout the text, the Reference Paper disciplines on domestic regulation have firmly become a part of the international legal order. It represents a significant step forward in advancing what the GATS Article VI(4) mandate seeks to achieve, which would not be diminished by lingering questions about the legitimacy of what has come to be called a "plurilateral" JSI approach to reaching negotiating outcomes on multilateral trade. It was a triumph of pragmatism in trade politics and a referendum against the wisdom of adhering to rigid negotiating mandates as if they represent immutable principles. In the end, like all negotiating outcomes in the WTO, the Reference Paper was a compromise—some of the more substantively intrusive aspects of GATS Article VI(4) were reduced, some transparency aspects were increased—that still led to a final product that will impact regulatory sovereignty over services, regardless of the modality or vehicle in which it was delivered. It also seemed to have validated a theory that Dean Magallona abhorred—that the act of ceding or constraining economic sovereignty through treaty is itself an exercise of sovereignty. If that should be the case, then nothing should prevent states from taking concrete steps to reclaim that sovereignty.

And the struggle continues.

RE-EXAMINING THE EFFECTS ATTRIBUTED TO PEREMPTORY NORMS UNDER THE LAW OF STATE RESPONSIBILITY

Gemmo Bautista Fernandez[*]

Writing in 1976 for the Philippine Law Journal, Professor Magallona sought to 'demystify' the concept of peremptory norms under the Vienna Convention on Law of Treaties ('VCLT'). Despite their origin in natural law, Magallona argued that peremptory norms remain based on positivism.[1] Their effect is by no means derived from the importance of the interest that they protect. Rather, it is a consequence of the decision of states to afford a non-derogable status to the norms. Such a view, referred to as a 'special form of *opinio juris*,' continues to be affirmed in contemporary literature.[2] Arguably, it is also correct one—a view that recognises the realities of the international legal order and the role of states' consent in international law-making.

Magallona confined his examination to the VCLT's concept of peremptory norms—the nullity of conflicting legal norms ('primary effect'). Yet, the decades following the VCLT's adoption saw an inflation in the effects attributed to peremptory norms ('secondary effects').[3] Generally, these had been derived

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[1] Merlin Magallona, *The Concept of Jus Cogens in the Vienna Convention on the Law of the Treaties*, 51 Phil L. J. 521, 522 (1976).

[2] See Ulf Linderfalk, *Creation of Jus Cogens––Making Sense of Article 53 of the Vienna Convention*, 71 Heidelb. J. Int'l L. 360, 370–1 (2011); Robert Kolb, Peremptory International Law–Jus Cogens: A General Inventory 95 (Hart 2020).

[3] *Note* that examples include the duty to nullify a municipal law contrary to peremptory norms, inapplicability of jurisdictional immunities, and assumption of universal jurisdiction by municipal courts (Mary Hansel, *"Magic" or Smoke and Mirrors? The Gendered Illusion of Jus Cogens, in* Peremptory Norms as a Legal Technique rather than Substantive Super-Norms,

through deduction by appealing to the importance of the interests that the norms protect.[4] While some of these remained within the realm of literature,[5] there are two effects under the Law on State Responsibility that have enjoyed a wider degree of support. Indeed, the International Law Commission ('ILC' or 'Commission') included these effects, albeit as measures of 'progressive development',[6] in its 2001 Articles on State Responsibility ('2001 Articles'),[7] and had been the subject of its work on Peremptory Norms of General International Law ('2019 Draft Conclusions').[8] The first, under 2001 Draft Article 41 (2019 Draft Conclusion 19),[9] pertains to what was left of the abandoned concept of 'international crimes of states'—duties imposed upon states in cases of serious breaches of peremptory norms: cooperation, non-recognition, and non-assistance.[10] The second, under

475 (Dire Tladi ed., BRILL 2021). *See* Kyoji Kawasaki, *A Brief Note on the Legal Effects of Jus Cogens in International Law*, 34 Hitotsubashi J. L. & Pol. 27, 28 (2006); Carlo Focarelli, *Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' "Legal Effects"*, 77 Nord. J. Int'l Law 429, 440 (2008).

4 Kolb, *supra* note 3, at 108; Focarelli, *supra* note 4, at 444; Erika de Wet, *Entrenching International Values through Positive Law: The* (*Limited*) *Effect of Peremptory Norms*, 15 (KFG Working Paper No. 25, 2019).

5 *See* Jean d'Aspremont, *Jus Cogens as a Social Contract without a Pedigree*, 46 Neth. Y.B. Int'l L. 85, 94 (2015) (noting the 'creative pull' of peremptory norms).

6 *Report on the Work of the 53rd Session*, [2001] II(2) Y.B. Int'l L. Comm'n 114, 127, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

7 *Note* that this article recognises that these provisions have had a significant impact on international law (Maurizio Arcari, *Future of the Articles on State Responsibility*, 93 Questions of Int'l L. 3, 10 (2022); Simon Olleson, *Virtue of Pragmatism: Reflections on the Future of the Articles of State Responsibility*, 93 Questions of Int'l L. 23, 32 (2022)). Yet, they arguably remain as a 'doctrinal product' (Carlo Focarelli, *International Law & Third-Party Countermeasures in the Age of Global Instant Communication*, 29 Questions of Int'l L. 17, 19 (2016)) and is not independent source of law despite their influence (Hossein Sartipi & Ali Reza Hojatzadeh, *Erga-Omnesisation of International Law*, 2 Int'l J. of Humanities & Soc. Sci. 189, 207 (2018)). Indeed, the two provisions that are the subject of this article have been deemed by the ILC as measures of progressive development (*Rep. on the Work of its 53rd Session*, *supra* note 7, at 114, 127).

8 U.N. GAOR, 71st Sess., U.N. Doc. A/74/10 (April 29–June 7 and July 8–Aug. 9, 2019).

9 *Id.* at 193.

10 *Report on the Work of the 53rd Session*, *supra* note 7, at 113–6 ('Article 41. . . 1. States shall cooperate to bring to an end through lawful means any serious breach [of a duty imposed by peremptory norm]. . . 2. No state shall recognise as lawful a situation created by [such breach], nor render aid or assistance in maintaining that situation). This is reproduced in U.N. Doc. A/74/10, *supra* note 9, at 193–8 (Draft Conclusion 19). *Note* James Crawford, *Third Report on State Responsibility*, [2000] II(2) Y.B. Int'l L. Comm'n 12, U.N. Doc. A/CN.4/507/Add.4, 108 ('The draft articles cannot hope to anticipate future developments, and it is. . . necessary to reserve to the

2001 Article 48 (2019 Draft Conclusion 17), refers to duties owed *erga omnes*,[11] or duties which 'states other than an injured state' have the competence to implement.[12]

This article, through *historical tracing* and *conceptual analysis*, examines the theoretical foundations of what may be collectively referred to as *les verticales*—peremptory norms and the secondary effects attributed to such norms.[13] *Part I* recalls Magallona's positivist approach towards peremptory norms. While the concept may be rooted in the natural law and public order theories, its 'emergence. . . in positive international law' was brought about by the states'

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future such additional consequences. . . which may attach to [the] wrongful conduct by reason of its classification as. . . as a breach of [a duty] to the international community as a whole. Such a clause might perhaps be seen as an admission of defeat in the search for adequate and principled alternatives to existing article 19. But in the Special Rapporteur's view, it is rather a realistic acknowledgement of the limits of codification and progressive development, at a time of rapid institutional and political change').

[11] *Note* that this article uses the term 'duties owed *erga omnes*' instead of 'obligations *erga omnes*.' Arguably, the former is conceptually more accurate. While a 'norm' is objective and abstract, an obligation 'personifies' this norm and creates subjective legal relations (Roberto Ago, *Fifth Report on State Responsibility*, [1976] II(1) Y.B. Int'l L. Comm'n 3, 4, U.N. Doc. A/CN.4/291). An 'obligation' in this sense does not refer to the requirements imposed by a norm such that it 'obliges' those who are subject to it to a course of conduct that it must or must not do (Peter Birks & Eric Descheemaeker, Roman Law on Obligations 3–5 (Eric Descheemaeker ed., Oxford University Press 2014) (2014); Martin Hogg, Obligations: Law & Language 15 (Cambridge University Press 2017) (2017)). It pertains to the juridical tie, resulting from the rule, between a state to whom a right is granted and the other upon which a duty is imposed (*Report on the Work of the 53rd Session*, *supra* note 7, at 14; 2 Henry De Bracton, On the Laws & Customs of England 283 (Harvard University Press 1968); A.C. Johnson et al., Roman Statutes (University of Texas Press 1961). *See* Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710, 717 (1917)).

[12] *Report on the Work of the 53rd Session*, *supra* note 7, at 126–8 ('Article 48. . . 1. Any state other than an injured state is entitled to invoke the responsibility of another State. . . if: (a) the [duty] breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group; or (b) the [duty] breached is owed to the international community as a whole.'); U.N. Doc. A/74/10, *supra* note 9, at 190–3 (2019) ('Conclusion 17. . . 1. Peremptory norms of general international law. . . give rise to [duties] owed to the international community as a whole. . . in which all states have a legal interest. . . 2. Any state is entitled to invoke the responsibility of another state for a breach of a peremptory norm of general international law').

[13] *See* James Crawford, *Multilateral Rights & Obligations in International Law*, 319 Recueil des Cours de l'Académie de Droit International 325, 452 (2006).

acceptance and recognition.[14] Likewise, they '[do] not [imply] the existence of superior norms independent of the wills of states.'[15] Rather, these rules become 'normatively superior to others' due to states' consent.[16] Of course, some scholars and states have justified peremptory norms based on the natural and public order theories. Yet, these risk peremptory norms are becoming necessarily subjective,[17] and possibly ideological.[18] Next, the article delves into the bases for the secondary effects attributed to peremptory norms within the law of state responsibility—the tripartite duties imposed upon states in case of serious breaches of duties imposed by peremptory norms (*Part II*) and the competence of states to invoke the responsibility in the absence of direct effect (*Part III*). Adopting Magallona's view, it argues that the secondary effects cannot be justified through deduction alone, whether due to the importance of the interest that a norm safeguards or the common interest of states in the observance of the duty arising from the norm. These approaches disregard the international legal order's realities where 'states [remain] creators of the law'.[19] It also risks the 'over-extension of the role and purpose of the notion' of peremptory norms.[20] The article submits that the process of ascertaining the effects of peremptory norms beyond the VCLT must necessarily be inductive. It should be demonstrated that states have accepted these effects to be law.[21] Such an examination, due to limitations of time and space, lies beyond the scope of the present analysis. Yet, given the varied views of states noted in *Parts II* and *III*, this may indeed be ripe for further studies.

I. A Positivist Approach to Peremptory Norms

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[14] Magallona, *supra* note 2, at 523.

[15] *Id.* at 541.

[16] *Id.*

[17] Kolb, *supra* note 3, at 31; Karl Zemanek, *Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?, in* The Law of Treaties Beyond the Vienna Convention, 384, 386 (Enzo Cannizzaro ed., Oxford University Press 2011) *citing* Michel Virally, *Réflexions sur le jus cogens*, 12 AFDI 5, 29 (1966).

[18] Mary O'Connell, *Jus Cogens: International Law's Higher Ethical Norms, in* The Role of Ethics in International Law, 86–7 (Donald Earl Childress III ed., Cambridge University Press 2012); Cezary Mik, *Jus Cogens in Contemporary International Law*, 33 Pol. Y.B. Int'l L. 27, 52 (2013).

[19] Magallona, *supra* note 2, at 523. *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77(3) Am. J. Int'l L. 413, 441 (1983).

[20] Andreas Zimmermann, *Sovereign Immunity & Violations of International Jus Cogens—Some Critical Remarks*, 16 Mich. J. Int'l L. 433, 438 (1995).

[21] Magallona, *supra* note 2, at 523–4. *See* Kolb, *supra* note 3, at 113; Focarelli, *supra* note 4, at 449.

As Magallona noted, perhaps the most crucial effect that the VCLT affords to collective norms is that of *peremptory norms*.[22] Also known as *jus cogens* or 'compelling law',[23] these norms occupy the 'highest hierarchical position among all other norms and principles'.[24] These include the norm against force,[25] several norms protecting human rights, such as those against genocide,[26] torture,[27] racial

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[22] Magallona, *supra* note 2, at 541.

[23] *See* Kolb, *supra* note 3, at 1 (arguing that this may be an 'imprecise expression, since all binding legal norms are compelling—not only *jus cogens* norms').

[24] M. Cherif Bassiouni, *International Crimes: Jus Cogens & Obligations Erga Omnes*, 59(4) L. & Contemp. Probs. 63 (1996), 67; Alexander Orakhelashvili, Peremptory Norms in International Law (Oxford University Press 2006), 9; *Reports on the Work of the 17th and 18th Sessions*, [1966] II(2) Y.B. Int'l L. Comm'n 1, 247, U.N. Doc. A/CN.4/SER. A/1966/Add.1; I.L.C., *Report on the Work of the 53rd Session*, *supra* note 7, at 76–7 (2001); Dire Tladi, *Fourth Report on Peremptory Norms*, U.N. Doc. A/CN.4/72, 24 ff (Jan. 31, 2019).

[25] *See* Olivier Corten, Law Against War: Prohibition on the Use of Force in Contemporary International Law, 200 ff; André De Hoogh, *Jus Cogens & the Use of Armed Force*, *in* Oxford Handbook of the Use of Force in International Law (Marc Weller ed., Oxford University Press 2015), 1164; Katie Johnston, *Identifying the Jus Cogens Norm in the Jus Ad Bellum*, 70 Int'l & Compar. L. Q 29 (2021).

[26] *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction & Admissibility, 2006 I.C.J. 6, 31–2 (Feb. 3) [hereinafter Armed Activities]; Roberto Ago, *Droit des traités à la lumière de la Convention de Vienne*, 134 Recueil des Cours de l'Académie de Droit International 297, 324 (1971); Andrea Bianchi, *Human Rights & the Magic of Jus Cogens*, 19 Eur. J. Int'l L., 491–2 (2008).

[27] *See* Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 457 (July 20); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶454 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 153–6 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Cantoral-Benavides v. Peru, Judgment, Merits, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 99 (Aug. 18, 2001); Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 144, ¶ 143 (Sept. 7 2004); Christian Tomuschat, *Security Council & Jus Cogens*, in Present & Future of Jus Cogens, 36 (Enzo Canizzaro ed., Sapienza 2015).

discrimination,[28] and slavery,[29] and the norm on a people's right to self-determination.[30] Some also argue that certain rules that safeguard the environment also possess this character.[31] Peremptory norms restrict the capacity of states to 'develop, maintain or change' rules relating to norms that are deemed vital by the international community.[32] The rationale being that there are rules

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[28] *See* William Schabas, The Customary International Law of Human Rights (Oxford University Press 2021), 64–6, 167–8 *citing* Georgia v. Russia, App. No. 38263/08 (July 3, 2014), https://hudoc.echr.coe.int/fre?i=001-207757#{%22itemid%22:[%22001-207757%22]} (dissenting opinion of Tsotsoria, J.); Erika de Wet, *Emergence of International & Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 Leiden J. Int'l L. 611, 616 (2006); Antonio Cassese, *Enhanced Role of Jus Cogens*, *in* Realising Utopia: Future of International Law, 162 (Antonio Cassese ed., Oxford University Press 2012); Tladi, *supra* note 25, at 45–6; Juridical Condition & Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶97–101, 110–1 (Sept. 17, 2003).

[29] *See* Schabas, *supra* note 29, at 56 *citing* Hersh Lauterpacht (Special Rapporteur), *First Report on the Law of Treaties*, [1953] II(1) Y.B. Int'l L. Comm'n 90, 154–5, U.N. Doc. A/CN.4/63; Tladi, *supra* note 25, at 46–8 *citing* Aloeboetoe v. Surin., Reparation & Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 57 (Sept. 10, 1993); Río Negro Massacres v. Guat., Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 227 (Sept. 4, 2012); Alfred Verdross, *Jus Dispositivum & Jus Cogens in International Law*, (1966) 50 Am. J. Int'l L. 55, 59 (1966); Mik, *supra* note 19, at 59.

[30] *See* Tladi, *supra* note 25, at 52 *citing* Stefan Kadelbach, *Genesis, Function, & Identification of Jus Cogens Norms*, 46 Neth. Int'l L. Rev. 147, 152 (2016); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International law*, 172 Recueil des Cours de l'Académie de Droit International 219, 229 (1981); Santalla Vargas, *In Quest of the Practical Value of Jus Cogens Norms*, 46 Neth. Int'l L. Rev. 211, 227 (2016).

[31] *See* Orakhelashvili, *supra* note 25, at 65; Mark Byrne, *Can Responsibility for Climate Change Damage Be Criminalised?*, 4 Carbon & Climate Change L. Rev. 278, 281 (2010); Jutta Brunnée, *Common Interest—Echoes from an Empty Shell? Some Thoughts on Common Interest & International Environmental Law*, 49 Heidelb. J. Int'l L. 791, 804 (1989) *noting* Marjorie Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 Ga. J. Int'l & Comp. L. 609, 626 (1977); Antonio Gómez Robledo, *Le jus cogens international: Sa genèse, sa nature, ses fonctions*, 172 Recueil des Cours de l'Académie de Droit International 9, 172 (1981); Alexidze, *supra* note 31, at 245. *Contra* Nilufer Oral, *Environmental Protection as a Peremptory Norm*, *in* Peremptory Norms of General International Law (Jus Cogens), 592 (Dire Tladi ed., BRILL 2021); Pierre-Marie Dupuy et al., *Customary International Law & the Environment*, *in Oxford Handbook of International Environmental Law*, 393 (Rajamani Lavanya & Peel Jacqueline eds., 2nd ed. Oxford University Press 2021); Patricia Birnie, et al., International Law & the Environment (3rd ed. Oxford University Press 2007), 109–10; Krista Singleton-Cambage, *International Legal Sources & Global Environmental Crises: Inadequacy of Principles, Treaties & Custom*, 2 I.L.S.A. J. Int'l & Compar. L. 171, 185 (1995).

[32] Michael Byers, *Conceptualising the Relationship between Jus Cogens & Erga Omnes Rules*, 66 Nordic J. Int'l L. 211, 220 (1997); Christian Hillgruber, *Right of Third States to Take Countermeasures*, *in* Fundamental Rules of International Legal Order: Jus Cogens &

which are essential to every state that contrary agreements cannot be allowed to prevail'.[33] In this sense, peremptory norms build a 'line of defence' to safeguard the 'predominant and overriding interests' of states by '[delimiting] the destructive effects of relativism and consensualism'.[34]

A. Development of Peremptory Norms within the VCLT

Limitations on the contractual abilities, Magallona observed, was not a new concept and had been present in municipal legal systems.[35] Roman law distinguished between *jus dispositivum* and *jus strictum*. While 'parties may disregard *jus dispositivum* in their contractual relations, their [normative] acts must comply with *jus strictum*', otherwise they are void.[36] It also distinguished between *jus publicum* and *jus privatum*. The former is 'based on public interests and is thus non-derogable' while the latter is 'based on private interests and can . . . be altered by the parties'.[37] Other municipal orders also provided for the nullity of contracts, as in the case of English law with *acts contra bones mores*, French law with *ordre public*, and German law with *öffentliche Ordnung*.[38]

In international law, scholars also 'explored the possibility of curbing the

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Obligations Erga Omnes, 270 (Christian Tomuschat & Jean-Marc Thouvenin eds., Nijhoff 2006); Magallona, *supra* note 2, at 529; Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Recueil des Cours de l'Académie de Droit International 217, 288 (1994); Yoram Dinstein, War, Aggression & Self-Defence (4th ed., Cambridge University Press 2011), 106; Dinah Shelton, *Hierarchy in International Law*, 100(2) Am. J. Int'l L. 291, 297 (2006).

33 Brunnée, *supra* note 32, at 800; André de Hoogh, Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States (Kluwer 1996), 39.

34 Giorgo Gaja, *Protection of General Interests in the International Community*, 364 Recueil des Cours de l'Académie de Droit International 9, 48 (2011); Orakhelashvili, *supra* note 25, at 47; Kirsten Schmalenbach, *Article 53, in* Vienna Convention on the Law of Treaties: Commentary, 966, 983 (Oliver Dörr & Kirsten Schmalenback eds., Springer 2018).

35 Magallona, *supra* note 2, at 521.

36 Jochen Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 Recueil des Cours de l'Académie de Droit International 345, 363 (1994).

37 Robert Kolb, *Peremptory Norms as a Legal Technique rather than Substantive Super-Norms, in* Peremptory Norms of General International Law (Jus Cogens), 40 (Dire Tladi ed., BRILL 2021).

38 Mark Villeger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Nijhoff 2009), 665.

power of states' through 'mandatory norms'.[39] Early writers such as Grotius posited, based on natural law, that there existed norms to which the powers of the state did not extend.[40] Likewise, Vattel envisioned laws which are 'necessary and indispensable' that 'nations cannot alter it by agreement, nor individually or mutually release themselves from it'.[41] Later writers, like Verdross, asserted that the interests of the international community required norms 'that prescribe a certain . . . behaviour unconditionally'.[42] Norms of this character, he argued, 'cannot be derogated from by the will of the contracting parties'.[43] Mosler similarly described a public order consisting of rule of vital importance that agreements to the contrary have no legal force.[44] Still, others, such as Oppenheim, argued based on positivism, that there are 'universally recognised principles' that rendered any conflicting treaty void.[45]

As Magallona observed, peremptory norms eventually 'found its way into positive law' through the VCLT.[46] Special Rapporteur Lauterpacht (1953–5), in his 1953 Report, proposed that a treaty is void if 'its performance involves an [unlawful] act'.[47] The voidness, he submitted, derives not from their 'inconsistency

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39 de Wet, *supra* note 5, at 7; Władysław Czapliński, *Concepts of Jus Cogens & Erga Omnes in International Law*, Pol. Y.B. Int'l L. 87, 83 (1997); Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes, & other Rules—Identification of Fundamental Norms*, *in* Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes, 21 (Christian Tomuschat & Jean-Marc Thouvenin eds., Nijhoff 2005); Eva Uhlmann, *Community Interests, Jus Cogens, & Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 Georgetown Int'l Env't L. Rev. 101, 101 (1998).

40 Magallona, *supra* note 2, at 522 *citing* Hugo Grotius, De jure belli ac pacis, 40 (Francis W. Kelsey trans., Clarendon 1625).

41 Emer De Vattel, The Law of Nations, 4 (Fenwick Hudson trans., Clarendon 1758).

42 Elena Katselli Proukaki, Problem of Enforcement in International Law: Countermeasures, The Non-Injured State & Idea of International Community, 15 (Routledge 2010) *citing* Alfred Verdross, *Forbidden Treaties in International Law*, 31 Am. J. Int'l L. 571, 571–2 (1937). *See* Zemanek, *supra* note 18, at 381; Shelton, *supra* note 33, at 298.

43 Verdross, *supra* note 43, at 571.

44 Frowein, *supra* note 37, at 364 *citing* Hermann Mosler, *International Society as a Legal Community*, 140 Recueil des Cours de l'Académie de Droit International 1, 18 (1974).

45 Byers, *supra* note 33, at 213 *citing* Lassa Oppenheim, International Law 528 (Longmans 1905).

46 Magallona, *supra* note 2, at 523. *See* Pierre-Marie Dupuy, *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations & Codification of the Law of Responsibility*, 13(5) Eur. J. Int'l L. 1053, 1055 (2002); Jure Vidmar, *Rethinking Jus Cogens after Germany v Italy*, 55 Neth. Int'l L. Rev. 1, 3 (2013).

47 Lauterpacht, *supra* note 30, at 154 ('[Draft] Article 15. . . A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared

with customary law' but with '[public policy's] overriding principles'.[48] Fitzmaurice further refined Lauterpacht's proposal. He submitted that a treaty, to be effective, must have 'essential validity', meaning that it must be formally, temporarily, and substantially valid.[49] He posited that a treaty lacks substantial validity if it contravenes or involves in its execution an infraction of 'principles and rules. . . which are. . . *jus cogens*'.[50] Finally, Waldock submitted that *jus cogens* 'means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law' and 'which may be modified or annulled only by a subsequent norm of general international law'.[51] He also cited examples that included the use of threat or force, any conduct characterised as an 'international crime', and any act or omission that international law requires every state to cooperate to suppress or punish.[52]

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so to be by the [ICJ]'). *See also Documents of the 5th Session*, [1953] II Y.B. Int'l L. Comm'n 163, 165, U.N. Doc. A/CN.4/L.46.

[48] Lauterpacht, *supra* note 30, at 155 ('These principles need not necessarily have crystallised in [an] accepted rule of law. . . They may be expressive of rules of international morality so cogent that [any] tribunal would consider them as forming part of those principles of law generally recognised by civilised nations').

[49] Gerald Fitzmaurice (Special Rapporteur), *Third Report on the Law of Treaties*, [1958] II Y.B. Int'l L. Comm'n 20, 30–1, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

[50] *Id.* at 23 ('[Draft] Article 16. . . (2) It is essential to the validity of a treaty that it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are . . . *jus cogens*'), 27 ('Draft Article 17. . . Only if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of . . . law in the nature of *jus cogens* that a cause of invalidity can arise'), 40–1.

[51] Humphrey Waldock, *Second Report on the Law of Treaties*, [1963] II Y.B. Int'l L. Comm'n 36, 38–9 ('[Draft] Article 1. . . (3). . . (c) "Jus cogens" means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law'), 39 ('A *jus cogens* rule is a rule embodying a norm of general international law from which no derogation is permitted and which can only be modified or set aside by the creation of a further norm of general international law'), U.N. Doc. A/CN.4/156/Add.1-3.

[52] *Id.* at 40 ('Imperfect though the international legal order may be, the view that . . . there is no international public order—no rule from which states cannot at their own free will contract out—has become increasingly difficult to sustain.'); 52 ('Draft Article 13. . . 4. The provisions of this article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*.'). *See Report on the Work of the 15th Session*, [1963] II Y.B. Int'l L. Comm'n YbILC 187, 198, U.N. Doc. A/CN.4/163.

The ILC accepted the concept of peremptory norms. Yet, views regarding its nature diverged.[53] Some submitted that these norms are based on public order.[54] Others argued that they are derived from positive law 'explicitly or implicitly recognised by states'.[55] The debate was not settled, and the ILC merely noted the divergent opinions but 'justified the [adoption of the] proposed draft article [on peremptory norms] as an attempt to seize a comparatively recent development in international law'.[56] As for states, many considered the concept an important step for international law.[57] While some deemed peremptory norms to be a 'fairly new concept',[58] others considered it to be a 'long-standing principle'.[59] However, there were also concerns regarding the basis for peremptory

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53 Villeger, *supra* note 39, at 666–7.

54 Schmalenbach, *supra* note 35, at 970 *citing Summary Records of the 15th Session*, [1963] I Y.B. Int'l L. Comm'n 1, 64, U.N. Doc. A/CN.4/SR.673.

55 Schmalenbach, *supra* note 35, at 970 *citing* I.L.C., *supra* note 55, at 63, 69; Kolb, *supra* note 38, at 24 ('What is essential. . . is that the rule is recognised in its peremptory quality. . . by. . . states'); Kolb, supra note 3, at 35 ('[The concept of peremptory norms] is hierarchically neutral'); Magallona, *supra* note 2, at 528.

56 Schmalenbach, *supra* note 35, at 970 *citing* I.L.C., *supra* note 53, at 198 ('Whatever imperfections [the] law may still have. . . [the view that] there is no rule from which states cannot at their own free will contract out has become. . . difficult to sustain. . . In codifying the law of treaties [the ILC] must take the position that there are rules and principles from which states are not competent to derogate by a treaty arrangement').

57 Schmalenbach, *supra* note 35, at 972; Anne Lagerwall, *Article 64*, *in* The Vienna Conventions on the Law of Treaties: A Commentary 1461 (Olivier Corten & Pierre Klein eds., Oxford University Press 2011).

58 Schmalenbach, *supra* note 53, at 972. *See* Humphrey Waldock, *Fifth Report on the Law of Treaties*, [1966] II(2) Y.B. Int'l L. Comm'n 1, 21, U.N. Doc. A/CN.4/183, 21 (Brazil), 21-2 (Cyprus), 22 (Czechoslovakia, Ecuador), 23 (Thailand, United Arab Republic); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 296 (Kenya), 296–7 (Cuba), 298 (Chile), 53rd plen. mtg. at 300 (Sierra Leone), 303 (Uruguay), 305 (Cyprus), 54th plen. mtg. at 311 (Hungary), 56th plen. mtg. at 322 (Ukraine), 324 (Monaco, Norway), 325 (Thailand), 326 (Trinidad & Tobago), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 95 (Philippines, Germany FR), 97 (Cuba), 98 (Cameroon), 100 (Ukraine), 20th plen. mtg. at 101 (Romania), 102 (Bulgaria), 103 (Cyprus), 105 (Belarus), 106 (Libya), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969).

59 Schmalenbach, *supra* note 35, at 972. *See* Waldock, *supra*, at 22 (Guatemala, Italy, Philippines, Poland, Syria), 23 (Venezuela, Yugoslavia) (1966); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 294 (USSR, Mexico), 295 (Iraq), 297 (Lebanon), 298 (Nigeria), 53rd plen. mtg. at 301 (Madagascar, Colombia), 54th plen. mtg. at 308 (Argentina), 310 (Israel), 311 (Italy), 312 (Romania), 55th plen. mtg. at 315 (Spain), 317 (Brazil), 320 (Ivory Coast), 56th plen. mtg. at 321 (Tanzania), 327 (Mali), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 96 (Ecuador), 97 (Romania), 20th plen. mtg. at 103 (Iraq), 104 (Italy), 106 (Libya), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969).

norms,[60] and the criteria for their identification.[61] Nevertheless, most accepted the concept and states adopted VCLT Article 53 with only a few votes against or abstentions.[62]

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[60] Schmalenbach, *supra* note 35, at 972. *Note* that some adopted the natural (Waldock, *supra* note 59, at 21 (Algeria), 22 (Panama); U.N. GAOR, 1st. Sess., 52nd plen. mtg. at 294 (Mexico), 295 (Iraq), 296 (Kenya), 297 (Lebanon), 298 (Nigeria), 53rd plen. mtg. at 301 (Ghana, Colombia), 302 (Poland), 305 (Cyprus), 54th plen. mtg. at 312 (Romania), 56th plen. mtg. at 324 (Monaco), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 95 (Philippines), 99 (Poland), 20th plen. mtg. at 104 (Italy), 105 (Costa Rica, Uruguay), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969)) and public order theories (Waldock, *supra* note 59, at 21 (Algeria, Brazil), 22 (Panama), 23 Uruguay); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 294 (Mexico), 295 (Greece), 296 (Iraq), 53rd plen. mtg. at 302 (Poland), 303 (Uruguay), 304 (United Kingdom), 54th plen. mtg. at 307 (Belarus), 311 (Italy), 313 (Bulgaria), 55th plen. mtg. at 316 (Pakistan), 317 (Brazil), 318 (Czechoslovakia), 320 (Ivory Coast), 56th plen. mtg. at 325 (Thailand, Malaysia), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd. Sess., 19th plen. mtg. at 95 (Philippines), 96 (Ecuador), 97 (Romania, United Kingdom), 20th plen. mtg. at 103 (Cyprus), 106 (Libya)). Others adopted the positivist view (Waldock, *supra* note 59, at 21 (Algeria), 22 (Iraq); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 295 (United States), 296 (Kenya), 298 (Nigeria), 53rd plen. mtg. at 302 (Poland), 54th plen. mtg. at 306 (Sweden), 311 (Hungary), 55th plen. mtg. at 317 (Brazil), 56th plen. mtg. at 322–3 (Philippines), 327 (Mali), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 95 (Germany), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969)).

[61] *See* Waldock, *supra* note 59, at 21 (United Kingdom, Brazil), 22 (Indonesia, Iraq); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 294 (Mexico), 295 (Greece), 53rd plen. mtg. at 300 (Turkey), 304 (United Kingdom), 54th plen. mtg. at 306 (Sweden), 309 (France), 55th plen. mtg. at 316 (Australia), 318 (Japan, Germany FR), 320 (Belgium), 56th plen. mtg. at 323 (Switzerland), 325 (Malaysia), 326 (Trinidad & Tobago), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd. Sess., 19th plen. mtg. at 93 (France), 95 (Germany FR), 97 (Cuba, United Kingdom), 20th plen. mtg. at 101 (Japan), 102 (United States), 103 (Switzerland), 104 (Malaysia), 105 (Netherlands), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969).

[62] Schmalenbach, *supra* note 35, at 975. *See* Waldock, *supra* note 59, at 20 (Luxembourg), 21 (Turkey); U.N. GAOR, 1st Sess., 53rd plen. mtg. at 300 (Turkey), 54th plen. mtg. at 309 (France), 55th plen. mtg. at 316 (Australia), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 93–5 (France: 'Some submit. . . that *jus cogens* was [based on] notions of internal law such as public policy [and] law. But. . . there [are] substantial differences between [the] international [and] national societies.'); 95 (Australia: 'Shared the difficulties. . . in agreeing to become bound by a doctrine so imprecisely formulated'); 99 (Turkey: '[Peremptory norms relate to the] hierarchy of norms. . . But such a presupposed a hierarchy. . . [is] not to be found in the international [legal order which differs from] internal law'); 20th plen. mtg. at 106 (Belgium: 'The international legal order. . . was as yet unorganised and to incorporate. . . *jus cogens* into it would therefore be premature'), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969).

B. Effect of Peremptory Norms under the VCLT

As Magallona observed, the 'specific function of [peremptory] norms' is to 'limit the freedom of the [states] parties to a treaty in determining the content of their agreement'.[63] Peremptory norms prohibit states from derogating from norms 'accepted and recognised' to be peremptory.[64] Simply, states are not permitted to 'contract out' of peremptory norms in their legal relations with one another.[65] In a 'purely technical sense', these norms provide a 'technique for solving conflicts between rules of international law'.[66] They function as the opposite of the *lex specialis* principle.[67] Peremptory norms deny the derogating norm's operation 'to uphold the general legal regime' for every state and 'protect some collective interest'.[68] Thus, under VCLT Article 53, a treaty that conflicts with an existing peremptory norm is considered wholly invalid due to the 'disregard of the [peremptory norm's] proscription'.[69] Yet, the VCLT is 'much more forgiving' for agreements that conflict with a peremptory norm that subsequently emerges.[70] Under VCLT Article 64, only the derogating provision, if separable, is deemed void

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[63] Magallona, *supra* note 2, at 529.

[64] Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 115 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

[65] Hillgruber, *supra* note 33, at 270.

[66] Ulf Linderfalk, *Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 18 Eur. J. Int'l L. 853, 854 (2007). *See* Zemanek, *supra* note 18, at 400. *Contra* Simma, *supra* note 33, at 287 ('Jus cogens distinguishes itself from systems that merely regulate the conflict of norms').

[67] Kolb, *supra* note 3, at 35.

[68] *Id.*

[69] VCLT, *supra* note 65; Schmalenbach, *supra* note 35, at 983; Dire Tladi, *Third Report on Peremptory Norms*, U.N. Doc. A/CN.4/714, 16 (Feb. 12, 2018); Orakhelashvili, *supra* note 25, at 139 ('The nullity under Article 53 is a special case of nullity. . . it is not simply the illegality subsumable within the bilateral relations of the parties, but the objective illegality requiring objective elimination.'). *Note* that 'a reading of articles 65 and 66 of the [VCLT] together leads to the conclusion that only a state which is a party to a treaty conflicting with a peremptory norm can challenge the validity of such a treaty' (De Hoogh, *supra* note 34, at 41; Enzo Cannizzaro, *A Higher Law for Treaties?, in* Law of Treaties Beyond the Vienna Convention 431 (Enzo Cannizzaro ed., Oxford University Press 2011); Christian Tomuschat, *Obligations arising for States Without or Against Their Will*, 241 Recueil des Cours de l'Académie de Droit International 195, 363 (1993); Magallona, *supra* note 2, at 536. *Contra* De Hoogh, *supra* note 34, at 42; Tladi, *supra*, at 22; Orakhelashvili, *supra* note 25, at 141–2; Zemanek, *supra* note 18, at 392).

[70] VCLT, *supra* note 65, art. 64; Kirsten Schmalenbach, *Article 64, in* Vienna Convention on the Law of Treaties: Commentary (Oliver Dörr & Kirsten Schmalenback eds., Springer 2018).

as it is 'merely refuted by subsequent legal developments'.[71]

Peremptory norms are also characterised by their 'rigidity' and 'resistance to change'.[72] The VCLT does not prescribe 'legal stagnation'.[73] As Waldock remarked, 'it would. . . be wrong to consider rules now accepted' as peremptory to be 'immutable and incapable of abrogation or amendment'.[74] Yet, peremptory norms make modification difficult, thereby placing an additional protection for the interests they safeguard. As in many domestic systems in which the 'only protection from abrogation for entrenched rights is a more onerous process of change,'[75] peremptory norms may only be modified through the acceptance and recognition by an overwhelming majority of states. Until such time, 'groups of states that fall short of a "very large majority" will neither be able to derogate from nor modify the contours of an existing [peremptory] norm'.[76]

Finally, the norm's peremptory character applies to states even if they have not accepted and recognised its status or have objected to its emergence. While the VCLT is silent on the matter, some scholars and states hold this view.[77] This is due to the 'very concept' of peremptory norms, which 'would be frustrated' if some states were 'allowed to escape [its] application. . . on the ground of

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71 Schmalenbach, *supra* note 71. *See* Lagerwall, *supra* note 58, at 1457.

72 Hillgruber, *supra* note 33, at 270.

73 Schmalenbach, *supra* note 35, at 984.

74 Waldock, *supra* note 52, at 53.

75 Johnston, *supra* note 26, at 51.

76 *Id.*

77 *See* Tladi, *supra* note 70, at 58–9 *citing* Juridical Condition & Rights of Undocumented Migrants, *supra* note 29, at ¶¶4–5; Domingues v. U.S., Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 49 (2000); Kolb, *supra* note 3, at 96; Schmalenbach, *supra* note 35, at 989 *citing* Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Development, Criteria, Present Status 214 (Finnish Laywer 1988); Maurizzio Ragazzi, Concept of International Obligations Erga Omnes 67 (Oxford University Press 1997); Shelton, *supra* note 33, at 304. *See also* I.L.C., *Peremptory Norms: Comments & Observations of Governments*, U.N. Doc. A/CN.4/748 39 (Japan), 67 (Cyprus), 71 (Spain), 73 (US) (March 9, 2022). *But see* Magallona, *supra* note 2, at 528–9; Ulf Linderfalk, *Source of Jus Cogens Obligations: How Legal Positivism Copes with Peremptory Norms*, 82 Nord. J. Int'l L. 369, 385 (2013); Maarten Bos, A Methodology of International Law 246, 250 (Elsevier 1984); Godefridness van Hoof, Rethinking the Sources of International Law 160–2 (Kluwer 1983); Christos Rozakis, Concept of Jus Cogens 76–80 (North Holland 1976). *But see* also I.L.C., *supra*, 69 (The Netherlands), 72 (UK), 68 (Israel), 70 (Russia), 72 (United Kingdom).

persistent objection'.[78] Others argue that peremptory norms are characterised by their 'universal application' and the persistent objector rule would contradict this, as it in effect permits derogation.[79] Still, some posit that states, 'by participating in the international legal system,' consent to the possibility that there are norms to which they would not be able to derogate even in the absence of their consent.[80]

C. Theoretical Bases of Peremptory Norms

The VCLT's concept of peremptory norms is arguably 'now well-established'.[81] Yet, there remains a 'doctrinal controversy' regarding its foundations.[82] Broadly, there are three views on the basis of peremptory norms—the natural, public order, and positive law theories.[83] Understandably, the complexity of this issue requires a separate examination. Indeed, a vast amount of literature has been dedicated to the examination of the concept's roots.[84] The analysis below provides an overview of these debates, which would also aid the next chapter's examination of the nature of duties owed *erga omnes.*

The naturalist theory, through scholars like Grotius and Vattel,[85] arguably provided the impetus for the development of peremptory norms.[86] Under this, peremptory norms are founded on 'principles of morality' which are 'inherent' in

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78 Ragazzi, *supra* note 78, at 66; Sondre Helmersen, *Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 56 Neth. Int'l L. Rev. 167, 172 (2014).

79 Tladi, *supra* note 70, at 58 (2018).

80 Johnston, *supra* note 26, at 39 *citing* Byers, *supra* note 33, at 228.

81 Crawford, *supra* note 14, at 417; Eric Suy Eric, *Article 53, in* The Vienna Conventions on the Law of Treaties 1226 (Olivier Corten & Eckart Klein eds., Oxford University Press 2011). *See* Armed Activities, at 32; Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. 99, 140–2 (Feb. 3); Furundžija, at ¶¶ 153–4; Juridical Condition & Rights of Undocumented Migrants, at 310.

82 Lagerwall, *supra* note 58, at 1457; Dire Tladi, *First Report on Peremptory Norms,* U.N. Doc. A/CN.4/693, 29 (March 8, 2016).

83 Lagerwall, *supra* note 58, at 1457, 1466; Tladi, *supra* note 83, at 30.

84 *See* the selected bibliography in Kolb, *supra* note 3, at 130–7.

85 *See* Grotius, *supra* note 41, at 40; De Vattel, *supra* note 42, at 4.

86 Suy, *supra* note 82, at 1225.

legal systems.[87] The norm's peremptory character derives not from states' will.[88] Instead, it is rooted in the norm's nature and the significance of the interest that it protects.[89] As the norm reflects the international community's 'fundamental values', it is 'placed in a hierarchically superior position in relation to all other norms'.[90] From this 'higher position flows' the conflicting inferior norms 'nullity or inapplicability'.[91]

Related to the naturalist view is the public order theory. The approach agrees that peremptory norms protect values that are fundamental to the international community.[92] However, in contrast with the natural law theory, the peremptory effect is based on *ordre public* or a body of 'rules embedded in the international legal system and indispensable for its existence and the operation.' [93] Such forms the 'minimum core of norms and principles safeguarding certain

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[87] Tladi, *supra* note 83, at 31 *citing* Mark Janis, *Nature of Jus Cogens*, 3 Conn. J. Int'l L. 359, 361 (1987); Dan Dubois, *Authority of Peremptory Norms: State Consent or Natural Law?*, 78 Nord. J. Int'l L. 133, 134 (2009); O'Connell, *supra* note 19, at 97; Santiago Villalpando, L'émergence de la communauté internationale dans la responsabilité des etats 77 (Graduate Institute 2005) ('La fonction du jus cogens dans le système juridique—et notamment l'impossibilité pour les Etats d'y déroger au moyen d'un traité—a rappelé à d'aucuns le "fantôme" du "vieux droit naturel" qui se présenterait "sous un déguisement nouveau"'), *citing* Krystyna Marek, Contribution à l'étude du jus cogens en droit international, Recueil d'études de droit international en hommage à Paul Guggenheim 445 (Graduate Institute 1968); Charles de Visscher, *Positivisme et "jus cogens"*, 71 Revue générale de droit international public 7, 9–10 (1971); Gómez Robledo, *supra* note 32, at 24.

[88] Frowein, *supra* note 37, at 365; Antônio Trindade, International Law for Humankind: Towards a New Jus Gentium 294–5 (Nijhoff 2013).

[89] Crawford, *supra* note 14, at 412; Orakhelashvili, *supra* note 25, at 10; Proukaki, *supra* note 43, at 26 *citing* Fitzmaurice, *supra* note 50, at 20, 40–1. *See* Trindade, *supra* note 89, at 291.

[90] Kolb, *supra* note 38, at 22 *citing* Patrícia Galvão Teles, *Peremptory Norms of General International Law* (*Jus Cogens*) *& the Fundamental Values of the International Community, in* Peremptory Norms of General International Law (Jus Cogens) (Dire Tladi ed., BRILL 2021), 45 ff.

[91] Kolb, *supra* note 38, at 22.

[92] Orakhelashvili, *supra* note 25, at 37; Simma, *supra* note 33, at 288; Galvão Teles, *supra* note 91, at 46. *See* I.L.C., *Fragmentation of International Law*, U.N. Doc. A/CN.4/L.682, 167 (April 13, 2006).

[93] Orakhelashvili, *supra* note 25, at 28–9 *cited in* Schmalenbach, *supra* note 35, at 967; Mosler, *supra* note 45, at 18; Arnold McNair, Law of Treaties 213–4 (Clarendon 1961); Cassese, *supra* note 29, at 160 *cited in* Galvão Teles, *supra* note 91, at 46; Thomas Weatherall, Jus Cogens: International Law & Social Contract 16, 99–100 (Cambridge University Press 2017). *See* Brunnée, *supra* note 32, at 800; Evan Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L. 331, 344 (2009).

higher interests' of every state that 'binds them all equally'.[94] Broadly speaking, public order theorists argue that because peremptory norms encompass 'the minimum threshold of the international value system' or constitute the 'apex of the legal system,'[95] derogations from these norms 'can have no legal force'.[96] In other words, the norm's peremptory effect is due to the fact that derogations contravene rules which are of vital importance to the international community and are 'intrinsically superior'.[97] Thus, they must override the 'tenets of a consensus-based international law-making'.[98]

The natural law and public order theories have 'historical links' to the development of peremptory norms and enjoy significant support. Yet, they are not without criticisms.[99] Primarily, these pertain to the theories' 'technical insufficiency' as to the norms' identification and content.[100] The reliance on the importance or 'moral value' of the norm alone, as one scholar points out, 'is too weak a criterion' and 'on such a question, opinions can and will largely differ'.[101] Of course, peremptory norms may well represent the core values of the international community. Indeed, as Magallona noted, peremptory norms reflect the 'recognition of necessity on the part of . . . states born out of historical experience common to them'.[102] However, as another argues, attempting to identify these

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94 Orakhelashvili, *supra* note 25, at 28; Byers, *supra* note 33, at 228.

95 *See* Thomas Kleinlein, Jus Cogens Re-examined: Value Formalism in International Law, 28 Eur. J. Int. Law 295, 300 (2017); Philip Allot, *Reconstituting Humanity—New International Law*, 3 Eur. J. Int. Law 219, 250 (1992).

96 Mosler, *supra* note 15, at 382.

97 Orakhelashvili, *supra* note 25, at 8; Antonio Cassese & Joseph Weiler, *Remarks* in Antonio Cassese & Joseph Weiler Joseph (eds), Change & Stability in International Law (De Gruyter 1988), 97.

98 Jure Vidmar, *Protecting the Community Interest in a State Centric Legal System: UN Charter & Certain Norms of "Special Standing"* in Wolfgang Benedek Wolfgang, et al. (eds), Community Interest in International Law (Intersentia 2014), 115; Schmalenbach, *supra* note 35, at 966; Mosler, *supra* note 15, at 34; Tomuschat, *supra* note 40, at 307; Erika de Wet, *Sources & the Hierarchy of International Law* in Samantha Besson & Jean d'Aspremont (eds), Oxford Handbook of the Sources of International Law, 632 (2017).

99 Tladi, *supra* note 83, at 31; *note* Prosper Weil, *Le droit international en quête de son identité,* 237 Recueil des Cours de l'Académie de Droit International 11, 274 (1992); Maurice Kamto, *La volonté de l'Etat en droit international*, 310 Recueil des Cours de l'Académie de Droit International 133, 353 (2004).

100 Kolb, *supra* note 3, at 31.

101 *Id.* at 31.

102 Magallona, *supra* note 2, at 524-525.

norms 'independently from the will of states' leads to 'arbitrary conclusions' that depend mainly 'on one's own perception of fundamental values'.[103]

The same may be said about claims concerning the public order. For some scholars, including Magallona, the analogy with municipal law may be questionable.[104] Such a concept 'does not necessarily fit international law' which lacks the 'development and differentiation' of the municipal order.[105] As the international legal order 'lacks an appropriate structure', the content and identification of peremptory norms become largely left to 'manifestations of the guiding principles' which are 'mostly nothing more than the author's opinion on what the essential and indispensable'.[106] This subjective criterion leads to 'unverifiable assertions' and possibly undue expansion of norms deemed peremptory.[107] The standard becomes unnecessarily subjective,[108] and creates uncertainty as to what norms 'graduate from the status of an ordinary norm' to a 'higher grade'.[109]

There is also the question of who determines the peremptory norms' content. The naturalist and public order theories submit that peremptory norms exist independently of states' will.[110] Yet, both still require some sort of 'legislator' and more often than not rely on 'subjective opinions of scholars, judges, or officials' or the views of a few states.[111] This makes the process 'bluntly and excessively ideological in nature'.[112] It opens the possibility for some states or scholars to arrogate to 'themselves the role of law-giver' and possibly 'erasing any

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[103] Mik, *supra* note 19, at 52.

[104] Magallona, *supra* note 2, at 523.

[105] Zemanek, *supra* note 18, at 385.

[106] *Id.* at 384, 386, *citing* Michel Virally, Réflexions sur le jus cogens, 12 Annuaire français de droit international 5, 29 (1966).

[107] Zemanek, *supra* note 18, at 385.

[108] Kolb, *supra* note 3, at 31.

[109] Wiel, *supra* note 20, at 435; Monica Hakimi, *Constructing an International Community*, 111 Am. J. Int. Law 317, 333 (2017).

[110] Gleider Hernandez, *A Reluctant Guardian: The International Court of Justice & the "International Community"*, 83(1) Br. Yearb. Int. Law 13, 38 (2013).

[111] O'Connell, *supra* note 19, at 86-87; Mik, *supra* note 19, at 52-52; Zemanek, *supra* note 18, at 384.

[112] Kolb, *supra* note 3, at v; *See also* Florian Hoffmann, *International Legalism & International Politics* in Anne Orford & Florian Hoffmann (eds), Oxford Handbook of the Theory of International Law (Oxford University Press 2016), 960.

distinction between *lex lata* and *lex ferenda* in the name of progress and values'.[113] Worse, it allows for the imposition by a minority of their 'values and aspirations to all on a global scale', thereby 'fostering parochial interests'.[114]

To this end, positivists argue that despite their 'natural law gloss', peremptory norms 'remains primarily premised on state consent'.[115] Magallona stressed this when he stated that the 'emergence of the concept of [peremptory norms] is by 'no means merely [its] *lex lata* transformation [from] natural law [or its] municipal law analogy'. Rather, it is due to the acknowledgement of states in a 'legal order' where they remain 'the creators of the law'.[116] In stronger terms, Magallona claimed that the 'recognition of [peremptory norms]. . . does not mean at all the existence of superior norms independent of the wills of states'.[117] It should be noted that this in no way makes the norms' importance and the interests that it protects irrelevant.[118] However, positivists submit that these *per se* do not dictate the norm's status.[119] They may be the reason why states 'in [their] legal policy [decide] to reinforce that norm' to 'make it particularly effective'.[120] Nonetheless,

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[113] *Id.*; Kolb, *supra* note 3, at 26; Carlo Focarelli, *International Law as Social Construct: Struggle for Global Justice,* Oxford University Press, at 470, (2012).

[114] Bianchi, *supra* note 27, at 495-496; *See* Schaumburge-Müller Sten, *To What Extent does International Law Obstruct the Protection of Common Interests?* in Wolfgang Benedek, et al. (eds), Community Interest in International Law (Intersentia 2014), 41 ('[In] emphasising common values and shared interests. . . they are more prone to the risk of making the mistake of conceiving particular interests as universal interests'); Symposium, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y Int'l L. PROC. 266 (1985) (Schacter: 'By subordinating law to policy, the. . . approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law').

[115] James Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 Mich. J. Int. Law 215, 257 (2011); Oppenheim, *supra* note 46, at 528; Magallona, *supra* note 2, at 522; Czapliński, *supra* note 40, at 87; Pierre-Marie Dupuy, *Droit International Public* (*Dalloz 1995*), 14–6. *Contra* Raphaêle Rivier, *Droit international public* (*2nd edn, Presses universitaires de France 2013*), 565; Orakhelashvili, *supra* note 25, at 107; Tomuschat, *supra* note 70, at 306-307.

[116] Magallona, *supra* note 2, at 523, 526.

[117] *Id.* at 541.

[118] Kolb, *supra* note 38, at 54; Ragazzi, *infra* note 298, at 54, ('The "intrinsic value" of a certain rule and the fact that it is "rooted in the international conscience". . . is reflected in the acceptance and recognition of that rule as a rule of jus cogens.'). *See also* James Crawford, *Responsibility to the International Community as a Whole,* 8 Ind. J. Global Legal Stud. 303, 314 (2001) ('A formulation. . . which appears to exclude that moral element does not seem appropriate.').

[119] Hillgruber, *supra* note 33, at 271.

[120] *See id.*

it is the states' recognition that affords the norm its peremptory effect.[121]

Arguably, this view, which Magallona deems to represent the 'consensual nature of [peremptory] norms',[122] is one that remains faithful to the wording of Article 53 of the VCLT. It is worth pointing out that some view the provision as one that defines peremptory norms and, in turn, deem it tautologous.[123] By stating that 'a peremptory norm. . . is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted. . . which can be modified only by a subsequent norm. . . having the same character', it appears to assume what remains to be established.[124] However, this apparent circularity may be solved if Article 53 is not deemed to define peremptory norms but rather one that describes the process by which peremptory norms are formed.[125]

In this regard, it may be argued that the process of 'elevating' an ordinary norm to peremptory status is akin to the formation of customary international law.[126] In the same way that custom, in its traditional—and arguably correct—conception, is formed by the concurrence of state practice and *opinio juris*,[127] norms become peremptory because states decide that the norms should possess a

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121 Kolb, *supra* note 38, at 24; Magallona, *supra* note 2, at 528.

122 Magallona, *supra* note 2, at 527.

123 Linderfalk, *infra* note 128, at 362; Czapliński, *supra* note 40, at 87; Johnston, *supra* note 26, at 41, *citing* Robledo Gómez, *supra* note 32, at 112; Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017), 15; T Minagawa, *Essentiality & Reality of International Jus Cogens,* 2 Hitotsubashi J. Law Polit. 1, 4 (1984).

124 Linderfalk, *infra* note 128, at 370.

125 *Id.* at 371; Ragazzi, *infra* note 298, at 51; Dire Tladi, *Second Report on Peremptory Norms,* U.N. Doc. A/CN.4/706 , 17, 32 (March 16, 2017).

126 Linderfalk, *infra* note 128, at 370-371; Kolb, *supra* note 3, at 67; Villalpando, *supra* note 88, at 77; De Hoogh, *supra* note 34, at 39; Green, *supra* note 116, at 243-244; Serge Sur, *Remarks* in Antonio Cassese & Joseph Weiler (eds), Change & Stability in International Law (De Gruyter 1988), 128; Byers, *supra* note 33, at 226; Lagerwall, *supra* note 58, at 1467. *Contra* Orakhelashvili, *supra* note 25, at 107('[The view is] incompatible with the moral basis of jus cogens and its necessity as public order'); Tladi, *supra* note 83, at 32, ('Jus cogens has. . . been. . . a revolution against "le froid cynisme positiviste".').

127 *See* Robert Kolb, Selected Problems in the Theory of Customary International Law, 50(2) Neth. Int. Law Rev. 119, 120 (2003); Linderfalk, *infra* note 128, at 364, *citing* John Finnis, Natural Law & Natural Rights (Oxford University Press 1980), 238.

non-derogable character.[128] That is, states consider an existing norm to be fundamentally important.[129] Because of this, they deem it 'desirable' and 'appropriate' that no derogations from the norm be permitted and that no modification of the norm by 'ordinary means' be allowed.[130] If this is supported by broad, representative, and consistent state practice and *opinio juris*, then the norm has become peremptory.[131] Thus, a norm's peremptory status is not determined by its nature or character but by states' acceptance and recognition.[132]

II. Serious Breaches, Nullity of Non-Normative Acts & the Corresponding Duties Imposed on 'Third States'

Since the adoption of the VCLT, attempts have been made to broaden the legal effects of peremptory norms beyond their nullifying effect on treaties.[133] As mentioned in the introduction, there are two effects often attributed to peremptory norms. The first pertains to duties imposed upon 'third states' should there be a 'serious' breach of duties imposed by peremptory norms.[134] The second refers to the competence of states, although not injured or directly affected by a breach of an international duty, to implement the responsibility of the wrongful state. The next two sections question the conceptual basis for attributing these effects to peremptory norms.

Understandably, the Commission did not delve into these effects during the drafting of the VCLT. At the time, its mandate was limited to issues concerning the regulation of international agreements. Thus, its consideration of peremptory

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[128] Helmersen, *supra* note 79, at 170, *citing* Hugh Thirlway, *The Sources of International Law*, Oxford University Press, (2014), 119; Robert Kolb, *Formal Source of Jus Cogens in Public International Law*, 53 Zeitschrift für öffentliches Recht 69, 103, (1998); Byers, *supra* note 33, at 222; Johnston, *supra* note 26, at 46-47.

[129] Kolb, *supra* note 38, at 41.

[130] Linderfalk, *infra* note 128, at 373.

[131] *Id.* at 374; De Hoogh, *supra* note 34, at 39; Green, *supra* note 116, at 244.

[132] Weil, *supra* note 100, at 427, ('A rule acquires superior normative density once its pre-eminence is accepted and recognised'); U.N. GAOR, *supra* note 9, at 167.

[133] VIdmar, *supra* note 47 at 17; Erika de Wet, *Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction*, 38 S.A.Y.I.L. 1, 6 (2013); Johnston, *supra* note 26, at 41.

[134] Johnston, *supra* note 26, at 44.

norms was limited to their non-derogability and nullifying effect.[135] It did not, however, intend to pre-empt issues arising from other fields of international law.[136] For this reason, some submit that the VCLT only partially codified the effects of peremptory norms and that these norms may have effects beyond VCLT Articles 53 and 64.[137] Indeed, since the VCLT's adoption, attempts have been made to broaden the peremptory norms' effects,[138] including the consequences for 'third states' or states not directly affected by the wrongful act, should states commit serious breaches of duties imposed by peremptory norms.[139]

A. Development of International Crimes & Serious Breaches of Peremptory Norms

The VCLT's concept of peremptory norms influenced the ILC's work on state responsibility.[140] In 1976, Special Rapporteur Ago (1969–80) posited that, like the VCLT, which distinguished between 'ordinary' and 'fundamental' norms, the law on state responsibility must also differentiate between 'ordinary' and 'serious' breaches of international duties.[141] In his 1976 Draft Article 18 (1996 Draft Article 19), Ago proposed the concept of an 'international crime' or the breach of a duty 'so essential for the protection of the [international community's] fundamental

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[135] Erika de Wet, *Prohibition of Torture as Jus Cogens & its Implications for National & Customary Law,* 15 Eur. J. Int. Law 97, 99 (2004).

[136] Vienna Convention on the Law of Treaties, Article 73, May. 23 1969, vol. 1155, ('The. . . Convention shall not prejudge any question that may arise. . . from. . . the responsibility of a state'); Tladi, *supra* note 126, at 17; Linderfalk, *supra* note 67, at 867-869.

[137] Tldadi, *supra* note 70, at 30; Summa, *supra* note 33, at 288; Trindade, *supra* note 89, at 295.

[138] VIdmar, *supra* note 47 at 17; Kolb, *supra* note 3, at 106; Gaja, *supra* note 35, at 52; Shelton, *supra* note 33, at 305; Johnston, *supra* note 25, at 44; De Hoogh, *supra* note 34, at 41.

[139] Crawford, *supra* note 14, at 465; Kolb, *supra* note 3, at 106.

[140] Eric Wyler, *From "State Crime'" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms,* 13(5) Eur. J. Int. Law 1147, 1150 (2002) *citing* Ago, *supra* note 12, at 28-29; Marina Spinedi, *From One Codification to Another: Bilateralism & Multilateralism,* Codification of the Law of Treaties & the Law of State Responsibility, 13(5) Eur. J. Int. Law 1099, 1125 (2002); U.N. GAOR, 28th Session Summary record, U.N. Doc. A/CN.4/SER.A/1976/Add.l (Jul. 23, 1976).

[141] Eric Wyler, *From "State Crime'" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms*, 13(5) Eur. J. Int. Law 1147, 1150 (2002) *citing* Ago, *supra* note 12, at 28-29; Marina Spinedi, *From One Codification to Another: Bilateralism & Multilateralism*, Codification of the Law of Treaties & the Law of State Responsibility, 13(5) Eur. J. Int. Law 1099, 1125 (2002); U.N. GAOR, 28th Session Summary record, U.N. Doc. A/CN.4/SER.A/1976/Add.l (Jul. 23, 1976).

interests' accepted and recognised 'by that community as a whole'.[142] It must be stressed that Ago, in using the term 'crime', did not refer to the municipal concept of crime nor intend to impose criminal responsibility upon states.[143] Rather, its purpose was to create an 'aggravated regime' for breaches of certain fundamental duties.[144] For Ago, these include the breach of the duty not to threaten or use force; the duty to protect fundamental human rights such as those on genocide, racial discrimination, and slavery; and the duty to safeguard the environment.[145]

Ago's departure from the ILC prevented him from developing the consequences of international crimes.[146] This task fell on Special Rapporteurs Riphagen (1980–6) and Arangio-Ruiz (1988–96). Riphagen proposed that three distinct duties imposed on third states (1984 Draft Article 14/1996 Draft Article 53) should an international crime be committed.[147] First, states have a *duty not to*

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[142] *Id.* at 26; U.N. GAOR, *supra* note 141, at 96; U.N. GAOR, 29th Session Summary record, U.N. Doc. A/32/10-EN (Jul. 9, 1977); U.N.GAOR, 48th Session Summary Record, U.N. Doc. CN.4/L528/Add.3 at 109, 112 (Jan. 1997).

[143] U.N. GAOR, *supra* note 141, at 104; *See* U.N.GAOR, 47th Session Summary Record, U.N. Doc. A/47/10 (Nov. 3, 2015).

[144] George Abi-Saab, T*he Uses of Article 19*, 10 Eur. J. Int. Law 339, 342, 346 (1999) *citing* Joseph Weiler, Antonio Cassese, & Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 1989), 52; De Hoogh, *supra* note 34, at 49.

[145] Ago, *supra* note 12, at 54, ('[Draft] Article 18. . . 2. The breach by a state of an international [duty against]. . . the threat or use of force. . . is an "international crime". . . 3. The serious breach by a state of an international [duty] established by a norm of general international law accepted and recognised as essential by the international community. . . (a) respect for the. . . right of self-determination; or (b) respect for human rights. . . or (c) the conservation. . . of a resource common to all mankind is also an "international crime".').

[146] Pierre Klein, *Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law*, 13 Eur. J. Int. Law 1241, 1244 (2002).

[147] Willem Riphagen, *Third Report on State Responsibility,* II(1) YbILC 22 , 48–9 (1982) ('[Draft] Article 6: An internationally wrongful act of a state, which constitutes an international crime, entails a [duty] for every other state: (a) not to recognise as legal the situation created by such act; (b) not to render aid or assistance to the author state in maintaining the situation created by such act; and (c) to join other states in affording mutual assistance in carrying out the [duties] under (a) and (b)'); Gaetano Arangio-Ruiz, Fifth Report on State Responsibility, II(1) YbILC 3 , 35, 38 (1995); Gaetano Arangio-Ruiz, Seventh Report on State Responsibility, II(1) YbILC 6 , 16–7 (1995); U.N. GAOR., Report on the Work of the 37th Session, U.N. Doc. A/40/10, (Jul. 26, 1985); U.N.GAOR, 48th Session Summary Record, U.N. Doc. CN.4/L528/Add.3 at 109, 112 (Jan. 1997).

recognise the legal situation created by the wrongful act.[148] Second, states also have a *duty not to aid or assist* the wrongful state in maintaining the situation that resulted from the breach of duty.[149] Third, states have a *duty to cooperate* with other states in carrying out these two duties.[150] Riphagen and Arangio-Ruiz also proposed mechanisms for dealing with state crimes in line with Ago's work.[151] Riphagen allotted a central role to the UN to respond to these wrongful acts.[152] For his part, Arangio-Ruiz developed a 'complex machinery' involving the UN and the ICJ.[153]

Yet, the notion of international crimes was a contentious subject.[154] The ILC included the concept in the provisionally adopted 1996 Draft Articles, but

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148 Willem Riphagen, *First Report on State Responsibility*, II(1) YbILC 107, 115– 20 (1980); Riphagen, *supra* note 148, at 48–50; *See Legal Consequences of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 1970 I.C.J. 16, 56 (Jun. 21, 1970); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 200–1 (Jul. 9, 2004); Lagerwall Anne, *Le principe ex injuria jus non oritur en droit international*, Collection De Droit International, 141-159, (Feb, 18, 2016),

149 Riphagen, *supra* note 148, at 49. *See* Willem Riphagen, *Fourth Report on State Responsibility,* Yearbook of the International Law Commission, 1983, vol. II, pt. 1 (1983); Willem Riphagen, *Sixth Report on State Responsibility*, II(1) Yearbook of the International Law Commission, 1985, vol. II, pt. 1 (1986).

150 Riphagen, *supra* note 148, at 48 (1982). *See* Willem Riphagen, *Fifth Report on State Responsibility*, Yearbook of the International Law Commission, 1984, vol. II, pt. 1 (1984).

151 *See* Ago, *supra* note 12, at 43-44.

152 Riphagen, *supra* note 148, at 48. *See* Klein, *supra* note 147, at 1244-1245 *citing* Pierre-Marie Dupuy, *Sécurité collective et organisation de la paix*, 97 R.G.D.I.P. 617, 619, 623 (1993).

153 Gaetano Arangio-Ruiz, *Fourth Report on State Responsibility,* Yearbook of the International Law Commission, 1992, vol. II, 6, 22 (1992); Arangio-Ruiz, *supra* note 148, at 38; U.N.GAOR, *supra* note 144, at 117, ('Article 19. . . 1. Any state. . . claiming that an international crime has been or is being committed. . . shall bring the matter to the [GA] or [SC]'s [attention]. . . 2. If the [GA] or [SC] resolves. . . that the allegation is sufficiently substantiated to justify the grave concern of the international community, any state. . ., may bring the matter to [ICJ] by unilateral application for. . . a judgment whether the alleged international crime has been or is being committed. . . 5. A decision of the [ICJ] that an international crime has been or is being committed shall fulfil the condition for the implementation, by any state. . . of the special or supplementary legal consequences of international crimes of states').

154 Stern, *supra* note 142, at 6; Martin Dawidowicz, *Third Party Countermeasures in International Law,* Cambridge University Press, 85, (2017); Linos-Alexander Sicilianos, *Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility,* 13(5) Eur. J. Int. Law 1127, 1130 (2002). *See* Krystyna Marek, *Criminalising State Responsibility,* 14 Rev. Belge. Dr. Intern. 460, 462, (1978).

doubts remained as to the concept.[155] There were concerns as to the implications of the term 'crime'.[156] Although, as mentioned above, the term was 'merely intended to designate' a 'serious violation of international law and involved no criminal connotation',[157] much reluctance remained within the ILC and among states due to its punitive implications.[158] There were also questions concerning the consequences attributed to international crimes.[159] Indeed, for some, the duties of *cooperation, non-recognition*, and *non-assistance* were not limited to international crimes but extended to other wrongful acts.[160] Finally, some ILC members and states questioned Riphagen and Arangio-Ruiz's proposal concerning the institutionalisation of responses to international crimes. This was due to the view that the proposed mechanisms were 'too broad to be realistic' and did not 'fit the states' sense of international law'.[161]

Ultimately, the ILC chose to 'disaggregate the notion of "crime" into its various components' and integrate them with the other concepts under the 2001

155 James Crawford, *First Report on State Responsibility,* Yearbook of the International Law Commission, vol. 2 part 1, 17–8 (1998); U.N. GAOR, *Report on the Work of the 50th Session*, U.N. Doc. A/53/10 (Aug. 14 1998). *See* Pemmaraju Sreenivasa Rao, *International Crimes & State Responsibility*, Maurizzio Ragazzi (ed), International Responsibility Today: Essays in Memory of Oscar Schachter (Nijhoff 2005), 67. *See also* Abi-Saab, *supra* note 145, at 344–346.

156 U.N. GAOR, *supra* note 156, at 66.

157 U.N. GAOR, *supra* note 144, at 48; U.N. GAOR, *supra* note 143, at 63; Anthony Duff, *State Responsibility: An Outsider's View in Samantha Besson* (*ed*), *Theories of International Responsibility Law*, 76, Cambridge University Press, (2022).

158 U.N. GAOR, *supra* note 156, at 66; Francois Voeffray, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (*Graduate Institute 2004*), 270–1. *See* I.L.C., *State Responsibility: Comments & Observations of Governments,* 53rd Session, U.N. Doc. A/CN.4/515, 64 (France), 65 (Mexico); 65 (Netherlands), 65–6 (Slovakia) (March 19, 2001).

159 U.N. GAOR, *supra* note 156 at 72; Dupuy, *supra* note 47, at 1063.

160 U.N. GAOR, *supra* note 144, at 55, *cited* in Crawford, *supra* note 14, at 11, 19-22. Sicilianos, *supra* note 155, at 1128; Int'l Law Comm'n, *supra* note 159, at 64 (France), 65 (Mexico), 66 (UK), 67 (Japan).

161 U.N. GAOR, *supra* note 144, at 48; Klein, *supra* note 147, at 1252; U.N. GAOR, *supra* note 156, at 71; Dawidowicz, *supra* note 155, at 83, *citing* U.N.G.A., *'Topical Summary of the Discussion of the Sixth Committee, 50th Session'* (16 February 1996) UN Doc A/CN.4/472/Add.1 , 25–7; Dupuy, *supra* note 47, at 1063.

Articles.[162] It removed the term 'international crime' from the 2001 Articles.[163] However, it retained the 'aggravated regime' that distinguished between breaches of duties arising from ordinary and peremptory norms.[164] This was reformulated under 2001 Article 40 as 'serious breaches by a state of a [duty] arising under a peremptory norm'.[165] Under 2001 Article 41, should there be a 'gross or systematic failure' by a state to fulfil its duties under a peremptory norm, third states, in what the ILC deemed a 'progressive measure', must cooperate to bring to an end through lawful means such serious breach.[166] Furthermore, they have the duty not to recognise as lawful any situation created by the breach and the duty not to aid or assist the wrongful state in maintaining the situation.[167] The ILC reiterated these consequences in Draft Conclusion 19 of its 2022 Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms ('2022 Draft

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[162] Crawford, *supra* note 14, at 470; U.N. GAOR, *supra* note 156, at 77, ('Systematic development in the draft articles'). *See* Kadelbach, *supra* note 40, at 36, ('Different concepts are found which relate to [this] category, but are only vaguely described and [are] insufficiently coordinated'). Note that peremptory norms also affect other provisions of the 2001 Articles. 2001 Article 26 provides that states' acts 'not in conformity with a [duty] arising from a peremptory norm' may not preclude the wrongfulness of such wrongful acts. Likewise, 2001 Article 50 provides that the taking of countermeasures shall not affect duties imposed by peremptory norms.

[163] Sicilianos, *supra* note 155, at 1128; Rao, *supra* note 156, at 79, *citing* Alain Pellet, *New Draft Articles of the ILC on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?,* 32 Yearbook of the International Law Commission, 2001, vol. II (Part Two) 55, 58 (2001).

[164] Christian Tams, *Do Serious Breaches Give Rise to Any Specific Obligations of the Responsibility State,* 13 Eur. J. Int. Law 1161, 1162 (2002); Tullio Treves, *Settlement of Disputes & Non-Compliance Procedures,* Tullio Treves, et al. (eds), Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements (TMC Asser 2009), 232; Stern, *supra* note 142, at 7, ('Ce qui était le crime international s'est dilué et a été remplacé par d'autres concepts relevant plus ou moins du même registre de préoccupations. . . ce que l'on pourrait appeler un fait illicite qualifié, au lieu et place du crime international').

[165] U.N. GAOR, *supra* note 13, at 112-113, ('A "serious" breach is defined. . . as one which involves "a gross or systematic failure by the responsible state to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialise the breach. . . To be regarded as systematic, a violation would have to be carried out in an organised and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule').

[166] *Id.* at 114. *See* Crawford, *supra* note 11, at 108, ('The draft articles cannot hope to anticipate future developments, and it is. . . necessary to reserve to the future such additional consequences, penal and other, which may attach to internationally wrongful conduct by reason of its classification as. . . as a breach of [a duty] to the international community as a whole').

[167] U.N. GAOR, *supra* note 13, at 114-116.

Conclusions').[168] It also asserted that these three duties have become customary.[169]

B. Conceptual Foundations of the Effects of Serious Breaches of Peremptory Norms

The attribution of legal consequences to peremptory norms beyond the VCLT deserves comment. In contrast with the VCLT, which became positive law due to states' consent, the additional effects attributed to peremptory norms have generally been derived either by extending the concept of non-derogability to include material acts or by deduction based on the 'higher rank' of the norms.

For some, the effects of peremptory norms cover not only the conclusion of treaties but also unilateral acts.[170] These acts 'can be of any type' so long as they are 'intended to produce effects on the national or international plane'.[171] The view is rooted in the need to 'ensure the 'practical utility' of peremptory norms.[172] It is claimed that limiting the effect of peremptory norms to normative acts disregards that material acts also produce detrimental consequences 'if allowed to be valid

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[168] U.N. GAOR., *Report on the Work of the 73rd Session,* U.N. Doc. A/77/10 , 70 (2022), ('Draft Conclusion 19. . . 1. States shall cooperate to bring to an end through lawful means any serious breach by a state of [a duty] arising under a peremptory norm of general international law (jus cogens); 2. No State shall recognise as lawful a situation created by a serious breach by a state of [a duty] arising under a peremptory norm of general international law (jus cogens), nor render aid or assistance in maintaining that situation. . . ')

[169] *Id.* at 71 ('The [duty] to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law. . . is now recognised under international law'), 76 ('Already in 2001, the Commission had recognised that the duties of non-recognition and non-assistance were part of customary international law').

[170] Cannizzaro, *supra* note 70, at 425; Mik, *supra* note 19, at 45; Orakhelashvili, *supra* note 25, at 208 *citing* Hannikainen, *supra* note 78, at 7; P. Saladin, *Völkerrechtliches Jus Cogens und Schweizerisches Landesrech*t in G. Jenny & W. Kalin (eds), Die Schweizerische Rechtsordnung in Ihren Internationalen Bezügen (Bern 1988), 73. *See* Robert Jennings, *General Course on Principles of International Law,* 121 Recueil des Cours de l'Académie de Droit International 323, 564 (1967); Eric Suy, *Concept of Jus Cogens in International Law, Lagonissi Conference: Papers & Proceedings,* vol II (Carnegie Endowment for International Peace 1967), 75.

[171] Orakhelashvili, *supra* note 25, at 216; Cannizzaro, *supra* note 70, at 425, ('Jus cogens. . . are not confined to the law of treaties [but] can also be offended by unilateral conduct.'); Mik, *supra* note 19, at 45, ('Jus cogens [applies]. . . to factual actions in the context of responsibility, as broadly understood, for a breach of international law'); Juridical Condition & Rights of Undocumented Migrants, *supra* note 29, (Trinidade, concurring); Suy, *supra* note 171, at 75; Jenning, *supra* note 172, at 564.

[172] Mik, *supra* note 19, at 36.

and to go unchallenged'.[173] Thus, in the same way that peremptory norms nullify conflicting norms, they likewise deprive contrary material acts of their legality.[174] Accordingly, states have a duty to 'eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law' and must 'bring their mutual relations into conformity with the peremptory norm of general international law'.[175]

However, several authors submit that this view conflates derogations and breaches.[176] It must be stressed that peremptory norms under the VCLT deal with the former and restrict the law-making capacity of states by limiting their competence to 'contract out' of peremptory norms in their legal relations.[177] When states 'derogate' from a norm, they replace a 'general legal regime' with another that is conflicting, which in turn becomes applicable *inter se*.[178] Derogations are concerned with normative or legal acts, including arguably unilateral ones,[179] that

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[173] Orakhelashvili, *supra* note 25, at 212, ('Acts of states consisting purely in their conduct'), 213. *See* Hersh Lauterpacht, *Règles générales du droit de la paix*, 62 Recueil des Cours de l'Académie de Droit International 5, 291 (1937) ('Unlawful acts or [their] consequences or immediate manifestations') cited in Anne Lagerwall, *Non-Recognition of Jerusalem as Israel's Capital,* 34 Questions of International Law 33, 34 (2018).

[174] Orakhelashvili, *supra* note 25, at 206, ('Jus cogens has expanded to encompass. . . all legal acts') *citing* Juridical Condition & Rights of Undocumented Migrants, *supra* note 29, at ¶99.

[175] Vienna Convention on the Law of Treaties, Article 71, May. 23 1969, vol. 1155; Orakhelashvili, *supra* note 25, at 216, 282; Kadelbach, *supra* note 31, at 38.

[176] Kolb, *supra* note 3, at 37; Kolb *supra* note 38, at 104 Jerzy Sztucki, *Jus Cogens & Vienna Convention on the Law of Treaties* (*Springer 1974*), 67–68; See Weil, *supra* note 100, at 261; Krystyna Marek, *"Jus cogens" en droit international*, Recueil d'études de droit international en hommage à Paul Guggenheim (Faculté de droit de l'Université de Genève 1968), 441. *Note* Christian Tomuschat, *Reconceptualizing the Debate on Jus Cogens & Obligations Erga Omnes—Concluding Observations, Christian Tomuschat & Jean-Marc Thouvenin* (*eds*), Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes (Nijhoff 2005), 430; Vidmar, *supra* note 47, at 13.

[177] Hillgruber, *supra* note 33, at 270; Zemanek, *supra* note 18, at 394.

[178] Kolb, *supra* note 3, at 2; Orakhelashvili, *supra* note 25, at 137.

[179] Johnston, *supra* note 26, at 43 *citing* Sztucki, *supra* note 177, at 68; Karl Zemanek, *How to Identify Peremptory Norms of International Law* in Pierre-Marie Dupuy (ed), Essays in Honour of Christian Tomuschat (Engel 2006), 1116; Kawasaki, *supra* note 4, at 32; Kolb, *supra* note 3, at 113; Victor Rodriguez-Cedeño, *Fifth Report on the Unilateral Acts of States*, II Yearbook of the International Law Commision 93 , 104 (2002).

create rules, give rise to rights, or impose duties upon other states.[180] Simply, a derogation refers to a situation in which states create rules among themselves that are in 'direct conflict' with another norm.[181] Should there be a derogation from a peremptory norm, the VCLT deems that conflicting normative act to be invalid.[182] On the other hand, breaches concern material acts that pertain to the non-observance or non-performance of duties imposed by norms.[183] A material act may be legal or illegal depending on whether it violates a particular rule.[184] However, while a state may breach a duty through a material act, it does not create a rule that constitutes a derogation.[185] For this reason, Kolb and Weil argue that extending the peremptory norms' nullifying effect under the VCLT to cover material acts is a logical impossibility since material acts involve no derogation.[186]

Others, including the ILC, suggest that peremptory norms' additional effects may be derived from the importance of the interests that they safeguard.[187] To some extent, this echoes Ago's basis for the 'international crimes'.[188] These norms are deemed superior and 'carry more weight than others'.[189] As a 'matter of hierarchy', they apply to inferior norms in the same way that they apply to treaties

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[180] Robert Kolb, *Théorie du Ius Cogens International: Essai de Relecture du Concept* (Graduate Institute 2001), 91, *cited in* Zemanek, *supra* note 18, at 394.

[181] Jurisdictional Immunities (2012), *supra* note 82, at 141; Helmerson, *supra* note 79, at 175.

[182] Kolb, *supra* note 3, at 28; Johnston, *supra* note 26, at 46.

[183] Hakimi, *supra* note 110, at 334; Zemanek, *supra* note 18, at 393; Kolb, *supra* note 3, at 59; *See* Shelton, *supra* note 33, at 297.

[184] Kolb, *supra* note 3, at 59, 101.

[185] *Id.* at 28; Marek, *supra* note 88, at 441 *cited in* Zemanek, *supra* note 18, at 393; Séverine Knuchel, *Jus Cogens: Identification & Enforcement of Peremptory Norms* (Schulthess 2015), 180; Costelloe, *supra* note 124, at 185-186.

[186] Weil, *supra* note 100, at 261 *cited in* Orakhelashvili, *supra* note 25, at 207; Denis Alland, *Countermeasures of General Interest,* 13 Eur. J. Int. Law 1220, 1237 (2002) ('Saying that a wrongful action derogates from jus cogens or anything else has no meaning from a technical legal viewpoint'); Rozakis, *supra* note 78, at 18.

[187] Report on the Work of the 53rd Session, *supra* note 7, at 110-112; Orakhelashvili, *supra* note 25, at 205; Gaja, *supra* note 35, at 51. *See* Abi-Saab, *supra* note 145, at 339, 341; John Dugard, *Recognition & the United Nations* (Cambridge University Press 1987), 142.

[188] Ago, *supra* note 12, at 54.

[189] Ulf Linderfalk, *International Legal Hierarchy Revisited—Status of Obligations Erga Omnes,* 80 Nord. J. Int. Law 1, 9 (2011). *See* Trindade, *supra* note 89, at 298-309; *La Cantuta v. Peru, Judgement,* Inter-American Court of Human Rights (ser. C) No. 213, ¶¶58–60 (May 26, 2010) (separate opinion by Trindade, J.).

to 'guarantee the integrity of the interest' they protect.[190] Thus, the law of state responsibility must attach graver consequences to breaches of duties imposed by peremptory norms.[191] To not do so, some argue, risks the 'legitimation of acts offending against' peremptory norms and renders the concept devoid of 'intelligible meaning'.[192] These consequences include nullifying or invalidating a material act 'whose object is unlawful' and the effects of which are 'contrary to . . . public policy'.[193]

It is recognised that the VCLT is not exhaustive as to the effects of peremptory norms.[194] Article 53 makes it clear that the provision applies only for the VCLT's purposes.[195] Thus, there may be other effects that may be attributed to peremptory norms.[196] Yet, it must equally be stressed that a norm's peremptory status and the importance of the interests it safeguards are not 'trump cards that can be played against all other' norms.[197] The importance of the interests that peremptory norms protect does not *per se* imply a 'hierarchical superiority' nor

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190 Orakhelashvili, *supra* note 25, at 207.

191 Abi-Saab, *supra* note 145, at 339; Gaja, *supra* note 35, at 51; Spinedi, *supra* note 141, at 1110; Tladi, *supra* note 70, at 30, *citing Report on the Work of the 53rd Session*, *supra* note 7, at 56.

192 ORAKHELASHVILI, *supra* note 25, at 205.

193 Suy, *supra* note 171, at 75; ORAKHELASHVILI, *supra* note 25, at 205, 213 ("Public policy is a factor which nullifies not just contract but legal acts of all kinds.").

194 Tladi, *supra* note 126, at 17; Vidmar, *supra* note 47, at 2.

195 Dubois, *supra* note 88, at 144, *cited in* Linderfalk, *supra* note 3, at 362.

196 Tladi, *supra* note 70, at 30; KOLB, *supra* note 3, at 8.

197 Vidmar, *supra* note 47, at 19; Johnston, *supra* note 26, at 46. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 25–6 (Feb. 14); Jurisdictional Immunities, *supra* note 82, at 140 ("This argument depends upon the existence of a conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one state to accord immunity to another. . . [For the Court], however, no such conflict exists."); Armed Activities, *supra* note 27, at 52 ("The mere fact that. . . peremptory norms. . . are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the [parties'] consent."), 88 (separate opinion by Dugard, J.) ("The scope of jus cogens is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law."); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgement, 2007 I.C.J. 43, 104 (Feb. 26) ("It has no power to rule on alleged breached of other [duties] of international law. . . that is so even if the alleged breaches are [duties imposed by] peremptory norms.").

the attribution of additional consequences to these norms.[198] This approach, based on deduction, risks the 'over-extension of the role and purpose of the notion' of peremptory norms.[199]

This apprehension is not unfounded. As some note, the 'effects of *jus cogens* have exploded in all directions . . . like a seminal Big Bang'.[200] Aside from the duties of *cooperation*, *non-recognition*, and *non-assistance*, other effects, whose status remains uncertain,[201] have been attributed to peremptory norms. These include the inapplicability of jurisdictional immunities of states,[202] the duty to exercise diplomatic protection,[203] the assumption of universal jurisdiction by municipal courts,[204] and, as will be examined in *Part III-B*, the competence of a 'state other than an injured state' to invoke the responsibility.[205] It bears stressing that these effects have often been 'obtained by deductive reasoning' by appealing to the 'fundamental values at stake'.[206] Of course, it is 'perfectly plausible' that peremptory norms may have these effects, given that they protect the

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198 Vidmar, *supra* note 99, at 116. *See* Hillgruber, *supra* note 33, at 271; Paolo Picone, *The Distinction between Jus Cogens & Obligations Erga Omnes*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 411, 421 (Enzo Cannizzaro ed., 2011).

199 de Wet, *supra* note 136, at 99; Johnston, *supra* note 26, at 46.

200 KOLB, *supra* note 3, at 108; Kawasaki, *supra* note 4, at 28. *See* KNUCHEL, *supra* note 186, at 4 ("It appears as a 'do-it-all' kind of a norm"); Focarelli, *supra* note 4, at 440; d'Aspremont, *supra* note 6, at 94.

201 ROBERT KOLB, THEORY OF INTERNATIONAL LAW 326 (2016) ("These. . . have often gone well beyond what is actually borne out by practice."); Kawasaki, *supra* note 4, at 28 ("They seem to proliferate without borders and without order and the entropy surrounding this notion appears to be increasing.").

202 KOLB, *supra* note 3, at 108, *citing* Andrea Bianchi, *Gazing at the Crystal Ball* (*Again*)*: State Immunity & Jus Cogens Beyond Germany v. Italy*, 4 J. INT'L DISPUTE SETTLEMENT 457, 457–75 (2013), and Séverine Knuchel, *State Immunity & the Promise of Jus Cogens*, 9 NW. UNIV. J. INT. HUM. RIGHTS 149, 149–83 (2011). *See* ORAKHELASHVILI, *supra* note 25, at 322.

203 KOLB, *supra* note 3, at 108–9, *citing* Joe Verhoeven, *Sur les "bons" et les "Mauvais" Emplois du jus cogens*, 5 ANUARIO BRASILEIRO DE DIREITO INTERNACIONAL 133, 159 (2002).

204 Bassiouni, *supra* note 25, at 63; ANTONIO CASSESE, INTERNATIONAL LAW 205–8 (2nd ed. 2005); Trindade, *supra* note 89, at 383.

205 *Report on the Work of the 53rd Session*, *supra* note 7, at 111; *Report on the Work of the 71st Session supra* note 9, at 191–2; Tladi, *supra* note 70, at 40–3. *See* Bassiouni, *supra* note 25, at 73; DE HOOGH, *supra* note 34, at 59; Fitzmaurice Malgosia, *Liability for Environmental Damage Caused to the Global Commons*, 5 REV. EUR. COMP. & INT'L ENVT'L. L. 305, 307 (1996); Sicilianos, *supra* note 155, at 1137; ORAKHELASHVILI, *supra* note 25, at 245; Proukaki, *supra* note 43, at 50.

206 KOLB, *supra* note 3, at 108; Focarelli, *supra* note 4, at 444–5.

international community's fundamental interests.[207] However, as in the case of the identification of peremptory norms discussed in *Part I-C*, the deductive approach is not without danger, given its subjectivity.[208] It opens the concept to 'varying standards and agendas', making it the 'epicentre of an unlimited series' of effects regardless of actual state practice and *opinio juris*.[209]

Arguably, the process of ascertaining the effects of peremptory norms beyond the VCLT arguably needs to be inductive rather than deductive. What must be shown is that states have accepted these effects, which may only be done through recourse to state practice and *opinio juris*.[210] Again, it is important to stress that such an approach does not minimise the importance of the interests that peremptory norms safeguard. Instead, it only stresses that the nature of these interests is not determinative *per se*.[211] While these may motivate states to afford certain effects to peremptory norms, it is their acceptance of these effects that makes these attributes law.[212]

In this regard, states' responses to the effects attributed to peremptory norms under the ILC's 2001 and 2022 Draft Conclusions suggest that *opinio juris* is divergent. Some welcomed 2001 Articles 40 and 41.[213] Several agreed with the view,

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[207] Focarelli, *supra* note 4, at 442.

[208] KOLB, *supra* note 3, at 109 ("A new effect can be 'discovered' in line with the apparent needs of the international society and the vision of the legal operator."), 114 ("In a sort of ontogenetic process, any type of consequence could be drawn from the concept. . . as varyingly defined by several legal operators.").

[209] *Id.* at 111; Picone, *supra* note 199, at 421.

[210] KOLB, *supra* note 3, at 113, *citing* Focarelli, *supra* note 4, at 439. *See* Fernando L. Bordin, *Reflection of Customary International Law: Authority of Codifications & ILC Draft Articles*, 63 INT'L & COMP. LAW Q. 535, 547 (2014).

[211] *See* Hillgruber, *supra* note 33, at 271; DE HOOGH, *supra* note 34, at 39.

[212] KOLB, *supra* note 3, at 110, 113.

[213] *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, U.N. Doc. A/CN.4/513, at 20, 22–4 (2001); Int'l Law Comm'n, *supra* note 159, at 65 (Argentina, Austria, & Nordic Countries), 65 (Netherlands, Poland, & Slovakia), 66 (Spain), 67 (Austria), 69 (South Korea); U.N. GAOR, 56th Sess., Summary record of the 11th mtg. at 5 (Finland on behalf of Nordic countries), 7 (New Zealand), 9 (Belgium), U.N. Doc. A/C.6/56/SR.11 (Oct. 29, 2001); U.N. GAOR, 56th Sess., Summary record of the 12th mtg. at 4 (South Africa), 5 (Netherlands), 7 (Bahrain), 11 (Germany), U.N. Doc. A/C.6/56/SR.12 (Oct. 31, 2001); U.N. GAOR, 56th Sess., Summary record of the 13th mtg. at 4 (Italy), 5 (Mali), 7 (Poland), U.N. Doc. A/C.6/56/SR.13 (Oct. 31, 2001); U.N. GAOR, 56th Sess., Summary record of the 14th mtg. at 2 (Sierra Leone), 4 (Greece), 6 (India), 8 (Russia), 9 (Mongolia), 10 (Portugal), U.N. Doc. A/C.6/56/SR.14 (Nov. 1, 2001); U.N. GAOR, 56th Sess.,

espoused by some authors,[214] that these reflected custom.[215] Yet, others criticised 2001 Articles 40 and 41,[216] or the view that these are customary.[217] The same is true for 2022 Draft Conclusion 19. While some supported the claim that the duties of *cooperation*, *non-assistance*, and *non-recognition* are customary,[218] others did not.[219]

Summary record of the 15th mtg. at 2 (Chile), 3 (Hungary), 4–5 (Jordan), 5 (Thailand), 8 (Argentina), 9 (Ireland), U.N. Doc. A/C.6/56/SR.15 (Nov. 1, 2001); U.N. GAOR, 56th Sess., Summary record of the 16th mtg. at 4 (Slovakia), U.N. Doc. A/C.6/56/SR.16 (Nov. 2, 2001).

[214] *See for example* Abi-Saab, *supra* note 145, at 55; Andrea Gattini, *A Return Ticket to "Communitarisme", Please*, 13 EUR. J. INT'L L. 1181, 1188–92 (2002). *Contra* Mark Toufayan, *A Return to Communitarianism? Reacting to 'Serious Breaches of Obligations Arising Under Peremptory Norms of General International Law' Under the Law of State Responsibility and United Nations Law*, 42 CAN. Y.B. INT'L L. 197, 207 (2004) ("This we are told, is consisted with state practice despite its admittedly parse and embryonic nature.").

[215] *See* Int'l Law Comm'n, *supra* note 159, at 66 (Spain); U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 6 (Morocco); U.N. GAOR, 56th Sess., Summary record of the 15th mtg., *supra* note 214, at 8 (Argentina).

[216] *See* Int'l Law Comm'n, *supra* note 159, at 64 (France), 65 (Mexico & Netherlands), 66 (UK), 67 (China & Japan), 69–70 (US); U.N. GAOR, 56th Sess., Summary record of the 13th mtg., *supra* note 214, at 5 (Israel).

[217] *See* Int'l Law Comm'n, *supra* note 159, at 65 (Mexico), 66 (UK), 68 (Japan), 69 (South Korea), 71 (US); U.N. GAOR, 56th Sess., Summary record of the 13th mtg., *supra* note 214, at 5 (Israel); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 3 (Mexico), 11 (US).

[218] *See* Tladi, *supra* note 25, at 5; U.N. GAOR, 73rd Sess., Summary record of the 25th mtg. at 6 (Cyprus), U.N. Doc. A/C.6/73/SR.25 (Oct. 26, 2018); U.N. GAOR, 73rd Sess., Summary record of the 27th mtg. at 18 (Iran), U.N. Doc. A/C.6/73/SR.27 (Oct. 30, 2018); U.N. GAOR, 74th Sess., Summary record of the 23rd mtg. at 13 (Nicaragua), U.N. Doc. A/C.6/74/SR.23 (Oct. 28, 2019); U.N. GAOR, 74th Sess., Summary record of the 24th mtg. at 11 (Italy: "They were simply a restatement of the normative elements that were already part of the law. . . of state responsibility."), 19 (Micronesia), U.N. Doc. A/C.6/74/SR.24 (Oct. 29, 2019); U.N. GAOR, 74th Sess., Summary record of the 25th mtg. at 4 (Cuba), U.N. Doc. A/C.6/74/SR.25 (Oct. 30, 2019); U.N. GAOR, 74th Sess., Summary record of the 26th mtg. at 3–4 (Spain), 5 (Togo), U.N. Doc. A/C.6/74/SR.26 (Oct. 31, 2019); U.N. GAOR, 74th Sess., Summary record of the 27th mtg. at 8 (South Africa), U.N. Doc. A/C.6/74/SR.27 (Oct. 31, 2019); Dire Tladi (Special Rapporteur on Peremptory Norms of General International Law), *Fifth Rep. on Peremptory Norms*, at 55 (Cyprus, Nicaragua, & Cuba), U.N. Doc. A/CN.4/747 (Jan. 24, 2022); Int'l Law Comm'n, *supra* note 78, at 85 (Cyprus), 86 (Italy), 87 (Netherlands), 88 (Spain).

[219] *See* U.N. GAOR, 73rd Sess., Summary record of the 27th mtg., *supra* note 219, at 10 (Israel: "Draft conclusions 20 [Duty to cooperate] and 21 [Duty not to recognise or render assistance], which were largely based on the [2001 Articles], which themselves did not reflect customary. . . law."); U.N. GAOR, 74th Sess., Summary record of the 23rd mtg., *supra* note 219, at 20 (Poland: "[R]equired further consideration."); U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 4 (Israel); Tladi, *supra* note 219, at 55 (Israel, UK, & US), 56 (Japan); Int'l Law Comm'n, *supra* note 78, at 8 (France: "It must be admitted that the manner in which *jus cogens*.

One state further commented that the Commission's work was 'not grounded on legal authority' but 'reflected an effort to imagine, through deductive reasoning, ways in which certain principles could apply in hypothetical circumstances'.[220] Another stressed that the 'determination of the. . . consequences *of jus cogens* 'must be based on the relevant provisions of the [VCLT] and supported by adequate state practice'.[221] One further reminded the ILC to 'stay true to the Westphalian principle. . . that law was one made by states'.[222]

The states' objections to the ILC's findings are not without merit. Arguably, the instances of practice cited by the Commission to support its conclusions may be attributed on grounds other than states' recognition of these duties' legal status. For instance, as to the duty of non-recognition, the ILC suggested that this has

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. . reflects a development of the concept that goes beyond what was envisaged in [the] [VCLT].''), 84 (Australia: "Requests that the commentaries identify further practice and *opinio juris*."), 86 (Israel: "The commentary [should] make it clear that it does not reflect existing law."), 87 (Japan: "Practice after the adoption of the [2001 Articles] should be examined with a view to ascertaining whether Draft Article 41 has been accepted by states."), 88 (Russia), 89 (UK: "[E]ncourages the [ILC] to acknowledge the unsettled status of the draft conclusions." and US: "The supposed [duties] do not reflect customary international law.").

220 U.N. GAOR, 73th Sess., Summary record of the 29th mtg. at 6 (US), U.N. Doc. A/C.6/73/SR.29 (Oct. 31, 2018).

221 Helmut Aust, *Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the ILC*, *in* PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*), *supra* note 32, at 241, *citing* U.N. GAOR, 73rd Sess., Summary record of the 25th mtg., *supra* note 219, at 3 (China). *See* U.N. GAOR, 73rd Sess., Summary record of the 26th mtg. at 4 (Slovakia: "[N]oted with concern that several of the draft conclusions on the topic. . . were based merely on doctrinal opinions rather than state practice."), 14 (New Zealand: "The [ILC] should continue to take a cautious and balanced approach to its work on the subject."), 15 (Romania: "The [ILC's approach] must be based on state practice, rather than on doctrinal approaches."), U.N. Doc. A/C.6/73/SR.26 (Oct. 26, 2018); U.N. GAOR, 73rd Sess., Summary record of the 27th mtg., *supra* note 219, at 10 (Israel); U.N. GAOR, 74th Sess., Summary record of the 23rd mtg., *supra* note 219, at 9 (Nordic Countries: "Considering the relatively limited and varying practice. . . caution was called for."), 15 (Slovakia: "A rushed outcome, with scant regard for the divergent views of states, was unlikely to lead to success."), 18 (UK: "The [ILC] had adopted [an] expansive and theoretical approach, which had resulted in a set of draft conclusions that covered a diverse range of sensitive issues and that did not, in all respects, reflect current law or practice.").

222 Aust, *supra* note 222, at 241, *citing* U.N. GAOR, 74th Sess., Summary record of the 27th mtg., *supra* note 219, at 9 (Cameroon). *See* U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 4, 6 (Israel); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 10 (Turkey).

been accepted as evinced by the practices and views of states in instances such as the actions of South Africa in Namibia (1948–91) and Israel's conduct in the Occupied Palestinian Territories (1967–).[223] It also claimed that the *Namibia* and *Wall* advisory opinions support this view.[224] In *Namibia*, the ICJ stated that states were duty-bound not to 'recognise the illegality and invalidity of South Africa's continued presence in Namibia' and had 'to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia'.[225] Likewise, the Court made similar statements in the *Wall* advisory opinion 'given the character and the importance of the rights and duties involved'.[226]

However, as some authors and states pointed out, the ILC's conclusion is doubtful considering that the states' actions in the cited instances were due to SC resolutions urging states not to recognise the wrongful acts' effects.[227] Indeed, this was the ICJ's rationale in *Namibia* when it noted that the SC resolutions on Namibia were 'adopted in conformity with the. . . Charter' such that UN member states are duty-bound 'to accept and carry them out'.[228] The same may be said about the *Wall* opinion. While it is true that the Court considered the 'importance of the duties . . . involved',[229] it also recognised the SC resolutions that deemed all Israel acts relating to the Occupied Palestinian Territories as invalid.[230] Furthermore, as to the duty of non-assistance, aside from questions whether it

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[223] Tladi, *supra* note 70, at 38–40; U.N. GAOR, *supra* note 9, at 197–8; Tladi, *Fifth Rep. on Peremptory Norms*, *supra* note 219, at 55.

[224] Tladi, *supra* note 70, at 34–40, *citing* Namibia, *supra* note 149, at 54–5; Wall, *supra* note 149, at 200.

[225] Namibia, *supra* note 149, at 54–5.

[226] Wall, *supra* note 149, at 200.

[227] *See* S.C. Res. 276 (Jan. 30, 1970); S.C. Res. 298 (Sept. 25, 1971); S.C. Res. 446 (Mar. 22, 1979); S.C. Res. 478 (Aug. 20, 1980. *See also* Anne Bird, *Third State Responsibility for Human Rights Violations*, 21 EUR. J. INT'L L. 883, 886, 888 (2010) ("[SC] resolutions all contained the duty of collective non-recognition."); Martin Dawidowicz, *Obligation of Non-Recognition of an Unlawful Situation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 683 (James Crawford et al. eds, 2010); KOLB, *supra* note 3, at 112. *Note* Crawford, *supra* note 14, at 465 ("At a more general level, the [duty] of non-recognition of legality is peripheral to any issue of criminality.").

[228] Namibia *supra* note 149, at 53, *citing* S.C. Res. 264 (Mar. 20, 1969); S.C. Res. 269 (Aug. 12, 1969); S.C. Res. 276, *supra* note 228; Wall, *supra* note 149, at 216 (separate opinion by Higgins, J.).

[229] Wall, *supra* note 149, at 200.

[230] *See* S.C. Res. 276, *supra* note 228; S.C. Res., *supra* note 228. *Note* Wall, *supra* note 149, at 232 ("The duty not to recognise amounts, therefore, in my view to [a duty] without real substance.") (separate opinion by Kooijmans, J.).

finds support in practice,[231] some have also questioned whether it is a distinct duty or whether it is simply a logical consequence of the fact that states also incur responsibility for aiding and assisting breaches of international law duties.[232] Finally, as to the duty to cooperate, the Commission concluded that this has 'become recognised under international law',[233] to which some states concurred.[234] Yet, others criticised this finding, citing the absence of practice.[235] Arguably, the criticism is well-founded. As one author suggests, while the duty is 'gaining legal traction', it 'remains almost entirely aspirational'.[236] Furthermore, it is also yet to be determined if the duty to cooperate is a distinct duty or simply a logical consequence of the conduct's illegality. As Judge Higgins noted, the 'binding determination made by the SC' that an act is 'illegal cannot remain without consequence'.[237] This entails a 'legal consequence [for states], namely that of putting an end to an illegal situation'.[238]

III. Duties Owed *Erga Omnes* & the Competence of 'States Other than

[231] Bird, *supra* note 228, at 889 ("This [duty] does not reflect [positive] law, and state practice can be found which does not comply with this [duty]."); Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 99, 106 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); Int'l Law Comm'n, *supra* note 78, at 86 (Israel), 86 (Japan), 87 (The Netherlands), 89 (UK), 90 (US).

[232] Aust, *supra* note 222, at 251.

[233] U.N. GAOR, 73rd Sess., Report of the International Law Commission. *supra* note 169, at 76.

[234] U.N. GAOR, *supra* note 9, at 194. *See* U.N. GAOR, 73rd Sess., Summary record of the 26th mtg., *supra* note 222, at 16 (Portugal); U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 19 (Micronesia); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 5 (Togo); Int'l Law Comm'n, *supra* note 78, at 87 (Netherlands); Tladi, *Fifth Rep. on Peremptory Norms*, *supra* note 219, at 55 (Cyprus, Nicaragua, & Cuba).

[235] Tladi, *Fifth Rep. on Peremptory Norms*, *supra* note 219, at 85. *See* Wall, *supra* note 149, at 233–4 (separate opinion by Kooijmans, J.); Int'l Law Comm'n, *supra* note 78, at 85 (Israel: "The [ILC] has itself acknowledged in the Commentary [to the 2001 Articles] that '[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation. . . in that respect [such duty] may reflect the progressive development of international law'. . . This remains true today."), 87 (Japan), 89 (UK), 89 (US: "There is neither a relevant rule of customary international law nor express agreement of states to accept such [a duty].").

[236] Hakimi, *supra* note 110, at 335.

[237] Namibia, *supra* note 149, at 53.

[238] Wall, *supra* note 149, at 216 (separate opinion by Higgins, J.), *citing* Haya de la Torre (Colom. v. Peru), Judgement, 1951 I.C.J. 71, 82 (June 13).

an Injured State'

The second effect pertains to duties owed *erga omnes*. The ICJ, in a *dictum* in its 1970 *Barcelona Traction* decision, distinguished between norms that impose duties owed *inter se* or by states '*vis-à-vis* another state' and those owed *erga omnes* or to the 'international community as a whole'.[239] The latter spans duties derived from collective norms such as those that outlaw 'acts of aggression and . . . genocide' along with 'rules concerning the basic rights of the human person' including 'slavery and racial discrimination'.[240] According to the Court, these norms, 'by their very nature. . . are the concern of all states'. Thus, 'in view of the importance of the rights involved', all states 'have a legal interest in their protection' and impose duties owed *erga omnes*.[241] This suggests that states, even in the absence of direct effect, have the capacity to implement responsibility for breaches of these duties.[242]

A. Development of Duties Owed *Erga Omnes*

The *dictum* in *Barcelona Traction* was not the first attempt to endow states with the general competence to implement responsibility.[243] Early writers had already advocated for this.[244] Grotius submitted that states may implement another's responsibility 'not only on account of [harm] committed against themselves or their subjects' but also for injuries that 'do not directly affect them but excessively violate the laws of nature or nations'.[245] While other scholars of the

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[239] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶33 (Feb. 5).

[240] *Id.* at ¶¶ 34, 91.

[241] *Id.* at ¶ 33.

[242] JAMES CRAWFORD, STATE RESPONSIBILITY: GENERAL PART 66 (2013); Crawford, *supra* note 14, at 425. *See* Christian J. Tams & Antonios Tzanakopoulos, *Barcelona Traction at 40: The ICJ as an Agent of Legal Development*, 23 LEIDEN J. INT'L L. 781, 792 (2010).

[243] RAGAZZI, *supra* note 78, at 17; Marthe Bradley, *Jus Cogens' Preferred Sister: Obligations Erga Omnes and the International Court of Justice – Fifty Years after the Barcelona Traction Case*, *in* PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*), *supra* note 32, at 194. *See* Alfred Rubin, *Actio Popularis, Jus Cogens, & Erga Omnes?*, 35 N. ENG. L. REV. 265, 278 (2001).

[244] RAGAZZI, *supra* note 78, at 17–18; CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 48–49 (2005); VILLALPANDO, *supra* note 88, at 137–40.

[245] Dupuy, *supra* note 47, at 1066, *citing* GROTIUS, *supra* note 41, at 504–6; VOEFFRAY, *supra* note 159, at 215.

time, such as Vattel, disagreed with this assertion,[246] later writers like Heffter and Bluntschli supported Grotius' claim and postulated that serious breaches of duties that affect all states should permit every state to redress the wrong.[247] This view gained further traction with authors such as Hall, Root, Jessup, and Hersch Lauterpacht.[248] But again, scholars like Anziliotti and Strupp disagreed, suggesting that responsibility may only be implemented by the states whose rights had been infringed.[249]

Courts also recognised this prerogative before *Barcelona Traction*. The Permanent Court of International Justice's ('PCIJ') 1923 *Wimbledon* case involved a claim from the UK, France, Italy, and Japan against Germany for breach of duties under the Treaty of Versailles. While Japan and Italy were not directly affected, the

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[246] Georg Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*, 13 EUR. J. INT'L L. 1083, 1085 (2002), *citing* 1 EMER DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS ¶ 348 (n.p., 1758). *But see* CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM LIBER SINGULARIS 554 (n.p., 1744).

[247] AUGUST WILHELM HEFFTER, DAS EUROPÄISCHE VÖLKERRECHT DER GEGENWART 222 (Berlin, 1882), *cited in* Frowein, *supra* note 37, at 40; JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN 265 (Nördlingen, Beck 1878), *cited in* Proukaki, *supra* note 43, at 60. *Contra* GEORG FRIEDRICH VON MARTENS, EINLEITUNG IN DAS POSITIVE EUROPDISCHE VIBLKERRECHT 295 (Göttingen, Dieterich 1796).

[248] *See* WILLIAM EDWARD HALL, TREATISE OF INTERNATIONAL LAW 57 (Oxford, Clarendon 1895) ("When a state grossly and patently violates [a duty of] international law. . . of serious importance, it is competent to any state, or to the body of states, to hinder the wrongdoing for being accomplished, or to punish the wrongdoer."); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 11 (1948), *citing* Elihu Root, *The Outlook for International Law*, 10 AM. J. INT'L L. 1, 9 (1916) ("Violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilised nation to have the law maintained and a legal injury to every nation."); 1 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 308 (Hersh Lauterpacht ed., 1937) ("If a state. . . violates such [duties] of the Law of Nations as are universally recognised by custom or are laid down in law-making treaties, other states have a right to intervene and to make the delinquent submit to the rules concerned."). *Note* Amos J. Peaslee, *The Sanction of International Law*, 10 AM. J. INT'L L. 328, 335–6 (1916); CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 226 (1928).

[249] *See* Nolte, *supra* note 247, at 1084–5 *citing* DIONISIO ANZILOTTI, TEORIA GENERALE DELLA RESPONSABILITÀ DELLO STATO NEL DIRITTO INTERNAZIONAL 88 (Florence Lumachi ed., 1902); HENRY HALLECK, INTERNATIONAL LAW 309, 1089 (New Jersey, D. Van Nostrand 1861), *citing* KARL STRUPP, DAS VÖLKERRECHTLICHE DELIKT 16 (1920); KARL STRUPP KARL, DIE VÖLKERRECHTLICHE HAFTUNG DES STAATES 8 (1927). *See also* 2 CHARLES DE VISSCHER, LA RESPONSABILITÉ DES ÉTATS 116–9 (1924); FRANZ VON LISZT, DAS VÖLKERRECHT 280, 287 (Max Fleischmann ed., 1925).

PCIJ deemed the claims admissible as 'each of the [applicants] has a clear interest in the execution of [Article 386 of the Treaty of Versailles]'.[250] Likewise, the European Commission of Human Rights ('ECmHR') recognised states' general competence to bring claims against other states under the European Convention on Human Rights ('ECHR'). In the 1961 *Pfunders* and 1969 *Greek* cases, it held that while the applicant states were not directly affected, their claims were admissible as the parties' 'purpose. . . in concluding the [ECHR] was not to concede to each other reciprocal rights and [duties]. . . but to establish a common public order'.[251] Finally, there were the *Southwest Africa* cases brought before the ICJ by Liberia and Ethiopia against South Africa for the breach of its duties under the 1920 Mandate Agreement. In its 1962 judgement on preliminary objections, the Court deemed the claim admissible as the Agreement's Article 7(2) granted the League of Nations' members a 'legal right or interest' in South Africa's observance of its duties 'towards the inhabitants of the Mandated Territory' and the 'League . . . and its members'.[252] Yet, the Court, after a change in its composition, reversed this stance in 1966 and held that the Mandate system did not give rise to rights and duties outside the system as a whole.[253] Thus, while League members had an interest in the observance of the duties under the Mandate system, it was the UN's appropriate organs that possessed the competence to implement the wrongful state's responsibility and not individual states.[254] Unsurprisingly, the reversal was

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[250] S.S. Wimbledon (U.K. et al v. Ger.), Judgment, 1923 P.C.I.J. (ser A.) No. 1, at 20 (Aug. 17).

[251] Austria v. It., App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 138 (Eur. Comm'n on H.R.); Den. et al. v. Greece, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. _ (Eur. Comm'n on H.R.).

[252] Southwest Africa (Eth. & Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, 343 (March 1). *But see* 455 (dissenting opinion by Winiarski, J.) ("Article 7 cannot be interpreted in such a way as to conflict with the general rule of procedure according to which the applicant state must have the capacity to institute proceedings."); 550–2 (dissenting opinions by Spender & Fitzmaurice, J.); 569 (dissenting opinion by Morelli, J.).

[253] Southwest Africa (Eth. & Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, 47 (Jul. 18) ("[The claim of the applicants] amounts to a plea that the Court should allow the equivalent of an *actio popularis* or [the prerogative of any state] to. . . vindicate. . . public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present.").

[254] *Id. See id* at 67 (separate opinion by Van Wyk, J.). *But see id.* at 60 (separate opinion by Morelli, J.); 219 (dissenting opinion by Koo, J.); 246 (dissenting opinion by Korestky, J.), 246; 254 (dissenting opinion by Tanaka, J.); 325 (dissenting opinion by Jessup, J.); 491 (dissenting opinion by Mbanefo, J.).

negatively received.[255] For this reason, the *dictum* in *Barcelona Traction* has often been viewed as an effort from the Court to 'right a wrong.'[256]

It bears stressing that the opinions of tribunals and scholars discussed above do not necessarily reflect law as acknowledged and practised by states. Neither did the ICJ in *Barcelona Traction* explicitly rule that states, in the absence of direct effect, may implement responsibility for breaches of duties owed *erga omnes*.[257] Since that decision, the Court, despite ample opportunities, has abstained from discussing its effects.[258] Only recently did it clarify what has been asserted in literature in its 2012 *Obligation to Prosecute and Extradite* judgment,[259] and in its 2022 *Application of the Genocide Convention* decision on preliminary objections.[260] For the Court, albeit dealing only with duties owed *erga omnes partes*, states have the competence, although not directly affected by the breach, to implement responsibility for breaches of duties arising from certain collective

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[255] TAMS, *supra* note 245, at 65; Claudia Annacker, *The Legal Regime of "Erga Omnes" Obligations in International Law*, 46 AUSTRIAN J. PUB. INT'L. L. 131, 133 (1994); D.N. Hutchinson, *Solidarity & Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT'L. L. 151, 174 (1988); Ingo Venzke, *Public Interests in the International Court of Justice—A Comparison Between Nuclear Arms Race (2016) & South West Africa (1966)*, 111 AM. J. INT'L L.(UNBOUND) 68, 68 (2017).

[256] Legal Consequences of the Separation of the Chagos Archipelago, Advisory Opinion, 2019 I.C.J. 95, 310 (Feb. 29) (separate opinion by Robinson, J.), *citing* Crawford, *supra* note 14, at 410, 423; Application of the Genocide Convention (Gam. v. Myan.), Preliminary Objections, 2022 I.C.J. 474, 520 (July 22) (dissenting opinion by Xue, J.).

[257] Frowein, *supra* note 37, at 406; André Nollkaemper, *International Adjudication of Global Public Goods: Substance and Procedure*, 23 EUR. J. INT'L L. 769, 784 (2012); TAMS, *supra* note 245, at 162; Annacker, *supra* note 256, at 133. *See* Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, 387 (Dec. 20) (dissenting opinion by de Castro, J.) ("These remarks. . . should be taken cum grano sali."); Application of the Genocide Convention (Gam. v. Myan.), *supra* note 257, ¶ 10 (dissenting opinion by Xue, J.).

[258] *See for example* Nuclear Tests, *supra* note 258; East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 30); Whaling in the Antarctic (Austl. v. Japan, N.Z. intervening), Judgment, 2014 I.C.J. 226 (Mar. 31). *Note* GLEIDER HERNANDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 214 (2014) ("The Court's. . . judgments. . . are characterised by their careful avoidance of explicit reliance upon community norms.").

[259] Obligation to Prosecute or Extradite, *supra* note 28, at 460.

[260] Application of the Genocide Convention, *supra* note 257, at 508, 510. *See* Application of the Torture Convention (Can. & Neth. v. Syria), Provisional Measures, 2023 I.C.J. 584, 605–6 (Nov. 16); Application of the Genocide Convention in Gaza (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. 1, 12 (May 24).

norms.[261]

This view is in accord with the conclusions of the ILC in its 2001 Articles, discussed below, which at the time the Commission deemed as 'progressive measures'.[262] Following extensive discussions, the ILC decided to abandon the definition of 'injured states' solely based on the infringement of rights and precluding the reactions from states only affected in their legal interests (1996 Draft Article 40) which was based on a synallagmatic view of legal relations that insisted on the 'exact correlation' between the duty of one state and the subjective right of another.[263] Instead, the ILC adopted 2001 Articles 42 and 48 that distinguished between 'injured states' and 'states other than an injured state'. The former pertains to states whose rights had been infringed or directly affected by the wrongful act.[264] The latter refers to those who have not been 'injured' by a breach of a duty but nevertheless possess an 'interest' in the performance or observance of the duties imposed by international norms.[265] These duties may be owed to a 'group of states' and 'established for the protection of the collective interest of the group' or the 'international community as a whole'.[266]

It is worth noting that this split between 'injured states' and 'states other than an injured state' received varied reactions from states. Some 'welcomed' it 'as a major improvement' that acknowledged the 'diversity of international [duties], notably [duties] owed *erga omnes*',[267] and distinguished between the 'directly

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[261] Obligation to Prosecute or Extradite, *supra* note 28, at 460; Application of the Genocide Convention (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. 1, 17 (Jan. 23); Application of the Genocide Convention, *supra* note 257, at 508–10.

[262] *Report on the Work of the 53rd Session*, *supra* note 7, at 117, 126–7.

[263] Ago, *supra* note 142, at 192; Riphagen, *supra* note 148, at 38; Arangio-Ruiz, *supra* note 154, at 44.

[264] I.L.C., *Report on the Work of the 53rd Session* (n _), 88–95, 95–107, 128–37 (2001).

[265] *Id.* at 127.

[266] Crawford, *supra* note 11, at 34.

[267] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, *supra* note 214, at 9, 25. *See* U.N. GAOR, 55th Sess., Summary record of the 16th mtg. at 2 (New Zealand), 5 (Egypt), 7 (Australia), U.N. Doc. A/C.6/55/SR.16 (Oct. 25, 2000); U.N. GAOR, 55th Sess., Summary record of the 17th mtg. at 13 (Austria), U.N. Doc. A/C.6/55/SR.17 (Oct. 27, 2000); U.N. GAOR, 55th Sess., Summary record of the 20th mtg. at 5 (Mexico), U.N. Doc. A/C.6/55/SR.20 (Oct. 31, 2000); Int'l Law Comm'n, *supra* note 159, at 73 (Mexico), 75 (South Korea, & Slovakia), 76 (US), 79 (Austria), 80 (Denmark); U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 5 (Finland), 8 (New Zealand), 9 (Belgium); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 9 (Australia); U.N. GAOR, 56th Sess., Summary record of the 13th mtg., *supra* note 214, at 10 (Cyprus); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra*

affected' and 'indirectly affected' states.[268] Other states sought clarification as to the concepts of 'collective interests' and duties owed to the 'international community as a whole'.[269] A few also asked if the provisions reflected state practice.[270] Still, some criticised the change. Several maintained that the concept of an 'injured state' under the 1996 Draft Article 40, based on the infringement of rights, was 'clearer and more direct' even for collective norms.[271] A few questioned the existence of a community capable of possessing rights.[272] Finally, some states, perhaps mindful of the risks,[273] questioned the competence of states to implement responsibility without direct effect.[274]

Arguably, the ILC had linked the concept of invocation of responsibility to measures of a formal character such as the 'raising or presentation of a claim

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note 214, at 5 (Greece), 9 (Mongolia); U.N. GAOR, 56th Sess., Summary record of the 15th mtg., *supra* note 214, at 4 (Hungary & Jordan), 6 (Venezuela).

[268] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, *supra* note 214, at 9, 25. *See* U.N. GAOR, 55th Sess., Summary record of the 14th mtg. at 11 (Japan), U.N. Doc. A/C.6/55/SR.14 (Oct. 23, 2000); U.N. GAOR, 55th Sess., Summary record of the 15th mtg. at 10 (Argentina), U.N. Doc. A/C.6/55/SR.15 (Oct. 24, 2000); U.N. GAOR, 55th Sess., Summary record of the 16th mtg., *supra* note 268, at 2 (New Zealand), 4 (Italy); U.N. GAOR, 55th Sess., Summary record of the 18th mtg. at 7 (Cyprus), 13 (US), U.N. Doc. A/C.6/55/SR.18 (Oct. 27, 2000); Int'l Law Comm'n, *supra* note 159, at 45 (US), 75 (UK), 79 (Argentina), 81 (UK); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 4 (South Africa), 7 (Bahrain); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 7 (India), 8 (Russia); U.N. GAOR, 56th Sess., Summary record of the 15th mtg., *supra* note 214, at 7 (Argentina), 8 (Croatia), 9 (Ireland); U.N. GAOR, 56th Sess., Summary record of the 16th mtg., *supra* note 214, at 6 (Guatemala).

[269] *See* U.N. GAOR, 55th Sess., Summary record of the 18th mtg., *supra* note 269, at 4 (Jordan); U.N. GAOR, 55th Sess., Summary record of the 19th mtg., at 12 (South Korea), U.N. Doc. A/C.6/55/SR.19 (Oct. 30, 2000); Int'l Law Comm'n, *supra* note 159, at 81 (Argentina); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 3 (Mexico).

[270] *See* Int'l Law Comm'n, *supra* note 159, at 73 (Mexico); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 3 (Belarus); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 9 (Cameroon). *See also* Int'l Law Comm'n, *supra* note 78, at 82 (US).

[271] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, *supra* note 214, at 25. *See* U.N. GAOR, 55th Sess., Summary record of the 15th mtg., *supra* note 269, at 3 (France), 8 (Netherlands), 14 (Greece); Int'l Law Comm'n, *supra* note 159, at 74 (France), 75 (Netherlands), 76, 80 (Japan); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 2 (Japan).

[272] U.N. GAOR, 55th Sess., Summary record of the 15th mtg., *supra* note 269, at 3 (Israel), 6 (India).

[273] DAWIDOWICZ, *supra* note 155, at 73; Tom Ruys, *Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?*, 20 CHINESE J. INT'L L. 457, 492 (2021).

[274] *See* U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 10 (China); U.N. GAOR, 56th Sess., Summary record of the 16th mtg., *supra* note 214, at 4 (Iran).

against another state or the commencement of proceedings before . . . tribunals'.[275] Yet, it has also recognised the role of countermeasures as another aspect of implementation, considering the 'imperfect structure' of the legal system that lacks an effective and 'centralised system of enforcement'.[276] However, due to the divergent opinions of states on the capacity of 'states other than an injured state' to take countermeasures, the ILC decided to institute a 'saving' or 'without prejudice clause' in the form of 2001 Article 54.[277] Thus, it left its resolution to 'the further development of international law'.[278] Simply, it is a '*renvoi* to customary law' that the ILC deemed not ripe for codification.[279]

B. Conceptual Foundations of Duties Owed Erga Omnes

The basis for the competence of states to implement responsibility for breaches of duties owed *erga omnes*, without direct effect, lies in the reconfiguration of legal relations from the synallagmatic to the non-synallagmatic.[280] The predominant view, which translates *erga omnes* as 'owed to all', deems duties owed *erga omnes* to be owed not to states individually. Rather, they are owed to a collective—'a group of states or the "international community

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[275] *Report on the Work of the 53rd Session*, *supra* note 7, at 117. *See* Crawford, *supra* note 14, at 169; Edith B. Weiss, *Invoking State Responsibility in the Twenty-First Century,* 96 AM. J. INT'L L. 798, 800 (2002); Jonathan Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 60 (1989); Matthew Happold, *"Injured State" in the Breach of a Non-Proliferation Treaty & the Legal Consequences of Such a Breach*, *in* NON-PROLIFERATION LAW AS A SPECIAL REGIME 175, 177 (Daniel Joyner & Marco Roscini eds., 2012); Frowein, *supra* note 37, at 423–5.

[276] *Report on the Work of the 44th Session*, [1992] II(2) Y.B. Int'l L. Comm'n 17, 19, U.N. Doc. A/CN.4/SER.A/1992/Add.l (Part 2); Proukaki, *supra* note 43, at 69; Alland, *supra* note 187, at 1223.

[277] James Crawford, *Fourth Report on State Responsibility*, [2000] II Y.B. Int'l L. Comm'n 3,18, U.N. Doc. A/CN.4/517 and Add.1. *See* U.N. GAOR, 55th Sess., Summary record of the 14th mtg., *supra* note 269, at 7 (UK).

[278] *Report on the Work of the 53rd Session*, *supra* note 7, at 139.

[279] Alan T. Nissel, *The ILC Articles on State Responsibility: Between Self-Help and Solidarity*, 38 N.Y.U. J. INT'L L. & POL. 355, 364 (2005).

[280] Annacker, *supra* note 256, at 135–6; Peter Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 GER. Y.B INT'L L. 285, 296, 301 (1996); Spinedi, *supra* note 141, at 1123; Sicilianos, *supra* note 155, at 1128; Juliette McIntyre, *Crawford's Multilateralism and the International Court of Justice*, 40 AUST. Y.B. INT'L L. 271, 273–5 (2022); Joost Pauwelyn, *Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907, 908 (2003).

as a whole"'.[281] This constitutes a departure from the traditional approach to implementation in which obligations create subjective relations among states. Instead, norms that impose duties owed *erga omnes* create objective legal relationships,[282] an extension of the concept of absolute obligations,[283] that do not allocate individual rights to states.[284] Being objective, norms that impose duties owed *erga omnes* 'can only be fulfilled or breached towards the community and not to individual states'.[285]

The resulting legal relationships are non-synallagmatic and do not give rise to bundles of bilateral relations.[286] There is no longer an exact correlation between the duty imposed on one state and the subjective right granted to another.[287] A state on which a duty owed *erga omnes* is imposed performs its duty not to individual states but to the 'international community as a whole'.[288] Accordingly, under the predominant and communitarian view, a state seeking to implement responsibility for a breach of a duty arising from a collective norm, in the absence of direct effect, does not rely on its subjective right.[289] It does not

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[281] Crawford, *supra* note 11, at 34; Annacker, *supra* note 256, at 149; Coffman, *supra* note 281, at 298; TAMS, *supra* note 245, at 130; Julio Barboza, *Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 7, 21 (Maurizio Ragazzi ed., 2005), *citing* Atila Tanzi, *Is Damage a Distinct Condition for the Existence of a Wrongful Act?*, *in* UN CODIFICATION OF RESPONSIBILITY 1, 8 (Marina Spinedi & Bruno Simma eds., 1987).

[282] Annacker, *supra* note 256, at 136, 147; Rachael L. Johnstone, *Invoking Responsibility for Environmental Injury in the Arctic Ocean*, 6 Y.B. OF POLAR L. 3, 13 (2014); TAMS, *supra* note 245, at 133.

[283] Simma, *supra* note 33, at 370; Vassilis P. Tzevelekos, *Revisiting the Humanisation of International Law: Limits and Potential – Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation*, 6 ERASMUS L. REV. 62, 70 (2013).

[284] Crawford, *supra* note 11, at 99; Annacker, *supra* note 256, at 147; Kamen Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and Its Legal Status*, 35 NETH. INT'L L. REV. 273, 279 (1988).

[285] Annacker, *supra* note 256, at 149; Crawford, *supra* note 11, at 34; Coffman, *supra* note 281, at 298; TAMS, *supra* note 245, at 130; Barboza, *supra* note 282, at 21, *citing* Tanzi, *supra* note 282, at 8.

[286] Annacker, *supra* note 256, at 149; Bradley, *supra* note 244, at 203; Nollkaemper, *supra* note 258, at 786; Pauwelyn, *supra* note 281, at 908; Barboza, *supra* note 282, at 21, *citing* Tanzi, *supra* note 282, at 17.

[287] Sachariew, *supra* note 285, at 281; Kyoji Kawasaki, *The "Injured State" in the Law of State Responsibility*, 28 HITOTSUBASHI J. L. POL. 17, 27 (2000).

[288] Linderfalk, *supra* note 67, at 862; Hutchinson, *supra* note 246, at 199.

[289] Crawford, *supra* note 11, at 99 (2000); Linderfalk, *supra* note 190, at 10-11; TAMS, *supra* note 245, at 174, *citing* Roberto Ago, *Obligations Erga Omnes & Community*, in INTERNATIONAL CRIMES

possess this right as it is the international community that is the intended beneficiary of the duty.[290] Rather, its competence is premised on its interest, 'presumably not [a] right but nevertheless something entitled to protection',[291] as a member of the collective to which the duty is owed.[292] This interest in the 'integrity of the [collective norm] and in the common value protected by norm' entitles it to demand the observance or performance of the duty even if not injured or directly affected.[293] Thus, if a duty owed *erga omnes* is breached, all states, even those that have not been directly affected, may implement the wrongful state's responsibility.[294]

The nature of the duties owed *erga omnes*, like peremptory norms, deserves examination. While the concept may be established,[295] there remain theoretical differences regarding its foundations.[296] For instance, some claim that what elevates a duty from being owed *inter se* to *erga omnes* is the importance of the interest that the norm protects.[297] That is, the norms' importance or value is its

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OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 238 (Joseph Weiler et al. eds., 1989).

290 Crawford, *supra* note 14, at 434; Annacker, *supra* note 246, at 147; Sachariew, *supra* note 285, at 279.

291 HUGH THIRLWAY (ED.), LAW & PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE, VOL. I 76 (2013); Crawford, *supra* note 14, at 434.

292 *Report on the Work of the 53rd Session, supra* note 7, at 127; James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility* in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 227 (Ulrich Fastenrath, et al. eds., 2011); Annacker *supra* note 246 at 146-147.

293 Annacker, *supra* note 246, at 146; Crawford, *supra* note 14, at 434, 444; Dupuy Pierre-Marie, *Deficiencies of State Responsibility relating to Breaches of "Obligations owed to the International Community as a Whole"* in REALISING UTOPIA: FUTURE OF INTERNATIONAL LAW 215 (Cassese Antonio ed., 2012).

294 *Report on the Work of the 53rd Session, supra* note 7, at 126-127; Crawford, *supra* note 293, at 228–229, 239 *citing* Institut de Droit International (IDI), *Resolution on Obligations Erga Omnes in International Law* art. 1(a) (2005). See Gaja, *supra* note 35, at 97; Spinedi, *supra* note 141, at 1123.

295 Alland, *supra* note 187, at 1229; Bradley, *supra* note 244, at 196; Nollkaemper, *supra* note 258, at 784.

296 Johnstone, *supra* note 283, at 13; PROUKAKI, *supra* note 43, at 49; *See* TAMS, *supra* note 245, at 128.

297 *See* e.g. Maurizzio Ragazzi, *International Obligations Erga Omnes: Their Moral Foundation & Criteria of Identification* in REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 466 (Guy Goodwill-Gill & Stefan Talmon eds.,1999); ORAKHELASHVILI, *supra* note 25, at 243; TRINDADE, *supra* note 89, at 291, 314, 443; Bradley, *supra* note 244, at 199.

'distinctive feature',[298] reflects the 'notion of value-loaded community interest',[299] forms the 'common core of norms',[300] gives them a 'higher normative value',[301] and grants them a 'different . . . status than others'.[302] By 'reason of the importance of the rights' that these norms protect,[303] all states have the competence to implement responsibility for breaches of the duty arising from the norm.[304]

Others claim that it is the commonality of interests of states in the norms that affords *erga omnes* effect to these rules.[305] By 'their very nature', these norms concern all states such that every state has an interest in the performance of the

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[298] PROUKAKI, *supra* note 43, at 50.

[299] Vidmar, *supra* note 99, at 11; Ragazzi, *supra* note 78, at 466 *citing* Southwest Africa, *supra* note 253 (dissenting opinion of Tanaka, J.).

[300] Int'l L. Ass'n, *First Report of the Study Group on the Law of State Responsibility and Its Basis* ¶105 (2000).

[301] Linderfalk *supra* note 190 at 5, *citing* A. J. J. de Hoogh, *The Relationship Between Jus Cogens, Obligations Erga Omnes and International Crime: Peremptory Norms in Perspective*, 42 Austrian J. Pub. & Int'l L. 183, 192 (1991); Jost Delbrück, *Laws in the Public Interest*—Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law in LIBER AMICORUM GUNTHER JAENICKE 35 (Volkmar Gotz, et al. eds., 1998); Ronald St. John Macdonald, *Fundamental Norms in Contemporary International Law*, 25 Can. Yearb. Int. Law 115, 136-139 (1987); Dinah Shelton, *Hierarchy of Norms & Human Rights: Of Trumps and Winners*, 65 Sask. Law Rev. 301, 323 (2002); Bardo Fassbender, *UN Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l Law 529, 591-592 (1998).

[302] MALCOLM N. SHAW, INTERNATIONAL LAW 124 (6th ed. 2008).

[303] Barcelona Traction, *supra* note 240, at 32; ORAKHELASHVILI, *supra* note 25, at 84, 243. See Int'l Law Comm'n, *supra* note 78, at 82 (Switzerland).

[304] PROUKAKI, *supra* note 43, at 54, 59; Bradley, *supra* note 244, at 200; Theodor Meron, *On a Hierarchy of International Human Rights,* 80 Am. J. Int. Law 1, 9 (1986).

[305] *See* e.g. Institut de Droit International (IDI), *supra* note 295, at art. 1 *cited in* Int'l Law Comm'n, Fragmentation of International Law*, supra* note 93, at 203 (2006); Annacker, *supra* note 246, at 149; COMMUNITY INTEREST IN INTERNATIONAL LAW 223 (Wolfgang Benedek, et al. eds., 2014); Samantha Besson, *Community Interests in International Law: Whose Interests Are They & How Should We Best Identify Them?*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 38 (Eyal Benvenisti & Georg Nolte eds., 2017); Yoshifumi Tanaka, *Legal Consequences of Obligations Erga Omnes in International Law*, 68 Neth. Int. Law Rev. 1, 9 (2021); Bradley *supra* note 244 at 213; Massimo Iovane, et al., *Some Introductory Remarks* in PROTECTION OF GENERAL INTERESTS IN CONTEMPORARY INTERNATIONAL LAW 5 (Massimo Iovane, et al. eds., 2021); Rüdger Wolfrum, *Identifying Community Interests in International Law: Common Spaces & Beyond* in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 19 (Eyal Benvenisti & Georg Nolte eds., 2017); Christina Voigt, *Delineating the Common Interest in International Law* in COMMUNITY INTEREST IN INTERNATIONAL LAW 223 20 (Wolfgang Benedek, et al. eds., 2014); TRINDADE, *supra* note 89, at 347; Toufayan, *supra* note 215, at 203.

duties to which they give rise.[306] This holds even when they have not been directly affected.[307] The common interests in the norm also mean that they cannot remain as 'non-directed responsibilities',[308] nor can they be 'left to the free disposition of states'.[309] This affects 'the way [the duty] is performed'.[310] They are no longer owed to states individually but to the 'international community as a whole'.[311] Thus, every state may implement responsibility for breaches of the duty.[312]

These approaches, based on the importance and commonality of interests in norms, relate to the norm's substance and are referred to as 'material approaches'.[313] In contrast, the 'structural approach' posits that what differentiates duties owed *erga omnes* from duties owed *inter se* is not the value nor the commonality of states' interests in a particular norm but the resulting legal relations.[314] For the adherents of this view, duties owed *erga omnes* are characterised by their non-synallagmatic character.[315] If a norm does not create

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[306] Barcelona Traction, *supra* note 240, at 32; Crawford, *supra* note 14, at 413; Annacker, *supra* note 246, at 136; Ragazzi, *supra* note 78, 17; Tanaka, *supra* note 306, at 9; Voigt, *supra* note 306, at 20, *citing* Dinah Shelton, *Common Concern of Humanity*, 1 Iustum Aequum Salutare 33, 38 (2009).

[307] Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations & the Enforcement of International Law*, 44(1) N.Y.U. J.I.L.P. 1, 11 (2011); Shelton, *supra* note 33, at 319.

[308] Besson, *supra* note 306, at 41.

[309] Bruno Simma, *International Crimes: Injury & Countermeasures* in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 285 (Joseph Weiler, et. al eds., 1989).

[310] Annacker, *supra* note 246, at 149.

[311] Tanaka, *supra* note 306, at 9; Vidmar, *supra* note 99, at 110; Annacker, *supra* note 246, at 149; Bradley, *supra* note 233, at 213.

[312] *Report on the Work of the 53rd Session, supra* note 7, at 126-127; Obligation to Prosecute or Extradite, *supra* note 28, at 450; Application of the Genocide Convention, *supra* note 28, at 36; Int'l Law Comm'n, *supra* note 78, at 81 (Spain); Tladi, *supra* note 219, at 52 (France, Spain, & Switzerland).

[313] Tams, *supra* note 245, at 136.

[314] *Id.* at 130; Int'l Law Comm'n, Fragmentation of International Law, *supra* note 93, at 197.

[315] Tams, *supra* note 245, at 131, *citing* Annacker, *supra* note 246, at 136; RENÉ LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE & THE ORIGIN OF STATE LIABILITY 113-114 (1996); IAN SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: HUMAN RIGHTS DIMENSION 126-129 (2001); Olivia Lopes Pegna, *Counter-claims and Obligations Erga Omnes before the International Court of Justice*, 9 Eur. J. Int. Law 724, 732 (1998), *citing* Frank Biermann, *Common Concern of Humankind: Emergence of a New Concept of Environmental Law,* 34 Archiv des Volkerrechts 426, 451 (1996); CARSTEN ALEXANDER GÜNTHER, DIE KLAGEBEFUGNIS DER STATTEN IN INTERNATIONALEN STREITBEILEGUNGSVERFAHREN 99-101, 109-115 (1999); Bruno Simma, *Does the UN Charter Provide an Adequate Legal Basis for Individual or*

synallagmatic relations, it imposes duties owed *erga omnes*.[316] In contrast, its 'moderate version' restricts duties owed *erga omnes* to those that are 'non-bilateralisable and important'.[317]

Arguably, the material approaches give rise to several problems already seen in the natural law and public order theories on peremptory norms discussed in *Part I-C* and *Part II-B.* These assume that the values that states afford to norms can be easily established. Yet, states seldom say if one norm is more important than another.[318] Furthermore, there are no established criteria to determine the importance of norms in international law.[319] The process is subjective and creates uncertainty as to what norms 'graduate from the status of an ordinary norm' to a 'higher grade'.[320] This lack of objectivity risks the undue proliferation of norms that impose duties owed *erga omnes*.[321]

Moreover, the recourse to the interests' importance raises the question of 'to whom is it important?'.[322] Opinions concerning an interest's value largely depend on one's perception.[323] For this reason, the attribution of importance to an interest tends to be based on 'nothing more than the author's opinion on what is essential and indispensable'.[324] This makes the process 'bluntly and excessively ideological in nature'.[325] It makes it possible for a select few to arrogate upon

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Collective Responses to Violations of Obligations Erga Omnes? in FUTURE OF INTERNATIONAL LAW ENFORCEMENT 132-133 (Jost Delbrück & Ursula Heinz eds., 1993); ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT 335 (2001).

316 Seiderman, *supra* note 316, at 126-129.

317 Tams, *supra* note 245, at 133-135. *See* Crawford, *supra* note 119, at 314 ('A formulation. . . [that excludes] that moral element does not seem appropriate.').

318 Linderfalk, *supra* note 190, at 8-9.

319 Tanaka, *supra* note 306, at 9; Voeffray, supra note 159, at 224, *citing* THEODOR MERON, HUMAN RIGHTS & HUMANITARIAN NORMS AS CUSTOMARY LAW 192 (1989).

320 *See* Weil, *supra* note 20, at 425.

321 Ragazzi, *supra* note 78, at 163; Tams, *supra* note 245, at 117.

322 Linderfalk, *supra* note 190, at 8.

323 *See* de Wet, *supra* note 134, at 7; Mik, *supra* note 19, at 52; Alexandra Hofer, *Negotiating International Public Policy through Adoption & Contestation of Sanctions*, 50 R. Bel. Dr. Int. 440, 442 (2017).

324 *See* Zemanek, *supra* note 18, at 384, *citing* Gómez Robledo, *supra* note 32, at 167, 386, *citing* Tomuschat, *supra* note 70, at 307.

325 *See* Kolb, *supra* note 3, at v; VOEFFRAY, *supra* note 159, at 224 ('Vouloir différencier entre les droits "fondamentaux" de l'homme et de simples droits "ordinaires " serait un exercice à la fois ardu d'un point de vue conceptuel et délicat sur le plan politique').

'themselves the role of law-giver',[326] and allows for the imposition by a minority of their 'values and aspirations' thereby 'fostering parochial interests'.[327] In other words, the approach gives rise to a 'syllogistic transformation' that 'allows the interpreter' to attribute *erga omnes* effect to existing rules by simply 'elaborating on the need' for such an effect.[328]

The same arguments may be made regarding the commonality of interests of states. Arguably, the concept of collective interests 'is not wholly unambiguous' as 'there is no universally established criterion for deciding on [such] interests'.[329] Consequently, this lack of subjectivity runs the risk of a 'snowballing effect' that leads to the undue expansion of norms that are considered to impose duties owed *erga omnes*.[330] More importantly, the existence of common interests of states in the norms does not necessarily mean that the duties they impose are owed *erga omnes*. As discussed above, all states have an interest in the compliance of other states with their duties. However, this interest, by itself, 'by no means authorises. . . every state to demand the performance [or observance] by every other state of its duties' in case of breach.[331]

This article takes the view that the value of the interest that a norm protects and whether such an interest is shared by all states do not *per se* imply *erga omnes* status. There may be factors that motivate the attribution of such status to a particular duty. They may be the rationale why states, in their legal policy, agree that the duties imposed by the norm be owed to every state.[332] However, they do not, by themselves, dictate the 'enforceability by every legal

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[326] *See* Kolb, *supra* note 3, at v; Focarelli, *supra* note 114, at 470.

[327] *See* Bianchi, *supra* note 27, at 495-496.

[328] Focarelli, *supra* note 114, at 470.

[329] Tanaka, *supra* note 306, at 9.

[330] Ruys, *supra* note 274, at 467; Mao Xiao, *Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case*, 21 Chin. J. Int. Law 589, 598 (2002). *See* Weil, *supra* note 20, at 432; Duff, *supra* note 158, at 81 ('[Duties owed erga omnes as they are understood] are not grounded in agreements; it is unclear what pre-existing interests of each state they protect, or why individual states should have standing to invoke responsibility').

[331] Riphagen, *supra* note 150, at 21. *See* Southwest Africa, *supra* note 253, at 34; Lac Lanoux (Fr. v. Spain) 62 R.G.D.I.P. 179, 116 (1957); East Timor, *supra* note 259, (dissenting opinion of Skubizewski, J.), 256.

[332] Hillgruber, *supra* note 33, at 271; Sartipi & Hojatzadeh, *supra* note 8, at 222; See Linderfalk, *supra* note 190, at 10; Mao, *supra* note 331, at 598, *citing* Nuclear Tests (Austl. v. Fr.), Provisional Measures, 1973 I.C.J. 99 (separate opinion of Gros, J.), 290.

subject of the relevant legal system'.[333] As one scholar notes, 'the real answer [should] lie elsewhere'.[334] Like peremptory norms whose formation, as discussed in *Part I-C*, has been likened to the formation of custom, it is the acceptance and recognition of states that make duties owed *erga omnes*.[335] In a sense, duties owed *erga omes* result from a 'two-step process' in which states agree on a rule and then decide that the duties it imposes are owed *erga omnes*.[336] Because of the importance and the interest of every state in a norm, states deem it desirable and appropriate that all states have the competence to implement responsibility for breaches of the duty that it imposes.[337]

The structural approach also suffers from problems. To begin with, it remains to be seen whether the legal relations arising from duties owed *erga omnes* may only be characterised as non-synallagmatic. Indeed, several scholars

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[333] Hillgruber, *supra* note 33, at 271; *See* Jose De Jesús, *Obligations Erga Omnes as Multilateral Obligations In International Law* 189 (2012)(Thesis, University of Oxford).

[334] Linderfalk, *supra* note 190, at 10; Hillgruber, *supra* note 33, at 272 ('It needs to be demonstrated that states have created a norm. . . that allows ["states other than an injured state"] to respond to violations [of the duties they impose]'). *See* Obligation to Prosecute or Extradite, *supra* note 28, (separate opinion, Skotnikov, J.), 484; (dissenting opinion of Xue, J.), 575 ('The fact that the states parties have a common interest in their observance. . . does not, in and by itself, give that state standing to bring a case in the Court.'); Application of the Genocide Convention, *supra* note 198, (dissenting opinion of Xue, J.), 6; Application of the Torture Convention, *supra* note 261, (dissenting opinion of Xue, J.), 1-2 ('Whether the states parties accepted. . . *actio popularis*. . . is. . . determined by the intention of the parties').

[335] Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203. See Hillgruber, *supra* note 33, at 270 ('[The competence of states] cannot simply and directly be. . . deduced from legal constructions. . . without having regard to. . . methods of establishing [custom] and interpreting treaties'); Andreas Paulus, *Whether Universal Values can Prevail over Bilateralism & Reciprocity* in REALISING UTOPIA: FUTURE OF INTERNATIONAL LAW 91 (Antonio Cassese ed., 2012); Pranay Lekhi, *Nuclear Problem: A Communitarian Response*, 68 Neth. Int. Law Rev. 89, 100 (2021) ('The. . . procedural rule is dependent on the. . . substantive right').

[336] Byers, *supra* note 33, at 233; Bradley, supra note 244, at 203; *See* Hillgruber, *supra* note 33, at 270 ('[The competence of states] cannot simply and directly be. . . deduced from legal constructions. . . without having regard to. . . methods of establishing [custom] and interpreting treaties'); Paulus, *supra* note 336, at 91.

[337] Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203; Annacker, *supra* note 246, at 136 ('[Duties owed] erga omnes necessarily protect. . . community interests [and] are the result of "consensus according to which respect for certain fundamental values is not to be left to the free disposition of states individually"'). *See* Linderfalk, *supra* note 190, at 10.

argue that this is not the case.[338] Assuming it does, such an approach arguably tends to 'cast the net too wide', including all norms that give rise to non-synallagmatic relations.[339] More importantly, the view dispenses with process and focuses on result. Non-synallagmatic relations are only the result of the process of the formation of duties owed *erga omnes*. Yet, they are not determinative. They merely characterise the relations created by norms deemed to impose duties owed *erga omnes*.[340]

As stressed in *Part I-B*, peremptory norms deal with the validity of a norm and prohibit states from derogating from norms 'accepted and recognised' to be peremptory.[341] On the other hand, duties owed *erga omnes* deal with the competence of every state to implement responsibility of the wrongful state.[342] While the exact relationship between the two concepts is yet to be definitively established,[343] the predominant view attributes a strong link between the two.[344] That is, either peremptory norms are coextensive with duties owed *erga omnes* or peremptory norms invariably give rise to duties owed *erga omnes*.[345]

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[338] *See* De Hoogh, *supra* note 34, at 44, 53; Stern, *supra* note 142, at 15-16; VILLALPANDO, *supra* note 88 at, 237, 242, 254; 279, 397; Barboza, *supra* note 282, at 21; HERNANDEZ, *supra* note 259, at 222; Duff, *supra* note 158, at 80; HUGH THIRLWAY (ED.), LAW & PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE, VOL. II 1151 (2013); De Jesús, *supra* note 334, at 103,186; NATAŠA NEDESKI, SHARED OBLIGATIONS IN INTERNATIONAL LAW 65, 81, 87 (2022). *See* also Kawasaki, *supra* note 288, at 20, 22; Weiss, *supra* note 276, at 803; VOEFFRAY, *supra* note 159, at 229; Picone, *supra* note 199, at 421; Hutchinson, *supra* note 256, at 160, 165; Ottavio Quirico, *Towards a Peremptory Duty to Curb Greenhouse Emissions?*, 44 Fordham Int. Law J. 923, 928 (2021); Wilfred Jenks, *The General Welfare as a Legal Interest* in JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMAN 154 (G. Wilner ed., 1979); Martti Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 71 Br. Year B. Int. Law 337, 344 (2002).

[339] Ruys, *supra* note 274, at 456; PROUKAKI, *supra* note 43, at 49. *See* Tams, *supra* note 245, at 133.

[340] *See* Hillgruber, *supra* note 33, at 272; Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203.

[341] VCLT, *supra* note 63, art. 53. *See* Picone, *supra* note 199, at 413.

[342] Crawford, *supra* note 14, at 412; Crawford, *supra* note 293, at 239; Int'l Law Comm'n, Fragmentation of International Law, *supra* note 98, at 193.

[343] Tladi, *supra* note 78, at 42; De Hoogh, *supra* note 334, at 81; Int'l Law Comm'n, Fragmentation of International Law, *supra* note 98, at 204.

[344] Frowein, *supra* note 37, at 405, *citing* H. Thierry, *L'évolution du droit international cours général de droit international public*, 222 Recueil des Cours de l'Académie de Droit International 9, 62 ff (1990).

[345] TAMS, *supra* note 245, at 146.

As to the first view, several scholars claim, and some states agree,[346] that peremptory norms and duties owed *erga omnes* are 'two sides of the same coin'.[347] That is, they are 'merely designations for the same thing from different viewpoints'.[348] While they differ as to their effects, they are 'virtually' or 'largely' coextensive.[349] The peremptory status of a norm implies that the duty it imposes is owed *erga omnes* and *vice versa*. The rationale for this view appears to primarily lie in deduction. Both concepts protect fundamental values.[350] This is evident from the examples of norms recognised as peremptory and deemed to impose duties owed *erga omnes*. Due to the importance of such values, every state has an interest in their protection.[351] Finally, there is a universal recognition of this fundamental nature.[352] The peremptory status is 'acknowledged and recognised by the international community as a whole,' and thus the duties the norm imposes are owed to the 'international community as a whole'.[353]

Nevertheless, many are not prepared to accept this equivalence. Others agree that the peremptory status of a norm only means that its duties are owed

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[346] *See* U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 6 (Finland on behalf of Nordic states); U.N.G.A., *Verbatim Record, 56th Session, 14th Meeting*, U.N. Doc. A/56/PV.14 (Oct. 2, 2001), 11 (Portugal); U.N. GAOR, 56th Sess., Summary record of the 15th mtg., *supra* note 214, at 4-5 (Jordan); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 10 (Armenia).

[347] Simma, *supra* note 33, at 300; Tams, *supra* note 245, at 146, *noting* Hannikainen, *supra* note 78, at 269-292; STEPHANIE PIEPER, NEUTRALITÄT VON STAATEN 388-389 (1997); HEINRICH BERNHARD REIMANN, IUS COGENS IM VÖLKERRECHT 97 (1971); Robledo Gómez, *supra* note 32, at 62.

[348] Sicilianos, *supra* note 115, at 1136; Sartipi & Hojatzadeh, *supra* note 8, at 208; Gattini, *supra* note 215, at 1184 ('Mere difference in accent').

[349] Crawford, *supra* note 11, at 34.

[350] Byers, *supra* note 33, at 233; Ragazzi, *supra* note 78, at 72; Ronald St. John Macdonald, *International Community as a Legal Community* in TOWARDS WORLD CONSTITUTIONALISM 870 (Ronald St. John Macdonald & Johnston Douglas eds., 2005). *See* Iain Scobbie, *Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law,* 13 Eur. J. Int. Law 1201, 1210 (2002); Wyler, *supra* note 141, at 1157.

[351] Barcelona Traction, *supra* note 240, at 325. See Int'l Law Comm'n, *supra* note 78, at 82 (Switzerland); Tladi, *supra* note 219, at 52 (France, Spain, & Switzerland).

[352] Giorgo Gaja, *Obligations Erga Omnes, International Crimes & Jus Cogens: A Tentative Analysis of Three Related Concepts* in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 149 ff. (Joseph Weiler, et. al eds., 1989)

[353] ORAKHELASHVILI, *supra* note 25, at 245. *See* Ragazzi, *supra* note 78, at 189. *See* Int'l Law Comm'n, *supra* note 78, at 81 (Spain).

erga omnes.[354] However, the same may not be said about the converse.[355] This claim seems to be derived from observation. Norms deemed peremptory, such as the norm against force and some norms that protect human and peoples' rights, like the prohibition of genocide, torture, racial discrimination, slavery, and the respect for self-determination, are also considered to impose duties owed *erga omnes*.[356] However, not all norms acknowledged to impose duties owed *erga omnes* have been widely-recognised to possess peremptory status, as in the case of certain norms safeguarding the environment.[357] By material implication, peremptory status implies that the duties it imposes are owed *erga omnes*.[358] In short, the two concepts are concentric rather than coextensive.[359]

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[354] Bassiouni, Jus Cogens & Obligations Erga Omnes *supra* note 25 at 73; Alain Pellet, *Conclusions* in FUNDAMENTAL RULES OF INTERNATIONAL LEGAL ORDER: JUS COGENS & OBLIGATIONS ERGA OMNES 418 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2005), *cited* in Tladi *supra* note 78 at 43; Gaja, *supra* note 35, at 55; Int'l Law Comm'n, Fragmentation of International Law, *supra* note 98, at 204 (2006); Marco Longobardo, *Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v. Myanmar & Beyond*, Int. Community Law Rev. 1, 8 (2021); TRINDADE, supra note 89, at 276, 297, 312. See Tladi, *supra* note 219, at 52 (France, Spain, & Switzerland); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 11 (Estonia); Int'l Law Comm'n, *supra* note 78, at 80 (Italy), 82 (Switzerland).

[355] Int'l Law Comm'n, Fragmentation of International Law, *supra* note 98, at 204 (2006); Gaja, supra note 35, at 55; Pellet, *supra* note 164, at 418; Tams, *supra* note 245, at 146, *noting* Paulus, *supra* note 316, at 413-415; Giorgo Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 Recueil des Cours de l'Académie de Droit International 271, 281 (1981); Meron, *supra* note 305, at 11; Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 Eur. J. Int. Law 425, 429 (1999); STEFAN KADELBACH, ZWINGENDES VÖLKERRECHT 32-33 (1992); GÜNTHER, *supra* note 316, at 111-114; Dupuy, *supra* note 47, at 1074; Byers, *supra* note 33, at 237; ORAKHELASHVILI, *supra* note 25, at 268; PROUKAKI, *supra* note 43, at 33; Shabtai Rosenne, *Decisions of the International Court of Justice & the New Law of State Responsibility* in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 304 (Maurizzio Ragazzi ed., 2005); Sicilianos, *supra* note 155, at 1137; VILLALPANDO, *supra* note 88, at 84.

[356] Tladi, *supra* note 78, at 40–41; Bradley, *supra* note 244, at 215; De Hoogh, *supra* note 334, at 48; Erika de Wet, *Jus Cogens & Obligations Erga Omnes* in OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 555 (Dinah Shelton ed., 2013); Kadelbach, *supra* note 31, at 27.

[357] Int'l Law Comm'n, Fragmentation of International Law, *supra* note 98, at 205; Dupuy, *supra* note 32, at 393; BIRNIE, *supra* note 32, at 109-10.

[358] *Note* that this can logically be represented as: all norms, n, that are peremptory, P, also impose duties that are owed erga omnes, $\mathbb{E}$. That is, $\forall n\,([n \in P] \Longrightarrow [n \in \mathbb{E}])$. Thus, $P \subseteq \mathbb{E}$. Further, it may be said that $P \Longrightarrow \mathbb{E}$ but not $\mathbb{E} \Longrightarrow P$.

[359] Gaja, *supra* note 35, at 156; Sicilianos, *supra* note 155, at 1137; *Summary Records of the 50th Session*, (1998) I Y.B. Int'l Law Comm'n 1, 104, U.N. Doc. A/CN.4/SER.A/1998; U.N. GAOR,

Again, the recourse to deduction arguably leads to problems.[360] As discussed in *Part II-B*, this involves the attribution of effects to peremptory norms solely on account of the fundamental character of the values they protect or the commonality of interests of states in these values. Scholars stressed that the value of interests and their commonality are not 'trump cards' that justify the attribution of consequences to such norms without the acceptance of states.[361] The same may be said about the *erga omnes* status of norms. The general competence of states to implement responsibility for breaches of duties arising from collective norms is 'by no means the logical conclusion to be necessarily drawn' from their importance or the interest of states in their protection.[362] They may be factors for the attribution of *erga omnes* status, but they are not determinative.[363] It is the acceptance and recognition of states that affords the state's general competence to invoke the responsibility of the wrongful state.[364] Thus, the fact that both concepts protect important values to which every state possesses an interest does not, by itself, imply that peremptory norms necessarily mean duties owed *erga omnes*.

With regard to the claim based on implication, it is not unnoticed that all known examples of peremptory norms are also duties owed *erga omnes*. However, stress must be laid on 'all known' examples of peremptory norms. Granted that all known peremptory norms also impose a duty *erga omnes*. Nevertheless, to say that all peremptory norms, even those yet to be recognised, will also impose duties owed *erga omnes* may be a hasty generalisation that prejudges future examples of

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Summary Records of the 50th Sess., *supra* note 9, at 191 (2019); Tladi, *supra* note 78, at 41; U.N. GAOR, Topical Summary of the Discussion of the Sixth Committee, 55th Sess., *supra* note 214, at 21 (2001); Int'l Law Comm'n, *supra* note 78, at 80 (Italy); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 11 (Estonia).

360 *See* Bassiouni, *supra* note 25, at 72; Picone, *supra* note 199, at 412.

361 Vidmar, *supra* note 99, at 116; Kolb, *supra* note 3, at 38.

362 Hillgruber, *supra* note 33, at 271; VOEFFRAY, L'actio popularis *supra* note 159, at 223-224 ('Le caractère erga omnes d'une obligation internationale découle. . . non de l'importance intrinsèque de l'intérêt protégé'); De Jesús, *supra* note 334, at 190.

363 Linderfalk, *supra* note 190, at 10; Hillgruber, *supra* note 33, at 272. *See* Weil, *supra* note 20, at 430 ('There is a growing tendency. . . to consider that peremptory norms [grant] standing [to every state] to call for those [duties] to be fulfilled and to assert [another's] responsibility').

364 Hillgruber, *supra* note 33, at 271–272; De Hoogh, *supra* note 34, at 37. *See also* Application of the Genocide Convention, *supra* note 247 (dissenting opinion of Xue, J.), at 525.

peremptory norms and duties owed *erga omnes*.[365] The relationship between the two concepts is better described as a correlation rather than an implication. The *erga omnes* status is not a necessary consequence of peremptory status. Instead, norms that are considered peremptory also tend to be acknowledged to impose duties owed *erga omnes*.[366]

States may indeed be motivated by similar factors in attributing peremptory *erga omnes* effects to norms. However, this does not mean that states, when agreeing that norms permit no derogations, necessarily agree that the duty the norm imposes is also owed *erga omnes*. As may be observed from the discussions above and *Part I-C*, the two differ in their process of formation. For peremptory norms, the interest that the norm protects is fundamentally important to the community. Thus, states deem it desirable and appropriate that no derogations from the norm be permitted and that no modification of the norm be allowed.[367] For duties owed *erga omnes*, the interest is also fundamentally important to the community. Accordingly, states deem it desirable and appropriate that all states possess the competence to implement responsibility for breaches of the duty that the norm imposes.[368]

As discussed in *Part II-B*, the attribution of effects to peremptory norms outside the VCLT is an inductive process rather than a deductive one. It needs to be shown that states have accepted these additional effects to be positive law, which may only be done through recourse to the views and practices of states.[369]

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[365] Tanaka, *supra* note 306, at 11 ('As a consequence, an attempt to identify [duties owed erga omnes] by reference to jus cogens may entail the risk of explaining the unknown by means of the more unknown (ignotum per ignotius). . . Therefore, it is difficult to consider that [duties owed] erga omnes can be properly identified on the basis of the concept of jus cogens'). But note that Tanaka nevertheless claims that 'jus cogens norms derive from the matrix of [duties owed] erga omnes, but not the reverse situation'.

[366] See Etienne Henry, *Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law* (*With Special Reference to the Jus Contra Bellum Regime*), 18 Melb. J. Int. Law 1, 18 (2017) ('Often. . . not necessarily always. . . the erga omnes character of the rights and [duties] flowing from a customary rule coincides with [its] peremptory character').

[367] Linderfalk, *supra* note 3, at 377.

[368] Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203; Annacker, *supra* note 246, at 140. See Hillgruber, *supra* note 33, at 270. Compare VOEFFRAY, *supra* note 159, at 223 ('C'est à la communauté internationale de décider si elle veut conférer à une obligation erga omnes un caractère indérogeable').

[369] Kolb, *supra* note 3, at 113; Focarelli, *supra* note 114, at 449.

Again, this does not minimise the character of interests that peremptory norms safeguard. Rather, the importance of the values and the commonality of interests are factors for the attribution of consequences to peremptory norms, but are not determinative *per se*.[370] It may be the motivation for states to afford distinct effects to peremptory norms, it is their recognition that makes these attributes part of positive law.[371]

Arguably, the view that peremptory norms impose duties owed *erga omnes* does not necessarily reflect positive international law. Even other material sources, for the longest time, have offered little help. For its part, the ICJ has yet to 'pronounce that a link exists between peremptory norms. . . and [duties owed] *erga omnes*'.[372] In contrast, the ILC implicitly linked the two concepts in its 2001 Articles,[373] and explicitly asserted in its 2022 Draft Conclusion 17 that 'peremptory norms of . . . give rise to [duties] owed [*erga omnes*].[374] Yet, states' reactions to this conclusion were divergent. Some states supported this claim.[375] Others suggested that it needs more clarification or evidence.[376] Still, a few have expressly voiced

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370 Kolb, *supra* note 3, at 110; Hillgruber, *supra* note 33, at 271; De Hoogh, *supra* note 34, at 39.

371 *See* Kolb, *supra* note 38, at 38; Focarelli, *supra* note 114, at 459; Bordin, *supra* note 211, at 547.

372 U.N. GAOR, *supra* note 9, at 191 (2019); Bassiouni, *supra* note 25, at 73. *See* Toufayan, *supra* note 215, at 209.

373 *Report on the Work of the 53rd Session, supra* note 7 at 111–112; Crawford, *supra* note 11, at 49 ('They are thus virtually coextensive with peremptory obligations. . . For if a particular [norm] can be set aside or displaced as between two states, it is hard to see how that [duty] is owed to the international community as a whole'), 99 ('It may be inferred that the content of those [duties] is largely coextensive with the content of the peremptory norms'); Crawford, *supra* note 14, at 473 ('The discarded notion of "international crime" has been broken down into a number of distinct components, more closely related to the twin concepts of peremptory norms and [duties owed] to the international community as a whole, which have always provided its legal. . . underpinnings'). See although referring to the deleted 1976 Draft Article 18/1996 Draft Article 19 I.L.C., *Report on the Work of its 28th Session, supra* note 141, at 102; *Summary Records of the 36th Session*, (1984) I Y.B. Int'l Law Comm'n., 1, 262; Int'l Law Comm'n., *Report on the Work of the 48th Session: State Responsibility,* U.N. Doc. CN.4/L528/Add.3 at 109, 112 (Jan. 1997).

374 Tladi, *supra* note 219, at 52.

375 *See* U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 10 (Armenia), 11 (Estonia). *See* Int'l Law Comm'n, *supra* note 78, at 80 (Italy), 82 (Switzerland); Tladi, Fifth Report on Peremptory Norms, *supra* note 219, at 52 (France, Spain, & Switzerland); Tladi, Fourth Report on Peremptory Norms, *supra* note 25, at 5.

376 *See* U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 14 (US); U.N. GAOR, 74th Sess., Summary record of the 25th mtg., *supra* note 219 at 4 (Cuba); U.N. GAOR, 73rd Sess., Summary record of the 26th mtg., *supra* note 222, at 8 (Slovakia), 16 (Portugal); U.N.

their opposition to this conclusion.[377]

Conclusion

Through *historical tracing* and *conceptual analysis*, this article examined the theoretical foundations of peremptory norms and the secondary effects attributed to such norms. It began by recalling Magallona's positivist view of peremptory norm. While peremptory norms are rooted in the natural law and public order theories, their emergence in international law, as Magallona argued, was brought by states' consent. Likewise, while they possess normatively superiority compared with ordinary norms, in the sense that conventional norms that derogate from those deemed peremptory are invalidated, they do not imply the existence of superior norms independent of the wills of states. Rather, these norms occupy their position due to the acknowledgement of states.

Next, this article separately examined the bases for the secondary effects attributed to peremptory norms within the law of state responsibility: first, the duties imposed upon states in case of serious breaches of duties imposed by peremptory norms; second, the competence of states to invoke the responsibility in the absence of direct effect. It argued that these secondary effects cannot be justified by recourse to deductive methods—whether due to the importance of the interest that a norm safeguards or the common interest of states in the observance of the duty arising from the norm. Such approaches risk the over-extension of the role and purpose of peremptory norms.

While most states have ratified the VCLT and Article 53 has arguably become customary, states' acceptance is arguably limited to its primary effect. Attaching additional consequences to peremptory norms through deductive methods go well beyond what states accepted in the VCLT. It is not claimed that the VCLT's concept of peremptory norms is exhaustive—there may as well be

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GAOR, 74th Sess., Summary record of the 27th mtg., *supra* note 219, at 9 (Cameroon); Int'l Law Comm'n, *supra* note 78, at 80 (Japan), 81 (Russia & Spain); Tladi, *supra* note 219, at 53 (Japan).

377 *See* Int'l Law Comm'n, *supra* note 78, at 82. (US: 'The commentary should therefore be adjusted to make clear that the [2001 Articles] are not necessarily the "rules" referenced in Draft Conclusion 17, as they. . . have not yet become subject to state agreement'). *See also* U.N. GAOR, 56th Sess., Summary record of the 13th mtg., supra note 214 at 5 (Israel: 'Not convinced. . . that jus cogens [norms] coincided with the norms [that impose duties owed erga omnes]'), 7 (Poland).

effects that these norms may entail. However, the process of attributing 'new' effects to peremptory norms outside the VCLT must necessarily be, considering the structure of the international legal order, based on the states' consent. Accordingly, the method must be inductive. That is, it should be shown that states have accepted these effects to be law by examining both state practice and *opinio juris*.

It is submitted that these observations are in accord with Professor Magallona's 1976 reflections on peremptory norms. As Magallona noted, the concept's inclusion in the VCLT may well be a 'landmark that [shifted] the whole perspective of the theory of international law'. However, this does not imply 'at all the existence of superior norms independent of the [consent] of states'.[378] Applied to the secondary effects attributed to peremptory norms discussed in this article, it must be remembered, as Magallona insisted, that their normative values must be 'brought about only by the concordance of wills of states themselves'.[379] However, as noted above, the states' reaction to these secondary effects have been divergent. To this end, further inductive studies are warranted to determine whether they have become positive law.[380]

[378] Magallona, *supra* note 2, at 541.

[379] *Id.*

[380] *Note* that arguably, the practice of states in responding to breaches of duties imposed by norms deemed peremptory since 1969 (the adoption of the VCLT) has been limited and inconsistent. Seldom have states cooperated to 'bring to an end' serious breaches of peremptory norms. The non-recognition by states of the situations created by these breaches arose not because of peremptory norms but due to their duty to comply with UNSC resolutions. The non-assistance by states to wrongful states may be attributed to the fact that should they have rendered aid, they too would have breached their international law duties. Similarly, only in limited instances have 'states other than an injured state'— mostly Western—sought to implement responsibility for breaches of duties imposed by peremptory norms, whether by measures of a 'formal character' or countermeasures, in the absence of injury or direct effect. This examination is the subject of the author's doctoral dissertation.

TRIBUTES

THE LAW PROFESSOR AS DIPLOMAT: MERLIN MAGALLONA AT THE DEPARTMENT OF FOREIGN AFFAIRS 2001-2002

J. Eduardo Malaya[**]

As a teacher, scholar, and public intellectual, Merlin Magallona belongs to a select few who, in contemporary times, contributed much to the field of international law in the Philippines, along with the likes of ICJ Judge Cesar Bengzon, Justice Florentino Feliciano, Senator Miriam Defensor-Santiago, Justice Jorge Coquia, Dean Joaquin Bernas SJ, and ICC Judge Raul Pangalangan.

When officers of the Department of Foreign Affairs (DFA) strategized in 2011 on how to conduct the candidature of Senator Defensor-Santiago for a seat in the International Criminal Court, a proposal was made for her to go to New York for the U.N. General Assembly sessions and deliver lectures as a way of introducing her to the other delegations. She was asked whom she preferred to assist in coming up with a first draft of her presentation. She replied simply – "Merlin Magallona."

With his heavy teaching load and prodigious published works, one would think that Magallona spent all his years in the serene, intellectually stimulating confines of the university campus. But he did cross over occasionally into domestic litigation and international law practice. Upon the request of the Department of Foreign Affairs (DFA), he represented the Philippines as Agent in the *Legality of Nuclear Weapons* advisory opinion case and on November 9, 1995,

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[**] Philippine Ambassador to The Netherlands (2021 to present), Acting President of the Administrative Council of the Permanent Court of Arbitration for term 2023-2024, and former Assistant Secretary for Treaties and Legal Affairs and Legal Adviser of the Department of Foreign Affairs (2017–2020). It was during his stint as Assistant Secretary when he delivered these remarks. He also delivered this piece during the National Conference of the Philippine Society of International Law (PSIL), held on September 6–7, 2018, in honor of Professor Merlin M. Magallona.

delivered the Philippine statement during oral arguments before the International Court of Justice (ICJ), together with counsels from 25 other countries and the World Health Organization.[1] Years later, he joined the DFA as Undersecretary (Deputy Minister) of Foreign Affairs from 2001 to 2002. Not much has been written on this brief but eventful phase of his professional life; thus, this attempt to shed some light on it.

Magallona joined the foreign affairs department at the start of the administration of President Gloria Macapagal-Arroyo, after she assumed office following the EDSA II People Power revolt. He was appointed by the President upon the recommendation of Vice President and concurrent Secretary of Foreign Affairs Teofisto Guingona. His portfolio was that dealing with migrant workers policy and concerns. In this capacity, he initiated a number of programs to protect the rights and promote the welfare and empowerment of overseas Filipinos, notably workers, including making available to them affordable savings bonds, and he visited overseas Filipino communities, including in Japan, together with Guingona.

Preserving rights over Sabah. His entry to the DFA came at a propitious time, as pending before the ICJ was the territorial dispute between Malaysia and Indonesia over Pulau Ligitan and Pulau Sipadan, and oral deliberations were about to start. With the Philippine claim over certain parts of North Borneo (Sabah) remaining unresolved, there was a need to protect and preserve the country's legal rights and interests in the territory, and the task of requesting the Court to allow the Philippines to intervene in the case was entrusted to Undersecretary Magallona. He teamed up with Professor W. Michael Reisman of Yale University Law School, and together they appeared before the Court in June 2000 and argued the Philippines' case.

The ICJ decided not to allow the requested intervention, but in reassuring words, the Court stated that the Philippine claim "could not be affected by the Court's reasoning or interpretation of treaties involving Pulau Ligitan and Pulau

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[1] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8 July 1996. The Philippine Statement is reprinted in Merlin Magallona, Problems and Prospects in International Law (University of the Philippines Law Complex, 2019), pp. 236-250.

Sipadan" and that it "remains cognizant of the positions stated before it by Indonesia, Malaysia and the Philippines."[2]

In reaction to the ICJ ruling, the DFA under Magallona's direction issued a statement that *"our objective was to protect the integrity of our historic title to Sabah. We have achieved that objective even if we were not allowed to intervene. So inspite of appearances, the decision of the International Court is good news for us."*[3]

His portfolio at the DFA did not include being head of its Treaties and Legal Affairs office, nor as its Legal Adviser, which was once held by Jorge Coquia during the time of Secretary Raul Manglapus in the late eighties, Eduardo Quintero in the fifties and a young Diosdado Macapagal in the late forties. Just the same, Magallona was constantly at the side of and had the ear of Guingona on issues that matter, legal or otherwise.

Doing proper in PH-US security relations. The most critical issue at that time – right after the 9-11 attacks in New York and the Pentagon – was the U.S.-led War on Terror in Afghanistan and by extension, Mindanao, and the larger frame of Philippine-U.S. security relations.

With Guingona's emphasis on an independent foreign policy and Magallona's well-known views on American imperialism, they expressed their reservations about the plans for military exercises to be conducted in Basilan and Sulu by Philippine military units alongside elements of the U.S. Special Forces. President Macapagal-Arroyo was for the exercises, so the two could only insist that if the "training exercises" dubbed "Balikatan Exercises 02-1" were to be undertaken, these should be within the parameters and limits of the Constitution.

A four-person panel composed of Guingona (as head), Magallona, Ambassador Minerva Falcon, and Department of Justice Special Counsel Ricardo Nepomuceno met with a U.S. panel led by Assistant Secretary of State James Kelly

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2 Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) in A. Suzette Suarez, ed., The Philippine Claim to a Portion of North Borneo: Materials and Documents, (Quezon City: University of the Philippines Law Center, 2003), p. 402.

3 DFA Press Release, "International Court Denies Philippine Intervention, But Assure RP on Sabah," October 2001.

to hammer out the Terms of Reference (TOR) for the exercises. The negotiation was "not an easy task," noted Guingona in his memoirs, *"Fight for the Filipino."*[4]

The TOR placed a cap on participating U.S. military personnel at 660 and limited the duration of the exercises to six months. The operations would also be under the overall command of the Chief of Staff of the Philippine Armed Forces. As noted by the Supreme Court of the Philippines in *Lim v. Executive Secretary*,[5] the TOR made clear that while U.S. forces could conduct joint exercises with Filipino soldiers, they were not to engage in direct combat but only in combat-related support.

Even after two decades, the above Terms of Reference have remained the guiding parameters for the Philippine armed forces when engaging with U.S. and other visiting friendly forces.

There were other issues where Guingona and Magallona took a principled stance, including on the IMPSA power plant deal, which didn't sit well with the President. Reflecting on their positions on certain U.S. security matters, Guingona wrote in his memoirs, *"I had the feeling that she was miffed, but Merlin told me on the way home that what we did is proper."*[6]

Soon after, in July 2002, Guingona and Magallona tendered their resignations as Secretary of Foreign Affairs and Undersecretary, respectively. Guingona stayed on as Vice President until the end of his term in June 2004.

Present at key crossroads. Issues pertaining to the Sabah claim and PH-US security relations, among others, reverberate to this day. These illustrate the tug-and-pull between law and policy, between legal mandates and foreign policy objectives, and from this often contentious process emerges the actual conduct of foreign policy.

The commentator Edward Corwin, reflecting on the U.S. experience, noted that "the Constitution, considered only for its affirmative grants of power capable of affecting the issue(s) is an invitation to struggle (between the President, the

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4 Guingona, Tito, Fight for the Filipino (Academic Publishing Corporation, 2008), p. 264.

5 Lim v. Executive Secretary, G.R. No. 151445.

6 Guingona, p. 265.

Congress, and the people) for the privilege of directing foreign policy."[7] This tussle between law and policy considerations also reflects the situation in the Philippines.

Magallona was present at and enriched the debates on many Philippines' crossroad issues. His exemplary pedagogy and prolific scholarship on diverse fields, notably on the constitution, human rights, the national territory, the law of the sea, and treaty law, have provided illumination on these subjects as well as on many issues the country has faced through the years.

Some may not share his views and politics, but perhaps none can rightly question his sincerity or integrity when he expressed them. Magallona's life's works are an affirmation that the best course for the country and people is that which is faithful to the Constitution.

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[7] Edward Corwin, The President: Office and Powers 1787-1957 171 (4th ed., 1957).

A LEGACY BEYOND WORDS: DEAN MERLIN M. MAGALLONA, A GUIDING LIGHT IN LAW AND LIFE

Lowell Bautista

As I sit to write this tribute, my heart is awash with a profound sense of gratitude and loss, reflecting on the monumental legacy of Dean Merlin M. Magallona. In the tapestry of Philippine law and its global interactions, he stood towering, his intellect and spirit not just shaping the contours of international law scholarship but also profoundly impacting the lives of those fortunate enough to have been his students and colleagues. Dean Magallona was an academic titan, a patriot, and a visionary scholar, deeply committed to advancing our nation's standing in the international arena. His extensive body of work, encompassing a wide range of books, papers, and publications were not just acts of academic pursuit but expressions of his profound love for our country and its place in the international community. Furthermore, his passionate defense of Philippine sovereignty and territorial integrity, a recurring theme in his work, showcased his deep love for our country and its people. To speak of him is to recall a legacy of excellence, patriotism, and an unforgettable impact on both the minds and hearts he touched, leaving a lasting imprint on our national identity and the broader landscape of legal scholarship.

My personal journey with Dean Magallona commenced at the Institute of International Legal Studies of the University of the Philippines Law Center, where he served as Director. His imposing presence was unmistakable, yet it was his genuine warmth and approachability that truly distinguished him. As a young law student, I was initially intimidated by his stature, worried he might be a demanding boss. However, these fears quickly dissolved as I came to know his kind and mild-mannered nature. Even his work assignments —often penned in his elegant, old-fashioned cursive on small white notepads and left on my desk or occasionally passed along by our administrative staff—felt more like gentle requests than commands. These tasks frequently involved retrieving journal articles or books on obscure topics from the library, the reasons for which he intriguingly kept to himself. I was awestruck by his ability to demystify complex legal principles, making them accessible and compelling. In the quiet sanctuary of

his office, I encountered insights and stories that transcended the confines of standard classroom learning. In the presence of his towering intellect, I felt both humbled and inspired, as the seeds of my future aspirations were nurtured under his thoughtful guidance.

I vividly recall the assignments he entrusted to me as his Graduate Assistant when I was still a sophomore law student. In 2001, I had the invaluable opportunity to engage in discussions regarding the Philippines' intervention in the ICJ case concerning Pulau Ligitan and Pulau Sipadan. He was a fervent advocate of the Philippine claim over Sabah. These discussions not only shaped my understanding of international legal processes but also deepened my appreciation for Dean Magallona's strategic thinking and his meticulous approach to legal scholarship. Three years later, in 2004, another pivotal experience unfolded when Dean Magallona was appointed as amicus curiae by the Supreme Court during the highly contentious Fernando Poe citizenship case. The case exposed me to the complexities and high stakes of constitutional law. My formative experiences under his mentorship have deeply shaped my understanding and approach to both domestic and international legal challenges. His profound mastery of the law of the sea captivated my intellectual curiosity and ignited my passion for this intricate area of public international law. I came to deeply appreciate and love this challenging field, which now forms the core of my academic and professional focus, a testament to his significant and enduring impact on my career.

Dean Magallona was also my professor in both Public and Private International Law at the University of the Philippines College of Law, where I completed my law degree. He demonstrated an exceptional breadth of knowledge and a palpable passion for teaching. However, it was in the domain of the law of the sea that his enthusiasm truly shone through. He cherished this aspect of public international law above others, something that became vividly clear to all of us students. For weeks, we immersed ourselves in the detailed study of the North Sea Continental Shelf and Fisheries cases at the ICJ. I distinctly remember one afternoon when Dean Magallona animatedly illustrated the intricate contours of the Norwegian coast and carefully delineated the various maritime zones on the blackboard, his eyes lighting up with each stroke of chalk as he explained the principles of maritime boundaries and the respective rights and obligations of states under the Convention. It was during these engaging sessions that the law became more than text to me; it pulsed with life.

Further embedding these lessons into our minds, he tasked us with a uniquely rigorous assignment: to outline and summarize the entire Law of the Sea Convention in our own handwriting. This exercise was more than just academic rigor; it was a ritual in precision that brought us closer to the text and its implications. Through these experiences, Dean Magallona did not merely teach me the law; he instilled in me a lasting reverence for the governance of the world's oceans. His dedication not only enriched my understanding but also inspired me to view the law not just as a profession but as a vital force in shaping global justice.

Dean Magallona possessed a unique blend of humour and intellect; his jokes, often layered with legal nuances, required a sharp wit to fully appreciate. I remember laughing heartily alongside him at his clever quips during our discussions on the Treaty of Paris, which were as enlightening as they were enjoyable. His unusual and distinct accent added a memorable cadence to these interactions, making every conversation not just a learning opportunity but a cherished moment. Dean Magallona had a unique way of infusing humour and wisdom into his lectures and teachings. It was in these moments, light-hearted yet profoundly educational, that I came to truly appreciate the depth of his character.

His elegance was not confined to his intellect but was also reflected in his personal style—most notably, his beautiful cursive handwriting and the ever-present Montblanc fountain pen clipped to his shirt pocket. These details, seemingly minor, were emblematic of the man—a scholar of the first order, precise and deliberate in every action.

Dean Magallona's support extended far beyond the classroom. He was instrumental in shaping my academic and professional trajectory, offering guidance and encouragement at every turn. His belief in my potential was unwavering, a fact made evident through the glowing letters of recommendation he wrote for my scholarship applications to the Rhodes Academy, as well as for my LLM and PhD studies. These were not mere formal endorsements but heartfelt attestations of his faith in my abilities and his sincere desire to see me succeed.

Under his mentorship, I learned that greatness is not merely a function of intellect but is deeply rooted in living with humility, integrity, and a commitment

to excellence. Dean Magallona embodied these virtues, demonstrating through his actions that true success is achieved not by standing above others but by lifting

them. He inspired me to aspire not just for professional accolades but to make meaningful contributions to society and to uphold the highest ethical standards in both my personal and professional life.

As we bid farewell to Dean Magallona, the void left by his passing is immense, yet his teachings and the memories we shared continue to light the way for those who follow. In remembering him, we do not just pay homage to a remarkable educator and scholar; we celebrate a life richly lived, dedicated to the betterment of others and the pursuit of justice on both a national and global scale. As a scholar and academic, I owe an immense debt of gratitude to him. His life and work continue to inspire my own teaching and scholarly endeavors.

In his memory, we are called to continue the work he so passionately advanced, carrying forward the torch of knowledge, integrity, and patriotism. Dean Merlin M. Magallona was more than a mentor; he was a guiding light, whose legacy of kindness, intellectual rigor, and unwavering support has inspired us to strive for a world that is more just, equitable, and compassionate. To have been under his guidance, to have learned from him, is an honour that I, along with many others, will forever hold dear. As we look ahead, guided by his wisdom and inspired by his example, we carry on his legacy with pride and gratitude.

Rest in peace, Dean Merlin M. Magallona. Your legacy is monumental, and your memory will forever be a source of inspiration and guidance as we continue to navigate the vast seas of law and life with the map you have provided us. Your influence endures, lighting our paths toward greatness, humility, and integrity in the pursuit of knowledge and justice.

WORK BEFORE THE INTERNATIONAL COURT OF JUSTICE

SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA/MALAYSIA)

In the determination of sovereignty over the contentious areas of Pulau Ligitan and Pulau Sipadan, the Philippine government sought to intervene in the proceedings at the International Court of Justice (ICJ) to preserve and safeguard the nation's rights over the territory of North Borneo.

Indispensable to this cause was Dean Merlin M. Magallona, who represented the Philippines as its agent in the oral arguments before the ICJ. In his testimony, he focused on two main issues: the historical and continuing claim of the nation to North Borneo; and the relevant treaties, agreements, and other documents applicable to these contested areas.

In 1962, cession of certain areas in Borneo was granted by the Sultanate of Sulu to the Government of the Philippines, allowing the latter ownership and free reign over the territory. In its arguments, the Philippine delegation veered away from these facts and put greater focus on the proposition that Great Britain's arrogation of sovereignty over this area was illegal and improper. In particular, the "Sulu-Overbeck Agreement" was created, which granted or leased certain areas in the North Borneo territory to Austrian and English businessmen. This was the first of many transactions that allowed other State and non-State entities to use and exercise sovereignty over this foreign land.

Ultimately, the Philippines concluded that, despite the breadth of historical documents granting this power over these territories, the Sultan of Sulu still enjoyed de jure continuous and uninterrupted sovereignty over the lands leased. Based on this reasoning, any subsequent agreement that granted such use of the land to any other entity had no basis at all in history and law.

However, despite the compelling arguments and comprehensive historical background offered by the Philippines, the ICJ rejected its applications for intervention. Although this was unsuccessful, Magallona and the delegation were able to effectively bring this issue onto an international stage and introduce the Philippine claim over the area into the consciousness of these international organizations. His work on the matter continues to be pivotal to the country's claim to the territories of Sabah and North Borneo today, and may serve as a basis for possible action in an international forum in the future.

ICJ OPINION ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Given the proliferation and growing threat caused by nuclear weapons, the Secretary-General of the United Nations (UN) officially communicated a need to resolve the permissibility of such weapons under international law. With this, several member States were requested to give their advisory opinions and participate in the oral arguments before the ICJ. One such participating state was the Republic of the Philippines, whose delegation sent Dean Magallona as counsel to speak on the nation's behalf during the oral proceedings.

He expounded on the Philippines' unwavering stance that the threat or use of nuclear weapons in any circumstance should be considered impermissible under international law. It is due to the nature of this type of weapon that such different treatment is required. Nuclear weapons are radically different from conventional weapons, millions of times more powerful than its standard counterparts. If states allow such permissive treatment in its use, it would unfairly target noncombatants or could even put an end to human civilization as we know it.

He argued that as the prohibition on the use of force constitutes general international law of jus cogens character, it should necessarily embrace all forms and gravity of the threat or use of armed force of States. Following this, it would be absurd to exclude the most threatening or destructive weapon of all from its ambit and allow for derogation. It is considered a customary norm of international law, which requires all states to follow the obligation not to use force.

Although the ICJ could not definitively conclude on whether or not the threat or use of such weapons would be unlawful in its final opinion, the Philippines' stance on the matter was helpful on the matter. This particular ICJ opinion continues to be the foremost legal source on the issue of nuclear weapons in the international sphere. Dean Magallona's contribution to the Philippine position and his arguments on the matter remain timely, and still hold water given the current political climate on the international stage.

EVENTS

Philippine Society of International Law

On September 6–7, 2018, the Philippine Society of International Law (PSIL) held its inaugural National Conference in honor of Professor Merlin M. Magallona, former Dean of the University of the Philippines (UP) College of Law and a pillar of the international legal academy in the Philippines.[1] Themed "The Philippines and the Dynamics of International Law in a Time of Transition", the conference was a platform for discussion on human rights, territorial disputes, regional maritime security, international trade law, and armed conflict, among many others.[2] Scholars from Australia, the Czech Republic, Hong Kong, India, Indonesia, Malaysia, Singapore, and various regions of the Philippines were in attendance.[3]

As an educator and author, Professor Magallona shaped the minds of generations of students and expanded scholarship on international law. To celebrate Professor Magallona's legacy, academics, judges, researchers, postgraduate students, lawyers, and law students were invited to submit papers under the theme. With the selected papers, the PSIL created a *festschrift*[4]—a volume of writings presented as a tribute to a scholar.[5]

Notably, on September 6, the PSIL also hosted a Cocktail and Dinner Reception after the Conference proper at the Espiritu Hall, the Library of the University of the Philippines. Prof. Rommel Casis, Ambassador J. Eduardo Malaya,

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1 Philippine Society of International Law (2018) *National Conference 2018, Philippine Society of International Law.* Available at: https://philsocietyinterlaw.wordpress.com/psil-national-conference-2018/ (Accessed: 09 June 2025).

2 Institute of International Legal Studies (2020) PH International Law Society holds inaugural conference, cites relevance of international law, UP College of Law. Available at: https://law.upd.edu.ph/IILS/pages/ph-international-law-society-holds-inaugural-conference-cites-relevance-of-international-law/ (Accessed: 09 June 2025).

3 Department of Foreign Affairs (2018) PH International Law Society's Conference to Tackle Wide-Ranging Issues, Department of Foreign Affairs. Available at: https://dfa.gov.ph/dfa-news/dfa-releasesupdate/17751-ph-international-law-society-s-conference-to-tackle-wide-ranging-issues (Accessed: 09 June 2025).

4 Philippine Society of International Law, *supra* note 1a.

5 Merriam-Webster (2025) Festschrift definition & meaning, Merriam-Webster. Available at: https://www.merriam-webster.com/dictionary/Festschrift (Accessed: 09 June 2025).

and Hon. Justice Francis H. Jardeleza delivered testimonial speeches.[6] Ambassador Malaya highlighted Professor Magallona's contributions as a diplomat. As the undersecretary of the Department of Foreign Affairs from 2001–2002, Professor Magallona empowered overseas Filipino workers through various initiatives, preserved the Philippines' rights over Sabah by appearing before the International Court of Justice, and handled Philippines-United States (U.S.) relations by establishing guidelines in engagements between the Philippine Armed Forces and U.S. Relations, among many others.[7]

Through the event, the PSIL gave a well-deserved and fitting recognition to the significant impact of Professor Magallona's work as a professor and scholar on international law in the Philippines.

[6] Philippine Society of International Law (2022) Philippine Society of International Law, Facebook. Available at: https://www.facebook.com/PhilSocietyInterLaw/posts/pfbid02F62XrLEcmxZUTRaQTRmL18Kn2aFP5caFReuuNUwCa34SKSNP579p4LqyQse6MBRFl?rdid=bRCUPVmztT93MIXN# (Accessed: 09 June 2025).

[7] Malaya, A.J.E. (2018) Facebook. Available at: https://www.facebook.com/share/p/1C9vUuAu5K/ (Accessed: 09 June 2025).

Hidden in Plain Sight: International Law and Marxist Praxis in the Life and Works of Merlin M. Magallona

In the article entitled *Hidden in Plain Sight: International Law and Marxist Praxis in the Life and Works of Merlin M. Magallona* published in the Asian Journal of International Law (AsianJIL), Dr Jose Duké Bagulaya and Romel Bagares explore the Marxist foundations of Professor Merlin Magallona's international legal thought, situating them within the broader trajectory of Third World Marxist praxis. Drawing from the scholar's life as a long-time cadre and General Secretary of the Partido Komunista ng Pilipinas (PKP-1930), the study surveys Magallona's legal writings and political interventions. Bagulaya and Bagares' article was published after the death of Professor Magallona.

The abstract of the article is reproduced here:

Through symptomatic reading, we analyze the visible and the invisible – the explicit and the implicit – in the works of Filipino international legal scholar Merlin Magallona (1934–2022). We argue that Magallona's international legal thought was rooted in Marxist theory and practice and honed through the mode of production debates in the Philippine communist movement during the 1960s. Specifically, he developed a critique of the neocolonial division of labour and produced a materialist reading of international legal doctrines through "Postcolonial Self- Determination" – a synthesis of the antinomy of positivism and self-determination. In practice, his Third World Marxism led him to support the NIEO and resist UNCLOS through constitutional litigation based on the imperialist Treaty of Paris of 1898. Magallona's critique and praxis suggest new forms of resistance to the new imperialisms and underscore the imperative of a practice turn in Marxist international legal theory.[1]

[1] José Duke Bagulaya & Romel Regalado Bagares, *Hidden in Plain Sight: International Law and Marxist Praxis in the Life and Works of Merlin M. Magallona,* 14(2) ASIANJIL, 235–267 (2023).

EULOGIES

OPENING REMARKS

Chancellor Edgardo Carlo L. Vistan II

Chancellor Edgardo Carlo L. Vistan opened the memorial, expressing deep condolences to the Magallona family and a warm acknowledgment of guests in attendance, including justices, deans, and faculty members of the UP College of Law.

Chancellor Vistan shared personal memories of Dean Merlin Magallona—known to students as "Dean Maggie"—recalling his sharp intellect, gruff yet endearing demeanor, and even his humor, which often surfaced in unexpected ways. He fondly narrated friendly exchanges with the late Dean, who always responded with a characteristic wit that made him all the more unforgettable.

Beyond personal anecdotes, Chancellor Vistan underscored what truly set Dean Magallona apart—his relentless activism in shaping legal institutions, both in the Philippines and beyond. Dean Magallona was not just a brilliant thinker; he acted on his understanding of the law's power to shape societies. And that, Vistan emphasized, is the greatest lesson Dean Magallona left behind.

As he bid farewell, Chancellor Vistan made a commitment not just to remember Dean Magallona, but to ensure that the institution he left behind, and the lawyers it produces, continue to reflect his legacy. "This is the least we could do," he said, as a final tribute to a man who gave so much to the law and to those who follow in his footsteps.

Judge Raul C. Pangalangan

Judge Raul C. Pangalangan recognized his intellectual debt to Dean Merlin Magallona, his very first teacher in International Law, the discipline which he now teaches and in which he has worked professionally as a lawyer. Judge Pangalangan paid homage to him as both a mentor and an "intellectual comrade." He had long hoped to present Dean Magallona with a copy of his book, *Philippine Materials in International Law,* that extensively cited Magallona's work, but alas, the book didn't come out of the press soon enough.

Judge Pangalangan highlighted a facet of Dean Magallona's career that must not be overlooked—his life as an activist. Judge Pangalangan described how the late Dean championed radical legal thought at a time when doing so carried real risks, especially at the height of McCarthyist paranoia. While the idea of public interest lawyering is today widely accepted, Dean Magallona embodied that ideal when it was way outside the mainstream of Philippine legal education. Dean Magallona advanced new perspectives in International Law, reflecting the needs of newly independent states and former colonies.

Judge Pangalangan acknowledged the personal sacrifices Magallona made—both within and outside of the law—to remain true to his beliefs. He conveyed to the Magallona family his wish that the late Dean's teachings and legacy would be remembered by future generations of UP Law students.

U.P. President Danilo L. Concepcion

UP President Danilo Concepcion paid tribute to Dean Merlin Magallona by describing him as a pillar of the legal profession, a cornerstone of UP Law, and a great Filipino. He recalled his time as Magallona's student, struggling through the professor's rigorous readings and analysis as an engineering graduate. Though feared as a "terror professor," Dean Magallona was known for his fairness, brilliance, and unwavering commitment to legal education.

As colleagues, Concepcion saw a more personal side of Magallona—one who valued camaraderie, shared intellectual discussions, and moments of friendship. Their work together in legal missions to Tokyo and at the Department of Foreign Affairs deepened their professional and personal bond. Dean Magallona also played a key role in shaping President Concepcion's leadership at UP Law, encouraging him to take on greater responsibilities within the college.

President Concepcion also shared how, before his passing, Magallona outlined his vision for a strategic center and a school of international diplomacy. During the tribute, President Concepcion made assurances that both projects are in progress, even expanded to include a National Institute for National Security and Public Safety.

He closed with a heartfelt farewell, imagining Magallona smiling from wherever he is, knowing that his work continues.

Senior Associate Justice Marvic M.V.F. Leonen

In Senior Associate Justice Marvic Leonen's tribute to Dean Magallona, he called the latter a "beloved mentor" who profoundly shaped his intellectual and professional journey. He shared fond memories, including Magallona's mischievous grin and unwavering support throughout his career—from his student days, through his time as a young academic, and even until his service as Supreme Court justice.

Justice Leonen narrated how Magallona introduced him to critical legal perspectives, Marxist legal thought, and the broader intellectual traditions that would influence his approach to law. Dean Magallona's teachings, according to Justice Leonen, helped redefine public interest legal practice and inspired his later work, including his role as a lead negotiator for the Moro Islamic Liberation Front.

He highlighted Dean Magallona's final arguments before the Supreme Court on legal education reform, an appearance that left an indelible mark. Justice Leonen credited Dean Magallona with shaping his concern for historical authenticity in jurisprudence and his commitment to reading law in light of contemporary realities.

Ending on a deeply personal note, Justice Leonen honored Dean Magallona's legacy by promising to continue working toward a legal culture that is not just about the rule of law, but about just law: *"Rest in peace, Dean. Your task is done. You have fought a good fight. We will try to do what you have dreamed of doing."*

Former U.P. President Francisco Nemenzo, Jr.

Former UP President Francisco Nemenzo, Jr., remembered Dean Merlin Magallona as both a scholar and a leader, but also hinted at their shared time in the political movement. Professor Nemenzo highlighted their days as students, when Dean Magallona was president of a newly formed organization that provided an alternative to traditional Greek societies. The group attracted provincial students, free-thinkers, and iconoclasts who questioned everything—from religion to UP's own traditions.

Under Magallona's leadership, their group stood out for their focus on social issues, engaging with real-world struggles beyond campus politics. He initiated a convocation featuring a barrio captain from Bulacan to shed light on peasant life—an early sign of his deep commitment to justice. He also launched *Grassroots*, a journal on social issues, though in reality, most of its content came from one prolific editor, Perfecto Fernandez, with other members' names simply used as bylines.

Nemenzo's tribute ultimately emphasized Magallona's early intellectual curiosity, leadership, and ability to challenge elitist norms—qualities that would define his lifelong career in law and public service.

Dean Pacifico Agabin

Dean Pacifico Agabin honored Dean Merlin Magallona as a patriot, scholar, teacher, advocate, and leader whose influence extended far beyond the halls of the UP College of Law.

He described Dean Magallona as a steadfast defender of Philippine sovereignty, constantly warning against the adverse effects of international institutions like the World Bank and the IMF on national governance, democracy, and economic independence. Magallona's scholarly work in international law, particularly on military bases and nuclear weapons, demonstrated his deep understanding of economic imperialism and global power dynamics.

As an educator, Magallona shaped multiple generations of students, instilling in them a critical and nationalist perspective on the law. He was also a powerful legal advocate—arguing cases at the International War Crimes Tribunal in Tokyo and the International Court of Justice while never losing sight of the struggles of workers and landless tenants.

Dean Agabin recalled Magallona's efficiency as an administrator, especially when he served as Associate Dean, helping run both the College and the Law Complex. Though he will be missed, Agabin imagined Dean Magallona as a watchful presence—like Zeus himself—whose writings will continue to challenge and inspire future generations.

Professor Elizabeth Aguiling-Pangalangan

Professor Elizabeth Aguiling-Pangalangan reflected on her long-standing connection with Dean Magallona, both professionally and personally. She recalls first encountering him during her law school admission interview, where he sat alongside two other formidable professors. While the others grilled her with questions, Dean Magallona seemed content to observe, offering her a small reprieve during the intense process—an early sign of the kindness that accompanied his intellect.

Their relationship deepened over the years as they became colleagues, working closely on major international law initiatives. They collaborated in organizing the Asian Society of International Law (AsianSIL) Biennial Conference, where she led the academic committee, selecting papers for presentation. They also worked on the *Philippine Yearbook of International Law*, where she witnessed not just Dean Magallona's vast expertise but also his sharp wit and tireless dedication to the field.

Professor Aguiling-Pangalangan recounted her last interaction with the late Dean—delivering a gift to his home during the pandemic, where he greeted them with his usual energy and warmth. His passing was unexpected, but she took comfort in knowing he had lived a full life, leaving behind a legacy deeply respected by students, colleagues, and the broader international legal community.

Prof. Patricia Rosalind Salvador-Daway

Professor Patricia Rosalind Salvador Daway delivered a deeply personal tribute to Dean Merlin Magallona, reflecting on his brilliance, activism, and unwavering commitment to scholarship and public service. She first encountered him as a young student during the height of campus activism, where he passionately introduced historical materialism and critical perspectives on capitalism. Later, as a law student, she had the privilege of learning directly from him, a relationship that would evolve into years of collaboration at UP Law.

She recalled how Magallona, as Dean, trusted her to serve as College Secretary and valued her insights on institutional matters. His leadership was marked by respect, fairness, and dedication to the faculty and staff. Even while administering the college, he remained a relentless scholar, continuing to teach, write, and shape legal discourse.

Dean Magallona's commitment to migrant workers' rights left a lasting impact. As DFA Undersecretary, he encouraged overseas Filipino workers (OFWs) in Tokyo to organize for empowerment, earning their admiration and respect. Despite his stature, he was approachable, hosting discussions in his home with his wife, Tita Miriam, a strong and witty partner whom Professor Daway saw as Magallona's perfect match.

In one of their last conversations, Magallona excitedly spoke about his vision for an Institute for Diplomacy and upcoming projects—never hinting at any decline in health. Professor Daway saw him as always intellectually engaged, ready for the next challenge. She closed with gratitude for his life and mentorship, offering prayers and a final farewell.

Atty. Joan De Venecia-Fabul

Atty. Joan De Venecia-Fabul paid tribute to Dean Magallona as the person who shaped her legal and teaching career. She first met him in 2004 as her professor in Public International Law, a class she thoroughly enjoyed—even if many of her classmates found his way of speaking cryptic. To her, his brilliance and humor were unmistakable, often revealing his deep conviction that the Philippines should remain independent from foreign influence. Dean Magallona played a pivotal role in her academic journey, encouraging her to try out for the Jessup Moot Court and later pursue an LL.M. through a Fulbright Scholarship. She credited his recommendation letter as the key to her acceptance at NYU, a moment that changed the course of her career for the better.

In 2015, when she joined the UP Law faculty, Magallona was among the first to welcome her, calling her "Professor" with his characteristic warmth. According to Atty. De Venecia's belief in her and in so many of his students left a lasting impact. She expressed her deep gratitude to him—not just for his mentorship but for his immeasurable contributions to Philippine foreign policy and international law.

Atty. Tanya Lat

Atty. Tanya Lat reflected on Dean Magallona's profound impact as a mentor, professor, coach, and intellectual guide. She recalled how, as a law student, she and her batchmates admired his brilliance, even as his way of teaching often left others struggling to keep up. Despite his reputation as a "terror professor," he was always kind, patient, and humorous—never instilling fear, but inspiring excellence.

Her connection with Dean Magallona deepened when she joined the Jessup Moot Court team, where he trained students late into the night, challenging them to be precise and principled in their arguments. His influence extended beyond international law—he had a revolutionary vision for a National Moot Court Competition simulating Philippine Supreme Court proceedings, which she helped bring to life under his guidance.

Dean Magallona was more than a teacher—he was a mentor who opened doors for his students, taking her under his wing and introducing her to justices and legal luminaries, exposing her to the highest levels of legal practice. Even as she moved on to teach elsewhere, she continued to emphasize his teachings in her legal profession classes, ensuring that his philosophy of law as both a responsibility and a tool for transformation lived on.

Atty. Lat also spoke of Magallona's warmth and generosity outside of academia. Despite his towering intellect, he remained down-to-earth, approachable, and genuine—a man whose ideas were far ahead of his time but whose kindness made him unforgettable.

She ended with deep gratitude, recognizing the enormity of the legacy he left behind. No one could fully replace him, she admitted, but through the many students and colleagues he inspired, his influence would continue. As she bid him farewell, she hoped he would find peace, reunited with his beloved wife.

Dr. Suzette V. Suarez

Speaking from Germany, Dr. Suzette Suarez, shared her memories of Dean Magallona, describing an image that had stayed with her—Magallona's smiling, laughing eyes, reflecting the love and appreciation of countless Filipinos whose lives he had touched. His academic brilliance, humor, generosity, and kindness left a lasting imprint not only on the College of Law's community but on everyone who had the privilege of working with him.

Although she was not his student, Dr. Suarez had the rare opportunity to work closely with him. Their work together was marked by urgency, especially in preparing the Philippines' claim for the extended continental shelf under UNCLOS. She recalled their presentations before the Senate, Congress, and even the President's Cabinet, advocating for the establishment of a technical and scientific team to secure the country's maritime entitlements.

One of her most unforgettable experiences with Magallona was accompanying him on what she believed to be his first—and possibly only—visit to Scarborough Shoal. Alongside other experts, they took in the significance of the moment and even swam in its pristine waters, an adventure now captured only in hazy photographs.

Even after she moved to Germany to work at the International Tribunal for the Law of the Sea and pursue her doctoral studies, they kept in touch through conversations spanning Philippine territorial issues, the UNCLOS, and his dreams for the country, but also touched on family—an aspect of his life that he cherished deeply.

Dr. Suarez expressed her condolences to Magallona's family, thanking them for sharing him with the world. She joined the many whose lives and careers he had influenced, promising to carry his legacy forward.

Dr. Peter Payoyo, delivered by Asst. Prof. Andre Palacios

Dr. Peter Payoyo's tribute, read by Asst. Prof. Andre "Raj" Palacios captured their experience of being a student of Dean Magallona. Payoyo's tribute described Magallona's teaching style as "legendary"—rigorous, enigmatic, and designed to push students beyond their intellectual limits. For those who had him as a professor, learning under his guidance was both a trial by ordeal and an enduring mark of distinction.

Payoyo reflected on Magallona's signature approach: a pedagogic method of "shock and awe" that had little to do with simply passing the bar and everything to do with unraveling the mysteries of the law. His courses were an academic gauntlet. Surviving his dense syllabi and reading lists, deciphering his lectures, and enduring his relentless questioning in class felt akin to an Arthurian knight seeking wisdom from Merlin himself.

The ultimate test, Payoyo recalled, was Magallona's final exams—a daunting yet almost poetic experience. Sitting for his exams was less about regurgitating legal concepts and more about grappling with the sheer depth of the subject. Many students found themselves staring blankly into the acacia trees of the sunken garden, lost in thought, as if trying to seize and make sense of an ephemeral burst of brilliance.

Despite the rigor, Payoyo emphasized that Magallona's teaching was a gift—one that instilled a lifelong appreciation for intellectual excellence. His commitment to legal education was unwavering, leaving an indelible mark on those fortunate enough to learn from him. Payoyo closed by expressing his eternal gratitude, honoring Magallona not just as a mentor, but as the Magi whose wisdom and legacy must be celebrated for generations to come.

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