



3-2018

# The Breakdown of International Treaties

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## Recommended Citation

93 Notre Dame L. Rev. 1173 (2018)

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# THE BREAKDOWN OF INTERNATIONAL TREATIES

*Jide Nzelibe\**

“[A] cause seldom triumphs unless somebody’s personal interest is bound up with it.”<sup>1</sup>

*In the past few years, we have witnessed a rise in antiglobalization sentiment in which certain treaties have succumbed to domestic political backlash. But why are particular treaties susceptible to breakdown while others tend to be more resilient? Paradoxically, this Article argues that the fragility of treaties follows a peculiar logic: treaties are most vulnerable to breakdown or withdrawal if they were originally negotiated in the absence of social conflict among domestic groups. The reason is that, having been negotiated and ratified with hardly any political struggle, consensus treaties often lack the support of battle-hardened special interest groups who are willing and able to defend such treaties against downstream political threats. This Article uses the contemporary backlash against both bilateral investment treaties and the Rome Statute establishing the International Criminal Court to illustrate the vulnerability of consensus treaties. By contrast, treaties negotiated amid intense political disagreement, such as the WTO/GATT framework governing international trade, have exhibited remarkable resilience over time. On a more speculative note, both the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) were likely rendered politically fragile by the first generation of consensus investment treaties entered into by the United States. Finally, this Article concludes by recommending measures to counteract the tendency of consensus treaties to collapse by making them more politically sustainable.*

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\* Professor, Northwestern Pritzker School of Law. I am grateful to Melissa Durkee and Sonia Rolland for detailed suggestions on an earlier draft of this paper. For useful comments I thank Laura Appleman, David Restrepo Amariles, Perry Bechky, Chris Brummer, Steve Calabresi, Steve Charnovitz, Peter DiCola, Marija Dordeska, David Friedman, Ezra Friedman, Aziz Huq, Tonja Jacobi, Neha Jain, Joshua Kleinfeld, Jonathan Koehler, Andrew Koppelman, Pierre LaRouche, Brian McGarry, Stephen Meili, Timothy Meyer, Peter Molk, Fred Morrison, James Nafziger, Ruth Okediji, Laura Pedraza-Fariña, James Pfander, Jeremy Rabkin, Darren Rosenblum, Max Schanzenbach, Aaron Simowitz, Gwynne Skinner, Richard Stewart, Symeon Symeonides, Samuel Tenenbaum, Deborah Tuerkheimer, and participants at the Northwestern Pritzker Law School Faculty Workshop, University of Minnesota International Law Workshop, Willamette University Law School Workshop, the 2017 Law and Society Workshop in Mexico City, the 2016 American Society of International Law Annual Research Forum at the University of Washington, and the ASIL International Economic Law Interest Group’s Biennial Conference at Georgetown Law School. Thanks also to David Lurie and Jaya Bajaj for excellent research assistance.

1 JOHN STUART MILL ON THE PROTECTION OF INFANT INDUSTRIES 16 (Cobden Club Publ’ns 1911).

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## INTRODUCTION

In both negotiating and enforcing international treaties, the appearance of consensus is widely considered a virtue. It is commonly thought that treaties that enjoy overwhelming domestic and international support will be subject to a lower risk of defection, appear more legitimate to voters, and be easier to enforce by international and domestic courts.<sup>2</sup> The contemporary academic discourse on constitutional design not only accepts this benign view of consensus treaties but often bolsters it: in the United States, for instance, the constitutional requirement of a supermajority under the Treaty Clause has been praised for building consensus and fostering lasting international agreements.<sup>3</sup>

The puzzle is that in real life, however, the opposite is often true. When it comes to the survival of treaties, a paradox of consensus or an inverse logic of numbers seems to prevail.<sup>4</sup> Treaties forged in the wake of intense domestic and international disagreement have often proven to be fairly sturdy and easier to enforce by judicial bodies, while those molded by overwhelming consensus have often turned out to be fragile and more easily susceptible to withdrawal or atrophy.<sup>5</sup> Take, for instance, the web of international agreements that underpin the global trading order. Historically, such agreements

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2 As relevant here, the focus of attention is on international treaties with binding and judicially enforceable commitments. See generally Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005) (discussing the various kinds of treaty commitments, including whether the agreement is binding or nonbinding, whether the agreement gives jurisdiction to any institution to monitor or enforce compliance, and to whom rights of enforcement are afforded). Even more importantly, the analysis here takes for granted that the scope of modern enforceable treaties is vast, often touching "almost every aspect of domestic civil, political, and cultural life." Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000).

3 See John O. McGinnis, *Medellín and the Future of International Delegation*, 118 YALE L.J. 1712, 1760 (2009) ("Once the Commerce Clause was gutted, it became a dead letter in the future even on matters for which there was far less support for the exercise of federal power. In contrast, a popular consensus for an international delegation is likely to translate into broad legislative support satisfying the Treaty Clause's supermajority rule."); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1282 (1995) ("[T]he American people, whether regarded collectively or as the citizens of their respective states, are similarly entitled to the safeguards provided by the Senate supermajority requirement of the Treaty Clause."). To be sure, there is a distinct strain in the literature that questions the democratic legitimacy of treaties as opposed to congressional agreements because treaties are supposedly more cumbersome to negotiate and might give a minority the power to block international agreements favored by a majority. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 810 (1995); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1312–15 (2008).

4 See *infra* Parts II & III.

5 The following analysis is conditioned on the possibility that such treaties are likely to pose unanticipated costs on domestic groups down the line, and thus there may be subsequent incentives to defect or renegotiate on different terms because of such costs.

have been marred by intense and drawn out social conflict, often pitting domestic export groups against protectionist groups.<sup>6</sup> When such agreements make it through domestic legislatures, they often pass by slim or non-substantial margins.<sup>7</sup> Nonetheless, the WTO/GATT framework for adjudicating international trade disputes is widely considered to be remarkably resilient and one of the most successful modern international legal regimes.<sup>8</sup> By contrast, international investment treaties have often sailed through domestic legislatures with overwhelming consensus and barely any political resistance.<sup>9</sup> In the modern era, however, it is these latter treaties that have been particularly subject to a rash of withdrawals, renegotiations, or significant revisions by national politicians, especially in the wake of unfavorable litigation outcomes against host states.<sup>10</sup> The recent backlash by certain

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6 See *infra* notes 81–90 and accompanying text.

7 See *infra* subsection III.A.1.

8 See Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761, 761 (2015) (“Although powerful members such as China, the European Union (EU), and the United States are regularly on the losing side of WTO trade disputes, overall support for the system remains high. If anything, it has increased over time, with early criticism by civil society waning.”); see also Gregory Shaffer et al., *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237 (2016) (observing that the authority of the WTO Appellate Body has become extensive). The WTO/GATT framework refers to the two treaties establishing the World Trade Organization and the General Agreement on Tariffs and Trade. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154. Annex 1A of the WTO Agreement largely incorporates the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

9 See *infra* subsection III.A.2.

10 See, e.g., *infra* subsection III.B.1 (discussing withdrawals from investment treaties and criticism of investment dispute resolution); see also GUS VAN HARTEN, SOLD DOWN THE YANGTZE: CANADA’S LOPSIDED INVESTMENT DEAL WITH CHINA (2015); Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 465–66 (2015) (discussing criticism and backlash against international investment treaties and investment dispute resolution); Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 315–16, 338–47 (2014) (discussing exit of states from the international investment regime); Jarrod Wong & Jason Yackee, *The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2009–2010, at 233, 235 (Karl P. Sauvant ed., 2010) (discussing reform proposal to deal with investment dispute resolution); Letter from Professor Erwin Chemerinsky, Dean of the Sch. of Law, Univ. of Cal., Irvine, et al., to Senator Mitch McConnell et al. (Mar. 11, 2015) (letter to United States congressional leaders signed by nearly 100 law and policy professors criticizing investment dispute resolution). For a discussion of current reform efforts, see submissions in *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, TRANSNAT'L DISP. MGMT., <http://www.transnational-dispute-management.com/journal-browser-issues-toc.asp?key=52> (last visited December 20, 2017). More broadly, outside of investment, some commentators have observed the vulnerability of treaties that were negotiated in pursuit of ambitious regulatory objectives. See Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CH. J. INT'L L. 491, 497 & nn.13–14,

African countries against the treaty establishing the International Criminal Court may be yet another illustration of the fragility of consensus treaties.<sup>11</sup>

The explanation for this rather puzzling development is straightforward. Consensus treaties tend to lack one key advantage of treaties forged in conflict: the intense support of domestic interest groups hardened by sustained political combat. Typically, when their favored international agreements are threatened, such groups are usually willing to go to extraordinary lengths to protect the fruits of their political struggles. Moreover, because of the presence of such groups, it is often conflict-ridden treaties—like those that underpin the WTO/GATT framework—that tend to weather adverse international judicial decisions that supposedly impinge on national sovereignty.<sup>12</sup> This state of affairs may explain, for instance, why international investment treaties have proven to be quite vulnerable to threats of withdrawal or significant renegotiation in certain countries.<sup>13</sup> National politicians are aware that their domestic constituencies who favor investment treaties are often unable or unwilling to fight hard enough when these treaties are challenged.

At bottom, in the absence of conflict, the long-term benefits—if any—of consensus-based treaties may often prove difficult to consolidate once such agreements become subject to downstream attack by hostile forces. To paraphrase a common aphorism about the frailty of collective goods: treaties that belong to everyone are defended by no one.<sup>14</sup>

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498 & nn.15–17 (2012) (collecting literature on multilateral treaty failures and identifying why treaties are ineffective at coordinating global financial regulations).

11 See *infra* Part IV.

12 See *infra* notes 126–31 and accompanying text.

13 See, e.g., *infra* subsection III.B.1 (discussing withdrawals from investment treaties and criticism of investment dispute resolution). But the phenomena of treaty withdrawal are by no means strictly a feature of investment treaties or the treaty establishing the international criminal courts. Indeed, many modern treaties provide explicitly for legal mechanisms that allow states to exit treaties. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1581–82, 1597–98 (2005). But the national legal rules for exiting treaties are hardly fixed. For instance, Curtis Bradley has observed that while congressional authorization was assumed to be a precondition for withdrawing from treaties during the nineteenth century in the United States, it is now assumed that Presidents can terminate treaties unilaterally. See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 773 (2014); see also Jean Galbraith, Response, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. SEE ALSO 121, 123 (2014) (arguing that the changing historical practice on treaty termination is part of a “foreign affairs exceptionalism”). Other scholars have argued that there is a textual basis for the President’s power to terminate treaties unilaterally. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–61 (2001); John C. Yoo, Response, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1677–78 (2002). But see Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT’L L. 247, 250–51 (2013) (noting that the Senate could impose a “for cause” requirement on the President’s power to terminate treaties).

14 A modern version of this collective action issue is found in Przeworski: “The property of all people . . .’ as the canonical Soviet phrase had it, is no one’s property.” ADAM PRZEWSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 116 (1991).

But why would certain treaties be more susceptible to beneficial conflict in their origins, while others are more prone to counterproductive consensus? The answer is that consensus treaties tend to exhibit three characteristics that are often absent in conflict-prone treaties: illusoriness, diffuse benefits, and low predictability about the burden of downstream costs.

First, consensus treaties are often somewhat illusory or nonreciprocal. From a strategic perspective, the real goal of such treaties is often to bind others while creating the pretense that all are bound. Indeed, in most cases, it is usually groups in developed countries that are trying to bind governments in developing countries. But in order not to appear biased against a subset of countries, developed countries also agree to assume obligations under these treaties, even when such obligations may be unnecessary. The rationale is simple: if the burden of consensus rules seems to apply to all parties in the agreement, then it may appear more tolerable for those whom it was really intended to constrain.

Take, for instance, international investment treaties. In principle, they commit each side to a range of symmetric obligations or constraints, including promises not to expropriate the private property of foreign investors without compensation. But in practice, it is usually one side that has both the willingness and ability to defect and engage in uncompensated expropriations—the capital-importing state.<sup>15</sup> The capital-exporting state is usually constrained by other considerations beyond the treaty. In the United States, for instance, constitutional rules prevent the state from confiscating private property (including those of foreigners) without adequate compensation. Thus, for the capital-exporting state, consensus-based investment treaties follow a peculiar logic: having been blocked by its own domestic laws from being able to expropriate the assets of foreigners, the developed state now seeks to use international law to level the playing field between itself and the developing country.

Nonetheless, there is a fiction that both state parties face symmetric compliance and defection incentives.<sup>16</sup> But this fiction becomes less credible once the obligations of the treaties become politically costly, and the developing country knows it can defect without facing any equivalent defection by the developed country. For developed countries, however, the reasons for

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15 See *infra* Section II.A.

16 In much of the international law literature, there is an assumption that cooperation is largely rational because the effects of defect of compliance can be largely harmful to all. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 4–7 (1995) (explaining that states comply with their treaty obligations largely because the treaties accommodate “a broad enough range of the parties’ interests”); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 13, 25, 29 (2008) (presenting a theory of how “international law affects the behavior of states . . . [and] facilitate[s] cooperation,” and then defining “cooperation” in terms of compliance and the attainment of shared gains); JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 97, 103 (2015) (explaining that participants “gravitate toward a particular legal norm and choose ‘compliance’ as their strategy” because “[d]efectors . . . lose all of the benefits of cooperation”).

withdrawal or renegotiation are usually different and more nuanced. So long as the obligations under the consensus treaty are interpreted in a manner that completely overlaps with what their domestic laws already require, all is fine. But once a tribunal or court interprets the treaty in a way that expands beyond what is provided in domestic law, then a dispute over the scope and meaning of the consensus treaty is likely to ensue.

By contrast, conflict treaties are often characterized by the logic of mutually assured defection in which harm inflicted by one state is reciprocated with harm. Take international trade treaties, for instance. Because each state knows that its trading partner is willing and able to retaliate by raising tariffs or other nontariff barriers if there is a breach or withdrawal, politically opportunistic withdrawals from international trade treaties are uncommon.<sup>17</sup>

Second, there is yet another feature that often plagues consensus treaties: uncertainty about their downstream costs. Let us return to the example of international investment treaties. When these treaties are first negotiated, the upfront benefits to foreign investors seem obvious, but it is often difficult to know ahead of time which domestic interest groups will bear the brunt of the costs of the treaty's provisions. So few groups have an incentive to mobilize against the treaty. But once there is an actual dispute under the treaty and the likely litigation outcome threatens policies favored by strong domestic constituencies, the dynamics change. In the wake of such litigation, not only are current investment treaties threatened, but the negotiation of future treaties is as well. With international trade agreements, by contrast, it is usually known at the time of the negotiation which groups bear the costs of the agreement; in most instances, it is protectionist groups.

Third, the groups that benefit the most from consensus treaties like investment and human rights agreements tend to be large and diffuse in both time and space, which means that the costs of organizing are often high.<sup>18</sup> Conflict-prone treaties are usually different. In the world of interna-

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17 See Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102, 109–11 (2011) (explaining why exporters could exert influence for compliance); Mark L. Movsesian, Essay, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 10–15 (2003) (same); Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 217 (2005) (describing an interest group's induced compliance through the threat of retaliation in international trade disputes). See generally GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003); Warten F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551.

18 It is also questionable that politically salient groups will have the foresight to weigh heavily in their calculus benefits that are going to be long-term and uncertain. As T. Clark Durant observes, "Individuals tend to have a clearer conception of their narrow and short-run interests, which are often in conflict with the narrow and short-run interests of others." T. Clark Durant, *Making Executive Politics Mutually Productive and Fair*, 22 CONST. POL. ECON. 141, 147 (2011).



tional trade agreements, for instance, both the groups in favor of and opposed to greater market access tend to be concentrated in specific geographical areas or industries, and are usually relatively small in number.<sup>19</sup> Moreover, the benefits that such trade interest groups stand to gain are also usually available in the short run, in the form of immediate adjustment to term barriers.<sup>20</sup> For these reasons, such groups can more easily mobilize for defensive purposes and attempt to counter threats to the institutional arrangement that benefit their interests. In such situations, they are willing not only to defend the scope of the treaty, but also the courts and other institutional actors that help interpret and enforce such treaties.

What are the normative implications of this analysis? One crucial takeaway is that international and domestic courts interpreting or enforcing treaties should not take consensus treaties at face value; on the contrary, the presence of such consensus could be a signal that such treaties are negotiated on the cheap. In such situations, judges or arbitrators should be wary that their edicts or decisions on such treaties might not carry much weight beyond the narrow confines of the immediate controversy they are addressing; indeed, in the long run, there might not be sufficiently firm or intense social support to make their judgments sustainable, especially if those decisions happen to threaten the preferences of powerful domestic groups in certain countries.

Ultimately, however, the normative thrust of this Article is far from pessimistic. The upshot is that even if consensus treaties collapse or face withdrawal after a threat by revisionist forces, the groups benefiting the most from such treaties could come from behind and fight for them to be reinstated. The experience they stand to gain from conflict during the renegotiation phase may eventually put such groups in good stead not only against their traditional adversaries, but against new ones that they may not be able to foresee. In the end, if such groups succeed, consensus treaties can be reborn as conflict-prone treaties and benefit from the politics of opposition.

But how can politicians be sure that such renegotiated treaties will survive? One plausible solution is that rather than structuring treaties as grand bargains that bind all relevant actors, there may be room for more optional provisions in treaties, such as escape clauses, which exempt certain interest groups or states from the constraints of a treaty. But to work, the accommodation of the political opposition through such escape clauses has to be real and not mere window dressing; in principle, the stability of such a treaty regime assumes that judges and other interpreters will respect the deal that

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19 See MICHAEL J. GILLIGAN, EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION, AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY 5 (1997); Michael A. Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 WORLD POL. 309, 313–14 (1997); Karen E. Schnietz, *The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, 12 J. POL'Y HIST. 417, 418–20 (2000).

20 See *infra* subsection III.B.2.

has been struck, and not try to dilute escape clauses by construing them in light of some higher ideal that the treaty is supposed to achieve.<sup>21</sup>

In the end, we must either relinquish the basic illusion of symmetry in treaty obligations (an illusion that tends to be favored by international judges), or we must relinquish the efficacy of the treaty. This inescapable dilemma arises when developed countries become overburdened by international law constraints they do not need, in the hope of convincing other countries that actually need such constraints. But giving up on the pretense of symmetry or reciprocity in international law is also fraught with its own difficulties: the idea seems to have a strong normative pull in the actual practice of state behavior as well as among international courts, especially when coercive options to enforce treaties are not readily available. More importantly, the intuitions that drive the desire for symmetry in obligations seem to extend well beyond international law. As Tocqueville keenly observed in another context: “A democratic government can do pretty well what it likes, provided that its orders apply to all and at the same moment; it is the inequality of a burden, not its weight, which usually provokes resistance.”<sup>22</sup> However, once confronted with an economic crisis or deteriorating political climate, this pretense of symmetry becomes less credible for states who know they can defect without the risk of sanction.

The rest of the Article proceeds as follows.

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21 In the domestic statutory interpretation context, Frank Easterbrook has argued that courts should interpret statutes to conform to the narrow bargain that may have been struck by interest groups, rather than some higher public interest reason. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–47 (1983). More broadly, there is a rich literature in positive political theory that suggests that adjudicators have to consider the likely reaction of other political actors when crafting their decisions. This insight may be relevant even when those reactions may seem like a capitulation to particularism and not the general welfare. See John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 267–76 (1992); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 328 (2007); Max M. Schanzbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 25 (2006); Pablo T. Spiller & Matthew L. Spitzer, *Where Is the Sin in Sincere? Sophisticated Manipulation of Sincere Judicial Voters (with Applications to Other Voting Environments)*, 11 J.L. ECON. & ORG. 32, 35–44 (1995). Scholars in this vein have also suggested that an expansive judicial interpretation of a public-regarding statute may backfire in predictable ways if it ignores the legislative bargains that underpin the statute. See Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1242–48 (2007).

22 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 651–52 (J.P. Mayer ed., 1969). More broadly, as Deborah Tuerkheimer has pointed out in a provocative recent article, the problem of unequal burdens applies beyond the asymmetric overenforcement of laws against certain groups or states, but also when certain communities are burdened by the asymmetric underenforcement of the laws as well. In her analysis, she focuses on the underenforcement of rape laws among vulnerable communities in the United States. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1289 (2016).

Part I emphasizes how domestic conflict or external threats help shape group solidarity, and how the group solidarity of treaty beneficiaries can then be deployed as an effective asset in protecting treaties from reversal. Part II examines why consensus treaties tend to exist, and why they eventually break down.

Part III turns to examples, and suggests that the success in enforcing conflict treaties, such as international trade agreements, cannot serve as a model for consensus treaties, such as international investment agreements. In the wake of adverse judgments by the WTO Appellate Body in international trade controversies, for instance, national politicians have usually stayed the course and resisted the impulse to withdraw from such treaties or renegotiate their scope. By contrast, the distributional burdens imposed by arbitration decisions under investment treaties have often prompted significant backlash. In response to adverse arbitration outcomes, national politicians have felt compelled to rethink the scope and substance of existing investment treaties, or suspend the negotiation of new ones. More speculatively, this Part concludes that the two international economic agreements that have been in the political limelight recently, the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), have fallen prey to the political forces unleashed by the first generation of consensus investment treaties entered into by the United States. In retrospect, those early investment treaties lacked a sound political foundation because they were not properly vetted by domestic social conflict.

Part IV examines the treaty establishing the International Criminal Court (ICC) as another illustration of a consensus treaty that has proven to be vulnerable to downstream political threats, especially from African states. Like investment treaties, the treaty establishing the ICC lacked the benefit of social conflict in its creation. Part V examines the normative implications of the lack of social conflict at the treaty ratification stage.

## I. WHY SOCIAL CONFLICT PRODUCES STURDY TREATIES

Much of the analysis of the role of social conflict during treaty making focuses on how much it can be avoided in order to achieve wider international cooperation.<sup>23</sup> But the greater danger to viable treaties might not be

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23 See Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L.J. 1, 1 (2017) (describing the pervasiveness of the cooperation thesis in international law scholarship); see also Anthony D'Amato, *Groundwork for International Law*, 108 AM. J. INT'L L. 650, 653 (2014). Realists claim that although international law might sometimes describe or manifest cooperation, it may not itself cause such cooperation. See, e.g., ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 9 (2013) (stating that international law is "the manifestation of interstate cooperation"); Richard H. Steinberg & Jonathan M. Zasloff, *Essay, Power and International Law*, 100 AM. J. INT'L L. 64, 76 (2006) ("[L]ike other realists, adherents of this approach believe that the relative power of states shapes international law: both cooperative and coerced outcomes are distributed asymmetrically, reflecting the relative power of states.").

too much social conflict in their origins, but too little.<sup>24</sup>

The irony is that the same political forces that might render a treaty more difficult to negotiate in the first instance might actually prove to be beneficial when the treaty is eventually subject to enforcement or implementation. In other words, national politicians are unlikely to defend an international treaty that is under threat from domestic backlash unless they perceive that the social groups who benefit from the treaty value it more than the cost of overcoming the opposition.<sup>25</sup> The most credible evidence of a group's willingness to defend a treaty is whether it has successfully fended off opposition to the treaty when it was first being negotiated.<sup>26</sup>

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24 To be sure, the notion that social conflict in international policymaking can be benign is not new. Indeed, one of the most commendable scholarly efforts in the past decade or so has been the renewed appreciation for the role of social conflict in international and constitutional law. See PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 145 (2012) (“[N]ormative conflict is unavoidable and so, instead of trying to erase conflict, [we should adopt a framework] to manage it.”); Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049, 1067 (2012); Hakimi, *supra* note 23, at 2–3; Martti Koskeniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 5 (1990). In much of that analysis, however, the emphasis has been on whether informed and intense debate by conflicting groups may improve social welfare. By contrast, the focus here is on the long-term sustainability of treaties, and not necessarily their welfare effects. Of course, what makes economic or social sense from a treaty perspective may occasionally overlap with what is politically profitable, but one should not bet on it. More generally, the rub is that the politicians who either support or oppose such treaties are not always motivated by national welfare. The differences of the objective functions of various political branches over the merits of such treaties may simply track the fact that they are responsive to different constituencies.

25 As Melissa Durkee has argued, in the kinds of treaties that regulate private behavior, effective implementation will often require buy-in by private actors. Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 68 (2013) (“[I]n order for states rationally to enter into a treaty that concerns principally private conduct—and for such a treaty ultimately to succeed—the state must be able to secure the compliance and cooperation of those private-sector entities whose conduct the treaty seeks to control.”). Of course, ultimately it is national politicians who decide to comply with or implement treaties. See Carlos M. Vázquez, *Essay, Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 930 (2005) (observing the “general rule” that international law obligations rest on states and international organizations alone; to the extent that international law governs corporate or other private behavior, it does so by requiring states to regulate those nonstate actors). But the underlying assumption here is that such politicians are ultimately responsive to constituencies who either benefit from or are harmed by such treaties.

26 To be sure, this kind of analysis implicitly rejects the notion of the nation-state in international affairs as some kind of welfare-maximizing “administrative agency of the masses.” S. Encel, *The Concept of the State in Australian Politics*, 6 AUSTL. J. POL. & HIST. 62, 73 (1960). Rather, it assumes that the desire by national politicians to appease conflicting constituencies may explain both support of and opposition to treaties. For an account of such a public choice view of international law, see generally Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 INT'L REV. L. & ECON. 27 (1996).

The analysis here relies on two distinct building blocks: the first focuses on how past social conflict can cement social solidarity for groups that benefit from treaties, and the second focuses on how the special advantage enjoyed by narrow interest groups, often considered a bane to sound international and domestic policy, can be a blessing in disguise when it comes to treaty durability.

A. *Conflict Helps Weed Out Weak Treaties*

The first building block relies on the literature that links conflict with an increase in group cohesion. As relevant here, the argument is that a treaty successfully secured through actual struggle against a powerful adversary is more likely to be valued and defended by its beneficiaries than one secured through consensus.

The possibility that conflict against a powerful enemy may shape how a group values its objectives is a concept that has a long intellectual pedigree, especially in the literature on state building and legal compliance. As Charles Tilly famously declared, “War made the state, and the state made war,”<sup>27</sup> and Herbst has argued persuasively that “[e]xternal threats have such a powerful effect on nationalism because people . . . are forced to recognize that it is only as a nation that they can successfully defeat the threat.”<sup>28</sup> A large body of this literature has explored how institutions and party structures forged in conflict tend to be more resilient and stable than those that are achieved peacefully without any disagreement.<sup>29</sup> For instance, Herbst laments that because many African states secured independence from colonial power without having to fight for it, the political resolve by elites in such states to build strong institutions is often weak.<sup>30</sup>

The role of social conflict in harnessing group cohesion can be fruitfully analogized to the benign role that rigorous competition is supposed to play for incumbents in the economic marketplace. Such conflict helps weed out weak actors, which usually strengthens the resolve and solidarity of those who survive. Coser has even suggested that when an obvious adversary is lacking, it might pay for a group to deliberately invent one for the purpose of maintaining group cohesion.<sup>31</sup>

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27 Charles Tilly, *Reflections on the History of European State-Making*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 3, 42 (Charles Tilly ed., 1975); see also CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990–1990*, at 15 (1990) [hereinafter TILLY, *COERCION*].

28 Jeffrey Herbst, *War and the State in Africa*, 14 *INT’L SECURITY* 117, 122 (1990).

29 See generally SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968) (arguing that single party regimes emerging out of revolutionary moments are more stable than systems that come to power after a short and relatively easy struggle).

30 See Herbst, *supra* note 28, at 117–18.

31 LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 110 (1956) (“Rigidly organized struggle groups may actually search for enemies with the deliberate purpose or the unwitting result of maintaining unity and internal cohesion.”); see also Leopoldo Fergusson et

The mechanisms through which social conflict is supposed to achieve these goals vary, but there are two plausible channels. First, there could be a selective incentive effect.<sup>32</sup> When the prospect of a treaty triggers the risk of political conflict, it is likely to screen out groups that exhibit little or no commitment to the long-term sustainability of the treaty. Simply put, domestic treaty supporters motivated by short term benefits might be intimidated by the likelihood of drawn out social conflict in securing the treaty's passage. Thus, the prospect of conflict leaves more room for committed treaty supporters who are willing and able to invest their energy and resources in overcoming any opposition. For groups with such a long run perspective, the need to thwart downstream threats to their material and political interests might motivate them to band together effectively and overcome collective action problems.<sup>33</sup>

Second, social conflict during the treaty making process might also have a socialization effect. The actual process of engaging an adversary through conflict in legislative channels might itself unleash forces that help cement social solidarity and resilience among the social groups that support the treaty. Outside of the treaty context, Way and Levitsky have argued that political parties forged during revolutionary periods tend to exhibit more enduring social ties that facilitate long-term political stability.<sup>34</sup> Relatedly,

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al., *The Need for Enemies*, 126 *ECON. J.* 1018, 1018 (2016) ("Politicians need to keep enemies alive in order to maintain their political advantage.").

32 In some respects, Tilly's argument for the relative survival of certain European states builds on such a selection effect: "Nevertheless, the increasing scale of war and the knitting together of the European state system through commercial, military, and diplomatic interaction eventually gave the war-making advantage to those states that could field standing armies . . ." TILLY, *COERCION*, *supra* note 27, at 15.

33 In this vein, commentators have argued that one reason that well-intended reforms often fail to survive is the lack of powerful constituencies willing and able to defend such reforms. See Eric Patashnik, *After the Public Interest Prevails: The Political Sustainability of Policy Reform*, 16 *GOVERNANCE* 203, 203–15 (2003). Relatedly, some commentators have also argued that domestic interest groups might have an incentive to deploy treaties or international law to entrench their preferred policies against reversal. See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 *VA. J. INT'L L.* 501, 511–24 (2004); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400, 454 (2015); Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 *NW. U. L. REV.* 635, 658–82 (2011) [hereinafter Nzelibe, *Strategic Globalization*]. But as argued here, the backside of that argument is that for such treaties to survive and perform this entrenchment function, they will need to be defended by well-organized interest groups. Elsewhere I have suggested that institutional arrangements designed to entrench policy preferences of specific interest groups can be beneficial. Jide Nzelibe, *In Praise of Faction: How Special Interests Benefit Constitutional Order*, 109 *NW. U. L. REV.* 639, 658–62 (2015) [hereinafter Nzelibe, *In Praise of Faction*].

34 See generally Steven R. Levitsky & Lucan A. Way, *Beyond Patronage: Violent Struggle, Ruling Party Cohesion, and Authoritarian Durability*, 10 *PERSP. ON POL.* 869 (2012); Steven Levitsky & Lucan Way, *The Durability of Revolutionary Regimes*, 24 *J. DEMOCRACY* 5 (2013). In another context, Douglas NeJaime has argued that social movements that face litigation losses may deploy such losses to mobilize latent constituencies and construct organizational identities. See Douglas NeJaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941

interest groups who lobby for valuable treaties or international institutions might benefit from the experience of fending off adversaries, since they are likely to be better equipped to resist other unexpected challenges in the future. Of course, taken to an extreme, this greater-resilience-through-competition framework might reach its limits. Both recent and historical debates over Britain's entry and eventual exit from the European Union might help illustrate the outer boundaries of this analogy in both the political and economic realm, at least for some Euroskeptics. Kindleberger recounts a British official, leery of joining the European Common Market back in its original incarnation because of its perceived distributional effects, who remarked, "Not every kick in the pants galvanizes, you know. Some just hurt."<sup>35</sup>

But despite this caveat, the notion that threats from a credible adversary can help mobilize the political momentum needed to support institutional reform and prevent policy reversals has significant empirical support. The American experience with constitutional change provides a helpful illustration. In the immediate aftermath of the Civil War, Northern Republican factions in the United States took advantage of their temporary political leverage to secure their institutional vision of postwar reconstruction by passing the Fourteenth Amendment.<sup>36</sup> They did so by eschewing any pretense of consensus; indeed, the Amendment passed in the midst of significant acrimony and without any input from the Southern part of the country.<sup>37</sup> But having been secured under the shadow of intense conflict, it is perhaps no understatement that the Fourteenth Amendment has historically inspired an intense degree of loyalty from its supporters. More broadly, Coser argues that the presence of a common threat explains some of the nationalizing tendencies of American political coalitions.<sup>38</sup> In the comparative context,

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(2011). So it is not only the opportunity to engage in social conflict that can catalyze the political energies of social groups, but also the experience of fighting and losing an important struggle in the first instance. I wish to thank Aziz Huq for alerting me to this point.

35 Charles P. Kindleberger, *International Trade and National Prosperity*, 3 CATO J. 623, 625 (1983).

36 As Professor Thomas Colby argued in a recent piece, "The Fourteenth Amendment was a purely partisan measure . . . ; it would never have made it through Congress had all of the elected Senators and Representatives been permitted to vote. . . . [I]t was ratified not by the collective assent of the American people, but rather at gunpoint." Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629 (2013). Bruce Ackerman has argued more broadly that constitutional change is sometimes secured without formal amendment in the United States, especially in the aftermath of crisis or war. In many respects, Ackerman's claim could be considered a public law variation of Tilly's "war makes the state" thesis. See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

37 See Colby, *supra* note 36, at 1629.

38 See COSER, *supra* note 31, at 143 ("The many regional or sectional interest groups in the United States have been moved to coalesce, to band together with other groups of parallel interest, under the impact of felt threats to their existence or the felt need to fight more effectively on the national scene.").

the experience of violent civil strife has been empirically associated with the strengthening of democracies.<sup>39</sup>

Generalizing from state building to treaty making, one may be able to make inferences about a treaty's worth from the degree of conflict it instigated when it was originally negotiated. Presumably, the real measure of how much certain groups value their preferred treaties is what they are willing to invest in fighting for it. But talk is cheap. In the absence of social conflict, groups benefiting from treaties have an incentive to exaggerate how much they stand to gain, as well as how much they are willing to sacrifice in order to defend such treaties. A plausible solution to this information problem is to let the conflict run its course, and deduce the strength of preferences of different groups from the outcome. But since consensus treaties usually lack strong opposition when they are first negotiated, both the intensity and cohesion of the treaty's supporters may remain unknown until the treaty is eventually challenged.

To summarize, the upshot of this analysis is the following. Countries negotiating with others for a treaty can enhance the value of their bargain if they can credibly demonstrate that their domestic groups who benefit from the treaty have a significant appetite for long-term conflict. To the extent that these domestic groups have already fought and overcome hostile adversaries at home to secure the treaty's passage, no extra evidence may be necessary. The social solidarity of the group will be demonstrated by the existence of a credible domestic adversary. But in the absence of such conflict, it may be tempting for a state seeking to defect from that agreement to assume that the other side will not reciprocate in return; in this picture, the existence of consensus may simply signal that the treaty lacks intense domestic support.

### *B. Concentrated Versus Diffuse Groups: How Political Liabilities Become Assets*

The second claim builds upon the observation, often attributed to Mancur Olson, that groups seeking narrow goals will tend to be more intense in their commitments than groups with broader or more diffuse goals.<sup>40</sup> Typically, this insight is thought to be unsettling: the self-interest of narrow-minded or provincial groups is assumed to block us from achieving our collective ambitions as a society.<sup>41</sup> But turning Olson's insight on its head, one

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39 See Leonard Wantchekon, *The Paradox of "Warlord" Democracy: A Theoretical Investigation*, 98 AM. POL. SCI. REV. 17, 17 (2004).

40 See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53 (1965).

41 Indeed, the notion that special interest groups will tend to undermine the general welfare has a distinguished pedigree in American public law. See THE FEDERALIST NO. 10, at 50 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) ("To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."). Indeed, one argument in defense of certain constitutional arrangements, such as the separation of powers or independent courts, is that they will help block or mitigate the baleful influence of interest groups. See, e.g., BARRY FRIEDMAN,



can glimpse a more optimistic outcome. In this picture, the narrow bias exhibited by parochial groups may be harnessed in the service of a more fruitful agenda; to wit, such groups may spur the necessary grist to push a favored treaty through a legislative arena often fraught with both inertia and other competing priorities.<sup>42</sup> To be sure, there is no guarantee that any resulting treaty will benefit all groups in society; on the contrary, it may harm some. But regardless of its welfare consequences, one is assured of at least the existence of a viable political group who is willing to defend the treaty vigorously if it is later threatened by downstream forces.<sup>43</sup>

If economic or social advantage shapes the willingness of interest groups to defend treaties, then it follows that it is more likely to do so where such advantage is either geographically or industrially concentrated.<sup>44</sup> All else equal, we should expect farmers or industries located in a common region to exhibit more cohesion in fighting for their favored treaties than those dispersed throughout an entire country.<sup>45</sup> Similarly, textile factory owners or single issue advocacy groups are more likely to cohere and fight harder for a treaty that advances their material and ideological interests than umbrella groups that represent a wide array of interests.

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THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 375 (2009) (“The [Supreme] Court has to be attuned to aroused public opinion because it is the public that can save a Court in trouble with political leaders and likewise can motivate political leaders against it.”); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 1–3 (2013) (arguing that interpreting the Constitution according to original intent will be welfare-improving because it received the assent of a supermajority); Alon Cohen, *Independent Judicial Review: A Blessing in Disguise*, 37 INT’L REV. L. & ECON. 209, 209 (2014) (arguing that judicial review dissipates the power of special interest groups); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 265 (1986) (arguing that interpretive canons that promote the separation of powers will weaken special interest); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 30 (1985) (arguing that administrative law doctrine is intended to counteract the power of factions on the behavior of public officials).

42 There is a growing literature that recognized the benign role of special interest groups in shaping policies and institutional arrangements. See Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69 (2006) (discussing how lobbying can help generate resources and relevant motivation for legislation); Nzelibe, *In Praise of Faction*, *supra* note 33, at 658–62 (discussing the constituencies that came to favor reform during the trade reform era of the 1930s).

43 As Patashnik has argued in another context, policy reforms that lack the support of narrow and well-mobilized constituencies are also liable to unravel when challenged. See Patashnik, *supra* note 33, at 212.

44 For an analysis of the effect of geographic and industrial concentration on interest group formation, see GEORGE J. STIGLER, *he Theory of Economic Regulation*, in THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 114, 114 (1975) (discussing the effect of geographic and industry concentration); Gilbert Becker, *The Public Interest Hypothesis Revisited: A New Test of Peltzman’s Theory of Regulation*, 49 PUB. CHOICE 223, 225–26 (1986) (discussing the effect of industry concentration).

45 See STIGLER, *supra* note 44, at 129.

But the hitch is that if a treaty is known to provide narrow and concentrated benefits to one group when negotiated, it may also provoke strong opposition from other groups. When the negotiations over the treaty are still ongoing, the presence of a significant opposition may seem like a significant obstacle. But once the treaty negotiations are successfully completed, this obstacle can be enlisted as an asset in the service of compliance.

More specifically, the presence of a strong (but not too strong) opposition makes treaties more credible because there will be a clear constituency in the country that benefits from defection. Ironically, this dynamic suggests that groups that favor treaties might sometimes profit from having a viable domestic opposition that is against the treaty. Take international trade disputes, for instance. The protectionist groups in such disputes stand to gain from punishing a defection where such punishment is defined by an increase in tariffs against the scofflaw state.<sup>46</sup> By making mutually assured defection more credible, the presence of protectionist groups raises the costs to each side of defecting, and it lowers the costs that any one state will incur in punishing defections.<sup>47</sup>

To be clear, the use of reciprocal retaliation is at most a second-best strategy.<sup>48</sup> In an ideal world, states will unilaterally reduce their tariffs regardless of what the other side does.<sup>49</sup> But in such a world, trade agreements would be unnecessary. All else equal, when one party has an incentive to defect, it pays for the other country to have protectionist groups who have

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46 As numerous commentators have pointed out, the factors that drive enforcement of trade rules in the WTO tend to have very little to do with what politicians think should be done from a consumer- or society-welfare maximization point of view. See, e.g., Movsesian, *supra* note 17; Nzelibe, *supra* note 17; Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 646–47 (2005).

47 See Nzelibe, *supra* note 17, at 217.

48 For a discussion of retaliation as a second-best approach to enforcement of international agreements, see Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 319, 325–28. But there is significant literature that criticizes the use of bilateral retaliation in WTO disputes and instead endorses monetary damages or multilateral sanctions. See Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement*, 1 WORLD TRADE REV. 123, 128–29 (2002); Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT'L AFF. 15, 28 (2001); Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101 (2005); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 814–24 (2001); Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 786–87 (2004); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763 (2000); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 346 (2000); Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT'L L. 127, 127–28 (2007). Brewster has also argued that because the retaliation mechanism only works to remedy prospective or ongoing harm, it incentivizes states to drag out the process of compliance. Brewster, *supra* note 17, at 109–11.

49 See Jagdish N. Bhagwati & Douglas A. Irwin, *The Return of the Reciprocitarians—US Trade Policy Today*, 10 WORLD ECON. 109, 109 (1987) (arguing in favor of unilateral reduction of trade barriers).

an incentive to defect as well.<sup>50</sup> Of course, this observation holds true if one concedes that one of the goals of designing a treaty enforcement mechanism is to increase the cost of breach; to that extent, it pays if the victim state is willing to incur the burden of inflicting costs on the scofflaw state.<sup>51</sup> In this way, the social groups that fight each other at home serve a symbiotic relationship in preserving the possibility of compliance with their commitments abroad.

## II. WHY CONSENSUS TREATIES BREAK DOWN

The principle of treaty consensus appeals, intuitively, to the notion that all the stakeholders have been consulted and have a stake in the treaty's viability. However, for treaty consensus to acquire this normative status, certain special circumstances have to be in place. First, the consensus should have been achieved after extensive legislative debate has presumably taken place over the merits of the treaty,<sup>52</sup> and competing considerations of all the coalitions in favor or against the agreement carefully weighed.<sup>53</sup> Second, all the politically efficacious groups who are likely to benefit or be harmed by the treaty should be aware of their relative positions, and have had the opportunity to bargain with each other during the legislative process. But for a variety of reasons, which are discussed below, these two conditions are often not met in practice.

This Part examines why consensus treaties tend to exist, and why they eventually break down. Although many consensus treaties are initially cheap, they sometimes have features hardwired into them that will invariably cause them to be expensive down the road. First, while reciprocity often plays a key role in the rhetoric justifying such treaties, its illusoriness often becomes apparent. And when that occurs, defection from the consensus treaty is likely. Second, *ex ante*, it is often hard to foresee which groups are likely to

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50 Nzelibe, *supra* note 17, at 217–18.

51 *See id.*

52 Of course, the focus here is on treaties and forms of international law that may be subject to legislative ratification or approval. But some forms of international law may allow politicians to bypass some of the conflict-laden feature of treaties. For instance, some commentators have suggested that politicians will resort to soft law as a legal instrument if the issue challenges state sovereignty or when states are jealous of their autonomy. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

53 Indeed, other commentators have observed that mere consent by member states to an agreement could be deceptive since the process of treaty making is not always inclusive of competing political groups. *See* Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733, 748–49 (2014). They argue that sometimes more informal methods of lawmaking outside the treaty context might be supported by broader consensus. *See id.* at 749. The claim I develop below is broader and different. I am arguing that even when interest groups may have an opportunity to participate in treaty making, they may have no incentives to do so because the downstream costs of the treaty are uncertain and the treaty itself might have illusory characteristics.

suffer any adverse effects from these consensus treaties when they are first negotiated, but *ex post*, many powerful groups end up being harmed.

### A. *Consensus Treaties Tend to Be Illusory*

Consensus treaties are often disguised as reciprocal exchanges, but in reality, such reciprocity is often illusory. The objective of such treaties is usually to bind only one subset of countries—usually developing countries, but then create the pretense that all are bound. The reason is simple: only one set of states has an incentive and capacity to defect, while the others might already be constrained by factors that lie outside the treaty. If Bolivia withdraws from an investment treaty with the United States and expropriates the property of American investors, for instance, the United States is unlikely to respond by confiscating the property of Bolivian investors in the United States. Constitutional rules in the United States limit the scope of redistribution or confiscation of property that can take place, regardless of one's status as a citizen.<sup>54</sup> In any event, there are a whole host of other treaties that have similar illusory features, such as consular agreements or human rights treaties, where defection by one state is unlikely to result in defection by the other. In most of these cases, one country already faces certain constraints outside a treaty and is simply trying to use the treaty to extend that constraint to others.

The illusoriness of consensus treaties has two distinct consequences: (1) for developing countries, the asymmetry of constraints means if the treaty becomes sufficiently costly down the line, they may withdraw without fearing the risk of retaliation; and (2) for developed countries, the dynamic is different: the willingness of such states to be bound by rules meant for weak or developing states is limited. If the treaty obligations overlap completely with what their domestic laws already require, then there is no problem. But to

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54 For a comparison between United States Takings Clause jurisprudence and NAFTA jurisprudence against expropriations, see Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 37–38, 59–60, 68 (2003); David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 500–01 (1996). Generally, domestic constitutional constraints against property expropriation and predatory state policies are a staple of modern democratic governments. See John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 196–97, 201, 203–04 (1997) (examining constitutional constraints on expropriation by special interests); Mila Versteeg, *The Politics of Takings Clauses*, 109 Nw. U. L. REV. 695 (2015) (examining the politics of the global diffusion of takings clauses). Moreover, courts in industrialized democratic countries like the United States might not necessarily treat foreign litigants in a biased way in legal controversies; on the contrary, foreign claimants may sometimes do better than their domestic counterparts in local courts. See Kevin M. Clermont & Theodore Eisenberg, *Commentary, Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441 (2007). But another article suggests a contrary conclusion. See Kimberly A. Moore, *Xenophobia in American Courts*, 97 Nw. U. L. REV. 1497, 1503–06, 1509–14 (2003).

the extent the consensus treaty requires more, groups in developed countries are likely to find the additional burdens intolerable.

### 1. Why Illusoriness May Cause Developing Countries to Defect

There is a significant literature that criticizes the modern-day proliferation of certain kinds of treaties as unfair to developing countries, such as bilateral investment treaties (BITs) or the treaty establishing the International Criminal Court.<sup>55</sup> According to these criticisms, these treaties might be viewed as fundamentally skewed against the interests of developing countries, if not exploitative.

The analysis here suggests a different view: these asymmetric treaties are often pushed by groups in developed countries to redress what is perceived to be an unfair advantage of developing countries, rather than a desire to impose an extra burden on such countries. Take the case of investment treaties, for instance. In the absence of such treaties, it is the poorer and less developed countries that are in a position to exploit more affluent countries because politicians in developing countries often face less binding constraints on their domestic discretion to engage in massive redistribution or expropriation. By contrast, in developed countries, bounds upon what is legally and politically permissible to do with both foreign and domestic property are extensive. Constitutional rules in such states, for instance, often prohibit or limit the ability of politicians to confiscate property without due process, and these rules are often vigorously enforced. Thus, such investment treaties can be best described as an effort by developed countries to use international law to bring the legal environment in developing states more in line with their own domestic laws.<sup>56</sup>

But therein lies the fragility of such treaties. The aspirations of both sets of countries (and their relevant interest groups) are likely to differ; in one

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55 See, e.g., Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 437, 452–55 (2009) (gathering sources discussing perceived bias against developing countries in investment arbitration); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 423–24, 427–31 (2000) (discussing bias in BITs against developing countries); M. Sornarajah, *The Climate of International Arbitration*, 8 J. INT'L ARB. 47, 47–48 (1991) (arguing from historical evidence that international arbitration manipulates vague notions of international law and systematically favors capital-exporting states). And with respect to the International Criminal Court, African criticism has been quite pronounced. See Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411, 412 (2013) (“The International Criminal Court (ICC) has been charged with bias against Africa and insufficient sensitivity to the politics of conflict resolution, and has gotten entangled in Kenyan electoral politics.”).

56 In NAFTA, for instance, Congress adopted the explicit goal of extending the American vision of constitutional takings across North America. See Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 898 (2003); see also Schneiderman, *supra* note 54, at 514–15. But ultimately, NAFTA’s reach seemed to extend beyond what American constitutional law requires. See Been & Beauvais, *supra* note 54, at 59–60.

case, groups in developing countries may hope that consensus agreements will trigger more private investment or foreign aid, while the developed countries seek greater constraints on politicians in developing countries.<sup>57</sup> If the transfers or private investment hoped for fail to materialize for developing countries, or if the treaty eventually becomes costly to a valued domestic constituency, the developing country can defect without risking much in the way of retaliation. Put differently, since politicians in the developing country are aware that the developed country cannot credibly return *harm for harm*, the treaty is not a particularly credible commitment device.<sup>58</sup>

In practice, this dynamic implies that politicians in developing countries are in a fix if they hope to use investment or human rights treaties as a tool to lock in reform programs.<sup>59</sup> To be sure, they may seek to reassure foreign investors or other groups that they are not likely to reverse course on their reform initiatives, and in the short run this assumption may well be true. In the long run, however, the politicians can simply unbind themselves by withdrawing from the treaty. In the case of developing countries, the threat of defection or withdrawal might be magnified by the reality that there may not be enough powerful groups in those countries who stand to benefit enough from an investment treaty in the first place.

In response, one might argue that reciprocity does not strictly require the equivalent exchange of similar goods; on the contrary, it is plausible that developed and developing countries could be transacting for wholly different

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57 See Andreas F. Lowenfeld, Essay, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 127 (2003) (stating that developing countries "came to realize that an attractive investment climate would be needed if they were to advance up the economic ladder through inflow of foreign capital"). But some commentators have argued that while individual developing countries might consider signing onto these BITs to be rational, such countries as a group might be harmed overall. See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 666–67 (1998). But for a much broader discussion of the various objectives of these BITs, see JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 95–126 (2011). The empirical literature on whether BITs actually promote foreign direct investment in developing countries is voluminous. See Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 1 (2010); see also Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L ORGANIZATIONS 1 (2011) (criticizing monolithic narratives about the actual or intended benefits of investment treaties); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 400 (2011) (suggesting that BITs may not have a positive effect on foreign direct investment).

58 See Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 806–08 (2008) (discussing credible commitment justifications for BITs).

59 Even when politicians set up regional courts to lock in policies like broader human rights, such courts are vulnerable to jurisdiction stripping when they lack powerful domestic constituencies willing to defend them against political backlash. See Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 293–94 (2016).

kinds of obligations. Returning to the running example of investment treaties, for instance, two candidates for such a swap are plausible: (1) the poorer or less developed countries may be exchanging greater legal protection of foreign investors in return for increased foreign investment;<sup>60</sup> or (2) the exchange is a swap where rich and powerful countries forgo their right to use military force or diplomatic protection to defend their investors, and in return, the developing countries agree to be bound by investment arbitration decisions established by the treaty.<sup>61</sup>

But these justifications cannot be regarded as fully satisfactory for two reasons. First, the notion of bargaining for increased foreign investment does not work because the developed country is not obligated to provide any additional foreign investment to the developing country under an investment treaty. At most, the developing country may hope that by constraining itself under a treaty it may attract foreign investors, but any such effect would merely be a byproduct of the treaty rather than the consequences of any quid pro quo exchange.<sup>62</sup> In any event, the problem with viewing an investment treaty as a credible commitment device is that in order to work it has to impose some costs on the scofflaw state for withdrawing the treaty that go beyond the prospect of losing additional foreign investment. But the likelihood of symmetric threats from defecting from BITs are rare. One state (the capital-exporting state) usually has much more to lose from defecting or withdrawing from a BIT. But with trade treaties, the scofflaw state is aware that once it defects from the trade agreement, the other state has an incentive to defect as well.

The second argument is more nuanced, and requires a little more elaboration. Within the legal literature, Joost Pauwelyn has suggested that investment treaties could fruitfully be viewed as a swap where developing countries trade away the risks of diplomatic coercion by powerful countries in return for the prospect of peaceful adjudication of disputes.<sup>63</sup> Against the historical

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60 Although not explicitly a quid pro quo arrangement, part of the justification of BITs as credible commitments against backsliding seem to treat them as bargains for increased foreign investment. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77–79 (2005).

61 Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can be Reformed*, 29 ICSID REV.—FOREIGN INV. L.J. 372, 403 (2014) (arguing that powerful states agree to forfeit diplomatic protection or coercive measures to collect private debts in exchange for developing countries agreeing to abide by rule-based settlement under arbitration).

62 But even this hope of increased investment as a side benefit might be too optimistic. Alvarez makes the following observation, “[A]s veteran U.S. BIT negotiators have repeatedly pointed out, U.S. negotiators routinely alerted prospective BIT partners not to expect that BITs would necessarily increase such flows from U.S. investors.” José E. Alvarez, *The Once and Future Foreign Investment Regime*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 621 n.69 (Mahmoud H. Arsanjani et al. eds., 2011).

63 See Pauwelyn, *supra* note 61, at 402–04; see also W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 750 (“The fundamental

backdrop of nineteenth century American dollar diplomacy, when the coercive use of state power to exact compliance over private disputes between investors and host states was common, such a view might have much to recommend it.<sup>64</sup> But in the contemporary era, the prospect of such diplomatic coercion faces significant obstacles. As a preliminary issue, the modern use of diplomatic coercion to enforce debt commitments or resolve commercial disputes between citizens of different countries is quite controversial.<sup>65</sup> And there are also political bounds as to the coercive measures that domestic audiences in the developed world will tolerate, especially if they think it means deploying significant national security or diplomatic resources to safeguard private commercial interests. In other words, it is not only the international law and foreign policy ramifications from coercive intervention that politicians have to worry about; they may also have to contend with their own domestic groups who may not tolerate coercive intervention for material or ideological reasons.<sup>66</sup>

But more importantly, the argument that investment dispute resolution is a more civilized substitute for coercive diplomacy is somewhat problematic. As a practical matter, for the claim to have bite, the home state of the investor may still resort to coercive diplomacy if the host state faces an adverse judgment from investment arbitration and refuses to comply. But if that is the case, then the developing state hosting the investment is facing an illusory choice: it will be subject to coercive diplomacy whether it chooses to sign onto an investment treaty or not; at bottom, the real issue is when the use of coercive diplomacy will likely be triggered. If a treaty with an arbitration clause exists, then the home state may likely utilize diplomatic coercion after a scofflaw state refuses to pay any judgment awarded by the arbitrators. And

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idea underlying the ICSID experiment was brilliantly simple: developing countries anxious to induce private foreign investment would agree to submit investment disputes to a tribunal, while the governments of foreign investors would agree to refrain from what is often euphemistically called ‘diplomatic protection.’”); cf. Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration*, 35 U. PA. J. INT’L L. 829, 844–45 (2014) (focusing on why investors might favor investment arbitration to diplomatic protection).

64 For a general historical discussion of the American experience in this regard, see NOEL MAURER, *THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893–2013* (2013).

65 See Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 200–01 (2014) (discussing pushback by certain states against the legality of the use of force as a means of diplomatic protection); see also Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1525–26 (2005) (“In order to avoid the historical difficulties associated with ‘gunboat diplomacy,’ countries have promulgated treaties to promote foreign investment and instill confidence in the stability of the investment environment.”).

66 See Benjamin Coates, *Securing Hegemony Through Law: Venezuela, the U.S. Asphalt Trust, and the Uses of International Law, 1904–1909*, 102 J. AM. HIST. 380, 388 (2015) (suggesting a wariness on the part of President Theodore Roosevelt in using diplomatic coercion to promote the interests of American corporations in Latin America, especially when he was trying to cultivate the image of a trust buster at home).



in the absence of such a treaty, the home state may invoke diplomatic coercion if its demands for relief from the scofflaw state through political channels prove to be unsuccessful.

There is also another significant problem with how developing countries are likely to perceive consensus treaties. If such consensus treaties only required equal treatment between foreigners and local citizens, they might be more tolerable since equal treatment or nondiscrimination has long been considered a conventional trademark of the rule of law, even in developing countries. The challenge is that consensus treaties may sometimes require more than nondiscrimination; indeed, in certain circumstances, they require signatory countries to treat foreigners better than their own citizens.<sup>67</sup> In other words, the explicit goal in such treaty provisions—such as the Fair and Equitable Treatment Standard in investment treaties—is to elevate the legal environment in the developing country to a standard desired by the investor's home state,<sup>68</sup> rather than simply level the playing field between foreign and domestic investors.<sup>69</sup> To the extent that this provision makes the asymmetric objective of investment treaties more explicit, it is vulnerable to the criticism that it might actually operate to the disadvantage of the host country's own citizens and companies.

## 2. Why Illusoriness May Cause Developed Countries to Defect

We may sometimes observe renegotiations or withdrawals from consensus treaties by developed states. In order not to appear discriminatory toward developing countries, developed countries may agree to also constrain themselves under a consensus treaty, even when such constraints may seem unnecessary given that their domestic laws already govern the relevant conduct. This aspiration is understandable: if the burdens of the constraints seem to apply to all countries under an international treaty, it will be harder to argue

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67 See Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 292 n.154 (2013) (discussing disagreement between developing and developed states over minimum standards of treatment in foreign investment).

68 Typically, provisions in investment agreements deploy similar language. For instance, the United States-Grenada BIT provides: "Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law." Treaty Between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment, Gren.-U.S., art. II, ¶ 2, May 2, 1986, S. TREATY DOC. No. 99-25.

69 See, e.g., *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 372 (July 14, 2006) (holding that the fair and equitable treatment standard now protects legitimate investor expectations even in the absence of bad faith or egregious conduct by the host state). The proliferation of fair and equitable treatment claims is also an independent source of controversy. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87, 87 (2005) ("[I]n current litigation practice, hardly any lawsuit based on an international investment treaty is filed these days without invocation of the relevant treaty clause requiring fair and equitable treatment.").

that the treaty is biased in favor of one set of countries.<sup>70</sup> But there are likely to be limits to the costs that developed states are willing to incur in order to appear unbiased, especially when the only reason for agreeing to be constrained is to induce others to be constrained.

For developed countries, the reasons why a consensus treaty may prove to be too burdensome are likely to be different from those of developing countries. When the obligations of the relevant consensus treaty overlap with what the domestic laws of the developed state already require, there is usually no problem. Thus, all else equal, we would expect negotiators from developed countries to try as much as possible to ensure that the language of obligations in such consensus treaties tracks their own domestic laws. It is no coincidence, for instance, that the language of expropriation under the model U.S. investment treaty closely mirrors the American domestic law of takings.<sup>71</sup> If the negotiators succeed, then the extra obligations of the treaty will mean little or nothing for the developed country and their domestic audiences should be largely indifferent. Such audiences will not face any more costs than they already do under domestic law, so they have little reason to complain. The upshot is that the treaty might succeed in constraining developing countries in a way that favors groups in developed countries, but little will be sacrificed by developed countries in the process.

But there is one significant wrinkle to this approach. Similar language between domestic laws and international treaties does not guarantee the two provisions will be interpreted in the same way. After all, international judges interpreting treaties are likely to have a different perspective than local judges interpreting domestic law. And once the interpretation of the treaty provisions starts to expand beyond what domestic law requires, a struggle over the meaning of the treaty is likely to take place. Treaty backlash will likely then be triggered among some segments of society, either because they believe that such expansive interpretation favors foreigners over domestic citizens, or because they believe that the treaty intrudes upon domestic regula-

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70 The importance of creating the illusion of symmetric burdens under the law has a veritable pedigree. As Elster succinctly puts it:

Imposed hardships are tolerable if shared by all . . . even where there is no point in more than a minority suffering them. . . . Welfare benefits are sometimes absurdly diluted because they cannot be offered to someone without being offered to everyone. Redistribution is most feasible in times of economic growth, where the differences in wage increases are to some extent swamped by the fact that everybody receives some increase. Hence governments become skilled at inventing policies whose first effect hits everybody equally, while the net effect is suitably unequally distributed.

JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 90 (1983). But as Steinberg notes elsewhere, the developed countries like the United States tend to exercise disproportionate power behind the scenes in negotiating these treaties, so the formal equality during negotiations might just be for appearances. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 346–49 (2002).

71 See Schneiderman, *supra* note 54, at 500–04.

tory prerogatives clearly beyond what their own domestic law allows. It is now a commonplace spectacle for politicians in developed countries to decry international treaties—especially consensus treaties—that were originally intended for developing countries for constraining the discretion of politicians in developed states.<sup>72</sup>

### B. *Unpredictability Regarding the Burden of Consensus Treaties*

This Section argues that the vulnerability of consensus treaties to reversal or renegotiation will also depend on the fact that while their upfront beneficiaries are usually obvious, the burden of their downstream costs are often hard to predict. This unpredictability often results in a disparity between capabilities and outcomes: in other words, the groups that end up being hurt by the consensus treaty down the line might prove to be more organized and powerful than the treaty's intended beneficiaries. So even though the beneficiaries may be able to muster enough political support to usher the treaty through the legislative process at a stage when the effects are uncertain, they may not be powerful enough to forestall the backlash that ensues when the costs of the treaty become obvious and happen to threaten the policy goals of a better-organized political coalition.

By contrast, the groups that stand to both benefit and lose from conflict-prone treaties are usually known upfront, which is precisely why the negotiations of such agreements are often fraught with intense disagreement by social groups over treaty scope, side deals, and the level of compromise.<sup>73</sup> When a conflict-prone treaty is successfully negotiated, it usually means that the balance of power between the contending groups has already been tested in the legislative arena and resolved in favor of the side seeking the treaty. Alternatively, significant side payments have been deployed to pay off the losing side.<sup>74</sup>

Typically, when we think of the distributional consequences of a treaty, we may assume that there are groups who clearly benefit from the treaty and

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72 The resistance in the United States to signing onto the Rome Statute that established the International Criminal Court is noteworthy, especially when one takes into account the extraordinary efforts the United States has undertaken to prevent the court from exercising jurisdiction over American citizens. Neha Jain, *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court*, 16 EUR. J. INT'L L. 239, 246–48 (2005) (discussing how the United States uses Security Council Resolutions to narrow the ICC's jurisdiction); see also Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573 (2007) (discussing how the United States tried to get countries, regardless of whether they were parties to the court or not, to sign agreements not to surrender Americans to the International Criminal Court).

73 See Brewster, *supra* note 33; see also Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 798–99, 801–02 (2005); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 204 (2004).

74 See Schwartz & Sykes, *supra* note 17, at 182–92 (explaining why the enforcement and renegotiation of provisions in the WTO system help compensate politically powerful interest groups).

others who loathe it. But there is a third possible category: those who may be largely indifferent to the treaty, but simply do not want to bear the brunt of a treaty violation. Their lives may not be shattered or diminished by the fact that certain groups seek greater protection of investment or human rights in other countries, but they might not want their own favored policy goals to be undermined by monetary damages or other remedies incurred from a lawsuit down the line. These groups are not easy to identify in advance. Which group will likely have its interests undermined by a future lawsuit under an investment or human rights treaty being negotiated today? Will it be the sugar growers, the Sierra Club, or the American Medical Association? No one knows. Thus, initially, these groups may have little reason to oppose the treaty.

But once a lawsuit is brought under the treaty, the dynamic may shift. The downstream risks of treaty backlash will likely turn on whether the group that bears the burden of a treaty lawsuit suffers concentrated losses while the benefits of the treaty remain diffuse. For instance, the benefits of not withdrawing from an investment treaty are likely to be dispersed among all investors, but the losses suffered from a treaty lawsuit might include policy reversals that threaten the jobs of a prominent industry or the cherished environmental goals of a geographically concentrated constituency. And if the group that bears the brunt of a treaty lawsuit perceives that it will likely be a repeat “target” of such lawsuits, then it will have a stake in trying to either withdraw from or undermine the treaty.<sup>75</sup> Furthermore, as the phenomenon of loss aversion would suggest, groups opposing a concrete harm to their interests are likely to be more motivated to fight harder than groups seeking a prospective benefit.<sup>76</sup>

### III. CONFLICT AND CONSENSUS TREATIES COMPARED: INTERNATIONAL TRADE VERSUS INTERNATIONAL INVESTMENT

Analytically, the treaties governing trade and investment are often treated as if they are similar. To be sure, both treaty regimes may be prompted by a common motivation: the desire by economic actors to use treaties to erect judicial or dispute resolution mechanisms that protect their interests from the unpredictable whims of domestic politics. In the case of international trade, the relevant dispute resolution mechanism in recent memory has been the World Trade Organization (WTO), while for interna-

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<sup>75</sup> If it were society at large that had to bear the brunt of all such litigation under a consensus treaty, the story might be slightly different. In such a situation, beneficiaries of such treaties might be able to profit from the logic of collective action. See OLSON, *supra* note 40, at 55–57. But as it turns out, once a specific policy becomes a target of a successful lawsuit under the treaty, other lawsuits are likely to follow unless the policy is reversed or significantly altered; thus, the occasion for mobilization for aggrieved groups is likely to be high.

<sup>76</sup> See Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197 (1991).

tional investment it has been arbitration under bilateral investment treaties.<sup>77</sup>

But that is where the similarities end. One key distinction is that under BITs, private parties are usually permitted to enforce treaty claims directly through arbitration, whereas the WTO only permits states to espouse claims on behalf of private parties.<sup>78</sup> More broadly, trade treaties benefit from being the product of a conflict between two economic forces, in which the balance of power has been resolved in favor of the more powerful group. In the case of investment, however, the balance of power between the competing groups is usually unknown at the time the treaty was signed, and the result has often been the emergence of a “fake” consensus. Simply put, conflict-prone trade treaties have often managed to align the self-interest of the more relevant interest groups in industrialized countries with the goals of the treaty, while consensus investment treaties have often bypassed altogether the process of figuring out who the most powerful interest groups might be in the first place.<sup>79</sup>

Ultimately, the relative distinction between investment over trade treaties is examined in detail in the following situations: (A) the difference that conflict plays in their origins; (B) how countries respond to unfavorable legal judgments, such as whether they decide to renegotiate or withdraw from such treaties; and (C) the extent to which reciprocity has been deployed to harness social groups in favor of enforcement.

#### A. *Different Origins of Trade and Investment Treaties*

##### 1. Conflict in the WTO/GATT Framework for Trade

Much ink has been spilt on the postwar origins of the modern regime governing international trade—the WTO/GATT framework. In brief outline, the triumph of the modern trade regime was the result of a power contest in which export groups seeking market access either managed to prevail over or pay off groups seeking protection. In the conventional narrative, consumer welfare or idealism did not register highly in the minds of politicians who were bickering over tariffs in the early twentieth century; on the contrary, consumer groups were often given short shrift in trade negotiations.<sup>80</sup> But the victory of export groups was rarely ever complete. Protec-

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<sup>77</sup> For a concise description of similarities and differences of the investment and trade regimes when it comes to litigation, see Pauwelyn, *supra* note 8, at 766–67. In the WTO, the states bring the claims on behalf of an industry group that alleges that it has been denied access to a foreign market in violation of the GATT rules; in the case of bilateral investment, the investor can bring the claim directly without getting permission from the home state. *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> For an economic analysis of why the trade regime disallows private standing and the investment regime allows it, see Sykes, *supra* note 46, at 633–34.

<sup>80</sup> *See* Bailey et al., *supra* note 19, at 327; Judith Goldstein & Robert Gulotty, *America and Trade Liberalization: The Limits of Institutional Reform*, 68 INT’L ORG. 263, 263–65 (2014).

tionist sectors that were too powerful to be sidelined during negotiations managed to receive special treatment, which explains the privileged position that agricultural protection has often been accorded in advanced industrial economies.

The United States' experience with trade treaties is illustrative. The period between the Civil War and the onset of the Great Depression was largely defined by a protectionist slant in American trade policy. In significant part, this state of affairs was due to the political dominance of Republicans during that era and their traditional industrial constituencies, who tended to favor higher tariffs against European manufactures.<sup>81</sup> But the widely controversial Smoot-Hawley Tariffs of 1930 and the onset of the Depression significantly transformed the political landscape. The economic malaise that ensued emboldened traditional export groups, who were able to overcome their freeriding problems in the wake of high tariff barriers that blocked their products from European markets.<sup>82</sup> In response, Franklin Roosevelt's administration took the first step to lock in lower tariffs with the Reciprocal Trade Agreement Act of 1934,<sup>83</sup> which helped coordinate reciprocal trade reduction between the United States and its main trading partners.<sup>84</sup> However, the modern global move to trade liberalization was largely implemented in the postwar era in 1947 with the passage of the General Agreement on Tariffs and Trade (GATT), and consolidated in 1994 with the establishment of the WTO.<sup>85</sup>

But the path from the 1934 Reciprocal Trade Agreement to the modern era was hardly straightforward or inexorable. Successful rounds of trade negotiations in the United States since that period have been punctuated by long periods of political stalemate and some degree of backtracking. The passage of the Reciprocal Trade Agreement Act of 1934 was itself a deeply polarizing episode, with Republican members of Congress voting overwhelmingly against the bill when it was first passed, and also when it came up for

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81 Earlier in the nineteenth century, disputes between that protectionist coalition and southern agrarian groups had taken their toll, culminating in the 1832 South Carolina "Nullification Ordinance," which was enacted in response to the high tariffs passed in 1828. For a detailed description of these historical events, see Jide O. Nzelibe, *The Illusion of the Free-Trade Constitution*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 31–32 (2016).

82 For a discussion of the role of export groups in response to Smoot-Hawley, see Bailey et al., *supra* note 19, at 327–30; Nzelibe, *supra* note 81, at 32–36; Karen E. Schnietz, *The Reaction of Private Interests to the 1934 Reciprocal Trade Agreements Act*, 57 INT'L ORG. 213, 227–28 (2003).

83 In 1934, Congress passed the Reciprocal Trade Agreement Act (RTAA), Pub. L. No. 73-316, § 350(a), 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351(a) (2012)). The RTAA authorized the President "[t]o enter into foreign trade agreements with foreign governments" and "[t]o proclaim such modifications of existing duties and other import restrictions . . . to carry out any [such] foreign trade agreement." § 1351(a)(1)(A)–(B).

84 See Nzelibe, *In Praise of Faction*, *supra* note 33, at 658–62 (discussing the constituencies that came to favor reform during this time period).

85 See Shaffer et al., *supra* note 8, at 241–45.

renewal in 1937 and 1940.<sup>86</sup> And significant side payments to the most powerful members of the political opposition had to be made. Hoary rhetoric against protectionism might have yielded some political dividends at the time, but there is not much evidence that legislators had the political will to stand up to the most powerful groups that favored high tariffs. Indeed, as Goldstein and Gulotty show in a recent piece, the U.S. tariff level reductions post-1934 were often concentrated among protectionist industries that seemed to have the least political clout in Congress, whereas those protectionist industries that had the most political clout still managed to retain their tariff preferences.<sup>87</sup>

Other illustrations of such conflict-strewn histories abound. The North American Free Trade Agreement in 1993 triggered one of the largest and most significant lobbying efforts by American labor groups, who expended significant resources opposing the agreement.<sup>88</sup> In response, President Clinton faced a legislative backlash from the left flank of his own party, and proposals for fast track authority were roundly defeated in the latter part of his presidency.<sup>89</sup> In the contemporary era, President Obama also faced resistance from members of his own political coalition, who mobilized against his wishes to support two key economic treaties in the waning days of his presidency.<sup>90</sup>

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86 See Douglas A. Irwin & Randall S. Kroszner, *Interests, Institutions, and Ideology in Securing Policy Change: The Republican Conversion to Trade Liberalization After Smoot-Hawley*, 42 J.L. & ECON. 643, 644–45 (1999).

87 See Goldstein & Gulotty, *supra* note 80, at 264.

88 NAFTA passed by a vote of 234–200 in the House of Representatives, and by 61–38 in the Senate. *Final Vote Results for Roll Call 575*, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/1993/roll575.xml>; *Roll Call Vote 103rd Congress—1st Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=103&session=1&vote=00395](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00395). As James Shoch shows in his extensive study of postwar U.S. trade policy, the fight against NAFTA was the most significant lobbying effort undertaken by organized labor since the 1930s. See JAMES SHOCH, *TRADING BLOWS: PARTY COMPETITION AND U.S. TRADE POLICY IN A GLOBALIZING ERA* 180 (2001).

89 See generally James Shoch, *Contesting Globalization: Organized Labor, NAFTA, and the 1997 and 1998 Fast-Track Fights*, 28 POL. & SOC'Y 119, 120–21 (2000).

90 The two agreements are the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). In his 2013 State of the Union address, President Obama formally announced the negotiations for a comprehensive partnership (TTIP) with the EU. President Barack Obama, *Remarks by the President in the State of the Union Address* (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-president-state-union-address>. But the President then faced opposition from his left flank. See Elizabeth Warren, *Opinion, The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html?utm\\_term=.B4b87cb330bf](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.B4b87cb330bf); see also Daniel J. Ikenson, *Hyperbole Aside, Elizabeth Warren Is Right About the Risk of Investor-State*, CATO (Feb. 26, 2015), <http://www.cato.org/blog/hyperbole-aside-elizabeth-warren-right-about-risk-investor-state>. The opposition by Senator Warren and others generated a strong rebuff from President Obama. Matt Bai, *Why Obama Is Happy to Fight Elizabeth Warren on the Trade Deal*, YAHOO NEWS (May 9, 2015), <https://www.yahoo.com/politics/why-obama-is>

To summarize, American trade policy has followed a consistent historical pattern: in each successfully negotiated international trade agreement, there is usually a significant and discernible threat to the interests of a powerful commercial coalition, and that threat could only be resolved either by an outright victory by one group in the legislative arena or a significant payoff to the more powerful members of the opposing interests that stand to lose from the trade agreement.

## 2. Consensus in Bilateral Investment Treaties

In contrast to international trade treaties, the debates over the passage of investment treaties in the United States and elsewhere have been relatively mundane affairs, often devoid of conflict among various interest groups or any serious political argument. Indeed, it would not be an understatement to broadly characterize the signing and ratification of modern investment treaties as relatively boring “*nonpolitical events*.”

Take the United States’ experience with signing onto BITs, for instance. From the founding era until the latter part of the twentieth century, the United States was a relative lightweight and latecomer when it came to signing bilateral investment treaties. Compared to Germany, which signed its first BIT in 1959, the United States signed its first BIT in 1977 and its first effective BIT was only in 1988.<sup>91</sup> From the late 1980s through the 2000s, the number of BITs signed by the United States has increased considerably—at last count, the United States has signed onto over forty-seven BITs.<sup>92</sup> As compared to trade agreements, however, what distinguishes BITs in the United States is the near absence of any strife in their origins. As Adam Chilton has observed, there was virtually no opposition by politically relevant groups to the negotiation of the first generation of BITs entered into by the United States.<sup>93</sup> Labor groups such as the AFL-CIO, which had been historically active in opposing trade agreements, were conspicuously absent during the

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happy-to-fight-elizabeth-warren-on-118537612596.html. During the 2016 presidential campaign, both candidates disclaimed any support for the TPP. See *Hillary Clinton Statement on Trans-Pacific Partnership*, POLITICO, <http://static.politico.com/d9/07/9a2940814c1abaab4d84e02c8eb8/hillary-clintons-full-statement-on-tpp.pdf> (last visited Nov. 16, 2017) (“[B]ased on what I know so far, I can’t support this agreement.”); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 5, 2015, 1:46 PM), <https://twitter.com/realdonaldtrump/status/651136309029834752> (“TPP is a terrible deal.”). For the TTIP, the political backlash has been palpable as well. See Christian Oliver, *Public Backlash Threatens EU Trade Deal with the US*, FIN. TIMES (Jan. 13, 2015), <https://www.ft.com/content/8c17a17e-9b33-11e4-882d-00144feabdc0?mhq5j=E5>.

91 See Adam S. Chilton, *The Political Motivations of the United States’ Bilateral Investment Treaty Program*, 23 REV. INT’L POL. ECON. 614, 617 (2016); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 433 (2010).

92 For an update of the BITs signed by the United States thus far, please see the State Department’s website. *United States Bilateral Investment Treaties*, U.S. DEP’T STATE, <https://www.state.gov/e/eb/afd/bit/117402.htm> (last visited Nov. 23, 2017).

93 See Chilton, *supra* note 91, at 619.



congressional hearings over the bilateral investment treaties.<sup>94</sup> And when these BITs were eventually ratified, they sailed unanimously through the Senate with hardly any debate.<sup>95</sup> But even more importantly, none of the large American multinationals appeared to lobby actively on behalf of this first generation of BITs; for the most part, the passage of these BITs was treated as low-stakes bureaucratic episodes with little political overtones.<sup>96</sup>

The clincher is that despite their uncontested origins, BITs have since become a source of significant political controversy and backlash by local actors.<sup>97</sup> Far from being treated as innocuous legal instruments, the provisions of BITs that give investors private standing to sue states are now viewed as a potential threat to the regulatory and political authority of sovereign states. As Chief Justice Roberts put it in a dissent in a recent controversy over the scope of the BIT between the United States and Argentina, “[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation’ whose ‘uniqueness and power should not be over-looked.’”<sup>98</sup>

But the puzzle is that since the possibility of investor suits against states was known from the beginning, why was there so little political resistance or even debate about these BITs in the first place? Explanations that rely heavily on irrationality, deception, or mistaken assumptions by national politicians are not entirely satisfactory;<sup>99</sup> at bottom, such accounts seem to depend on having certain countries (or their politicians) be more gullible or prone

94 See *id.*; see also Adam S. Chilton, *Reconsidering the Motivations of the U.S. Bilateral Investment Treaty Program*, 108 AM. SOC. INT’L L. PROC. 373, 374 (2014).

95 See Chilton, *supra* note 91, at 619.

96 See *id.* at 619–20.

97 See Gus van Harten, *Perceived Bias in Investment Treaty Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 432, 432–33 (Michael Waibel et al. eds., 2010). Also, there have been ongoing controversies in which party states have been trying to hem in the interpretive scope of tribunals construing such investment treaties, such as NAFTA. See generally Andrea K. Bjorklund, Essay, *Contract Without Privilege: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT’L L. 183 (2001).

98 BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1220 (2014) (Roberts, C.J., dissenting) (alteration in original) (quoting JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 137 (2010)). For a thorough analysis of the Court’s review in the case of the Argentina-U.S. BIT, see Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108 AM. J. INT’L L. 750, 762 (2014).

99 Poulsen has argued, for instance, that the haphazard spread of BITs around the world is a result of bounded rationality, in which politicians were constrained by cognitive biases in determining the benefits and costs of bilateral investment treaties. See LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES 26–27 (2015). Although this explanation may have some merit, there are reasons to consider it incomplete. First, as discussed above, even politicians from developed countries with well-entrenched political systems seemed to have been unaware of the costs entailed in negotiating bilateral investment treaties. Second, as argued, there is very little reason for national politicians to try to figure out all the costs and benefits of a specific legal regime when they are not facing constituency pressures to do so. So the bigger issue is to figure out why these politicians did not face such constituency pressures in the first place. And as suggested below, there are rational

to mistake than others. However, the phenomenon to be explained—the pervasive lack of serious debate or contention attending BIT negotiations—appears to hold true across both rich and poor countries, as well as countries with varying political institutions. For instance, it was not only politicians or bureaucrats in developing countries who appeared unable to grasp the full implications of extending private rights of action to investors; on the contrary, members of Congress in the United States were also largely uninterested in or indifferent to these important details of BIT negotiations.<sup>100</sup>

An alternative view, which is embraced here, is that the near-complete absence of social conflict in the negotiation of BITs cannot adequately be understood by a model where politicians are assumed to be public-spirited maximizers of the national welfare. On the contrary, one likely reason why members of Congress in the United States passively acquiesced to the first generation of BITs without much debate was that the narrow constituencies to which they were responsive were not mobilized. And the reason why the various interest groups were indifferent at the time of the negotiation of the BITs was simple: while it was possible for various groups to anticipate that private litigation against states would one day take place, it was very difficult to anticipate *ex ante* which groups would bear the burden of such litigation. But here is the catch: initial uncertainty about the burdens of BITs will not prevent revisionist groups from subsequently seeking to undermine those BITs down the road once it becomes obvious that the costs of litigation will be concentrated on such groups. And if the groups that benefit from BITs in any specific country happen to be diffuse, they are likely to face greater collective action problems than those who would benefit from undermining the BIT.

### *B. The Consequences of Consensus*

By obscuring the downstream risks of certain treaties, consensus treaties may forestall the emergence of groups who have sufficient stakes to fight over the scope and substance of such treaties. As compared to those trade treaties which are born of conflict, two discrete implications follow from the diffusion of consensus investment agreements: (1) there has been a greater tendency for consensus investment treaties to break down or be renegotiated in the wake of unfavorable litigation outcomes against scofflaw states; and (2) the impetus of powerful interest groups to monitor and punish breaches or withdrawals from investment treaties is not as pronounced as it has been for trade treaties.

#### 1. Responding to Unfavorable Litigation Outcomes

To illustrate some of the disadvantages of consensus treaties, one need only compare the divergent responses by domestic audiences to adverse adju-

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explanations for why interest groups were not fully mobilized in favor of or against bilateral investment treaties.

100 See *infra* notes 133–55 and accompanying text.

dication decisions in international trade and investment controversies. Admittedly, some negative reaction from national groups is to be expected when international courts or tribunals render unfavorable judgments that constrain sovereign flexibility. But what stands out in the context of investment arbitration is both the scope and depth of the political backlash from states from either simply being sued or having to deal with an adverse decision;<sup>101</sup> indeed, in some cases these responses have even triggered substantive constitutional and structural changes.<sup>102</sup> By contrast, the WTO/GATT structure for resolving international trade disputes has retained its basic outline since it was first introduced in 1994.

a. Unconsolidated Deals: Treaty Withdrawals After Adverse Decisions

The Latin American experience with investment dispute resolution from the early 2000s until recently illustrates how investment agreements not backed by consolidation through domestic conflict have proven to be vulnerable. Ecuador, Bolivia, and Venezuela have all withdrawn from the ICSID Convention in the past six years, invariably in the aftermath of unfavorable arbitration outcomes.<sup>103</sup> Far from being viewed as commitments that were locked in, procedures for resolving investment disputes were often treated by politicians in these countries as temporary arrangements that could expire in the next election cycle.

Here a typical pattern may be observed: a regime in a country facing a deteriorating fiscal condition adopts a comprehensive package of economic reforms meant to stimulate investment, of which signing onto a bilateral investment agreement is a part. After the political winds shift in the other direction, a new populist coalition comes into power, engages in widespread nationalization of industry, triggers investor lawsuits, and eventually denounces the investment agreements signed by the prior regime. Take the

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101 Michael Waibel et al., *The Backlash Against Investment Arbitration: Perceptions and Reality*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION*, *supra* note 97, at xxxvii (“Commentators increasingly see signs of . . . a backlash against the foreign investment regime.”).

102 Bolivia was the first state that withdrew from the ICSID. News Release, ICSID, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement3.html>; Sébastien Manciaux, *Bolivia's Withdrawal from ICSID*, *TRANSNAT'L DISP. MGMT.* (2007), <https://www.transnational-dispute-management.com/article.asp?key=1076>. The Constitutional Court of Ecuador has ruled that the clauses concerning investor-state arbitration in investment treaties might be unconstitutional. *See, e.g.*, La Corte Constitucional [Constitutional Court of Ecuador] Nov. 25, 2010, Resolution No. 043-10-DTI-CC, Case No. 0013-10-TI (Ecuador) (Ecuador-United States BIT); *see also* La Corte Constitucional [Constitutional Court of Ecuador] Oct. 7, 2010, Resolution No. 035-10-DTI-CC, Case No. 0003-10-TI (Ecuador) (Canada-Ecuador BIT).

103 For a description and critical analysis of the withdrawal of these countries from the ICSID Conventions, see Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 *J. INT'L BUS. & L.* 239 (2012). *See also* Waibel et al., *supra* note 101, at xlix (discussing efforts by certain countries to limit their exposure to investment arbitration).

experience of Venezuela, for instance. In 2012, the government of Hugo Chavez, reeling from multiple losses in investment arbitration after a series of nationalizations, repudiated treaty arbitration clauses and withdrew from the ICSID Convention.<sup>104</sup>

Argentina did not quite follow Venezuela's lead in withdrawing from ICSID after it suffered multiple losses in arbitration, but it came close to doing so in 2013.<sup>105</sup> And the Argentine government's relationship with BITs has long been fraught and uncertain. In 2005, for instance, the Peronist regime of Néstor Kirchner lambasted the investors who sued his government and actively tried to avoid paying them the damages they won in arbitration.<sup>106</sup> The conservative government of Mauricio Macri, which won office in 2015, has since reversed course by paying off the investors and seems bent on seeking out new investment agreements.<sup>107</sup> In this case, each new regime seems to use their power to undo the key international policies and treaties enacted by their predecessors.

This pattern of oscillating wildly on treaty commitments between electoral cycles suggests a lack of political consolidation on the issue of foreign investment. In the Latin American context, the issue is compounded by the fact that it appears political polarization might be driving the institutional politics of international investment treaties; on the one hand, the left might seek to use the domestic constitution as an entrenchment device to block future investment treaties (or other forms of international law), while the right might seek to use investment treaties to constrain the domestic policy discretion of future left governments.<sup>108</sup> At bottom, the commitment to

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104 See News Release, ICSID, Venezuela Submits a Notice Under Article 71 of the ICSID Convention (Jan. 26, 2012), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=47>; Kejal Vyas, *Venezuela's Chávez: Won't Accept Rulings by ICSID Court*, INV. HUB (Jan. 8, 2012), <http://ih.adfn.com/p.php?pid=nmona&article=50659958>. For a thorough analysis of Venezuela's denunciation of the ICSID Convention, see Kathryn E. Rimpfel, *Treaty Shopping and Expansive Jurisdiction: Causes and Effects of Venezuela's Denunciation of the ICSID Convention*, 5 Y.B. ON ARB. & MEDIATION 371, 373 (2013).

105 See Oscar Lopez, *Smart Move: Argentina to Leave the ICSID*, 1 CORNELL INT'L L.J. ONLINE 121 (2013).

106 See Jorge San Pedro, *Kirchner's Tough Talk Rattles Big Business*, EL PAIS (ENG.), Mar. 16, 2005, 2005 WLNR 4029858 (describing President Kirchner's announcement that "Argentina would not abide by the ICSID rulings and would only recognize the jurisdiction of local courts").

107 See Facundo Pérez-Aznar, *Argentina Is Back in the BIT Negotiation Arena*, INV. CLAIMS (Nov. 14, 2016), <http://oxia.oupplaw.com/page/argentina-bit>. But one need not stake out a position on the merits of a treaty to see that this cycle of back and forth on treaty commitments can devolve into an unstable and unpredictable policy environment. And there is no obvious solution to this dilemma. From the perspective of a right-leaning office holder in Argentina, for instance, the political benefits in the short term of signing onto new investment treaties may be significant, but the costs are back-loaded. But once a left-leaning populist regime comes into power, they may have little to gain but much to lose by sticking to these commitments.

108 Ecuador's constitution, for instance, was amended in 2008 to prevent the country from entering into agreements with non-Latin American states that require international

investment arbitration has been weak because the domestic groups in these countries did not have the occasion to fight it out and reach a conclusive outcome, which also explains the repeat cycles of nationalization and denationalization observed in the wake of national elections.<sup>109</sup> And Latin American countries are hardly alone in this respect. South Africa,<sup>110</sup> Indonesia,<sup>111</sup> Russia,<sup>112</sup> and Italy<sup>113</sup> followed suit by withdrawing from some bilateral investment treaties after adverse decisions threatened important domestic constituencies, and South Africa and Pakistan have been openly critical of the dispute resolution mechanism in BITs generally.<sup>114</sup> One common thread in all these cases is that the national politicians rarely ever suffer serious political repercussions from their domestic audiences by withdrawing from these treaties, which suggests that the domestic coalition in support of these investment agreements was relatively tepid in the first place.

Other countries have responded to adverse decisions by seeking to redesign their future BITs. For instance, in response to a single unfavorable arbitration outcome,<sup>115</sup> India launched a comprehensive review of its entire investment treaty regime and adopted a new model BIT in 2015 that restricted the scope of investments which would qualify for arbitration review.<sup>116</sup> And in response to an investor suit by Philip Morris over cigarette

arbitration. See Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, 19 AM. REV. INT'L ARB. 269, 286 (2008).

109 The fallacy of composition has often disguised this important fact by assuming somehow that a state can effectively bind itself; on the contrary, it may simply be that one faction is taking advantage of its temporary power to bind another. For a discussion of the fallacy of composition and how it is deployed in public law, see Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 63–64 (2009) (discussing fallacies of composition and division in American public law).

110 See Leandi Kolver, *SA Proceeds with Termination of Bilateral Investment Treaties*, ENGINEERING NEWS (Oct. 21, 2013), <http://www.engineeringnews.co.za/article/sa-proceeds-with-termination-of-bilateral-investment-treaties-2013-10-21>; Gerhard Erasmus, *Investment Protection Agreements: The Implications of South African Policy and Legislative Changes* (Tralac, Working Paper No. S15WP18/2015, 2015), <https://www.tralac.org/images/docs/8281/s15wp182015-erasmus-investment-protection-agreements-south-africa-20151015-fin.pdf>.

111 See Kayla Feld et al., *BIT by BIT: Indonesia's Push-Back on Foreign Investment*, 20 ARB. NEWS 23 (2015).

112 See *Russia's Withdrawal from the Energy Charter Treaty*, NORTON ROSE FULBRIGHT (Aug. 2009), <http://www.nortonrosefulbright.com/knowledge/publications/22691/russias-withdrawal-from-the-energy-charter-treaty>.

113 See Gaetano Iorio Fiorelli, *Italy Withdraws from Energy Charter Treaty*, GLOBAL ARB. NEWS (May 6, 2015), <http://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/>.

114 See Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 TRADE L. & DEV. 19, 22 (2010).

115 See *White Indus. Austl. Ltd. v. Republic of India*, Final Award, United Nations Commission on International Trade Law [UNCITRAL], (Nov. 30, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>.

116 For the relationship between the *White Industries* decision and the future of India's BIT program, see Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, 2 INV. TREATY NEWS 13, 13 (2012); UNCTAD, *India, Bilateral*

labeling, the government of Australian Prime Minister Julia Gillard announced in 2011 that it would no longer permit provisions on investor-state dispute settlement in any of its future BITs.<sup>117</sup> Even the United States has not been immune; in reaction to a series of lawsuits under NAFTA Chapter 11, the governments of the United States, Mexico, and Canada all agreed on measures that would curtail the discretion of investment arbitrators to review certain kinds of investment controversies.<sup>118</sup> Finally, Brazil, a significant destination of inward foreign investment, has decided to eschew the ratification of BITs altogether.<sup>119</sup>

By contrast, over roughly the same time period, there has been a range of decisions by the WTO on international trade that has had a profound effect on member-state sovereignty, *but there have been neither withdrawals nor renegotiations*. In the early 2000s, for instance, the EU successfully challenged a U.S. tax provision before the WTO—the Foreign Sales Corporation (FSC) regime—which provided certain tax exemptions to U.S. exporters; in the end, the WTO decisions left the United States in a position where it would have to overhaul portions of its tax code or face sanctions.<sup>120</sup> In response to these WTO rulings, Congress has twice had to repeal the challenged tax provision, and it eventually replaced the provision in 2004 with a deduction for income attributable to domestic production.<sup>121</sup> The transformation that these WTO decisions wrought on the U.S. tax system was hardly trivial; indeed, some commentators suggested that Congress’s legislative response to

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*Investment Treaties (BITs)*, INV. POL’Y HUB (2013), [http:// investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu](http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu).

117 See AUSTRALIAN GOV’T DEP’T OF FOREIGN AFFAIRS & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY (2011), [http://blogs.usyd.edu.au/japaneselaw/2011\\_Gillard%20Govt%20Trade%20Policy%20Statement.pdf](http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf).

118 In 2001, Trade Ministers from each Party, acting as the Free Trade Commission, issued an Interpretation of Certain Chapter 11 Provisions. See NAFTA FREE TRADE COMM’N, *Notes of Interpretation of Certain Chapter 11 Provisions*, ORG. AM. STATES (July 31, 2001), [http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp). The Interpretation addressed how the minimum standard of treatment should be interpreted in a manner that would circumscribe the scope of the standard and interpretive flexibility of arbitrators. *Id.* The FTC was comprised of Robert B. Zoellick, the then-U.S. Trade Representative; Luis Ernesto Derbez Bautista, the then-Secretary of Economy of Mexico; and Pierre S. Pettigrew, the then-Minister for International Trade of Canada. *Id.*

119 See Nancy A. Welsh et al., *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil’s Rejection of Bilateral Investment Treaties*, 45 WASH. U. J.L. & POL’Y 105 (2014).

120 See Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,”* WTO Doc. WT/DS108/AB/RW (adopted Jan. 14, 2002) (discussing all previous Appellate Body rulings on this controversy).

121 See American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (codified in scattered sections of 7, 15, 19, 26, 31, and 42 U.S.C.). For a discussion of the background of the FSC controversy and the legislative response by Congress, see Stuart Smith, Comment, *Fishing for Rainbows, the FSC Repeal and Extraterritorial Income Exclusion Act*, 5 SAN DIEGO INT’L L.J. 503 (2004).

the first WTO decision “represented a significant move by the United States to a territorial tax system (a position that historically has been opposed by U.S. tax policy).”<sup>122</sup> In numerous other controversies, WTO judges have struck down provisions that implicated the state’s basic regulatory authority, such as the European Community’s regulations on bananas, regulations governing beef hormones, subsidies for sugar production, restrictions on GMOs, U.S. trade-remedy laws, and U.S. cotton subsidies.<sup>123</sup>

But despite these adverse rulings, the basic structure of the WTO/GATT dispute resolution mechanism has nonetheless remained intact, even when its decisions cut against the interests of its most powerful members. For the most part, politicians in advanced industrialized countries have resorted to countering unfavorable decisions by the WTO within the framework of the treaty regime itself, either through tightening oversight of judicial appointments or attempting to clarify the interpretation of the treaty.<sup>124</sup> Indeed, over the years, the WTO’s underlying adjudication role has been expanded and consolidated over the past decade.<sup>125</sup>

So what explains the difference in how domestic audiences have responded to these two kinds of adjudicatory bodies? When will domestic political factions accept an unfavorable verdict by an international court and tribunal, and when will they actively seek to undermine or change it? As suggested by Professor Pauwelyn in a recent piece, there may be some non-institutional factors that can account for some of the divergence between trade and investment adjudication, such as the differences in the kinds of personnel who staff such tribunals.<sup>126</sup>

The capacity of interest groups to defend the relevant judicial body against revisionist forces is likely to be an important, if not a decisive, consideration. Thus, a plausible explanation for the durability of WTO dispute resolution may simply be that it coincided with the consolidation of the relative

122 JAMES S. EUSTICE & BORIS I. BITTKER, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 15.23[4] (2017).

123 See Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Sept. 29, 2006); Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WTO Doc. WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (adopted Apr. 28, 2005); Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (adopted Mar. 3, 2005); Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Jan. 16, 1998); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted Sept. 9, 1997).

124 Recently, for instance, the United States blocked the reappointment of Seung Wha Chang, a South Korean judge on the WTO Appellate Body, to signal its disfavor with certain rulings. See *Washington Threatens to Undermine the WTO*, FIN. TIMES (May 31, 2016), <https://www.ft.com/content/e679fd58-2730-11e6-8b18-91555f2f4fde>.

125 See Pauwelyn, *supra* note 8, at 761 (“Although powerful members such as China, the European Union (EU), and the United States are regularly on the losing side of WTO trade disputes, overall support for the system remains high. If anything, it has increased over time, with early criticism by civil society waning.”).

126 See *id.* at 768–84.

dominance of export industries over protectionists in many industrialized states. By the time the Uruguay Round was completed in 1994 and NAFTA was signed in 1992, organized labor—the traditional opponents of free trade—had long been on the decline, and export-oriented industries were ascendant.<sup>127</sup>

To be sure, politicians across industrialized countries routinely attack the WTO's dispute settlement system when it renders controversial decisions that cut against national priorities. But export groups have proven to be willing and able to mobilize and thwart these attacks before they transpire into serious legislative action. In 2000, for instance, there was a legislative proposal during the Clinton administration to withdraw from the WTO after its dispute resolution mechanism rendered unfavorable judgments against the United States in disputes with protectionist overtones.<sup>128</sup> But members of Congress resoundingly rejected the proposal. Other bills seeking to establish a legislative commission to review WTO decisions have been proposed, but nothing much has come of them.<sup>129</sup>

The key to effective mobilization of export groups against revisionist attacks on the WTO is twofold: first, the stakes have to be fairly high for these concentrated economic groups,<sup>130</sup> and second, the adversary they are likely to face has to be known to them in advance. The basic logic is that it would not pay to invest deeply in political lobbying when only speculative future benefits are involved or when you are unable to anticipate the identity of your adversary. Export groups were able to link the WTO with obvious short-term benefits; in other words, they hoped that the WTO would act immediately as a check on the tendency of politicians to cloak protectionist defec-

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127 See MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* (1987).

128 Withdrawing the Approval of the United States from the Agreement Establishing the World Trade Organization, H.R.J. Res. 90, 106th Cong. (2000). The bill failed to pass by a lopsided margin of 363–56. A similar resolution was introduced in 2005, but it also failed. For a discussion of these proposals, see CONG. RESEARCH SERV., *RL32700, SEEKING WITHDRAWAL OF CONGRESSIONAL APPROVAL OF THE WTO AGREEMENT: BACKGROUND, LEGISLATIVE PROCEDURE, AND PRACTICAL CONSEQUENCES* (2005), [https://www.everycrsreport.com/files/20050609\\_RL32700\\_b03d90b5403cf7467d12d9f45a96325ddb87081.pdf](https://www.everycrsreport.com/files/20050609_RL32700_b03d90b5403cf7467d12d9f45a96325ddb87081.pdf).

129 WTO Dispute Settlement Review Commission Act, H.R. 4706, 106th Cong. (2000). A previous proposal to establish such a commission was made in 1994 in the wake of the Uruguay Round negotiations. See WTO Dispute Settlement Review Commission Act, S. 1438, 104th Cong. (1995). For a discussion of these proposals, see Gary G. Yerkey, *Rep. Cardin Revives Dole Plan to Create Panel to Review WTO Rulings Against U.S.*, INST. FOR AGRIC. & TRADE POL'Y (June 23, 2000), <https://www.iatp.org/news/rep-cardin-revives-dole-plan-to-create-panel-to-review-wto-rulings-against-us>.

130 The notion that export groups in industrialized economics are relatively concentrated economic groups has support in the political economy literature. See Orin Kirshner, *Superpower Politics: The Triumph of Free Trade in Postwar America*, 19 CRITICAL REV. 523, 530 (2007) (observing that only 3.5% of all active American corporations and partnerships accounted for 86% of all American exports).



tions from trade agreements in high-minded rhetoric.<sup>131</sup> Moreover, they understood that in the absence of the WTO, such defections could take place from trading partners with large shares of world trade. For elected officials in the United States, for instance, the threat to their exporters of losing access in the short run to very lucrative world markets in the European Union, China, or Japan is likely to weigh more heavily in their political calculus than the benefits to protectionist groups from the WTO's unraveling.

By contrast, with respect to investment treaty arbitration, the likely dynamics cut in the opposite direction for foreign investors; in other words, we should not automatically assume that investors will have the ability to overcome the collective action problems necessary to thwart downstream attacks on investment arbitration. First, for such investors, the stakes may often not be high enough because the benefits of investment dispute resolution tend to materialize only when there is an actual breakdown in a relationship between foreign investors and the host state. In other words, even though the direction of the benefits is obvious, the salience of investment arbitration for any one group of investors may be undercut by its perceived infrequency of use.

Second, another big challenge for foreign investors is that there are usually readily available substitutes for the collective good provided by investment treaty arbitration, which include domestic courts in industrialized states or privately negotiated international commercial arbitration.<sup>132</sup> Thus, rather than investing a lot of effort in trying to muster the collective action to defend investment tribunals from attack, a group of investors might simply opt to enter into a separate contract with the host state that provides for commercial arbitration, or take their chances in the host state's domestic courts.

Before concluding, another illustration suggests that even when investment arbitration clauses are not divisive when originally negotiated, the distributional burdens they impose on powerful groups will likely become apparent after the outcome of arbitration disputes. When that occurs, it can trigger a political stalemate regarding the negotiation of similar clauses in future international economic agreements.

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131 For how export groups benefit from the WTO dispute resolution mechanism and shape its design, see generally SHAFER, *supra* note 17 (discussing how private actors influence the public enforcement of trade commitments); Movsesian, *supra* note 17 (same); Nzelibe, *supra* note 17 (same). For how protectionist benefits are often obscured by high-minded rhetoric, see Daniel Y. Kono, *Optimal Obfuscation: Democracy and Trade Policy Transparency*, 100 AM. POL. SCI. REV. 369 (2006).

132 Indeed, outside the protection of foreign investments by domestic law, sometimes domestic courts have been used to enforce international investment law directly. See John F. Coyle & Jason Webb Yackee, *Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts*, 49 ARIZ. ST. L.J. 61 (2017).

b. From Indifference to Stalemate: Negotiating Dispute Resolution After NAFTA

The negotiation of NAFTA in the early 1990s was a massive undertaking, and it provided mechanisms for resolving disputes in both international trade and foreign investment. The dispute resolution provisions for international trade controversies were thoroughly vetted and seriously debated over months by legislatures in the United States, Canada, and Mexico. However, with respect to NAFTA Chapter 11, the provision governing investment disputes, there seemed to be an attitude of “*indifference all around*” among the politicians in all three signatory states.<sup>133</sup> As then-U.S. Senator Kerry put it memorably in 2002: “*When we passed NAFTA, there wasn’t one word of debate on the subject of the chapter 11 resolution—not one word. Nobody knew what was going to happen. Nobody knew what the impacts might be.*”<sup>134</sup>

One obvious ramification of the indifference over NAFTA Chapter 11’s origins is that it managed to produce a consensus regarding dispute resolution during the negotiations, albeit a fragile one. As NAFTA arbitration claims have proliferated, however, the weight of politics in all three countries has naturally shifted its attention to the mechanics of Chapter 11.<sup>135</sup> Potential and actual losers from investment arbitration have since been identified, and the initial consensus has gradually dissolved.

The United States’ experience is illustrative. Investors from the United States have evidently filed more Chapter 11 claims against Mexico and Canada than investors from each of those countries have brought against the United States. So, on balance, one would expect United States politicians across the spectrum to be happy with how things have transpired because the United States has presumably gotten more out of the system than it has had to give. But that has not been the case. Even when the United States prevailed on the merits in foreign investor lawsuits brought against it,<sup>136</sup> such as

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133 See MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 63–68 (2000); Meg Kinnear & Robin Hansen, *The Influence of NAFTA Chapter 11 in the BIT Landscape*, 12 U.C. DAVIS J. INT’L L. & POL’Y 101, 104 (2005) (“The historical record suggests that the Parties’ main goals in signing NAFTA related to objectives other than Chapter 11’s investor-state dispute resolution mechanism and that investor-state arbitrations under BITs were relatively unusual at the time.”).

134 148 CONG. REC. S4594 (daily ed. May 21, 2002) (statement of Sen. Kerry) (emphasis added).

135 See, e.g., Anthony DePalma, *Nafta’s Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>. In 2002, the Canadian Department of Foreign Affairs and International Trade had the dubious distinction of winning the “Code of Silence Award,” given annually by the Canadian Association of Journalists, for its participation in closed-door NAFTA Chapter 11 tribunals. *Canadian Association of Journalists—Code of Silence Nominees*, CISION, <http://www.newswire.ca/news-releases/canadian-association-of-journalists—code-of-silence-nominees-533764631.html> (last visited Nov. 23, 2017).

136 Indeed, the United States’ track record for claims brought against it has been pretty good. Since NAFTA passed, there have been eighteen claims brought by investors against

it did in the *Mondev* and *Methanex* cases,<sup>137</sup> the mere fact that investment tribunals were able to entertain such claims in the first place, especially on issues that might not have been seriously entertained by domestic courts, has proven to be quite controversial.<sup>138</sup> In *Methanex*, for instance, a Canadian distributor of methanol submitted an arbitration claim contending that it was injured by a California ban on the use or sale of certain gasoline additives.<sup>139</sup> The reverberations of this case likely weighed heavily on congressional debates regarding pending investment treaties. During the 2015 debates over the Trans-Pacific Partnership, for instance, Senator Elizabeth Warren penned an editorial in the *Washington Post*, where she denounced investment state dispute settlement for allowing “foreign companies to challenge U.S. laws—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court.”<sup>140</sup>

On a speculative note, one fallout of these NAFTA Chapter 11 lawsuits is that there appears to be a growing political stalemate in the United States regarding the inclusion of dispute resolution clauses in future international economic agreements. Two significant treaties with sweeping economic and distributional implications—the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP)—were both stalled in Congress for much of 2016, as advocates on both sides dug in their heels either in favor or against each of the agreements.<sup>141</sup> Although sometimes

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the United States, and the United States has prevailed on the thirteen that have been decided. Jay Chittooran, *TPP in Brief: Investor-State Dispute Settlement*, THIRD WAY (Sept. 19, 2016), <http://www.thirdway.org/report/tpp-in-brief-investor-state-dispute-settlement>.

137 *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, pt. I, ¶ 1 (NAFTA Ch. 11 Arb. Trib. 2005); *Mondev Int’l Ltd. v. United States*, 6 ICSID (W. Bank) 181 (NAFTA Ch. 11 Arb. Trib. 2002).

138 See Detlev Vagts, *Foreword to THE BACKLASH AGAINST INVESTMENT ARBITRATION*, *supra* note 97, at xxiii, xxv (noting that NAFTA cases, particularly the *Methanex* case that was rejected on the merits, caused concern for the signatory states and led to changes to the U.S. 2004 Model BIT); Dana Krueger, Note, *The Combat Zone: Mondev International, Ltd. v. United States and the Backlash Against NAFTA Chapter 11*, 21 B.U. INT’L L.J. 399 (2003).

139 For a detailed discussion of the controversy in *Methanex*, see Courtney C. Kirkman, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 L. & POL’Y INT’L BUS. 343 (2002).

140 Warren, *supra* note 90. In Senator Warren’s piece, the echoes of the *Methanex* case are obvious:

Here’s how it would work. Imagine that the United States bans a toxic chemical that is often added to gasoline because of its health and environmental consequences. If a foreign company that makes the toxic chemical opposes the law, it would normally have to challenge it in a U.S. court. But with ISDS, the company could skip the U.S. courts and go before an international panel of arbitrators. If the company won, the ruling couldn’t be challenged in U.S. courts, and the arbitration panel could require American taxpayers to cough up millions—and even billions—of dollars in damages.

*Id.*

141 See Jennifer Rankin, *EU and US Trade Negotiators Seek to Get TTIP Talks Back on Track*, GUARDIAN (Sept. 30, 2016), <https://www.theguardian.com/business/2016/sep/30/ttip-eu-and-us-trade-negotiators-seek-to-get-talks-back-on-track> (describing the controversy sur-

nominally labeled trade treaties, both of these proposed agreements were broad economic deals that embodied significant rules governing investment arbitration, as well as other issues—such as the protection of intellectual property rights. The bundling of issues that did not involve the removal of trade barriers proved to be controversial, even for those who otherwise favor economic liberalization. For instance, Joseph Stiglitz, a Nobel-winning economist, decried the TPP as a terrible economic treaty and labeled the investment arbitration aspects the worst part of the deal.<sup>142</sup> The suspense over the future of the TPP eventually came to an end when President Trump decided as one of his first executive actions to abandon the treaty.<sup>143</sup> It is anticipated that the TTIP will likely be next on the Trump administration's treaty chopping block.<sup>144</sup>

So what happened? One likely factor is that as both agreements made their way through Congress, the political space for accommodation and compromise seemed to have dwindled, especially with respect to the possibility of including investor-state dispute settlement language. Since neither side had a reason to think that it could be overwhelmed or defeated decisively by the other in the legislative arena, none had a particularly strong incentive to seek accommodation.<sup>145</sup> After all, given the consensus nature of prior investment treaties, neither the opponents nor the proponents of the TTIP or the TPP had a prior opportunity to fight it out between themselves and discover the true balance of power.

## 2. Enforcing International Trade and International Investment

How does interest group conflict shape the willingness of countries to engage in reciprocal sanctions for breaches of a treaty? Stripped of any complicated institutional details, the essence of the matter can be stated as follows: the role of interest group conflict in international commerce may lead

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rounding dispute resolution clauses and the TTIP); Todd Tucker, *How to Fix the Most Controversial Element of Trade Deals*, POLITICO (Sept. 21, 2016), <https://www.politico.com/agenda/story/2016/09/fix-isds-trade-deals-000204> (describing the controversy surrounding dispute resolution clauses and the TPP).

142 See TPP 'Worst Trade Deal Ever,' Says Nobel-Winning Economist Joseph Stiglitz, CBC NEWS (Apr. 1, 2016), <http://www.cbc.ca/news/business/joseph-stiglitz-tpp-1.3515452>.

143 Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

144 Philip Blenkinsop, *U.S. Trade Talks in Deep Freeze After Trump Win, Says EU*, REUTERS (Nov. 11, 2016), <http://www.reuters.com/article/us-usa-election-eu-trade-idUSKBN1361UN>; Joey Millar, *Is the EU's TTIP Now Under Threat? Donald Trump Scraps Controversial TPP Trade Deal*, EXPRESS (Jan. 23, 2017), <http://www.express.co.uk/news/world/757832/donald-trump-eu-tpp-Trans-Pacific-Partnership-deal>.

145 Cf. COSER, *supra* note 31, at 135 ("If the adversary's strength could be measured prior to engaging in conflict, antagonistic interests might be adjusted without such conflict . . . . Since power can often be appraised only in its actual exercise, accommodation may frequently be reached only after the contenders have measured their respective strength in conflict.")

to more effective enforcement of international commitments because it takes for granted—and even exploits—a certain instrumental approach to political life. Such an approach assumes that the self-interest of discrete and narrow groups can be enlisted in the service of enforcement. For instance, the enforcement machinery within the WTO/GATT regime explicitly allows states prevailing in a trade dispute to increase trade barriers to a level equivalent to the barriers imposed by the scofflaw state, and allows the retaliation to continue until the scofflaw state withdraws the offending measure.<sup>146</sup> This particular institutional feature within the WTO, which allows for mutual defection, is best understood as an effort to use domestic interest groups as enforcement agents. If one country breaches its commitments under the treaty or seeks to withdraw, interest groups in the victim country have an incentive to lobby hard for retaliation against the scofflaw state.<sup>147</sup>

But there are crucial aspects of the WTO/GATT enforcement regime that do not translate well to the investment arbitration context; indeed, the absence of incentives and opportunities for interest groups to lobby for retaliation are inherent problems in the current design of international investment arbitration.

In order for retaliation to be a self-enforcing mechanism, the following conditions (which are not particularly suited to investment arbitration disputes) would have to be met:

First, realistic opportunities to retaliate by the prevailing state against the scofflaw state have to exist. And there are reasons to think that these opportunities will differ across trade and investment regimes. Take international trade, for instance. In many industrialized countries, domestic laws implicitly or explicitly allow states to raise trade barriers against other states, especially

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146 If compliance is not forthcoming within a reasonable time and the scofflaw state refuses to offer any compensation that involves the elimination of trade barriers, then the victim state can retaliate against the scofflaw state by suspending equivalent “concessions or other obligations under the covered agreement[.]” Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226.

147 Indeed, if anything, developed countries have sometimes deployed sanctions associated with the international trade regime in order to punish states that have violated their international investment commitments. For instance, President Obama suspended trade benefits to Argentina in response to massive Argentine default on debt payments to American investors. See RACHEL L. WELLHAUSEN, *THE SHIELD OF NATIONALITY: WHEN GOVERNMENTS BREAK CONTRACTS WITH FOREIGN FIRMS* 10–11 (2014). But there are two problems with deploying this as a consistent strategy for handling investment defaults. First, it is unlikely that such linkages across the trade and investment regimes are legally permissible under the WTO/GATT framework, as it currently stands. Indeed, the failure to adopt a multilateral investment framework within the GATT structure suggests that such linkage does not enjoy sufficient political support, especially among developing countries. Second, the political dynamics of such linkages are complicated. As Wellhausen has argued, scofflaw states have the opportunity and incentive to seek out new investment or trading markets when such trade sanctions are imposed in these linkage arrangements because these are bilateral arrangements that do not implicate relationships with third parties. See *id.* at 11.

if the other state in the trade agreement is violating its commitments. In the context of bilateral investment treaties, however, there are strong and long-standing statutory and constitutional constraints that disallow industrialized states from engaging in expropriation of property without compensation, even if other countries engage in expropriation.<sup>148</sup> Thus, countries not bound by such domestic constraints will have greater leeway to violate their commitments or withdraw from investment agreements, because they know that in the future the circumstances are unlikely to be reversed.

Second, the rights protected by the agreement have to be important enough to powerful interest groups in both the victim and scofflaw states; in other words, these groups have to be willing to punish politicians for withdrawing from or breaching the agreement. To a significant degree, such a reciprocal willingness to punish defections approximates the relationship among the more powerful trading partners within the WTO/GATT framework.

In international trade, the threat to retaliate when there is a breach is credible because interest groups in the victim state that are normally at loggerheads with each other stand to mutually profit from retaliation.<sup>149</sup> Export groups in the victim state obviously benefit when retaliation forces the scofflaw state to back down from its trade-inconsistent behavior. Protectionists in the victim state benefit when retaliation is ongoing against the scofflaw state and tariff barriers are raised on competitive products.<sup>150</sup> Thus, paradoxically, the protectionist groups in the victim state indirectly enhance the dispute resolution mechanisms that protect free trade. To illustrate the role of interest groups in enforcing trade commitments, one need only examine some of the retaliation targets compiled by prevailing parties in WTO disputes. For instance, in a dispute over ten years ago involving U.S. tariffs on steel,<sup>151</sup> the European Community published a retaliation list that would target industries in battleground states in the U.S. presidential election of 2004.<sup>152</sup> In both the EC-Beef Hormones and the EC-Bananas controversies,<sup>153</sup> the United States subscribed to a similar retaliation strategy and

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148 See *supra* note 54 and accompanying text.

149 See Nzelibe, *supra* note 17, at 215–17.

150 See *id.*

151 See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (adopted Nov. 10, 2003).

152 See Nzelibe, *supra* note 17, at 224–25; see also James Cox, *Sparks Fly over U.S.-EU Trade*, USA TODAY, Nov. 12, 2003, at 3B (discussing political benefits to President Bush of steel tariffs and the political sensitivity of threatened retaliation by the European Community).

153 For the Appellate Body Report on the Beef Hormones dispute, see Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 2, 158, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Nov. 10, 2003) (finding European prohibition on import of beef treated with growth hormones to violate SPS Agreement).

imposed prohibitive rates of 100% on a narrow range of exports from key European countries.<sup>154</sup> In drafting the lists of target companies in such disputes, the U.S. Trade Representative routinely seeks feedback and input from the various interest groups.<sup>155</sup> In the absence of such a carefully calibrated retaliation strategy that focuses on industries in politically vulnerable regions, the effects of retaliation may be too diffuse and collective action problems will then prevent interest groups in the victim state from mobilizing to lobby against the violation.

Moving beyond the issue of breach or noncompliance, there is an open question as to whether a state suffers any obvious political costs if it decides to withdraw from an international economic agreement altogether. After all, it would seem that one easy route to avoid punishment for breaching an agreement would be to choose the exit option. But with respect to BITs, the matter is somewhat complicated. Of course, if a state has already signed a BIT that permits investor-state arbitration, then the harmed investor can bring a suit for damages against the scofflaw state as long as the BIT is still effective. Many BITs have long sunset periods where the dispute resolution mechanism continues to be in effect for a number of years even after a state has formally withdrawn from the treaty.<sup>156</sup> But once the scofflaw state's withdrawal from the BIT becomes legally effective, it usually leaves the investor (and its home state) with no effective legal or political recourse.

By contrast, in the WTO/GATT framework, the willingness of domestic groups in the victim state to lobby for retaliatory sanctions to pry open foreign markets is likely to continue after a state withdraws from an agreement. Indeed, as Alan Sykes and Warren Schwartz have convincingly argued, one of the goals of the WTO/GATT enforcement mechanism is not necessarily to

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154 In the Beef Hormones dispute, after the WTO approved a level of tariff suspensions worth \$116.8 million, the United States imposed 100% retaliatory tariffs on a specific range of EC agricultural products. See *Final List of European Union Products on Which U.S. Will Impose 100% Ad Valorem Duties in Response to Beef Hormones Dispute*, Released by USTR July 19, 1999, 16 INT'L TRADE REP. (BNA) 1231, 1231 (1999). For the EC-Bananas dispute, the retaliation amount authorized was \$191.4 million. See *U.S. Issues Final List of European Imports to Be Hit with Higher Duties in Banana Row*, 16 INT'L TRADE REP. (BNA) 621, 621 (1999). For the DSU arbitration decision authorizing the United States to suspend concessions, see Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WTO Doc. WT/DS27/ARB (adopted Apr. 9, 1999).

155 *Advisory Committees*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/advisory-committees> (last visited Nov. 5, 2017).

156 For instance, the Netherlands-Venezuela BIT, which was denounced by Venezuela in 2008, provides that “[i]n respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.” Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela, *Neth.-Venez.*, art. 14, ¶ 3, Oct. 22, 1991. For Venezuela's denunciation of that treaty, see Luke Eric Peterson, *Venezuela Surprises the Netherlands with Termination Notice for BIT; Treaty Has Been Used by Many Investors to “Route” Investments into Venezuela*, 1 INV. ARB. REP. 2 (2008).

increase the level of enforcement, but rather to reduce the risk of over-enforcement that is likely to occur in the absence of such an overarching dispute resolution mechanism.<sup>157</sup> In other words, without a neutral third party adjudicator such as the WTO, if country *A* decides to increase its trade barriers against country *B*, it is not necessarily protected from retaliation or the imposition of high tariff barriers from country *B*; on the contrary, country *A* could be exposed to unilateral sanctions from country *B* that might be clearly disproportionate to the breach that occurred. Indeed, after a withdrawal from a treaty, the state that is harmed by a withdrawal need not take any positive legal action against the scofflaw state; by simply recognizing that it is no longer in a trade agreement, the victim state may simply let its tariffs rise to the preagreement level, which may be relatively high. If a trading partner withdraws from a trade agreement with the United States, for instance, such a partner can be exposed to the fairly high tariffs for countries that lack an agreement with the United States.<sup>158</sup> Thus, such a country has a strong disincentive against withdrawing from the trade treaty, because it is likely to face higher retaliation outside the trade treaty than it would face within it.

#### IV. WITHDRAWAL FROM THE INTERNATIONAL CRIMINAL COURT

The Rome Statute establishing the International Criminal Court (ICC) is yet another striking illustration of a consensus treaty succumbing to intense political backlash, especially from African leaders. In 2002, a number of countries agreed to establish a permanent ICC with broad jurisdiction over atrocities occurring in the territory of any state party to the ICC treaty.<sup>159</sup> Since then, over 120 countries have signed and ratified the ICC statute.<sup>160</sup> Thirty-four African states signed onto the Rome Statute, which makes it the regional bloc with the largest number of state parties. But in the past few years, the ICC has been engulfed by the threat of a string of withdrawals by African states.

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157 See Schwartz & Sykes, *supra* note 17, at 187 (“[B]y limiting the retaliatory withdrawal of concessions to those substantially equivalent, the system seeks to ensure that the price for non-performance under the liability rule is not too high.”); *id.* at 203 (“Although the GATT system had always required that any sanction be substantially equivalent to the harm done by the violation, the question of whether an actual or threatened sanction was excessive by this standard might be one about which the members of the trading community have very poor information.”).

158 For a discussion of how the United States deployed unilateral sanctions to enforce trade commitments before the advent of the WTO, see Alan O. Sykes, “Mandatory” Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT’L L.J. 301, 311 (1990).

159 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 91 [hereinafter Rome Statute].

160 See *State Parties—Chronological List*, ICC, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/states%20parties%20\\_%20chronological%20list.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx) (last visited Nov. 6, 2017) (listing states party to the Rome Statute).



The backlash against the ICC was likely rooted in two related factors: (1) the absence of any serious political strife or contestation during the Rome Statute's negotiation and ratification, especially among African states; and (2) the widespread perception that the ICC's criminal prosecutions and investigations have been skewed largely against targets from Africa.

#### A. *The Role of Consensus*

Unlike international trade treaties, the Rome Statute establishing the ICC originated in relative consensus. The path to ratification among African state parties was fairly easy and bereft of any contentious political debate, and the risk of ICC prosecution of local politicians was rarely discussed during the legislative debates.<sup>161</sup> While a full-blown study of the legislative response by African states to the Rome Statute is beyond the scope of this Article, cursory evidence tends to support this claim. Reports of the legislative response to the Rome Statute in Kenya and South Africa, for instance, reveal that there was very little or no discussion of the risks of ICC prosecutions of domestic political actors. As Susanne Mueller observes with respect to Kenya:

In the parliamentary debates of the time and among civil society activists, one finds no concern that any Kenyans would ever be hauled before the ICC. Instead, the focus was on delays in ratification and on reconciling the parts of the Kenyan constitution that gave immunity to the president, something the *Rome Statute* prohibited.<sup>162</sup>

Political scientists trying to discern motivations of the Rome Statute makers have been somewhat stumped by this phenomenon. In their study about the ICC and credible commitment, for instance, Beth Simmons and Allison Danner observe: "Many of the countries of central interest to our thesis—the

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161 For the embrace of African states of the Rome Statute, and the large enthusiasm for the treaty shown by the African Union when it was first proposed, see Rowland J.V. Cole, *Africa's Relationship with the International Criminal Court: More Political Than Legal*, 14 MELBOURNE J. INT'L L. 670, 672–75 (2013); see also Charles Chernor Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation?*, 34 N.C. CENT. L. REV. 203, 204–06 (2012). Senegal was actually the first state to ratify the Rome Statute. Rome Statute, *supra* note 159, at 6. More broadly, outside of the ratification context, relative harmony and a lack of discord also characterized the process of negotiating the actual text of the treaty. See M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 455 (1999) ("Unlike other multilateral negotiation processes, where governmental delegates and NGO representatives are frequently in opposition, the cooperation between the two groups at the Conference was optimal. Also, the fact that the same participants met for thirteen weeks in New York, three weeks in Siracusa, and two weeks in Zutphen fostered cooperation and a collegial atmosphere which advanced the process in spite of differences of opinion.").

162 Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the Election and the Law*, 8 J.E. AFR. STUD. 25, 29 (2014) (footnote omitted). For an analysis of the South African support of the Rome Statute when it was first negotiated, see Max du Plessis, *Recent Cases and Developments: South Africa and the International Criminal Court*, 22 S. AFR. J. CRIM. JUST. 441, 441 (2009); see also Cole, *supra* note 161, at 673–74.

authoritarian countries that have experienced recent civil war—ratified the Rome statutes with hardly a trace of legislative debate or justification.”<sup>163</sup>

But why might African politicians have rationally discounted the risks of being targets of ICC investigations? One plausible explanation was that, in the short run, the political benefits of the treaty—even if marginal—might have seemed concrete and clear for the politicians who signed it, while the nonimmediate costs of facing prosecution by the ICC were likely to be borne by future politicians. In any event, for downstream politicians who might later find themselves embroiled in a domestic civil war or political crisis, joining the Rome Statute might no longer seem like a worthwhile gambit. Such politicians might come to rue the choices made by their predecessors who signed onto the treaty under a different political climate. But insensitivity to the risks of future prosecution at the time the treaty was signed does not mean that when the risk materializes, the treaty will survive any political blowback. Therein lies the irony: when crisis hits and there is a breakdown of civil order, it might be that the country that needs the protection of the ICC the most would be most likely to withdraw from the treaty.

### B. *The ICC's Illusion of Symmetry Disappears*

But like investment treaties, the Rome Statute establishing the ICC was afflicted by the illusion of symmetry. For instance, as a juridical matter, all signatories to the treaty are bound to its provisions and there are no provisions for exceptions and reservations. As a practical matter, however, the treaty is more likely to target political actors in weak states, such as in Africa. Some of the reasons for this asymmetry are artifacts of the scope of the legal regime itself; for instance, the jurisdiction of the ICC is limited to “the most serious crimes of concern to the international community” such as genocide and crimes against humanity, and these are offenses that are more likely to occur in weak or dysfunctional states.<sup>164</sup> Also, the ICC can only exercise jurisdiction when a party is “unwilling or unable . . . [to] prosecut[e],”<sup>165</sup> and governments from powerful states in Europe and elsewhere are likely to meet easily the ICC’s due process standards for prosecuting potential offenders.<sup>166</sup>

During the period of normal politics immediately after it was established, the ICC did not rankle African politicians. But once political crisis struck, the illusion of symmetry under the Rome Statute soon became less

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163 Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225, 236 (2010).

164 Rome Statute, *supra* note 159, at 92.

165 *Id.* at 100; *see id.* at 100–01 (directing ICC to refuse to admit cases where “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” or where “[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”).

166 *See id.* at 101 (directing ICC to consider “principles of due process recognized by international law” when determining whether state is unable or unwilling to prosecute).

credible once it turned out that all the initial prosecution targets of the ICC were from Africa.<sup>167</sup> At first, when the ICC's investigations were focused on low- or moderate-level political targets, such as Joseph Kony of Uganda's Lord's Resistance Army or the participants in Congo's brutal civil war, the political backlash seemed more manageable and self-contained. But the situation eventually became more problematic after the 2009 ICC arrest warrant for President Omar al-Bashir of Sudan on charges of serious crimes committed in Darfur.<sup>168</sup> It then reached a heightened degree of political intolerance in 2013, when two individuals subject to ICC investigation, Uhuru Kenyatta and William Ruto, won elections to be President and Deputy President of Kenya, respectively.<sup>169</sup> The ICC trial against these two eventually collapsed due to a lack of witnesses willing to testify.<sup>170</sup>

Denunciations of the ICC from a wide range of African politicians and bureaucrats soon followed.<sup>171</sup> Another point of contention was the fact that nine out of ten situations under investigation by the ICC involved African countries.<sup>172</sup> Both Gambia and Burundi served notice of an intent to withdraw from the Rome Statute in 2016.<sup>173</sup> The African Union (AU) has even taken steps to establish a regional criminal court which will serve as an alternative to the ICC.<sup>174</sup> In 2015, South African President Jacob Zuma ignored an ICC request to arrest Sudanese President al-Bashir when he attended an AU meeting in Johannesburg. After being criticized by a South African court for his decision, President Zuma later announced in 2016 that South Africa was also withdrawing from the ICC.<sup>175</sup> Current reports are that legislatures in Namibia, Kenya, and Uganda are all seriously contemplating with-

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167 See *African Union Accuses ICC of 'Hunting' Africans*, BBC (May 27, 2013), <http://www.bbc.com/news/world-africa-22681894>.

168 See Robert Marquand, *African Backlash Against International Courts Rises*, CHRISTIAN SCI. MONITOR (Oct. 6, 2009), <http://www.csmonitor.com/World/Global-News/2009/1006/african-backlash-against-international-courts-rises>.

169 Pascal Fletcher & Edmund Blair, *Insight: Kenya Cases Stir African Backlash Against ICC*, REUTERS (Sept. 16, 2013), <http://www.reuters.com/article/us-warcrimes-africa-insight-idUSBRE98F0P920130916>.

170 Bruce Zagaris, *ICC Trial Chamber Rejects Prosecutor's Request for Further Adjournment, Causing Prosecutor to Withdraw Charges Against Kenyatta*, 30 INT'L ENFORCEMENT L. REP. 578 (2014).

171 See Luckystar Miyandazi et al., *Opinion, Why an African Mass Withdrawal from the ICC Is Possible*, NEWSWEEK (Nov. 2, 2016), <http://www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-burundi-515870>.

172 See *id.*

173 See *id.*

174 See Gino J. Naldi & Konstantinos D. Magliveras, *African Union Establishes an International Criminal Court*, 30 INT'L ENFORCEMENT L. REP. 430 (2014).

175 Sewell Chan & Marlise Simons, *South Africa to Withdraw from International Criminal Court*, N.Y. TIMES (Oct. 21, 2016), [https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?\\_r=0](https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?_r=0).

drawal.<sup>176</sup> And in February 2017, the AU formally approved a resolution calling for mass withdrawal by African countries from the ICC.<sup>177</sup>

Nonetheless, one might argue that the pretense of equal treatment could have still been salvaged if the ICC would have targeted just one or two politicians from powerful western countries. But that possibility would also likely face significant political obstacles. Domestic audiences in powerful industrialized countries might balk at the notion of ever having their politicians hauled before an international tribunal that they might perceive to have been created for weak states. In the case of the Rome Statute, some politicians wanted to make exceptions for developed states explicit. As David Scheffer, the United States' negotiator for the Rome Statute has observed, the United States balked at joining the treaty unless there were further limits on the Court's jurisdiction that would avoid targeting American military personnel—a position rejected by other signatory states.<sup>178</sup> Of course, one might argue that such concerns make sense; after all, what is the point of simulating symmetry by charging politicians from major democracies for crimes in international venues for no other reason than to pacify audiences from weak states?

But in this dynamic, the ICC prosecutor is trapped in an inescapable predicament. On the one hand, if the prosecutor were to try to adhere scrupulously to the legal mandate of the ICC by focusing only on individuals from states where domestic courts are unwilling and unable to prosecute the most serious crimes, she would invariably be targeting mostly (if not only) individuals from weak states, especially in Africa. In that case, she would likely be accused, rightly or wrongly, of being biased against weak states.<sup>179</sup> But if she tries to extend her investigations and seek indictments against

176 See Miyandazi et al., *supra* note 171.

177 *African Union Backs Mass Withdrawal from the ICC*, BBC (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073>.

178 David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19 (1999). Other than the United States, other powerful states have also opted not to sign the Rome Statute and be subject to the ICC's jurisdiction. China, India, Russia, Indonesia, and Israel are among those who have declined ICC membership. See, e.g., Genady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 446 & n.3 (2000).

179 Even supporters of the ICC acknowledge that the perception of bias toward African countries could cause the ICC to face an existential threat. As Philippe Sands QC, who has been an advocate before the ICC, observes:

There are clear signals of concern about the future wellbeing of the ICC in relation to Africa.

If you take what is happening to the ICC along with Brexit and Trump, there's a real warning here of a threat to the post-1945 settlement that involved free trade, prohibitions on the use of violence and protection of human rights. There's a danger of that unravelling and, if that happens, then of a return to the absolute sovereignty of the 1930s.

Owen Bowcott, *Rising Nationalism Leaves International Criminal Court at Risk*, GUARDIAN (Dec. 29, 2016), <https://www.theguardian.com/news/2016/dec/29/rising-nationalism-leaves-international-criminal-court-at-risk>.

political actors from powerful states, she will likely be accused of overstepping her jurisdictional boundaries in order to simulate symmetry.

In sum, the African response to the ICC is an illustration of how a consensus-based treaty might be threatened in the face of perceived bias, especially when the treaty is framed as binding on all signatories. Despite the fact that it enjoyed overwhelming support during its creation, the ICC has not seen much action as a court; indeed, it has only secured convictions against nine individuals since it was founded<sup>180</sup> and appears to be facing an existential crisis. More broadly, although the ICC has not successfully prosecuted an African head of state, the mere fact that some have been indicted has been sufficient to trigger demands for a mass withdrawal from the treaty by African states. To be sure, the ICC might still survive. Outside the Western world, it still has some vocal supporters among African nongovernmental organizations and human rights groups,<sup>181</sup> but it is doubtful that they will prove to be a political match for the court's growing roster of opponents.

## V. NORMATIVE TAKEAWAYS

### A. *Is There Hope for Viable Consensus Treaties?*

The foregoing analysis suggests that the degree to which international treaties can serve as credible commitments against domestic policy reversals is limited, especially when such treaties have not been filtered adequately through the rigors of domestic political conflict. To be sure, aspiring to consensus in treaty making might seem particularly appealing to international negotiators and lawyers, especially when such treaties are believed to be the product of high-minded officials trying to weaken the influence of parochial domestic groups. But more often than not, the presence of consensus might indicate something quite different: that the treaty was conceived on the cheap. In other words, the presence of consensus might suggest that no domestic interest group cared enough to oppose the treaty because its distributional burdens were too difficult to forecast, and conversely, that no powerful group might be available down the line to defend the treaty once it comes under attack.

One obvious implication is that efforts by governments to use consensus treaties to bind themselves against certain future behavior will often be self-defeating, since the public knows the politicians can eventually withdraw from such treaties without incurring the wrath of powerful political groups. To overcome the impulse to defect from a treaty commitment, it is not enough that a treaty provides for remedies in terms of breach; it is also

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180 See *Trying Individuals for Genocide, War Crimes, Crimes Against Humanity, and Aggression*, ICC, <https://www.icc-cpi.int/Pages/defendants-wip.aspx> (last visited Dec. 20, 2017).

181 Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 *LAW & CONTEMP. PROBS.* 1, 28 (2016) (observing that despite the controversy the ICC still has some influential African supporters). And scholars have continued to stress that the ICC might have long-term beneficial effects for conflict-ridden states even if there is some blowback in the short term. See, e.g., OHLIN, *supra* note 16, at 224–25.

important that there be important domestic political consequences for withdrawing from the treaty altogether. Anticipating that politicians cannot be trusted to stick to their commitments, economic and social actors will adopt a myopic view and eschew any long-term planning based on the treaty. In this picture, any treaty benefits hoped for by the government will not materialize.<sup>182</sup>

But there is a less pessimistic side to this analysis. One upshot is that consensus treaties are not necessarily one-shot events; if there is a withdrawal or termination of a treaty in response to an adverse judicial outcome, then such a treaty may eventually be renegotiated and reborn as a conflict treaty. If so, that treaty might profit the next time around from the politics of opposition, where any shortcomings of the treaty might be fruitfully vetted and informed by extensive political debate.<sup>183</sup> Obviously, there is no guarantee that the newly proposed treaty will survive the stresses of domestic political contestation; indeed, it might end up being thwarted completely or languishing permanently in the legislative process. From the perspective of stability, however, the risks that powerful opposition groups may frustrate the adoption of a beneficial treaty may be the price to pay for a process that filters out weak treaties in favor of the strong.

### B. *Using Escape Clauses to Neutralize Treaty Opposition*

Suppose that a consensus treaty is subsequently reconceived as a conflict treaty. How then does an incumbent regime design treaties that will last, especially in the face of a newly emboldened domestic opposition?

To be electorally sustainable, the treaty should be selective in identifying the most powerful groups opposing the treaty, and then only try to accommodate such groups. In this vein, such an agreement will usually include escape clauses that either preserve the entitlements and privileges of certain groups or allow politicians to trigger exceptions to the treaty when certain conditions are met.<sup>184</sup>

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182 This logic of anticipation might help explain the slew of studies that suggest an ambiguous relationship between signing onto bilateral investment treaties and the flow of investment returns. See Clint Peinhardt & Todd Allee, *Failure to Deliver: The Investment Effects of US Preferential Economic Agreements*, 35 *WORLD ECON.* 757 (2012) (suggesting no net positive effect on foreign direct investment); see also Yackee, *supra* note 57 (same). But see Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *WORLD DEV.* 1567 (2005) (suggesting a positive relationship between the inflow of FDI and the signing of BITs).

183 In this respect, the normative recommendations here are consistent with those made by Erin O'Hara O'Connor and Susan Franck in a recent piece. See Erin O'Hara O'Connor & Susan D. Franck, *Foreign Investments and the Market for Law*, 2014 *U. ILL. L. REV.* 1617.

184 In many ways, the recommendations that follow are very complementary to the arguments by Barbara Koremenos that international treaties ought to have built-in mechanisms that allow them to lapse and be renegotiated over time. See Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 *INT'L ORG.* 289 (2001). In many respects, her model assumes that politicians will find it hard to anticipate

Such escape clauses are already a fixture of modern international trade agreements; in this case, there may be room for extending their basic logic more broadly to investment and other consensus agreements that are more fragile.<sup>185</sup> For certain groups, the privileges gained under an escape clause could be temporary with a built-in expiration date; under the GATT, for instance, the carve-out protection afforded to textiles in industrial countries was phased out over a ten-year period, which ended on January 1, 2005.<sup>186</sup> Alan Sykes has also argued convincingly that Article XIX of the GATT,<sup>187</sup> which allows states to renege on their commitment to reduce trade barriers under certain circumstances, operates as a device that compensates the most powerful protectionists against the risks of market liberalization.<sup>188</sup> Sykes's analysis is a classic application of the second best approach to institutional design: in this case, when economic welfare and politics appear to conflict, it

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how political power will fluctuate over time. In the framework I am proposing, however, I do not think that politicians necessarily view the future with open-ended uncertainty; indeed, in the short run, they might know where they stand with respect to who has political power. Also, what the treaty beneficiaries seek in the beginning might not be compatible with automatic sunset provisions, and since the likely downstream opponents are unknown, there may not be interest groups lobbying for such provisions.

185 For an economic analysis of these escape clauses in international trade agreements, see Kyle Bagwell & Robert W. Staiger, *Enforcement, Private Political Pressure, and the General Agreements on Tariffs and Trade/World Trade Organization Escape Clause*, 34 J. LEGAL STUD. 471 (2005). To a certain degree, nonprecluded measures (NPM) clauses in bilateral investment treaties function somewhat as escape clauses in allowing states to escape treaty obligations in emergency situations. But the problem is that the scope of their enforcement by arbitrators has thus far proven to be fairly narrow. See William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 330 (2008).

186 The industrial and geographical concentration of textile manufacturers in developed countries might explain why these groups were able to deploy their outsized leverage to obtain protectionist exemptions not available to other industry groups. See Daron Acemoglu & James A. Robinson, *Inefficient Redistribution*, 95 AM. POL. SCI. REV. 649, 650 (2001).

187 GATT, *supra* note 8, at 36. Article XIX provides:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

*Id.*

188 See Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 275 (1991); see also Schwartz & Sykes, *supra* note 26, at 39.

may be necessary sometimes to privilege politics in order to make incremental progress on the economic welfare front.<sup>189</sup>

The dilemma with such escape clauses is that it might be difficult to identify, *ex ante*, the opposition groups that are powerful enough to need to be exempted from the constraints in a treaty, as opposed to those groups that could be safely ignored.<sup>190</sup> Ideally, the treaty should accommodate the opposition groups in a manner that is proportional to their political ability to threaten the treaty. But groups might have an incentive to exaggerate their power or level of resolve and ability to do damage. Past history of treaty conflict in a country might provide some guidance, although it might not be entirely reliable. For instance, one might try to figure out which groups have successfully impeded similar economic treaty negotiations in the past. In the United States, organized labor groups might rank high on this measure, but their strength and membership is currently on the wane. Paradoxically, it might be necessary sometimes for treaty proponents to attempt to push through a treaty first, fail, and then use the experience of failure to discover the opposing interest groups whom they need to bargain with in the future.

### C. *Obstacles to Escape Clauses as a Solution*

Unfortunately, the mere possibility of escape clauses being inserted in treaties does not guarantee that they will work, or that they are even practically tenable. The reasons why escape clauses might fail vary, but this Section will focus on two: feasibility and effectiveness.

#### 1. Escape Clauses Might Not Be Feasible

In the context of treaties, there are two ways in which bargaining for escape clauses might be rendered impracticable. The first is when the primary object secured by the treaty is viewed by contending groups as a zero-sum good; in other words, where gains by one faction imply that there will be fewer or none for others. In that case, the treaty precludes the kind of all-around sharing of political spoils that makes escape clauses workable.

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189 For instance, see the following passage by Sykes on the logic of Article XIX:

[P]rotection for “injured” industries does not directly promote economic efficiency or distributive equity—the popular rhetoric provides neither a coherent justification nor a persuasive explanation for safeguards policy. The question then arises: why does Article XIX exist in a cooperative agreement such as GATT? The proposition that GATT is a mutually advantageous contract among self-interested political officials provides a convincing answer.

Sykes, *supra* note 188, at 274.

190 Bagwell and Staiger deal with this issue as well, but they frame it as “commitments made in the presence of substantial uncertainty about the state of the world that will exist at the time the agreement is actually implemented.” See Bagwell & Staiger, *supra* note 185, at 472. In the analysis that follows, the problem that escape clauses might try to accommodate is not necessarily implementation of the treaty *per se*, but the pressures the politicians might face when an adverse litigation outcome threatens a powerful domestic constituency.



Take, for instance, one particular illustration of the problem of nondivisible goods in the international context: the diffusion of certain human rights treaties. Since a human rights treaty's validation of one group's moral or social values might imply that another group's values are devalued, such treaties are notoriously prone to destabilizing conflicts.<sup>191</sup> Hirschman famously characterized political disputes over money or resources (such as those covered by investment/trade treaties) as "more-or-less" conflicts, while labeling those over moral and social values as "either-or" conflicts.<sup>192</sup> In social conflicts of the latter variety, he argued that compromise solutions were intrinsically more difficult because there was not much to give and take as part of a bargain.<sup>193</sup> But one might argue that if the trajectory of investment treaties exemplifies cheap treaties becoming expensive over time, the problem of human rights treaties cuts in the opposite direction: the proliferation of reservation clauses renders once-expensive treaties too cheap.<sup>194</sup>

The second obstacle is that collective action costs might make it hard for groups to reach agreement, especially where the issues covered by the treaty are too broad or the various treaty stakeholders are too dispersed. Single-issue groups that are geographically concentrated might have an advantage here; for instance, they might be more willing to bear significant political costs if the agenda of the treaty is sufficiently tailored to address their specific needs. But if too many stakeholders are involved, the treaty benefits might become too diluted to make serious negotiations worthwhile. In such circumstances, the treaty beneficiaries might seek to narrow the scope of the agenda for negotiation in order to ensure that any issues addressed under the treaty rubric are complementary and not antagonistic. Again, the desire for a condensed scope might also suit the agenda of elected political actors; in this case, politicians can focus on the needs of particular "high-value" constituencies without having to overburden themselves with interest groups whose influence may only be marginal.

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191 As Kenneth Meier put it, "Morality politics involves interesting policy areas, because one segment of society attempts by governmental fiat to impose their values on the rest of society. As such they are a form of redistributive policy that is rarely viewed as redistributive because the policies redistribute values rather than income." KENNETH J. MEIER, *THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY* 4 (1994) (citation omitted). Given this dynamic, it is no surprise that in the late 1940s and 1950s, when the issue of human rights treaties touched upon polarizing issues like civil rights in the United States, it proved to be very difficult to propose escape clauses that would assuage treaty skeptics. See Nzelebe, *Strategic Globalization*, *supra* note 33, at 668–69; see also CHRIS ROBERTS, *THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS* 72–121 (2014) (exploring in detail the longstanding political divisions over human rights treaties in the United States).

192 See Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, 22 *POL. THEORY* 203, 213–14 (1994).

193 See *id.*

194 I thank Adam Chilton for making this observation.

## 2. Escape Clauses Might Not Be Effectively Enforced

One significant drawback to efforts to include escape clauses in modern treaties is that there is no assurance that courts or tribunals will enforce them faithfully. Of course, the notion of a possible conflict of interest between judges and their political overseers is fairly old, but there are reasons to think that such agency costs may be particularly pronounced when it comes to the interpretation of escape clauses.

The most obvious problem is that escape clauses, which are meant to exempt the politically powerful from certain disciplines of a treaty, are likely to run up against judicial norms of generality and impartiality.<sup>195</sup> In this case, judges might worry that escape clauses seem to establish a two-tier hierarchy of obligations based simply on the greater political power of certain groups or states. Justice Jackson denounced explicitly the risk of partial application of the laws in his defense of equal protection under the U.S. Constitution:

[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure therefore to assure that laws will be just than to require that laws be equal in operation.<sup>196</sup>

But there may be an unavoidable tension between the appearance of judicial impartiality in treaty interpretation and a treaty's effectiveness. At bottom, if one gives up on the prospect of giving effect to escape clauses that might be biased in favor of the powerful or a select few, then one risks undermining the very logic on which rigorous treaty enforcement is possible. Simply put, without the possibility of making enforceable concessions to key constituencies that are not available to all other groups, a number of states will not enter into such treaties in the first place. Ironically, as in so many spheres of life, the asymmetric distribution of constraints or opportunities might help overcome collective action, because those who have intense preferences for a particular social good may work extra hard to attain it, while those who dislike it intensely may be in a position to be paid off by those who value it more than others. From this political reality, certain implications follow: since not every group in society will have identical tastes in support and opposition to the goods produced by treaties, it pays for institutional designers to focus largely on those powerful groups who have intense preferences at the expense of those who are relatively indifferent.

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195 See ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* 32–37 (2007) (describing the values associated with the rule of law as the insistence that laws should be public, prospective, general in their application (to everyone similarly situated), and durable).

196 *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

On the other hand, if the net effect of the escape clauses in treaties seems skewed against certain parties or states, then there is a risk that such states (or groups) may succumb to a mentality of “agreeing to be constrained only if they think others are constrained.” In other words, the counsel of equality might demand sometimes that constraints be generalized to all state parties, including the richest and most developed states. Of course, true impartiality may suffer under such an approach, especially if the risks of violating the treaty are not symmetric across developing and developed states.

Beyond the need to feign symmetry, larger issues of political expediency also loom large: it is a familiar claim in debates about the modern welfare state, for instance, that in order to preserve the possibility of welfare for the poor, one needs to make it available to the well-off. The result is that, as Elster argues, “[w]elfare benefits are sometimes absurdly diluted because they cannot be offered to someone without being offered to everyone.”<sup>197</sup> Similarly, the need for judges to appear fair or impartial under treaty disputes may mean that they may seek to constrain powerful democratic states or groups by rendering decisions against them, even where such an approach might risk diluting the substantive goals of the treaty.

One plausible solution to this dilemma is to try to convince judges to strictly construe the terms of side deals struck by self-interested political officials, rather than focusing on what they perceive to be the broader policy goals animating the treaty.<sup>198</sup> According to this argument, when judges fail to ensure the enforcement of these political side deals, they risk thwarting the overall objectives of the treaty by discouraging politicians who are marginally in favor of the treaty from negotiating similar treaty provisions in the future. Such thinking, for instance, lies at the heart of the claim by Daniel Rodriguez and Barry Weingast that judges ought to focus on the preferences of the median compromising legislator in interpreting progressive civil rights legislation, rather than the preferences of the legislators who are intense supporters of the legislation.<sup>199</sup> They argue that there is often a tradeoff between expansive judicial interpretation of progressive legislation and the willingness of Congress to enact more progressive legislation in the future.<sup>200</sup> Similarly, Daniel Tarullo has contended that when the WTO Appellate Body

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197 See ELSTER, *supra* note 70, at 90.

198 Take the WTO Appellate Body, for instance. Empirical research has shown that plaintiffs win a very high portion of the cases litigated in front of the WTO. Some commentators have argued that these results might suggest a bias by the Appellate Body toward an expansive and overly liberal interpretation of the treaty provisions at the expense of side agreements struck by the negotiators. See Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383, 402–12 (2009); Keisuke Iida, *Why Does the World Trade Organization Appear Neoliberal? The Puzzle of the High Incidence of Guilty Verdicts in WTO Adjudication*, 23 J. PUB. POL'Y 1, 3–4 (2003).

199 Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1431–32 (2003).

200 See *id.*

(AB) adopts an overly antiprotectionist interpretation of the standard of review of the Anti-Dumping Agreement under the GATT, it increases the risk that countries like the United States will be less willing to negotiate such issues in future trade rounds, especially if they think the AB will ignore them.<sup>201</sup>

One problem with this recommended solution is that it might be undermined by the fallacy of composition; as Vermeule has observed in another context, the judiciary is a “they” and not an “it.”<sup>202</sup> In this case, the fact that certain international judges or arbitrators may believe that it may be wise or prudent for them collectively to honor the political side deals embedded in treaties does not imply that it will be rational for any one judge to uphold such side bargains. Like any other enterprise that depends on a collective will, freeriding issues loom large. In this case, each judge may be reluctant to make the necessary sacrifices to their personal or professional reputation (as a “free trader” or “impartial arbiter”), with the hope that other judges will bear the burden of enforcing the side deals at issue.

Second, and more importantly, judges could conclude reasonably that the strategic environment in which these deals are enforced might be highly unstable and uncertain; for instance, an interest group that has leverage to get its way when a treaty is first negotiated might turn out to be less powerful in the distant future when the same treaty comes up for renegotiation. If so, a judge sympathetic to the goals of the treaty might gamble that construing the treaty against such an interest group might help weaken the group’s ability to fight again in the future. But even with this qualification, there are cautious grounds for optimism. More specifically, if international arbitrators and judges are sufficiently uncertain about how the domestic political forces may react to their pronouncement in contentious cases, they may opt instead for avoidance doctrines that allow them to kick the issue down the line until the core political disputes over the scope of the treaty have been resolved.<sup>203</sup>

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201 Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL’Y INT’L BUS. 109, 148–53, 159 (2002). Overall, some commentators suggest a bias toward free trade in decisions by the WTO Appellate Body. See Colares, *supra* note 198, at 392.

202 See Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 554–64 (2005).

203 As Erin Delaney shows in a recent piece, judicially crafted doctrines for avoiding politically contentious issues are relatively widespread across countries with varying judicial systems. See Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016). Also, Rosalind Dixon and Samuel Issacharoff have suggested that courts may also deploy judicial deferral strategies as a device for delaying the practical implications of their decisions, especially when the political foundations for implementing such decisions are not ripe. See Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683.

## CONCLUSION

International treaties have been often heralded as precommitment devices that help insulate national politicians from the harmful pressures of selfish and narrow domestic interest groups. According to this line of reasoning, consensus treaties ought to be applauded and their normative status given extra weight by the judges and arbitrators who interpret them. Presumably, such treaties have been vetted widely and should be easier for courts to enforce.

By contrast, this Article has argued that if one wants durable treaties, social conflict among domestic groups should be embraced as part of the solution and not the problem. In other words, domestic groups will be more willing and able to defend treaties that are the product of intense political struggles than those achieved with little or no opposition.

The normative implications of this analysis are straightforward. If the public believes that politicians have only shallow commitments to a treaty's objective, they are not going to be confident that such politicians will stay the course when the treaty is threatened, especially in the wake of adverse legal judgments. Thus, the intended benefits of the consensus treaty might never be realized. And the fact that new international courts or arbitration mechanisms have been established to vindicate these treaty rights might do very little to mitigate the credibility problem; on the contrary, they might actually exacerbate it by exposing how shallow the political commitments to the treaty were in the first place. Of course, if the establishment of the new treaty and its accompanying enforcement mechanism happen to coincide with a positive change of economic and political fortunes of a signatory state, all is well. But if the economic climate turns south, as it did in Latin America in the late 1990s and early 2000s,<sup>204</sup> then such treaties might not have much effect. Ironically, investment treaties might actually offer the least protection when the dangers of expropriation and other investment threats by national authorities are highest.

Thus, the enterprising politician should perhaps welcome a modest degree of domestic political turmoil over the scope and substance of treaties. Such domestic disagreement may afford him or her the occasion to pare down on some of the excessive impulses of both treaty interpreters and treaty beneficiaries. And if a consensus treaty eventually breaks down under pressure, politicians may then have more leeway to renegotiate and cobble together a new treaty that better reflects the domestic distribution of power. They may seek to do so by expanding the scope of legal provisions such as escape clauses or reservations which exempt certain powerful groups from the disciplines of a treaty. Of course, for legal idealists who believe that treaties should both impose symmetric obligations and advance objective notions of global or national welfare, such a quest might seem like a capitulation to

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204 Kenneth Rapoza, Opinion, *Is US Debt Problem as Big as the 1990s Latin America Crisis?*, FORBES (June 8, 2011), <https://www.forbes.com/sites/kenrapoza/2011/06/08/is-us-debt-problem-as-big-as-1990s-latin-america/#319d385a7837>.

naked power politics. But the response to such criticism should be simple: historical experience suggests that when international rules impose distributional costs on powerful domestic groups, those rules are politically fragile, even when they are assumed to be welfare enhancing. Thus, if one wants international legal rules that are going to last, the constraints imposed by the domestic balance of power among interest groups might have to be addressed and incorporated explicitly into treaty design.

