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## The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited

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## STUDENT NOTE

# THE RELATIONSHIP OF IMF STRUCTURAL ADJUSTMENT PROGRAMS TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: THE ARGENTINE CASE REVISITED

*Jason Morgan-Foster\**

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## I. INTRODUCTION

The impact of structural adjustment programs (SAPs) on economic, social, and cultural rights (ESC rights) has been a highly debated issue by international human rights commentators for almost two decades.<sup>1</sup> The late nineties saw the debate transcend academia, as protests of the International Monetary Fund (IMF) and the World Bank (collectively, the IFIs) became common.<sup>2</sup> There now exists a whole class of non-governmental organizations (NGOs) that concentrates exclusively on monitoring of the IFIs.<sup>3</sup> While much of these protests may oversimplify the issue, some concern is certainly justified. This Note examines the possibility that SAPs conflict with ESC rights. Such critiques have become common in the academic literature of the past decade, but usually share common weaknesses. First, most such critiques of structural adjustment are too general in nature to be useful. The more general, the more hypothetical, and the less likely the possibility of establishing a viable link between structural adjustment and a violation of economic, social, and cultural rights. Instead, this Note will examine the substantive results of SAPs specifically in the context of one country: Argentina.

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1. Structural adjustment programs, or conditionality, are conditions attached to a loan by an international financial institution to a country in lieu of monetary collateral. PAUL MOSLEY ET AL., *AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING, ANALYSIS AND POLICY PROPOSALS* 65–66 (1991). For a comprehensive study of structural adjustment, see generally ERIK DENTERS, *LAW AND POLICY OF IMF CONDITIONALITY* (1996). Structural adjustment is a major component of international aid lending. For example, the percentage of loans involving SAPs was “42 percent in Latin America; 33 percent in sub-Saharan Africa; 30 percent in Europe, the Middle East, and North Africa; and 10 percent in Asia.” Nancy C. Alexander, *Transcending the Vicious Cycle of Debt and Adjustment*, in *WORLD DEBT AND THE HUMAN CONDITION: STRUCTURAL ADJUSTMENT AND THE RIGHT TO DEVELOPMENT* 171, 173 (Ved P. Nanda et al. eds., 1993).

2. For a detailed, annotated bibliography on the IMF, see 4 ANNE C. M. SALDA, *THE INTERNATIONAL MONETARY FUND* (Robert G. Neville et al. eds., 1992). For a general description of the IMF and evaluations of proposals for changes in the IMF’s objectives, see John Williamson, *Reforming the IMF: Different or Better?*, in 3 *THE POLITICAL MORALITY OF THE INTERNATIONAL MONETARY FUND: ETHICS AND FOREIGN POLICY* 1, 1–7 (Robert J. Myers ed., 1987).

3. See, e.g., Bretton Woods Project, at <http://www.brettonwoodsproject.org> (last visited Dec. 16, 2002); GlobalizeThis!, at <http://globalizethis.org/> (last visited Dec. 16, 2002); 50 Years is Enough Network, at <http://www.50years.org/> (last visited Dec. 16, 2002); Bank Information Center, at <http://www.bicusa.org> (last visited Dec. 16, 2002); Campagna per la riforma della Banca Mondiale, at <http://www.unimondo.org/guide/fmi> (last visited Jan. 24, 2003); Center of Concern, “Rethinking Bretton Woods” Project, at <http://www.coc.org/focus/?ID=902> (last visited Dec. 16, 2002); AITEC, at <http://www.globenet.org/ifi> (last visited Dec. 16, 2002); Focus on the Global South, at <http://www.focusweb.org> (last visited Dec. 16, 2002); CEE Bankwatch Network, at <http://www.bankwatch.org> (last visited Dec. 16, 2002); Global Policy Forum, *The Three Sisters and Other Institutions*, at <http://www.globalpolicy.org/soecon/bwi-wto/indexbwi.htm> (last visited Dec. 16, 2002); World Bank Group, at <http://www.worldbank.org> (last visited Dec. 16, 2002); Structural Adjustment Participatory Review International Network, at <http://www.saprin.org> (last visited Dec. 16, 2002).

Elaborating specific examples of ways in which Argentine SAPs contradicted Argentina's human rights obligations will facilitate an analysis of the human rights implications of SAPs that is based on more than mere speculation.

Another weakness of SAP critiques is that they rarely analyze the ability of the international human rights mechanisms to address SAPs. Instead, this Note will build on the Argentine example, developing the "Structural Adjustment Paradigm," the unique model of human rights responsibility presented by structural adjustment. Having outlined this paradigm, the Note will conclude by offering ways in which the existing (or potential) international human rights mechanisms could (and could not) address it.

Perhaps as important as what this Note is, is what it is not: Economic theories abound concerning the causes of the Argentine crisis,<sup>4</sup> some of which directly analyze the IMF's causal connection to the Argentine catastrophe.<sup>5</sup> A Note on this subject would be one of economic theory, not international human rights law. While at certain points in the analysis of the human rights implications of SAPs, it will become difficult to avoid some speculation of economic theory, it is not the primary focus of this Note. Rather than implicate the IMF as part of the cause of the crisis, this Note explicates the ways in which it is an imperfect solution from the standpoint of ESC rights. It does not attempt to argue against the prevailing economic theories for the crisis, but rather discusses ways in which certain provisions of SAPs—provisions also often present in stronger economic periods—are inconsistent with ESC rights. To the extent that the ESC rights law discussed in this Note may appear contrary to the theories embodied in the economic studies cited above, this may reflect an underlying inconsistency between ESC law and macroeconomic scholarship, an inconsistency which should be dealt with in greater detail in future scholarship.

## II. SAPS AND ESC RIGHTS: THE BIG PICTURE

This Part examines the effects of SAPs on ESC rights on two levels, reflecting the difference in thought processes commonly at play between

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4. For a detailed summary of many economic analyses of the Argentine crisis, see MARCOS A. BUSCAGLIA, *THE ECONOMICS AND POLITICS OF ARGENTINA'S DEBACLE 5*, at <http://www.iae.edu.ar/mbuscaglia> (Oct. 15, 2002). See also Sebastian Galiani et al., *Missed Expectations: The Argentine Convertibility*, at <http://www.udes.edu.ar/deptodeeconomia/workp/doc55.pdf> (Nov. 2002) (offering a highly theoretical explanation of the crisis, but including references to many additional studies).

5. See generally MICHAEL MUSSA, *ARGENTINA AND THE FUND: FROM TRIUMPH TO TRAGEDY* (2002).

macroeconomic policy decisions, where the focus is not on the individual,<sup>6</sup> and human rights decisions, where it is.<sup>7</sup> The first Section, reflecting the macroeconomic thought process, attempts to show that SAPs have, on average, led to worse economic situations. If this can be shown, then SAPs contradict ESC rights (espoused in the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>8</sup> the Universal Declaration of Human Rights (UDHR),<sup>9</sup> the Declaration on the Right to Development,<sup>10</sup> and the IMF Articles of Agreement themselves.<sup>11</sup> But, as stated above, a human rights-based critique of SAPs, or of anything, is less concerned about overall macroeconomic effects and more concerned with individual effects. The second Section turns toward this approach, arguing that even if one disregards or disbelieves the first point and believes that SAPs contribute to a country's overall economic growth, this does not preclude them from violating the economic, social, and cultural rights of individual citizens in reaching these macroeconomic results.

#### A. The Macroeconomic Standpoint

Paul Mosley, Jane Harrigan, and John Toye have investigated the general effectiveness of SAPs in their extensive two volume work *Aid and Power: The World Bank and Policy-Based Lending*.<sup>12</sup> Although this

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6. The Webster's Third New International Dictionary Unabridged defines macroeconomics as the "[s]tudy of the economic system as a whole especially with reference to its general level of output and income and the interrelations among sectors of the economy—opposed to microeconomics." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1355 (3d ed. 1986).

7. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 93 (2001) (describing human rights as "[t]he study of individuals' rights as against their own States of nationality"); SIGRUN SKOGLY, HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 50 (2001) ("The primary rights-subjects in international human rights law are individuals.").

8. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

9. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR], available at <http://www.unhcr.ch/udhr/lang/eng.pdf>.

10. Declaration on the Right to Development, G.A. Res. 41/128, 41st Sess., 97th mtg., U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

11. IMF Articles of Agreement art. I, § ii, available at <http://www.imf.org/external/pubs/ft/aa/aa01.htm> (defining the purpose of the IMF as contributing "to the promotion and maintenance of high levels of employment and real income and the development of the productive resources of all members").

12. MOSLEY ET AL., *supra* note 1. Because Mosley and coauthors focus on structural adjustment in the World Bank context, some would object to my generalizing their findings to the IMF. See SKOGLY, *supra* note 7, at 17–21 (2001) (outlining some basic features of the IMF and World Bank and noting that "[t]he programmes run by the IMF differ both in scope and content from those of the World Bank. The IMF aims at more short term balance of payment

study regards the World Bank and not the IMF, the question of structural adjustment remains essentially the same. The study notes that other studies, including official World Bank studies on the progress of Structural Adjustment Loans (SAL) often compare SAL countries with "other non-oil LDC [Least Developed Countries] as a whole . . . attributing any difference in performance to the impact of SALs."<sup>13</sup> Mosley explains that pairing SAL countries with LDCs generally leads to misleading results since SAL countries may not be representative of developing countries as a whole.<sup>14</sup>

By contrast, the Mosley study creates a set of country pairs, by matching an SAL country with a comparable non-SAL country in terms of GNP per capita, GDP growth rates, economic structure, level of industrialization, prevalence of commercial and subsistence agriculture, degree of export concentration, and trends in trade.<sup>15</sup> Of course, perfect pairs were difficult to find: While some countries in the non-SAL control group had higher GDP growth rates, or more favorable terms of trade in the pre-SAL period than the SAL countries to which they were paired, other control group countries had lower GDP growth rates and less favorable terms of trade.<sup>16</sup> The same was true for the other economic factors. By carrying out comparisons between the aggregated data for each group of countries, the Mosley study accounts for such imperfect pairings.<sup>17</sup> In this way, the study employs specific pairing instead of the

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improvement, which implies an emphasis on contractionary measures, while the Bank aims at longer term development results which causes them to focus on expansionary measures . . . ."); Daniel C. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 47, 53–74 (1996). *But see* SKOGLY, *supra* note 7, at 20 ("Towards the end of the 1970s . . . the strict division of labour between the World Bank and the IMF became blurred. The World Bank moved into more programme lending, and the conditions pertaining to the loans and credits from both institutions became stricter and more comprehensive than before. These sets of conditions, combined with the transfer of financial resources, became more or less institutionalized and have been labeled Structural Adjustment Programmes (SAPs). . . . The IMF introduced SAP lending in the early 1980s."). Because the Mosley study concerns programme lending SAPs of the World Bank after 1980, the results can be generalized to IMF SAPs in this Note.

13. MOSLEY ET AL., *supra* note 1, at 190–92. As the name suggests, an SAL is a loan with an SAP.

14. *Id.*

15. *Id.* at 188–90.

16. *Id.* at 190.

17. *Id.* at 190 ("[T]he noticeably imperfect pairings are not systematically imperfect: some of the non-SAL countries faced more favourable terms of trade than their SAL counterpart country, others less favourable terms of trade. Hence, in the aggregative statistical comparisons between the SAL group and the non-SAL group which will be used to assess the impact of SALs, the effects of the presence of imperfectly paired countries in the non-SAL control group will, to some extent, cancel out.").

less useful comparison to LDCs generally,<sup>18</sup> but it also makes effective use of aggregation to balance out specific differences.<sup>19</sup>

The study goes on to compare the performance of these country pairs between 1980 and 1987,<sup>20</sup> on the macroeconomic terms that IFIs understand, and the results are striking:

[F]or both groups of countries annual average GDP growth rates fell significantly during the latter period. This is hardly surprising since the period was characterized by the effects of a second oil price shock, world economic recession, declining commodity prices, rising interest rates and severe drought in sub-Saharan Africa. However, given that the programme aid in the form of SALs was introduced as a response to the effects caused by the above changes in the international economic environment, one would expect the decline in GDP growth rates to be less severe in the case of countries receiving SALs. Surprisingly, . . . average GDP growth rates for the SAL countries fell from 4.5 per cent . . . to 2.0 per cent, . . . a decline of 56 per cent. By contrast, the annual average growth rates for the non-SAL control group fell from 3.8 per cent . . . to 2.7 per cent . . . a decline of 28 per cent. In principle, this problem could be due to bias in the selection of the sample, and in particular to the possibility that SAL countries had inherently weaker economies than their non-SAL counterparts. In fact, the reverse is the case. The control group had an annual average GDP growth rate of 3.8 per cent in the pre-SAL period by comparison with 4.5 per cent for the SAL countries, a gap which reflects the degree of imperfection in the pairing methodology.<sup>21</sup>

In addition, the study further subdivided the countries by isolating those SAL countries that actually implemented the majority or all of the SAL conditions, which it termed “low slippage” countries.<sup>22</sup> Comparing these countries both to their country pairs or to the general SAL group yields even more marked results.<sup>23</sup> For example, annual GDP growth rates fell from 3.8 percent to 2.1 percent, compared to the non-SAL low slippage control group, which increased from 2.3 percent to 3.4 percent.<sup>24</sup> Mosley concludes that “despite having a stronger growth record in

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18. *Id.* at 190–92.

19. *Id.* at 190.

20. *Id.* at 188.

21. *Id.* at 193–94.

22. *Id.* at 193.

23. *Id.*

24. *Id.* at 193–94.

the latter half of the 1970s, and despite receiving programme aid, the SAL group of countries have performed significantly worse than their non-SAL counterparts.”<sup>25</sup>

In terms of investment, the study yielded similar results. In SAL countries, investment declined by 17 percent, whereas it only fell 4 percent in the control group.<sup>26</sup> Investment as a share of GDP fell for all countries, but the decline was much more serious in the SAL group.<sup>27</sup> Once again, low slippage countries showed an even more marked result: Investment declined 20 percent in the low slippage countries, but it actually *rose* by 11 percent in the group of control countries with which the low-slippage countries were paired.<sup>28</sup> Thus, as with GDP growth, the more a country implemented its SAL, the worse its numbers appeared.

Such results provide credible evidence that, on IFIs’ own terms, structural adjustment does not improve growth. Further, Mosley conducted a separate study using regression analysis that attempts to further isolate the effect of SALs from other variables such as trade movements and climate changes.<sup>29</sup> This study also found weak growth and negative investment in the SAL group.<sup>30</sup> In summary, although not solely responsible for a country’s economic turmoil, this study provides convincing evidence that structural adjustment contributes to poor economic results, specifically in the areas of GNP growth and investment, two important macroeconomic variables for the IMF.<sup>31</sup>

### B. *The Human Standpoint*

Although the above results are important in establishing a case against structural adjustment, human rights are not about macroeconomic variables: Human rights are about people,<sup>32</sup> and nowhere

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25. *Id.* at 194.

26. *Id.* at 196.

27. *Id.*

28. *Id.*

29. *Id.* at 208–32.

30. *Id.* at 230.

31. See also Haider Ali Khan, *Economic Modeling of Structural Adjustment Programs: Impact on Human Conditions*, in *WORLD DEBT AND THE HUMAN CONDITION*, *supra* note 1, at 97, 100 (describing another study of structural adjustment, conducted between 1982 and 1986, which concludes that “except for current account balance, the comparisons of program versus nonprogram countries failed to produce any evidence of the effectiveness of IMF conditionalities”).

32. See SKOGLY, *supra* note 7, at 50 (“The primary rights-subjects in international human rights law are individuals.”); BEDERMAN, *supra* note 7, at 93 (describing human rights as “[t]he study of individuals’ rights as against their own States of nationality”); Eugene Kamenka, *Human Rights, Peoples’ Rights*, in *THE RIGHTS OF PEOPLES* 127 (James Crawford ed., 1988) (“All rights . . . are claims made, conceded or granted by people. . . . They are asserted by people on their own behalf or as perceived and endorsed implications of specific historical traditions, institutions and arrangements or of a historically conditioned theory of



could this be more true than in the human right to development.<sup>33</sup> The case against SAPs is even more compelling when the SAP is also a failure in macroeconomic terms as shown above. Regardless of the relative macroeconomic success of a SAP country, a SAP cannot demand policy changes that violate an individual's (or a group of individuals') human rights. This Section outlines the general doctrine relating to how SAPs violate human rights regardless of their effectiveness or ineffectiveness at the macroeconomic level. The next Part then delves into the Argentine context, analyzing how SAPs can violate specific provisions of the ICESCR.

A discussion of the human rights implications of structural adjustment should begin with article 1 of the ICESCR.<sup>34</sup> Section 1 of that article states, "All peoples have the right of self-determination. By virtue of that right they . . . freely pursue their economic, social and cultural development."<sup>35</sup> Section 2 continues: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation."<sup>36</sup> This idea is embodied in an ongoing debate on the existence of a "right to development," first articulated by Senegalese jurist Keba M'Baye in 1972,<sup>37</sup> codified in 1986 in the Declaration on the Right to

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human needs . . ."); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1 (1982); UDHR, *supra* note 9, arts. 1–29 (consistently focusing on individual rights, not macroeconomic indicators).

33. See *Declaration on the Right to Development*, *supra* note 10, pmbl. (declaring that "the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development"); *Id.* art. 2(1) ("The human person is the central subject of development and should be the active participant and beneficiary of the right to development."); James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT'L L.J. 307, 312 (1995) (arguing that the international law of development stresses "that development should be people-centered, sustainable, and primarily concerned with the welfare of the poor and powerless, and that the processes of development should be 'democratized' and sensitized to 'human rights'").

34. See ICESCR, *supra* note 8, art. 1, 993 U.N.T.S. at 5. The ICESCR, although not binding international law for all countries, has been ratified by a large number of States with 145 current State Parties. Furthermore, it has been ratified by almost every State that borrows from the IMF, with a few exceptions. It is against this background that this Note addresses the ICESCR and statements by the ESCR Committee, as generally relevant in international jurisprudence. See UNHCHR, *Status of Ratifications of the Principal International Human Rights Treaties as of 8 February 2002* [hereinafter *Treaty Ratification Status*], <http://www.unhchr.ch/pdf/report.pdf>.

35. ICESCR, *supra* note 8, art. 1(1), 993 U.N.T.S. at 5.

36. *Id.* art. 1(2), 993 U.N.T.S. at 5.

37. Ved P. Nanda, *The Right to Development: An Appraisal*, in *WORLD DEBT AND THE HUMAN CONDITION*, *supra* note 1, at 41, 43 (citing Keba M'Baye, *Le droit au Développement Comme Un Droit de l'Homme*, 5 REVUE DES DROITS DE L'HOMME 505 (1972)).

Development.<sup>38</sup> The international community is divided on whether such a right exists; on the one hand, Mohammed Bedjaoui, former judge on the International Court of Justice (President of the Chamber), calls the right to development “the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights, in short the core right from which all the others stem.”<sup>39</sup> On the other end of the spectrum, professor of political science Jack Donnelly argues that such a right to development is without interest in light of the already firmly established right of self-determination.<sup>40</sup> The phrasing of the ICESCR article 1(1) seems to lend itself to an interpretation somewhere in between, where the right of development is a unique right, ancillary to the right of self-determination but important enough that it is separately enumerated as a goal of self-determination.<sup>41</sup> Since the adoption of the Declaration on the Right to Development, it has become increasingly common to embody development norms in international legal instruments.<sup>42</sup> The Secretary General of the United Nations noted in 1994, “It is particularly through the development and implementation of legal instruments that the world community of nations attempts to provide for the basic conditions for social progress.”<sup>43</sup> In fact,

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38. *Declaration on the Right to Development*, *supra* note 10, art. 1 (declaring that “[t]he right to development is an inalienable human right,” but not defining the right to development). The Declaration on the Right to Development received only one dissenting vote, from the United States. All eight abstentions also came from developed nations. The Declaration received 146 votes in favor. Nanda, *supra* note 37, at 44. Nanda’s article provides a detailed account of the history of the right to development, challenges facing the right to development, and its evolution as an international legal norm.

39. Mohammed Bejaoui, *The Right to Development*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 1182 (1991).

40. Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 *CAL. W. INT’L L.J.* 473, 482 (1985). Furthermore, Donnelly has been highly critical of all such group rights, including self-determination. For a description of the philosophical challenges in defining the right to development, the right of self-determination, and Donnelly’s critiques thereof, see Nanda, *supra* note 37, at 47–48.

41. For yet a third view, see Juan Carlos Hitter, *El Derecho al Desarrollo y las Naciones Unidas*, [1989-II] *J.A.* 887. Hitter agrees with the view that the right to development is fundamental for the elaboration of first and second generation rights, but points out that those rights are also fundamental to the right to development. Thus, rather than focus on positioning rights in a hierarchy, the most important characteristic is the indivisible and interdependent characteristic of all rights. *But see id.* at 888 (arguing that the right to development is the synthesis of all human rights and most advanced right thus far).

42. Paul, *supra* note 33, at 307; *see also* SKOGLY, *supra* note 7, at 141–43 (describing the work of three successive U.N. working groups on the right to development established since 1986).

43. UNITED NATIONS PREPARATORY COMMITTEE FOR THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT, ANALYSIS OF THE CORE ISSUES TO BE ADDRESSED BY THE SUMMIT AND POLICY MEASURES TO ATTAIN ITS OBJECTIVES, IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 47/92; WORLD SUMMIT FOR SOCIAL DEVELOPMENT: AN OVERVIEW REPORT OF

the Secretary General has created a list of eighty-one international instruments codifying a commitment to social development.<sup>44</sup> In his article summarizing the rapidly growing law on the right to development, professor James C.N. Paul has also argued that, because the two objectives of development and human rights are stated together in key articles of the U.N. Charter, “they impose complementary, not separate, duties. The promotion of economic, social and cultural development must be harmonized with, indeed reinforced by, the promotion of universal rights.”<sup>45</sup>

ICESCR article 1(2) could be read to codify a “right to development” by placing the effect of “international economic cooperation” at odds with the right of a people to dispose of their natural wealth and resources, without mentioning self-determination.<sup>46</sup> Regardless of the relative levels of success they achieve, SAPs violate article 1(2) by forcing a country to accept a set of economic conditionalities.<sup>47</sup> The notion of free consent over economic choices is reiterated in ICESCR article 11(1), which states, in relevant part, “The States Parties . . . will take appropriate steps to ensure the realization of [the right to an adequate standard of living], *recognizing to this effect the essential importance of international co-operation based on free consent.*”<sup>48</sup> The paradox of structural adjustment is that, by the time the IMF proposes a SAP, the situation is so grave that outside assistance is the only way to begin creating a list of economic policy options; yet, with the outside support, free consent is lost. Because the country absolutely needs the money, and because the IMF (or perhaps the World Bank, which also imposes conditionality) is probably the only institution with enough money to give (or to coordinate sufficient giving), the IMF has extremely high bargaining power. Because of this role as lender of last resort (LLR), countries default on private loans in order to pay it

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THE SECRETARY-GENERAL, ¶ 172, U.N. Doc. A/Conf.166/PC/6 (1994), *cited in* Paul, *supra* note 33, at 307 [hereinafter WORLD SUMMIT FOR SOCIAL DEVELOPMENT OVERVIEW REPORT].

44. PREPARATORY COMMITTEE FOR THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT, OUTCOME OF THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT: DRAFT DECLARATION AND DRAFT PROGRAMME OF ACTION, REVIEW OF EXISTING INTERNATIONAL COMMITMENTS RELEVANT TO POVERTY, EMPLOYMENT AND SOCIAL INTEGRATION, 2d Sess., Provisional Agenda Item 4 ¶ 259, U.N. Doc. A/Conf.166/PC/16 [hereinafter WORLD SUMMIT FOR SOCIAL DEVELOPMENT DRAFT PROGRAMME]; *see also* Paul, *supra* note 33, at 307 (noting that “[t]his contribution is an illustrative, but hardly complete, effort to identify some of the sources and principles of the international law of development . . . that has been generated by the U.N. system, particularly during the past two decades”).

45. Paul, *supra* note 33, at 312 (quoting U.N. CHARTER arts. 61–62).

46. ICESCR, *supra* note 8, art. 1(2), 993 U.N.T.S. at 5.

47. *See, e.g., infra* Section III.C (economic conditionalities discussed in the Argentine case). *Cf.* ICESCR, *supra* note 8, art. 1(2), 993 U.N.T.S. at 5.

48. ICESCR, *supra* note 8, art. 11(1), 993 U.N.T.S. at 7 (emphasis added).

back.<sup>49</sup> In this regard, the World Bank and IMF probably have the lowest default rating of any bank in history, as no country wants to lose the chance of future bailouts<sup>50</sup> nor tarnish their image with those who set the pace for all other development banks worldwide, as the IMF recently pointed out in the Argentine context.<sup>51</sup> So, the State Party is confronted with a unique human rights paradigm, the “Structural Adjustment Paradigm” (elaborated in Part IV below), by which the State Party, with low bargaining power, has to accept the terms offered by the IMF, regardless of their consistency with ESC rights, because they have no other source of equivalent funds. Recognizing the necessary evil of outside assistance, the ICESCR includes article 22, which states that the Economic and Social Council will advise technical assistance agencies on matters which will help them make decisions consistent with the Covenant.<sup>52</sup> In expanding on this article, the Committee on Economic,

49. *Argentina's Collapse: Progress, of Sorts*, ECONOMIST, Oct. 19, 2002, at 34. (noting that Argentina defaulted on loans from private creditors in December 2001, but continues to service its debts to IFIs); Lance Taylor, *IMF Conditionality: Incomplete Theory, Policy Malpractice*, in 3 THE POLITICAL MORALITY OF THE INTERNATIONAL MONETARY FUND 33 (Robert J. Myers ed., 1987) (“[T]he IMF is the final source of cash—the lender of last resort.”); MICHEL AGLIETTA & SANDRA MOATTI, *LE FMI: DE L'ORDRE MONÉTAIRE AUX DÉSORDRES FINANCIERS* 178–89 (2000) (describing the IMF as a “nouveau modèle d'institution financière, chargé d'une véritable fonction de prêteur en dernier resort international [new model of financial institution, whose role is to function as a true lender of last resort]”).

50. Under IMF statutes, a debtor in arrears more than twelve months can be suspended from membership in the organization. *Id.* One glaring exception to this rule was the Argentina default on US\$805 million dollars due to the World Bank in October 2002. *La Argentina Seguirá sin Pagarle al Banco Mundial*, LA NACION, Dec. 13, 2002, available at <http://www.lanacion.com.ar>; see also *La Argentina No Pagará Más Hasta No Acordar con el FMI*, LA NACION, Nov. 22, 2002, available at <http://www.lanacion.com.ar>; *El FMI Insiste en que Se Le Pague al Banco Mundial*, LA NACION, Nov. 21, 2002, available at <http://www.lanacion.com.ar>; *Para Acordar, el FMI Pide que Se Le Pague al Banco Mundial*, LA NACION, Nov. 20, 2002, available at <http://www.lanacion.com.ar>.

51. See Anoop Singh (IMF), *Introductory Remarks on the Role of the IMF Mission in Argentina*, Press Briefing, Buenos Aires, Apr. 10, 2002, available at <http://www.imf.org/external/np/tr/2002/tr020410.htm> (noting that “an agreement with the Fund is key to unlock the wider international support that will be needed for . . . [an overall economic stabilization] program”); see also Mussa, *supra* note 5, at 57 (noting that the IMF and other suppliers of official support “will surely and rightfully insist that their claims be fully serviced, and this potentially diminishes the resources available to meet the claims of Argentina’s private creditors”).

52. ICESCR, *supra* note 8, art. 22, 993 U.N.T.S. at 10. Of course, this does not solve the self-determination/right to development problem, but in the very least ECOSOC can provide a counterbalance to the macroeconomic factors IFIs are likely to consider first. In addition, three successive decisions of the U.N. Commission on Human Rights call for added input from governments, NGOs, and other international organizations. See U.N. OHCHR, *Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights*, Comm’n on Hum. Rts. Decision 1997/103, U.N. Doc. E/CN.4/DEC/1997/103 (1997); U.N. OHCHR, *Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights*, Comm’n on Hum. Rts. Decision 1998/102, U.N. Doc. E/CN.4/DEC/1998/102 (1998); U.N. OHCHR, *Effects of*

Social and Cultural Rights (ESCR Committee) said in a General Comment:

A matter which has been of particular concern to the Committee in the examination of the reports of States parties is the adverse impact of . . . adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavors to protect the most basic economic, social and cultural rights become more, rather than less, urgent.<sup>53</sup>

Thus, recognizing the unavoidable evil of outside assistance (and accompanying austerity measures), the Committee perceptively insists that it is just such situations when ESC rights are most at risk. The idea that ESC rights are any less important in difficult economic times requiring austerity measures is similar to the argument in the civil and political rights context that emergency due to terrorism might merit the sacrifice of civil liberties. In both cases, human rights commentators argue that it is during such emergencies that human rights are *most* important.<sup>54</sup> The next Part illustrates (in the Argentine context) the tension between SAPs and ESC rights identified by the Committee.

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*Structural Adjustment Policies on the Full Enjoyment of Human Rights*, Comm'n on Hum. Rts. Decision 1999/104, U.N. Doc. E/CN.4/DEC/1999/104 (1999).

53. U.N. ESCOR, 4th Sess., General Comment No. 2, International Technical Assistance Measures art. 22 (1990), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 17 ¶ 9, U.N. Doc. HRI/GEN/1/Rev.5 (2001).

54. *Compare id.* (stating that in times of economic austerity, "endeavors to protect the most basic economic, social and cultural rights become more, rather than less, urgent"), with U.N. High Commissioner for Human Rights Mary Robinson, Address to Amnesty International USA Annual General Meeting (Apr. 19, 2002), available at <http://www.amnestyusa.org/usacrisis> ("International human rights standards are at real risk of being undermined in the wake of the 11th of September. . . . The way to combat terrorism is to do so by upholding vigorously international human rights and humanitarian law standards."); see also WORLD SUMMIT FOR SOCIAL DEVELOPMENT OVERVIEW REPORT, *supra* note 43, ¶ 126 ("During periods of economic stress, it is even more important to consider how social protection can be enhanced."); Emanuele Baldacci et al., *Financial Crises, Poverty, and Income Distribution*, FIN. & DEV., June 2002, at 24, 27 (three economists at the IMF stress the importance of adequate social safety nets in time of economic crisis).

### III. SUBSTANTIVE VIOLATIONS OF ESC RIGHTS BY SAPs: THE ARGENTINE CASE REVISITED

*A joke on the streets of Buenos Aires: ¿Tu sabes por qué a Menem [ex-president of Argentina] le decían “perro rabioso”? Porque estaba amarrado al fondo.*<sup>55</sup>

*“What has happened in Argentina is global terrorism of international organizations.”*<sup>56</sup>

#### A. Introduction

Argentina provides a particularly interesting case study in the greater question of the human rights obligations of IFIs: In the 1930s, income per head in Argentina was similar to France, Germany, and Canada,<sup>57</sup> and Argentina helped feed a ravaged post-war Europe.<sup>58</sup> Such bygones have long faded for the people on the streets of Buenos Aires, as one of the largest economies in the world has been swallowed up by enormous debt, recurring financial crisis, and control by IMF SAPs. It was no surprise that Margaret Conklin and Daphne Davidson used Argentina as a case study in their comprehensive 1986 article “The IMF and Economic and Social Human Rights: A Case Study of Argentina, 1958–1985.”<sup>59</sup>

Much has happened economically in Argentina since 1985, all closely related to economic, social, and cultural rights. The headlines

55. The joke was provided by a Peruvian law student at the Catholic University of Lima, Peru. The double meaning is: (1) “You know why they call Menem a rabid dog? Because he was tied to the Fund”; and (2) “You know why they call Menem a rabid dog? Because he was tied up in back.”

56. Declaration by Uruguayan author and political activist Eduardo Galeano, recently announced on Argentine national television (“Lo ocurrido en Argentina es el terrorismo global de los órganos internacionales”), reported at *Argentina: Del Sueño Democrático a la Pesadilla Neoliberal*, at <http://www.nnc.cubaweb.cu/mesas/mesa12312-01.htm> (last visited Dec. 16, 2002).

57. *Argentina’s Economy: Down, and Almost Out*, in *Buenos Aires*, *ECONOMIST*, Nov. 3, 2001, at 43.

58. Tom Vogel, *Worst May Yet Come in Argentina’s Crisis*, *BLOOMBERG NEWS* (São Paulo), Jan. 3, 2002, available at LEXIS, News Library, Economic News.

59. Margaret Conklin & Daphne Davidson, *The IMF and Economic and Social Human Rights: A Case Study of Argentina, 1958–1985*, 8 *HUM. RTS. Q.* 227 (1986). For additional accounts covering roughly this same period, see LUIGI MANZETTI, *THE INTERNATIONAL MONETARY FUND AND ECONOMIC STABILIZATION: THE ARGENTINE CASE* (1991) (analyzing the stabilization plans of the Frondizi, Videla, and Alfonsín administrations); KENDALL W. STILES, *NEGOTIATING DEBT: THE IMF LENDING PROCESS 169–95* (1991) (analyzing IMF lending in Argentina between 1982–87); Jorge Marshall S. et al., *IMF Conditionality: The Experiences of Argentina, Brazil, and Chile*, in *IMF CONDITIONALITY* 275 (John Williamson ed., 1983) (analyzing IMF conditionality in Argentina between 1958 and 1977).

Argentina made in the eighties due to massive hyperinflation<sup>60</sup> are now overshadowed by the events of 2000–2002. And what peculiar events they are: When Argentine President Menem was given the honor of appearing with U.S. President Clinton to address the joint IMF/World Bank meeting in 1998, Argentina was the IMF's poster child.<sup>61</sup> Two years later, Argentina was the scene of the largest sovereign default in human history.<sup>62</sup> The country's debt has topped US\$132 billion dollars, over half of its GDP. This is gargantuan compared to its neighbor Chile who, with half the population has a public debt of only US\$5 billion.<sup>63</sup> In one day in November 2001, over US\$1.3 billion fled Argentine banks.<sup>64</sup> Unemployment in the country rose to 25 percent in 2002.<sup>65</sup> Industrial output dropped 15 percent<sup>66</sup> and prices of a "basic basket" of groceries rose by 50 percent in a year.<sup>67</sup> Forty-seven percent of the population now lives in poverty.<sup>68</sup>

The situation has gotten so bad that 100 people reportedly volunteered to be crucified in protest to the economy's troubles in the northern province of Jujuy.<sup>69</sup> Banging pots in protest in the streets has become a national pastime, but as yet such demonstrations have only led to more negative results, with thirty-one dead, thousands injured, and about two thousand arrested.<sup>70</sup> Politicians in government have fared little better than

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60. *Timeline: Argentina—A Chronology of Key Events*, BBC NEWS ONLINE, at [http://news.bbc.co.uk/low/english/world/americas/newsid\\_1196000/1196005.stm](http://news.bbc.co.uk/low/english/world/americas/newsid_1196000/1196005.stm) (last visited Dec. 17, 2002) (noting that in 1983, inflation was higher than 900 percent).

61. MUSSA, *supra* note 5, at 19.

62. *Id.* at 71.

63. Anthony DePalma, *Fixing Argentina: Whose Job Is It?*, N.Y. TIMES, Jan. 6, 2002, § 4, at 4. There are, of course, other countries in the world with a similar debt burden. In fact, most industrialized countries have government debt-to-GDP ratios of at least 50 percent and some over 100 percent. Michael Mussa, former Director of the Department of Research at the IMF, explains why such a debt-to-GDP ratio can be sustained in industrialized countries but is alarming in developing countries generally and Argentina in particular. Mussa identifies five factors that make the Argentine debt-to-GDP ratio of around 50 percent so dangerous: 1) Low tax revenues available for debt servicing; 2) Large amount of debt held in foreign currencies; 3) A highly volatile debt-to-GDP ratio even in periods of good economic circumstances; 4) Particular vulnerability to external shocks; and 5) A history of periodic financial crises and debt restructuring. MUSSA, *supra* note 5, at 16–17.

64. *Argentina's Economy: Strapped for Cash*, ECONOMIST, Dec. 8, 2001, at 36.

65. *Argentina's Crisis: Floating into the Unknown*, ECONOMIST, Feb. 9, 2002, at 31, 32.

66. *Argentina's Crisis: Waiting for the IMF to Tango*, ECONOMIST, Mar. 30, 2002, at 31, 31.

67. *Id.*

68. Daniel Merolla, *IMF Team Sets Conditions for Helping Argentina Beat Recession*, AGENCE FRANCE PRESSE, Apr. 11, 2002, available at LEXIS, News Library, Economic News.

69. *Argentina Survival Struggle*, ECONOMIST, Jan. 19, 2002, 31, 31.

70. Carlos Gabetta, *Argentina: IMF Show State Revolts*, LE MONDE DIPLOMATIQUE, Jan. 2002, available at <http://mondediplo.com/2002/01/12argentina>; see also *Argentina: Del Sueño Democrático a la Pesadilla Neoliberal*, *supra* note 56, at <http://www.nnc.cubaweb.cu/mesas/mesa12312-01.htm>.

their constituents on the streets, the country going through an incredible five presidents in two weeks time.<sup>71</sup> According to a recent opinion poll, half the country favors cutting all ties with the IMF.<sup>72</sup>

Amidst all of this, the IMF has publicly denied all responsibility for the Argentine crisis.<sup>73</sup> Now more than ever, Argentina provides an important case study on the effect of SAPs on economic, social, and cultural rights.<sup>74</sup> As the economic woes of Argentines continue to make daily headlines, this Note cannot claim to be a final chapter in the story of ESC rights in Argentina, but in light of the most recent (indeed, current) financial hardships facing Argentina, and the appointment of a Working Group on Structural Adjustment in 1996,<sup>75</sup> an Independent Expert on Structural Adjustment in 1997,<sup>76</sup> and a Special Rapporteur on Structural Adjustment in 2000,<sup>77</sup> the time is ripe to revisit the relationship of ESC rights to SAPs in the Argentine context.

### B. *Human Rights Law in the Argentine Legal Order*

Before beginning an analysis of international Human Rights in relation to Argentina, it is appropriate to outline the position of human rights law in the Argentine legal order. This Section will trace the growing acceptance of international human rights law in Argentina.

Miguel A. Ciuro Caldani notes that the recognition of international law within domestic Argentine jurisprudence has been evolving since 1899, when Heinrich Triepel first noted the distinction between monism and dualism.<sup>78</sup> Article 31 of the Argentine Constitution is decidedly

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71. *Argentina's Crisis: Floating into the Unknown*, *supra* note 65, at 31.

72. *La Gente No Objeta Una Renegociación Favorable*, LA NACION, Nov. 17, 2002, available at <http://www.lanacion.com.ar>.

73. *Jornadas del 19 y 20 de diciembre en Argentina: El FMI Rechaza Responsabilidades en la Crisis Argentina*, DIARIO EL PAIS (España), Dec. 21, 2001, at 5; *see also* MUSSA, *supra* note 5, at 68–69 (admitting that the IMF failed Argentina, but arguing that that failure was in not pressing even *harder* for fiscal austerity).

74. Michael Mussa notes that an examination of the Argentine crisis is also particularly enlightening because 1) the IMF was deeply involved with Argentina for many years before the crisis, unlike other countries which have received exceptionally large bail-out packages, and 2) the economic issues concerned in the Argentine crisis (as compared to the Russian crisis) fell squarely into the IMF's areas of expertise, being fiscal, monetary, and exchange rate policy. MUSSA, *supra* note 5, at 2–3.

75. *See* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-Seventh Session, U.N. OHCHR, 47th Sess., at 13–14, ¶ 5, U.N. Doc. E/CN.4/1996/2, U.N. Doc. E/CN.4/Sub.2/1995/51 (Oct. 23, 1995).

76. U.N. ESCOR, 54th Sess., Item 5, at 1, U.N. Doc. E/CN.4/1998/26 (1998).

77. According to the UNHCHR, the Special Rapporteur on Structural Adjustment was appointed through ESCOR Resolution 2000/82 and Decision 2000/109, but these documents are not yet available. *See* <http://www.unhchr.ch/html/menu2/7/b/tm.htm>.

78. Miguel A. Ciuro Caldani, *Los Acuerdos Internacionales en la Reforma de la Constitución Nacional*, [1995-] J.A. 816. The distinction between monism and dualism is now well-established in international law. Professor Bederman has summarized this



monist, stating that the supreme law of the land shall come from three sources: the Constitution, national laws, and international treaties.<sup>79</sup> Caldani explains that, within this monism, Argentine jurisprudence has passed through several stages of development throughout the years. First, the Supreme Court of Argentina upheld the primacy of the Constitution over treaties, although controversy abounded in cases where laws and treaty provisions were in conflict. Eventually, the treaties were given equal force as laws, but it was generally accepted that subsequently enacted laws could trump treaties. Throughout the latter half of the twentieth century, the power of treaties was increasingly recognized in Argentina, with the Supreme Court finding guidance in article 27 of the Vienna Convention on the Law of Treaties of 1969, which states, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>80</sup> This was generally accepted until the radical changes brought about by the Constitutional Convention of 1994.<sup>81</sup> Choosing to let article 31 stand, the framers of the 1994 amendments instead worked within article 75 (formerly article 67) of the Argentine Constitution. The language they adopted is a bold commitment to incorporate international human rights standards into the Argentine domestic legal order:

The American Declaration on the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; The International Covenant on Economic, Social, and Cultural Rights; The International Covenant on Civil and Political Rights . . . [among others including all six of the major human rights treaties] have constitutional status, do not derogate from any article in the first part of this constitution, and should be understood to complement the rights and guarantees recognized in it. They can only be denounced through the power of the National Executive subject to the approval of two thirds of the members of both houses in the legislature. Future human rights treaties, once approved by Congress, require a vote of two

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well-established in international law. Professor Bederman has summarized this distinction in the following terms: "*Monism* is the idea that international law and domestic law are parts of the same legal system, but that international law is higher in prescriptive value than [sic] national law. *Dualism* is the position that international law and municipal law are separate and distinct legal systems which operate on different levels, and that international law can only be enforced in national law if it is incorporated or transformed." BEDERMAN, *supra* note 7, at 151-52.

79. Caldani, *supra* note 78, at 816.

80. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339 (effect on Argentine jurisprudence analyzed by Caldani, *supra* note 78, at 816 n.4).

81. Caldani, *supra* note 78, at 816.

thirds of the members of both houses to reach this same level of constitutional status.<sup>82</sup>

Beyond simply recognizing these human rights treaties, even beyond putting treaty obligations on the same level as statutory law, the Argentine Constitution actually elevates these human rights treaties to the level of constitutional law.<sup>83</sup> This is done not only expressly (by naming the relevant treaties and saying they will enjoy constitutional status) but also by example (explaining both the constitutional amendment process it would take to undo the constitutionalization of these human rights instruments, as well as the stringent amendment process required to constitutionalize additional treaties).<sup>84</sup> In this way, the constitutionalization of these human rights treaties is made absolutely certain. In 1996, Argentina's Supreme Court explained the reasoning of the framers of this provision, justifying and legitimizing their actions:

In section 22 of Article 75 of the national constitution, which gives constitutional status to international treaties, the Framers have made a value judgment, in which they have examined the treaties and the constitutional articles and verified that not the slightest derogation in meaning is produced, a judgment that the constituted powers will be neither changed nor contradicted.<sup>85</sup>

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82. CONST. ARG. art. 75, sec. 22, reported in Caldani, *supra* note 78, at 817–18. The Spanish text as it appears in Caldani reads:

La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo . . . [y otros incluyendo todo los seis tratados de derechos humanos mas conocidos] tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos. Solo podrán ser denunciados, en su caso, por el Poder Ejecutivo nacional, previa aprobación de las dos terceras partes de la totalidad de los miembros de cada Cámara. Los demás tratados y convenciones sobre derechos humanos, luego de ser aprobados por el Congreso, requerirán del voto de las dos terceras partes de la totalidad de los miembros de cada Cámara para gozar de la jerarquía constitucional.

*Id.* English translation is the author's own, and the original Spanish text should be taken as authoritative.

83. Caldani, *supra* note 78, at 818.

84. See ARG. CONST. art. 75, sec. 22, reported in Caldani, *supra* note 78, at 817–18.

85. Chocobar v. Caja Nacional de Previsión para el Personal del Estado y Servicios Públicos, Semanario n. 6033 del 16/4/97 (Dec. 27, 1996), reported in Jose Luis Amadeo, *Los Tratados Internacionales con Jerarquía Constitucional (Interpretados por la Corte Suprema)*, [1997-II] J.A. 1113.

Thus, not only does the Court recognize the constitutionalization of the human rights instruments listed in article 75, but it also validates and supports it. It gives full legitimacy to the framers of this amendment, eliminating any doubt as to the consistency between the Argentine Constitution and the human rights instruments it has incorporated.<sup>86</sup> The court reaffirmed its words verbatim in 1998 in *Petric v. Diario Página 12*.<sup>87</sup> Furthermore, it stated in another case that “constitutional clauses and those with constitutional status have the same status, are complementary, and above all cannot displace or contradict each other.”<sup>88</sup> It has, therefore, been recognized by the framers of the constitutional amendment, and by the Supreme Court, that certain human rights treaties carry constitutional status in Argentina. It is against this legal backdrop that this Note will examine the respect for economic, social, and cultural rights in Argentine structural adjustment programs.

### *C. International Adhesion Contracts: Argentina's Letters of Intent to the IMF*

At the time this Note was written, the current official understanding between the government of Argentina and the IMF as to conditionality for continued IMF assistance was set out in Argentina's August 30, 2001 Letter of Intent to the IMF and attached Memorandum of Economic Policies (hereinafter LOI/MOU).<sup>89</sup> Subsequent to this date, changes have been made to the amount of Argentina's standby credit,<sup>90</sup> some debt has been postponed on an emergency basis,<sup>91</sup> some funds from a prior pack-

[En el art. 75 inc. 22 CN., que otorgó jerarquía constitucional a tratados internacionales, los constituyentes han efectuado un juicio de comprobación en virtud del cual han cotejado los tratados y los artículos constitucionales y han verificado que no se produce derogación alguna, juicio que no pueden los poderes constituidos desconocer o contradecir.]

English translation by the author. Spanish should be taken as authoritative.

86. *Id.*

87. *Petric v. Diario Página 12*, [1998-IV] J.A. 316 (Apr. 16, 1998).

88. *Monges v. Universidad de Buenos Aires*, CSJN [1998-I] J.A. 350, 353 (Dec. 26, 1996), *cited in Amadeo, supra* note 85, at 1113. [“Las cláusulas constitucionales y las de jerarquía constitucional, tienen la misma jerarquía, son complementarias y, por lo tanto, no pueden desplazarse o destruirse recíprocamente.”]

89. Govt. of Arg., Letter of Intent, Memorandum of Economic Policies, Technical Memorandum of Understanding to Horst Köhler, Managing Director, IMF, Aug. 30, 2001 [hereinafter LOI/MOU], available at <http://www.imf.org/External/NP/LOI/2001/arg/02/index.htm> (last visited Feb. 3, 2003).

90. See, e.g., Press Release No. 01/37, *IMF Augments Argentina Stand-By Credit to \$21.57 Billion, and Completes Fourth Review*, (Sept. 7, 2001), available at <http://www.imf.org/external/np/sec/pr/2001/pr0137.htm>.

91. *The Events That Triggered Argentina's Crisis*, BBC NEWS ONLINE (Dec. 21, 2001), at [http://news.bbc.co.uk/1/hi/english/business/newsid\\_1721000/1721103.stm](http://news.bbc.co.uk/1/hi/english/business/newsid_1721000/1721103.stm). (noting that on Dec. 18,

age were withheld,<sup>92</sup> and Argentina spent all of 2001 in frenzied negotiations with the IMF before finally concluding a new agreement for US\$6.78 billion on January 24, 2003.<sup>93</sup> All of these events carry their own set of demands by the IMF, and it can be complicated to determine what is official policy. In this Section, the LOI/MOU will be analyzed on a general level from a human rights perspective, before addressing specific provisions in the following Subsections.

The gracefully worded sixteen page document advocates further increases in IMF loans, nonchalantly requesting 800 percent of the quota set for Argentina under the IMF Standby Agreement with the IMF.<sup>94</sup> Yet, at the same time it attempts to paint a positive economic picture of the country: In the midst of Argentina's economic disaster, the letter claims "substantial progress,"<sup>95</sup> citing the attached Memorandum, without specifying how it supports this point. It predicts "the attainment of fiscal balance and a sustainable public debt position much earlier than anticipated in our original program" if its provisions are met, without justifying why the measures are likely to succeed.<sup>96</sup> The economic pandemonium making headlines around the world<sup>97</sup> is largely reduced to dependent clauses, such as "Despite a difficult environment . . ."<sup>98</sup> and "Despite the weak Economy. . ."<sup>99</sup>

In the entire document, military spending (US\$3.1 billion in 2000<sup>100</sup>) is never mentioned, whereas cuts in social security are discussed five times.<sup>101</sup> The document describes an entire "understanding of economic policies" without ever referring to the citizens of Argentina. The words "people," "person," "citizen," "laborer," "lower-class," "poor," "women,"

2001 the IMF allowed Argentina to postpone its January interest payment of US\$940 million in light of the crisis).

92. *Id.* (noting the IMF's December 5 announcement not to disperse US\$1.3 billion in aid because austerity measures were not tough enough).

93. See *Finalmente, Ayer se Firmó el Acuerdo con el FMI*, LA NACION, Jan. 25, 2003, available at <http://www.lanacion.com.ar>; see also *Tras Acordar con el FMI, el País Refinancia US\$11,000 Millones*, LA NACION, Jan. 17, 2003, available at <http://www.lanacion.com.ar> (describing the year of negotiations as "arduous"); *Köhler: El FMI Corre Riesgos al Acordar con la Argentina*, LA NACION, Jan. 18, 2003, available at <http://www.lanacion.com.ar> (Economy Minister Roberto Lavagna characterizing the year's negotiations as "long and hard").

94. LOI/MOU, *supra* note 89, Letter ¶ 2.

95. *Id.*

96. *Id.*

97. See, e.g., Clifford Krauss, *Austerity Plan in Argentina Provokes Wide Protests*, N.Y. TIMES, Aug. 1, 2001, at A3.

98. LOI/MOU, *supra* note 89, Memorandum ¶ 1.

99. *Id.* ¶ 2.

100. Christopher Hellman, *Last of the Big Time Spenders: U.S. Military Budget Still the World's Largest, and Growing*, CENTER FOR DEFENSE INFORMATION (Feb. 4, 2002), available at <http://www.cdi.org/issues/wme/spendersFY03.html>.

101. LOI/MOU, *supra* note 89, Memorandum ¶¶ 3, 9, 12, 20, and Technical Memorandum ¶ 7 ("Structural Background").

“children,” “standard of living,” “cost of living,” and “earning power” are completely absent from the seven thousand word document.<sup>102</sup> The use of the word “wage” is restricted to five references to cutting wages,<sup>103</sup> two references to paying provincial government workers with *patacones*<sup>104</sup> (“provincial bonds” that are not, in fact, real money at all<sup>105</sup>), and one reference to increasing the minimum wage necessary to qualify for social security.<sup>106</sup> Likewise, the mention of “salaries” is advocating increased use of provincial bonds to pay salaries.<sup>107</sup>

Analysis of the opening premise of the February 2000 Memorandum of Economic Policies (2000 MEP)<sup>108</sup> exemplifies the poor relationship between the desired ends and the means to achieve them:

The government sees as its foremost priority to create the conditions for the sustainable recovery of economic activity that is needed to reduce unemployment and poverty in a lasting manner, with continued price stability. These conditions include a sustained increase in national savings, to finance the needed growth of investment without further raising the external debt burden on the economy; and a progressive improvement of the international competitiveness of local production, within the framework of the convertibility regime to which the government is fully committed. Competitiveness will be strengthened by continued moderation of costs and prices, productivity gains, wide-ranging structural reforms—especially in the labor market,

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102. See generally LOI/MOU, *supra* note 89.

103. *Id.* Memorandum ¶¶ 6, 9, 10, and 11.

104. *Id.* Memorandum ¶ 11.

105. *Patacones* are government bonds that have been printed as an alternative to hard currency and have been used during the recent crisis to pay the salaries of civil servants. *Argentina's Funny Money*, WASH. TIMES (Washington, D.C.), June 9, 2002, at B(2); *Argentina: One Year of Solitude*, BANQUE PARIBAS CONJONCTURE, Oct. 30, 2002, 16, at ¶ 26 (describing *patacones* as “quasi-money”), available at [http://research.bnpparibas.com/www/recheco.nsf/ConjonctureByDateFR/A4DB6F245C883551C1256C4F004BFBFA/\\$File/C0210\\_f2.pdf?OpenElement](http://research.bnpparibas.com/www/recheco.nsf/ConjonctureByDateFR/A4DB6F245C883551C1256C4F004BFBFA/$File/C0210_f2.pdf?OpenElement). The value of the notes is so questionable that the IMF has pressured Argentina to refuse them as tax payments. *IMF Wants Argentina to Ban Tax Payments with Bonds—Report*, AFX NEWS LTD., Oct. 2, 2002, available at LEXIS, News Library, Economic News. The IMF has since taken the view that provinces should stop using quasi-currencies such as *patacones*, which only create a bigger debt burden. Thomas Catán & Mark Mulligan, *The Daunting Power and Poverty of Buenos Aires: Duhalde's Fragile Government Feels Threatened by its Most Indebted Province*, FIN. TIMES, May 28, 2002, at 4.

106. LOI/MOU, *supra* note 89, Memorandum ¶ 20.

107. *Id.* Technical Memorandum ¶¶ 3, 6.

108. Argentina—Memorandum of Economic Policies, Feb. 14, 2000 [hereinafter 2000 MEP], available at <http://www.imf.org/external/NP/LOI/2000/arg/01/INDEX.HTM>. This memorandum is an earlier memorandum not to be confused with the “Letter of Intent, Memorandum of Economic Policies, Technical Memorandum of Understanding,” of August 30, 2001, *supra* note 89.

the education and health systems, and the financial system—and by increased competition, as a result of improvements in the regulatory framework.<sup>109</sup>

Thus, the 2000 MEP correctly identifies an end of reduction of “unemployment and poverty in a lasting manner” that is consistent with the ICESCR (which Argentina ratified in 1986<sup>110</sup>). Yet in the same breath it constructs a method for correction that includes structural reforms in the labor market (despite ICESCR articles 6 and 7),<sup>111</sup> the education and health systems (despite ICESCR articles 12 and 13),<sup>112</sup> and the financial system (read provincial cuts, use of provincial bonds, currency devaluation, zero-deficit laws, freezes on bank accounts, despite ICESCR articles 1 and 11).<sup>113</sup> This disregard of the Covenant is worth investigating further. The following Subsections will analyze the economic, social, and cultural rights implications of four prominent means of structural reform in the Argentine context: the “zero-deficit” law, social security, provincial cuts, and monetary policy changes.<sup>114</sup>

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109. *Id.* ¶¶ 8–9.

110. Treaty Ratification Status, *supra* note 34.

111. Article 6 enshrines the right to work, particularly work that one freely chooses or accepts, and the obligation upon States Parties to provide “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.” ICESCR, *supra* note 8, art. 6., 993 U.N.T.S. at 6. Article 7 codifies a right to favorable conditions of work, including remuneration adequate to provide for a decent living. *Id.* art. 7.

112. Article 12 guarantees the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” ICESCR, *supra* note 8, art. 12, 993 U.N.T.S. at 8. The ESCR Committee’s General Comment on article 12 further specifies that this right includes an obligation upon States Parties to provide “[f]unctioning public health and health-care facilities, goods and services, as well as programmes.” These health care facilities “must be within safe physical reach for all sections of the population . . . , affordable for all . . . , and of good quality.” Committee on Economic, Social, and Cultural Rights, General Comment 14 on Article 12, The Right to the Highest Attainable Standard of Health, at ¶ 12, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment No. 14]. Article 13 codifies a right to education. ICESCR, *supra* note 8, art. 13, 993 U.N.T.S. at 8.

113. Article 1 establishes the right to “freely pursue their economic, social and cultural development [and] . . . freely dispose of . . . natural wealth and resources without prejudice to any obligations arising out of international economic co-operation.” ICESCR, *supra* note 8, art. 1, 993 U.N.T.S. at 5. Article 11 enshrines the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” *Id.* art. 11, 993 U.N.T.S. at 7.

114. For an in-depth critique of yet another specific structural reform policy in Argentina, see Larry Sawers & Raquel Massacane, *Structural Reform and Industrial Promotion in Argentina*, 33 J. LATIN AM. STUD. 101 (Feb. 2001). Professor Larry Sawers and economist Raquel Massacane examine in detail the system of tax subsidies for provincial industries in Argentina known as industrial promotion. Sawers and Massacane trace the effectiveness of industrial promotion, beginning with its purported goals of promoting domestic production, expanding exports, and stimulating small and medium enterprise. Beginning in 1956 with new tax breaks for companies in Patagonia, what has come to be termed “industrial promotion” is

### 1. Zero Deficit

A main theme of the LOI/MOU, as is common to nearly every SAP, is fiscal austerity measures. In Argentina, this is most widely discussed in terms of the “zero-deficit law.”<sup>115</sup> The LOI/MOU defines “zero-deficit” as requiring the “Secretary of the Treasury to introduce across-the-board proportional cuts in primary expenditures (including wages, pensions, and purchases of goods and services) to ensure that the federal government budget is balanced on a cash basis, initially for the period from August to December 2001.”<sup>116</sup> This type of across-the-board cut to the government budget can have a harsh effect on the country, inconsistent with the ICESCR article 2(1), which calls for *progressive* realization of the rights recognized in the Covenant.<sup>117</sup> Progressive realization does not lend itself to a deadline, like the December 2001 limit originally agreed to in the LOI/MOU.<sup>118</sup> In General Comment No. 3, the ESCR Committee expands on the meaning of progressive realization espoused in article 2(1):

The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights.<sup>119</sup>

Thus, the ESCR Committee distinguishes the progressive realization of the ICESCR from the more immediate protection offered by the ICCPR, noting that ESC rights cannot normally be achieved with such

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really many separate programs enacted at various times in various areas over the next thirty years, through at least fourteen laws and countless decrees. In Sawers and Massacane’s view, “[s]tructural reform at first blush appears to be a relatively simple process. If the problem is excessive interference in the market by the government, the solution is simply for the government to cease its intervention. If the problem is the wrong kind of intervention, then the government must simply find and implement policies that are more effective. But two decades of experience shows that ending some kinds of ineffective or counterproductive manipulation of the market by the government is neither politically nor administratively simple.” *Id.* at 101.

115. LOI/MOU, *supra* note 89, Memorandum ¶ 6.

116. *Id.*

117. ICESCR, *supra* note 8, art. 2(1), 993 U.N.T.S. at 5.

118. See Committee on Economic, Social, and Cultural Rights, General Comment No. 3, Annex III, ¶ 1, U.N. Doc. E/1991/23 (1990) [hereinafter General Comment No. 3] (contrasting the majority of ESC rights espoused in the Covenant, which can be achieved progressively, with the few specific exceptions which are to be achieved immediately).

119. *Id.* ¶ 9; see also Williamson, *supra* note 2, at 8 (“A measured pace of adjustment is particularly important in countries with a narrow economic base.”).

immediacy. Yet, measures such as the “zero-deficit” law attempt to do just that. Such reforms are contrary to ICESCR article 2(1).<sup>120</sup>

## 2. Social Security

The continued restructuring of social security is one of the main structural changes outlined in the LOI/MOU.<sup>121</sup> The relevant provision of the ICESCR is article 9, which “recognize[s] the right of everyone to social security, including social insurance.”<sup>122</sup> In addition, UDHR article 25 states, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care and necessary social services, and the right to security in the event of unemployment.”<sup>123</sup> Article 2 of the ICESCR specifies that States parties should undertake to realize ESC rights “through international assistance and co-operation.”<sup>124</sup> Thus, the duty to meet this right is shared by the IMF.<sup>125</sup>

The LOI/MOU suggests that social security can be reformed without any reduction in coverage, simply by eliminating the abuse of family

120. Furthermore, the recent proposal at the IMF to move toward results-based conditionality, or “financing conditional on previously set outcomes, rather than on the steps toward those outcomes,” Masood Ahmed et al., *Refocusing IMF Conditionality*, FIN. & DEV., Dec. 2001, at 40, 42, contrasts directly with the language of the ICESCR, stating that “[e]ach State Party . . . undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant.” ICESCR, *supra* note 8, art. 2(1), 993 U.N.T.S. at 5.

121. LOI/MOU, *supra* note 89, Memorandum ¶ 12.

122. ICESCR, *supra* note 8, art. 9, 993 U.N.T.S. at 7.

123. UDHR, *supra* note 9, art. 25.

124. ICESCR, *supra* note 8, art. 2, 993 U.N.T.S. at 5; *see also* UDHR, *supra* note 9, art. 22 (specifying that economic, social, and cultural rights will be realized through both “national effort and international co-operation”); Hitter, *supra* note 41, at 887 (arguing in terms of the right to development that governments should meet positive obligations to citizens through international cooperation).

125. SKOGLY, *supra* note 7, at 128–29 (elaborating on the extent of the obligation of the IMF and the World Bank created by ICESCR article 2). In the context of the Declaration on the Right to Development, which also uses the “international co-operation” language, Skogly implicates the World Bank and the IMF because “[o]ne of the most powerful formulations of development policies occurs throughout the collectivity of States when meeting as the World Bank and IMF.” *Id.* at 141. The IMF would share in the responsibility of international cooperation because it itself has international legal personality. *See infra* Section V.A. But, because neither the UDHR or the Declaration on the Right to Development are binding treaties, the responsibility enshrined in UDHR article 22 is only a legal obligation to the extent that UDHR article 22 is customary international law, a point which is highly contested. *See* SKOGLY, *supra* note 7, at 120–25 (describing the debate surrounding whether the UDHR is, in whole or in part, customary international law); *see also* Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1996).



allowances and avoiding duplication of allowances for dependents.<sup>126</sup> Mere streamlining of this sort, the argument goes, is *prima facie* compliant with Argentina's obligation under the ICESCR and UDHR, since it is not taking away substantive entitlements, only eliminating abuses and externalities. This logic, however, presupposes that the existing social security system complies with ICESCR article 9, which it does not: Although article 9 (and UDHR articles 22, 25) states that "everyone" has the right to social security,<sup>127</sup> estimates of coverage in Argentina range from as low as 17 percent<sup>128</sup> to a high of 71.4 percent,<sup>129</sup> with one study showing an 8.8 percent drop in percentage of the population covered between 1993 and 2000,<sup>130</sup> equivalent to 40,000 people per year losing coverage.<sup>131</sup> Even the most conservative of these figures leaves Argentina significantly short of satisfying its duty under article 9.<sup>132</sup> A primary reason so many people are not covered is that the Argentine Social Security system (ANSES) requires a person to work for thirty years in order to qualify for coverage.<sup>133</sup> Therefore, some of the alleged "abuses" the LOI/MOU vows to correct may be self-help attempts by the uninsured to find ways to qualify for the social security that their government is bound to provide by treaty. In a country so far from providing the universal coverage it has promised under article 9, pledges to reduce "abuses" of the system amount to an agreement to

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126. LOI/MOU, *supra* note 89, Memorandum ¶ 20.

127. ICESCR, *supra* note 8, art. 9, 993 U.N.T.S. at 7 (recognizing the "right of everyone to social security, including social insurance").

128. NCPA Policy Group, *Reform in Argentina*, PRIVATIZING SOCIAL SECURITY IN LATIN AMERICA, Jan. 1999, at <http://www.ncpa.org/studies/s221/s221b.html#argentina> [hereinafter *Reform in Argentina*] (stating that only *one sixth* of Argentines participate in either of the two social security systems that comprise ANSES (Argentine Social Security system)).

129. *Implementation of the International Covenant on Economic, Social, and Cultural Rights, Second Periodic Report: Argentina*, U.N. Economic and Social Council, ¶ 149, U.N. Doc. E/1990/6/Add.16 (1997) [hereinafter *Second Periodic Report of Argentina to the CESCR*]. Fabio Bertranou and coauthors provide an explanation of why such disparate estimations abound regarding social security coverage. They note the inaccuracy of the personal coverage indicator due to variations in the age group selected and the increasing complexity in definitions and indicators of coverage due to the 1994 social security reforms in Argentina, concluding that "[t]he available statistics on coverage, at the moment, have not accompanied the mentioned changes." Fabio Bertranou et al., *Aging and Social Security in Argentina: Institutions, Public Policies and Challenges* (Oct. 2001), at 6–7 (most recent version and permission to cite provided by author).

130. Bertranou et al., *supra* note 129, at 9; *see also id.* at 10 (arguing that "coverage was growing in the early 1990s but the path reversed after the 1994 reform").

131. *Id.* at 15.

132. ICESCR article 9 recognizes the "right of *everyone* to social security, including social insurance." ICESCR, *supra* note 8, art. 9, 993 U.N.T.S. at 7 (emphasis added). Even the highest figure of 71.4 percent is significantly less than "everyone."

133. *Reform in Argentina*, *supra* note 128; *see also* Bertranou et al., *supra* note 129, at 5.

move further away from already unmet treaty obligations.<sup>134</sup> The LOI/MOU also notes that “a minimum contributing wage of Arg\$100 a month has been established,” denying benefits to more Argentines in a system that is supposed to provide universal coverage.<sup>135</sup>

In addition, the 2001 LOI/MOU binds Argentina to further limit the operating expenses of ANSES to Arg\$150 million a year.<sup>136</sup> In this respect, it is useful to compare adjustment measures such as social security reform with Argentina’s external debt burden. According to the International Labor Organization (ILO), revenue from individual contributions and social security taxes slightly exceeded expenditures on social security for the three most recent years where data is available.<sup>137</sup> Furthermore, expenditures for those years averaged 4.36 percent of GNP,<sup>138</sup> compared to 50 percent of GDP for debt servicing.<sup>139</sup> In fact, according to one study, the *entire* social security system currently costs US\$6.7 billion per year.<sup>140</sup> By contrast, Argentina is now spending US\$1.4 billion *per month* on debt interest payments.<sup>141</sup> In all, the *total* savings projected in the LOI/MOU for all reforms to Argentina’s social

134. In addition to its treaty obligations, Bertranou and coauthors further note the increased importance of social security in Argentina due to its rapidly aging society: The number of elderly per 100 adults has increased from 7 percent in 1950 to 18 percent in 2000 and is projected to reach 32 percent in 2050. Bertranou et al., *supra* note 129, at 2.

135. LOI/MOU, *supra* note 89, Memorandum ¶ 20.

136. *Id.* ¶¶ 12, 20.

137. Deposits in 1994 represented 5.88 percent of GNP compared to 4.11 percent of GNP for expenses, resulting in a savings of 1.77 percent of GNP. Deposits in 1995 were 4.51 percent of GNP and expenses were 4.54 percent of GNP, resulting in an expense of .03 percent of GNP. Deposits in 1996 were 2.8 percent of GNP and expenses 4.44 percent of GNP, resulting in an overall expense of 1.64 percent of GNP. Averaging these results, social security resulted in a savings of .03 percent of GNP over the three years considered. Compare Int’l Labor Org., *Costo de la Seguridad Social 1994–96: Gastos*, at <http://www.ilo.org/public/english/protection/socsec/publ/css/94t96/arge96e.htm> [hereinafter *1994–96 Expenditures*], with Int’l Labor Org., *Costo de la Seguridad Social 1994–96: Ingresos*, at <http://www.ilo.org/public/english/protection/socsec/publ/css/94t96/arge96r.htm> [hereinafter *1994–96 Deposits*]. *But see Second Periodic Report of Argentina to the Committee on Economic, Social, and Cultural Rights, supra* note 129, ¶ 145 (reporting that 17.1 percent of Argentine public sector spending was for social security).

138. Expenditures as a percentage of GNP were 4.11, 4.54, and 4.44 for the years 1994, 1995, and 1996, respectively. Thus, the average expenditure for these three years was 4.36 percent. *1994–96 Expenditures, supra* note 137.

139. *Argentina’s Economy: Down, and Almost Out, in Buenos Aires, supra* note 57, at 44.

140. Bertranou et al., *supra* note 129, at 25, table A2 (US\$15.4 billion expenditures minus US\$8.7 billion revenues); see also Nicholas Barr, *The Truth About Pension Reform*, FIN. & DEV., Sept. 2001, at 6, 8 (arguing that a fiscally sustainable State pension plan “does not mean that public pension spending must be minimized (as opposed to optimized), but that it must be compatible with continued economic growth”).

141. *Argentina’s Economy: Down, and Almost Out, in Buenos Aires, supra* note 57, at 44.

security system is Arg\$170 million.<sup>142</sup> Argentina pays that amount in interest on its debts about every three days.<sup>143</sup> Instead of concentrating on the comparatively miniscule costs of the ANSES operating expenses, a human rights approach would focus on the comparison of social security to debt servicing.<sup>144</sup> Discussion of social security should be limited to finding a cost-efficient means of providing universal coverage.<sup>145</sup>

### 3. Provincial Cuts

A common theme in Argentinean SAPs, and present again in the LOI/MOU, is heavy cuts to the provincial government budget.<sup>146</sup> Making the provinces a focus of fiscal austerity measures, besides being contrary to the Argentine Constitution,<sup>147</sup> is a violation of article 2(2) of the ICESCR, by which State Parties will uphold the Covenant “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>148</sup> Citizens of the provinces could fit into at least three of these protected categories: social origin (being from rural provinces in-

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142. LOI/MOU, *supra* note 89, Memorandum ¶ 9.

143. US\$1.4 billion per month divided by 31 days times 3 days.

144. Here, the comparison is debt burden to social security, but the same analogy could be made to the savings gained by provincial cuts, the “zero-deficit” law, currency changes, or any contemplated structural adjustment measure. The IMF, for its part, has taken to attacking the debt problem from the other end: In recent negotiations, it has made clear that a new agreement with Argentina would not replenish Argentina’s reserves with money previously paid to IFIs, hoping that this decision will create an incentive for countries to default earlier than they otherwise would. *El FMI No Devuelve Lo Que El País Pagó*, LA NACION, Dec. 23, 2002, available at <http://www.lanacion.com.ar>; see also Buscaglia, *supra* note 4, at 5 (“It is hard if not impossible to argument [sic] against the notion that the fiscal deficit was the immediate cause of the crisis. Simply put, if Argentina’s public sector did not have big external borrowing requirements during the period 1999–2001, there would have been no crisis.”); John Cavanagh, *Shifting the Burden of the Debt Crisis*, in *WORLD DEBT AND THE HUMAN CONDITION*, *supra* note 1, at 193 (noting that “[t]he net resource flow out of the Third World to service . . . debt totaled U.S.\$168 billion between 1984 and 1989. In this context the term *development* must be rethought”).

145. See, e.g., Bertranou et al., *supra* note 129, at 18–23 (describing “four relatively viable alternatives . . . for a pension program that could fulfill the target of providing universal coverage,” ranging in cost between 0.28 percent and 2.16 percent of GDP); see also Barr, *supra* note 140, at 8 (arguing that “[r]eform of pensions . . . is not an event but a process, requiring support from all levels of government”).

146. LOI/MOU, *supra* note 89, Memorandum ¶ 11.

147. MUSSA, *supra* note 5, at 14 (noting that the practice by which the provinces retain much of the initiative and incentive for public spending is enshrined in the Constitution of Argentina). Because this Note concerns international human rights law, not domestic law of Argentina, this point is mentioned out of interest only.

148. ICESCR, *supra* note 8, art. 2(2), 993 U.N.T.S. at 5.

stead of the urban centers), property (discrimination based on where one owns property),<sup>149</sup> and birth (by being born in a provincial area).<sup>150</sup>

However, it should be emphasized that the distinction between the federal government and provincial government is as much a federalist distinction of government power sharing as it is a geographic distinction between the cities and rural areas. In fact, the most indebted province is that of Buenos Aires.<sup>151</sup> Nevertheless, the IMF solution to the Buenos Aires provincial debt disproportionately burdens other rural provinces. For example, although the IMF requested that all provinces cut their budget deficits by 60 percent, “senior IMF officials say in private that the biggest problem is Buenos Aires itself, which accounts for more than half the combined spending deficit of 23 provinces.”<sup>152</sup> Not only will provincial cuts outside of Buenos Aires province amount to less savings than cuts in Buenos Aires,<sup>153</sup> but they will disproportionately burden those provinces to correct a problem they did not create.

These cuts are so severe that there is no money left in the budget to pay provincial employees, who have been paid using provincial bonds called *patacones*, which are not necessarily honored in stores.<sup>154</sup> To the extent that payment in *patacones* is limited to provincial civil servants or is not universally adopted, it is a violation of ICESCR article 7, which guarantees “the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular . . . fair wages and equal remuneration for work of equal value without distinction of any kind.”<sup>155</sup> Not being true legal and tender money, *patacones* cannot be considered equal remuneration for their work within the language of article 7. Merchants are in no way legally bound to accept *patacones*, so in many transactions they may be of no value at all. When *patacones* are accepted, they may be highly devalued, since that merchant will likely have the same trouble trying to spend them.<sup>156</sup>

On the other hand, *patacones* represent an attempt by Argentina to continue to pay employees despite lack of funds. In this way, *patacones*

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149. The United Nations notes that “[t]he rural poor are mostly landless or have farms that are too small to yield an adequate income. As a consequence, there is a strong correlation between rural poverty and asset deprivation.” WORLD SUMMIT FOR SOCIAL DEVELOPMENT OVERVIEW REPORT, *supra* note 43, ¶ 111.

150. ICESCR, *supra* note 8, art. 2(2), 993 U.N.T.S. at 5. (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . social origin, property [or] birth.”).

151. Catán & Mulligan, *supra* note 105.

152. *Id.*

153. *See id.*

154. *See supra* note 105.

155. ICESCR, *supra* note 8, art. 7, 993 U.N.T.S. at 6.

156. *See Argentina’s Funny Money*, *supra* note 105 (“[S]hopkeepers take them reluctantly in exchange for food, since they have few prospects of getting real cash.”).

work both in support of and contrary to ESC rights. If they are not being used universally, they violate ICESCR article 7(a).<sup>157</sup> However, in light of severe lack of government funds, *patacones* represent a desperate attempt to continue to meet Covenant obligations by providing some remuneration for work.<sup>158</sup> In this light, it is the subsequent IMF opposition to *patacones*, because of the additional provincial debt they create,<sup>159</sup> that violates ICESCR article 7(a), since it would then be denying the workers of *any* remuneration.<sup>160</sup>

Pedro Pou, Governor of the Central Bank of Argentina, recently wrote in *Finance and Development* (a periodical published by the IMF) that “provincial governments continue to depend on taxes raised at the federal level, while the municipalities depend on taxes raised at the provincial level,” continuing to remark that “[a] system needs to be developed that improves the balance, at each level of government, between the political benefits of public services and the political costs of raising revenues.”<sup>161</sup> Pou’s argument is consistent with the LOI/MOU, which calls to “reform the revenue sharing arrangement between the federal government and the provinces to . . . allow for a better match of each province’s share with its own revenue effort.”<sup>162</sup> Such logic, however, undermines the whole premise of taxation as a form of wealth redistribution.<sup>163</sup> If taxes truly operated on Pou’s presumption that each individual should get what she pays for, a society could simply eliminate most taxes and all government funded social services, and everyone could self-insure for the services they need. But, according to the ICESCR, there are certain entitlements a State Party is obligated to provide, re-

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157. See *supra* note 155 and accompanying text.

158. Catán & Mulligan, *supra* note 105 (noting that the provincial government feels it “cannot start firing people at a time when more more [sic] than half of [its] constituents live below the poverty line”).

159. *Id.*

160. Presumably, the IMF is not advocating payment in pesos instead of *patacones*, since that would create an equivalent debt.

161. Pedro Pou, *Argentina’s Structural Reforms of the 1990s*, FIN. & DEV., Mar. 2000, at 13, 15.

162. LOI/MOU, *supra* note 89, ¶ 18.

163. 51 AGUSTIN JOSE MENENDEZ, JUSTIFYING TAXES: SOME ELEMENTS FOR A GENERAL THEORY OF DEMOCRATIC TAX LAW ¶ 200 (Francisco J. Laporta et al. eds., 2001) (“It is probably not too adventurous to assume that if . . . [wealth redistribution] is considered a legitimate purpose of political action, the tax system will be at the heart of the institutional mechanisms to implement it.”); see also Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 226–36 (1956) (noting that proponents of the estate tax in the nineteenth and twentieth centuries often stress its usefulness in preventing the concentration of wealth); C. Ronald Chester, *Inheritance and Wealth Taxation in a Just Society*, 30 RUTGERS L. REV. 62, 93–100 (1976) (providing a modern defense of taxation as a means of wealth redistribution).

ardless of a person's economic means, including health care,<sup>164</sup> education,<sup>165</sup> freedom from hunger,<sup>166</sup> and social security.<sup>167</sup> These minimum obligations have also been recognized by the Committee in the principle of core obligations:

[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.<sup>168</sup>

Thus, a State which is compliant with the Covenant is inevitably a welfare state in at least some capacity, which involves taxation as wealth redistribution.<sup>169</sup> This principle is embodied in UDHR article 28, which states, "Everyone is entitled to a social . . . order in which the rights and

164. For example, the ESCR Committee has explained that "health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households." General Comment No. 14, *supra* note 112, ¶ 12(b)(iii).

165. ICESCR, *supra* note 8, art. 13(2)(a), 993 U.N.T.S. at 8 ("Primary education shall be . . . available free to all").

166. *Id.* art. 11(2), 993 U.N.T.S. at 7; *see also* Committee on Economic, Social, and Cultural Rights, General Comment No. 12, ¶ 13, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (explaining that the right to food under article 11 includes a duty on the State Party to facilitate accessibility to food, and that "particularly impoverished segments of the population may need attention through special programmes").

167. ICESCR, *supra* note 8, art. 9, 993 U.N.T.S. at 7.

168. General Comment No. 3, *supra* note 118, ¶ 10.

169. WORLD SUMMIT FOR SOCIAL DEVELOPMENT OVERVIEW REPORT, *supra* note 43, ¶ 127 ("While employment and social security programmes are the major factors determining who falls into or escapes from poverty, a variety of other social and economic factors are also influential, *including the tax structure*. . .") (emphasis added). This is sometimes framed in the language of decentralization of social services. *Id.* ¶¶ 87–89 (noting that "[I]n most countries that have elaborate State systems of social provision and where the State plays a major role in directing the economy, the trend in thinking over the past several decades has been towards decentralization" which "should remain an important longer-term goal"); *see also id.* ¶¶ 60–63 (arguing the importance of a governmental structure which enhances "social integration, particularly of the more disadvantaged and marginalized groups," and noting that "[t]his is not the first time in recent history that humanity has faced such a challenge. The founding of the United Nations, itself a response to deep-seated crises in the decades of the 1920s and 1930s, . . . ushered in the full-fledged welfare State").

freedoms set forth in this Declaration can be fully realized.”<sup>170</sup> The people in all provinces are entitled to the same core obligations under the ICESCR, regardless of their inability to pay the same level of taxes. Thus, all provinces should not be expected to generate tax revenue to fund government operations in the same way the federal government can, and this argument for provincial cuts should not be recognized.<sup>171</sup> Rather, structural adjustment should recognize any provincial spending which addresses the high level of rural poverty.<sup>172</sup>

Provincial cuts are justified by the IMF to compensate for past frivolous spending in the provinces by incumbents to gain important swing votes in elections.<sup>173</sup> Recognizing and stopping wasteful spending is certainly a legitimate goal of the IMF in supporting fiscal austerity, and Argentina should avoid all such irresponsible expenditures. But, a solution which aims to correct for past State wrongs by present-day harm to individuals flies in the face of human rights norms: Instead of protecting individuals against their government, the solution would punish individuals because of their government.<sup>174</sup>

#### 4. Convertibility, Devaluation, and Their Effects

Convertibility (linking the peso at parity with the U.S. dollar and constraining monetary policy to support this peg),<sup>175</sup> devaluation, and other forms of monetary control (hereinafter referred to as “monetary policy”) are perhaps the most difficult areas to establish human rights culpability of the IMF. First, unlike the other categories previously discussed, they are *not* among those issues that Argentina contracted to

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170. UDHR, *supra* note 9, art. 28.

171. LARRY SAWERS, THE OTHER ARGENTINA: THE INTERIOR AND NATIONAL DEVELOPMENT 141–64 (1996) (outlining in detail the lack of economic resources in the Argentine provinces). Sawers concludes that “[t]he poverty and inequality of the interior translate into fiscal backwardness. The poor do not have much taxable income or wealth. The inequality in the distribution of income and wealth . . . leads to political inequality. . . . *The middle class in the interior is too small to serve as the principal tax base. A government without resources cannot build the infrastructure that promotes economic growth.*” *Id.* at 158 (emphasis added).

172. WORLD SUMMIT FOR SOCIAL DEVELOPMENT OVERVIEW REPORT, *supra* note 43, ¶ 110 (noting that 61 percent of the rural population in Latin America is poor).

173. Catán & Mulligan, *supra* note 105.

174. Provincial finance remains a major issue in the current negotiations. *Más Ajustes Provinciales para 2003*, LA NACION, Nov. 17, 2002, available at <http://www.lanacion.com.ar>. See also *Duhalde Pedirá Más Ajuste a las Provincias para Acordar con el FMI*, LA NACION, Nov. 17, 2002, available at <http://www.lanacion.com> (describing President Duhalde’s attempt to reach an agreement with the IMF, causing him to pressure the provinces into more adjustment by threatening imminent anarchy).

175. MUSSA, *supra* note 5, at 5.

change in the 2001 LOI/MOU.<sup>176</sup> Monetary policy issues also differ from those previously discussed, because even if detrimental changes in monetary policy could be linked to SAPs, it is much more difficult than in other areas to establish a violation of ESC rights because of the inherent economic complexities involved: great economists, indeed the world's best economists, differ even with 20/20 hindsight on the most prudent decisions of monetary policy.<sup>177</sup> Just as the IMF is required under its Articles of Agreement to support a national policy as long as it has at least a reasonable chance of success,<sup>178</sup> so would it be difficult in the human rights context to place blame in hindsight for reasonable choices made by highly trained policy makers simply because the choice they made turned out to be wrong. Both because monetary policy is not directly addressed in the LOI/MOU, and because it has no "right answer" even in ESC-rights terms, this Section takes on a different character from the previous ones, attempting to expose evidence of times in which the IMF was pressuring Argentina to adopt a certain monetary policy without specifically mandating it in the LOI/MOU.

As stated above, exchange rate decisions are a complex area of international economic policy, and this Note does not attempt analysis of the policy in economic terms.<sup>179</sup> Indeed, in terms of the ICESCR article

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176. See generally LOI/MOU, *supra* note 89. Devaluation and monetary policy are not discussed at all. Convertibility is mentioned once as a *fait accompli*, but no new convertibility arrangements are agreed upon. *Id.* at 3.

177. For example, even Joseph Stiglitz, winner of the Nobel Prize in Economics in 2001, provides a disclaimer when analyzing IMF policy: "My point . . . is not to resolve these controversies, or to push for my particular conception of the role of government and markets, but to emphasize that there are real disagreements about these issues among even well-trained economists." JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 220 (2002). Compare, e.g., Sérgio Pereira Leite, *Human Rights—and the IMF*, 38 *FIN. & DEV.*, Dec. 1, 2001, at 45 ("It has been shown . . . that external trade promotes growth . . . [and] that, despite transitional costs, trade liberalization generally has a positive overall effect on the employment and income of the poor.") with MUSSA, *supra* note 5, at 220 ("the problem is that the IMF . . . presents as received doctrine propositions and policy recommendations for which there is not widespread agreement; indeed, in the case of capital market liberalization, there was scant evidence in support and a massive amount of evidence against"). Michael Mussa, Director of Research at the IMF for a decade, also stated "there is room for reasonable disagreement about what are the right assumptions concerning real growth, interest rates, and achievable fiscal outcomes." MUSSA, *supra* note 5, at 78. Perhaps most candidly of all, former Finance Minister of Argentina Domingo Cavallo stated recently at a conference on the Argentine crisis at the University of Michigan that "Argentines are confused, and I am one of them." Alberto Armendáriz, *Cavallo Dijo que No Hay Que Echarle la Culpa al Fondo*, *LA NACION*, Oct. 24, 2002, available at [http://www.lanacion.com.ar/02/10/24/de\\_443448.asp](http://www.lanacion.com.ar/02/10/24/de_443448.asp) (hypothesizing in hindsight that perhaps the Argentine crisis could have been avoided if the peso was allowed to float in 1997 or if in 1999 it had been pegged to the U.S. dollar and the euro) (translation by the author).

178. MUSSA, *supra* note 5, at 24 (citing Articles of Agreement art. IV, sec. 2).

179. WILFRED L. DAVID, *THE IMF POLICY PARADIGM* 83 (1985) ("One of the most controversial, and indeed complex, aspects of IMF policy packages concerns the inordinate



1(1) guarantee of a right to self-determination, including the right of a people to “freely pursue their economic, social and cultural development,”<sup>180</sup> commentators are divided as to the extent that the IMF has pressured Argentine convertibility decisions. For example, former IMF chief economist Michael Mussa argues in his recent book *Argentina and the Fund: From Triumph to Tragedy* that it was the Argentine government alone that designed and implemented the convertibility plan directly against IMF advice.<sup>181</sup> Moreover, several commentators have described convertibility as a right in itself, including the right to peg a currency to another currency or use another currency.<sup>182</sup> This being said, convertibility decisions by governments still present interesting human rights questions: Even when the decision is made by a government on behalf of its people (consistent with the right to self-determination), its result is *prima facie* open to question from the standpoint of economic self-determination, since it is the economic situation of a far-away land which controls the economy of Argentina, not the work or decisions of people on the ground.<sup>183</sup>

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degree of emphasis placed on exchange rate depreciation, or devaluation, especially in those developing countries whose exchange rates are tied to major currencies.”). For an economic analysis of exchange rate policy, see Ronald I. McKinnon, *Limiting Moral Hazard and Reducing Risk in International Capital Flows: The Choice of an Exchange Rate Regime*, 579 ANNALS AM. ACAD. POL. & SOC. SCI. 200 (2002).

180. ICESCR, *supra* note 8, art. 1(1), 993 U.N.T.S. at 5.

181. MUSSA, *supra* note 5, at 5.

182. ANTONIO CASSESE, INTERNATIONAL LAW 404 (2001) (describing the ability of a country to regulate its currency, including pegging it to another currency, as a right in itself, created with the elimination of the gold standard in 1978); Domingo Cavallo & Eduardo Cavallo, *Argentina 2002: When the Attempt to Set “Prices Right” Destroyed “Property Rights”*, (Oct. 22, 2002) (manuscript at 1) (Paper presented at the Symposium on the Argentine Crisis, University of Michigan Business School), available at <http://www.cavallo.com.ar> (describing convertibility as “a right that Argentines demanded and until then had been denied: the right to use foreign currencies, in particular the US dollar, to protect their savings”).

183. Mussa concedes this point, noting that “Argentina was surely not part of an optimum currency area with the United States, because the Argentine economy was subject to much different shocks from the US economy and the monetary policy appropriate for Argentina need not generally coincide with that appropriate for the United States.” MUSSA, *supra* note 5, at 22. Of course, economic trends are in a sense “uncontrollable” by the daily actions of a people anyway, and can only be controlled by government to a certain extent, but this is literally the case when a currency peg is used. Moreover, the modified currency peg proposed in April 2001 and initiated later in the year (tying the peso 50 percent to the dollar and 50 percent to the euro) complicated matters of economic sovereignty even further, with the value of Argentine money then determined by twelve other countries. DePalma, *supra* note 63, § 4, at 4; *Argentina’s Economy: At Last, A Deal*, ECONOMIST, Nov. 17, 2001, at 36. (The twelve euro countries at that time were Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. *The History of the European Union: 2002*, at [http://www.europa.eu.int/abc/history/2002/2002\\_en.htm](http://www.europa.eu.int/abc/history/2002/2002_en.htm). The dual exchange rate lasted several months and was then discontinued. MUSSA, *supra* note 5, at 62; *Argentina’s Crisis: Loaded Dice*, ECONOMIST, Feb. 16, 2002, at 36. This is usually what the policy makers

The situation is even more complicated by evidence of pressure by the IMF on Argentina regarding its exchange rate regime. The *Economist* notes that:

The IMF's official position is that . . . exchange-rate arrangements are a sovereign decision. "Countries choose their own exchange-rate regime and we determine whether we support it," says Tom Dawson, the IMF spokesman. . . . In part, this is a real change of philosophy: since the arrival of Horst Kohler, the Fund's German boss, the IMF takes country "ownership" of economic reforms more seriously.<sup>184</sup>

Dawson's statement is a half truth. Stanley Please, a former consultant and employee at the World Bank, noted quite to the contrary, that "[r]esponsibility for exchange rate policy at the international level resides with the IMF. Under its Articles of Agreement, the IMF was mandated: 'To promote exchange stability, to maintain orderly exchange arrangements among members and to avoid competitive exchange depreciation.'"<sup>185</sup> He further contends that such exchange-rate policy management most often occurs not in the aggregate but through a "country-by-country approach."<sup>186</sup>

Furthermore, even if it were true that the IMF did not officially control the exchange rate, it possesses enormous unofficial bargaining power as lender of last resort (LLR), causing countries to predict what the IMF will support and to choose that option. For example, in the Argentine

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are after, precisely because the American (and European) economy is historically less volatile than the economy whose currency is being pegged. Indeed, between 1935 and 1991, before the peso was pegged to the U.S. dollar, its value fell against the dollar by a factor of *three trillion* times. *Id.* Another aspect of the exchange rate regime is the cost to the IMF (and ultimately the country concerned) to maintain artificial exchange rates. Joseph Stiglitz, ex-president of the World Bank who has become the IMF's most vocal critic, notes that the IMF "justifies these interventions on the grounds that *sometimes* markets exhibit excessive pessimism." STIGLITZ, *supra* note 177, at 198. He finds it "curious that an institution committed to the doctrine that markets work well, if not perfectly, should decide that this one market—the exchange rate market—requires such massive intervention[,]” adding that “[t]he IMF has never put forward a good explanation either for why this expensive intervention is desirable in this particular market—or why it is undesirable in other markets.” *Id.* Answering his own question, he notes that “[w]hen the IMF and the Brazilian government, for instance, spent some \$50 billion maintaining the exchange rate at an overvalued level in late 1998, where did the money go? The money doesn't disappear into thin air. It goes into somebody's pocket—much of it into the pockets of the speculators.” *Id.* at 198–99.

184. *The IMF and Argentina: Staying Mum*, *Economist*, Dec. 15, 2001, at 30.

185. STANLEY PLEASE, *THE HOBBLING GIANT: ESSAYS ON THE WORLD BANK* 60–61 (1984) (noting that “[t]he IMF becomes operationally involved in issues of exchange rate adjustment in the context of the use of IMF resources by individual member governments”).

186. *Id.* Certainly, IMF policy on exchange rates may have changed since 1984 when Please wrote his book, but his point that official surveillance of exchange rates is written into the Articles of Agreement remains salient.

context the *Economist* notes: "On December 5th [2001], the Fund said that it was 'unable at this stage to recommend completion' of its review of Argentina's loan programme. Translation: it will not release the last tranche of its latest loan, worth \$1.3 billion, unless the government either adopts the dollar, or devalues."<sup>187</sup> The *Latin America Weekly Report* also noted IMF pressure on exchange rate policy, stating that in the ongoing talks between the IMF and Argentina in October 2002, there "remain some disagreements over the exchange system (the IMF reportedly wanting to rule out central bank intervention)."<sup>188</sup> Thus, although monetary decisions are not officially mandated by the LOI/MOU, and despite evidence that Argentina has adopted policies contradicting IMF advice, there is also evidence to suggest that countries, including Argentina, sometimes face unofficial pressure from the IMF to make these decisions. Because these decisions implicate ESC rights, they are briefly addressed here.

Devaluation raises other serious human rights questions. As a general matter, by devaluing a currency, as President Duhalde did by 29 percent in early January 2002, the government is changing the value of citizens' savings in the tick of the clock.<sup>189</sup> In so doing, devaluation violates the ICESCR article 25, which notes the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."<sup>190</sup> More specifically, this often has a large effect on the price of daily food staples,<sup>191</sup> contrary to ICESCR article 11(1), codifying the right of everyone to "an adequate standard of living for himself and his family, including adequate food," and article 11(2), recognizing the "fundamental right of everyone to be free from hunger."<sup>192</sup> Furthermore, because most mortgages in Argentina are taken out in dollars while most wages are paid in pesos,<sup>193</sup> citizens with property are at a unique disad-

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187. *Argentina's Economy: Strapped for Cash*, *supra* note 64, at 36. Jorge Oviedo, editor at the daily *La Nacion*, blames the IMF for requiring the floating of the currency, calling this the biggest of many catastrophic errors committed by the IMF in Argentina. Jorge Oviedo, *Aparecen las Razones del Fondo*, *LA NACION*, Nov. 21, 2002, available at <http://www.lanacion.com.ar>.

188. *And Yes, There Are Still Unsolved Issues with the IMF*, *LATIN AM. WKLY. REP.*, Oct. 15, 2002, at 482. Pressure on currency decisions also came from foreign private investors. See S. Neal McKnight, *Stepping Stones to Reform: The Use of Capital Controls in Economic Liberalization*, 82 *VA. L. REV.* 859 (1996) ("Argentina . . . was under significant pressure [from foreign investors] to abandon its currency board system and devalue its currency. . .").

189. *Devaluation's Downbeat Start*, *ECONOMIST*, Jan. 12, 2002, at 34.

190. ICESCR, *supra* note 8, art. 25, 993 U.N.T.S. at 10.

191. See Baldacci et al., *supra* note 54, at 25 ("The currency depreciation may also affect consumer prices, and the higher cost of imported food hurts poor individuals and households that spend much of their income on food.")

192. ICESCR, *supra* note 8, art. 11, 993 U.N.T.S. at 7.

193. *Devaluation's Downbeat Start*, *supra* note 189, at 34 ("Most mortgages and loans were taken out in dollars, while wages are mainly in pesos.")

vantage, contrary to ICESCR article 2(2) (preventing economic discrimination based on property), and against the spirit of article 11(1) (noting the importance of adequate housing to an individual and family).<sup>194</sup> Finally, the poorest people in Argentina are more likely to have their savings in pesos. In contrast, wealthy individuals, banks, and corporations usually save in dollars or other hard currencies.<sup>195</sup> Therefore, devaluation disproportionately discriminates against the poor, a violation of article 2(2), which, by banning discrimination based on property, implicitly bans discrimination based on wealth, or amount of property.<sup>196</sup>

Many of the recent tactics of current President Duhalde to deal with the flailing economy exemplify human rights-conscious decision making: The *Economist* has consistently noted that the Duhalde government has attempted to focus the pressure of devaluation on banks and large, privatized utilities (several of which are Spanish owned), and away from individuals.<sup>197</sup> The *Economist* has noted, however, that “outside help,” meaning IMF approval, will be conditioned on “more even-handed treatment of the banks.”<sup>198</sup> While President Duhalde is trying to protect his citizens, the macroeconomic pressure from the outside is more interested in banks and privatized enterprise. In the context of devaluation, the right to development and right to self-determination resurface again.

This problem has two levels. First, policy considerations on devaluation must take into account ICESCR article 1(2), which establishes the primacy of individual use of wealth and resources over international economic cooperation.<sup>199</sup> Second, in the event that policy considerations do attempt to consider individuals over outside factors, but are effectively prevented from doing so by outside IFIs holding the purse strings, article 11(1) comes into play, stressing the “essential importance of international co-operation based on free consent.”<sup>200</sup> The threat that the IMF will deny financing prevents President Duhalde from making a policy choice consistent with article 1(2) that shifts the blow of

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194. ICESCR, *supra* note 8, arts. 2(2), 11(1), 993 U.N.T.S. at 5, 7.

195. See *Devaluation's Downbeat Start*, *supra* note 189, at 34.

196. ICESCR, *supra* note 8, arts. 2(2), 993 U.N.T.S. at 5 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . property.”).

197. *Devaluation's Downbeat Start*, *supra* note 189, at 34; *Argentina Survival Struggle*, *supra* note 69, at 31.

198. *Argentina Survival Struggle*, *supra* note 69, at 31.

199. ICESCR, *supra* note 8, art. 1(2), 993 U.N.T.S. at 5 (“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation”).

200. *Id.* art. 11(1), 993 U.N.T.S. at 7 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living. . . . The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”).

devaluation from banks to individuals. Thus, the international cooperation between the Duhalde government and the IFIs is not based on consent, as mandated in article 11(1). In this way, articles 1(2) and 11(1) form a sort of hierarchy in the right to development and right to self-determination context: Article 1(2) protects individual choice from an overpowering government, and article 11(1) protects government choice from an overpowering international community. Article 11(1) is therefore an important link in considering the new human rights paradigm of structural adjustment.<sup>201</sup> This premise will be examined more thoroughly later in the discussion.

Another problem with devaluation, or the outright “floating” of the peso which occurred in early February 2002,<sup>202</sup> is that other techniques must then be employed to maintain a stable economy, to prevent a floating peso from leading to hyperinflation, violating these same human rights provisions by different means. Unfortunately, the techniques to stabilize the Argentine economy in the face of an impending currency float are themselves in violation of ESC rights. One such policy in Argentina is the *corralito*, Spanish for little fence, a government mandated freeze on savings accounts, initiated to prevent a run on the banks. The exact details of the *corralito* seemed to change with the hour, but essentially it limited the amount Argentines could withdraw from their bank accounts to US\$1000 per month, and prevented the transfer of money abroad without approval of the Economic Ministry.<sup>203</sup> This is a violation of ICESCR article 1(2) right of everyone to “freely dispose of their natural wealth and resources,”<sup>204</sup> and the UDHR’s article 17 right that “[n]o one shall be arbitrarily deprived of his property.”<sup>205</sup>

Furthermore, the *corralito* policy discriminates based on wealth, and is thus a violation of the ICESCR article 2(2)’s prohibition of discrimination based on property<sup>206</sup> in two ways. First, a government decision in early December 2001 to change the amount of cash Argentinean tourists

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201. General Comment No. 12 on article 11 specifically clarifies that “international cooperation” was meant to reference, among other organizations, the IMF. General Comment No. 12, *supra* note 166, ¶ 41. ICESCR article 11 does not deal with ESC rights generally but rather with the right to an “adequate standard of living . . . , including adequate food, clothing and housing, and to the continuous improvement of living conditions.” ICESCR, *supra* note 8, art 11(1), 993 U.N.T.S. at 7. But General Comment No. 12 on article 11 makes clear that the language concerning international cooperation was meant to apply to all ESC right by referring in General Comment No. 12, paragraph 41 to General Comment No. 2, paragraph 9. In General Comment No. 2, paragraph 9, the Committee speaks to the burden of structural adjustment on all ESC rights. See General Comment No. 2, *supra* note 53 and accompanying text.

202. *Argentina’s Crisis: Loaded Dice*, *supra* note 183, at 36.

203. *Argentina’s Economy: Strapped for Cash*, *supra* note 64, at 36.

204. ICESCR, *supra* note 8, art. 1(2), 993 U.N.T.S. at 5.

205. UDHR, *supra* note 9, art. 17.

206. See *supra* note 196 and accompanying text.

can take abroad from US\$1000 to US\$10,000<sup>207</sup> (while leaving the bank freeze the same) discriminates against the poor, since they are less likely to participate in international tourism. Second, it has been argued by several professors at the University of Michigan Business School that American Depository Receipts (ADRs) have been heavily employed in Argentina as a method of capital flight.<sup>208</sup> This additional loophole also discriminates against the poor, who are less likely to have the funds or expertise to invest in the stock market to protect their assets.

Argentineans absolutely despise the *corralito*, and it was this fact more than anything else that prompted the pot-banging protests that made headlines around the world, left more than twenty-five people dead, and prompted Fernando de la Rúa to resign as president in December 2001.<sup>209</sup> In the widely-publicized decision of *Smith v. Estado Nacional*, the Supreme Court of Argentina declared such a freeze to be unconstitutional on February 1, 2002.<sup>210</sup> Although both the Argentine public and the Argentine Supreme Court were against the mechanism, the government continued to impose it for most of the year. Instead of abiding by the Supreme Court decision, President Duhalde used the “emergency economic powers” granted to him in the Argentine

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207. *Argentina's Economy: Strapped for Cash*, *supra* note 64, at 36.

208. Sebastian Auguste et al., *Cross-Border Trading as a Mechanism for Capital Flight: ADRs and the Argentine Crisis*, (Oct. 22, 2002) (Paper presented at the Symposium on the Argentine Crisis, University of Michigan Business School), available at <http://www.econ.lsa.umich.edu/~burststein/seminar/ADRs%20and%20the%20Argentine%20crisis.%20Nov%202002.pdf>. American Depository Receipts, commonly known as “ADRs,” are “shares of non-U.S. (in this case Argentine) corporations sold in the U.S. (and denominated in dollars).” *Id.* (manuscript at 1 n.1). Created to allow “firms in foreign markets to enjoy the advantages of greater liquidity, transparency and access to the U.S. capital market” and to allow for easy diversification for U.S. investors, *id.* (manuscript at 3). Auguste and coauthors show that Argentine investors were able to use them to transfer up to roughly US\$835 million to US\$3.4 billion between December 1, 2001 and May, 2002 out of Argentina despite the *corralito* policy, by buying Argentine stocks and then selling their stock as ADRs in the United States for dollars. *Id.* (manuscript at 2). This practice is exemplified by a 25 percent increase in stock market activity following the instatement of the *corralito*, despite falling stock prices. *Id.* at 1 (citing Joshua Goodman, *Argentines Dust Off Their Survival Skills*, *BUS. WK.*, Dec. 24, 2001, at 48, and Paul Luke, *Cavallo's Days as Argentina Finance Minister Could Be Numbered*, *INVEST AVENUE*, Dec. 10, 2001, available at <http://www.investavenue.com/article.html?ID=3307> (“The reason the market is going up is simply that the stock market is seen as a way of protecting assets and a means, by ADR conversion, of getting money out of Argentina”). Auguste and coauthors add that, after February 2002, Argentine investors employed a similar tactic using *Certificados de Depositos Argentinos* (CEDEARs), essentially the reverse of ADRs, “shares of non-Argentine firms (mostly U.S. firms) cross-listed on the Argentine exchange.” Auguste et al., *supra*, (manuscript at 24–26).

209. *Argentina's Crisis: Floating into the Unknown*, *supra* note 65; *Timeline: Argentina—A Chronology of Key Events*, *supra* note 60.

210. *Smith v. Estado Nacional*, [2002-I] J.A. 237 (Feb. 1, 2002); see also *La Corte Puse Fin al Correllito*, *DIARIO JUDICIAL* (Feb. 1, 2002), available at [www.diariojudicial.com/nota.asp?ID=9741&Estilo=1&Pagina=nota.asp?ID=9741](http://www.diariojudicial.com/nota.asp?ID=9741&Estilo=1&Pagina=nota.asp?ID=9741).

Congress's January 5–6, 2002 emergency weekend session to ban further legal challenges to the savings freeze by presidential decree.<sup>211</sup> Furthermore, the government coalition in Congress even attempted unsuccessful impeachment proceedings against the Court.<sup>212</sup> The Court, for its part, retaliated, granting injunctions to return deposits to tens of thousands of savers.<sup>213</sup> The *corralito* restrictions were finally significantly eased in October and November 2002, and abolished on December 2, 2002.<sup>214</sup>

The *corralito* brings us full circle in the cycle: from the “zero-deficit”<sup>215</sup> mandate of the IMF, influencing decisions on monetary policy which necessitated the bank freeze. Yet, ironically, the IMF eventually pushed Argentina to abandon the *corralito*.<sup>216</sup> Certainly, in an economy as volatile as Argentina's, no one can be sure before *or* after the fact exactly what result any policy measure can or did have. In that sense, perhaps it is perfectly reasonable for the IMF to wish for devaluation one day, yet decry its result (the *corralito*) on another day. It is worth reiterating that this Note does not attempt to establish which economic policy led to which result, or to judge any policy on its economic merit. Instead, this Section argued that regardless of the cause or effect of devaluation, convertibility, and the *corralito*, each have human rights implications under the ICESCR which should be taken into account.

#### D. Creditor Confidence

After outlining the major elements of structural adjustment discussed above, the LOI/MOU states: “The government believes that a firm implementation of the policies outlined in the paragraphs below will boost confidence both at home and abroad, contributing to increased availability and lower costs of financing for Argentine borrowers.”<sup>217</sup> Beginning with the legitimate end of reducing poverty, the IMF elevates creditor confidence to an end in itself; the driving force behind SAPs is

211. *Devaluation's Downbeat Start*, *supra* note 189, at 34; *Argentina's Crisis: Floating into the Unknown*, *supra* note 65, at 32.

212. *Argentina's Collapse: Progress, of Sorts*, *supra* note 49, at 34; *Argentina's Crisis: Floating into the Unknown*, *supra* note 65, at 32.

213. *Argentina's Crisis: Waiting for the IMF to Tango*, *supra* note 66, at 31.

214. *Deal with IMF Expected This Week: Rift with Supreme Court May Soon Be Over*, *LATIN AM. WKLY. REP.*, Oct. 8, 2002, at 470; *Se Restituirían Hasta \$20.000 Del Corralón*, *LA NACION*, Nov. 27, 2002, available at <http://www.lanacion.com.ar>; *El Procurador General, En Contra del Corralito*, *LA NACION*, Nov. 21, 2002, available at <http://www.lanacion.com.ar>; *Termina El Corralito, Un Año Después*, *LA NACION*, Dec. 2, 2002, available at <http://www.lanacion.com.ar>.

215. LOI/MOU, *supra* note 89, Memorandum ¶ 6.

216. *IMF Wants Argentina to Suspend the 'Corralito'*, *GAZETA MERCANTIL INVEST NEWS* (Apr. 10, 2002), available at LEXIS, News Library, Economic News.

217. 2000 MEP, *supra* note 108, ¶ 9.

thus to make a country appear macroeconomically sound to creditors and investors, regardless of what the reality is for people on the ground.<sup>218</sup> In this way, creditor confidence is a sort of “intermediate” end, which can become the means toward “true” ends of unemployment and poverty reduction.<sup>219</sup> The reality is that not only does this intermediate goal become the primary focus, ironically swallowing up the “true” end in an effort to reach this “intermediate” end, but this “intermediate” end is itself illegitimate from the standpoint of the ICESCR: As outlined above, the ICESCR article 1(2) places the effect of “international economic cooperation” at odds with the right of a people to dispose of their natural wealth and resources.<sup>220</sup>

In order to understand why the confidence of private creditors would matter in a deal between an intergovernmental lending organization and a sovereign nation, one must understand the role of the IMF in consolidating and guiding lending by all the key stakeholders. For example, the December 2000 financial support package of the IMF was for US\$40 billion, but only US\$14 billion of that money was from the IMF itself. Also included was US\$5 billion from the Inter-American Development Bank and the World Bank, US\$1 billion from Spain, and (the largest of all) US\$20 billion from the private sector.<sup>221</sup> This creates an interesting situation where the IMF is committing money from the private sector, but the private sector, made up of individual self-interested actors, are not themselves bound by this commitment. These investors will only help the IMF to meet its goals if they feel it is profitable for them.<sup>222</sup>

218. See SKOGLY, *supra* note 8, at 20–26.

219. See *id.*

220. ICESCR, *supra* note 8, art. 1(2), 993 U.N.T.S. at 5.

221. Press Release 01/3, International Monetary Fund (Jan. 12, 2001), *cited in* MUSSA, *supra* note 5, at 31; see also LOI/MOU, *supra* note 89, Memorandum ¶ 14 (“Private sector involvement in financing the fiscal program in 2001 is expected to reach about US\$15 billion”); Cavanagh, *supra* note 144, at 194 (noting that private banks lent 62 percent of total debt to the developing world in 1987); *id.* at 201 (noting that most debt in the developing world is owed to private banks); AGLIETTA & MOATTI, *supra* note 49, at 67 (noting that “[l]es banques commerciales, qui ne sont guère en mesure d’imposer des conditions économiques aux emprunteurs souverains et de surveiller leur respect, subordonnèrent leurs négociations avec les pays emprunteurs à la conclusion d’un accord avec le Fonds [commercial banks, which are hardly in a position to impose economic conditions on sovereign borrowers or monitor such conditions, subordinate their negotiations with borrowing States to an agreement with the Fund]”).

222. This is a bit like telling your friend “if you give me your apple, I’ll get the drugstore to sell you a notebook for a nickel!” Regardless of the deal between you and your friend, the drugstore will only make that sale if it is profitable for it. See, e.g., Joan M. Nelson, *Stabilization, Growth, and Equity: The Narrowing Parameters of Debate*, in *WORLD DEBT AND THE HUMAN CONDITION*, *supra* note 1, at 13, 19 (noting that government policy “choices cannot be entirely guided by the goal of minimizing impact on the poor. Other goals of public policy and consideration of administrative and political feasibility are also important. One important objective is regaining the confidence of businesses and potential investors . . .”).



Thus, ensuring creditor confidence is the only way the IMF can guarantee the kind of private support it writes into its loan packages. This situation is exacerbated by the IMF's status as the preferred creditor. Former Director of Research for the IMF Michael Mussa notes that the IMF and other suppliers of official support "will surely and rightfully insist that their claims be fully serviced, and this potentially diminishes the resources available to meet the claims of Argentina's private creditors."<sup>223</sup> In this way, the IMF's status as lender of last resort is hurting creditor confidence. Instead of solving this problem by sharing the default burden with private creditors (a solution which would increase monetary risk for the IMF), the IMF attempts to increase creditor confidence through insistence on fiscal austerity (a solution which would increase risk of violation of ESC rights).<sup>224</sup>

The importance of creditor confidence cannot be overstated. Stiglitz notes that attempts in Ecuador and Romania to condition IMF support on private creditor debt forgiveness proved a dismal failure.<sup>225</sup> Similarly, in his description of IMF complicity in the Argentine crisis, Mussa continuously raises the importance of creditor confidence in the international financial architecture. For example, he explicitly states that "[t]hrough the responsibility of the Fund is not to maximize returns to private creditors, it cannot serve the important interests of all its members in an efficiently functioning international financial system by ignoring the legitimate concerns of private creditors."<sup>226</sup> He gives an example in Russia, whereby the IMF required fiscal measures as a prerequisite for US\$5.5 billion of support. When these measures were not met, the money was withheld, because "the managing director [of the IMF] . . . was determined to show that the Fund was serious about its conditionality in a situation where determined action by the authorities was absolutely essential to restore market [creditor] confidence."<sup>227</sup> He also notes that the trend away from large IMF bailout packages to "more consistent efforts to involve private creditors in the resolution of

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223. MUSSA, *supra* note 5, at 57.

224. Leite, *supra* note 177, at 46.

225. STIGLITZ, *supra* note 177, at 203.

226. MUSSA, *supra* note 5, at 57 (emphasis added); *see also id.* at 27 ("[T]he government needed to demonstrate its capacity to restrain its appetite for public borrowing to within reasonable limits before international credit markets would willingly take on additional exposure."). He notes particularly that if creditors lose enough confidence as to pursue legal actions for collection, "Argentina would be precluded from access to international credit markets for a protracted period." *Id.* at 29-30; *see also id.* at 65 ("When the economic situation does stabilize and the Argentine economy moves forward into recovery . . . the international community will still have considerable leverage over the Argentine authorities; and, if necessary, it should be prepared to use this leverage to help assure that [sic] external claimants on Argentina are treated fairly.").

227. *Id.* at 43.

financial crises” increases even further the importance of creditor confidence.<sup>228</sup> In fact, it is his view that, if only the Argentine government had implemented even tougher austerity measures to boost creditor confidence in late 2000, the disaster could have been avoided.<sup>229</sup> He concludes with an outright declaration of the problematic double role of the IMF which this Note brings to light, dubbing it the tension of the IMF as “a sympathetic social worker and as a tough cop,” arguing that the “tough cop” approach of SAPs is “consistent with—indeed, it is required by—the Fund’s fundamental responsibility to provide assistance to its members while simultaneously supporting the principles of a stable and efficient international financial system and safeguarding the temporary revolving character of its own resources.”<sup>230</sup>

### *E. The Other Contract: The Social Contract*

The presumption of structural adjustment is that there are only particular economically austere policies that will lead to growth and make a creditor confident.<sup>231</sup> Because these policies are generally at odds with the right of a people to dispose of their natural wealth and resources (as shown in the Argentine case in the previous four Subsections), this presumption violates ICESCR article 1(2).<sup>232</sup> The following Section first refutes the assumption that the IMF has never suppressed proposed or attempted alternative Argentine policies that were consistent with the ICESCR, then begins to examine the dynamic operating between the

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228. *Id.* at 36.

229. *Id.* at 33.

230. *Id.* at 65–67.

231. Leite, *supra* note 177, at 46 (“It is sometimes said that IMF conditionality runs counter to countries’ education, health, or poverty alleviation goals. Conditions may entail, for example, the privatization of basic services—such as water and electricity—which some believe could endanger the provision of these services to vulnerable groups. The merits of such measures need to be debated, with responses tailored to each country. Because many State-owned utilities had an unbroken record of poor service and high cost to the taxpayer, the alternative of using private but properly regulated companies cannot be excluded from consideration”). The question remains: If “private but properly regulated companies” are possible, why not “public but properly regulated?” Leite seems to mix the issue of private/public with that of poorly/properly regulated. By switching to private companies instead of attempting a properly regulated public system, the poor are likely to receive fewer services, since the company has no obligation to them in the same way a public service does. Compare STIGLITZ, *supra* note 177, at 222 (“Markets cannot be relied upon to produce goods that are essentially public in nature, like defense. In some areas, markets fail to exist; governments have provided student loans, for instance, because the market, on its own, failed to provide funding for investments in human capital. And for a wide variety of reasons, markets are often not self-regulating—there are booms and busts—so the government has an important role in promoting economic stability. . .”).

232. ICESCR, *supra* note 8, art. 1(2), 993 U.N.T.S. at 5.

IMF, the borrowing country, and the citizen, proposing that it represents a unique human rights paradigm.

In his general discussion of IMF policy and alternatives, Joseph Stiglitz reminds the international community that in addition to the contract a country enters into with its creditors such as the IMF, "there is another, equally important, unwritten contract, that between citizens and their society and government, what is sometimes called 'the social contract.'"<sup>233</sup> This Section examines the social contract in the Argentine case through the dialogue between Argentina and the ESCR Committee, in order to question how these two equally important contracts can coexist.

Argentina ratified the ICESCR on August 8, 1986, its first periodic report was examined in 1994, and its second in 1999.<sup>234</sup> In response to a battery of questions from the ESCR Committee in its 1999 review of Argentina, about topics as varied as indigenous rights and discrimination, but including structural adjustment, the first response of the Argentine delegate exhibited Argentina's concerns about the negative effects of structural adjustment:

[My] Government, like so many others, was trying to adapt to the current global situation and open up the country's economy, which it could not do without loans. The international financial institutions, such as the IMF, imposed certain conditions on the country when loans were being negotiated, especially in the fields of employment and social security. It would therefore be helpful if the Committee would share its criticisms, suggestions and concerns not only with delegations, but with institutions like the IMF as well.<sup>235</sup>

Similarly, in response to intense criticisms over labor standards in relation to articles 6, 7, and 8 of the ICESCR, the Argentine delegation had this to say:

Since labour flexibility was one of the conditionalities imposed on the Government by the International Monetary Fund (IMF), the Committee might wish to inform IMF of its concerns in that

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233. STIGLITZ, *supra* note 177, at 209 ("This contract requires the provision of basic social and economic protections, including reasonable opportunities for employment. While misguidingly working to preserve what it saw as the sanctity of the credit contract, the IMF was willing to tear apart the even more important social contract."); *see also id.* at 240 ("There needs to be a restoration of balance: the concerns of workers and small businesses have to be balanced with the concerns of creditors.").

234. Treaty Ratification Status, *supra* note 34; Summary Record of the 31st Meeting, U.N. ESCOR, 11th Sess., 31st mtg., U.N. Doc. E/C.12/1994/SR.31 (1994); Summary Record of the 33rd Meeting, U.N. ESCOR, 21st Sess., 33d mtg., U.N. Doc. E/C.12/1999/SR.33 (1999).

235. U.N. Doc. E/C.12/1999/SR.33, *supra* note 234, ¶¶ 13-23.

regard. Macroeconomic considerations must not be the sole criterion; the social sector's voice should also be heard. . . . Argentina was unique in Latin America for the size of its middle class, whose shrinking earning power stemmed from the abolition of posts in public services and the public utilities. The advent of the structural adjustment process had precluded full employment and adequate salaries.<sup>236</sup>

The ESCR Committee similarly expressed concern about SAPs in the Argentine context. In its concluding observations, the sole comment given by the ESCR Committee under its section on "factors and difficulties impeding the implementation of the Covenant" was: "The Committee acknowledges the financial difficulties encountered by the Argentine economy in the last four years. While the Government has succeeded in stabilizing the value of the currency, the implementation of the structural adjustment programme has hampered the enjoyment of economic, social and cultural rights, in particular by the disadvantaged groups in society."<sup>237</sup>

This is an outright acknowledgement by the Committee that structural adjustment has hindered the realization of ESC rights in Argentina, consistent with Argentina's official comments to that body. The Committee goes on to recommend "that the State party, when negotiating with international financial institutions, take into account its Covenant obligations to respect, protect and fulfil all of the rights enshrined in the Covenant."<sup>238</sup> Certainly, the nation-state has primary responsibility for preventing human rights abuses of its citizens in which it might be involved.<sup>239</sup> Indeed, the original model of human rights is one of insuring that citizens of any particular country are protected from their own government.<sup>240</sup> The conundrum of structural adjustment is that the nation-state is a captive in its own right. The question is one of bargaining power, and the sequence looks like this:

- 1) Argentina attempts to meet the obligations it has to its citizens under the ICESCR.

236. Summary Record of the Second Part (Public) of the 34th Meeting, U.N. ESCOR, 21st Sess., 34th mtg., at ¶ 32, U.N. Doc. E/C.12/1999/SR.34/Add.1 (1999).

237. U.N. ESCOR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, at ¶ 10, U.N. Doc. E/C.12/1/Add.38 (1999).

238. *Id.* ¶ 28.

239. SKOGLY, *supra* note 7, at 50 ("States have traditionally been seen as the primary obligation-subjects in relation to human rights. The origin of human rights is to be found in an attempt to limit the scope of action of a government—to set certain limits as to what a government could do to its citizens. . . ."); BEDERMAN, *supra* note 7, at 93.

240. *See supra* note 32.

- 2) To do that, the government needs two things, policies and money.
- 3) The Argentine government attempts to choose policies consistent with the Covenant and borrow the money from the IMF.
- 4) The IMF refuses to loan the money unless Argentina adopts the IMF's policies over its own. Such policies, including the zero-deficit law, cuts to social security, and provincial cuts are *inconsistent* with Argentina's obligations under the ICESCR.
- 5) The IMF has superior bargaining power, being the LLR.
- 6) Because of this superior bargaining power of the IMF, Argentina is forced to accept the terms that violate the ICESCR.

If Argentina had never attempted to choose policies consistent with ESC rights and thus step three never actually occurred, the causal link to the IMF would be lost. However, Argentine governments have attempted on several occasions to enact policies consistent with the ICESCR while negotiating with the IMF, and funds have been consistently denied until these policies were changed. For example, ex-President Arturo Illia, who came to power in 1963 at a time of very high unemployment, budget deficit, foreign debt, and high inflation, attempted a nationalist-reformist strategy consistent with ESC rights.<sup>241</sup> He called for government support of domestically owned industries, a proactive "affirmative action" interpretation of article 2(2)'s freedom from economic discrimination, since foreign firms are likely to be at a strong advantage in a flailing economy by profiting on exchange rates and price of local labor, and such firms are much less likely to keep profits in the country. He also called for price controls, attempting to uphold the article 11 right to an adequate standard of living and freedom from hunger in a time when prices on basic staples risked spiraling out of control; and wage increases, attempting to stimulate the economy in a manner consistent with the article 7 right of a fair wage and a decent living for work.<sup>242</sup> The result: International loans to Argentina fell from a high of US\$361 million to US\$6 million in two years time.<sup>243</sup> It was not until his successor Colonel Juan Onganía agreed to reverse these policies that the doors to the IMF and other IFIs swung back open for Argentina.<sup>244</sup>

Second, the IMF refused loans to Isabel Peron's government in 1974 because of her policies of government social spending and wage in-

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241. Conklin & Davidson, *supra* note 59, at 234.

242. *Id.*; ICESCR, *supra* note 8, art. 7, 993 U.N.T.S. at 6.

243. Conklin & Davidson, *supra* note 59, at 234.

244. *Id.* at 234-35.

creases.<sup>245</sup> Third, Alfonsín's 1983 government faced a similar fate when it refused to use US\$1 billion in foreign exchange on debt servicing, insisting on using the money for development instead, and announcing plans to increase expenditures for housing, consistent with article 11; health, consistent with article 12; and education, consistent with article 13; while reducing military spending.<sup>246</sup> His Finance Minister Grinspun announced, "We will not make any agreement with the IMF if this in any way limits the growth of the Argentinean economy."<sup>247</sup> Argentina held out for several months, but it proved impossible to negotiate with the IMF on such terms. In September 1984, Argentina was forced to accept a traditional IMF austerity package to qualify for standby credits and debt rescheduling. The terms of the austerity package included a reduction of public expenditures and deferral of wage increases.<sup>248</sup>

Finally, in the current crisis, the IMF and Argentina spent the year 2002 in constant deadlock over competing goals of fiscal austerity and social spending. On September 24, 2002, Economy Minister Roberto Lavagna said that the Duhalde government would not abandon its policy of social assistance even if it meant further delays to IMF support.<sup>249</sup> Specifically, Minister Lavagna stated that "[t]here are two priorities which we will not abandon[:] We will maintain social programs and ensure the financing of provincial economies."<sup>250</sup> According to the Argentine government, IMF negotiators were demanding more spending cuts and an end to court rulings against the *corallito*. Alfredo Atanasof, President Duhalde's Cabinet Chief, said, "It seems ill advised to me that the fund has expressed its opinion about social plans. Köhler and Krueger [Managing Director and First Deputy Director of the IMF] ought to know that if the enormous network of social containment wasn't working, this country would have gone up in flames."<sup>251</sup> These events thus represent the last and perhaps most poignant example of Argentina's attempts to meet its Covenant obligations being blocked by the IMF's requirements to borrow resources.<sup>252</sup> When the negotiations

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245. *Id.* at 236.

246. *Id.* at 241; ICESCR, *supra* note 8, arts. 11–13, 993 U.N.T.S. at 7–8.

247. Marlise Simons, *Argentina Repayment Is Doubted*, N.Y. TIMES, Mar. 27, 1984, at D23.

248. Conklin & Davidson, *supra* note 59, at 242.

249. Larry Rohter, *Argentina Says It Will Skip International Loan Payment*, N.Y. TIMES, Sept. 25, 2002, at W1.

250. *Id.*

251. *Id.*

252. See also *Argentina's Collapse: The Death of Peronism?*, ECONOMIST, Nov. 16, 2002, at 31 (noting that part of the delay in approval of a new agreement between the IMF and Argentina "is said to be due to the IMF's . . . queasiness that any deal might boost Mr. Duhalde, thus prolonging a government which has lacked the strength and will to take tough decisions").

finally did come to an end with the signing of a new Letter of Intent on January 24, 2003,<sup>253</sup> President Duhalde, marked the occasion with adamant criticism of IFIs. Speaking three days after the agreement at the World Economic Forum in Davos, Switzerland, President Duhalde used his only official intervention to accuse the IFIs of operating on a “double standard” unfavorable to developing countries, arguing that international organizations are creating policy through structural adjustment to controvert the will of developing-country leaders such as himself.<sup>254</sup>

As these four examples show, policy alternatives consistent with ESC rights have been suppressed by SAPs on several occasions.<sup>255</sup> Because they were suppressed, we do not know whether such policies would have been effective. The historically prevailing ideology at the IMF, which has forced Argentina to abandon such policies, is that such policies would *not* be effective. Although there is a growing dialogue—not only by protesters,<sup>256</sup> but also among winners of the Nobel Prize in Economics,<sup>257</sup> within other U.N. Agencies,<sup>258</sup> and even in limited cases at

253. *Finalmente, Ayer se Firmó el Acuerdo con el FMI*, *supra* note 93.

254. *Duhalde Cuestionó al FMI y Provocó un Duro Debate*, LA NACION, Jan. 27, 2003, available at <http://www.lanacion.com.ar>. President Duhalde's critiques of IFIs, which continued for ten minutes, were opposed only by financier George Soros, who places all blame for the Argentine crisis squarely on prior mismanagement by the Argentine government. President Duhalde's comments were supported by all remaining speakers, including Phil Gramm, Vice President of the World Financial Group UBS Warburg (and ex-United States Senator); Trevor Manuel, Minister of Finance of South Africa; Rajat Gupta, Executive Director of McKinsey and Company; and Hernando de Soto, President of the Institute of Liberty and Democracy and author of *THE MYSTERY OF CAPITAL* (2000). Despite his criticisms of IFIs, Duhalde nevertheless guarded stubborn confidence for the future: Asked by Kenneth Rogoff, Chief Economist and Director of Research at the IMF, what title he would give to a book about Argentina and the IMF written ten years from now, President Duhalde responded “Argentina, From Disaster to Success.”

255. *Compare Leite*, *supra* note 177, at 44 (“[T]he IMF encourages governments to do everything within their power to protect social expenditures, [and] this advice is generally being followed”) with STIGLITZ, *supra* note 177, at 209–10 (“[A]fter the billions are spent to maintain the exchange rate at an unsustainable level and to bail out the foreign creditors, after their governments have knuckled under to the pressure of the IMF to cut back on expenditures, so that the countries face a recession in which millions of workers lose their jobs, there seems to be no money around when it comes to finding the far more modest sums to pay subsidies for food or fuel for the poor.”). Yet, even Leite, writing in the IMF's own publication on the IMF, admits that “[a]djustment efforts create winners and losers, and sometimes the poor suffer disproportionately. In those cases, it may be necessary to introduce appropriate safety nets to help alleviate adverse social consequences. The IMF seeks to remain open to criticism and to change its policies when results are disappointing.” Leite, *supra* note 177, at 44.

256. See Structural Adjustment Participatory Review International Network, *supra* note 3.

257. STIGLITZ, *supra* note 177, at 241 (“It is possible to promote equality and rapid growth *at the same time*; in fact, more egalitarian policies appear to help growth . . .”).

258. Giovanni Andrea Cornia, Richard Jolly, & Frances Stewart, *An Overview of the Alternative Approach*, in ADJUSTMENT WITH A HUMAN FACE 131, 131–46 (Giovanni Andrea Cornia, Richard Jolly, & Frances Stewart eds., 1987) (advocating macro policies which are

the IMF<sup>259</sup>—that policies emphasizing social services would promote growth, this Note does not follow that line exactly. Rather, it acknowledges that the IMF is beholden to the confidence of private creditors *and* that the private creditors will demand market led reforms. This assumption creates a unique human rights paradigm, in which the IMF is necessary to States for them to meet their ICESCR obligations by providing resources, but simultaneously imposes SAPs that, as in the Argentine case, can violate ESC rights.

#### IV. THE STRUCTURAL ADJUSTMENT PARADIGM

International human rights law traditionally emerged from the international law of nations because it provided rights to individuals against their government, as compared to traditional international law which resolved disputes between nations.<sup>260</sup> It should be clear by this point that, although the State always retains a role of primary responsibility in human rights abuses of its own citizens, structural adjustment presents a unique human rights model, in which it would be unjust and ineffective to hold the State solely responsible because of its unequal bargaining power in relation to IFIs.<sup>261</sup> Thus, whereas traditional international law addresses the relationship between nations, and human rights law addresses the relationship between citizens and their nation, the structural adjustment paradigm addresses the relationship between a nation representing its citizens and intergovernmental agencies themselves such as the IMF.<sup>262</sup>

Because ICESCR article 2(1) limits the responsibility of a State Party in fulfilling the provisions of the Covenant to “the maximum of its available resources,” the argument could be made that a case of severe economic distress such as that experienced by Argentina simply

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more expansive and gradual, a focus on basic services, and compensatory programs to protect basic living standards, monitoring of health, and nutrition).

259. Leite, *supra* note 177, at 46 (noting that recently, several countries’ structural adjustment programs—most notably Burkina Faso, Nicaragua, and Rwanda—have included new efforts to incorporate human rights, including a stronger emphasis on access to education, health care, and food security).

260. SKOGLY, *supra* note 7, at 50; *see also* BEDERMAN, *supra* note 7, at 93.

261. *See* Paul, *supra* note 33, at 310 (arguing that the international law of development “can be seen as a species of public international law because it speaks primarily to states and intergovernmental organizations”) (emphasis added).

262. *See generally* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights ¶ 2 (Maastricht, Jan. 22–26, 1997), at [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html) [hereinafter Maastricht Guidelines] (“It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights.”).



necessitates a lessening of Covenant obligations on the State Party.<sup>263</sup> The problem with this argument is that it ignores the new human rights paradigm that structural adjustment presents: It is true that article 2(1) attaches the duty to realize the ICESCR to the maximum of its available resources on the State Party.<sup>264</sup> But, this does *not* speak to the duty of IFIs and structural adjustment policy. The State Party, in fact, is trying to meet its ICESCR obligations, through borrowing money, presumably in an honest attempt to provide services to its citizens consistent with the Covenant. The structural adjustment paradigm is concerned with the *IMF's* duty not to prevent the State Party from meeting its Covenant obligations, rather than the State Party's duty to meet those obligations. The structural adjustment paradigm presumes that the State Party, if allowed, will meet its Covenant obligations, but is prevented from doing so by the SAP. The "to the maximum of its available resources" clause thus does not apply, because that clause concerns the State Party's duty, which we presume it will meet if its free will is not constrained by the SAP.<sup>265</sup>

Under the structural adjustment paradigm, a number of realities are accepted:

- States will occasionally become so want for resources that they cannot meet their ICESCR obligations;
- IFIs help States to meet their ICESCR obligations by loaning them money; and

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263. ICESCR, *supra* note 8, art. 2(1), 993 U.N.T.S. at 5; see SKOGLY, *supra* note 7, at 127; General Comment No. 3, *supra* note 118, arts. 1, 9–11.

264. SKOGLY, *supra* note 7, at 50.

265. Another argument that surfaces is that the "real problem" is wasteful spending by corrupt leaders. This argument focuses the attention away from any change the SAP has on ESC rights and instead focuses on a few prominent examples of massive wasteful spending by dictators like Amin, Marcos, or Bokassa. This Note acknowledges that many IMF dollars have been wasted or hoarded by corrupt governments, but from this it does not follow that every government is corrupt. The question of corruption is for a different paper, because these cases are outside the structural adjustment paradigm. The structural adjustment paradigm is concerned, rather, with cases where a government *has* attempted to act in the interest of its people's ESC rights, but was prevented from doing so. Overall, it is my contention that the structural adjustment paradigm is present far more often than the corruption paradigm. It is important to acknowledge the possibility of corruption, but trying to focus *all* the attention on the concern for corruption, ignoring even the possibility of the structural adjustment paradigm where the government *is* acting in the people's best interest, is paternalistic on the part of commentators analyzing IFIs, and borders on neocolonialism in its perceived need to control developing world governments.

- Under existing macroeconomic theory, the IFIs will legitimately impose conditionalities in order to gain enough creditor confidence to support private loans to the State.<sup>266</sup>

All three of these realities have been debated by commentators in the past, but the structural adjustment paradigm assumes that they are true and focuses on the result: Because an IFI's complicity in the human rights situation of the State is reciprocal, effective monitoring of the State's human rights practices is possible only through effective monitoring of the IFI's practices.<sup>267</sup>

This inevitable tension between macroeconomic reforms and human rights was also noted by the *Banque Paribas Conjoncture*:

By imposing adherence to another IMF program as a condition for more aid, the international community is pursuing a laissez-faire strategy regarding this crisis. Argentina requires the help of an international LLR, i.e. a quasiunconditional injection of cash to stop the hemorrhaging of capital. The problem of sharing the burden of asset losses, on the other hand, is an issue that calls for an unprecedented international political choice. The IMF is not adapted to resolving these two distinct problems.<sup>268</sup>

This passage recognizes the structural adjustment paradigm, but stops short of a solution, adding that the IMF is not well-adapted to offer one. The next Part attempts to carry forward the debate, analyzing what level of external human rights monitoring of the IMF is legally possible, concluding with an analysis of what kind of monitoring is practically desirable.

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266. See *Statement of the Representative of the IMF to the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 43d Sess., ¶ 7, U.N. Doc. E/CN.4/Sub.2/1991/63 (1991) (“[T]here appears to be relatively widespread agreement as to the necessity for adjustment, and . . . without adjustment the economic condition of many countries might have become even worse . . .”), quoted in SKOGLY, *supra* note 7, at 41. But see Martin Feldstein, *Argentina Doesn't Need the IMF*, WALL ST. J., May 28, 2002, at A18 (arguing that Argentina could and should build its economy without the help of another IMF loan).

267. The IFI's complicity in a State's human rights obligations is reciprocal because the IFI helps the State to fulfill its human rights obligations through providing “available resources,” yet imposes conditionalities which are in some cases contrary to human rights.

268. *Argentina: One Year of Solitude*, *supra* note 105, ¶ 5.

## V. ADDRESSING THE STRUCTURAL ADJUSTMENT PARADIGM

A. *The Position of the IMF in International Human Rights Law*

In order to examine whether the structural adjustment paradigm can be addressed by international human rights law, the IMF's relationship to international human rights law must first be established. This is a two-part analysis. First, on the most general level, there is a longstanding debate over the international legal personality of all international organizations.<sup>269</sup> International legal personality is "the quality of being an international person."<sup>270</sup> Amidst two extremes—one arguing that international organizations have no legal personality at all, and another advocating a legal personality of international organizations equivalent to that of States—most commentators have settled in a middle ground, by which international organizations have some international legal personality determined primarily by their constituent instruments.<sup>271</sup> A

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269. This debate goes back at least to 1949, when the ICJ decided *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (1949).

270. ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 14 (1995). Tunkin defined full legal personality of States as including the following characteristics: 1) Rights and duties under international law; 2) Sovereignty, which means supreme power over States' respective territories and population; 3) Sovereign equality of all States; 4) Privileges and immunities of States and their organs; 5) The capacity to participate in the process of creating norms of international law; 6) The capacity to participate in international legal relations; 7) The capacity to bring international claims; 8) The capacity to take enforcement actions under international law; and 9) The capacity to bear international responsibility. Grigory Tunkin, *International Law in the International System*, 147 *RECEUIL DES COURS* 1, 201–02 (1975). International organizations cannot achieve full international legal personality of States because they lack territory. Enrique J. Aramburu, *Responsabilidad de los Organismos Internacionales y Jurisprudencia Argentina*, [2000-II] J.A. 1115, 1116. Thus, a relaxed test has developed with respect to international organizations which requires "the possession of international rights and duties," the capacity to create such rights and obligations, and the ability to demand recognition of such rights in the international forum. BROCHES, *supra*, at 15; *see also* Aramburu, *supra*, at 1115–16 (formulating a four part test including 1) the ability to make international claims, 2) the ability to enter into treaties, 3) the right to exercise diplomatic protection in some cases, and 4) the active and passive right of legation). In terms of the subject matter of this Note, Aramburu's contribution is also noteworthy because it analyzes the few times that Argentine courts have treated the question of the legal personality of international organizations, argues the treatment has been insufficient, and calls for a national law regulating this matter. *Id.* at 1117–19.

271. Tunkin, *supra* note 270, at 198–201; *see also* P.K. MENON, *THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS* 17–25 (1992) (outlining a similar history with respect to the treaty-making power of international organizations). The limits of this treaty-making power have been codified by the United Nations in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, UNGOR, UN Doc. A/CONF.129/15 (Mar. 20, 1986) [hereinafter VCLTIO], reproduced in MENON, *supra*, at 159–245; *see also* *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. at 180 ("Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties

review of the IMF Articles of Agreement suggests that the IMF has such legal personality.<sup>272</sup> Furthermore, it is significantly easier to justify human rights duties for the IMF under its Articles of Agreement than for the World Bank under its corresponding Articles of Agreement: Whereas the World Bank is explicitly prohibited from interfering in the domestic affairs of its members including human rights, the IMF has no equivalent “prohibition of domestic affairs” provision in its Articles of Agreement.<sup>273</sup>

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of . . . [an international organization] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. . . .”); MENON, *supra*, at 202–03; Aramburu, *supra* note 270, at 1116–17.

272. SKOGLY, *supra* note 7, at 68–70 (analyzing the Articles of Agreement and concluding that they “clearly assume a personality for the IMF separate from that of the members, giving the IMF both a municipal and an international legal personality”).

273. Articles of Agreement of the World Bank, Dec. 27, 1945, art. IV, § 5. But, even in the case of the World Bank, there is a growing number of commentators who argue that, by virtue of the fact that human rights are enshrined in the U.N. Charter, they can no longer be considered purely domestic political affairs. SKOGLY, *supra* note 7, at 96–97 (citing, among others, HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 213–14 (1950) (arguing that human rights are an issue of international and not domestic concern by virtue of their codification in the U.N. Charter as one of the main purposes of the United Nations); A.A. Cançado Trindade, *The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations*, 25 *INT’L & COMP. L.Q.* 715, 736–37 (1976) (describing a unanimous vote of the Security Council in 1960 for a Resolution calling for the end of the sale of equipment for arms manufacture in South Africa, against that State’s contention that consideration of the issue by the Security Council violated its domestic affairs)). Skogly notes that “If human rights issues were seen to fall solely within the domestic jurisdiction of the Member States, because it concerns matters between the individual and his/her government, and therefore is covered by [article] 2(7), it would basically render [article] 1(3) worthless.” *Id.* at 97. Indeed, even the World Bank has acknowledged that it “must consider . . . economic effects together with all other relevant economic factors, in the light of the purposes of the Organisation. What [the Bank] is precluded from considering is the political character of a member as an independent criterion for a decision.” *Id.* at 98 (citing Memorandum of the Legal Department of the IBRD, U.N. GAOR, 22d Sess., Annex 2, Agenda Item 66, at 9, U.N. Doc. A/6825 (1967)). Thus, even with a “prohibition of domestic affairs” provision, it is not at all clear that the Bank lacks human rights duties. The domestic affairs limitation is also illogical within the framework of the structural adjustment paradigm. As stated above, under the structural adjustment paradigm it is presumed that a State has intentions of meeting its ICESCR obligations, but has so few resources to do so (a requirement for “bail out” structural adjustment lending) that it is dependent on the World Bank to gain the resources so that it can meet its obligations. In the case where the World Bank loans money without conditionality, no human rights duties would become shared by the State and the World Bank. But, in the structural adjustment paradigm, conditionalities are imposed. Thus, at the same time that the World Bank is helping the State to meet its ICESCR obligations by lending the money, it is imposing conditionalities that may limit the State’s ability to meet its Covenant obligations. In other words, it is giving with one hand and taking away with the other. This being the case, it is nonsensical to say that the World Bank’s human rights obligations are limited because it is prohibited from interfering in the political affairs of a Member State, since the conditionality is itself the biggest interference of all: To the extent that the SAP is contrary to human rights norms, the principle of noninterference is a reason why the World Bank *should* be held accountable under human rights law, not a reason why it should not. If a State is obligated to accept a SAP in order to acquire resources to meet its Covenant obligations, and the SAP will

Second, questions are also raised with regard to the IMF as a specialized agency of the United Nations. In her comprehensive analysis of the human rights obligations of IFIs, Professor Sigrun Skogly notes that although

[t]he literature contains little analysis as to the difference it makes, in terms of law, whether an organization is a specialized agency or not[, o]ne would . . . assume that part of the reasoning behind bringing these organizations into a formalized relationship with the UN must have been to grant them, both legally and practically, rights and obligations in relationship to the UN, which would have been different if they were not brought into this relationship through [the Relationship] Agreements.<sup>274</sup>

By this reasoning, one should be less hesitant to attach human rights duties to the IMF, as a specialized agency of the U.N., than another organization that is not a specialized agency.<sup>275</sup> Article 22 of the ICESCR also includes specialized agencies:

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the

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cause the State to violate human rights, then the World Bank should be prevented from imposing this SAP because it will interfere in the State's domestic political affairs (its human rights obligations). *See also* Nanda, *supra* note 37, at 55 (explaining that the interference in domestic affairs "argument ignores the fact that international human rights law should be observed by all states and thus observance of this same law by international agencies could not cause a political interference"); SKOGLY, *supra* note 7, at 97-98; *id.* at 94-97 (noting IMF claims that a "domestic affairs" provision is implied by U.N. Charter article 2(7), and refuting these claims based on several cases of the International Court of Justice). On the inclusion of human rights within the scope of "domestic affairs," see SKOGLY, *supra* note 7, at 94-95.

274. SKOGLY, *supra* note 7, at 100 (citing THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 799 (Bruno Simma ed., 1994) ("[B]efore the beginning of a relationship (through an agreement) a specialized agency does not yet have rights and duties of its own towards the UN")); *see also* Nanda, *supra* note 37, at 55-57 (arguing for human rights duties of IFIs based on articles 57 and 63 of the U.N. Charter and the agencies' Articles of Agreement).

275. *See also* Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. 73, 89-90 (1980), *cited in* SKOGLY, *supra* note 7, at 70 (holding with respect to the World Health Organization that "[i]nternational organizations are bound by any obligations incumbent upon them under general rules of international law, under their constitutions, or under international agreements to which they are parties").

advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.<sup>276</sup>

In its General Comment No. 2 on article 22, the ESCR Committee states that “[r]ecommendations in accordance with article 22 may be made to . . . the World Bank and the IMF.”<sup>277</sup> Although this general comment clearly establishes, from the ESCR Committee’s point of view, the legitimacy of a human rights dialogue between the Committee and the IMF, such human rights recommendations do not necessarily imply human rights duties, since the IMF is not a party to the ICESCR and cannot become one.<sup>278</sup> The duties of third-party international organizations to treaties is codified in article 35 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO):

An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the rules of the organization.<sup>279</sup>

Although some commentators argue that this prevents the ICESCR from creating human rights duties for the IMF absent express consent by the IMF, a minority argue that the very fact that the IMF cannot ratify the Covenant, which is limited to States, makes this passage inapplicable.<sup>280</sup> In general, it is unlikely that, in light of this article, the IMF can be directly bound by the ICESCR.<sup>281</sup> However, the IMF is bound by the

276. ICESCR, *supra* note 8, art. 22, 993 U.N.T.S. at 10.

277. General Comment No. 2, *supra* note 53, ¶ 2.

278. SKOGLY, *supra* note 7, at 130 (“The Bank and the Fund have not ratified [and cannot ratify] the Covenant, and are consequently not parties to it”).

279. VCLTIO, *supra* note 271, art. 35, reproduced in MENON, *supra* note 271, at 195.

280. SKOGLY, *supra* note 7, at 83–84 (establishing the dispute between commentators) Skogly concludes:

Thus, even though it has been established that draft treaty law precludes obligations for third parties unless they have explicitly accepted such obligation, there is a theoretical possibility that treaty law may bind organizations without their consent. It could be argued that the draft treaty law is aimed at treaties to which the international organizations are able to accede, and not to all treaties.

*Id.*

281. Skogly also argues that because the majority of IMF member nations are parties to the Covenant, the IMF would have some duty to respect it. *Id.* at 134–36. This assertion is of questionable merit because, as Skogly herself admits, the IMF has its own international legal personality, a veil that the human rights duties of its members would not pierce. Skogly acknowledges this to a point, stating that the obligation to respect members’ human rights duties is not as strong in relationship to the ICESCR as to the U.N. Charter. *Id.* at 135. But, as

U.N. Charter, which also contains human rights provisions relating to economic, social, and cultural rights.<sup>282</sup> These Charter provisions are hierarchically superior and therefore control the agreements between the IMF and borrowing nations, such as the LOI/MOU at issue in this Note.<sup>283</sup> As a means of elaborating and explaining the human rights provisions of the Charter, the ICESCR can indirectly be applied to the IMF.<sup>284</sup> Finally, the IMF is bound by customary international human rights law, which applies to all actors with international legal personality.<sup>285</sup>

### B. *The Obligation to “Respect, Protect, and Fulfill” in the Structural Adjustment Paradigm*

The Committee on Economic, Social, and Cultural Rights has, in its General Comment No. 12 on the Right to Food, clearly outlined the extent of ESC duties on States Parties:

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explained below, the IMF as an international legal actor has a duty to respect the U.N. Charter independent of the duties of its constituent members.

282. *Id.* at 101 (“[S]pecialized agencies such as the World Bank and the IMF are legally obligated not to conduct actions contravening the principles and purposes of the UN Charter, and also to respect the Charter, including the human rights provisions”); U.N. CHARTER art. 1, para. 3 (establishing human rights as one of the fundamental purposes of the U.N., with specific reference to Economic, Social, and Cultural Rights), available at <http://www.un.org/aboutun/charter/index.html>; U.N. CHARTER art. 55 (establishing U.N. promotion of human rights as necessary for the creation of conditions of stability and well-being); U.N. CHARTER art. 62 (granting power to the Economic and Social Council to advise specialized agencies (such as the IMF) on economic, social, and cultural matters); see also ICESCR, *supra* note 8, art. 22, 993 U.N.T.S. at 10.

283. Article 103 of the U.N. Charter states that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The International Law Commission has concluded that this also applies in the case of treaties between international organizations and States. Summary Records of the 1438th meeting of the International Law Commission, June 10, 1977, 1977-I Y.B. ILC 120, para. 2, cited in SKOGLY, *supra* note 7, at 102.

284. SKOGLY, *supra* note 7, at 136 (“[T]he application of the Covenant brings more clarity to the substantive content of the human rights standards, which the [IMF has an] . . . obligation not to violate . . . according to . . . the Charter. . .”).

285. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN LAW AS CUSTOMARY LAW 3 (1989), cited in SKOGLY, *supra* note 7, at 113; see also VCLTIO, *supra* note 271, art. 43 (stating that the “invalidity, termination, or denunciation of a treaty” by a State or international organization does not affect its duty to observe customary international law). Although some commentators argue that the entire UDHR is customary international law, many commentators agree that ESC rights are generally not among the human rights norms with status as customary international law. SKOGLY, *supra* note 7, at 121–22. Some commentators have also attempted to attach human rights liability to IFIs because of their nature as bodies composed of nations with human rights obligations. See Maastricht Guidelines, *supra* note 262, ¶ 19; SKOGLY, *supra* note 7, at 106–08.

The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* (*facilitate*) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil* (*provide*) that right directly. This obligation also applies for persons who are victims of natural or other disasters.<sup>286</sup>

Although the Comment relates to the right to food, it clearly states that its standards are generally applicable, and the tripartite “respect, protect, and fulfill” language is becoming common parlance among commentators on ESC rights.<sup>287</sup> The question which needs to be addressed is how this framework fits into the structural adjustment paradigm. The structural adjustment paradigm is unique because it assumes that a country is trying to meet its ICESCR obligations by borrowing money, but the conditionalities on which the very money is borrowed go against human rights norms. If the IFI were only helping the State to solve its human rights problem by lending it the “available resources,” then it would not become complicit in the State's human rights obligations, and the structural adjustment paradigm would not be created. When the IFI simultaneously solves and creates human rights problems, however, some level of human rights duties must be shared by the IFI. Much of the confusion revolves around the correct level of duty the IFI should assume. A fair amount has been written suggesting that the IFIs, especially the World Bank, should or at least may have a role in protecting human rights,<sup>288</sup> but that goes too far since “human rights is

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286. General Comment No. 12, *supra* note 166, ¶ 15.

287. See Maastricht Guidelines, *supra* note 262, ¶¶ 6–7 (summarizing the international law of ESC rights since 1986, and employing the “respect, protect, and fulfill” language).

288. See Leite, *supra* note 177, at 47 (arguing that “the work of the IMF should not be seen as a threat to human rights, but as a key contribution. Together, human rights and economic development hold the key to a better world for all.”); Halim Moris, *The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?*, 4 ILSA J. INT'L & COMP.



not mentioned in the institutions' statutes, and promotion of human rights will require a much more active human rights policy operation than the institutions have been set up to handle.<sup>289</sup> Rather, the human rights dialogue on IFIs should be limited to human rights compliance (respect), before questioning human rights promotion (protect, fulfill). Whereas the State's duty extends from respect to protect to fulfill, the IFI is under a duty only to respect human rights.<sup>290</sup> In other words, SAPs can be imposed if they respect human rights norms. By providing the available resources, they will help States to protect and fulfill, but the SAP is not under an obligation to do so.<sup>291</sup>

### C. A Solution in Game Theory?

The structural adjustment paradigm brings to light the possibility that human rights advocates are loathe to accept: SAPs are unavoidable, but there may be cases in which no foreseeable SAP can be designed which would completely respect human rights. Assuming that the IMF is the last resort for the borrowing State, then denial of the structural adjustment loan could mean even greater threats to human rights through lack of resources in the future, or at time 2 (*T2*) than the human rights concerns inherent in the loan itself through conditionality in the present, or at time 1 (*T1*).<sup>292</sup> Both the State Party and the IMF have an obligation to respect human rights at all times.<sup>293</sup> In a case of economic hardship necessitating a structural adjustment loan,<sup>294</sup> this would mean attempting to respect human rights in the future, at *T2*, by taking out a structural adjustment loan in the present, at *T1*. As the Argentine case shows, it

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L. 173 (1997) (setting out arguments for and against an active World Bank role in human rights, and concluding that such a role is desirable and could be legal with changes to its Articles of Agreement); Bradlow, *supra* note 12, at 50–52 (Claiming that human rights and the economic functions of the IFIs are “inherently intertwined,” and therefore urging IFIs to better define their human rights policy, so that their impact can be a positive one).

289. SKOGLY, *supra* note 7, at 151.

290. *Id.* at 135–36, 151–52.

291. Another way of framing this same issue is employed by the Maastricht Guidelines, *supra* note 262, ¶ 7, which set up a dichotomy between “obligations of conduct” (equivalent to obligations to protect and fulfill) and “obligations of result” (equivalent to obligations to respect). Under this terminology, IMF human rights obligations are obligations of result. SKOGLY, *supra* note 7, at 162 (noting that the “absence of specific requirements of implementation procedures is a common characteristic of international law. International law will often leave the specific implementation decisions to States or other legal subjects without dictating in detail how it is to be done. This does not imply that obligations are lacking. . .”).

292. Alexander, *supra* note 1, at 173 (noting that the “critique of adjustment does not imply that the condition of the poor would necessarily improve without adjustment”).

293. For an explanation of why the IMF has an obligation to protect human rights, see *supra* Section V(A). See also SKOGLY, *supra* note 7, at 93–109, 162.

294. If a solution to the economic hardship that does not involve structural adjustment is foreseeable, then the structural adjustment paradigm is not present.

may not be possible to design a SAP which both assures creditor confidence and respects human rights. In this case, the best possible compromise between human rights and creditor confidence at *T1* and *T2* should be sought, assuring the highest overall human rights compliance while still achieving a sufficient level of creditor confidence.<sup>295</sup> The diagram in Table I illustrates this interplay:

TABLE I  
 POSSIBLE OVERALL HUMAN RIGHTS EFFECTS (*T1* + *T2*)  
 BASED ON VARIOUS COMPROMISES BETWEEN HUMAN RIGHTS  
 AND CREDITOR CONFIDENCE AT *T1*.

|  |                       | <i>Human Rights (T<sub>2</sub>)</i>  |   |
|--|-----------------------|--|---|
|  |                       | <i>Not Considered</i>  | <i>Considered</i>   |
| <i>Creditor Confidence (T<sub>1</sub>)</i> | <i>Not Considered</i> | A) Unacceptable scenario (neither IMF nor human rights mechanisms satisfied at <i>T1</i> ) | B) Cannot receive IMF loan at <i>T1</i> to meet any human rights obligations at <i>T2</i> , so overall human rights compliance low. |
|  | <i>Considered</i>     | C) Some human rights abuses at <i>T1</i> and <i>T2</i> (current model).                    | D) Less Human Rights abuses at <i>T1</i> , some at <i>T2</i> , but cumulatively less than box C.                                    |

As the illustration shows, ignoring both human rights and creditor confidence is clearly out of the question; this would not address either macroeconomics or human rights concerns. A plan that ignores macroeconomic factors and favors only human rights—the policy of most of the NGOs mentioned in Part I of this Note,<sup>296</sup> is also illegitimate, because the structural adjustment paradigm assumes that a State cannot meet its ICESCR obligations without borrowing money and that it will not be

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295. Perhaps in some countries, an IFI will be able to loan money without requiring conditionalities that violate the human rights obligations of the borrower at *T1* (either because the borrower has few human rights obligations or because the borrower is so situated that few conditionalities are necessary to gain adequate creditor confidence). In this case, the structural adjustment paradigm is not present. By definition the structural adjustment paradigm means a conflict of interests is present, a perfect solution is lacking.

296. See *supra* note 3 and accompanying text.

able to borrow money without sufficient creditor confidence.<sup>297</sup> So in box *B*, the State would not be able to get a loan by only considering human rights without macroeconomic concerns, and failure to secure available resources would mean failure to meet human rights duties at *T2*.<sup>298</sup> Such a complete human rights failure at *T2* would mean low overall human rights compliance.

The third scenario, shown in box *C*, is the current model, in which macroeconomic concerns are considered in securing a loan to assure creditor confidence but human rights at *T1* are not considered, either because they are judged a political and not an economic issue, because they are judged the internal affairs of a Member State, or for any of the other reasons that the IMF gives to justify not considering human rights.<sup>299</sup> In box *C*, human rights at *T1* are sacrificed in order to secure a loan to meet human rights duties at *T2*. This Note argues for a move from box *C* to box *D*. In box *D*, human rights *and* macroeconomic concerns are considered at *T1* in order to secure a loan and meet human rights duties at *T2*. It is the contention of this Note that, although it will be impossible to completely satisfy human rights at *T1* while assuring creditor confidence, a best possible compromise between human rights and macroeconomic concerns at *T1* will lead to more human rights being considered overall than in the current model, represented in box *C*. This argument is summarized mathematically in Equation I.

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297. The structural adjustment paradigm assumes that creditors will not be sufficiently confident unless macroeconomic factors are considered. So, under the structural adjustment paradigm, a State can consider human rights without considering macroeconomic factors if and only if it does not have to borrow money to consider and meet human rights duties.

298. See F.L. Osunsade, *Impacts of Adjustment Programs: Concern for the Human Condition*, in *WORLD DEBT AND THE HUMAN CONDITION*, *supra* note 1, at 107 (discussing the “pure human rights” solutions such as those proposed in *ADJUSTMENT WITH A HUMAN FACE*, *supra* note 256, and concluding that “[h]owever legitimate such concerns may be on humanitarian or analytical grounds, the logical point of departure should perhaps always be the fundamental fact that lack of timely action to correct prevailing imbalances and distortions is likely to do severe and possibly greater damage to economic well-being, especially among the poor”).

299. SKOGLY, *supra* note 7, at 94–98.

## EQUATION I:

$$C_1 + C_2 > D_1 + D_2$$

(*C* and *D* representing human rights abuses in box *C* and *D*, with the subscript indicating whether the abuses were at *T1* or *T2*).

Of course, one rarely gets something for nothing, so how could extra human rights be protected in box *D* with seemingly no costs? The answer is that there is a cost: Although both human rights and macroeconomic indicators are considered in box *D*, just as it is not possible to protect all human rights, so is it that macroeconomic indicators may not be as exceptional as in box *C*. If properly balanced, what is given up in macroeconomic consideration in box *D* over box *C* is more than made up for in increased human rights protection. The key is to find the right balance.

An example will help illustrate this point. The different policy choices and valuations are fictitious; however, the exercise shows that, whereas some box *D* scenarios (namely *D1*) result in a worse overall score than box *C*, another combination of compromises between human rights and macroeconomic concerns might result in a score that is significantly better than the current model. Assume, as is commonly the case, that a government is not able to meet its ICESCR obligations in a number of areas for lack of funds. Without funds from the IMF (and other donors) the government will not be able to run. Consequently, it will not be able to provide services, and will violate the ICESCR in many ways at *T2*. So, assume it borrows \$10 billion from the IMF. This money is loaned under a structural adjustment plan of fiscal austerity, programs which save government money but also limit the Covenant duties the government is able to meet at *T1*. Assume that these fiscal austerity measures save the government \$3 billion per annum, but limit the government's ability to provide health care, social security, and adequate salaries for government employees, ICESCR duties, at a cost of \$3 billion.<sup>300</sup> This would represent the common model, or box *C*. In this

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300. Although it is problematic to quantify loss of human rights, it has been attempted. See, e.g., Khan, *supra* note 31, at 101–03 (describing an effort to quantify distributional effects of structural adjustment in Kenya using multisectoral models based on social accounting matrices).

example, assume that creditor confidence, if it could be quantified, would be worth \$2 billion.

But, it is important to recognize that many alternative plans exist.<sup>301</sup> Assume that instead, we move into box *D*, and human rights advocates and economics policy makers create an alternate plan. Under this plan, the government, at the cost of some creditor confidence, only implements austerity measures of \$1 billion. Perhaps it keeps its health care and cuts social security and government salaries, but not by as much. Assume that, if creditor confidence in this decreased plan could be quantified it would be worth \$1 billion, and that if the decrease in human rights duties could be quantified, they would be worth \$2 billion. This is summarized in Table II as box *D1*. Now, assume the human rights advocates and economic policy makers alter the plan, by which social security and health care are kept intact, government salaries lowered slightly, a temporary tax on stock transactions is implemented,<sup>302</sup> and regional tariff partners agree to a tariff on imports.<sup>303</sup> In this scenario, assume that the stock tax and import tariffs more than make up for the added social security benefits, and that austerity amounts to \$4 billion. Let us quantify creditor confidence at \$1 billion,<sup>304</sup> and the decrease in human rights duties at \$1 billion. This scenario appears in Table II as box *D2*.<sup>305</sup>

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301. Nelson, *supra* note 222, at 19 (“[T]here is room in most programs for more modest choices that affect the allocation of costs and burdens in the society. Governments can choose to raise revenues more and cut expenditures less; impose a surtax on corporate taxes rather than increase sales taxes; cut military expenditures instead of food subsidies; and raise fees for university education to help maintain free elementary education. There are also choices regarding the degree of reliance on fiscal versus monetary policy. . . .”); Williamson, *supra* note 2, at 9 (“The greatest area of flexibility is in the choice of where to direct cuts in public expenditure. For example, the macroeconomic impact will be much the same whether a reduction in public expenditure is achieved by cutting food subsidies or military spending, but the distributional impact is quite different.”); *see also* Nanda, *supra* note 37, at 43 (“It is imperative that human rights and the activities of international financial agencies be linked so that the adjustment policies designed to accomplish debt repayment and economic stabilization reflect adequate concern for human rights issues.”). It should be noted that this duty to include human rights concerns is conceptually distinct from the premise that rights-oriented policies will lead to macroeconomic growth. While in some cases this may be true, in other cases human rights concerns may slow growth. Regardless of these variations, this Note argues that human rights concerns must be included, and the best possible compromise between macroeconomic and human rights concerns must be sought.

302. Such a financial transactions tax was attempted by Domingo Cavallo in Argentina. MUSSA, *supra* note 5, at 37.

303. Perhaps the regional partners are surprisingly accepting of this tariff because they hope it will help solve the country’s problems, thereby avoiding contagion problems.

304. Perhaps they are quite concerned by the stock transaction tax, but this is equalized by their added confidence that austerity is effectuated beyond their hopes.

305. At this point, the careful reader is probably objecting that this hypothetical is only true as to the fictitious values used, and that different values could be given to create an example where box *D* scored consistently worse than box *C*. Of course, the same reader would surely be critical of Ronald Coase: In his seminal article in the Law and Economics move-

TABLE II

|        | <i>Austerity</i> | <i>Creditor Confidence</i> | <i>Human Rights</i> | <i>Total</i> |
|--------|------------------|----------------------------|---------------------|--------------|
| Box C  | 3                | 2                          | -3                  | 2            |
| Box D1 | 1                | 1                          | -2                  | 0            |
| Box D2 | 4                | 1                          | -1                  | 4            |
| Box D3 | 2                | 2                          | -1                  | 3            |

Perhaps yet another plan could be conceived that resulted in \$2 billion in savings, quantifying creditor confidence at \$2 billion, and limiting human rights by \$1 billion. This is summarized in Table II as box *D3*. The point is that the ideal plan does not necessarily accentuate any one of these variables—rather, it is the total result that matters.<sup>306</sup> The IMF has acknowledged this point in the Argentine context. Michael Mussa has stated that although the IMF supported fiscal austerity measures to reassure creditors, “had the Argentine authorities decided at some time during 2000–01 . . . to pursue an alternative course involving debt restructuring and a possible change on the exchange rate regime, the Fund would have supported responsible efforts in this direction.”<sup>307</sup>

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ment, Coase uses similarly simplified and arbitrarily hypothetical figures to create a situation that was contrary to the doctrine of the time, in which holding a railroad liable for a fire on nearby land caused by locomotive sparks is not necessarily the most efficient result. He states, “Of course, by altering the figures, it could be shown that there are other cases in which it would be desirable that the railway should be liable for the damage it causes. It is enough for my purpose to show that, from an economic point of view, a situation in which there is ‘uncompensated damage done to surrounding woods by sparks from railway engines’ is not necessarily undesirable.” R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 33–34 (1960). The same could be said here. Although, by altering the figures, box *D2* could be made to score less than box *C*, the purpose here is to show that the possibility exists that a box *D* scenario can be found that is favorable to box *C*, and that that possibility is real enough to investigate.

306. Osunsade, *supra* note 298, at 108 (“It is important to recognize that protection of the poor in the course of an adjustment program does not necessarily warrant avoidance of cuts in public expenditures on such goods and services. Adjustment being essentially a policy effort to align aggregate demand with available resources, the exercise calls legitimately for assessment of individual expenditure items in terms of alternative uses, within the prevailing priorities of a polity.”).

307. MUSSA, *supra* note 5, at 6. Mussa later provides an example when this happened, stating,

It is not infrequent that the Fund-supported programs go off track and fail to meet their previously agreed-on objectives (spelled out in Fund conditionality). When this happens, the Fund member is almost always allowed to propose corrective policies which, if they offer the reasonable expectation of returning performance to the original program objectives, lead to a Fund decision to continue scheduled disbursements under the program. This is what happened for Argentina. In view of

Two things can be gleaned from this exercise: First, both the macroeconomic factors variable and the human rights variable are themselves composed of multiple variables. Second, there may exist some ideal combination of human rights concerns and macroeconomic policy concerns, *D2*, that would lead to better results than macroeconomic concerns alone, but there also inevitably exists some less ideal combination, *D1*, that would actually lead to a worse outcome, as well as any number of intermediate scenarios like *D3*. Human rights and macroeconomic concerns cannot jointly and severally be completely satisfied. Accepting these two realities, the exercise becomes finding the most favorable combination of variables.

A model which has no perfect solution, but rather seeks as its solution the best combination of factors based on their relation to other factors is a common one, and has been widely studied by economists, political scientists, operations researchers, military strategists, and mathematicians under the rubric of "game theory."<sup>308</sup> Whereas human rights law generally is absolute, it cannot be absolute in the structural adjustment paradigm because the very mechanism (IMF) trying to avoid human rights violations at *T2* by providing available resources may be causing others at *T1* (SAPs). Because of this inherent conflict, the structural adjustment paradigm must be conceptualized differently, and game theory provides a possibility for such conceptualization. For example, the concept of the "Nash Equilibrium" provides for balancing situations which are not zero-sum, and have no "absolute" solution, representing "the combination of strategies [which is] the best response of each player to the predicted strategies of the other players. Such a prediction may be called 'strategically stable' or 'self-enforcing' because no single player is interested in deviating from the predicted strategy."<sup>309</sup> The Nash Equilibrium is precisely what is sought in box *D* of the structural adjustment

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the new fiscal measures, violation of the fiscal target for the first quarter of 2001 was waived and the disbursement for that quarter (after a short delay) was made.

*Id.* at 38.

308. William B.T. Mock, *Human Rights, Corporate Responsibility, and Economic Sanctions: Corporate Transparency and Human Rights*, 8 TULSA J. COMP. & INT'L L. 15, 18 (2000) (describing game theory as "a branch of public choice or rational choice analysis . . . which . . . deals with issues of strategic interaction between parties seeking to maximize their own interests"). According to Mock, game theory was originally formulated in JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (3d ed. 1953) (1944). Game theory has previously been used in the human rights context to determine the most effective means of ensuring human rights compliance by transnational corporations. See Mock, *supra*, at 18-26 (summarizing game theory and applying the game theoretical concept of separating equilibriums).

309. Moshe Hirsch, *Game Theory, International Law, and Future Environmental Cooperation in the Middle East*, 27 DENV. J. INT'L L. & POL'Y 75, 80 (1998).

paradigm: The variables of human rights and macroeconomic concerns are in competition, but in competition, at least in part, toward the same goal of highest overall human rights compliance. The best solution, the Nash Equilibrium, is the one which leads to the best combined score. In the example in Table II above, the Nash Equilibrium is box *D2*.

The goal of this discussion is not a complete examination of game theory. Rather, it has been to show that the structural adjustment paradigm assumes that macroeconomics and human rights work toward the same goal, overall human rights compliance. A solution closer to this goal is reached when both creditor confidence and human rights are considered as variables in the overall solution. In that scenario, the optimum amount for each is that which best increases the whole, not necessarily the maximum possible value. Through game theory, this sort of solution is commonly sought across many disciplines.<sup>310</sup>

#### *D. Using International Human Rights Law to Address the Structural Adjustment Paradigm*

##### 1. Where Would the Ideal Monitoring Body Be?

Once one accepts that some level of human rights monitoring of structural adjustment is legitimate and indeed desirable, the next question is the form that such monitoring should take. This Section will attempt to address this issue, beginning with a discussion of the most appropriate locus of the monitoring body, and concluding with a discussion of the most appropriate structure of that body.

In terms of human rights monitoring of the IMF, the first question to be asked is whether such monitoring should be within the institution itself or part of some exterior structure. From within, the most salient example is certainly the World Bank's recently established Inspection Panel, created in 1993 to hear complaints from civil society and bring them to World Bank management.<sup>311</sup> Although this is a step in the right

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310. Hirsch, *supra* note 309, at 78 ("Mathematicians were the first to develop game theory, primarily for use in economics. Later, other disciplines, such as political science, international relations, law, sociology and biology also employed game theory concepts. . .").

311. For an exhaustive description of the Inspection Panel, see IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* (2d ed. 2000); see also SKOGLY, *supra* note 7, at 180–85 (noting that the Inter-American Development Bank, the African Development Bank, and the Asian Development Bank have all created similar inspection panels, but the IMF has not); Daniel C. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994) (providing a general overview of the operation of the Inspection Panel); see also SKOGLY, *supra* note 7, at 22 ("The initiatives to address . . . problems have been more substantial on the part of the World Bank than has been the case for the IMF. The IMF has tended to reject its role in addressing these issues, seeing them as distributional policy problems on which the fund cannot take a position, and has left it to the national governments to address.").



direction in terms of transparency, Skogly finds it insufficient on two levels.<sup>312</sup> First, it does not accept complaints from individuals.<sup>313</sup> This is a major shortfall indeed, as individual complaint mechanisms are now widely seen as the future of human rights monitoring, the most effective means of developing human rights law.<sup>314</sup> Second, the complaints may only regard acts or omissions of the Bank's operational policies and procedures, not human rights law generally.<sup>315</sup> Even Skogly does not seem to take this idea far enough: Whereas she notes that the Panel can and has treated human rights not explicitly covered in the policies, there is no guarantee the Panel can and will systematically take this step.<sup>316</sup> Although upholding Bank policies and procedures may sometimes uphold human rights, it cannot be assumed that all human rights are upheld by the policies and procedures. A system is therefore still lacking in which all human rights law is applied to the Bank.<sup>317</sup>

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312. Paul, *supra* note 33, at 317 (arguing that in creating the Inspection Panel, the World Bank "appears to recognize both the general principle that [International Development Agencies] must be accountable for legally cognizable wrongs (i.e., rights violations) resulting from their activities, and an obligation to provide structures for mediation and redress for claims of wrongdoing").

313. SKOGLY, *supra* note 7, at 181.

314. Markus G. Schmidt, *Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform*, 41 INT'L & COMP. L.Q. 645 (1992) ("The right of individuals to complain about alleged violations of their human rights to expert bodies established under United Nations human rights instruments is one of the major achievements of UN efforts aimed at the protection and promotion of human rights."); see also Alfred de Zayas, *The Examination of Individual Complaints by the United Nations Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 67 (Gudmunder Alfredsson et al. eds., 2001) (providing detailed analysis of the working methods and jurisprudence of the individual complaints mechanism under the International Covenant on Civil and Political Rights, arguing that the individual complaints mechanism has made a positive contribution to human rights protection).

315. SKOGLY, *supra* note 7, at 181.

316. *Id.* at 182-84 (noting the first complaint to the Inspection Panel, the Arun III Hydroelectric Project in Nepal, was framed entirely in environmental terms instead of human rights terms because of the Bank's more active policies in environmental issues).

317. Skogly also makes the point that the Inspection Panel is weak in that it is not a judicial body. *Id.* But this is the common status of human rights mechanisms, especially at the global level. Of all the problems of the Inspection Panel, this is not the biggest. The same could be said for Skogly's concern that the Panel is weak since the Board of Directors can simply override it (noting Board denial of an inspection proposed by the Inspection Panel in the Itapartica Resettlement and Irrigation Project in Brazil). *Id.* at 184-85; see also Dana L. Clark, *Boundaries in the Field of Human Rights: The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205 (2002) (providing examples of "glaring gaps" between problems identified by the Inspection Panel and institutional commitment and capacity to remedy them, and proposing the creation of a "Development Effectiveness Remedial Team to address the ongoing suffering caused by unsustainable development-induced displacement and to provide oversight and effective remedial assistance to local communities where the Inspection Panel has identified violations of Bank policies resulting in harm"). While I agree with both authors that a Panel that lacks "teeth" is not ideal, it is

In addition to Skogly's concerns about the Inspection Panel system, two more are apparent: First, the panel lacks institutional expertise in human rights jurisprudence. Human rights law, evolving for over fifty years, is complex, so much so that each human rights treaty has a corresponding treaty body to interpret it, and attempts to combine the treaty bodies have continuously been rejected.<sup>318</sup> One panel composed of human rights "outsiders" could not possibly possess sufficient knowledge of the field to adequately judge projects from a human rights perspective. Even if the panel could draw on human rights law, it may not know how to use it. A body that can truly interpret and apply human rights norms not only needs to be able to draw on those norms, it needs to be a human rights body. Any other panel, especially an internal one, is more likely to draw on economic theory than human rights law, and to risk applying the human rights norms incorrectly when it does try to apply them. Also, the Inspection Panel is too close to the institution it is monitoring to be independent.<sup>319</sup> As an interior body of the Bank itself, its ideas cannot be completely independent of the ideology of that institution.<sup>320</sup> This concern was raised by several NGOs in the planning stages of the Inspection

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nevertheless quite standard for human rights mechanisms to lack relative powers compared to the international actors they control. It would be unrealistic to suggest a binding mechanism with complete control over the Bank from a human rights approach. More importantly, for reasons outlined in this Note, it would also be unwise: The structural adjustment paradigm requires the input of both human rights and macroeconomic voices.

318. Hurst Hannum, Book Review, *Setting a New Agenda for UN Human Rights Activities*, 15 MICH. J. INT'L L. 823, 826 (1994) (reviewing THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston ed., 1992)) ("[T]he mandates and powers of the various procedures remain sufficiently different—and human rights violations sufficiently widespread—that it is premature to call for combining procedures under the rubric of greater efficiency").

319. Skogly also expresses an "independence" concern, but it is not the same kind of independence I am focusing on. Rather, she couches her concern about the lack of power of the Inspection Panel to bind the Board of Directors in terms of "independence" of the Panel from the Board. SKOGLY, *supra* note 7, at 184–85. I am referring to independence of the ideas of the Panel from the ideology of the Bank. Whereas I play down Skogly's "lack of power" independence, she is similarly less concerned about my "autonomy" independence, arguing that it is "secured through the provisions concerning the members of the panel and their prior and post-appointment independence from the Bank." *Id.* at 184.

320. THE WORLD BANK INSPECTION PANEL: THE FIRST FOUR YEARS (1994–1998), at 323 (Alsvar Umana-Quesada ed., 1998) (noting that the Inspection Panel has been under extreme pressure in its operations). The World Bank denies this claim, arguing that a number of safeguards insure the independence of the Inspection Panel, including the mandatory two year lapse before Bank employees can become Panel members, the fact that Panel member terms are non-renewable, and the independent budget of the Panel. It further points to participation by NGOs, and evidence of strong disagreement between the Panel and Bank management as proof that the Panel is independent. SHIHATA, *supra* note 311, at 206–07. If the Inspection Panel is truly as independent as the Bank claims, it is unclear why the Bank did not go the one additional step and allow for a Panel physically removed from the Bank. Similarly, if NGOs truly have a voice, it is unclear why efforts to formalize this voice were rejected. *Id.* at 21.

Panel. Their proposal of an "Independent Appeals Commission," with significantly more autonomy than the Inspection Panel, was eventually disregarded.<sup>321</sup>

Both of the concerns expressed above, as well as both of Skogly's, could be solved by an inspecting body that was part of the international human rights framework instead of the IFI's framework. Like other mechanisms in the international human rights framework, it would draw on human rights treaties and be made up of experts in the field of human rights.<sup>322</sup> It could have an individual complaints mechanism. It would be sufficiently distanced from the IFIs to be considered independent and impartial. The only question that remains is whether there is an existing mechanism that could take on this role, or whether a new mechanism must be created.

Skogly believes that, although none of the existing human rights mechanisms are currently suited for monitoring IFI compliance with human rights norms, the most likely formulation would be a working group under the Commission on Human Rights which would deal with complaints in a manner inspired by the current 1503 procedure.<sup>323</sup> In terms of convention-based organs, Skogly believes that new conventions or at least protocols would have to be created to oversee IFI compliance with human rights norms, noting that none of the conventions give direct obligations to the IFIs, since IFIs cannot accede to them.<sup>324</sup> Although she is certainly correct that a working group is most feasible, the most complete solution would involve both the U.N. Charter-based and treaty-based human rights mechanisms, which have been shown to exist in a synergistic relationship: The treaty bodies provide a review that is both more individual and more judicial; the Charter-based mechanisms provide a forum that is more political, more general, and less constrained by individual treaty obligations.<sup>325</sup>

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321. SHIHATA, *supra* note 311, at 20–21.

322. See, for example, the Human Rights Committee, which works with the International Covenant of Civil and Political Rights and is "composed of nationals of the States Parties to the [International Covenant on Civil and Political Rights] . . . who shall be persons of high moral character and recognized competence in the field of human rights." See International Covenant on Civil and Political Rights, arts. 28, 40, Dec. 19, 1966 (entered into force Mar. 23, 1976), 999 U.N.T.S. 171 [hereinafter ICCPR].

323. SKOGLY, *supra* note 7, at 187 (acknowledging that U.N. Charter-based organs are limited since only consistent patterns of gross violations of human rights are examined, leaving no room for individual cases).

324. *Id.* at 188.

325. On complementarity between Charter- and treaty-based mechanisms, see Sir Nigel Rodley, *United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights—Complementarity or Competition?*, 25 HUM. RTS. Q. (forthcoming Aug. 2003) (arguing that the two systems are substantially different, and

## 2. How Would the Ideal Monitoring Body Function?

Even once the above concerns are addressed in terms of where the monitoring mechanism will be, the question remains how it will be structured. Because the structural adjustment paradigm is unique in that the IMF, in attempting to assist a State in meeting its ICESCR obligations, violates human rights, it calls for a unique structure, which adequately reflects the rights and duties of all actors.<sup>326</sup> The appropriate example should be taken from the ILO model of tripartism, in which the composition of all main political bodies, but even some quasi-judicial structures, must reflect the presence of employers, workers, and the government of each Member State.<sup>327</sup> This structure has added vigor and dynamism to the ILO's work, and increased the authority of its

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therefore complementary, from the standpoint of structural features, style of communication, focus, working methods, fact-finding capacity, and general activities).

326. See STIGLITZ, *supra* note 177, at 225 (expressing concern that only finance ministers and central bank governors have been involved in IMF decisions so the decisions have reflected only the views of those stakeholders).

327. Constitution of the ILO (Oct. 9, 1946), arts. 3, 7, 15 U.N.T.S. 35, 46–54; *see also* Nicolas Valticos & Geraldo W. von Potobsky, *International Labour Law*, in 2 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, ELL Supp. 163, ¶¶ 36–37 (R. Blainpain ed., 1994) (citing C. Wilfred Jenks, *The Significance for International Law of the Tripartite Character of the International Labour Organisation*, 22 TRANSACTIONS OF THE GROTIUS SOCIETY 45 (1936), and others). Although tripartism involves representation from all three groups, they are not necessarily represented equally. Usually, there are two government delegates for every one delegate from labor and employers. *See* ELIANE VOGEL-POLSKY, DU TRIPARTISME A L'ORGANISATION INTERNATIONALE DU TRAVAIL 23–29 (1966) (describing a representation of delegates weighted toward government in the Conference and Administrative Council of the ILO, but equal representation in the ILO Industrial Commissions). This Note has argued above that the most effective monitoring system would combine both Charter- and treaty-based mechanisms. On this issue, too, the ILO example can be followed, which applies the tripartite structure both in the judicial and political organs. *See* Jenks, *supra*, at 46–48 (explaining the tripartite structure of the Conference and Governing Body, political bodies); *id.* at 64 (explaining that in interpretation of ILO Conventions (a judicial function), “a definite procedure is prescribed for the consideration by tripartite organs”); *see also* Valticos & von Potobsky, *supra*, ¶ 682 (explaining the quasi-judicial interpretation of “representations” by the Governing Body, a tripartite organ). Moreover, just as the structural adjustment paradigm is a nontraditional hybrid of individual, national, and international competing interests, so did Jenks remark in 1936 that ILO tripartism created a unique treaty interpretation paradigm: “In connection with interpretation there arises the further question of whether the tripartite character of the Organisation implies any modification of the principles of interpretation applicable to international instruments. In some cases it would appear to do so. Thus the object of any recourse to the preparatory work of international labour Conventions must be to discover not the intention of the parties but the intention of the International Labour Conference.” Jenks, *supra*, ¶ 37. Thus, in the ILO, like in the structural adjustment paradigm, it is the combination of interests that counts. *But see* Hannum, *supra* note 318, at 826 (arguing that “the formal role given to NGOs under the ILO's tripartite structure cannot be duplicated within the United Nations,” but conceding that “the ILO experience does illustrate the importance of substantially improving NGO access to the various U.N. bodies”).

decisions.<sup>328</sup> Just as the framers of the ILO deemed the voice of labor and commercial interests so important as to necessarily add to the voice of governments, so too must multiple voices be heard in the structural adjustment paradigm.<sup>329</sup> The first set of representatives would be U.N. experts, speaking independently from their governments and appointed in a manner consistent with other human rights treaty bodies. Like in other treaty bodies, these experts would base their reasoning and their arguments primarily in the normative framework of human rights law itself, as compared to the more political Commission on Human Rights.<sup>330</sup> They would be unconstrained by political and economic concerns. The second group of representatives would be the experts appointed from the IFIs, very much like those who sit on the World Bank Inspection Panel. These members would take both human rights and macroeconomic concerns into account, but in order to provide the best balance of interests in the overall committee, they would be economists before being human rights commentators. Finally, the third group would be composed of government representatives, so as to take into account

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328. Valticos & von Potobsky, *supra* note 327, at 35. Valticos and von Potobsky point out:

The Organization's tripartite structure has been an undeniable source of vigour for the ILO, as it gave it the support not only of the diplomatic representatives of States, but also of the productive forces of nations. The participation of workers brought an element of dynamism . . . In spite of the delay that divergent interests sometimes involved, the tripartite structure of the ILO gave an increased authority to its decisions, as these were taken with due consideration of the positions of all parties concerned.

*Id.* (citing Resolution Concerning the Strengthening of Tripartism in the Over-All Activities of the ILO, Rec. Proc. Conf. 56, at 806-08 (1971), and Resolution Concerning the Strengthening of Tripartism in ILO Supervisory Procedures of International Labour Standards and Technical Co-operation Programmes, Rec. Proc. Conf. 63, at 847-49 (1977)).

329. VOGEL-POLSKY, *supra* note 327, at 321 ("En instituant le système tripartite à l'O.I.T. les promoteurs de la Législation Sociale Internationale ont voulu tenir compte des intérêts des trois groupes sociaux en présence (les travailleurs, les employeurs et les gouvernements) et en faire la synthèse. Or ces intérêts sont fréquemment différents, si pas opposés [In instituting the tripartite system in the ILO, the promoters of the International Social Legislation wanted to take the interests of the three social groups present into account (the workers, the employers, and the governments), synthesizing these interests. But, these interests are frequently different, if not opposed]."). The ESCR Committee agrees: "Many activities undertaken in the name of "development" have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration." General Comment No. 2, *supra* note 53, ¶ 7. The "Independent Appeals Commission," described above, also attempted to counter-balance "official" voices, in this case by providing two NGO representatives on the nine member proposed Commission. SHIHATA, *supra* note 311, at 21.

330. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 601-02 (2000).

political concerns, acting as spokespersons for their citizens. In order for this group to be effective, it would be composed half of members who represent borrowing States and half of members who represent lending States. Alternatively, the third group could be composed of NGO representatives, keeping in stride with the notion in development literature that NGO representatives are better suited to represent poor and disadvantaged groups than are their governments.<sup>331</sup>

A common problem encountered when one starts mixing economic theory and human rights is that the fields are based on such different models that common ground is hard to come by. As a result, human rights commentators and economists very often end up talking past each other.<sup>332</sup> The tripartite structure would avoid this phenomenon by putting the human rights commentators and the economists in the same room and forcing them to agree on a solution.<sup>333</sup> The reason why this is possible is based on the fact that, in the structural adjustment paradigm, it is accepted that the solution is not going to be a perfect one. Rather, the Committee would be looking for the Nash Equilibrium. In order to find such a solution where economic, human rights, and political concerns

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331. Paula Rhodes & Eileen McCarthy-Arnolds, *Expanding NGO Participation in International Decision Making*, in *WORLD DEBT AND THE HUMAN CONDITION*, *supra* note 1, at 153, 153–57 (challenging the classic thesis that the State is the best and most logical representative on the international scene of poor and disadvantaged members of a society); Williamson, *supra* note 2, at 10–11 (arguing that even if government legitimately attempted to gain the opinions of different societal groups, this task may be overburdensome, and suggesting direct contact between IFIs and such groups).

332. On the ongoing controversy about the wisdom of embedding human rights in international trade treaties (linkages), see Pradeep S. Mehta, *Human Rights and International Trade: Right Cause With Wrong Intentions*, 2001 CUTS CENTRE FOR INTERNATIONAL TRADE ECONOMICS & ENVIRONMENT (Briefing Paper No. 3/2001, Jaipur Printers, Mar. 2001) (arguing against linkages); see also Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 *HUM. RTS Q.* 1 (2002) (supporting the use of linkages, but nevertheless noting specific areas of conflict between human rights norms and WTO-related policies); Symposium, *The Boundaries of the WTO: The WTO as Linkage Machine*, 96 *AM. J. INT'L L.* 146, 157 (summarizing many divergent expert opinions on linkages from a related symposium, but noting that “[r]epresentatives to the WTO from the ‘global South’ have long opposed the formal or legal linking of trade and labor issues”); Jagdish Bhagwati, *Trade Linkage and Human Rights*, in *THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL* 241, 249 (Jagdish Bhagwati & Mathias Hirsch eds., 1998) (arguing that linkages are “not an efficient way to advance a human rights or social issues agenda”); Paul, *supra* note 33, at 310 (arguing that the international law codifying the right to development “exists in an uneasy relationship with the International Economic Law (IEL), which deals with trade, investment, intellectual property and access to technologies, and the activities of Transnational Corporations (TNCs)”).

333. See, e.g., Osunsade, *supra* note 298, at 111–12 (“Through combined efforts on the part of various organizations, in collaboration with a wide range of institutions in adjustment problem countries, it is possible to produce synergetic effects in identifying and addressing issues relating to possible adverse human conditions impacts of adjustment programs . . . Efforts by third-party entities such as NGOs, academics, UNICEF, and other United Nations agencies not directly involved in adjustment lending have undoubtedly been important. . .”).

are all considered equally and thus the best balance possible is struck between them, we must put all the stakeholders in the same room and let them bargain.

## VI. CONCLUSION

This Note has explored the relationship between IMF structural adjustment programs (SAPs) and economic, social and cultural rights obligations (ESC rights). Beginning with a short examination of SAPs in macroeconomic terms, the majority of the Note focuses on a human rights analysis of SAPs, in the particular context of the current Argentine crisis. Following a brief summary of the legal status of human rights norms in the Argentine context, it then examines three areas where SAPs have conflicted with ESC rights in Argentina: the zero-deficit plan, cuts to social security, and provincial cuts. It then addresses the more controversial area of monetary policy, arguing that even though monetary policy decisions are ostensibly sovereign decisions and they do not appear directly in Argentina's Letter of Intent to the IMF, the IMF has nevertheless played a role in these decisions. Having established certain areas where SAPs' austerity measures are inconsistent with ESC rights, it argues that this occurs because the IMF is often forced to demand these measures because it is beholden to the confidence of private creditors. In cases where this tension between creditor confidence and ESC rights is present, this Note argues that a unique human rights paradigm is created, whereby the IMF is simultaneously helping a State to meet its ICESCR obligations by providing "available resources," and preventing the State from meeting its Covenant obligations by imposing SAPs. The final Part of this Note searches for a human rights solution to this paradigm. The Note argues that because its solution will often be imperfect, it resembles a Nash Equilibrium in game theory, and that the ideal mechanism to reach this solution would involve economists, human rights experts, and country representatives in a body modeled on ILO tripartism. The tripartite system could be a tool to transcend the ever-present divide between concerns for ESC rights and concerns for macroeconomic stability. With such a tripartite decision structure, the international community would no longer be bounded by respective disciplines and academic limitations in dealing with questions that concern all human rights advocates, all economists, indeed everyone on Earth . . . .