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PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW

The ICESCR in Trade,
Finance, and Investment

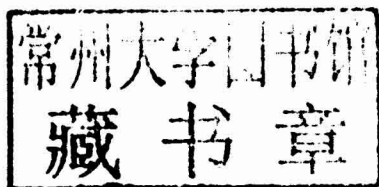
Diane A. Desierto



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Preface

This book examines the design of public policy mechanisms and institutions in international trade, finance, and investment treaties, to evaluate how States can maintain compliance with their fundamental obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Its central thesis is that beyond the usual debates on “public policy spaces” and “regulatory freedom” in these treaty regimes, the broader interaction and reconciliation of international economic treaty obligations with States’ ICESCR obligations also requires specific analysis. The purposely dynamic and binding obligations of over one hundred and sixty States under the ICESCR necessitates rethinking—not just on the issues of treaty interpretation that dominate much of the “public policy” literature in international economic law (IEL)—but in particular, in the design of treaty monitoring institutions for these regimes. As States continue to make long-term distributional choices on resource allocation and market access, financing and debt, and investment protection as manifested in international economic treaties, they will be pressed to ensure that such long-term choices will not violate their fundamental obligations to respect, protect, and fulfill ICESCR rights owed to their populations. This book approaches ICESCR compliance and harmonization with international economic treaty obligations from the prism of designing and interpreting international treaty texts, up to the institutional monitoring and empirical analysis of ICESCR compliance in conjunction with the Committee on Economic, Social, and Cultural Rights (CESCR) and the functional interpretive communities and institutions within international trade, finance, and investment law.

Chapter 1 (*Keynes v. Hayek in IEL*) discusses the underlying philosophical *problematique* in modern IEL on the width and role of the State over public policy decisions that affect resource distribution, market regulation, sovereign debt practices, and investment commitments; the extent of multilateral and plurilateral intergovernmentalism and the role of non-State actors in international economic governance; and the recurring arguments between governmental intervention vis-à-vis neoclassical laissez-faire arguments in the specialized treaty regimes in trade, finance, and investment. It is intended to show that the debate on public policy and State regulatory freedom within these regimes manifests a fundamental ideological tension between Keynesian (welfare-interventionist) as opposed to Hayekian (free market-libertarian) principles, but recognizes that both ideologies accepted the value of social protection (albeit in different degrees) to address income inequality. Against this thematic debate, I argue that there are five significant policy considerations for designing ICESCR compliance in IEL: 1) the ICESCR codified deliberate distributive choices to ameliorate, if not eradicate, income inequality; 2) ICESCR compliance is presumptively part of the

contemplated economic decision-making process of the State, such that States cannot act in ways that deliberately imperil the ICESCR's social protection baseline; 3) while States Parties to the ICESCR bring duties to respect, protect, and fulfill the ICESCR in their participation in international economic institutions, they likewise cannot invoke the ICESCR pretextually and in a self-judged manner to avoid complying with international economic obligations; 4) it should not be assumed *a priori* that compliance with IEL is entirely incompatible with ICESCR compliance; and 5) in the event of a purely irreconcilable narrow treaty conflict, then the State Party to the ICESCR must choose the policy option that best effectuates ICESCR compliance, while internalizing the costs of non-compliance with the IEL norm and simultaneously ensuring that those very same IEL non-compliance costs do not also impair the State's ultimate capacity to discharge duties to respect, protect, and fulfill ICESCR rights.

Chapter 2 (*The Role of the State under the ICESCR*) then proceeds to discuss the historical rationale and evolution of the minimum core obligations and the full spectrum of protective obligations under the ICESCR, showing that the normative and institutional developments in the implementation of the ICESCR (and the Optional Protocol to the ICESCR which conferred new competences on the CESCR) can, and should, be taken into account by States as the foundation of their public policy decisions in international economic transactions such as trade, finance, and investment. A "reimagining" of the role of the modern State in relation to the ICESCR is critically warranted in view of the coalescence of around five decades of State practices; the Committee's development of broad-based monitoring of State compliance with the ICESCR and information sources gained from the repeated interactions between the Committee and non-governmental organizations (NGOs) and intergovernmental organizations; the parallel adjudication of economic, social, and cultural rights in national, regional, and international courts; and recent methodological developments in the empirical verification of ICESCR compliance.

Chapter 3 (*The ICESCR in State Public Policy-making within the World Trade System*) analyzes how the various institutions and treaty gateways within the world trading system interact to maintain public policies and States' regulatory freedoms within international trade law. The chapter demonstrates that ICESCR compliance can be accommodated within the interpretation of exceptions provisions and "public policy" provisions in the fundamental trade law treaties (e.g. General Agreement on Tariffs and Trade (GATT), General Agreement on Trade and Services (GATS), Subsidies and Countervailing Mechanisms (SCMs), Technical Barriers to Trade, Agreement on Sanitary and Phytosanitary Measures). It further shows how consistency with ICESCR can likewise be mediated into two key processes of the world trading system—the Trade Policy Review Mechanism (TPRM) and the Dispute Settlement Understanding (DSU). Finally, this chapter shows that the governing bodies of the World Trade Organization (WTO)—specifically the Ministerial Conference and the General Council—can facilitate the authentic interpretation of trade law treaties towards consistency and harmonization with fundamental ICESCR obligations, such as through the

strategic use of the WTO political organs' waiver, agenda-setting, and treaty renegotiation powers.

Chapter 4 (*The ICESCR in State Public Policy-making in the International Financial System*) examines States' obligations under lending arrangements and credit facilities with the international financial institutions (IFIs) (e.g. the International Monetary Fund (IMF), the World Bank, the Paris Club, the London Club, and regional development banks) and voluntary international financial practices and instruments that advocate social responsibility, such as the Equator Principles. The chapter also discusses the role of decisions of States Parties to the ICESCR in IFIs' debt surveillance practices in economic emergencies, especially in regard to prescriptions such as austerity measures that directly impact economic, social, and cultural rights. This chapter shows how States can operationalize ICESCR obligations in the most tangibly felt international financial arrangements (such as international development financing agreements and surveillance of sovereign debt), taking into consideration that the international financial architecture is replete with multiple regulatory norms (agendas, standards, regulations) but lacks centralized regulators as well as rule-interpreters or adjudicators.

In contrast to the international financial system's highly political architecture, Chapter 5 (*The ICESCR in State Public Policy-making in the International Investment System*) proceeds to situate the ICESCR in the international investment system, which is uniquely characterized by the exponential growth of "hard law" investment treaties with equally diverse rule-interpreters in investor-State arbitration tribunals. The chapter discusses the diverse design of investment treaty texts from the first to the current fourth generations of international investment agreements (IIAs), and the extent to which States' regulatory freedoms have been preserved within these treaties. It shows how the ICESCR extraterritorially applies to both home States of investors as well as host States, and how the duties to "respect, protect, and fulfill" the ICESCR can be built into the foreign investment due diligence and contracting process, the design of regulatory risk assessments, IIA provisions on State regulatory freedoms and public policies, and compensation valuation methods in investor-State dispute settlement.

The Conclusion (*Beyond Keynes v. Hayek: Social Protection and the Rejection of Inequality in the ICESCR as the Normative Foundation for States' Economic Decisions*) points out the possibilities and limitations in using the ICESCR to substantiate and further public policy-making in IEL, and anticipates future research areas delving more deeply into issues of State attribution, international regulation, and empirical verification of ICESCR and IEL compliance.

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Complex questions have a way of fueling one's continued pursuit of answers and exploration of theories. This book owes its origins and development to many experiences of intellectual mentorship and exchanges, law reform and policy engagement in the last four years. It was first intended to serve as the remaining third of my doctoral dissertation at Yale Law School, except that my JSD supervisor, Professor W. Michael Reisman, and dissertation readers, Professors Susan Rose-Ackerman and Lea Brilmayer (along with the rest of the Yale Law Faculty that voted for the conferral of my JSD degree) found my manuscript on *Necessity and National Emergency Clauses* already more than sufficient to graduate me from the doctoral program after spending one year of doctoral writing, and one year of clerking at the International Court of Justice. When they informed me in 2010 that I would be graduating from Yale Law School earlier in 2011 instead of the scheduled 2014 graduation, I still found myself engaging many of the public policy questions that originally set up my doctoral dissertation in various published works throughout 2010 to 2014. For these reasons among many others, I am deeply indebted to Professor W. Michael Reisman, Professor Susan Rose-Ackerman, and Professor Lea Brilmayer for graciously enabling me to come back, this time in my capacity as a permanent faculty member at UH Richardson School of Law in Honolulu, Hawaii, to finalize this book manuscript during a visit in summer 2014 to Yale Law School. I extend my gratitude on this book, in particular, to Professor Susan Rose-Ackerman, whose well-known theories on public policy and comparative approaches to administrative design inspired me to continue pursuing this topic as I joined the faculty of Peking University School of Transnational Law (PKUSTL) in China, and thereafter, the faculty of the University of Hawaii William S. Richardson School of Law. This book is—and always would have been—my contribution as a result of Professor Rose-Ackerman's provocative mentorship and challenge to the legal academics she has guided and fostered, to explore and respond to urgent questions of public policy and law reform in international economic transactions.

I am also grateful to then ICJ Judge and now Judge of the Iran–US Claims Tribunal, Bruno Simma, for inspiring me to theorize economic, social, and cultural rights in the ICESCR as the treaty basis for States' public policy decisions in international economic transactions. Much of my published academic work over the last three years on various aspects of the theory encapsulated in this book owes inspiration to thought-provoking discussions with Judge Simma, from our early days at the Court at the Hague, to various exchanges since at Michigan Law School and in other academic meetings and fora around the world. I benefited greatly from Judge Simma's deep intellectual critiques, his doctrinal rigor, and his thorough and well-grounded advocacy of economic, social, and cultural

rights—in many ways, I am grateful to him for being an unofficial *doktorvater* in the writing of this work.

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My own thinking for this book—mainly cultivated over the last three years of publishing different articles on the ICESCR, trade, investment, and financial regulation—admittedly shifted after witnessing firsthand the practical policy difficulties of marshaling needed technical and financial resources, institutional assistance and involvement for creating and sustaining investment, financing, trade, and international development efforts, after Typhoon Haiyan devastated my home region in Central Visayas, the Philippines in November 2013—where the world’s worst hurricane to date caused nearly ten thousand deaths, over a

million displaced families, and the utter destruction of countless community infrastructures, airports, roads, hospitals, schools, and homes. As of this writing, the rebuilding program and governmental strategies for Haiyan-afflicted areas is ongoing—and presents a glaring example of the pressing resilience challenges to “build back better” amid abject deprivation and destruction. The Philippines’ rebuilding effort itself demonstrates the complex public policy and governance dilemma on how to ensure respect, protection, and fulfillment of fundamental economic, social, and cultural rights to health, adequate housing, adequate food, education, social security, work, in such a critical race against time and dwindling resources. This book is a modest contribution seeking to help States—including my home country, the Philippines—to pragmatically embed the realization of economic, social, and cultural rights into the planning, design and assessment of economic policies, programs, and operational decisions involving international trade, investment, and finance, especially in times of crisis when the threat to economic, social, and cultural rights is greatest. Notably, postwar Philippine diplomat Salvador Lopez was one of the primary architects of the ICESCR—it is a fitting tribute to his work and our country that we remain constantly mindful of realizing the ICESCR in the day-to-day decisions that governments take for peoples everywhere.

Finally, this book is dedicated with deep love and gratitude, to my home—my best friend, co-author, and the kindest sister, Dr. Desiree Desierto, my brother and law partner Atty. Dante Desierto, and, with constant prayers, to my parents—retired civil servants Justice Aniano Desierto and Commissioner/Director Teresita Alferez-Desierto, whom we nearly lost in 2013. I am daily grateful for the most precious gift of your presence for your family, and that you are still here to read the ideas I offer the world.

New Haven, Connecticut, and Honolulu, Hawaii, August 2014

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