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Ryan R. Migeed

*Morris, Manning, & Martin*

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## TRADE-BASED SOLUTIONS FOR REVITALIZING POST- CONFLICT ECONOMIES

Ryan R. Migeed\*

### ABSTRACT

*International trade improves efficiency in home markets, creates new sources of demand for domestic industries, and boosts worker productivity. However, some types of trade are better than others for reviving the economies of countries emerging from internal or international armed conflicts. This note evaluates existing trade mechanisms that ostensibly help developing countries but fail to actually do so. It ultimately recommends the use of investor-state partnerships over trade-based mechanisms as the appropriate tool for improving the economies of post-conflict states. Part I evaluates a number of these existing trade mechanisms, including preferential trade agreements and the General System of Preferences. Part II raises two problems unique to post-conflict countries that must be factored into any analysis of how to best help their economies: aid dependency and resource dependency. Part III undertakes several historical comparisons to examine the effects of these measures in practice. It offers a set of brief case studies into post-war reconstruction efforts in Germany and Japan after World War II and Iraq after the First Gulf War. Finally, Part IV distills the lessons learned from these inquiries and presents “build-operate-transfer” schemes as the “ideal” way to boost tradable goods sectors in post-conflict countries and ensure that funds used to do so are directed to their purposes effectively and efficiently.*

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\* Ryan R. Migeed is an Associate in Morris, Manning, & Martin, LLP’s international trade practice. The views expressed in this note are those of the author and not necessarily those of Morris, Manning, & Martin, LLP or any of its partners. The author would like to thank the editors of the Michigan Journal of International Law, particularly Marcus Levy and Julia Shults, for their patient and diligent review of this work and their insightful contributions which have made it better.

War is nothing but what you know it to be and have  
 experienced,  
 What is said of it is not conjecture

When you stir it up, you stir up something ugly  
 When you provoke it, it will roar and rage  
 [...]
   
 And yield [] you a harvest very different from [] bushels or silver<sup>1</sup>

### INTRODUCTION

International trade is good. It promotes efficient resource allocation, creates new sources of demand for domestic industries, and boosts countries' overall productivity by introducing their companies to new inputs, among other benefits.<sup>2</sup> But, some types of trade are better than others for reviving the economies of countries emerging from internal or international armed conflicts. This note endeavors to identify the international trade and funding instruments best suited to improving the long-term growth of export industries in countries experiencing a post-conflict transition.

The existing literature discussing trade and development tends to address concerns regarding improving the economies of developing countries with only glancing attention paid to developing *post-conflict* countries.<sup>3</sup> This note seeks to add to the existing literature by focusing on

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<sup>1</sup> SINAN ANTOON, *THE BOOK OF COLLATERAL DAMAGE* 32 (Jonathan Wright trans., Yale Univ. Press 2019) (2016) (quoting Baha al-Din Zuhair, *The Mu'allaqa*).

<sup>2</sup> WORLD BANK GRP. & WORLD TRADE ORG. [WTO], *THE ROLE OF TRADE IN ENDING POVERTY* 19 (2015), <http://documents1.worldbank.org/curated/en/726971467989468997/pdf/97607-REPLACEMENT-The-Role-of-Trade-in-Ending-Poverty.pdf>.

<sup>3</sup> "Post-conflict" here refers to countries which have very recently experienced international or non-international armed conflict. The International Criminal Tribunal for the former Yugoslavia ("ICTY") has provided widely cited definitions of these terms. The International Committee of the Red Cross summarizes this jurisprudence as providing that an international armed conflict "exist[s] whenever there is *resort to armed force between two or more States*." INT'L COMM. OF THE RED CROSS, *HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW?* 5 (2008) (emphasis in original) (citing *Prosecutor v. Tadić*, Case No. IT-94-1, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>). Determining the existence of a non-international armed conflict requires assessing whether there is a "*protracted armed confrontation*[]" occurring between governmental armed forces and the forces of one or more [organized] armed groups, or between such groups arising on the territory of a State" and whether it "reach[es] a *minimum level of intensity*." *Id.* (emphasis in original) (citing *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 84, 135-170 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005)); see also Nathalie Weizmann, *The End of Armed Conflict*,

mechanisms available to boost trade specifically in post-conflict economies. Indeed, in a recent policy paper, the International Monetary Fund (“IMF”) recognized the need to tailor its engagement with “fragile and conflict-affected” states (“FCS”) to address their unique circumstances.<sup>4</sup> According to that paper, more than fifty percent of emergency financing requests from “low-income countries”<sup>5</sup> between 2010 and 2021 came from FCS.<sup>6</sup> Yet, while post-conflict states receive over half of development aid, development research focuses on economic designations without paying proportionate attention to the unique conflict-related circumstances of these states.

Of course, there is a natural overlap between this study and the existing literature on trade in developing countries more generally. “[P]ost-conflict transition countries are some of the poorest countries in the world,” and their categorization typically overlaps with other categories such as “least developed,” “fragile economies,” or “landlocked.”<sup>7</sup> For this reason, other studies of post-conflict economies have relied on data and research referring to countries in these categories and even used the descriptors “post-conflict” and “less developed” interchangeably.<sup>8</sup> This note similarly uses research and data that refer to developing countries, but it distinguishes post-conflict economies when relevant to the analysis. Importantly, this note addresses the needs of post-conflict countries; its ultimate recommendations are meant to apply once the conflict has ended and the country is seeking to rehabilitate its economy.

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*the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations Under the 2001 AUMF*, 47 COLUM. HUM. RTS. L. REV. 204, 210–13 (2016) (citing *Prosecutor v. Tadić*, Case No. IT-94-1; *Prosecutor v. Limaj*, Case No. IT-03-66-T).

<sup>4</sup> See INT’L MONETARY FUND [IMF], POL’Y PAPER NO. 2022/004, IMF STRATEGY FOR FRAGILE AND CONFLICT-AFFECTED STATES 18 (2022) [hereinafter IMF STRATEGY]. In assigning states to its “internal FCS list,” the IMF uses criteria including the presence of a United Nations or regional peacekeeping mission during the preceding three years and incorporates “those caught up in war.” See *id.* at 9. While this note avoids strict criteria to categorize “post-conflict” states, the IMF’s FCS list captures states this note contemplates, such as Afghanistan, Eritrea, Mali, and Syria. This IMF paper was published shortly after Russia invaded Ukraine, but this note presumes its conclusions would be relevant to Ukraine’s reconstruction once that armed conflict ends. *Id.*

<sup>5</sup> “Low-income countries” is an IMF designation, which defines this group as states eligible to receive support through the Poverty Reduction and Growth Trust (“PRGT”). See IMF, POL’Y PAPER NO. 2021/20, MACROECONOMIC DEVELOPMENTS AND PROSPECTS IN LOW-INCOME COUNTRIES—2021, at 1 n.1 (2021). The PRGT provides three financing mechanisms specific to eligible states: “rapid financial support,” financing based on short-term balance of payments needs due to economic shocks, and sustained medium- to long-term financing. See *Factsheet: IMF Support for Low-Income Countries*, IMF (Jan. 5, 2022), <http://www.imf.org/en/About/Factsheets/IMF-Support-for-Low-Income-Countries> (describing the PRGT mechanisms).

<sup>6</sup> IMF STRATEGY, *supra* note 4, at 14.

<sup>7</sup> Kojo Yelapaala, *Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries*, 30 NW. J. INT’L L. & BUS. 23, 51 (2010).

<sup>8</sup> See, e.g., *id.* at 33 n.39.

Determining when an armed conflict has ended can be difficult.<sup>9</sup> Others have relied on the phrase “general close of military operations,” found in article 6 of the Fourth Geneva Convention, to mark the end of a conflict.<sup>10</sup> This note prefers the phrase “cessation of active hostilities,” found in articles 118 and 133 of the Third and Fourth Geneva Conventions, respectively, because it allows for the reality that military operations may continue even after the cessation of hostilities.<sup>11</sup> As used in this note, the term “post-conflict” presumes that active hostilities have ended and the former combatants have turned their attention to reconstruction and to addressing immediate humanitarian needs. Yet, this broader definition allows for the consideration of countries engaged in counterinsurgency operations after the declared end of “major combat” operations, as in the case of Afghanistan.<sup>12</sup> There are, of course, different considerations for preserving tradable goods sectors in countries experiencing active armed conflict, which “disrupts trade, investment, and private sector development.”<sup>13</sup> However, those considerations are beyond the scope of this note and not fully addressed here, as this note is concerned with identifying the most effective means of trade-related reconstruction after a conflict.

Part I of this note evaluates the existing trade mechanisms that should be helping developing countries but are failing to do so. Part II raises two problems unique to post-conflict countries: aid dependency and resource dependency, both of which must be factored into any analysis of how best to help these countries’ economies. Part III offers a historical comparison through a set of brief case studies analyzing post-war reconstruction

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<sup>9</sup> The end of an armed conflict “often depends on the fulfilment of a combination of indicators” rather than on finding a single criterion. Julia Grignon, *The ‘General Close of Military Operations’ and the End of Armed Conflicts*, LIEBER INSTIT. (Sept. 21, 2022), <http://lieber.westpoint.edu/general-close-military-operations-end-of-armed-conflicts>.

<sup>10</sup> See, e.g., Weizmann, *supra* note 3, at 221 (citing Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]); see also Grignon, *supra* note 9. Importantly, “general close of military operations” appears only in the Fourth Geneva Convention and is not a common article across the Geneva Conventions. Thus, it applies only to international, not non-international, armed conflict. Grignon, *supra* note 9.

<sup>11</sup> See Weizmann, *supra* note 3, at 221 n.61 (citing Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva IV, *supra* note 10, art. 133); see also Grignon, *supra* note 9 (stating that the “end of [active] hostilities” language is, “in reality,” a legal term of art that marks the “beginning of applicability of some provisions” of the Geneva Conventions rather than describing when the provisions no longer apply).

<sup>12</sup> The Taliban collapsed in the face of the U.S.-led coalition’s invasion of Afghanistan in December 2001, and U.S. Defense Secretary Donald Rumsfeld told reporters on May 1, 2003 that coalition forces had transitioned from “major combat” to “a period of stability and stabilization and reconstruction activities.” *1999-2021: The U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELS., <http://www.cfr.org/timeline/us-war-afghanistan> (last visited Nov. 27, 2022). Yet, coalition forces would continue to battle armed insurgents until U.S. President Joe Biden withdrew U.S. forces in September 2021. *Id.*

<sup>13</sup> IMF STRATEGY, *supra* note 4, at 18; see, e.g., INT’L COMM. OF THE RED CROSS, BUSINESS AND INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW (2020), [http://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0882.pdf](http://www.icrc.org/en/doc/assets/files/other/icrc_002_0882.pdf).

efforts in (A) Germany and Japan after World War II and (B) Iraq after the First Gulf War. Finally, Part IV distills the lessons learned from these inquiries and proposes build-operate-transfer (“BOT”) contracts as an ideal way to boost the tradable goods sectors of post-conflict countries and to ensure that funds used to do so are directed to their purposes effectively and efficiently.

#### I. “GREED CAN FUEL PEACE”<sup>14</sup>: TRADE IS THE BEST TOOL FOR POST-CONFLICT RECONSTRUCTION, BUT WHAT TYPES OF TRADE?

Discussions of modern trade policy typically begin with the end of World War II. The negotiators of the post-war Bretton Woods institutions and the General Agreement on Tariffs and Trade (“GATT”) “believed that the trade wars of the 1930’s...had prolonged the [Great Depression], thereby creating an atmosphere favorable to the outbreak of World War [Two].”<sup>15</sup> The negotiators believed that trade would result not only in “economic well-being” but in “better relations among nations.”<sup>16</sup> Trade remains central both to reinvigorating a post-conflict economy and to “promoting peace and security,” as highlighted by the research of the World Trade Organization’s (“WTO”) Trade for Peace Programme.<sup>17</sup> Indeed, a paper published by the Organization for Economic Co-operation and Development (“OECD”) notes that “many fragile states have long been members of the WTO.”<sup>18</sup> As such, a discussion about the trade tools available to boost these states’ economies cannot ignore WTO rules.

However, when it comes to reviving the economies of post-conflict countries, some types of trade are better suited than others. What follows is an evaluation of three mechanisms ostensibly designed to assist the economies of developing countries: preferential trade agreements (“PTAs”), the GATT’s Generalized System of Preferences (“GSP”), and foreign direct investment (“FDI”). These mechanisms were chosen for their widespread (and growing) use, and their resulting impact—or, at least, the impact they were designed to have. This conversation analyzes how each mechanism ultimately fails to create significant trade growth for post-conflict countries.

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<sup>14</sup> Nalaka Senaratne, *Now What? Coping Strategies for Post-Conflict Countries*, 18 CURRENTS: INT’L TRADE L.J. 58, 61 (2010).

<sup>15</sup> William Davey, *The World Trade Organization: A Brief Introduction* (2003) (manuscript), reprinted in JOOST H.B. PAUWELYN, ANDREW T. GUZMAN, & JENNIFER A. HILLMAN, INTERNATIONAL TRADE LAW 87, 88 (3d ed. 2016).

<sup>16</sup> *Id.*

<sup>17</sup> See Senaratne, *supra* note 14, at 60; *Trade for Peace Programme*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/acc\\_e/tradeforpeace\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/tradeforpeace_e.htm) (last visited Feb. 23, 2023) (“The goal of the Trade for Peace Programme is to assist countries in transitioning from fragility or conflict to stability and economic well-being.”). The program “grew out of” the eleventh WTO Ministerial Conference in Buenos Aires in December 2017 with the purpose of “facilitat[ing] the integration of fragile and conflict-affected economies into the multilateral trading system.” *Id.*

<sup>18</sup> Peter Middlebrook, *Building a ‘Fragile Consensus’: Liberalisation and State Fragility* 25 (OECD Working Paper No. 7/2012, 2012), <http://www.oecd-ilibrary.org/docserver/5k49dfg07sxx-en.pdf?expires=1669166232>.

A. *Regional Trade Agreements among Developing Countries Are Preferred to “Asymmetrical” Agreements with Developed Countries, But Ultimately Insufficient in Themselves*

The first of these three trade mechanisms analyzed for their impact on post-conflict economies is the PTA, a mechanism that has proliferated since the 1990s.<sup>19</sup> Most commonly, PTAs take the form of free trade agreements in which duties and other restrictions on trade are eliminated on “substantially all” trade between the parties to the agreement.<sup>20</sup> While such agreements are compatible with the GATT, the formation of a free trade area must not result in an increase in a party’s previously-agreed-to tariffs under the GATT.<sup>21</sup> Some PTAs, such as those negotiated under the Cotonou Agreement,<sup>22</sup> have been created with the express purpose of fighting poverty and aiding the sustainable development of developing countries under the belief that access to developed markets is sufficient to boost the developing countries’ tradable goods sectors.<sup>23</sup> However, as discussed below, analyses of PTAs between developed and developing countries have exposed their shortcomings in promoting development.

In the 1970s, the European Communities (the forerunner to the European Union) negotiated a series of trade preferences with former European colonies in Africa, the Caribbean, and the Pacific (“ACP”) in a trade agreement known as the Lomé Convention.<sup>24</sup> In acceding to the WTO, the European Communities received a waiver (the “Lomé Waiver”) from obligations under GATT article I, the Most-Favored Nation (“MFN”) provision, which requires contracting parties to give the same tariff treatment to all other contracting parties.<sup>25</sup> As a result of the waiver, GATT article I did not apply to the European Communities in relation to its trade with ACP countries. Thus, the waiver allowed the European Communities to impose lower tariffs on goods, such as bananas, from

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<sup>19</sup> James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421, 427 (2011).

<sup>20</sup> General Agreement on Tariffs and Trade art. XXIV(8)(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>21</sup> *Id.* art. XXIV(5)(b). This discussion presumes that the states being discussed are WTO Members and thus, must comply with these GATT provisions. For a full list of WTO Members, see *Members and Observers*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Nov. 22, 2022).

<sup>22</sup> The Cotonou Agreement, an “overarching framework for EU relations with African, Caribbean, and Pacific countries,” is the successor to the Lomé Convention, discussed in more detail later in this part. See Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States, of the One Part, and the European Community and its Member States, of the Other Part, June 23, 2000, 2000 O.J. (L 317) 3 [hereinafter Cotonou Agreement].

<sup>23</sup> Danielle Robertson, *EU-ACP Economic Partnership Agreements: Modern Colonialism Disguised in Violation of the WTO*, 50 VAND. J. TRANSNAT’L L. 463, 484 (2017).

<sup>24</sup> PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 334–35; see also Robertson, *supra* note 23, at 474, 480–84.

<sup>25</sup> GATT, *supra* note 20, art. I(1).

former colonies.<sup>26</sup> After the expiration of the Lomé Waiver, the European Communities began to negotiate a series of PTAs with ACP countries under the Cotonou Agreement, to bring such trade preferences into compliance with WTO rules.<sup>27</sup>

The purported intent of Europe's PTAs with ACP countries was to provide developing countries with flexibility to contract around the trade obligations that can be onerous for less-developed economies.<sup>28</sup> However, Europe's PTAs with ACP countries have been criticized by scholars and even some governments of the so-called beneficiary states as existing "primarily for the benefit of the European Union and not that of the ACP countries."<sup>29</sup> The European Union ("EU") typically enters such PTAs only with countries with which it has a trade surplus.<sup>30</sup> Thus, the EU is in a position to dictate the terms of an agreement because the smaller, developing countries want their industries to have access to the EU's large market, whereas the EU market can withstand the absence of their goods.<sup>31</sup> Although these PTAs allow the EU to give preferences to imports from Member States' former colonies, the ACP countries must still fulfill their GATT tariff commitments to other Member States.<sup>32</sup> As a result, the ACP countries are required to relinquish tariffs which might protect the competitiveness of their domestic industries.<sup>33</sup> In the end, these PTAs do not necessarily provide developing countries flexibility around the GATT rules.<sup>34</sup> At most, they provide an economic benefit, if any, only to those countries which already have functioning export industries.

Although PTAs may foster new trade and business relationships between developing and developed countries, as well as open the door to more foreign investment, they simultaneously enable a strong negotiator–weak negotiator dynamic that does not exist in the multilateral forum of the WTO.<sup>35</sup> For instance, the commitments on trade in services that the EU obtained in the EU-CARIFORUM Economic Partnership Agreement

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<sup>26</sup> PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 334 (citing Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R (adopted Sept. 25, 1997) [hereinafter *EC–Bananas*]).

<sup>27</sup> See Sebastian Krapohl & Sophie Van Huut, *A Missed Opportunity for Regionalism: The Disparate Behaviour of African Countries in the EPA-Negotiations with the EU*, 42 J. EUR. INTEGRATION 565, 565–66 (2020). The Cotonou Agreement itself expired in 2020; negotiations on a successor agreement concluded in April 2021, but the final text has yet to be approved. See *Post-Cotonou Negotiations on New EU/Africa-Caribbean-Pacific Partnership Agreement Concluded*, EUR. COMM'N (Apr. 15, 2021), [http://international-partnerships.ec.europa.eu/news-and-events/news/post-cotonou-negotiations-new-euafrica-caribbean-pacific-partnership-agreement-concluded-2021-04-15\\_en](http://international-partnerships.ec.europa.eu/news-and-events/news/post-cotonou-negotiations-new-euafrica-caribbean-pacific-partnership-agreement-concluded-2021-04-15_en).

<sup>28</sup> See Elisabeth de Vos, *The Cotonou Agreement: A Case of Forced Regional Integration?*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 497, 504–07 (Gerard Kreijen, Marcel Brus, Jorris Duursma, Elisabeth de Vos, & John Dugard eds., 2002).

<sup>29</sup> Robertson, *supra* note 23, at 494; see also Krapohl & Van Huut, *supra* note 27, at 566.

<sup>30</sup> Gathii, *supra* note 19, at 437 (noting that the same is also true for PTAs negotiated by the United States).

<sup>31</sup> See *id.* at 438.

<sup>32</sup> See de Vos, *supra* note 28.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See Gathii, *supra* note 19, at 446–48; see also Robertson, *supra* note 23, at 472–73, 486.



with Caribbean states, signed in 2008, were more favorable to the EU than the concessions made by the same states in their General Agreement on Trade in Services (“GATS”) 1994 tariff schedules.<sup>36</sup> Developing countries tend to have greater bargaining power under the multilateral auspices of the WTO, where they can build “coalitions with similarly situated countries,”<sup>37</sup> which is not the case when they negotiate—even in a regional grouping—with a desirable export market such as the EU.

Developed countries have leverage in trade negotiations because of “asymmetrical” comparative advantages.<sup>38</sup> Scholars note that developed countries tend to have a comparative advantage in services, which are typically liberalized in PTAs, whereas developing countries have a comparative advantage in agriculture.<sup>39</sup> The agriculture sector has remained exempt from liberalization because developed states have refused to open agriculture to greater competition, choosing instead to grant large subsidies to their own agriculture industries. This practice has compounded the disadvantages of developing states.<sup>40</sup> Moreover, developed countries have usually made their PTA negotiations contingent on developing countries’ acceptance of concessions on elements particularly beneficial to developed economies, such as trade in services or strict protections for intellectual property.<sup>41</sup> Developing countries often accept the conditions because their economies need access to the larger external market of a developed country.<sup>42</sup>

Notwithstanding asymmetrical trade advantages between developed and developing states, regional trade agreements *among* developing countries can be beneficial where the agreements provide the contracting parties negotiating power as a unit vis-à-vis developed states and larger external markets.<sup>43</sup> Regional free trade areas or customs unions<sup>44</sup>—like the Southern African Customs Union (“SACU”) between Botswana, Lesotho, Namibia, South Africa, and Eswatini<sup>45</sup>—have allowed

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<sup>36</sup> Gathii, *supra* note 19, at 448; *see also* Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part, Dec. 16, 2007, 2008 O.J. (L 281) 1.

<sup>37</sup> Gathii, *supra* note 19, at 448.

<sup>38</sup> *Id.* at 463. “Comparative advantage” refers to countries’ tendency to “specialize in the sectors in which they perform comparatively well.” Michiel Gerritse, *Does Trade Cause Detrimental Specialization in Developing Economies? Evidence from Countries of the Suez Canal*, 152 J. DEV. ECON. 1, 1 (2021).

<sup>39</sup> Gathii, *supra* note 19, at 467.

<sup>40</sup> Davey, *supra* note 15, at 89 (noting that agriculture is one “major area of trade” that has “effectively escaped GATT disciplines”). “Reciprocal trade liberalization” is the negotiated process between countries agreeing to “open up” their domestic markets to more imports from each other. *See* Krapohl & Van Huut, *supra* note 27, at 566.

<sup>41</sup> Gathii, *supra* note 19, at 466–67.

<sup>42</sup> *See, e.g.*, Krapohl & Van Huut, *supra* note 27, at 566 (“Access to the European market is extremely important for African economies.”).

<sup>43</sup> *See id.* at 567 (“Regional groups of countries have more economic and political weight than single countries on their own, and this should increase their bargaining power . . . in interregional trade negotiations . . .”).

<sup>44</sup> The formation of a customs union, like the formation of a PTA, is governed by GATT article XXIV. *See* GATT, *supra* note 20, art. XXIV.

<sup>45</sup> Formerly called Swaziland.

developing countries to assert their preferences and even walk away from the negotiating table when necessary. For example, the SACU rejected U.S. proposals in negotiations for a free trade agreement that would have required strict protections for intellectual property and limited licensing for governmental non-commercial use.<sup>46</sup> Admittedly, Africa's regional economic communities have been less effective in trade negotiations with the EU, which has fractured regional cohesion by offering different trade preferences to different countries in the region. For example, the EU imposes no tariff on oil imports from Nigeria and concluded several bilateral trade agreements with specific African states.<sup>47</sup> Together, these policies pit African states against each other because the country benefiting from one of these bilateral agreements has no incentive to engage in regional negotiations in which trade-offs made to benefit the group could diminish its own.<sup>48</sup>

Despite some success in using regional trade agreements to collectively bargain with larger developed markets, regional trade agreements among developing countries remain insufficient to boost trade in post-conflict countries for several reasons. First, because post-conflict transition countries tend to be in small regional markets (whether measured by population or per capita income), they do not generate enough trade to transform their economies even when pooling their economies.<sup>49</sup> In fact, such regions typically “depend economically on investments from, and exports to,” larger external markets, as in the case of African regional economies and the EU.<sup>50</sup> Second, such regions may (and frequently do) “lack basic infrastructure, transportation, and telecommunications” which can effectively bring their goods to market and perpetuate a successful trading system.<sup>51</sup> Third, because their economies face the same challenges, the regional markets formed by neighboring post-conflict and developing countries are “hampered by similar inadequate infrastructural linkages.”<sup>52</sup> In other words, the sum is not greater than the parts. Regional PTAs do not make up for the lack of

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<sup>46</sup> Gathii, *supra* note 19, at 469–70. Intellectual property protections have routinely been a sticking point in trade negotiations between developed and developing countries because such intellectual property protections create financial liability for developing countries which seek to nationalize use of medical patents to mass produce generic pharmaceuticals needed to treat pervasive diseases such as HIV/AIDS. See PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 729–32.

<sup>47</sup> Krapohl & Van Huut, *supra* note 27, at 570–71, 572, 575 (noting, *inter alia*, that the EU's different trade preferences lead some African countries to lose competitiveness in relation to each other, entrenching their strengths outside a regionally negotiated PTA, and that Nigeria has refused to sign a regional PTA with the EU because its oil exports face no tariffs in the EU market); see also *Access2Markets, EPA – West Africa*, EUR. COMM'N, <http://trade.ec.europa.eu/access-to-markets/en/content/epa-west-africa> (last visited Dec. 4, 2022) (noting that the prospective EU-West Africa PTA, which includes Nigeria, will not enter into force until all negotiating states have signed it).

<sup>48</sup> See Krapohl & Van Huut, *supra* note 27.

<sup>49</sup> Yelapaala, *supra* note 7, at 51.

<sup>50</sup> Krapohl & Van Huut, *supra* note 27, at 567.

<sup>51</sup> Yelapaala, *supra* note 7, at 51.

<sup>52</sup> *Id.* at 52.

infrastructure needed to support a thriving market in tradable goods. For these reasons, developing countries are unlikely to obtain the same benefit from a regional trade agreement between themselves as they might from a more balanced PTA with a developed state.

B. *The Unfulfilled Promises and Unusable Tools of the Generalized System of Preferences*

The second trade mechanism designed to benefit developing countries and addressed here to assess its impact on post-conflict economies, is the Generalized System of Preferences. In an effort to stimulate developing economies' export industries, the GATT contracting parties created a form of waiver to exempt developed countries from certain trade requirements when trading with developing countries.<sup>53</sup> Specifically, the parties to the GATT established the Generalized System of Preferences ("GSP"), which effectively waived the MFN provision of the GATT to allow "developed contracting parties . . . to accord preferential tariff treatment to products originating in developing countries."<sup>54</sup> Although the GSP was originally designed to expire ten years after its creation in 1971, the GATT contracting parties made it permanent by adopting the Enabling Clause, which was later incorporated into the WTO treaty as part of GATT 1994.<sup>55</sup>

However, while the GSP was intended to loosen the GATT's strict lower-tariff rules to benefit less-developed countries, it is far from a panacea for the economies of post-conflict states. This is for two primary reasons. First, as a threshold matter, it is unclear who can benefit from a GSP program. Countries seeking to benefit from a GSP program must "qualify" for the preferential treatment as a "developing country" under the Enabling Clause—but "[t]here is no agreed-upon list of developing countries."<sup>56</sup> The WTO Agreement refers to "developing" and "least developed" countries, but "does not offer a formal definition of these terms."<sup>57</sup> Rather, countries self-elect as a developing country: In other words, a country "decides . . . for itself whether it qualifies as a . . . developing country."<sup>58</sup> Developed countries, which dole out the benefits of a GSP program, may dispute a country's self-election as "developing."<sup>59</sup> Notably, countries may not self-select as least developed

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<sup>53</sup> Decision on Generalized System of Preferences, L/3545 (June 25, 1971), GATT B.I.S.D. (18th Supp.), at 24 (1972).

<sup>54</sup> *Id.*

<sup>55</sup> Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 203 (1980) [hereinafter *The Enabling Clause*].

<sup>56</sup> de Vos, *supra* note 28, at 509.

<sup>57</sup> PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 740.

<sup>58</sup> de Vos, *supra* note 28, at 509; *see also* PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 740–41.

<sup>59</sup> *See* PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 740–41.

countries (“LDCs”), a category identified by the United Nations.<sup>60</sup> The Enabling Clause permits WTO Members to extend “special treatment” to “the least developed among the developing countries.”<sup>61</sup> Of course, differentiating between “developing” and “least developed” countries enables a two-tiered system of development assistance. The EU has explicitly created such a two-tiered system with its “Everything But Arms” program, which grants zero-tariff entry to the EU market for all products (except arms) from LDCs.<sup>62</sup> This two-tiered system has helped frustrate regional trade negotiations between the EU and certain regional groupings of African states, since some of those states are LDCs eligible for duty-free access to the EU and thus have no incentive to join a regional trade agreement.<sup>63</sup> For post-conflict states, this two-tiered policy could disadvantage a developing state that is rebuilding after armed conflict but does not meet the United Nations’ LDC criteria (such as Ukraine).

Second, while sympathy toward a perceived “victim” state may prevent a developed country from contesting a developing post-conflict state’s need for preferential treatment,<sup>64</sup> post-conflict states—like all developing countries—are at the mercy of “voluntarism on the part of the developed countries” with respect to the GSP.<sup>65</sup> Developed countries *choose* whether to offer a GSP program to a developing country based on their own internal policies.<sup>66</sup> The United States, for instance, has imposed a list of eligibility requirements in addition to those demanded by the WTO.<sup>67</sup> (The U.S. GSP program expired in 2020; as of this writing, lawmakers are still considering a new trade law that would reinstate the program.<sup>68</sup>) The United States’ statutory list of eligibility requirements excludes certain products from duty-free treatment and withdraws eligibility from countries that have nationalized property owned by a U.S. citizen or which afford preferential treatment to a developed country other than the United States, among other reasons.<sup>69</sup> The United States recently

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<sup>60</sup> The U.N. identifies a list of LDCs every three years based on per capita gross national income; human assets; and economic vulnerability, which is measured, *inter alia*, by factors including instability of exports. PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 743; *see also* U.N. CONF. ON TRADE & DEV., THE LEAST DEVELOPED COUNTRIES REPORT 2021, annex, tbl.1.1, U.N. Doc. UNCTAD/LDC/2021 (2021), [http://unctad.org/system/files/official-document/ldc2021\\_en.pdf](http://unctad.org/system/files/official-document/ldc2021_en.pdf).

<sup>61</sup> The Enabling Clause, *supra* note 55, ¶ 2(d).

<sup>62</sup> *See Everything But Arms (EBA)*, EUR. COMM’N, <http://trade.ec.europa.eu/access-to-markets/en/content/everything-arms-eba> (last visited Dec. 4, 2022); *see also* PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 746–47.

<sup>63</sup> *See* Krapohl & Van Huut, *supra* note 27, at 570, 573.

<sup>64</sup> *See, e.g.*, Geir Moulson, *Germany, EU Launch Work on ‘New Marshall Plan’ for Ukraine*, ASSOCIATED PRESS (Oct. 25, 2022), <http://apnews.com/article/11ussia-ukraine-germany-berlin-western-europe-business-50fa5ca7ee97eab5bfde1869d78f19ad> (describing EU leaders’ discussions of how best to direct funding to Ukraine’s post-war reconstruction).

<sup>65</sup> de Vos, *supra* note 28, at 510.

<sup>66</sup> PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 763.

<sup>67</sup> 19 U.S.C. § 2462.

<sup>68</sup> *See* Margaret Spiegelman, ‘GSP Countries’ Urge U.S. Lawmakers to Reauthorize Lapsed Program, INSIDE U.S. TRADE (Feb. 21, 2023), <http://insidetrade.com/daily-news/gsp-countries-urge-us-lawmakers-reauthorize-lapsed-program>.

<sup>69</sup> *See* 19 U.S.C. § 2463(b); 19 U.S.C. § 2462(b)(2)(C)–(D).

withdrew GSP eligibility from India and some products from Thailand based on a statutory provision that permitted withdrawal if the developing country had not “assured the United States that it [would] provide equitable and reasonable access” to its markets.<sup>70</sup> Such conditions on access to GSP benefit programs result in “unequal leverages in trade relations between developing and developed countries,”<sup>71</sup> such that developed countries can use improved trade as a bargaining chip—rather than furthering the high ideal of the post-war trade system to “better relations among nations.”<sup>72</sup>

Even when developed countries choose to offer benefits under the GSP, the Enabling Clause limits the preferential treatment that can be accorded to developing countries to “*tariff* preferences only,”<sup>73</sup> rather than other trade mechanisms which might provide more targeted help to developing post-conflict states. Thus, even though economic evidence shows that the EU’s GSP scheme “impact[s] positively on trade,” the economic impact can be marginal.<sup>74</sup> For example, even before the EU offered tariff preferences to Afghanistan under its GSP program, almost ninety-three percent of Afghan exports to the EU already received a MFN duty of zero because Afghanistan was a WTO Member.<sup>75</sup> In other words, a program designed to lower duties was inapt when those duties were already nil.

Moreover, while GSP waivers were originally meant to benefit developing countries, this benefit may be virtually nonexistent for those states bound by a Structural Adjustment Programme (“SAP”) attached to loans from the IMF or the World Bank.<sup>76</sup> Post-conflict states frequently receive loans—subject to SAPs—from these international financial

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<sup>70</sup> 19 U.S.C. § 2462(c); see Proclamation No. 9902, 84 Fed. Reg. 26,323 (May 31, 2019) (regarding India); Proclamation No. 10107, 85 Fed. Reg. 70,027 (Oct. 30, 2020) (regarding products from Thailand).

<sup>71</sup> Alex Ansong, *Creating WTO Law by Stealth: GSP Conditionalities and the EC—Tariff Preferences Case*, 14 ESTEY CTR. J. INT’L L. & TRADE POL’Y 133, 138 (2013).

<sup>72</sup> Davey, *supra* note 15, at 88.

<sup>73</sup> de Vos, *supra* note 28, at 511 (emphasis added by de Vos) (quoting Panel Report, *United States—Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, WTO Doc. DS18/R - 39S/128 (adopted June 19, 1992)).

<sup>74</sup> MICHAEL GASIOREK ET AL., CTR. FOR THE ANALYSIS OF REG’L INTEGRATION AT SUSSEX, MID-TERM EVALUATION OF THE EU’S GENERALISED SYSTEM OF PREFERENCES (2010), reprinted in PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 765.

<sup>75</sup> *Id.* at 766. As a WTO member, Afghanistan is entitled to MFN treatment when trading with another WTO member. See *Members and Observers*, *supra* note 21.

<sup>76</sup> See de Vos, *supra* note 28, at 506, 515–16. An SAP is “a set of economic reforms that a country must adhere to in order to secure a loan from the [IMF] and/or the World Bank,” typically including austerity measures such as “reducing government spending.” Clay Halton, *What Are Structural Adjustment Programs (SAPs)?*, INVESTOPEDIA (Sept. 25, 2021), <http://www.investopedia.com/terms/s/structural-adjustment.asp>. For a fuller analysis and critique of SAPs, see Brian C. Stuart, *Structural Adjustment and the Role of the IMF*, IMF ELIBRARY, in response Akbar Noman, Comments, <http://www.elibrary.imf.org/display/book/9781557753021/ch05.xml> (last visited Apr. 6, 2023).

institutions.<sup>77</sup> IMF loans are contingent on the debtor state carrying out a number of fiscal policies included in the SAPs.<sup>78</sup> Although SAPs are negotiated based on the individual economic conditions of the debtor states, Professor Elisabeth de Vos notes that the “elimination of restrictions on import and export” is a “pillar . . . at the base of each SAP.”<sup>79</sup> In practical terms, these conditions on IMF loans strip away much of the benefit from a GSP program because they require states to reduce or eliminate trade barriers (including tariffs), which could protect domestic industries recovering from conflict.<sup>80</sup>

At the same time, IMF requirements may lead countries to adopt fiscal policies that violate GATT rules, allowing them to be “punished” through the GATT/WTO dispute resolution system, which permits WTO Members to suspend their obligations to a member found in violation of GATT rules.<sup>81</sup> Although the WTO and the IMF have committed to cooperate in order to ensure “coherence” between trade and fiscal policy, Professor Robert Howse has argued that IMF policies often lack “sensitivity” to the “constraints” of the trading system, foreclosing “trading-system-friendly” policy options.<sup>82</sup> Yet, the GATT/WTO tends to act as an “enforcer for the IMF” even when the two have dissonant rules for promoting development.<sup>83</sup> “[W]here a country disagrees with the [IMF] on the best course for resolving a financial crisis,” Howse explains, the country’s chosen policy may violate GATT rules, which would allow other WTO Members to “punish” the country with “retaliatory” measures.<sup>84</sup> Due to the “economic dire straits of the debtor State, the choice not to conform with the IMF prescription is only a theoretical option.”<sup>85</sup> The debtor states, especially those recovering from conflict,

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<sup>77</sup> “Between January 2010 and December 2021, the IMF supported 28 [fragile and conflict-affected states] with 88 programs and financing totaling \$20 billion.” IMF STRATEGY, *supra* note 4, at 14. More than 50 percent of emergency financing requests from “low-income countries” (an IMF designation) came from fragile and conflict-affected states during that time. *Id.*

<sup>78</sup> *See de Vos, supra* note 28, at 516.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), art. 22.

<sup>82</sup> Robert Howse, *Fragmentation and Utopia: Towards an Equitable Integration of Finance, Trade, and Sustainable Development*, in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 432-33 (Antonio Cassese, ed. 2012) (citing Agreement Between the International Monetary Fund and the World Trade Organization, Dec. 9, 1996, *reprinted in* SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND 428, 428 (Twenty-fifth Issue, 2000)).

<sup>83</sup> *Id.* at 436; *see also id.* at 436-39 (describing Appellate Body decisions disagreeing with states’ arguments that policies required by the IMF were justified even if inconsistent with GATT rules—essentially finding coherence where there was none).

<sup>84</sup> *Id.* at 435-36.

<sup>85</sup> *de Vos, supra* note 28, at 516; *see also* Howse, *supra*, at 437 (asserting that the fact that the IMF has not requested a specific policy does not mean that a state’s implementation of that policy was not a result of requirements imposed by the IMF).

need the influx of capital the IMF offers and readily accept these arrangements even with their onerous conditions.<sup>86</sup>

As a result of these policy clashes and other constraints, there is serious doubt that current GSP programs can have *any* positive impact on developing countries.<sup>87</sup> Because the programs are discretionary on the part of the granting state, they are unpredictable and prone to policy changes in that state.<sup>88</sup> Such unpredictability hinders export industries in the grantee state, which must forecast their business needs based on reliable projections of capital.<sup>89</sup> GSP programs are also constrained by rules of origin, which require that a certain percentage of the “inputs” for an end product (whether labor or component parts) be added in the countries benefitting from the program.<sup>90</sup> Paradoxically, rules of origin can have the effect of limiting what a GSP beneficiary country can export—despite the program’s purpose of boosting that country’s exports.<sup>91</sup>

Thus, the Enabling Clause cannot be the basis for a policy designed to benefit exclusively *post-conflict* transition countries for several reasons. First, the Enabling Clause, as it was initially designed, required the grantor state to uphold non-discrimination between developing countries, so a granting state could not give a special tariff preference to *post-conflict* developing countries that it did not also give to other developing countries.<sup>92</sup> The WTO Appellate Body reinterpreted this rule in the *European Communities—Tariff Preferences* case, finding that the Enabling Clause “authoriz[es] preference-granting countries to ‘respond positively’ to ‘needs’ that are *not* necessarily common or shared by all developing countries,” meaning that GSP programs could “treat[] different developing-country beneficiaries differently.”<sup>93</sup> The *European Communities—Tariff Preferences* case could therefore provide a basis for applying a GSP program specifically to post-conflict states—provided, however, that the granting state applied objective criteria to the program.<sup>94</sup> These objective criteria would require that the granting state give “identical treatment . . . to all similarly-situated [*i.e.*, all post-conflict] GSP

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<sup>86</sup> See de Vos, *supra* note 28, at 516.

<sup>87</sup> PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 763–64.

<sup>88</sup> *Id.* at 764; see also text accompanying *supra* note 68 (explaining that the U.S. GSP program expired in 2020 and Congress is still considering its renewal).

<sup>89</sup> See generally Bruce Shaw, Ariel Babcock, & Victoria Tellez, *Building Long-Term Value: A Blue Print for CFOs*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 21, 2020), <http://corpgov.law.harvard.edu/2020/01/21/building-long-term-value-a-blue-print-for-cfos>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see also Robertson, *supra* note 23, at 490.

<sup>92</sup> See de Vos, *supra* note 28, at 514.

<sup>93</sup> Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 162, WT/DS246/AB/R (adopted Apr. 20, 2004) (emphasis in original) [hereinafter *EC—Tariff Preferences*].

<sup>94</sup> See Ansong, *supra* note 71, at 137.

beneficiaries.”<sup>95</sup> Even if a state were able to design a GSP program to benefit post-conflict states that was compliant with the dictates of the *European Communities—Tariff Preferences* case, developed countries could still restrict access to such benefit programs by applying conditions to them, as discussed above.

Therefore, to truly benefit beneficiary countries, including post-conflict states, preferential treatment programs should be binding on developed states rather than unilaterally volunteered.<sup>96</sup> In practice, this would require the GSP programs to be negotiated under the multilateral forum of the WTO.<sup>97</sup> Ideally, such negotiations would remake GSP programs without the strings of various grantor states attached, and the programs would apply to *all* of a beneficiary state’s trade, rather than exempting only certain exports.<sup>98</sup> A new WTO waiver specifically to aid post-conflict transition countries—perhaps based on a new WTO “post-conflict” designation—would help to close the gaps in the current construction and interpretation of the Enabling Clause.

Finally, a WTO-based trade benefit designed to help post-conflict states must do more than lower tariffs which, as the case of Afghanistan illustrates, might be an inadequate or inapplicable benefit.<sup>99</sup> As Professor Frank Garcia has argued, least developed countries’ access to foreign markets is the “key variable” in “address[ing] inequalities through trade law.”<sup>100</sup> Thus, preferential treatment in the form of enhanced market access for post-conflict countries could be more beneficial than the Enabling Clause language which limits the available benefits to tariff relief. Market access includes more than bringing goods into a market; it can also refer to the movement of natural persons across borders to

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<sup>95</sup> *EC—Tariff Preferences*, *supra* note 93, ¶ 173. It is hard to imagine a developed country offering the same trade benefits to both parties to an international conflict when, for geopolitical and other policy reasons, the country likely supported only one of the parties in the conflict. Thus, for a developed country, the risk in designing a GSP program for post-conflict states is that it would have to offer the program to every state that could meet the program’s criteria, or else open itself to WTO disputes from qualified states claiming the benefit—including, potentially, the aggressor state in a conflict. The grantor state could narrow its criteria to avoid these challenges (such as by denying the program’s benefits to a state that violated the UN Charter’s prohibition on the use of force, in art. 2(4)) but might then preclude the effectiveness of the benefit when various exceptions to the rule became relevant.

<sup>96</sup> See, e.g., Ansong, *supra* note 71, at 138–40; Frank Garcia, *Global Justice and the Bretton Woods Institutions*, 10 J. INT’L ECON.

L. 461 (2007), *reprinted in* PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 771–72.

<sup>97</sup> See Ansong, *supra* note 71, at 138. Although WTO Members committed, in the “Doha Declaration,” to improving measures designed to assist least-developed countries—and to consider making additional, more precise measures which might be binding—this has not resulted in a binding amendment to the GATT, aimed either at assisting post-conflict states precisely or developing states more broadly. See World Trade Org., Ministerial Declaration of 14 November 2001, ¶¶ 42–44, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002).

<sup>98</sup> Garcia, *supra* note 96, at 772.

<sup>99</sup> See *supra* note 74 and accompanying discussion.

<sup>100</sup> Garcia, *supra* note 96, at 771–72.



provide services abroad, which implicates the GATS.<sup>101</sup> However, allowing *more* protection for domestic markets—contrary to the lower-tariff goals of the WTO—could also aid developing countries’ fledgling export industries.<sup>102</sup> Without alterations to how GSP programs are used, they cannot currently “be relied on as a development tool.”<sup>103</sup>

C. *Foreign Direct Investment, Without Strategic Attention to States’  
Development Goals, May Provide No Benefit to—and Even  
Harm—Post-Conflict Countries*

FDI,<sup>104</sup> a private activity which can be kindled by trade agreements between states, is the third means to aid the economies of post-conflict states analyzed here. Indeed, more attention should be paid to how instruments other than tariff-reductions can “expand the benefit of existing trade rules.”<sup>105</sup> As such, “the topics of investment and trade promotion” can, and should, be integrated.<sup>106</sup> FDI has been found to “play[] a key role in long term stability of post-conflict nations.”<sup>107</sup> At its best, FDI “create[s] job opportunities, . . . supplies capital to further increase the productive capacity of the host state[, and] provid[es] access to the international market.”<sup>108</sup> In addition, FDI “can upgrade national infrastructures [and] introduce new technology.”<sup>109</sup> In this way, the “greed” of profit-motivated foreign investors “can fuel peace.”<sup>110</sup> But FDI comes with both benefits and drawbacks and should be treated as a “supplement to foreign aid” rather than the end in itself.<sup>111</sup>

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<sup>101</sup> See Evita Schmiege, *EU and Africa: Investment, Trade, Development: What a Post-Cotonou Agreement with the ACP States Can Achieve*, SWP COMMENT, Jan. 2019, at 4–5 (Meredith Dale trans.), [http://www.swp-berlin.org/publications/products/comments/2019C01\\_scm.pdf](http://www.swp-berlin.org/publications/products/comments/2019C01_scm.pdf) (contemplating a scenario in which ACP countries negotiate market access to provide services “in return for concessions in the area of preventing migration”); see also General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 192–204 [hereinafter GATS]. Migration—specifically, formal agreement on the return of nationals who have illegally emigrated—is a perennial “crucial issue” in the EU’s negotiations with countries of the Global South. Federico Petrangeli, *Does the EU-ACP Agreement Still Make Sense for Africa?*, ITALIAN INST. INT’L POL. STUD. (Jan. 17, 2020), <http://www.ispionline.it/en/publicazione/does-eu-acp-agreement-still-make-sense-africa-24859>.

<sup>102</sup> See, e.g., Krapohl & Van Huut, *supra* note 27, at 568.

<sup>103</sup> Ansong, *supra* note 71, at 140.

<sup>104</sup> FDI “is a type of investment that involves the injection of foreign funds into an enterprise that operates in a different country of origin from the investor.” Middlebrook, *supra* note 18, at 27 (quoting *Definition of Foreign Direct Investment (FDI)*, ECON. WATCH (last updated May 18, 2021), <http://www.economywatch.com/definition-of-foreign-direct-investment-fdi>).

<sup>105</sup> Schmiege, *supra* note 101, at 2, 7.

<sup>106</sup> *Id.* at 7; see also Karen B. Brown, *Tax Incentives and Sub-Saharan Africa*, 48 PEPP. L. REV. 995, 995 (2021) (advocating for developed countries to use their tax codes to incentivize infrastructure investments in developing countries).

<sup>107</sup> Senaratne, *supra* note 14, at 60; see also Schmiege, *supra* note 101, at 2 (“Foreign direct investment is regarded as a decisive factor for securing growth and employment.”).

<sup>108</sup> Senaratne, *supra* note 14, at 61.

<sup>109</sup> U.N. High Comm’r for Hum. Rts., *Liberalization of Trade in Services and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002) [hereinafter *Liberalization of Trade in Services*].

<sup>110</sup> Senaratne, *supra* note 14, at 61.

<sup>111</sup> *Id.*

Without strategic direction, FDI not only fails to benefit post-conflict countries, but it can even harm their economies in the long run. FDI on its own, without the host country's participation to regulate the terms of foreign investment and integrate that investment into the country's industrial strategy, is insufficient to boost growth in post-conflict countries.<sup>112</sup> Indeed, the OECD's "Guidelines for Multinational Enterprises" urge multinational enterprises ("MNEs") to "take fully into account established policies in the countries in which they operate," including those policies regarding "economic progress."<sup>113</sup> The OECD has also encouraged MNEs to "give due consideration" to "the creation of employment opportunities" and, specifically, the "transfer of technology."<sup>114</sup> A 2002 report of the U.N. High Commissioner for Human Rights warns that "FDI can also have undesired effects" on wealth equality "where there is insufficient regulation to protect human rights," including "[a]n overemphasis on commercial objectives" and "[a]n increasingly large and powerful private sector that can . . . subvert[] regulatory systems through political pressure or the co-opting of regulators."<sup>115</sup> Such "economic stress" and political instability can itself stoke conflict.<sup>116</sup>

Thus, to ensure the long-term economic success of post-conflict transition countries, FDI must come with more than financial investment; it must include a transfer of technology and skills. "It is often assumed," according to Professor Kojo Yelapaala, "that FDI will . . . induce the transfer of technology and much-needed know-how to the host country."<sup>117</sup> But, to ensure these transfers happen, Yelapaala argues that governments of post-conflict transition countries must *require* these transfers in the contracts they negotiate with foreign investors or the bilateral investment treaties they negotiate with other states.<sup>118</sup> As Professor Stanimir Alexandrov, a longtime arbitrator in investor-state disputes, has explained, "[f]oreign investments are often made through a contract between a foreign investor and an entity or instrumentality of the

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<sup>112</sup> Middlebrook, *supra* note 18, at 27; *see also* Yelapaala, *supra* note 7, at 52.

<sup>113</sup> Organization for Economic Co-operation and Development [OECD], *Declaration on International Investment and Multinational Enterprises*, Annex 1, at 8–9, OECD Doc. OECD/LEGAL/0144 (May 24, 2011). The OECD's "Guidelines for Multinational Enterprises" have been reissued and periodically revised since their original landmark publication in 1976.

<sup>114</sup> OECD, *Declaration on International Investment and Multinational Enterprises*, at 13 (June 21, 1976), <http://www.oecd.org/corporate/mne/50024800.pdf>.

<sup>115</sup> *Liberalization of Trade in Services*, *supra* note 109.

<sup>116</sup> *See* Adam Burke, *Where Will War Break out Next? Predicting Violent Conflict*, THE ASIA FOUND. (Oct. 26, 2022), <http://asiafoundation.org/2022/10/26/where-will-war-break-out-next-predicting-violent-conflict/> ("Uneven access to justice, business opportunities, and official positions fuels resentment as privileged elites take advantage of crony connections, family ties, and financial clout to act with impunity and evade the law.")

<sup>117</sup> Yelapaala, *supra* note 7, at 26. Kojo Yelapaala served as a state attorney in the Justice Department of Ghana before teaching law at the University of the Pacific McGeorge School of Law.

<sup>118</sup> *See id.* at 26, 43.

host State.”<sup>119</sup> In contrast to investor-state contracts, a bilateral investment treaty is negotiated between two states to secure protections for each state’s investors operating in the other state.<sup>120</sup> Bilateral treaties are often the means used to enforce investor-state contracts because “protection of such investments is consistent with the object and purpose of investment treaties.”<sup>121</sup>

Post-conflict states negotiating FDI schemes with foreign investors must make skills and technology transfer a priority in negotiating these investor-state contracts because MNEs do not have economic development as their “primary objective.”<sup>122</sup> Rather, MNEs are structured to pursue a “corporate strategic vision”—to use subsidiaries to “create their own internal markets [that] circumvent various market imperfections.”<sup>123</sup> MNEs follow their own market needs, relying on “outsourcing” (*i.e.*, using foreign labor to staff local projects) and “delocalization” (*i.e.*, importing necessary materials rather than fostering local markets) as a matter of course.<sup>124</sup> Left to “pure market forces,” the characteristics that attract investors to post-conflict countries—such as cheap labor and a welcoming government ready to cut bureaucratic red tape—can immediately disappear when a similarly situated country appears more profitable as a place to relocate operations.<sup>125</sup>

## II. THE RISK OF “AID DEPENDENCY”<sup>126</sup> AND OTHER PROBLEMS UNIQUE TO POST-CONFLICT RECONSTRUCTION

### A. *Aid Dependency and a Two-Stage Analysis of Post-Conflict Aid*

Similar to PTAs, GSP programs, and FDI analyzed in Part I, research has consistently shown that long-term foreign development aid does not achieve long-term economic growth in recipient countries.<sup>127</sup> Foreign humanitarian aid tends not to produce growth, in part, because it is more

<sup>119</sup> Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 J. WORLD INV. & TRADE 555, 555 (2004).

<sup>120</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 13 (2d ed. 2012). A state’s breach of its contractual obligations to a foreign investor may rise to a breach of a bilateral investment treaty with the investor’s home state, providing grounds for the investor to seek compensation from the state in investor-state arbitration. See Alexandrov, *supra* note 119, at 560. The treaty’s terms are interpreted in light of rules of customary international law regarding states’ obligations. See *id.* (explaining that a state’s breach of contract “may constitute a violation of the international law standard of fair and equitable treatment”); see also DOLZER & SCHREUER, *supra* note 120, at 13, 17.

<sup>121</sup> See Alexandrov, *supra* note 119.

<sup>122</sup> Yelapaala, *supra* note 7, at 52.

<sup>123</sup> *Id.* at 38, 40.

<sup>124</sup> *Id.* at 40.

<sup>125</sup> *Id.* at 52.

<sup>126</sup> Dimitri G. Demekas, Jimmy McHugh, & Theodora Kosma, *The Economics of Post Conflict Aid* 21–22 (IMF, Working Paper No. WP/02/198, 2002) [hereinafter IMF Working Paper].

<sup>127</sup> *Id.* at 5–7; see also Yelapaala, *supra* note 7, at 83–84 (citing, *inter alia*, WILLIAM EASTERLY, *THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 38–40, 50 (2006)).

likely to be consumed than invested.<sup>128</sup> Additionally, “[u]ncertainty about aid disbursements” and the general “volatility of aid flows” can also cause recipients to spend aid dollars on shorter-term needs rather than investing in long-term growth—which ultimately “hinders growth.”<sup>129</sup>

With respect to post-conflict economies, however, two types of aid should be distinguished from each other: immediate humanitarian assistance, such as providing shelter to internally displaced persons; and reconstruction aid, such as rebuilding destroyed infrastructure and communications networks.<sup>130</sup> The authors of a 2002 IMF working paper separated these two types of aid to analyze their independent effects on post-conflict economies. The IMF researchers ultimately concluded that post-conflict aid flows should be “sequenced” so that humanitarian aid is used in the “immediate post conflict phase” (when the country’s export industries have “virtually stopped” anyway) followed by prioritized “infrastructure rehabilitation in areas that will benefit first and foremost tradable activities.”<sup>131</sup>

Reconstruction aid, as identified by the IMF paper authors, includes line items such as “infrastructure,” “private sector development,” and “vocational education and training”<sup>132</sup>—precisely the types of skills transfer that are also beneficial byproducts of effective long-term FDI.<sup>133</sup> Importantly, reconstruction aid also includes “institution-building efforts, such as re-establishing or reinforcing the basic legal framework for private sector development . . . [and] opening regional trade links.”<sup>134</sup>

Humanitarian aid, by contrast, is donors’ response to “the humanitarian emergency that often follows violent conflict.”<sup>135</sup> It “is intended to support basic consumption needs,” unlike reconstruction aid which “directly boost[s] productivity . . . [and] may indeed result in a sustained expansion of the tradable goods sector.”<sup>136</sup> Reconstruction aid can have a longer-term impact on post-conflict economic growth in part because it “influenc[es] consumption decisions” rather than simply contributing to an economy’s consumption.<sup>137</sup> In short, humanitarian aid does not contribute to long-term growth of domestic industries because the capital is consumed rather than accumulated.<sup>138</sup>

As the IMF paper warns, without a transition from humanitarian to reconstruction aid, “protracted disbursement of humanitarian aid . . . risks creating aid dependency.”<sup>139</sup> The paper points to refugee camps as an

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<sup>128</sup> IMF Working Paper, *supra* note 126, at 6.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 3.

<sup>131</sup> *Id.* at 20–22.

<sup>132</sup> *Id.* at 25 tbl.3 (categorizing the elements of foreign aid flows to southeastern Europe following the conflict that resulted from the breakup of the former Yugoslavia).

<sup>133</sup> *See supra* Part I.C.

<sup>134</sup> IMF Working Paper, *supra* note 126, at 4.

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *Id.* at 20–21.

<sup>137</sup> *Id.* at 21.

<sup>138</sup> *See id.*

<sup>139</sup> *Id.* at 21–22.

example of a “counterproductive” use of aid dollars because the camps’ “long-term residents” have no incentive to save and invest funds.<sup>140</sup> Of course, the problem is not merely one of incentive: Refugee camps are not known for their thriving banking sectors, which typically provide capital to startup enterprises. This unvarnished economic analysis should not be taken as an argument to forego humanitarian aid, but rather, as a recommendation to “sequence” aid so that funds are used strategically in the long-term interests of the recipients. In other words, humanitarian should be prioritized first and then the priority should shift to reconstruction aid, with the goal that the local economy—supported by reconstruction aid—can begin to cover the costs of ongoing humanitarian needs. When post-conflict aid is channeled to humanitarian purposes *to the exclusion of* reconstruction aid, there is no possibility of using funds—even if they could be saved at a reasonable rate of return—for entrepreneurial pursuits in the tradable goods sector.

Notably, GSP programs and PTAs can also cause developing countries to acquire dependencies on the trade preferences in these instruments, such as the EU’s preferences for bananas from ACP countries, ultimately “limiting [these countries’] liberalization in the global market.”<sup>141</sup> Worse still, these countries are then “compelled to accept aid and loans because of their continued . . . economic vulnerability and their urgent short-term needs.”<sup>142</sup> Because the trade preferences are based on the needs of developed markets like the EU, the very preferences purportedly designed to help developing countries grow their export capacity actually entrench their comparative advantage in sectors like agriculture<sup>143</sup>—placing these less-developed countries in a perpetual subordinate position to developed states.<sup>144</sup> For instance, the EU’s preferential tariff treatment on bananas from ACP countries (upheld by a WTO panel because of the Lomé Waiver, despite violating the MFN provision of GATT article I:1)<sup>145</sup> has “largely contributed to making these countries dangerously dependent on one crop, rather than diversified in other sectors.”<sup>146</sup>

The goal of aid flow sequencing, as the IMF paper suggests, is to phase out humanitarian aid once a “target level of consumption” is reached so that the aid avoids a harmful effect on long-term economic development.<sup>147</sup> Post-conflict aid is unique because it typically comes in quick, short-term bursts, when donor countries’ attention is focused on

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<sup>140</sup> *Id.*

<sup>141</sup> Robertson, *supra* note 23, at 490.

<sup>142</sup> *Id.* at 491 (quoting Nsongurua J. Udombana, *Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union*, 40 *TEX. INT’L L.J.* 59, 100–01 (2004)).

<sup>143</sup> Indeed, some evidence shows that trade liberalization stunts the growth of “more complex sectors” in developing countries as they try to press their comparative advantage in agriculture—ultimately “slowing down growth in the long run.” Gerritse, *supra* note 38, at 2.

<sup>144</sup> See Robertson, *supra* note 23, at 491 (quoting Udombana, *supra* note 142, at 100–01).

<sup>145</sup> See *EC—Bananas*, *supra* note 26.

<sup>146</sup> PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 334.

<sup>147</sup> IMF Working Paper, *supra* note 126, at 21.

rehabilitating a country coming out of armed conflict.<sup>148</sup> The funding usually floods in during the immediate post-conflict years and then sharply drops off “once the emergency phase is over.”<sup>149</sup> The IMF working paper, in analyzing post-conflict aid to Bosnia and Herzegovina and Rwanda, noted that in each case, the aid rose sharply then declined within the course of about a five-year period.<sup>150</sup> The different impacts of post-conflict aid flows and general long-term development aid, however, demonstrate that short-term post-conflict reconstruction aid can have a more profound and positive impact on the long-term economic health of post-conflict countries than long-term subsistence-level humanitarian aid that fosters aid dependency.<sup>151</sup> Thus, post-conflict reconstruction planning must take advantage of this five-year cycle, directing aid first to humanitarian needs and then to the reconstruction phase, all within a five-year period.

#### B. *Resource Dependency and the Need to Process Raw Materials Locally*

Another form of dependency unique to the experiences of developing and fragile countries is the “natural resource curse,”<sup>152</sup> which refers to the heavy dependency of these economies on a small number of primary exports.<sup>153</sup> Post-conflict states stricken with this curse include Iraq and Angola (both reliant on oil exports) and Sierra Leone (reliant on diamond exports).<sup>154</sup> Although an abundance of an exportable resource may seem like a blessing, it can lead to economic woes. An economy focused on the cultivation and exportation of a single resource can crowd out other industries at the expense of a country’s economic diversification.

In addition, resource-rich post-conflict states often fall victim to the corruption of political elites, who enrich themselves through physical control of the resources. Compounding the problem, these political elites have no incentive to diversify the country’s economy since their wealth is directly tied to the natural resource industry.<sup>155</sup> Indeed, control over the resource may even be the cause of a post-conflict country’s conflict in the first place. For instance, in Sierra Leone, control of the country’s diamond mines enabled rebels to fund their violent resistance to the national

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<sup>148</sup> *See id.* at 3.

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 3, 23 (reporting that aid to Bosnia and Herzegovina was 73.6 million Euros, nearly 75 percent of GDP, in 1994 and dropped to 24.2 million Euros, less than 25 percent of GDP, in 1999; for Rwanda, aid fell dramatically from 94.7 million Euros, 95 percent of GDP, in 1994 to 19.1 million Euros, less than 20 percent of GDP, in 1999).

<sup>151</sup> *See infra* Part III.

<sup>152</sup> Jeffrey Frankel, *The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions* 3 (Ctr. for Int’l Dev. at Harv. Univ., Working Paper No. 233, Apr. 2012), <http://www.hks.harvard.edu/sites/default/files/centers/cid/files/publications/faculty-working-papers/233.pdf>.

<sup>153</sup> *See* Middlebrook, *supra* note 18, at 24.

<sup>154</sup> *Id.*

<sup>155</sup> Frankel, *supra* note 152, at 3.

government.<sup>156</sup> Similarly, dramatic price swings in the formal economy can incentivize illicit activities, as observed in the opiate trade in Afghanistan, which provides a relatively more stable income than fluctuating commodities.<sup>157</sup> Worse still, fluctuations in the prices of natural resources in the global commodities markets lead these countries to contract “Dutch disease”—a form of economic captivity to the volatility of their most abundant and valuable resources.<sup>158</sup> As noted, many fragile states are members of the WTO, meaning that they must uphold their treaty obligations—such as low tariff commitments—even if their economy is disproportionately impacted by a commodity market.<sup>159</sup>

To avoid the negative effects of a resource-dependent economy on the growth of local industries, the governments of affected states must also ensure that the resource is not merely extracted by a foreign investor. For their long-term economic health, Professor Yelapaala argues that post-conflict countries must “eliminat[e] the export of raw materials without some local processing.”<sup>160</sup> According to Yelapaala, “[s]uch a policy will be perhaps the single most important policy decision made” because it will “compel the adoption of several policies essential to local . . . economic development in general.”<sup>161</sup> When countries with valuable natural resources refuse to export the natural resources in raw form, they will prevent so-called “scoop and ship” operations, whereby foreign investors simply buy up the resources and sell them on the open markets.<sup>162</sup> This is the sort of FDI that does not transfer skills or technology. More importantly, requiring domestic processing will breathe life into an entrepreneurial ecosystem which can build a diversity of industries and attract the skilled labor needed to perpetuate itself.<sup>163</sup>

Indeed, the over-specialization of resource dependency can negatively impact a country’s economy in other ways that are counterproductive to its trade position. Even when governments of low-income countries spend aid dollars themselves, publicly funded investment projects in these states tend to be heavily reliant on imports, in part because of the lack of available domestic alternatives.<sup>164</sup> To generate government revenues for this investment spending, states without strong export sectors, such as

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<sup>156</sup> See Laura Forest, *Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control over the Country’s Diamond Resources*, 11 *IND. INT’L & COMPAR. L. REV.* 633, 633–34 (2001).

<sup>157</sup> See Middlebrook, *supra* note 18, at 27.

<sup>158</sup> See Frankel, *supra* note 152, at 13–14.

<sup>159</sup> See Middlebrook, *supra* note 18, at 25.

<sup>160</sup> Yelapaala, *supra* note 7, at 58.

<sup>161</sup> *Id.*

<sup>162</sup> See *id.* at 28; see also Kojo Yelapaala, *In Search of a Model Investment Law for Africa*, 1 *AFR. DEV. BANK L. DEV. REV.* 2, 12 (2006).

<sup>163</sup> Yelapaala invokes the example of Mozambique, which received \$1.2 billion in funding from the International Finance Corporation in 1998—six years after emerging from its civil war—to build an aluminum smelter. See *id.* at 69. Mozambique did not have the labor supply to operate a smelter at the time the financing was secured, but the labor supply grew out of the opportunity afforded by the project. Yelapaala, *supra* note 7, at 28.

<sup>164</sup> Wenyi Shen, Shu-Chun S. Yang, & Luis-Felipe Zanna, *Government Spending Effects in Low-Income Countries*, 133 *J. DEV. ECON.* 201, 202 (2018).

Kosovo, often raise the necessary revenue from imports, through such means as customs taxation.<sup>165</sup> But, taxing imports is counterproductive to building trade relationships. Making matters worse, import-reliant economies “struggle to create jobs.”<sup>166</sup> Rather, “balanced trade”—in which a country imports “only as much as it exports”—offers fragile states greater stability in coping with export dependency and price fluctuations.<sup>167</sup>

### III. FDI CASE STUDIES: HELP GIVEN TO SOME, HELL VISITED ON OTHERS

The specific factors that made the recovery of Germany and Japan after World War II so successful mirror the successful post-conflict recoveries decades later in very different countries, namely Bosnia and Herzegovina and Rwanda.<sup>168</sup> These common factors, distilled from the IMF working paper, include: (1) a quick influx (then decrease) of aid dollars within five years after the end of the conflict; (2) a two-stage administration of these funds that focused first on humanitarian assistance and then on long-term infrastructure- and institution-building; and (3) an economic strategy that prepared the post-conflict economy to sell to the global market, *i.e.* rebuilt its exportable goods sectors.<sup>169</sup> Thus, although Germany and Japan were fully developed countries prior to World War II, mapping the IMF working paper factors onto these countries’ recoveries helps illustrate the stages of post-conflict recovery. When juxtaposed with the example of Iraq between the wars of 1991 and 2003, these factors make clear that post-conflict recovery takes place in a short five-year window and, after immediate humanitarian needs have been met, countries should prioritize their exportable goods sectors.

#### A. *Rebuilding Germany and Japan after World War II*

In a speech given in May 1947, Under Secretary of State Dean Acheson told an audience at Delta State University in Cleveland, Mississippi that “the ultimate recovery of Europe and Asia depended on the reconstruction of Germany and Japan.”<sup>170</sup> Economic studies from the 1950s, as well as more recent research, confirm that the \$3.5 billion U.S. dollars in aid delivered through the Marshall Plan was a “decisive factor”

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<sup>165</sup> Middlebrook, *supra* note 18, at 26.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 24–25, 27.

<sup>168</sup> See IMF Working Paper, *supra* note 126, at 3, 23.

<sup>169</sup> See *id.*

<sup>170</sup> *The Marshall Plan and Postwar Economic Recovery*, THE NAT’L WORLD WAR II MUSEUM (Mar. 30, 2022), <http://www.nationalww2museum.org/war/articles/marshall-plan-and-postwar-economic-recovery>. Acheson’s speech in Mississippi previewed another speech in June, in which Secretary of State George Marshall would unveil the “Marshall Plan” to deliver U.S. aid to rebuild war-torn Europe after World War II. *Id.*



in the “remarkable postwar revival of Western Germany.”<sup>171</sup> A *CQ Press* research study from 1954 credited this recovery in part to two factors: (1) the large infusion of funds from the Marshall Plan, and (2) the “[e]ffective joint administration” of those funds by the German and Allied governments.<sup>172</sup> Marshall Plan funds were essential in providing necessary investments, notably in domestic resource industries. Marshall Plan funds financed more than forty percent of the investment in coal from 1949-1950 and twenty percent in electricity from 1949-1951.<sup>173</sup>

“Financial pressures” ensured that the Allies’ reconstruction efforts turned from humanitarian aid to reviving the German economy as quickly as possible, “to reduce the cost of feeding and clothing [the] German population.”<sup>174</sup> Unlike other European countries, Germany’s industrial capital was not decimated after the war and in fact had benefitted from war-time investment.<sup>175</sup> Rather, post-war Germany’s main obstacles to economic recovery were “bottlenecks in the flow of raw materials and fuel due to the almost complete paralysis of the transport system” and the lack of “market incentives or an effective planning system for resource allocation”<sup>176</sup>—problems that also arise in contemporary post-conflict aid projects.<sup>177</sup>

In the case of Japan, the Supreme Command of Allied Powers confronted a shortage of raw materials in rebuilding the post-war economy.<sup>178</sup> As described above, raw materials can either be an export good in themselves or be used by domestic industries with the proper processing capabilities to create finished goods for export. A shortage of raw materials cuts off both these opportunities. In addition, providing humanitarian aid was not an initial priority of the U.S. occupation force: The Allies preferred to keep food distribution “at subsistence levels.”<sup>179</sup> However, this policy would change after General Douglas MacArthur’s

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<sup>171</sup> ED. RSCH. REPORTS, WEST GERMAN RECOVERY (1954), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1954011900>. The Marshall Plan is the name given to the Economic Recovery Act of 1948, which ultimately provided \$13.3 billion U.S. dollars to various Western European countries in the form of materials and capital to rebuild the region’s industrial capacity following World War II. See *Milestone Documents: Marshall Plan (1948)*, NAT’L ARCHIVES (last updated on June 29, 2022), <http://www.archives.gov/milestone-documents/marshall-plan>.

<sup>172</sup> ED. RSCH. REPORTS, *supra* note 171.

<sup>173</sup> Wendy Carlin, *West German Growth and Institutions, 1945–90*, in *ECONOMIC GROWTH IN EUROPE SINCE 1945*, at 455, 466 (Nicholas Crafts & Gianni Toniolo eds., 1996).

<sup>174</sup> JAMES DOBBINS, JOHN G. MCGINN, KEITH CRANE, SETH G. JONES, ROLLIE LAL, ANDREW RATHMELL, RACHEL SWANGER, & ANGA TIMILSINA, *AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ* 17 (2003), [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/MR1753/RAND\\_MR1753.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1753/RAND_MR1753.pdf).

<sup>175</sup> Carlin, *supra* note 173, at 463–65.

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* Part I.A (on the lack of transport networks in developing regions); Part II.B (on the problem of resource dependency).

<sup>178</sup> *Occupation and Reconstruction of Japan, 1945–52*, OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1945-1952/japan-reconstruction> (last visited Apr. 3, 2022). This was because the war had deprived the Japanese Empire of its colonies, which had been sources of raw materials. See DOBBINS ET AL., *supra* note 174, at 28.

<sup>179</sup> See DOBBINS ET AL., *supra* note 174, at 37.

successful budget request for “\$250 million [U.S. dollars] for food, fertilizer, petroleum products, and medicine.”<sup>180</sup>

Japan’s economy was ultimately “saved” by a nearby crisis: the Korean War.<sup>181</sup> Japan “became the principal supply depot for U.N. forces” engaged in the conflict,<sup>182</sup> which began just five years after Japan surrendered to Allied forces in 1945.<sup>183</sup> This economic boost occurred within a relatively short-term burst in the immediate post-conflict phase, which is in line with the findings of the IMF working paper.<sup>184</sup>

Indeed, the history of Japan’s post-war reconstruction is inseparable from Japan’s role in the U.S. post-war security strategy. Growing concerns about the spread of communism in East Asia prompted the United States to double down on its efforts to ensure a prosperous capitalist Japan could project U.S. influence in the region.<sup>185</sup> The two states signed a Security Treaty allowing the United States to station troops in Japan in 1951, a mere six years after Japan’s surrender.<sup>186</sup> Yet, U.S. investment in Japan’s reconstruction and the transformation of its former foe into an economic and strategic ally stands in stark contrast to the U.S. relationship with Iraq following the First Gulf War.

### B. *Sanctioning Iraq after the First Gulf War*

Iraq in the interwar period between 1991 and 2003 did not benefit from the sort of massive reconstruction packages that prior U.S. military foes Germany and Japan received. On the contrary, Iraq was subject to a punishing sanctions regime that had begun even before the First Gulf War. U.N. Security Council Resolution 661 prohibited all U.N. Member States from accepting imported products originating from Iraq as well as exporting goods to Iraq.<sup>187</sup> If trade is in fact central to reinvigorating a post-conflict economy,<sup>188</sup> these U.N. resolutions stifled any chance Iraq had at rebuilding its economy after the First Gulf War.

The U.N. sanctions blocked the shipment of critical foodstuffs and other products to Iraq.<sup>189</sup> For instance, the sanctions prohibited the import of chlorine into Iraq based on concerns that Saddam Hussein’s regime would use it to produce chemical weapons.<sup>190</sup> But, the lack of chlorine

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<sup>180</sup> *Id.*

<sup>181</sup> *Occupation and Reconstruction of Japan*, *supra* note 178.

<sup>182</sup> *Id.*

<sup>183</sup> After North Korean forces invaded the South, the U.N. Security Council, in a series of resolutions, called on member states to repel the aggression back to the previously-agreed 38th parallel. *See* S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950); S.C. Res. 84 (July 7, 1950).

<sup>184</sup> *Cf.* IMF Working Paper, *supra* note 126, at 3.

<sup>185</sup> *Korean War and Japan’s Recovery*, OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1945-1952/korean-war> (last visited Apr. 3, 2022).

<sup>186</sup> *Id.*

<sup>187</sup> S.C. Res. 661, ¶ 3 (Aug. 6, 1990).

<sup>188</sup> *See supra* Part I.

<sup>189</sup> Deutsche Welle, *Iraq – Destruction of a Nation*, YOUTUBE (Mar. 5, 2022) <https://www.youtube.com/watch?v=BPh53INZjCc>.

<sup>190</sup> *Id.*

prevented Iraq's public health authorities from sanitizing the drinking water, which led to a cholera epidemic.<sup>191</sup> The lack of chlorine also prevented domestic industry from manufacturing pesticides, which caused Iraqi farms to experience severe crop failure.<sup>192</sup> The denial of fertilizer to Iraq is the exact opposite of the U.S. policy prioritizing provision of fertilizer to post-war Japan.<sup>193</sup> Perhaps the most devastating result of the U.N. sanctions program was that more than 500,000 Iraqi children may have perished as a result of food rationing caused by the sanctions.<sup>194</sup> While humanitarian assistance was a low priority at the start of the U.S. occupation of Japan in 1945, risking a similar malnutrition crisis, post-war reconstruction planners realized that such assistance was a necessary first step to post-war recovery and made it a first-phase priority.<sup>195</sup> In contrast, by creating a humanitarian crisis, the U.N. sanctions prolonged the "humanitarian aid" segment of post-conflict aid identified in the IMF working paper and forestalled the transition to the "reconstruction" phase of post-conflict recovery in Iraq.<sup>196</sup>

Of course, the post-war contexts of World War II and the First Gulf War are readily distinguishable. While the United States occupied Germany and Japan after World War II and, therefore, had "complete control" over their economies,<sup>197</sup> Iraq's dictator, Saddam Hussein, remained in power after the First Gulf War. Arguably, the type of post-war reconstruction more reflective of post-World War II aid came in 2003, after the Second Gulf War ended.<sup>198</sup> But, by then it was too late. Even as of 2022, Iraq's power supply *still* was not functioning at pre-1991 levels.<sup>199</sup> This continuing failure shines a light on the long-term impact of ineffective (or non-existent) reconstruction aid in post-conflict economies

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> DOBBINS ET AL., *supra* note 174, at 37. Indeed, in a recent study, the WTO called for "global action to improve access to fertilizers" in light of the Russia-Ukraine war, recognizing the relationship between access to fertilizer and the prevention of hunger crises. See *FAO Study Calls for Global Action to Improve Access to Fertilizers, Avert Food Crisis*, WORLD TRADE ORG. (Nov. 14, 2022), [http://www.wto.org/english/news\\_e/news22\\_e/igo\\_14nov22\\_e.htm](http://www.wto.org/english/news_e/news22_e/igo_14nov22_e.htm).

<sup>194</sup> See Barbara Crossette, *Iraq Sanctions Kill Children*, U.N. REPORTS, N.Y. TIMES (Dec. 1, 1995), <http://www.nytimes.com/1995/12/01/world/iraq-sanctions-kill-children-un-reports.html>; see also Peter L. Pellett, *Food and Agricultural Organization of the United Nations: Technical Report*, 35 *ECOLOGY FOOD & NUTRITION* 105 (1996). These numbers have more recently been called into question by researchers who conclude the Hussein government, through cooperation with U.N. investigators, manipulated the available data. See Tim Dyson & Valeria Cetorelli, *Changing Views on Child Mortality and Economic Sanctions in Iraq: A History of Lies, Damned Lies and Statistics*, *BMJ GLOB. HEALTH*, July 24, 2017, at 1, <http://gh.bmj.com/content/2/2/e000311>. But there is no dispute that the sanctions caused widespread suffering and hindered Iraq's reconstruction, with ramifications still felt today.

<sup>195</sup> See DOBBINS ET AL., *supra* note 174, at 37.

<sup>196</sup> See *supra* Part II.A.

<sup>197</sup> See DOBBINS ET AL., *supra* note 174, at 8, 31.

<sup>198</sup> In April 2003, shortly after the U.S. invasion, Congress approved about \$2.5 billion USD in immediate humanitarian aid; in November 2003, Congress allocated \$18.4 billion USD to Iraq's reconstruction. See U.S. DEP'T OF STATE, *REBUILDING IRAQ: ACHIEVEMENTS THROUGH THE IRAQ RELIEF & RECONSTRUCTION FUND* (2006), <http://2001-2009.state.gov/documents/organization/60952.pdf>.

<sup>199</sup> Deutsche Welle, *supra* note 189.

and lends credence to the utility of the two-phase analysis of post-conflict reconstruction outlined above. The example of Iraq's lagging reconstruction suggests that long-term economic health should be of paramount importance in post-conflict reconstruction planning. It also serves as a warning that economic gains can be lost when humanitarian aid is prolonged at the expense of a transition to reconstruction.

#### IV. THE "IDEAL"<sup>200</sup> FORM OF FOREIGN INVESTMENT FOR POST-CONFLICT COUNTRIES—AND HOW BEST TO ALLOCATE THE FUNDING

As the IMF working paper concluded, reconstruction aid should be designed "so as to stimulate the development of the tradable goods sector."<sup>201</sup> The IMF authors recommend giving "high priority to infrastructure rehabilitation in areas that will benefit first and foremost tradable activities, such as repairing ports and road networks."<sup>202</sup> A specific method of FDI that fits this recommendation—already identified in the literature—is the BOT contract. BOT contracts are a form of public-private partnership in which the government grants a "concession" to one or more private sector investors, which agree to fund, design, and build an infrastructure project, such as a power plant or a toll road. The private investors then manage the project for a designated time period, after which it will be transferred to local owners, sometimes a government utility.<sup>203</sup> Extrapolating from Professor Yelapaala's thesis that a country's government should be involved in the planning and use of FDI,<sup>204</sup> it also stands to reason that developed countries can use their institutions to guide and incentivize their investors to direct their funds to the most effective development uses in post-conflict economies.

##### A. *The Ideal Post-Conflict Aid Instrument: BOT Contracts*

Contrary to conventional FDI, which fails to adequately transfer skills,<sup>205</sup> BOT contracts are "ideal," particularly in the natural resource sector, because of their ability to transfer skills and retain local control of resources.<sup>206</sup> The "goal [of BOT contracts] is to encourage the post-conflict society to initiate its own version of the foreign facility and generate revenue using its own personnel and finances."<sup>207</sup> The premise of such project finance schemes is that the project itself is a goal of the local government's industrial policy, but its implementation is carried out

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<sup>200</sup> Senaratne, *supra* note 14, at 61.

<sup>201</sup> IMF Working Paper, *supra* note 126, at 21.

<sup>202</sup> *Id.*

<sup>203</sup> See Jiaju Yang, Tahir M. Nisar, & Guru Prakash Prabhakar, *Critical Success Factors for Build-Operate-Transfer (BOT) Projects in China*, 36 IRISH J. MGMT. 147, 148, 150–51 (2017).

<sup>204</sup> See *supra* Part I.C (citing Yelapaala, *supra* note 7, at 26, 43); Part II.B (citing Yelapaala, *supra* note 7 at 58).

<sup>205</sup> See *supra* Part I.C.

<sup>206</sup> Senaratne, *supra* note 14, at 61.

<sup>207</sup> *Id.*

by the private sector.<sup>208</sup> Therefore, the attendant risk does not fall on an economically strained government.<sup>209</sup> Both government and private sector investors have a stake in the project's success.<sup>210</sup> The funding may be undertaken by multiple parties, including banks and development finance institutions, but the projects are designed to succeed because the project must "pay for itself."<sup>211</sup> Thus, the private financiers own and manage the finished project until they receive an agreed-upon return, and then the financiers transfer the project to local owners.<sup>212</sup>

There are short and long-term benefits of a BOT contract: "In the short term, it can be used to jumpstart an industry, and in the long term, to develop successful local entrepreneurial skills."<sup>213</sup> Rather than "scoop and ship" operations,<sup>214</sup> BOT contracts typically ensure that natural resources (such as crude oil, iron ore, and even coffee beans) are in the hands of local owners because the contract usually transfers ownership of the project after the private investor receives its agreed-upon return.<sup>215</sup> Local ownership of natural resources enables the creation of national brands and can stabilize a post-conflict transition country's economy over time when it is no longer victim to foreign-owned commodities markets beyond its control.<sup>216</sup> And, given that BOT projects typically involve building local infrastructure, they help correct for the "inadequate infrastructural linkages" that "hamper" economic development in small regional markets.<sup>217</sup> Moreover, not only do BOT projects result in technology transfer, but such transfers have been identified as one of several factors "critical" to the success of a BOT project—so a BOT project and its attendant skills transfer creates a self-reinforcing virtuous cycle.<sup>218</sup>

Economic research shows that foreign investment also has a multiplier effect. Whereas traditional government spending in an economy can "crowd out" its positive effects by changing private consumption and investment, external financing vitiates this problem because it "do[es] not have to be paid back in the future."<sup>219</sup> Moreover, externally financed projects, rather than aid funds paid directly to a host government, might also lessen the risk of corruption.<sup>220</sup> Project finance denies politicians an opportunity to siphon aid dollars and instead transfers a fully-formed project whose completion cannot be frustrated by corruption.

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<sup>208</sup> See Yang, Nisar, & Prabhakar, *supra* note 203.

<sup>209</sup> See Yelapaala, *supra* note 7, at 66–67; see also Yang, Nisar, & Prabhakar, *supra* note 203, at 152 ("[Public-private partnerships like BOT projects] are underpinned by the need to transfer risks from the public sector to the private party managing the project.").

<sup>210</sup> See Yelapaala, *supra* note 7, at 66–67.

<sup>211</sup> See *id.* at 67–68.

<sup>212</sup> See *id.* at 73.

<sup>213</sup> *Id.*

<sup>214</sup> See note 163.

<sup>215</sup> See Yelapaala, *supra* note 7, at 68–69.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.* at 52.

<sup>218</sup> Yang, Nisar, & Prabhakar, *supra* note 203, at 151.

<sup>219</sup> Shen, Yang, & Zanna, *supra* note 164, at 202, 205.

<sup>220</sup> See Yelapaala, *supra* note 7, at 84.

Afghanistan's telecommunications ("telecoms") industry reflects many of the positive characteristics of effective BOT contracts in post-conflict states. First, the Afghan government led the industrial strategy from the beginning, identifying telecoms as a strategic sector that would attract foreign investment and help rebuild the country after the 2002 war.<sup>221</sup> Recognizing that institutional capacity was needed to regulate this new industry, the Afghan government created the Telecommunications Regulatory Board, which began awarding licenses to private internet service providers.<sup>222</sup> Second, the competitive process of awarding licenses not only attracted foreign investors but also ensured that a monopoly would not capture the fledgling industry and become too powerful for the young government to regulate.<sup>223</sup> Third, although many of the licenses were awarded to foreign companies, at least two were awarded to Afghan companies in consortium with foreign companies—in other words, the licensing process helped foster skills transfer to Afghan companies and retained some level of local control over the industry.<sup>224</sup> The government also created a public corporation, Afghan Telecom, to provide telecoms service.<sup>225</sup> It now owns the largest amount of physical telecoms infrastructure in the country.<sup>226</sup> Investments in Afghanistan's telecoms sector also benefited from coordination among the U.S. agencies helping to fund the project.<sup>227</sup> As of 2016, the telecoms sector had attracted more than \$2 billion U.S. dollars in private investment and contributed "billions in tax revenue to the Afghan government" in addition to employing tens of thousands of Afghans.<sup>228</sup>

However, BOT contracts are effective only when each side—the state and the private investor—upholds its end of the bargain. The government's guarantees in the contracting process "rank very high as a factor" in BOT projects' long-term success, according to survey data from government officials and private investors who have worked on BOT projects in various other regions.<sup>229</sup> Indeed, the "long duration of BOT projects"—from bidding to financing to constructing and operating—

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<sup>221</sup> Bhavna Bhatia & Neeraj Gupta, *Transforming Telecoms in Afghanistan: Expanding Affordable Access by Introducing Competition* 1–2 (Public-Private Infrastructure Advisory Facility, Gridlines Note No. 1, Apr. 2006).

<sup>222</sup> *Id.* at 2.

<sup>223</sup> *See id.* at 2–3. Indeed, the service providers were geographically diverse, thereby also preventing undue political pressure from any one state: Licenses were awarded to a U.S.-owned company, a Lebanese company, and a company based in the United Arab Emirates, in addition to two Afghan companies. *Id.*

<sup>224</sup> *See id.*

<sup>225</sup> *Id.* at 2.

<sup>226</sup> *See* SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, REP. NO. 16-46, AFGHANISTAN'S INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR 10–11 (2016).

<sup>227</sup> *See id.* at 7–8.

<sup>228</sup> KENNETH KATZMAN & CLAYTON THOMAS, CONG. RSCH. SERV., RL 30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 62 (2017).

<sup>229</sup> Yang, Nisar, & Prabhakar, *supra* note 203, at 157. This study of "critical success factors" for BOT projects is applicable beyond projects in China, and worth considering here, given that the study's authors selected and categorized the factors based on BOT projects in various regions, including developed countries such as the United Kingdom and Australia. *See id.* at 150–51.

“gives rise” to a diverse set of risks for which the government and private parties must prepare.<sup>230</sup> These risks are allocated in the BOT contracts, and the BOT contracts are typically enforced through investor-state arbitration.<sup>231</sup> Admittedly, investor-state arbitration can disadvantage states without adequate resources to defend their interests in such a legal proceeding. But, to combat this, some law firms have designed innovative financing schemes to leverage funds from “strong cases” to finance the significant litigation costs of international arbitrations.<sup>232</sup>

Of course, “chasing FDI to the exclusion of other . . . policies is dangerous.”<sup>233</sup> As discussed above, the “rush” to deregulate industries in order to attract FDI can give private interests outsized influence, enabling the formation of monopolies.<sup>234</sup> Fragile states—especially those recovering from conflict—typically have weak governments and few resources to devote to regulatory oversight.<sup>235</sup> Poor regulatory oversight, in turn, can allow “political capture of procurement processes through corruption, cronyism or nepotism.”<sup>236</sup> Indeed, a “competitive tendering system” in awarding the government concession to build and operate the BOT project is another factor that has been found to be “critical” to the success of a BOT project.<sup>237</sup> Finding the right contractor for a project is, of course, “pivotal” to the “construction phase” of the project, which “can directly affect the fate of the whole project.”<sup>238</sup> Government regulations defining the scope and terms of BOT contracts have also been shown to increase parties’ willingness to carry out BOT projects.<sup>239</sup>

At the same time, FDI “remains an economic lifeline” for low-income countries and can be a large percentage of fragile states’ GDP.<sup>240</sup> This is where lending organizations and international finance institutions come

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<sup>230</sup> *Id.*

<sup>231</sup> *See supra* note 118.

<sup>232</sup> *See, e.g., Litigation Financing*, PRAVATI CAP., <http://pravaticapital.com/litigation-financing> (last visited Nov. 27, 2022); *How We Work with Law Firms*, BURFORD CAP., <http://www.burfordcapital.com/how-we-work/with-law-firms> (last visited Nov. 27, 2022); *What We Do*, VANNIN CAP., <http://vannin.com/what-we-do> (last visited Nov. 27, 2022). Similarly, in 2001, a number of WTO Members established a legal defense fund to provide “discounted” legal services to developing countries so that they could adequately defend or initiate dispute settlement proceedings at the WTO. *See* PAUWELYN, GUZMAN, & HILLMAN, *supra* note 15, at 748; *see also* ADVISORY CENTRE ON WTO LAW, <http://www.acwl.ch> (last visited Nov. 27, 2022).

<sup>233</sup> Middlebrook, *supra* note 18, at 29.

<sup>234</sup> *Id.* at 28.

<sup>235</sup> *See id.*

<sup>236</sup> *Id.*

<sup>237</sup> *See* Yang, Nisar, & Prabhakar, *supra* note 203, at 158. Because only large companies—or consortia of companies—have the capacity to carry out a BOT project, the concession process lends itself to monopolization. *See id.* However, a competitive system for awarding BOT contracts forces companies competing for the contract “to optimize their resources and make them more effective.” *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* This echoes findings described earlier, on the importance of government regulation to FDI more generally. *See supra* Part I.C.

<sup>240</sup> Middlebrook, *supra* note 18, at 28, 31. For instance, FDI has been nearly 10 percent of GDP in Uganda and nearly 50 percent in Democratic Republic of Congo. *Id.*

in. Lending organizations are in a unique position to oversee how financing is used.

### B. *A Central Clearinghouse for Post-Conflict Aid Funds*

Another mechanism necessary to effectively distribute post-conflict aid dollars is a centralized funding system in the granting state. A centralized funding system can ensure that policymakers are involved in steering FDI schemes toward their most effective use for long-term growth<sup>241</sup> and provide certainty about aid disbursements to counteract the “volatility of aid flows.”<sup>242</sup> The United States has long had several agencies that promote private sector investment in developing countries, such as the Overseas Private Investment Corporation (“OPIC”), the State Department, USAID’s Development Credit Authority, the Trade and Development Agency, and the Export-Import Bank.<sup>243</sup> But, this proliferation of agencies has often left U.S. companies rudderless in navigating among them, each with its own unique purpose and funding restrictions. Before leaving office, Secretary of State Hillary Rodham Clinton, among others, identified a need to form a centralized agency “that could mobilize resources from across the government” and recommended building OPIC “into a full-scale ‘development finance institution.’”<sup>244</sup> Notably, other countries including the United Kingdom and Japan have such institutions,<sup>245</sup> and China’s has dispensed hundreds of billions of U.S. dollars in loans to developing countries.<sup>246</sup>

While OPIC has existed since 1971, it is subject to a number of statutory restrictions which have limited its effectiveness as a development finance institution. Typically, development finance institutions “use a range of investment tools including equity or quasi-equity investments, loans, loan guarantees, and risk insurance.”<sup>247</sup> But OPIC is prevented by its rules from making equity investments.<sup>248</sup> To address this, and other, concerns, in 2018, the U.S. Congress passed the Better Utilization of Investment Leading to Development (“BUILD”) Act.<sup>249</sup> The BUILD Act created a new agency without OPIC’s limitations,

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<sup>241</sup> *See id.* at 26, 43.

<sup>242</sup> IMF Working Paper, *supra* note 126, at 6.

<sup>243</sup> HILLARY RODHAM CLINTON, *HARD CHOICES* 539 (2014).

<sup>244</sup> *Id.*

<sup>245</sup> *Modernizing Development Finance: Hearing Before the S. Comm. on Foreign Rel.*, 115th Cong. 3 (May 10, 2018) (written statement of Daniel F. Runde, William A. Schreyer Chair and Director, Project on Prosperity and Development, Center for Strategic and International Studies) [hereinafter *Runde Testimony*].

<sup>246</sup> CONOR M. SAVOY, PADDY CARTER, & ALBERTO LEMMA, *CTR. FOR STRATEGIC & INT’L STUD.*, *DEVELOPMENT FINANCE INSTITUTIONS COME OF AGE: POLICY ENGAGEMENT, IMPACT, AND NEW DIRECTIONS* 7 (2016).

<sup>247</sup> *Id.* at 8.

<sup>248</sup> *Id.*

<sup>249</sup> The BUILD Act was signed into law on Oct. 5, 2018. BUILD Act of 2018, Pub. L. No. 115-254.



the U.S. International Development Finance Corporation (“IDFC”).<sup>250</sup> The BUILD Act allows the new IDFC to make equity investments and expands OPIC’s authorities in other ways, such as allowing the IDFC to make riskier loans with first loss guarantees—which could help finance BOT contracts—and increasing the spending cap on the IDFC’s investments from OPIC’s limit of \$29 billion USD to \$60 billion USD.<sup>251</sup>

Of course, to have an impact on post-conflict transition countries, the IDFC and other international finance organizations should calibrate investments to the two stages of post-conflict aid,<sup>252</sup> with an emphasis on providing a boost to reconstruction aid in the immediate short-term aftermath of a conflict. Ideally, the IDFC and its counterparts will help fund BOT contracts in the tradable goods sectors of these countries to build local technical skills and create an entrepreneurial foundation for long-term growth. Because long-term humanitarian aid is consumed rather than contributing to long-term economic health,<sup>253</sup> funding the IDFC itself can contribute to “redirect[ing] some . . . development assistance funds . . . to support . . . project finance.”<sup>254</sup>

## V. CONCLUSION

This note has focused on *trade-based* instruments for assisting the economies of post-conflict countries. It advocates for strategic administration of FDI that is coordinated with local governments which have identified projects aimed at boosting export industries. Of course, other tools could be incorporated into an effective post-conflict transition plan. Professor Karen Brown has noted, for instance, that countries’ tax codes can be used to incentivize infrastructure investments in developing countries.<sup>255</sup> As MNEs look for “gaps” in various countries’ tax laws,<sup>256</sup> developed countries could *create* gaps for the benefit of developing post-conflict states by not taxing corporate income spent in these states’ key export sectors. Additionally, states should bolster good governance, including competitive tender processes, since wealth inequality and unfair access to wealth can provoke conflict in the first place.<sup>257</sup> Thus, there is a need to incentivize and monitor companies’ compliance with human rights and international humanitarian law when operating in conflict zones and post-conflict countries, with the understanding that rule of law and

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<sup>250</sup> See Daniel F. Runde & Romina Bandura, *The BUILD Act Has Passed: What’s Next?*, CTR. FOR STRATEGIC & INT’L STUD. (Oct. 12, 2018), <http://www.csis.org/analysis/build-act-has-passed-whats-next>.

<sup>251</sup> Runde Testimony, *supra* note 245, at 3.

<sup>252</sup> See *supra* Part II.A.

<sup>253</sup> See *id.*

<sup>254</sup> Yelapaala, *supra* note 7, at 84.

<sup>255</sup> See Brown, *supra* note 107.

<sup>256</sup> *Id.*

<sup>257</sup> See *supra* Part I.C.

human rights are prerequisites to economic development.<sup>258</sup> Thus, this note has not addressed *every* tool available for assisting post-conflict economies.

Still, two key lessons revealed here offer a path forward for those planning the future reconstruction of states transitioning out of conflict, as will be the case for Ukraine once it emerges from its ongoing conflict with Russia. First, post-conflict aid tends to follow a reliable pattern: It comes in a quick infusion, first to immediate humanitarian needs and then to economic reconstruction. As quickly as it comes, so it often goes, with most aid steeply dropping off about five years after the end of hostilities.<sup>259</sup> Being aware of this pattern can help policymakers use it to plan effectively, recognizing that humanitarian aid must give way to reconstruction aid in the interest of the recipient country's long-term economic health.

Of course, recovery relies in part on a robust trade sector.<sup>260</sup> The exportable goods sectors are the ones that will revive a post-conflict country's economy and power it into the future. But a second lesson from the analysis above is that some trade-based mechanisms are better than others for delivering on the promise of economic recovery. Project finance schemes, particularly the BOT contract, are archetypes of successful public-private partnerships. BOT partnerships combine the strategic economic planning of the local government with the investment of foreign partners to create economic development that ultimately transfers skills and technology. These transfers provide the foundation on which an entrepreneurial economy can grow.

However, BOT contracts are not silver bullets for reviving post-conflict economies. Nor do BOT contracts operate in a vacuum; they are one piece of a package of policies essential to revitalizing the economies of post-conflict states. Indeed, "a stable macroeconomic environment" is important to the overall success of BOT projects.<sup>261</sup> BOT projects cannot create the stable environment they need to prosper. For those post-conflict countries afflicted with the "resource curse," ensuring local processing<sup>262</sup> of the valuable resource and instituting "balanced trade"<sup>263</sup> (*i.e.*, leveling imports and exports) can help stabilize an economy dependent on one export prone to price fluctuations. Additionally, along with encouraging strategic FDI, developed countries should consider reforming their GSP programs to specifically benefit the trade sectors of post-conflict

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<sup>258</sup> See, e.g., INT'L COMM. RED CROSS, *supra* note 13, at 16, 21. Trade rules can be written to enforce human rights norms, as evidenced by the Uyghur Forced Labor Prevention Act of 2021. See Uyghur Forced Labor Prevention Act of 2021, Pub. L. No. 117-78, 135 Stat. 1525. Guidelines, such as those proposed by the OECD, can help business and countries ensure ethically responsible supply chains in, e.g., mining industries of conflict-affected states. See generally OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (3d ed. 2016).

<sup>259</sup> See *supra* Part II.A.

<sup>260</sup> See Senaratne, *supra* note 14, at 60; see also *Trade for Peace Programme*, *supra* note 17.

<sup>261</sup> Yang, Nisar, & Prabhakar, *supra* note 203, at 150.

<sup>262</sup> See Yelapaala, *supra* note 7, at 58.

<sup>263</sup> See Middlebrook, *supra* note 18, at 24–25, 27.

economies, as permitted by the *European Communities—Tariff Preferences* decision.<sup>264</sup> Such reforms would require exploring creative solutions that reexamine market access and the tariff-only benefits of current GSP programs.

Finally, as the case of post-war reconstruction in Germany demonstrates, even where there might be available funds and working industrial capital, these resources still need to be channeled to their most effective use by efficient and strategic administration.<sup>265</sup> Developed countries can use development finance corporations to achieve this, and BOT contracts do this by design. Trade is good and greed can fuel peace—but only effective allocation of resources will get results.

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<sup>264</sup> *See supra* Part I.B.

<sup>265</sup> *See supra* Part III.A.