

**The Inter-American Court on Human Rights’  
Judgment in *Artavia Murillo v. Costa Rica* and  
Its Implications for the Creation of Abortion  
Rights in the Inter-American System of Human  
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**INTRODUCTION**

The American Convention on Human Rights<sup>1</sup> has consistently been identified by state parties, nonparties, commissioners, former judges,

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\* The author intervened in *Artavia Murillo v. Costa Rica* as amicus curiae along with former Inter-American Court Judge Rafael Nieto Navia, and law professors Jane Adolphe and Richard Stith. The author wishes to thank Richard Stith for his wise suggestions on earlier drafts of this Article.

<sup>1</sup> Organization of American States, American Convention on Human Rights, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

foreign courts, and observers of the Inter-American system on human rights, among others, as a pro-life treaty granting comprehensive protection to the unborn's right to life.<sup>2</sup> Previous Inter-American Court judges and commissioners have confirmed this understanding.<sup>3</sup> The Convention's Article 4(1) reads as follows: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

Nevertheless, in *Artavia Murillo et al. v. Costa Rica*,<sup>4</sup> the Inter-American Court interpreted the right to life from conception in the most restrictive possible manner, holding that, before implantation, the human embryo is not a person entitled to human rights protection under the American Convention,<sup>5</sup> while redefining the term "conception" as implantation, not fertilization.<sup>6</sup> The court also defined Article 4(1)'s terms "in general, from the moment of conception" to mean that only gradual or incremental protection should be given to prenatal life, depending on the unborn child's physical stage of development. In addition, it held that "personal decisions" to produce

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<sup>2</sup> See, e.g., Julio Barberis, *El derecho a la vida en el pacto de San Jose de Costa Rica* (The right to life in the San Jose, Costa Rica Pact), in OS RUMOS DO DIRETIO INTERNACIONAL DOS DIREITOS HUMANOS; ENSAIOS EM HOMANEGEM AO PROFESSOR ANTÔNIO AUGUSTO CANÇADO TRINDADE: LIBER AMICORUM CANÇADO TRINDADE 20 (Renato Zerbini Ribeiro Leão et al. eds., 2005).

<sup>3</sup> See Rafael Nieto Navia, *Aspectos Internacionales de la demanda contra la penalización del aborto* [International aspects of the lawsuit against criminalization of abortion], 21–42, REVISTA PERSONA Y BIOÉTICA, Vol. 9, No. 1 (24) (Colom.) (2005), cited in Ricardo Bach de Chazal, *Inconstitucionalidad y No Convencionalidad Del Aborto Voluntario* [Unconstitutionality and unconventionality of voluntary abortion], NOTIVIDA 8 (July 2011), at 9, <http://www.notivida.org/Articulos/Aborto/INCONSTITUCIONALIDAD%20Y%20NO%20CONVENCIONALIDAD%20DEL%20ABORTO%20VOLUNTARIO.pdf>; see also Concurring Opinion Regarding The Judgment of The Inter-American Court of Human Rights in The Case of the Castro Prison v. Peru, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 160, P. 61 (Nov. 25, 2006) (where Judge Cançado Trindade lamented "the extreme pre-natal violence, put in evidence in the brutalities to which pregnant women were submitted in the Castro-Castro prison," as he wondered about "the consequences of this situation of extreme violence in the mind-or the subconscious-of the children born from the mother's womb so disrespected and violated, even before their birth"); see also *Baby Boy v. United States*, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L./V/II.54, doc. 9 rev. ¶ 1 (1980–81) (Marco Gerardo Monroy Cabra, Comm'r, dissenting), available at <http://www.cidh.org/annualrep/80.81eng/USA2141b.htm>.

<sup>4</sup> *Artavia Murillo et al. v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012) [hereinafter *Artavia*], available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf).

<sup>5</sup> *Id.* at ¶ 223.

<sup>6</sup> *Id.* at ¶ 189.

biological children by in vitro fertilization (IVF) were protected under the American Convention on Human Rights,<sup>7</sup> thus opening the way to a future proclamation of a broad right to personal decisions to choose state-funded abortion.

This paper explores the decision's potential impact in the creation of abortion rights in Costa Rica and other states parties to the American Convention,<sup>8</sup> and its effects on a wider weakening of the right to life in the Inter-American system of human rights.

## I

### THE UNBORN CHILD'S RIGHT TO LIFE IN ARTICLE 4(1) OF THE AMERICAN CONVENTION ACCORDING TO *ARTAVIA V. COSTA RICA*

#### A. *Abortion in Artavia*

Although the *Artavia* complaint dealt exclusively with the issue of in vitro fertilization, the judgment also dealt with legalization of abortion, an issue that was immaterial to the complaint. The court inappropriately read Article 4(1)'s terms "in general, from the moment of conception" to mean that "gradual" or "incremental" protection should be given to prenatal life, depending on the unborn child's physical stage of development,<sup>9</sup> thus allowing abortion under at least some circumstances.<sup>10</sup> Judge Vio Grossi suggested that the rationale used by the majority was obviously intended to legitimize elective abortion.<sup>11</sup>

Although the court failed to create a right to abortion under the Convention, or to enunciate any state duties to create exceptions to abortion bans, its interpretation of Article 4(1) is erroneous for several

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<sup>7</sup> *Id.* at ¶¶ 136–162.

<sup>8</sup> States parties to the American Convention on Human Rights (a total of twenty-three nations as of December 2013) are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Nonparties include: Antigua and Barbuda, Bahamas, Belize, Cuba, Venezuela, Guyana, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. Canada and the United States, although members of the Organization of American States (O.A.S.), have not ratified the American Convention either. *Inter-American Commission on Human Rights, B-32: American Convention on Human Rights*, CIDH.OAS.ORG, <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Oct. 25, 2013).

<sup>9</sup> *Artavia*, *supra* note 4, at ¶ 256.

<sup>10</sup> *Id.* at ¶¶ 257–264.

<sup>11</sup> *Id.* at 19 (Vio Grossi, J., dissenting).

reasons. First, the text of Article 4(1) recognizes a right to life “from the *moment* of conception” (emphasis added), clearly indicating that the states intended to grant full protection to the unborn child from a distinctive moment onwards, not gradually or incrementally, as the court alleged. The judge’s personal opinion may be that the human embryo is an individual under construction that only becomes a person in stages.<sup>12</sup> The Convention, however, grants full human rights protection to the human embryo from the moment of conception, recognizing its continual existence regardless of its stage of human development.<sup>13</sup>

While the court rejected the personhood of the human embryo before implantation in the womb, it does implicitly grant that, after implantation, the embryo may be entitled to such recognition in a “gradual and incremental” manner.<sup>14</sup> The Court seems to espouse the premise that the same embryo somehow gets transformed from non-person to person at implantation in the maternal womb or gradually thereafter, even though, from a scientific perspective, the human embryo continues to be the same embryo at implantation and does not undergo any substantial changes upon it.<sup>15</sup> In regard to this outdated perception of embryonic life, Professor Robert P. George has written that implantation does not act on the embryo “in such a way as to produce a new character or new direction of growth,”<sup>16</sup> implantation does not transform the developing organism from one kind of entity into another. The same organism or distinct biological unit does not essentially change or morph into a different entity, i.e., a person, upon implantation for the purposes of the Convention.<sup>17</sup> Similarly, no maternal action changes the human embryo from a non-person into a

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<sup>12</sup> Artavia, *supra* note 4, at ¶¶ 163, 183. See also Richard Stith, *Construction vs. Development: A Source of Deep Misunderstanding Concerning the Beginning of Life*, KENNEDY INST. ETHICS J. (forthcoming) (on “construction” versus “development” models of perceiving the human embryo’s status).

<sup>13</sup> *San José Articles*, Article 2 (last visited Jan. 10, 2014), [http://www.sanjoseArticles.com/?page\\_id=2#sthash.4ytN3Zls.dpuf](http://www.sanjoseArticles.com/?page_id=2#sthash.4ytN3Zls.dpuf).

<sup>14</sup> *Id.* See also Artavia, *supra* note 4, at ¶ 256.

<sup>15</sup> Robert P. George & Christopher Tollefsen, *Embryonic Debate: A Reply to William Saletan, Liberal Bioethics Writer, Former Embryo*, NATIONAL REVIEW ONLINE (Feb. 11, 2008), <http://www.nationalreview.com/articles/223640/embryonic-debate/robert-p-george>.

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

<sup>17</sup> *Guanajuato Declaration About ‘In Vitro’ Fertilization*, ¶ II (Apr. 20, 2013), [hereinafter *Guanajuato Declaration*] (The Guanajuato Declaration reacts to the A Court holding in Artavia by pointing out that the human embryo’s life is, from its inception, human, its nature is not modified or perfected by reason of its development.), available at <http://declaraciondeguanajuato.org/english.php>.

person. That is because it was always a person, from the moment of fertilization.<sup>18</sup>

Second, the court's restrictive and creative interpretation of "in general" in the context of IVF is significantly inconsistent with its own jurisprudence on the right to life and the non-restrictive interpretation thereof, as indicated by Judge Vio Grossi.<sup>19</sup> Before *Artavia*, the Inter-American Court had noted that the right to life has been narrowly interpreted too often.<sup>20</sup> In both *Villagrán Morales and Others v. Guatemala* and *Gomez Paquiyauri*, the court held that

the right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible.<sup>21</sup>

Costa Rica pointed out that a minimally restrictive interpretation of the term "in general," regarding the unborn, could excuse or permit abortion where a mother's right to life is at stake, or when the death of the unborn is unintended, but arguing that protection "in general" is compatible with elective and intentional abortions would stretch interpretation much too far.<sup>22</sup> Judge Vio Grossi, in his dissenting opinion, lamented that, through such an interpretation, the court would deprive the American Convention's express provision protecting the unborn of its *effet utile*, which was to give ample protection to the unborn child, not "exceptional" as stated in *Artavia*.<sup>23</sup> Scholars have agreed that *Artavia* trivialized the human embryo's life and subordinated it to other interests (parental wishes,

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<sup>18</sup> For an explanation of the fallacy of imagining that the nature of a thing changes in the course of its development, see George & Tollefsen, *supra* note 15.

<sup>19</sup> *Castro Prison v. Peru*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 61 (Nov. 25, 2006).

<sup>20</sup> See, e.g., Case of the "Street Children" (*Villagrán-Morales et al.*) v. Guatemala, Merits, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 3 (Nov. 19, 1999) ("The right to life cannot keep on being conceived restrictively, as it was in the past, by reference only to the prohibition of the arbitrary deprivation of physical life. We believe that there are distinct ways to deprive a person arbitrarily of life: when his death is provoked directly by the unlawful act of homicide, as well as when circumstances are not avoided which likewise *lead word* to the death of persons as in the *cas d'espèce*.").

<sup>21</sup> *Id.* at ¶ 144. See also *Gómez-Paquiyauri Brothers v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 2. (July 8, 2004).

<sup>22</sup> *Artavia*, *supra* note 4, at ¶ 168.

<sup>23</sup> *Id.* at ¶¶ 7, 19–20 (Vio Grossi, J., dissenting).

privacy), potentially justifying, in theory, abortion or other embryo destructive acts.<sup>24</sup>

Judge Vio Grossi did not even believe that the term “in general” was meant to create exceptions to the unborn’s right to life. He understood the term as a synonym of “common,” and stated that it was simply meant to extend right to life protection to the unborn, perhaps in a different manner than that given after birth, but to include rather than exclude the unborn in any case.<sup>25</sup> Former Judge Julio Barberis also suggested the term “in general” could be read this way. He said Mexico’s reservation to the treaty, which states that the term “in general” would not entail the obligation to legislate in favor of the right to life from conception at the federal level, is evidence that the majority of states parties read the terms to contain an obligation or permission to protect the unborn, rather than an obligation to allow their destruction.<sup>26</sup> Judge Augusto Cançado Trindade also understood the expression in a minimally restrictive way. He suggested that domestic laws allowing abortion and defining conception as the beginning of life may be one of the reasons why some states, like the United States or Canada, have not ratified the Convention.<sup>27</sup> Other commentators have pointed out that states parties to the American Convention did not or do not understand “in general” as permitting abortion. Author Ricardo Bach de Cazal has indicated that the acceptance of the terms “and, in general, from the moment of conception” by states parties was simply meant to emphasize that the right to life extended to the unborn, from conception, in equality of conditions, in every instance.<sup>28</sup>

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<sup>24</sup> Luis Alejandro Silva Irrázaval, *La protección de la vida humana entre paréntesis; Comentario crítico a la sentencia Artavia Murillo y otros (“fecundación in vitro”) vs. Costa Rica, de la Corte Interamericana de Derechos Humanos*, ANUARIO DE DERECHO PUBLICO, UNIVERSIDAD DIEGO PORTALES 383, 394–95 (2013) [hereinafter *La Protección*] (Chile) (The parenthetical protection of human life. Critical commentary to the Inter-American Court on Human Rights’ judgment in *Artavia Murillo and others v. Costa Rica*).

<sup>25</sup> *Artavia*, *supra* note 4, at 7–8 (Vio Grossi, J., dissenting).

<sup>26</sup> Julio Barberis, *El derecho a la vida en el pacto de San Jose de Costa Rica*, in OS RUMOS DO DIREITO INTERNACIONAL DOS DIREITOS HUMANOS; ENSAIOS EM HOMENAGEM AO PROFESSOR ANTONIO AUGUSTO CANCADO TRINDADE: LIBER AMICORUM CANCADO TRINDADE 12 (Renato Zerbini Ribeiro Leão et al. eds., 2005). See also Alvaro Paúl, *Controversial Conceptions: The Unborn and the American Convention on Human Rights*, 9 LOY. U. CHI. INT’L L. REV. 209–47 (2012).

<sup>27</sup> Lauri R. Tanner, *Interview with Judge Antônio A. Cançado Trindade*, *A Court of Human Rights*, XVI ANN. SURV. INT’L & COMP. L. 165, 177 (2010).

<sup>28</sup> Ricardo Bach de Chazal, *El aborto en el derecho positivo argentino* [Abortion in positive Argentinian Law], EL DERECHO, 199 (2009) (Arg.).

In any case, even if states were allowed to create narrow exceptions to the unborn's "general" right to life from conception, there is certainly no state *duty* to create them. The words in general are preceded by the terms "protected by law," which indicates that exceptions to the *enforcement* of the right to life from conception would be permissible, not to the legal recognition of the right to life itself. Even where exceptions to the enforcement or legal protection of the right to life of unborn children may be permissible, they are never *required* under the Convention. Such a reading would be incompatible with the object and purpose of the Convention, which is to protect the right to life, not mandate violations thereof. The court has held that "the fundamental criterion which creates the very nature of human rights requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted."<sup>29</sup> The Commission has also stated that, in order to prevent human rights restrictions from becoming the rule rather than the exception, the broadest rule and the most extensive interpretations have to be applied when recognizing human rights.<sup>30</sup> However, the majority opinion's claim in *Artavia*, that the object and purpose of the treaty was to permit exceptions to the right to life from conception,<sup>31</sup> rather than protect it, illustrates the very effect described by the Commission.

If acquiesced in by future domestic and international courts, the court's restrictive interpretation of the right to life in *Artavia* may contribute to the erosion of the fundamental character of the right to life "as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights."<sup>32</sup> Scholars have pointed out that the Inter-American Court's limitations on the right to life as imposed in *Artavia* are unprecedented: for the first time, the court declared the right to life to apply to some human beings, and not

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<sup>29</sup> Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1), and 2, American Convention on Human Rights), Advisory Opinion Oc-7/85, Inter-Am. Ct. H.R. (ser. A) ¶ 36 (Aug. 29, 1986).

<sup>30</sup> See, e.g., Jorge, José & Dante Peirano Basso, Eastern Republic of Uruguay, Case 12.553, Inter-Am Comm'n. H.R., Report No. 86/09, ¶ 75 (Aug. 6, 2009).

<sup>31</sup> *Artavia*, *supra* note 4, at ¶ 258.

<sup>32</sup> *Medellín, Ramírez Cardenas and Leal García v. United States*, Case 12.644, Inter-Am. Comm'n H.R., Organization of American States, Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37, ¶¶ 122–123 (2009), available at <http://www.cidh.org/annualrep/2009eng/US12644eng.htm>.

others,<sup>33</sup> as requested by the petitioners.<sup>34</sup> The Manifiesto de San José characterized the judgment as a “dangerous precedent” for that reason.<sup>35</sup> The “relativization” of right to life<sup>36</sup> versus the absolute character given to autonomy may eventually undermine the court’s understanding of the right to life in general.<sup>37</sup>

### *B. One-Sided, Evolving Interpretation of Article 4(1)*

Rather than focusing on Latin American state practice on abortion, as Article 31 of the Vienna Convention requires, the court relied again on judicial decisions favoring abortion in non-parties to the American Convention, including the United States and European states like Germany and Spain. The court also relied on the European court on Human Rights and the Council of Europe<sup>38</sup> to conclude that the American Convention could not have granted an unqualified right to life to the human embryo. The reliance on these judgments was strongly criticized by Judge Vio Grossi.<sup>39</sup>

Putting aside the issue of whether United States domestic courts or European courts have any authority as sources of interpretation of the American Convention, the court cited only those decisions that

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<sup>33</sup> La Protección, *supra* note 24, at 387. *See also* Ian Henríquez Herrera, Comentario al Fallo de la Corte Interamericana de Derechos Humanos en el caso Artavia Murillo y otros [Comment to the Inter-American Court Judgment in Artavia Murillo and Others], III REVISTA INTERNACIONAL DE DERECHOS HUMANOS 55, (2013) (Arg.) (forthcoming), <http://ojs.revistaidh.org/ridh>.

<sup>34</sup> Artavia, *supra* note 4, at ¶¶ 258–263. *See also* Ana Victoria Sanchez Villalobos and Others v. Costa Rica, Petition 12.361, Inter-Am. Comm’n H.R., Report No. 25/04, OEA/Ser.L./V/II.122, doc. 5 rev. ¶¶ 20–21 (Mar. 11, 2004). (Admissibility Report), available at <http://www.cidh.org/women/CostaRica.12361sp.htm>; *see* Gerardo Gómez, Aída Marcela Garita et al. v. Costa Rica, Petition 1368-04, Inter-Am. Comm’n H.R., Report No. 156/10, OEA/ser.L./V/II.122, ¶ 35 (2010) (Admissibility Report) [hereinafter Gomez Garita], <http://www.cidh.org/annualrep/2010eng/crad1368-04en.doc>.

<sup>35</sup> *See Manifiesto de San José* [San Jose Manifesto], ENCuentro Matrimonial Mundial Costa Rica ) ¶ 6 (last visited Nov. 15, 2013), <http://www.encuentromatrimonialcr.org/nuevo-eeen-2013/manifiestosanjose1-8.pdf>.

<sup>36</sup> Jorge Nicolás Lafferriere, *Invisibilizar al embrión ante los intereses biotecnológicos* [Invisibilizing the embryo before biotechnological interests], 245 REVISTA JURIDICA LA LEY [L.L.] 1, 3 (2012).

<sup>37</sup> Artavia, *supra* note 4, at ¶¶ 258–259, 262. For more comment on this aspect, see Luis Alejandro Silva Irrázaval, *La protección de la vida humana entre paréntesis. Comentario crítico a la sentencia Artavia Murillo y otros (“fecundación in vitro”) vs. Costa Rica, de la Corte Interamericana de Derechos Humanos* [The parenthetical protection of human life. Critical commentary to the Inter-American Court on Human Rights’ judgment in Artavia Murillo and others v. Costa Rica]. ANUARIO DE DERECHO PÚBLICO, UNIVERSIDAD DIEGO PORTALES 383, 387 (2013) (Chile).

<sup>38</sup> Artavia, *supra* note 4, at ¶¶ 245–253.

<sup>39</sup> *Id.* at 17–18 (Vio Grossi, J., dissenting).

avored abortion rights in those jurisdictions, while ignoring the jurisdictions that were not in favor. The German Constitutional Court, for instance, repeatedly affirmed the constitutional right to life of the unborn, even in the embryonic stage.<sup>40</sup> This Court interpreted the term “everyone” in its Constitution (Article 2(2) of the Grundgesetz: “everyone possesses the right to life”) to include the unborn human being.<sup>41</sup> A 1975 decision spoke of the legal irrelevance of distinctions among the various stages of “self-developing life” (*sich entwickelnden Lebens*).<sup>42</sup> In 1993, the court reaffirmed most of that earlier judgment, holding that discussion of the unborn concerns “an individual life, one that in the process of growing and unfolding itself does not develop into a human being but rather develops as a human being,” with its “own” (“eigenen”) constitutional right to life.<sup>43</sup> The Inter-American Court also ignored that German law protects non-implanted embryos against lethal experimentation.<sup>44</sup>

Similarly, the judgment imitated the United States Supreme Court’s reasoning in *Roe v. Wade*,<sup>45</sup> by declaring that the Convention required a balancing test between the rights and interests at stake<sup>46</sup> thereby reducing the human embryo’s life to a mere “interest” in this

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<sup>40</sup> See Bundesverwaltungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverwaltungsgericht [BVerfG] 1, translated in Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. OF PRAC. & PROC. 551, 605–84 (1976), and see Bundesverwaltungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (Second Senate), in 1993 Europäische Grundrechte Zeitschrift [EUGRZ] 229. The German court indicated, however, that it was making no judgment about the nature or rights of the embryo prior to implantation because this matter was not at issue in the cases before it. *But cf.* The general protection of the preimplantation embryo in German statutory law, Embryonenschutzgesetz (ESCHG) [Law on the Protection of Embryos], Bundesgesetzblatt Dec. 19, 1990, BGRI I at 2746 (Ger.).

<sup>41</sup> MARTIN RHONHEIMER & PAOLO G. CAROZZA, *Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy* 151 (Working Paper No. 849, 1998), available at [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/849](http://scholarship.law.nd.edu/law_faculty_scholarship/849).

<sup>42</sup> 39 BVERFGE 1 (37), translated in Richard Stith, *Construction vs. Development: A Source of Deep Misunderstanding Concerning the Beginning of Life*, KENNEDY INST. ETHICS J. (forthcoming 2015).

<sup>43</sup> 88 BVERFGE 203, (251–52), translated in Richard Stith, *Construction vs. Development: A Source Of Deep Misunderstanding Concerning The Beginning Of Life*, KENNEDY INST. ETHICS J. (forthcoming 2015).

<sup>44</sup> Embryonenschutzgesetz (ESCHG) [Law on the Protection of Embryos], *supra* note 40.

<sup>45</sup> See *Artavia*, *supra* note 4, at ¶ 262.

<sup>46</sup> *Id.* at ¶ 263.

case, rather than a right.<sup>47</sup> But it left out *Roe*'s admission that, were the unborn found to be persons, they would have been entitled to human rights protection:<sup>48</sup> "If this suggestion [that a fetus is a "person"] is established, [Roe]'s case, of course collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."<sup>49</sup> *Roe*'s creation of abortion rights within a right to privacy may have inspired the *Artavia* court, but the U.S. Supreme Court has stopped using the "privacy" rationale after *Planned Parenthood of Southeastern Pa. v. Casey*.<sup>50</sup> Furthermore, the judgment failed to mention subsequent U.S. Supreme Court case law, like *Gonzales v. Carhart*, upholding a federal ban on partial-birth abortion, where the court referred to the unborn as an "unborn child" and a "baby,"<sup>51</sup> and to "the State's interest in promoting respect for human life at all stages in the pregnancy."<sup>52</sup> The judgment ignored post-*Roe* U.S. federal statutes, such as the Unborn Victims of Violence Act, that has continued to protect the unborn from the moment of conception, understood as fertilization, in contexts where *Roe* did not apply.<sup>53</sup>

The evolving interpretation analysis also mentioned three Latin American high court decisions that legalized abortion under limited circumstances<sup>54</sup> but left out three Mexican Supreme Court decisions upholding state amendments protecting the right to life from conception<sup>55</sup> and five high court decisions banning emergency

<sup>47</sup> *Id.* at ¶ 260.

<sup>48</sup> *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

<sup>49</sup> *Id.*

<sup>50</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 170–72 (2007) (Ginsburg, J. dissenting) (categorizing legal abortion as a matter of autonomy rather than privacy, in virtue of *Eisenstadt v. Baird*, 405 U.S. 438, 453, (1972)). See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, (1992).

<sup>51</sup> *Gonzales*, *supra* note 50, at 124, 134, 138–39.

<sup>52</sup> *Id.* at 124, 163.

<sup>53</sup> Unborn Victims Of Violence Act, 18 U.S.C.A § 1841(d) (2004) (defining "an unborn child" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb") (emphasis added).

<sup>54</sup> *Artavia*, *supra* note 4, at ¶¶ 172–262.

<sup>55</sup> See *Mexico: Supreme Court Upholds State Pro-Life Protections*, PARLIAMENTARY NETWORK FOR CRITICAL ISSUES (Sept. 2011), <http://www.pncius.org/newsletter.aspx?id=52>; see also Piero Tozzi, *Analysis: Unborn in Mexico Dodge Bullet–For Now*, C-FAM.FAM (Oct. 6, 2011), <http://E.c-fam.org/en/2011/6821-analysis-unborn-in-mexico-dodge-bullet-for-now>; Matthew Hoffman, *Turn-around victory: Mexican Supreme Court upholds state pro-life laws*, LIFESITE (May 3, 2013, 01:54 PM), <http://www.lifesitenews.com/news/turn-around-victory-mexican-supreme-court-upholds-state-pro-life-laws/>; *México: Suprema Corte ratifica blindaje de vida ante aborto en 18 estados*, ACIPRENSA (May 3, 2013, 03:34 PM), <http://www.aciprensa.com/noticias/mexico-suprema-corte>

contraception.<sup>56</sup> Evidently, the mere existence of judicial decisions favoring abortion in states parties does not create abortion rights under the American Convention. In Advisory Opinion OC-14/94,<sup>57</sup> the Inter-American Court on Human Rights held that the existence of domestic laws validating violations of human rights do not justify a breach of the American Convention;<sup>58</sup> therefore, three decisions on abortion cannot justify its validation under the American Convention. Furthermore, the three decisions it enumerated do not represent a regional consensus on the issue, an essential element of an evolving interpretation.<sup>59</sup> Judge Pérez Pérez once complained that the Inter-American Court had dismissed the need of reaching a consensus

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-ratifica-blindaje-de-vida-ante-aborto-en-18-estados-53077/#.UZpmmWzD8dU; *Mexican Supreme Court Strikes Down State Pro-Life Constitutional Amendment*, LIFESITE (Apr. 30, 2013, 5:09 PM), <https://www.lifesitenews.com/news/mexican-supreme-court-strikes-down-state-pro-life-constitutional-amendment>.

<sup>56</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 03/05/2002, “Portal de Belén–Asociación Civil sin Fines de Lucro c. Ministerio de Salud y Acción Social de la Nación s/ amparo,” [Fallos] (Arg.), <http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=516601>; Corte Suprema de Justicia [C.S.J.] [Supreme Court], 30/8/2001 “Philippi Izquierdo con Laboratorio Chile S.A.,” Rol: 2186-2001 and Tribunal Constitucional [T.C.] [Constitutional Court], 18/4/2008 Requerimiento de Inconstitucionalidad Deducido inconstitucionalidad deducido en Contracontra de Algunas Disposiciones algunas disposiciones de las “Normas Nacionales Sobre Regulación de la Fertilidad,” aprobadas por el Decreto Supremo No. 48, de 2007, del Ministerio de Salud, Rol de la causa: 740n07 (Chile), [http://www.tribunalconstitucional.cl/wp/descargar\\_expediente.php?id=34407](http://www.tribunalconstitucional.cl/wp/descargar_expediente.php?id=34407); Corte Suprema de Justicia de la República de Honduras [Supreme Court of Honduras], Dictamen Decreto 54-2009, 21 de junio 2012 (Hond.), [http://www.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id\\_decision=438](http://www.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id_decision=438); Tribunal Constitucional [Constitutional Court], 2214 de junio 2006, “José Fernando Roser Rohde con Instituto Nacional de Higiene y Medicina Tropical “Leopoldo Izquieta Pérez” y el Ministro de Salud S/ Acción de Amparo” Caso No. 0014-2005-RA, pp. 22–26 (Ecuador), <http://www.derechoecuador.com/productos/producto/catalogo/registros-oficiales/2006/junio/code/18651/registro-oficial-22-de-junio-del-2006-suplemento#anchor330581>; Tribunal Constitucional, [T.C.] [Constitutional Court] 16 octubre 2009, ONG “Acción de Lucha Anticorrupcion” Sentencia del Tribunal Constitucional, EXP. No. 02005-2009-PA/TC, ¶ 12 (Peru), available at <http://www.tc.gob.pe/jurisprudencia/2009/02005-2009-AA.html>.

<sup>57</sup> International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 35 (Dec. 9, 1994), available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_14\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_14_ing.pdf).

<sup>58</sup> *Id.*

<sup>59</sup> Artavia, *supra* note 4, at ¶¶ 17–18 (Vio Grossi, J., dissenting).

among the States Party to the ACHR before considering that the treaty has evolved,<sup>60</sup> as it seems to be the case in *Artavia*.

## II POTENTIAL EFFECTS OF THE ARTAVIA JUDGMENT IN THE CREATION OF ABORTION RIGHTS IN THE INTER-AMERICAN SYSTEM

The *Artavia* holding is both broad and narrow, and its effects in depriving the unborn of human rights protection in the Inter-American system may be manifested accordingly. It is broad in the sense that, even though it is not directly applicable to abortion laws or laws on abortifacients, some of the very broad language on abortion might, and probably will, be used by abortion rights advocates to support claims for legalization of emergency contraception. It may also be used to promote access to reproductive technologies as a human right, favoring the commercial interests of the biotechnology industry.<sup>61</sup> The decision has already prompted such lawsuits in at least one Latin American domestic jurisdiction.<sup>62</sup> But the judgment's effects on the creation of abortion rights in the Inter-American system of human rights remain unclear.

It can be expected that some of Judge García-Sayán's broad rhetoric on privacy as a supreme right that prevails over all others<sup>63</sup> and his reiterated claim that the right to life can be subject to multiple limitations<sup>64</sup> can and will be used to politically pressure states to recognize abortion rights, particularly those that have comprehensive bans on abortion. The decision's redefinition of conception as implantation would leave room for protection of the human embryo after implantation, e.g., even in selective abortions following IVF, but

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<sup>60</sup> *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012) ¶ 20 (Pérez Pérez, J., partially dissenting), available at [http://corteidh.or.cr/docs/casos/articulos/seriec\\_239\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf).

<sup>61</sup> See Lafferriere, Jorge Nicolás, *La Corte Interamericana de Derechos Humanos y un Injusto Fallo Sobre el embrión humano ante las Biotecnologías* [The Inter-American Court on Human Rights and an unjust ruling on the human embryo confronting biotechnology], *Revista de Derecho de Familia y las Personas*, ¶ 9, *La Ley* [L.L.] (2013) (Arg.) (pointing out that the judgment may indirectly benefit the embryo market biotechnology industry). See also Guanajuato Declaration, C-FAM.ORG (Aug. 27, 2010), available at [http://c-fam.org/docLib/20100908\\_declaracion\\_guanajuato\\_ing-1.pdf](http://c-fam.org/docLib/20100908_declaracion_guanajuato_ing-1.pdf).

<sup>62</sup> See *Juzgado Federal de Salta No. 1* [Federal court of Salta N. 1], 8/7/2013, "Lodi Ortiz Andrea Melisa-Larran Cristian c. Swiss Medical s/ Amparo," Expte. No. 61000007/13, *La Ley* [L.L.] (Arg.).

<sup>63</sup> *Artavia*, *supra* note 4, at ¶¶ 278–279, 326.

<sup>64</sup> *Id.* at ¶¶ 258–259, 261–262.

the statements on a gradual, incremental approach, suggest that the younger the embryo or fetus in question, the more likely the court would be to validate his destruction.

It appears that most members of the Commission and the Inter-American Court are currently unwilling to give the unborn's right to life any meaningful protection under the Convention, but the outcome of future litigation may not be as predictable as one may think. For instance, in May 2013, a request for abortion as a provisional measure was filed before the Inter-American Court six months after *Artavia* on behalf of Beatriz, a lupus patient who allegedly wanted to have a late-term abortion in El Salvador, a state that bans abortion under all circumstances.<sup>65</sup> Interestingly enough, when ordering provisional measures, the court asked that El Salvador ensure she be given necessary medical treatment, not an abortion.<sup>66</sup> This result was probably not based on a change of mind on the part of the court, but on the specific facts of the case and the impeccable logic of the national Supreme Court decision.

#### ***A. Artavia's Applicability in Costa Rica***

The *Artavia*'s holding itself is narrow in the sense that it does not apply anywhere outside of Costa Rica. Furthermore, the holding is unlikely to be directly on point in any other state party to the American Convention, given that no other country has an explicit ban on IVF and such a situation is now unlikely to repeat itself. Even if other court decisions mandating emergency contraception or abortion under some circumstances follow, other states parties may not be as willing as Costa Rica to comply with such a decision.

In fact, under Article 29 of the American Convention, states that include the human embryo in the category of persons or give the human embryo greater protections than those stated in *Artavia* would certainly have no obligation to permit embryo-destructive technologies or abortion. Article 29 of the American Convention preempts the Court from "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party" and restricting "other rights or guarantees that are inherent in the

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<sup>65</sup> Resolución de la Corte Interamericana de Derechos Humanos, *Medidas Provisionales Respecto De El Salvador*, 29/5/2013, Asunto B., available at [http://www.corteidh.or.cr/docs/medidas/B\\_se\\_01.pdf](http://www.corteidh.or.cr/docs/medidas/B_se_01.pdf).

<sup>66</sup> *Id.* at ¶ 9.

human personality.” Article 29 also codifies the *pro homine* principle: “No provision of this Convention shall be interpreted as . . . precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”<sup>67</sup> This rule has been repeatedly applied by the Inter-American Court to children and illegal immigrants,<sup>68</sup> and may be used in favor of the human embryo, as pointed out by an Argentinian federal court.<sup>69</sup>

The state has so far complied with many of the court’s recommendations: the Executive has produced a bill allowing and regulating in vitro fertilization and submitted it for congressional consideration, and the government has publicized the Inter-American Court decision, carried out trainings on sexual and reproductive rights for employees of the judiciary, and has ordered that reparations be paid to the petitionaries.<sup>70</sup> As of February 2014, the actual regulation of the practice by Congress and the implementation of subsidized IVF services, however, remain uncompleted,<sup>71</sup> perhaps due to the economic challenges that state-funded IVF would pose.

Existing claims that all of the *Artavia* decision would be self-executing in Costa Rican courts<sup>72</sup> would directly contradict Article

<sup>67</sup> See *Ticona Estrada et al. v. Bolivia* Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) ¶ 11, (García-Sayán & Ramírez, J., concurring) (Nov. 27, 2008), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_191\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_191_ing.pdf); *Raxcacó-Reyes v. Guatemala*, Merits, Reparations and Costs, (ser. C) ¶ 12 (Ramírez, J.) (Sept. 15, 2005), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_133\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_133_ing.pdf); *Acevedo-Jaramillo et al. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. ¶ 283(a) (Feb. 7, 2006), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_144\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_144_ing.pdf); see also “Five Pensioners” v. Peru, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) ¶ 143(b) (Feb. 28, 2003), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_98\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_98_ing.pdf).

<sup>68</sup> See *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am Ct. H.R. (ser. A) No. 18, ¶¶ 47, 78 (Sept. 17, 2003) (requested by the United Mexican States), available at [http://www1.umn.edu/humanrts/iachr/series\\_A\\_OC-18.html](http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html); see also *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶¶ 30–31, (Trindade, J., concurring), (Aug. 28, 2002) (requested by the Inter-Commission on Human Rights), available at [http://www1.umn.edu/humanrts/iachr/series\\_A\\_OC-17.html](http://www1.umn.edu/humanrts/iachr/series_A_OC-17.html).

<sup>69</sup> “Lodi Ortiz Andrea Melisa–Larran Cristian,” *supra* note 62.

<sup>70</sup> See, e.g., *Artavia* decision posted on Costa Rica’s Supreme Court website, available at <http://www.csjn.gov.ar/data/cidhfa.pdf>.

<sup>71</sup> See Hubert May, *El Estado incumple la sentencia FIV* [the state failed to comply with IVF ruling], LA NACION, [http://www.nacion.com/opinion/foros/incumple-sentencia-FIV\\_0\\_1360263964.html](http://www.nacion.com/opinion/foros/incumple-sentencia-FIV_0_1360263964.html).

<sup>72</sup> See Jorge Oviedo, *Costa Rica después de la sentencia de la CIDH en Artavia Murillo* [*Costa Rica after the ruling of the IACHR in Artavia Murillo*], OBSERVATORIO INTERNACIONAL DE POLITICAS PUBLICAS Y FAMILIA (Feb. 14, 2014) (Arg.),

68(2) of the American Convention which limits a judgment's direct effect to provisions on reparations.<sup>73</sup> The specific reference to a particular section of the judgment in that Article clearly indicates that states did not intend for all of the judgment to be self-executing in domestic courts; therefore it is highly doubtful that the court's statements on abortion, for instance, would be binding on Costa Rica. Only domestic law could provide for automatic, comprehensive compliance with Inter-American Court decisions, as illustrated by the former Executive Secretary of the IACHK, Santiago Cantón, who suggested that "states should pass internal legislation to ensure compliance with the decisions of the Commission and court."<sup>74</sup> In the region, only Peru, Costa Rica, and Colombia have such legislation, though none of these States provide an ideal model to follow."<sup>75</sup> In Costa Rica's case, Supreme Court precedent has established that only Congress, and not domestic courts, may order compliance with Inter-American Court decisions.<sup>76</sup>

It should be noted that the decision, like most Latin American judgments, does not make clear distinctions between the *ratio decidendi* and *dicta* in terms of their legal weight, perhaps because this distinction is not as important where a jurisprudence is not bound by the doctrine of *stare decisis*, traditionally the case for civil law

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<http://observatoriodinternacional.com/?p=1576> (where state attorney Oviedo describes status of current lawsuits before Costa Rican suits seeking further damages and judicial authorization for private practitioners to carry out IVF procedures, as well as administrative action against the Costa Rican social security system for delaying implementation of IVF subsidies).

<sup>73</sup> See Valentín Thury Cornejo, *Revisión del Control de Convencionalidad Difuso y la Identidad Institucional de la Corte Interamericana* [Review of diffuse control of conformity and institutional identity of the Inter-American Court], UCA/CONICET (last visited Jan. 10, 2014), <http://cedecu.edu.uy/uploads/media/mdCategory/bebf264aa42b3aa85e5afdcd20370855.pdf>.

<sup>74</sup> Santiago Cantón, *To Strengthen Human Rights, Change the Organization of American States (Not the Commission)* 3, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?Article=1836&context=hrbrief>.

<sup>75</sup> *Id.*

<sup>76</sup> See Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of Supreme Court], Sentencia 05274, May 4, 2005, SISTEMA COSTARRICENSE DE INFORMACIÓN JURÍDICA (Costa Rica), [http://jurisprudencia.poder-judicial.go.cr/SCIJ\\_PJ/busqueda/jurisprudencia/jur\\_Documento.aspx?param1=Ficha\\_Sentencia&nValor1=1&nValor2=335617&strTipM=T&strDirSel=directo](http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&nValor1=1&nValor2=335617&strTipM=T&strDirSel=directo); Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of Supreme Court], Sentencia 14953, Nov. 2, 2011, SISTEMA COSTARRICENSE DE INFORMACIÓN JURÍDICA (Costa Rica), [http://jurisprudencia.poder-judicial.go.cr/SCIJ\\_PJ/busqueda/jurisprudencia/jur\\_Documento.aspx?param1=Ficha\\_Sentencia&nValor1=1&nValor2=525680&strTipM=T&strDirSel=directo](http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&nValor1=1&nValor2=525680&strTipM=T&strDirSel=directo).

nations. The distinction is, however, particularly important for common law states parties to the Convention, and should be taken into account when evaluating the weight of certain statements in international court decisions. Alvaro Paúl notes “[t]his distinction is fundamental for a court aspiring to have its precedents applied by domestic State bodies, as the Inter-American Court claims.”<sup>77</sup>

A starting point for the distinction between *ratio* and *dicta* could be Article 68 of the Convention, which provides that only “[t]hat part of a judgment that stipulates compensatory damages,”<sup>78</sup> that is, the dispositive section, may be directly executed by domestic courts. The fact that the judgment’s operative section made no mention whatsoever of Article 4(1), as pointed out by Judge Vio Grossi,<sup>79</sup> could mean that the Court’s interpretation of the right to life from conception would not have the same level of authority as the dispositive paragraphs. This would make the *Artavia* holding relatively narrow. In any case, in the absence of *stare decisis*, it seems unlikely that judges would be bound by the Court’s interpretation of the right to life from conception in *Artavia*.<sup>80</sup>

### ***B. Artavia’s Applicability in Latin American Jurisdictions***

Any claims that the *Artavia* decision would have a direct effect on other states parties to the Convention that were not parties to the dispute would be in direct contradiction with the treaty text itself.<sup>81</sup> The treaty, like other Romano-Germanic treaties, provides that states are bound only by decisions in cases to which they are parties. Article 68(1) of the Convention leaves little room for doubt in that regard: “The states parties to the Convention undertake to comply with the judgment of the court *in any case to which they are parties* (emphasis

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<sup>77</sup> This disregard for common law and Anglo-Saxon legal traditions is referred to as “hispanocentrism” in Alvaro Paúl, *Decision-Making Process of the Inter-American Court: A Commentary Based on the “In Vitro Fertilization” Case* 33–34 (draft), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2303637](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303637) (for more on the Inter-American Court’s interpretation of Article 4(1) of the American Convention in *Artavia*).

<sup>78</sup> American Convention, *supra* note 1.

<sup>79</sup> *Artavia*, *supra* note 4, at 23 (Vio Grossi, J., dissenting).

<sup>80</sup> See, e.g., Álvaro Paúl, *Giro En Materia De Recurso De Revisión Ante La Corte Interamericana (Twist on the Remedy of Revision Before the Inter-American Court)*, *Revista Chilena de Derecho y Ciencia Política*, Vol. 4, 131–38 (2013), <http://ssrn.com/abstract=2333818>, (commenting on the Inter-American Court’s departure from consistent precedent on the availability of revision before its chambers in the *case of the Mapiripán massacre*).

<sup>81</sup> See Cornejo, *supra* note 74.

added).” Thus, nonparties to a case are not automatically bound by Inter-American Court judgments.

Some members of the Inter-American Court and Inter-American Commission have promoted the idea that their interpretations of the American Convention must prevail over domestic courts, but it is unlikely that *Artavia* will consolidate that kind of authority. Known as *control de convencionalidad*,<sup>82</sup> or, as translated decisions call it, “control of conformity” or “control of compliance,”<sup>83</sup> this doctrine was created in 2006 by Judge Diego García Sayán in *Almonacid Arellano v. Chile*<sup>84</sup> and reiterated in subsequent court decisions<sup>85</sup> and Commission communications.<sup>86</sup>

The theory appears to have been copied from the European Court of Justice (ECJ), which has long insisted that its interpretations of European law are superior to national laws (including national constitutions) as well as directly effective in conferring individual rights and duties.<sup>87</sup> Acceptance of the ECJ’s demands for unlimited supremacy of its treaty interpretations over the courts and nations of Europe has been neither complete nor unanimous, however. Early European treaties constituted a kind of economic and political union in which certain national powers had been surrendered by the signatory states, and the ECJ had been explicitly given the authority to interpret those delegated powers when called upon by a court to do

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<sup>82</sup> See Diálogo jurisprudencial y control de convencionalidad: una mirada comparada [Judicial dialogue and control of conformity, a comparative outlook], Inter-Am. Ct. H.R. Panel (Oct. 11, 2013), available at <http://vimeo.com/album/2565106/video/76720365> (for further discussion of the *control de convencionalidad* doctrine).

<sup>83</sup> See Álvaro Paúl, *Translation Challenges of the Inter-American Court of Human Rights and Cost-Effective Proposals for Improvement*, 5 INTER-AM. & EUR. HUM. RTS. J. 1, 3–26 (2012), available at <http://dx.doi.org/10.2139/ssrn.2060897> (for a critique of the term’s translation).

<sup>84</sup> *Arellano v. Chile*, Inter-Am. Ct. H.R. (ser. C), No. 208 (Oct. 9, 2002).

<sup>85</sup> See *Redilla Pacheco v. Mexico*, Inter-Am. Ct. H. R. (ser. C) No. 65/05 (Oct. 12, 2005); *Cabrera Garcia v. Mexico*, Inter-Am. Ct. H. R. (ser. C) No. 11/04 ¶ 7, 12, 21 (Feb. 24, 2004); *Tamayo v. Peru*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 42 ¶ 35 (Nov. 27, 1998).

<sup>86</sup> See also IACHR, *Questionnaire to Consult the States and Civil Society for Drawing up the Annual Overview of the Human Rights Situation in the Hemisphere*, <http://www.oas.org/en/iachr/consultation/docs/cap4A-en.pdf> (where IACHR requests official information on domestic laws, resolutions and judicial decisions incorporating this doctrine).

<sup>87</sup> See Richard Stith & J.H.H. Weiler, *Can Treaty Law Be Supreme, Directly Effective and Autonomous—All at the Same Time? (An Epistolary eEhchange)*, 34 N.Y.U.J. INT’L L. & POL. 729 (2002).

so.<sup>88</sup> Despite this, the German Constitutional court determined, in the decision known as *Solange I*, that the fundamental individual rights found in the German constitution take precedence over any conflicting doctrines developed by the ECJ.<sup>89</sup> A basic reason given by the German court was that the government of the federal Republic never had a power to override inalienable constitutional rights to begin with, so it could not have delegated (alienated) such a power to any European institution through a treaty. In the subsequent *Maastricht* case, the German high court further held that an implausible ECJ interpretation of a treaty (i.e., one that went significantly beyond any reasonable interpretation of the treaty's language), was *ultra vires* and thus amounted to a disguised attempt at a treaty *amendment*. Such a solely court-generated amendment, however, is impermissible, for it lacks the democratic legitimacy that would support a treaty amendment approved by European Union member states. A wholly implausible interpretation by the ECJ cannot, therefore, have domestic effects within Germany, according to *Maastricht*.<sup>90</sup>

Judge García Sayán has stated that the application of this doctrine would enable the court's jurisprudence to be "multiplied in hundreds or perhaps thousands of domestic courts in cases that it would never have been able to hear directly"<sup>91</sup> and to become a source of

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<sup>88</sup> Entscheidungen des Bundesverfassungsgerichts [BVERFG] [Federal Constitutional Court] May 29, 1974, 37, 271 (Ger.).

<sup>89</sup> *Id.* A subsequent decision known as *Solange II* drastically raised the burden of proof on opponents of the ECJ but nevertheless reaffirmed that treaty interpretations in conflict with fundamental German constitutional rights do not in principle have domestic validity; see BVERFGE 73, 339 2 BvR 197/83.

<sup>90</sup> See *Brunner and Others v. the European Union Treaty (The Maastricht Judgment)*, Bundesverfassungsgericht [BVERFG] [Federal Constitutional court, 2d Senate] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 155 (F.R.G.), 2 BvR 2134/92 & 2159/92, 1 C.M.L.R. 57, 105 (1994), 1993 WL 965303, at \*105, cited in Richard Stith, *Securing the Rule of Law Through Interpretive Pluralism: An Argument From Comparative Law*, 35 HASTINGS CONST. L.Q. 401, 411 note 25 (2008). ("[I]n future, it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes . . . the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany."). A recent and extensive reaffirmation by the Constitutional court of this view can be found in the *Lisbon* decision of 2009, BVERFG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. ¶¶ 1–421, available at [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html).

<sup>91</sup> Diego García-Sayán, *The Inter-American Court And Constitutionalism In Latin America*, 89 TEX. L. REV. 1835, 1836 (2011).

doctrinary and jurisprudential inspiration for national courts.<sup>92</sup> But the Inter-American Convention on Human Rights was never intended to produce the quasi-constitutional unity of the European Union treaties (nor that of the Latin American and Caribbean economic union treaties). So, *a fortiori*, the Inter-American Court has no power to make its treaty interpretations override inalienable and thus undelegable national constitutional rights. These rights include the fundamental right to life or the right to be considered a juridical person. Nor does the Court have the power to freely amend the Convention by means of an unbounded *control de convencionalidad* extending beyond the parties in a case to encompass every signatory nation and every individual therein without regard to the limits of democratic legitimacy. Indeed, in his dissenting opinion in *Artavia*, Judge Vio Grossi points out precisely that the Inter-American Court of Human Rights has no power to amend the treaty: “[T]he Court must interpret and apply the Convention, instead of assuming . . . the lawmaking function. The latter belongs to the States, which have the exclusive power to modify the Convention.”<sup>93</sup>

At least one domestic court has already rejected application of the *Artavia* decision on this basis. The Federal Court of Salta, an Argentinian province, partially rejected a couple’s request based on *Artavia* for full insurance coverage of artificial reproductive technologies, holding that the decision was not binding on the state of Argentina, because it was not a party to the dispute.<sup>94</sup> The court held *Artavia*’s rejection of the embryo’s personhood conflicted with Argentinian jurisprudence.<sup>95</sup> The court observed that the control of compliance doctrine could only be found among the court’s own jurisprudence, and not in any independent source, thus providing no

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<sup>92</sup> See Diego García Sayán, *Exámenes del horizonte* [Assessments from the horizon], in *La reforma de la Comisión Interamericana de Derechos Humanos* [Inter-American Commission on Human Rights Reform], 19 APORTES DPLF, REVISTA DE LA FUNDACIÓN PARA EL DEBIDO PROCESO 54 (2014), available at [http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op\\_20140508\\_03.pdf](http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op_20140508_03.pdf).

<sup>93</sup> *Artavia*, *supra* note 4, at 7–8 (Vio Grossi, J., dissenting).

<sup>94</sup> Juzgado Federal de Salta No. 1 [Juzg. Fed.] [Federal Court of Salta No. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).

<sup>95</sup> “Cabezas Daniel Vicente y otros s/denuncia–Cabeza de Buey,” sent. del 20/04/10 cited in Juzgado Federal de Salta No. 1 [Federal court of Salta N. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).

evidence of a duty to follow the said doctrine.<sup>96</sup> The court also reiterated the national Supreme Court's authority over constitutional interpretation, including international treaties that became a part of domestic constitutional law and rejected the premise that the Inter-American Court could legitimately interpret Argentinian constitutional law, which protects the unborn child.<sup>97</sup> Likewise, a group of Argentinian academics adopted a statement indicating that the *Artavia* decision was not binding on Argentinian law.<sup>98</sup>

Although judge García Sayán argues that states parties have accepted his control of conformity doctrine,<sup>99</sup> the highest courts of Argentina, Mexico, and Uruguay have explicitly rejected the idea that Inter-American Court decisions have binding authority over domestic courts. The Uruguayan Supreme court, in the “Two Coronels” case, held that Inter-American Court decisions are only binding on domestic courts in their dispositive section, i.e., the resolution.<sup>100</sup> It also held that the ultimate interpreter of the Uruguayan Constitution is the Uruguayan Supreme court, and that no duty to be bound by the Inter-American Court's jurisprudence can be found in the American Convention.<sup>101</sup> The Argentinian Supreme court stated that Inter-American Court decisions have no binding authority over domestic courts but only “moral significance.”<sup>102</sup> Likewise, the Mexican

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<sup>96</sup> Juzgado Federal de Salta No. 1 [Federal court of Salta N. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).

<sup>97</sup> Juzgado Federal de Salta No. 1 [Juzg. Fed.] [Federal Court of Salta No. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).

<sup>98</sup> *Conclusiones, Comisión de Parte General: “Persona Humana: comienzo de la existencia. Estatuto,”* XXIV JORNADAS NACIONALES DE DERECHO CIVIL, UNIVERSIDAD DE BUENOS AIRES 26–28 (Sept. 2013), [www.cfra.org.ar/agenda-y-jornadas/jornadas-2013/xxiv-jornadas-nacionales-de-derecho-civil/](http://www.cfra.org.ar/agenda-y-jornadas/jornadas-2013/xxiv-jornadas-nacionales-de-derecho-civil/) (“La doctrina del fallo ‘Artavia Murillo’ dictado por la Corte Interamericana de Derechos Humanos no es vinculante para nuestro derecho.”) [“The doctrine in Artavia Murillo decided by the Inter-American Court of Human Rights is not binding in our legal system.”].

<sup>99</sup> See García Sayán, *Panel I. Dialogo jurisprudencial y control de convencionalidad. Una Mirada comparada* [Panel I. Jurisprudential dialogue and control of conformity. A comparative look.] VIMEO (Oct. 11, 2013), <http://vimeo.com/album/2565106/video/76720365> (García Sayán claims Inter-American Court decisions have led to 39 domestic court convictions in different states parties).

<sup>100</sup> Suprema Corte de Justicia del Uruguay [S.C.J.] [Uruguay Supreme Court of Justice], 22/02/2013, *M. L., J. F. F., O.–Denuncia–Excepcion de inconstitucionalidad arts 1, 2 y 3 de la ley 18831*, ¶ CONSIDERANDO III (a), No. 20/2013 (Uru.).

<sup>101</sup> *Id.*

<sup>102</sup> Fallos: 330:4040, 332:1488, cited in Juzgado Federal de Salta No. 1 [Juzg. Fed.] [Federal Court of Salta N. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).

Supreme court has found that Inter-American Court judgments to which Mexico was not a party may provide guidance to Mexican judges only as long as they favor the human person and the protection of his rights,<sup>103</sup> not where their interpretation is more restrictive, or where domestic law grants greater protection than the American Convention. Even when courts have acknowledged or invoked Inter-American Court decisions in their high court decisions, they have only attributed them non-binding authority.<sup>104</sup>

Only one country seems to have adopted the control of conformity doctrine in its full form: Peru, García Sayán's country of origin, where the Constitutional court held that the judgments of the Inter-American Court of Human Rights, including their *ratio decidendi*, were "binding for all public authorities . . . , even in those cases in which the Peruvian State has not been a party to the proceedings."<sup>105</sup> But even in that case, the Constitutional court of Peru specifically limited the judgments' authority to the *ratio decidendi* and not the decision as a whole.<sup>106</sup>

### ***C. Artavia's Potential Effects on the Inter-American Court's Authority***

Controversial decisions, albeit on different issues, have historically raised among states parties a great deal of opposition and skepticism against the Commission, to the point where some states have sought to diminish its powers.<sup>107</sup> Such tensions eventually led states parties to

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<sup>103</sup> Juzgado Federal de Salta No. 1 [Juzg. Fed.] [Federal Court of Salta No. 1], 8/7/2013, "Lodi Ortiz Andrea Melisa-Larran Cristian c. Swiss Medical s/ amparo," Expte. No. 61000007/13, (Arg.).

<sup>104</sup> According to Judge García Sayán, Inter-American Court decisions have been mostly cited in domestic high court decisions involving four issues: amnesties, the obligation to investigate human rights violations, the right to an effective remedy, and nondiscrimination and the rights of indigenous peoples. See Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835, 1841 (2011).

<sup>105</sup> Judgment of the Constitutional court of Peru, in the action on unconstitutionality, filed by the Callao Bar Association against Law 28,642, cited in TC, Pleno Jurisdiccional, 19/6/2007, "Colegio de Abogados del Callao c. Congreso de la República," No. 00007-2007-PI/TC ¶ 36. See also *Haiti-Observaciones Comité Derechos de la Mujer/2009*, OBSERVATORIO INTERNACIONAL, (Aug. 23, 2014), <http://observatorioderechos.org/observatoriointernacional.com/?p=964>.

<sup>106</sup> Judgment of the Constitutional court of Peru, *supra* note 105.

<sup>107</sup> See *La reforma de la Comisión Interamericana de Derechos Humanos* [Inter-American Commission on Human Rights reform], 19 APORTES DPLF, REVISTA DE LA FUNDACIÓN PARA EL DEBIDO PROCESO (2014), available at <http://perso.unifr.ch>

carry out a comprehensive review of the IACHR's functions<sup>108</sup> that concluded in reform of its Rules of Procedure, among others.<sup>109</sup> Decisions like *Artavia* could, at least in theory, have a similar effect on states parties' acceptance of the court's authority.

The court's lack of flexibility in refusing to grant a state deference in controversial matters of moral relevance does little to reinforce its authority in the long term. Restricting national judges' ability to interpret national Constitutions and imposing interpretative uniformity, according to the court's personal views on human life, may dissuade states parties from submitting to its jurisdiction.<sup>110</sup> Furthermore, the requirement that Costa Rican judges and their staff be retrained in proper judging on matters of abortion and reproductive technologies,<sup>111</sup> may strike some national judges as arrogant and paternalistic, while others could view such trainings as a tool of ideological imposition of pro-choice views on the judiciary. Such perceptions may dissuade states from increasing the Court and Commission's funding, as members of both bodies have repeatedly requested.<sup>112</sup>

*Artavia*'s disregard for national sovereignty may also dissuade non-parties to the treaty, like the United States, from ratifying the

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/derechopenal/assets/files/obrasportales/op\_20140508\_03.pdf (Authors, including OAS Chief of Staff, states parties' diplomatic representatives, and other commentators describe the Commission's reform process, which took place in several regional meetings among states parties to the American Convention. They speak of expressed distrust and hostility on the part of some states, particularly those with leftist political regimes, such as Argentina, Venezuela, Ecuador, Bolivia, Nicaragua and, at one point, Brazil, who accused the Commission of being ideologically biased in favor of U.S. foreign policy interests, and of inappropriately issuing precautionary measures, reports on freedom of expression, among others).

<sup>108</sup> *Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System*, OEA/Ser.P AG/RES. 1 (XLIV-E/13) rev. 1 (July 23, 2013), available at [scm.oas.org/doc\\_public/ENGLISH/HIST\\_13/AG06212E06.doc](http://scm.oas.org/doc_public/ENGLISH/HIST_13/AG06212E06.doc).

<sup>109</sup> See IACHR, *New Rules of Procedure*, INTER-AM. COMM'N H.R. (Aug. 1 2013), <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

<sup>110</sup> See Press Release, Organization of American States, IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights (Sept. 12, 2012), available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/117.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp) (on Venezuela's denunciation of the Convention and withdrawal from IA court jurisdiction).

<sup>111</sup> *Artavia*, *supra* note 4, at ¶¶ 341, 381 operative paragraph #7.

<sup>112</sup> See, e.g., J. Jesus Orozco, *La reforma de la Comisión Interamericana de Derechos Humanos* [Inter-American Commission on Human Rights reform], 19 APORTES DPLF, REVISTA DE LA FUNDACIÓN PARA EL DEBIDO PROCESO 8 (2014), available at [http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op\\_20140508\\_03.pdf](http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op_20140508_03.pdf) (Commissioner Orozco calling for greater funding for Inter-American human rights bodies).

American Convention. Even though state representatives may agree with some parts of the holding, the court's overruling of a Supreme Court decision and the subsequent imposition of a duty to facilitate IVF through government agencies and provide government funds may prove unacceptable for traditional U.S. constitutional standards. For similar reasons, nonparties to the Inter-American Court's Statute (Dominica, Grenada, and Jamaica) may be dissuaded from recognizing the court's jurisdiction.<sup>113</sup>

Furthermore, *Artavia* may weaken states parties' perceptions on the enforceability of Inter-American Court decisions in general. Even for Costa Rica, a country that has so much invested in the Inter-American System on human rights, host to the Inter-American Court headquarters and the first state to ratify the American Convention,<sup>114</sup> compliance with the court's unreasonable demands, specially in regard to IVF state subsidies, has been less than perfect. As of February of 2014, Costa Rica complied with the victim compensation mandate and the Executive, namely the Ministry of Health, has submitted a bill that would authorize and regulate IVF for congressional approval.<sup>115</sup> But the country probably lacks the resources to provide subsidized IVF services in the near future,<sup>116</sup> and it is uncertain that it ever will. Santiago Cantón stated that "despite the important markers of success of the Inter-American system on human rights, states do not fully comply with a large majority of its decisions," and *Artavia* may be no exception.<sup>117</sup>

Finally, the *Artavia* decision or subsequent similar decisions may alert the Organization of American States General Assembly to the

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<sup>113</sup> See American Convention on Human Rights Status of ratifications, Ratification/Accession: 03/02/70, American Convention on Human Rights, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>114</sup> *Id.*

<sup>115</sup> E-mail interview with Jorge Oviedo Alvarez, Deputy Solicitor General, and member of the legal defense team for the state in *Artavia Murillo v. Costa Rica* (Dec. 25 2012). See also Luis Eduardo Diaz, *Salud decidira si la FIV se reactiva via ley o reglamento* [Health Ministry will decide if IVF is reactivated through statute or regulation], LA NACION (last visited Jan. 10, 2014), [http://www.nacion.com/nacional/comunidades/Salud-decidira-FIV-reactiva-reglamento\\_0\\_1316668385.html](http://www.nacion.com/nacional/comunidades/Salud-decidira-FIV-reactiva-reglamento_0_1316668385.html).

<sup>116</sup> See L. Arias, *Human Rights Court Orders Costa Rica to Legalize In Vitro Fertilization*, TICO TIMES (Dec. 20, 2012), <http://www.geneticsandsociety.org/Article.php?id=6601> (where the Director of Costa Rica's Social security authority indicates that the institution does not yet have the resources to comply with the judgment).

<sup>117</sup> Cantón, *supra* note 74.

need for discussion of the court's decisions and the Commission's reports and activities in greater detail. Santiago Cantón indicates that:

[T]oday, the combined time given to the Commission and the court during the General Assemblies is no more than fifteen minutes. Most of the time, there is absolutely no discussion of the activities carried out during the year by these two bodies. In the last fifteen years, the only discussions about the System took place in El Salvador in 2011 and Bolivia in 2012, and those instances were both to discuss the reform process, not necessarily to discuss strengthening the System.<sup>118</sup>

### CONCLUSION

Due to the court's limited jurisdiction under the American Convention, the *Artavia* decision should not have any direct effect anywhere other than Costa Rica. However, in practice, its rationale may be used to promote abortion rights in Latin America and the Caribbean. Individual states may give *Artavia* as much or as little authority as they want, given that nothing in the Convention mandates that non-parties to the dispute give it any authority at all, and that the doctrine of control of conformity has questionable acceptance.

It is unlikely that *Artavia* will be deemed to be the final word on the interpretation the right to life from conception. The court's biased interpretation of Article 4(1) in *Artavia* may, inevitably, succumb under its own weight and be overturned by a future composition of the Inter-American Court, since the court does not consistently follow the anglo-saxon doctrine of *stare decisis*.<sup>119</sup>

In the long term, the decision may also motivate states parties to produce counter-legislation protecting the unborn, or to modify the court statute to amend its interpretation faculties. Judge Vio Grossi encouraged states to use their legislative faculties, warning that:

If they fail to do so, there is the risk that—as it somewhat happens in this case—the court may not only decide on these issues, which require a more political pronouncement, but may also be obliged to assume this normative function. This would distort the court's jurisdictional function, affecting thus the performance of the whole Inter-American system of human rights.<sup>120</sup>

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<sup>118</sup> *Id.* at 7.

<sup>119</sup> See Alvaro Paúl, Decision-Making Process of the Inter-American Court: A Commentary Based on the "In Vitro Fertilization" Case 6 (Oct. 11, 2013) (unpublished comment), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2303637](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303637).

<sup>120</sup> *Artavia*, *supra* note 4, at 23 (Vio Grossi, J., dissenting).

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