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CONTENTS

Articles

TRANSNATIONAL RIGHTS ENFORCEMENT
David Gartner .................................................. 1

WHEN ACTIONS SPEAK LOUDER THAN WORDS: THE RELEVANCE OF SUBSEQUENT PARTY CONDUCT TO TREATY INTERPRETATION
Rahim Moloo .................................................. 39

THE HUMAN RIGHT(S) TO WATER AND SANITATION: HISTORY, MEANING, AND THE CONTROVERSY OVER-PRIVATIZATION
Sharmila L. Murthy .......................................... 89

THE LAW ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: IS IT BROKEN AND HOW DO WE FIX IT?
Yuliya Zeynalova ........................................... 150

SYMPOSIUM: INTRODUCTION
John Yoo ............................................................ 207

GLOBALIZATION AND SOVEREIGNTY
Julian Ku & John Yoo ....................................... 210

THE ROLE OF JUSTICE IN ANNULLING INVESTOR-STATE ARBITRATION AWARDS
Tai-Heng Cheng ............................................... 236

INTERNATIONAL LAW AND INSTITUTIONS AND THE AMERICAN CONSTITUTION IN WAR AND PEACE
Thomas H. Lee ................................................. 291

SOVEREIGNTISM’S TWILIGHT
Peter J. Spiro ................................................... 307
2013

Transnational Rights Enforcement

David Gartner

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Transnational Rights Enforcement

David Gartner*

INTRODUCTION

A major debate among international law scholars revolves around the question of how, if at all, international human rights are enforced. International human rights treaties include few effective enforcement mechanisms. Many scholars have found that treaty ratification has only a limited impact on state practices when it comes to human rights, and some scholars have suggested that states that ratify human rights treaties are more likely to violate these

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rights.³ States have little incentive to coerce other states into enforcing their respective human rights obligations.⁴ Yet even as many states remain reluctant to implement human rights obligations, non-state actors are increasingly catalyzing them to do so. Transnational rights enforcement is emerging as a key alternative mechanism for catalyzing the enforcement of human rights.

Recent empirical studies have highlighted three leading explanations for why states enforce their human rights obligations: (1) the democracy thesis; (2) the constitutional thesis; and (3) the international non-governmental organization (INGO) thesis.

In order to identify key causal mechanisms involved in human rights enforcement, this article tests these competing theories through controlled comparisons and qualitative case studies focused on a single widely ratified human right: the right to education. Based on an empirical analysis of the enforcement of the right to education, this article identifies significant limitations in the explanatory reach of each of these leading theories. Through qualitative case studies, the article identifies transnational rights enforcement as an alternative model for understanding the process of human rights enforcement. Transnational rights enforcement highlights the role of civil society actors and the significance of the strategies and frames adopted by these actors. It identifies several causal mechanisms through which domestic and international civil society actors contribute to human rights enforcement. Transnational rights enforcement reveals how these actors overcome international constraints on domestic enforcement, utilize global frames to leverage domestic commitments, and take advantage of regional norms and regional institutions to foster domestic compliance.

The three leading theories of human rights enforcement emerged from a new wave of quantitative empirical studies in the field of human rights.⁵ The democracy thesis asserts that democratic political structures catalyze states to enforce human rights commitments. Even studies that find treaty ratification has little impact on human rights highlight the fact that fully democratic countries

³. See Hathaway, supra note 1, at 1999 (states ratifying human rights agreements were, on average, more likely to violate rights than other states). But see Derek Jinks & Ryan Goodman, Measuring the Effects of Human Rights Treaties, 14 EUR. J. INT’L L. 171, 182 (2003) (the incorporation of human rights norms is a process, treaty law plays an important role in this process-ratification is a not magic moment of acceptance but rather a point in a broader process of incorporation).

⁴. SIMMONS, MOBILIZING FOR HUMAN RIGHTS, supra note 1, at 122 (“Foreign governments simply do not have the incentives to expend political, military, and economic resources systematically to enforce human rights treaties around the globe . . . . Governments will have especially weak incentives to enforce international human rights agreements involving their important trade partners, allies, or other strategically, politically, or economically important states.”).

are more likely to enforce human rights treaties.\textsuperscript{6} Democracies generally keep the promises that they make\textsuperscript{7} and are therefore more likely to enforce their human rights commitments.\textsuperscript{8} In contrast, the worst enforcement of human rights across a range of rights is commonly found in non-democratic regimes.\textsuperscript{9}

While the democracy thesis focuses on domestic political structure, the constitutional thesis highlights the role of substantive constitutional commitments in human rights enforcement. Recent scholarship has identified constitutionally based legal mobilization as a key factor in the enforcement of a wide range of human rights.\textsuperscript{10}

Finally, the INGO thesis argues that human rights enforcement within a state reflects the number of international non-governmental organizations that operate at the national level. Evidence for the INGO thesis can be found in recent scholarship, which finds that the number of international non-governmental organizations in a given country contributes to better human rights practices.\textsuperscript{11}

Although these theories have identified important variables that appear to affect human rights enforcement, some of this literature has drawn causal inferences from studies that are better at demonstrating recurring associations between different processes than in proving actual causation or revealing the underlying causal mechanisms.\textsuperscript{12} Furthermore, given that most of these studies focus on enforcement of civil and political rights, the enforcement of social and economic rights is even less well understood.\textsuperscript{13}

To gain better insight into the causal mechanisms involved in human rights enforcement, this article seeks to test these competing theories through

\begin{itemize}
  \item \textsuperscript{6} Hathaway, \textit{supra} note 1, at 1980.
  \item \textsuperscript{7} \textit{LANDMAN, supra} note 2.
  \item \textsuperscript{8} Neumayer, \textit{supra} note 5.
  \item \textsuperscript{10} MALCOLM LANGFORD, \textsc{Social Rights Jurisprudence: Emerging Trends in International and Comparative Law} (2009); MARK TUSHNET, \textsc{Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law} (2008).
  \item \textsuperscript{11} Hafner-Burton & Tsutsui, \textit{supra} note 2, at 1386 (the larger number of INGOs operating in a country, the higher the protection of human rights, holding other factors constant); Neumayer, \textit{supra} note 5, at 925 (“rarely does [human rights] treaty ratification have unconditional effects on human rights. Instead improvement in human rights is more likely the more democratic the country or the more international nongovernmental organizations its citizens participate in.”).
  \item \textsuperscript{12} Emilie Hafner-Burton, \textit{International Regimes for Human Rights}, 15 ANN. REV. POL. SCI. 265 (2012).
\end{itemize}
controlled comparisons and qualitative case studies focused on the right to education. Nearly every country in the world has ratified the right to education. It is similar to a wide range of human rights in that it includes immediately binding obligations on state parties regardless of a state’s level of economic development. However, it lends itself more easily to clear-cut evaluation of state compliance than many other human rights because of the explicit requirement that primary education be available free to all children. Part I of the article analyzes the requirements of the right to education established by the core conventions of the legal regime of international human rights. Specifically, it highlights free primary education as a key element of the right to education, which states are required to implement regardless of their level of economic development. This section reveals the limits of these three theories of human rights enforcement for explaining the abolition of school fees and the implementation of the right to education.

Part II examines five case studies involving the right to education and the abolition of school fees. These case studies are carefully matched to reveal the operations of different causal mechanisms. Based on interviews in Sub-Saharan Africa and other types of qualitative evidence, this section utilizes the social science methodology of process tracing to “identify the intervening causal process[es]” involved in the enforcement of the right to education. The first case is an “outlier case,” which cannot be easily explained by the existing theories of human rights enforcement. This allows for the identification of potential alternative mechanisms of human rights enforcement. The next four cases are matched pairs, involving “most similar” and “most different” cases. These cases vary in terms of the strength of the values of democracy, domestic constitutional protections of the right to education, and the number of INGOs in each country. These controlled comparisons make it easier to identify the significance of different variables within each case. Finally, Part III highlights transnational rights enforcement as an alternative approach to


17. See generally Andrew Bennett, Case Study Methods: Design, Use, and Comparative Advantages, in MODELS, NUMBERS, & CASES: METHODS FOR STUDYING INTERNATIONAL RELATIONS (Detlef F. Sprinz, et al. eds., 2004).


19. Id. at 34.
understanding human rights enforcement and outlines its significance for catalyzing states to meet their human rights obligations in the twenty-first century.

I. THE RIGHT TO EDUCATION

The right to education has roots in international conventions dating to the early twentieth century and has now been ratified, in some form, by almost every country in the world. The early outlines of the right to education can be found in the conventions of the International Labor Organization with respect to child labor shortly after World War I. However, the modern right to education was not explicitly articulated in international conventions until shortly after World War II. The right to education was incorporated into the Universal Declaration of Human Rights in 1948, which declared that: “Education shall be free, at least in the elementary and fundamental stages.”

An enforceable right to education was included in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which entered into force in 1976 and has been ratified in some form by nearly 160 countries. Article 13 of the ICESCR declares that “primary education shall be compulsory and available for all” and has been ratified by nearly as many countries as its counterpart for civil and political rights. The Committee on Economic, Social, and Cultural Rights, a body of experts that evaluates compliance with the ICESCR, determined that “indirect costs, such as compulsory levies on parents” are not permissible under the Covenant. States parties to the ICESCR are required to adopt a plan within two years to implement free and compulsory primary education within a reasonable number of years.

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24. Id.
The obligations established by the ICESCR are elaborated in General Comment number 13, which reflects the interpretation of the Covenant’s requirements by the United Nations Committee on Economic, Social, and Cultural Rights (UNCESCR). The General Comment reiterates the two distinctive features of primary education: that it must be “compulsory” and “available free to all.”28 It particularly highlights the immediate action required in the area of primary education: “The obligation to provide primary education for all is an immediate duty of all States parties.”29 The General Comment also specifies that it would be a violation of that right to fail to introduce “as a matter of priority, primary education which is compulsory and available free to all.”30

The Convention on the Rights of the Child, adopted in 1990, strongly reaffirmed the right to education. The Convention also re-iterates specific obligations with respect to free primary education, including that “states parties recognize the right of the child to education . . . they shall, in particular: (a) make primary education compulsory and available free for all.”31 The Convention on the Rights of the Child is currently binding on 193 states.32 The Committee on the Rights of the Child, a body of independent experts, is charged with monitoring and enforcing the Convention, including the provisions relating to education. However, the Committee does not have the authority to hear individual complaints about violations of the Convention. Instead, the Committee relies heavily on self-reporting by states about their level of compliance and the factors that might hinder fulfillment of their obligations under the Convention.33

The United Nations Educational, Scientific, and Cultural Organization (UNESCO), which serves as the lead United Nations agency on education, has taken an active role in defining the right to education but has not contributed significantly to legal enforcement of the right.34 Former U.N. Special Rapporteur on the right to education, Katarina Tomasevski, recognized that: “There are no words such as violation or responsibility in UNESCO-ese . . . . The key word in UNESCO-ese is government leadership and all governments are assumed to be committed to education for all.”35 While the United Nations Human Rights Council established the position of the Special Rapporteur on the

29. Id. ¶ 51.
30. Id. ¶ 59.
32. Id.
right to education to investigate the status of the right in member states, there has not been a strong connection between this reporting and the actual resolutions of the Council.\(^\text{36}\) In 2008, the U.N. General Assembly adopted a resolution giving individuals the right to submit complaints on states’ violations of the right to education to the U.N. Committee on Economic, Social, and Cultural Rights.\(^\text{37}\) However, this optional protocol has not yet been ratified by the ten countries required for it to enter into force.\(^\text{38}\)

While the foregoing analysis highlights the limits of existing international enforcement mechanisms, recent empirical scholarship points to the significance of democratic political structures, strong constitutional protections, and the number of INGOs operating within a given country for human rights enforcement. The next section examines the significance of the democracy thesis, the constitution thesis, and the INGO thesis for explaining the abolition of primary school fees and the enforcement of the right to education.

\(\text{A. The Democracy Thesis}\)

The democracy thesis holds that democratic states are more likely to respect their human rights obligations. The level of democracy in a given country has been tied to levels of primary school enrollment and government expenditure on primary education across a range of countries.\(^\text{39}\) Some scholars have argued that democracy is the key variable that can explain the shift toward school fee abolition among countries in Sub-Saharan Africa. According to the democracy thesis, “electoral competition resulting from a democratic transition should increase the likelihood of user fee abolitions in Africa.”\(^\text{40}\) According to this view, the entire gap in school enrollment between democracies and non-democracies can be explained by controlling for the single variable of school fee abolition.\(^\text{41}\)

However, a closer examination of the specific cases upon which this conclusion relies suggests that democracy may not be enough to explain school fee abolition.\(^\text{42}\) Of the sixteen countries identified as having abolished school

\(^{36}\) Tomaševski, Has the Right to Education a Future, supra note 21, at 208.


\(^{39}\) Id. at 19.


\(^{41}\) Id. at 4.

\(^{42}\) Id. at 13, tbl. 1.
fees, more than half do not fit the theory’s model of a competitive election generating new human rights commitments from a democratic government. In five of the sixteen cases, the abolition of school fees did not take place following an election. In four other cases, the elected presidents won with at least fifty percent more votes than their opponents, suggesting that the election was not really competitive in practice. Additionally, multiple democracies in Sub-Saharan Africa that otherwise fit this profile still have not abolished primary school fees. And finally, a few African countries have taken steps to abolish fees despite the absence of democracy.

B. The Constitutional Thesis

The constitutional thesis articulates a legal mechanism for enforcement of human rights. This theory holds that countries that adopt more explicit constitutional protections of human rights demonstrate more effective enforcement of those rights. Modern constitutions increasingly include explicit references to a right to education, often borrowing directly from the language of international human rights conventions. In 2001, the U.N. Special Rapporteur on the right to education found explicit guarantees of the right to education in the constitutions of 142 out of 186 countries. Furthermore, ninety-five of these national constitutions explicitly articulate the government’s obligation to provide free education. In the developing world, 87.7 percent of all national constitutions include a right to education. Such a right is present in every constitution in Latin America and every constitution in Eastern and Central

43. Id.
44. For example, Botswana, South Africa, Mali are each classified as democracies on the Polity IV scale but none of these countries have fully abolished primary school fees. See the Polity IV Index, Polity IV Project, SystemicPeace.org (Feb. 15, 2012), http://www.systemicpeace.org/polity/polity4.htm (last visited Nov. 12, 2012) (project coding the authority characteristics of states).

45. Neither Cameroon, the Republic of Congo, Rwanda, Tanzania, Togo, or Uganda were classified as democracies on the Polity IV scale when each of these countries implemented primary school-fee abolition. Even autocracies, such as Swaziland, and military governments, such as Nigeria in 1976, have taken some steps to eliminate primary school fees. See Polity IV Index, supra note 44.


Europe. In fact, the right to education is absent in only two constitutions in Asia and in only seven constitutions in Sub-Saharan Africa.50

However, a recent analysis of education in sixty-eight countries found that the inclusion of a right to education in the national constitution seemed to have no positive effect in terms of the enforcement of the right to education.51 More explicit constitutional protection did not lead to expanded levels of primary or secondary school enrollment.52 Constitutional provisions protecting the right to education are not sufficient in many countries to ensure implementation of the right to primary education for all children. With some important but limited exceptions, the right to education has not yet been widely enforced by national courts relying on national constitutional protections.53

C. The INGO Thesis

The INGO thesis suggests that countries with a greater number of international non-governmental organizations are more likely to enforce human rights protections.54 Recent empirical work highlights a connection between the enforcement of the rights of children and the number of child rights INGOs within a given country.55 Countries with stronger connections to INGOs are more likely to increase their education spending per child.56 However, it is much less clear that the number of INGOs can easily explain shifting levels of enforcement of the right to free primary education. Half of the sixteen countries in Sub-Saharan Africa that abolished school fees had a low number of INGOs.57 Many of the countries in the region with the highest number of INGOs continue to allow schools to charge primary school fees.58

Despite important work highlighting the significance of transnational actors for rights enforcement, there is still only a limited understanding of the causal mechanisms through which INGOs might catalyze rights enforcement.59

50. Id. at 21.
52. Id.
53. GAURI & BRINKS, supra note 48, at 308.
56. Id. at 478-79.
58. For example, South Africa and Nigeria have among the highest number of INGOs on the continent but neither country fully abolished primary school fees nor have other countries with a relatively high number of INGOs, such as Senegal and Ivory Coast.
59. See MARGARET KIEK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 4 (1998) (examining the role of “transnational advocacy
Relatively little is known about the ways in which non-state actors translate international obligations into domestic contexts. Therefore, the INGO thesis, like the democracy thesis and the constitutional thesis, does not reveal the underlying causal mechanisms involved in human rights enforcement and does not seem to offer an adequate explanation for the varying levels of enforcement of the right to education.

II.

SCHOOL FEES AND THE RIGHT TO EDUCATION

This section analyzes five different country case studies on the enforcement of the right to education in order gain insight into the causal mechanisms that drive the enforcement of human rights. In order to control for the impact of ratification, all selected countries have ratified at least one of the major conventions that guarantee free primary education.

The first case study looks at an “outlier case” that is not easily explained by leading theories and can therefore potentially reveal alternative causal mechanisms. Tanzania was not a full-fledged democracy when it abolished school fees and did not have a strong constitutional right to education or an especially large number of INGOs operating within the country.

The next four cases are matched pairs that vary in terms of the strength of the values of the variables that correspond to the current leading explanations. The first pair features the “most different” cases, which are countries that match only in terms of their level of constitutional protection of the right to education, but vary in almost all other key variables. Ghana and Swaziland share extremely explicit constitutional provisions protecting the right to education. However, Ghana is a low-income country with a strong democracy and a high number of INGOs. In contrast, Swaziland is a middle-income country that is not democratic and has relatively few INGOs. The second pair of countries is the “most similar” cases, which are countries that are closely related in terms of...
most key variables, but vary along one major dimension. Colombia and Nigeria are both classified as middle-income countries, democracies, and fragile states with comparable levels of INGOs, but these two countries are situated in very different regional contexts with distinct regional institutions and norms.

<table>
<thead>
<tr>
<th>Country</th>
<th>Tanzania</th>
<th>Ghana</th>
<th>Swaziland</th>
<th>Colombia</th>
<th>Nigeria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democracy⁶³</td>
<td>Hybrid</td>
<td>Strong Democracy</td>
<td>Autocracy</td>
<td>Weak Democracy</td>
<td>Weak Democracy</td>
</tr>
<tr>
<td>Constitutional Right to Education⁶⁴</td>
<td>Weak</td>
<td>Strong</td>
<td>Strong</td>
<td>Moderate</td>
<td>Moderate</td>
</tr>
<tr>
<td>INGO⁶⁵</td>
<td>Medium</td>
<td>Medium</td>
<td>Low</td>
<td>High</td>
<td>High</td>
</tr>
</tbody>
</table>

Despite unambiguous language requiring free primary education within the text of the Universal Declaration of Human Rights, the International Covenant on Social and Economic Rights, the Convention on the Rights of the Child, and many national Constitutions, primary school fees remained a persistent practice in many countries into the twenty-first century.⁶⁶ The World Bank’s policies have often been much more influential in shaping realization of the right to education. Between 1980 and 1995, the World Bank and other leading international financial institutions encouraged countries to introduce user fees

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⁶³ The democracy categorizations are based upon a combination of the Polity IV Index and the Freedom House Index. Polity IV Index, supra note 44; Freedom House Index available at http://www.freedomhouse.org/ (last visited Nov. 12, 2012). Strong democracies are clearly ranked as democracies under Polity IV and rated as fully free by Freedom House. Weak democracies are in the low end of the scale for democracies on Polity IV and rated as partly-free by Freedom House. Hybrid regimes fall well below the level of democracies on Polity IV and are rated as partly-free by Freedom House. Autocracies fall at the very bottom end of the Polity IV ranking and are rated as not free by Freedom House.

⁶⁴ The Constitutional Right to Education categorization is based upon the level of explicit protection within the constitution of each country. Countries with constitutions that have explicit requirements for the implementation of free primary education are classified as strong, countries with constitutions that include language on free primary education are classified as moderate, and countries with constitutions that have no reference to free primary education are classified as weak.

⁶⁵ See Yearbook of International Organizations, Union of Int’l Ass’ns (1948) (The INGO categorizations are based on the Yearbook of International Organizations catalogue of INGOs operating within a given country. Countries with more than 2,000 INGOs are classified as high, those with less than 1,000 INGOs are classified as low, and countries with between 1,000 and 2,000 INGOs are classified as medium.).

for primary education. Several World Bank papers in the early 1980s recommended expanding school fees as a policy intervention by national governments. Mateen Thobani was among the World Bank officers who recommended that Malawi expand its primary school fees, which he argued would “discourage those with a low expectation of gaining significantly from education and ... will lead to fewer drop-outs.” In order to secure a loan from the World Bank, Malawi substantially increased primary school fees, and primary enrollment fell across the country. According to the U.N. Special Rapporteur for the right to education, the introduction of school fees in Malawi ruptured the “previous consensus that at least primary education should be free.” The World Bank’s own analysis concluded that structural adjustment lending, of which user fees were one dimension, had a negative impact on primary education enrollment in the 1980s.

By 1990, the World Bank’s $1.5 billion annual investment made it the largest individual source of external financing for education, yet it still represented just 0.5 percent of total education spending in low-income countries. According to the Bank’s own research, “about 40 percent of projects in the Bank’s HNP [health, nutrition, and population] portfolio and nearly 75 percent of projects in sub-Saharan Africa included the establishment or expansion of user fees.” As of 2000, seventy-seven of seventy-nine surveyed countries had adopted some form of user fees for primary education. In the case of thirty-eight percent of these countries, these fees included tuition for attending primary school, while in the other countries these fees took the form of textbook, uniform, or other kinds of fees. Although several domestic courts in Europe served as important buffers against similar pressure from international financial institutions to cut back on social and economic rights in Europe, these dynamics were not strong enough in Africa

70. Mark Bray, Is Free Education in the Third World Either Desirable or Possible?, 2 J. EDUC. POL’Y 122-23 (1987).
75. Kattan & Burnett, supra note 66, at 10.
76. Id.
77. Scheppele, supra note 1, at 1924-25.
to prevent the introduction of significant cost barriers to primary education. The re-introduction of primary school fees reversed many of the gains in primary school enrollment in Sub-Saharan Africa.\textsuperscript{78} The impact was most profound at the primary level for impoverished students, especially for girls.\textsuperscript{79}

\textbf{A. Overcoming International Constraints: Tanzania}

Tanzania is an “outlier case” because it does not easily fit with leading explanations for the enforcement of the right to education. The country was not a democracy when it abolished primary school fees, and its constitution does not guarantee that the government would provide free primary education. Nonetheless, Tanzania was among the early countries in Sub-Saharan Africa to shift toward fee-free primary education. When primary school fees were eliminated in Tanzania, the country was governed by a hybrid regime in which multi-party elections were already established, but incumbents faced little real electoral competition. The ruling party in Tanzania has overwhelmingly dominated every election since the transition to multi-party rule based on its superior access to state institutions, resources, and the media, leading some to characterize the dynamic as “hyper-incumbent advantage.”\textsuperscript{80} Tanzania’s constitutional provision regarding education does not explicitly guarantee free primary education. Instead, Article 11 of the Tanzanian Constitution simply states “[t]he government shall endeavor to ensure that there are equal and adequate opportunities to all persons to enable them to acquire education.”\textsuperscript{81} Given its abolition of school fees despite limited democratization and weak constitutional protection for the right to education, Tanzania is a promising case for exploring alternative explanations for the enforcement of the right to education.

In Tanzania, the universal primary education movement began in 1974 and eliminated primary school fees from an earlier era.\textsuperscript{82} By the early 1980s, primary schools existed in nearly every village in Tanzania and gross primary enrollment was approaching 100 percent. Subsequently, a major fiscal crisis and external pressure from international financial institutions led to the re-imposition of school fees. As one Tanzanian government official explained, “contributions by local communities to the running of schools were gradually introduced due to declining resources, the national ethos of self-reliance, and the push by international financial institutions towards “cost-sharing.”\textsuperscript{83} The World Bank

\begin{itemize}
  \item \textsuperscript{78} See Fernando Reimers, \textit{Education and Structural Adjustment in Latin America and Sub-Saharan Africa}, 14 Int’l J. Educ. Dev. 119, 123 (1994).
  \item \textsuperscript{79} Id. at 128.
  \item \textsuperscript{81} CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, Apr. 26, 1977, art. 11(3).
  \item \textsuperscript{83} ROSA ALONSO I TERME, \textit{THE ELIMINATION OF USER FEES FOR PRIMARY EDUCATION IN
Civil society mobilization against the World Bank’s support for user fees was critical to successful efforts to once again eliminate primary school fees in Tanzania. The Tanzania Education Network (TEN/MET) was formed in 1999 and included faith-based groups, teacher organizations, and parent organizations. Its membership includes leading INGOs, but only three of these organizations are allowed on the ten-member board at any one time. One of the earliest members of TEN/MET was Maarifa ni Ufunguo, established in 1998, which used its research capacity to catapult school fees onto the national agenda. In 1999, Maarifa ni Ufunguo examined the impact of primary school fees in Tanzania in some of the most well-off regions of the country. This research on primary school user fees was publicized with the help of TEN/MET, and the results were cited by international groups working to change the World Bank’s policy as an example of the negative effects of primary school fees.

In the United States, a civil society coalition convinced key members of Congress to introduce legislation requiring U.S. representatives at the World Bank and the International Monetary Fund to oppose any program that involved user fees for primary education. The coalition ultimately involved more than 100 organizations, including faith groups, environmental groups, and labor unions. In July 2000, the House of Representatives passed the amendment, but the U.S. Department of Treasury sought to block its inclusion in the final legislation. In advocating for the World Bank to formally reverse its support for user fees, many INGOs utilized the language of human rights while highlighting the fees’ negative impact on educational access. Civil society groups highlighted the “catastrophic impact [of fees] on the capacity of the most impoverished people to . . . send their children, especially girls, to school” and urged allies in Congress to maintain the provision.

The ultimately successful legislation required “the United States Executive Director of each international financial institution . . . to oppose any loan, grant,
strategy or policy of these institutions that would require user fees or service charges on poor people for primary education." \(^89\) This transnational civil society coalition also pushed to include the elimination of school fees in Tanzania’s Poverty Reduction Strategy Program with the World Bank. \(^90\)

The World Bank subsequently issued a non-binding statement announcing that the Bank “does not support user fees for primary education." \(^91\) This reversal by the World Bank is all the more remarkable given some scholars’ findings of strong resistance to human rights approaches within the organizational culture of the Bank. \(^92\) The transformation of the World Bank’s policies on user fees in primary education contributed to a wave of national government decisions to abolish primary school fees in many Sub-Saharan African countries.

The shifting support for user fees at the international level opened up important space for the government of Tanzania to change its position on the issue of school fees. Discussions between Tanzanian President Benjamin Mkapa and the World Bank’s Tanzania country director, Jim Adams, contributed to the inclusion of school fee elimination in the country’s Poverty Reduction Strategy Program (PRSP). \(^93\) The government also approached the wider donor community, on whom Tanzania relied for a large percentage of its budget, to find out if it would support the elimination of user fees for primary education. \(^94\) Research on the process of designing PRSP’s found “evidence that the active involvement of civil society has influenced PRSP content, particularly in drawing attention to social exclusion, the impoverishing effects of poor governance and specific policy issues such as the elimination of school fees in Tanzania." \(^95\) Civil society actors such as TEN/MET remained closely involved in shaping and monitoring the government’s policies abolishing school fees. \(^96\)

Beyond the reversal of the World Bank’s position on primary school fees, the other major international constraint that shifted during this period was the reduction of the country’s external debt owed to international financial institutions. A transnational campaign to significantly reduce the levels of indebtedness of many low-income countries also contributed to overcoming

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89. Rosensweig, supra note 68, at 5.
90. TERMÉ, supra note 83, at 5.
91. KATTAN & BURNETT, supra note 66, at 28.
94. TERMÉ, supra note 83, at 7.
international constraints to the elimination of primary school fees in Tanzania. The Jubilee 2000 campaign led to significant debt relief through the Heavily Indebted Poor Countries (HIPC) initiative. In some cases, creditor nations made commitments seemingly against their material interests in response to a diverse and broad civil society coalition across G8 countries. Across twenty-three African countries, HIPC contributed to a reduction in the ratio between debt service and government revenue from 24.2 percent in 1998 to 13.3 percent in 2003. Additional resources from the expanded HIPC initiative contributed to increased investments in education in many of the Sub-Saharan African nations that subsequently eliminated primary school fees.

After Tanzania abolished primary school fees the country’s level of primary school enrollment nearly doubled from 4.4 million in 2000 to 8.3 million in 2007. Recent scholarship strongly supports the conclusion that the elimination of school fees was the central reason for the rapid increase in primary enrollment in Tanzania. In addition, the passage rate for primary school exit exams increased from just twenty-two percent in 2000 to more than seventy percent in 2006. In order to accomplish these results, Tanzania doubled its per capita education spending between 1999 and 2003. The government introduced capitation grants through school bank accounts in order to provide replacement financing for textbooks, learning materials, and facility repairs. It also initiated separate development grants for the cost of school buildings and furniture. The lifting of international constraints opened up critical space for domestic civil society actors and political leaders in countries such as Tanzania to successfully push for the abolition of primary school fees.

Although the August 2000 draft of the Tanzanian government’s education plan...
still included primary school fees, amidst weakening international constraints, then-President Mkapa later declared his intentions to eliminate primary school fees.104

The enforcement of the right to education in Tanzania highlights the role of transnational rights enforcement in overcoming international obstacles by influencing leading international institutions through the reversal of the World Bank’s position on school fees and the launch of the HIPC debt relief program. The Tanzania case also suggests the limits of the democracy thesis for explaining the enforcement of the right to education. In Tanzania, often referred to as a “hybrid regime,”105 school fee abolition initially preceded multi-party elections by some two decades and subsequently emerged in a country with extremely limited electoral competition. Contemporary news accounts highlighted the ways in which then-President Mkapa’s campaign reflected a rejection of populist policies because of the near certainty of his re-election.106 The opposition received just eight percent of the vote in the election that preceded school fee abolition.107

The Tanzania case also reveals the significance of regional influences and regional diffusion on the enforcement of the right to education. In the wake of Tanzania’s decision to abolish school fees, a number of countries in East Africa quickly followed its approach in eliminating primary school fees.108 The strongest apparent impact of Tanzania’s abolition of school fees was regional, as nearly every neighboring country abolished school fees within just a few years. In 2002, Kenya and Zambia announced the abolition of primary school fees; in 2003, Rwanda followed suit; and in 2005, Burundi and Mozambique also abolished these fees. Less than a decade after the formal reversal of the World Bank’s support for primary school fees, the implementation of free primary schooling took hold in countries across Sub-Saharan Africa and marked a major step forward in realizing the right to education. The evidence of regional effects from Tanzania’s abolition of school fees strongly suggests that regional variables need to be better incorporated into explanatory models of human rights enforcement as well as the ratification of human rights treaties.

104. TERME, supra note 83, at 6.
106. Dar Es Salaam, A Modest Success Story, THE ECONOMIST, Oct. 19, 2000 (“It takes unusual confidence to put up taxes on alcohol, tobacco and fuel shortly before an election. But Benjamin Mkapa, Tanzania’s president, is quite sure that he will be re-elected on October 29th . . . So he makes no concessions to populism . . . .”), available at http://www.economist.com/node/397758.
107. KIELL HAVNEVIK & AIDA C. ISIUKA, TANZANIA IN TRANSITION: FROM NYERERE TO MKAPA 244 (2010).
B. Leveraging Constitutional Commitments: Ghana and Swaziland

In Ghana, despite a very explicit constitutional provision specifying the right to education and a robust democracy, it took more than a dozen years before the government implemented policies to effectively abolish primary school fees. Calls for free education in Ghana date back to 1951, but it was not until 1992 that a new constitution explicitly required the implementation of this aspiration. Like many constitutions around the world, Article 25 of the Ghanaian constitution requires that basic education shall be “free, compulsory, and available to all.” Unlike most other constitutions, Article 38(2) of the Ghanaian constitution is extremely explicit with regard to implementation and requires that the government “shall within two years after Parliament first meets after the coming into force of this Constitution, draw up a programme for implementation within the following ten years, for the provision of free, compulsory, and universal basic education.”

The Free Compulsory Universal Basic Education Programme (FCUBE) established in 1996 was the Ghanaian government’s initial legislative attempt to implement the constitutional guarantees related to education. At the time FCUBE was fully launched, thirty percent of Ghana’s school age children were not in primary school. The centerpiece of the initiative was the commitment “to make schooling from Basic Stage 1 through 9 free and compulsory for all school-children by the year 2005.” However, in practice, the FCUBE initiative did little to reduce or eliminate school fees. Without the government directing significant additional resources to schools, many schools introduced a variety of new levies.

Nearly a decade after the launch of FCUBE, school fees remained prevalent in many parts of Ghana. Borrowing from the strategies that had been successfully implemented in East Africa, the national government sought to implement a pilot program to provide capitation grants to local primary schools that did not charge school fees. Beginning in forty districts, the governments introduced these capitation grants amidst “complaints from civil society groups about the country’s inability to fulfill its pledge under the FCUBE to achieve free, compulsory, and universal primary education by 2006.” The initial success of the pilot program brought renewed pressure from civil society actors.

110. Id. art. 38(2).
112. Id. at 176.
within Ghana for the government to implement a comprehensive approach to guaranteeing the right to primary education.

The influence of domestic civil society actors partly corresponded with their growing transnational links. The Ghana National Education Campaign Coalition (GNECC) initially included the Ghana Association of Teachers, the Integrated Social Development Center Ghana, and the Christian Council among other domestic groups. It also included leading INGOs such as Oxfam, Action Aid, and World Vision. In 2005, the coalition developed a formalized decision-making process, established a full-time secretariat, supported in part by an INGO, and became more active working with the national government.

With support from local and international partners, GNECC launched a campaign for the abolition of school fees in 2005. The group highlighted a national survey showing that twenty-six percent of school dropouts left because of their inability to pay for the costs of schooling. Among other actions, the coalition sent a petition to the President of Ghana calling for the “government to make education really free by abolishing all levies, taxes, and barriers to education.” As a result of these pressures, the national government’s pilot program was rapidly scaled up across the country, which contributed to swift progress toward universal primary education. Later in 2005, the Ministry of Education abolished school fees for basic education across the country and introduced a capitation grant for all primary schools. The shift led to an expansion of primary enrollment in Ghana by an additional 1.2 million students.

While Swaziland has similar formal constitutional protection for the right to education as Ghana, it diverges sharply in terms of other key variables such as its level of democracy and the number of INGOs operating in the country. In Swaziland, as in Ghana, the constitution specifically guarantees the right to

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117. Id.


primary education. However, Swaziland is still governed by a monarchy despite the adoption of the Swazi Constitution after a constitutional crisis in 2002. Although classified as a middle-income country, Swaziland has a high level of inequality with sixty-nine percent of the population living below the poverty line.\footnote{121}{Lomcebo Dlamini, ‘Interesting Times’ In The Kingdom of Swaziland: The Advent of the New Constitution and the Challenge of Change, in OUTSIDE THE BALLOT BOX 168 (Jeanette Minnie ed., 2006), available at http://archive.niza.nl/docs/200702131328321333.pdf#page=173.}

The Swazi government sparked a constitutional crisis that led to a mass resignation of judges in the country when it publicly declared that it would ignore orders of the courts.\footnote{122}{INTERNATIONAL BAR ASSOCIATION, LAW, CUSTOM AND POLITICS: CONSTITUTIONAL CRISIS AND THE BREAKDOWN IN THE RULE OF LAW 21 (2003).} Subsequently, the monarchy proposed a new constitution that created a Judicial Services Commission and specified that judges could only be removed upon the recommendation of this Commission. Although the King appointed the Commission, this arrangement created some modest level of independence for the judiciary.\footnote{123}{See generally Dlamini, supra note 121.}

The right to education within the Swazi Constitution is very explicit about the implementation of free primary education. Article 29 of the Constitution provides that all children have the right to free primary education: “every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school.”\footnote{124}{CONSTITUTION OF THE UNITED KINGDOM OF SWAZILAND, 2005, art. 29(c).} However, the King of Swaziland gave a speech in early 2009 in which he declared that free primary education was not feasible in the country.\footnote{125}{Swaziland Nat’l Ex-Miners Workers Ass’n v. Minister of Educ., 335 I.L.R. 9, 27, (Swaz. High Ct. 2009), available at http://www.swazilii.org/files/sz/judgment/high-court/2009/104/SZHC_335_2009.pdf.}

In response to this statement by the King, the Ex-Miners Workers Association and the Swaziland Council of Churches brought a case seeking the intervention of the recently established High Court regarding the constitutional obligation to make primary education free for all children.\footnote{126}{Lisa Steyn, Setback for Free Education in Swaziland, MAIL & GUARDIAN, May 31, 2010, available at http://mg.co.za/article/2010-05-31-setback-for-free-education-in-swaziland.} Although the case was originally financed by the Council of Churches, these plaintiffs later received financial support from the Open Society Initiative in Southern Africa to cover litigation expenses and pay for a study to demonstrate that government resources were available to implement free primary education.\footnote{127}{Swaziland Nat’l Ex-Miners Workers Ass’n v. Minister of Educ., 335 I.L.R. 9, 27, (Swaz. High Ct. 2009), available at http://www.swazilii.org/files/sz/judgment/high-court/2009/104/SZHC_335_2009.pdf.} The government argued that it was already covering the cost of school fees for orphan children and that it could comply by progressively realizing the right to education. However, in 2009, the High Court issued a declaratory order that the
right to education was an inviolable right and that it was not designed to be subject to progressive realization. The Court ruled that, “every Swazi child of whatever grade attending primary school is entitled to education free of charge, at no cost and no requirement of any contribution of any such child regarding tuition, supply of textbooks, and all inputs that ensure access to education.”

Following the Court’s ruling, the Ministry of Education announced its plan for complying with the decision. The education minister interpreted the ruling as requiring only “a consolidated program aimed at creating an environment characterized by minimum barriers to quality primary education.” The government’s plan provided for instituting free primary education only in grades one and two starting in 2010 and for the gradual expansion of free primary education. Although the plaintiffs obtained an order from the Court barring all head teachers from turning children away for failing to pay their fees, this order was not enforced or implemented by schools in the country.

While the High Court decision created new urgency for achieving universal primary education, it later retreated from its own ruling. Claiming to enforce the initial decision brought before the High Court of Swaziland the following year, the Court ruled that the government did not have to provide free primary education for all children. Instead, the Court concluded that in its earlier decision “this court merely made a declaratory order which was not executor and which did not compel the Respondents to implement the right to Free Primary Education.” In effect, the Court labeled its prior ruling as merely a “declaration” and ruled that free primary education could be implemented with a more gradual approach.

128. Swaziland Nat’l Ex-Miners Workers Ass’n, No. 335/09, at 27.
While Ghana demonstrates the potential for explicit constitutional protection to contribute to the enforcement of the right to education, Swaziland highlights the limits of such protection. Even in Ghana, it took thirteen years between the establishment of a clear constitutional obligation with respect to free primary education and significant government action to ensure the availability of free primary education. Without the mobilization of the Ghana National Education Campaign Coalition, it is unlikely that Ghana would have rapidly transitioned from a pilot program to abolishing school fees nationwide. Finally Ghana, like Tanzania, benefitted from the weakening of international constraints that resulted from the reversal of the World Bank’s approach and the HIPC debt relief initiative.

Despite a very explicit constitutional mandate, it took thirteen years from the ratification of the Ghana’s new constitution to the implementation of free primary education. In explaining the shift toward free primary education in Ghana, government officials highlighted the role of civil society pressure and the explicit requirements of the constitution. The former Director General of the Ministry of Education specifically highlighted the role of civil society actors in accelerating the enforcement of the right to education through the emergence of GNECC as an effective coalition.134 It remains unclear what the prospects for this shift would have been without robust civil society pressure to abolish school fees by the constitutional deadline of 2005. Strong constitutional protection did matter in Ghana, but it was not itself a sufficient condition for the enforcement of the right to education without transnational civil society mobilization to overcome international constraints and catalyze accelerated domestic action.

In Swaziland, explicit constitutional protection has not been sufficient to generate government compliance with the right to education. Despite the reluctance of the High Court to enforce its initial ruling, that decision did prompt the government to begin implementing free primary education. As one Education Ministry official explained: “The civil service does still tend to look at the Constitution as just a piece of paper. But the decision of the High Court created a noticeable change here. There was all of a sudden an urgency to realize

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134. Van der Plaat, supra note 116, at 73.
Free Primary Education for all." Given its lack of effective democratic institutions, Swaziland is an unlikely country to have demonstrated any progress on school fee abolition under the democracy thesis. From this vantage point, the modest progress Swaziland has made in implementing free primary schooling in the early grades could still be viewed as somewhat surprising.

Transnational civil society collaboration clearly contributed to the initially successful litigation efforts in Swaziland, but the nature of that collaboration was actually quite limited. Unlike in Ghana, where a national coalition focused on the right to education included many INGOs that had deep ties to a global campaign, in Swaziland transnational efforts were largely limited to the financing of litigation efforts within the country. Thus, the Swaziland case highlights that external financing alone is unlikely to be sufficient for transnational rights enforcement. It also suggests that transnational civil society mobilization is more likely to be effective in countries with more responsive political institutions and a greater degree of judicial independence.

C. Enhancing Regional Effects: Colombia and Nigeria

Even as momentum toward abolishing school fees was accelerating in Sub-Saharan Africa, there remained a major hold-out on the fee issue in the Latin American region. By the twenty-first century, nearly every country in Latin America had eliminated primary school fees except Colombia. The right to primary education was already quite well established in regional agreements in Latin America. The San Salvador Protocol, signed by Colombia and other countries in the region, requires that primary education “be compulsory and accessible to all without cost.” The right to education is one of just two rights in the San Salvador Protocol that have explicitly been determined to be justiciable before the Inter-American Court of Human Rights. While international institutions were an obstacle to eliminating school fees in Tanzania and Sub-Saharan Africa, regional institutions and regional collaboration in Latin America created a foundation for eliminating primary school fees in Colombia.

Rates of primary education completion are lower in Colombia than in most other Latin American countries, and the country generally performs poorly on international quality comparisons. Colombia’s status as a laggard within the

135. ROGERS, supra note 131, at 65.
136. KATTAN & BURNETT, supra note 66, at 48.
region in terms of primary education dates back to the nineteenth century.\textsuperscript{140} As the country entered the twenty-first century one of the key challenges Colombia faced was the inequitable access to education in poor rural areas.\textsuperscript{141} Many of the poorer and more isolated regions continued to lag far behind the urban areas in terms of access to education.\textsuperscript{142} The success of Colombia’s Gratuidad program, which eliminates primary school fees for low-income children in Bogota, demonstrated the continuing significance of cost barriers in shaping access to education in the Colombia.\textsuperscript{143}

For nearly a decade, various international bodies monitoring Colombia’s human rights obligations had unsuccessfully called on the government to implement free primary education. In 2001, the Committee on Economic, Cultural, and Social rights concluded that Colombia was not fulfilling its obligation to “secure . . . compulsory primary education free of charge.”\textsuperscript{144} In 2006, the Committee on the Rights of the Child found that the government’s failure to implement free primary education “created a discriminatory educational system marked by arbitrary fees and social exclusion.”\textsuperscript{145} The Committee further recommended that national legislation be amended to “clearly reflect the right to free primary education.”\textsuperscript{146} A number of academics within the country, such as Dr. Rodrigo Uprimmy Yepes, similarly argued that Colombia’s “obligation based on international norms is very clear” and contended that the country was thirty years overdue in implementing its obligations with respect to free primary education.\textsuperscript{147}

\begin{thebibliography}{99}
  \bibitem{140} Maria Teresa Ramirez & Irene Salazar, \emph{The Emergence of Education in the Republic of Colombia in the 19th Century: Where Did We Go Wrong?}, 3, Presented at the International Seminar on the Economic History of Colombia in the 19th century, Bogotá, Colombia (Aug. 15-16, 2007), http://www.international.ucla.edu/economichistory/summerhill/ramirezsalazar.pdf.
  \bibitem{142} Id. at 27.
  \bibitem{143} Felipe Barrera-Osorio, \emph{The Effects of a Reduction in User Fees on School Enrollment: Evidence From Colombia}, in \emph{GIRLS EDUCATION IN THE 21ST CENTURY} 201, 204 (Mercy Tembon & Lucia Fort eds., World Bank 2008).
  \bibitem{144} Committee on Economic, Social, and Cultural Rights, \emph{Concluding Observations from 85th and 86th Meetings}, ¶ 48, E/C.12/1/Add.74 (Nov. 29, 2001) (considering the fourth periodic report of Colombia on the implementation of the International Covenant on Economic, Social and Cultural Rights), available at \url{http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175bf68baa7c1256677004eb333/22fa4f8348ec81452c12566b44004993e3?OpenDocument}.
  \bibitem{146} Id. ¶ 77.
  \bibitem{147} Dr. Rodrigo Uprimmy Yepes, \emph{El Significado de la Gratuidad del Derecho a la Education},
\end{thebibliography}
In 2010, the Committee on Economic, Social, and Cultural Rights completed another review of Colombia and again expressed its concern that “free and compulsory education is not fully ensured, as families continue to pay for the provision of educational services.”\(^{148}\) The Committee recommended “immediate measures” by the government to ensure all children have access to free primary education.\(^{149}\) However, none of these international recommendations directly catalyzed action on the part of the government of Colombia to eliminate primary school fees.

In 2008, a new coalition of Colombian NGOs joined with a regional network in Latin America, the Latin American Campaign for the Right to Education (CLADE), to launch a new campaign for free education in Colombia.\(^{150}\) CLADE and the Colombian Coalition for the Right to Education joined with the U.N. Special Rapporteur for the right to education to organize a workshop analyzing innovative strategies for achieving free education in Colombia.\(^{151}\) The critical role of these regional allies was highlighted by the Coordinator of the Colombian Coalition who stated, “the role played by CLADE at regional and international levels through its justiciability initiative has been key, by contributing with the instruments and networking that otherwise would not have been available for the process.”\(^{152}\)

In 2008, the Robert F. Kennedy Human Rights Center (RFK Center) released a report alleging that Colombia was in violation of Article 13 and Article 16 of the San Salvador Protocol for allowing fees to be charged for primary education.\(^{153}\) The report found that only eighteen percent of indigenous children and thirteen percent of Afro-Colombian children actually completed primary school.\(^{154}\) The Inter-American Commission on Human Rights (IACHR) provides a petition mechanism through which individuals can allege violations of human rights that have been codified in regional treaties.\(^{155}\) In 2008, the RFK
Center and its collaborators presented their findings to a session of the IACHR to highlight the lack of availability of free primary education and bring greater regional pressure to bear on Colombia. The same year, the Ombudsman for Human Rights in Colombia found that nearly seventy-five percent of municipalities charged fees for educational services and the Colombian Commission of Jurists determined that one of the main reasons that many children left school was the cost of school fees.

In 2009, DeJusticia, a group closely aligned with the Colombian Campaign for the Right to Education, filed a petition before the Colombian Constitutional Court challenging a 1994 law to allow the imposition of fees on primary education and the government’s failure to enforce the right to education. The petition highlighted Colombia’s status as the only country in Latin America that allowed for primary school fees in government schools. It argued that Colombia’s practice was in clear violation of the country’s obligations under the International Covenant on Social, Economic, and Cultural Rights, the San Salvador Protocol, and the Convention on the Rights of the Child. The petition pointed to the Constitutional Court’s recognition, in prior cases, that the country’s international human rights obligations are incorporated into the national constitution.

An amicus brief by the Cornell Law School International Human Rights Clinic, the RFK Center, and Nomadesc, cited the fact that every other Latin American country implemented its international legal obligation to guarantee free primary education. The amici argued that, under its commitment to international and regional human rights treaties, “Colombia is generally obligated to immediately provide free primary education for all citizens . . . .” The brief emphasized the range of regional agreements to which Colombia was a party which guaranteed the right to education, including the San Salvador Protocol, the charter of the Organization of American States, and the American Declaration on the Rights and Duties of Man. Finally, it emphasized how much of an outlier Colombia represented in the region, stating that “Colombia

156. RFK CENTER, supra note 153.
157. Id. at 72-73.
159. Id.
160. Id. at 6.
162. Id. at 10.
163. Id. at 3-4.
remains the only country in Latin America that explicitly authorizes educational institutions to charge fees, even at the primary level."164

The Court ruled that the underlying provisions upon which the government relied to charge school fees could not be applied to the primary school level. It recognized that the delegates to the Constitutional Convention of 1991 explicitly allowed for the possibility of charging school fees to those who could afford them, but the Court held that it did not apply to primary education. The Court reasoned that because free primary education was an integral part of Colombia’s human rights obligations under regional and international agreements, the Constitution could not be interpreted to allow the government to charge school fees at the primary level.165 The Court cited the San Salvador Protocol for the proposition that primary education must be available to all free of charge.166

The government of Colombia quickly took action to implement the Court’s decision. The director of the Department of Provision and Equity of the Vice Ministry of Preschool, Basic, and Secondary Education quickly announced “the free education program is already being implemented across the country.”167 Before the end of 2010, the Secretary of Education issued a resolution requiring that Medellin, the country’s second largest city, follow Bogota in eliminating the use of primary school fees.168 As of January 2012, according to the Minister of Education, the government would no longer permit schools to charge enrollment and service fees.169

Nigeria and Colombia are similar in terms of the major variables that are the focus of leading explanations of human rights enforcement, but the impact of regional institutions and regional norms proved to be quite different with respect to the right to education. Since its transition to democracy, Nigeria has held several competitive multi-party elections, and the country also has a relatively high number of INGOs.170 Despite having less explicit constitutional protection for the right to education, Nigeria is a party to strong regional treaties that include the right to education.171 However, despite these apparent built-in

164. Id. at 10.
166. Id.
168. Resolucion por la Gratuidad en Medellin tiene gran valor simblico para las otras ciudades pequenas, afirma abogado que apoya a la Coalicion Colombiana, Campana Latinoamericana por el Derecho a la Educacion (Dec. 17, 2010), available at http://www.campanaderechoeducacion.org/justiciabilidad/clad.php?catId=1&contId=30&p=1
169. CLADE, supra note 150.
170. See Schofer & Longhofer, supra note 57.
advantages in terms of human rights enforcement, the Nigerian government has not yet abolished primary school fees.

In Nigeria, the constitution provides the “Government shall, as and when practicable, provide (a) free compulsory and universal primary education.”\(^\text{172}\) In 2004, the government of Nigeria enacted the Compulsory and Basic Education Act which, in theory, guarantees the provision of free, compulsory, and universal education at the primary level throughout Nigeria.\(^\text{173}\) The Act provides that at least two percent of the Consolidated Revenue Fund of the federal government should be used to fund basic education.\(^\text{174}\) The Nigerian Courts have held that they are precluded by Section 6(6)(c) of the Constitution from enforcing certain provisions of the Act, including economic and social rights.\(^\text{175}\) The African Charter on Human and People’s Rights contains strong protection for the right to education. The Charter is considered domestic law in Nigeria, second only to Nigeria’s constitution in its authoritativeness.\(^\text{176}\) Although Nigeria ratified the strong provisions of the African Charter, which has no limitations on justiciability, Nigerian courts interpreted the Constitution to make these obligations non-justiciable.\(^\text{177}\)

Given these narrow interpretations by Nigerian Courts, civil society actors within Nigeria have increasingly turned to regional institutions to enforce the right to education. In 2005, the Socio-Economic Rights Accountability Project (SERAP) challenged the failure of the Nigerian government to implement the right to education before the African Commission. SERAP is not an INGO, but it does receive funding from external donors including the Open Society Initiative for West Africa, the MacArthur Foundation, and the National Endowment for Democracy. In \textit{SERAP v. Nigeria}, the Commission rejected the case on the grounds that SERAP had not adequately exhausted its local remedies in Nigerian courts. Although SERAP highlighted the fact that the claim it was bringing would not be justiciable in Nigerian courts, the Commission nonetheless concluded that “[t]he Complainant could have made attempts to utilise the local remedies available instead of making presumptions that this

\(^{174}\) African Charter on Human and Peoples’ Rights Act, supra note 171.
Complaint would not be heard since Nigerian courts do not generally regard economic and social rights as legally enforceable human rights.\textsuperscript{178}

Regional courts within Africa have been more aggressive in interpreting the African Charter’s provisions with respect to the right to education. In West Africa, the Economic Community of West African States (ECOWAS) is a regional body consisting of fifteen states with the primary mission of promoting regional economic integration. The ECOWAS Community Court of Justice was created by a protocol of member states and formally came into existence in 1993.\textsuperscript{179} In 2004, the Court successfully petitioned the African Commission to widen the Court’s jurisdiction to include suits filed by private parties alleging violations of either ECOWAS treaties or other secondary laws. As a result, unlike in many regional courts, plaintiffs do not have to exhaust their domestic remedies before bringing suit in the ECOWAS Community Court of Justice.\textsuperscript{180} In recent years, the ECOWAS Community Court of Justice has stepped in where national courts would not with respect to the right to education and other human rights.

In \textit{SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission}, the plaintiffs challenged the government of Nigeria before the ECOWAS Community Court of Justice for alleged violations of the right to education and other rights under the African Charter on Human and Peoples’ Rights.\textsuperscript{181} The ECOWAS Community Court of Justice ruled that it had jurisdiction to adjudicate violations of the African Charter on Human and Peoples’ Rights for signatory countries within ECOWAS, including Nigeria. The court determined that it had jurisdiction to adjudicate claims related to the right to education and rejected the Nigerian government’s assertion that education "[i]s a mere directive policy of the government and not a legal entitlement of the citizens."\textsuperscript{182}

In its decision, the ECOWAS Community Court of Justice asserted its jurisdiction over the right to education and other human rights contained within the African Charter regardless of how the Nigerian government interpreted those


\textsuperscript{182} Id.
obligations: “The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of the Federal Republic of Nigeria cannot oust the jurisdiction of the Court.”\textsuperscript{183} The Court also reaffirmed its broad view of standing that merely requires a plaintiff establish that “there is a public right which is worthy of protection and which has been allegedly breached.”\textsuperscript{184}

Article 15(4) of the ECOWAS treaty makes the judgment of the Court binding on member states.\textsuperscript{185} In November 2010, the Court ordered the government of Nigeria to replenish the shortfall in education funding required to implement free primary education.\textsuperscript{186} In enforcing its decision, the ECOWAS Court ruled that Nigeria “should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.”\textsuperscript{187} After the decision, civil society actors issued an open letter to the President of Nigeria calling for full implementation of the ECOWAS judgment and highlighting the country’s international obligations with respect to the right to education. Subsequently, the leader of the Nigerian Senate announced his intention to implement the ruling and referred action to the Senate Committee on Inter-Parliamentary Affairs. Despite this, the government has still not implemented free primary education within the country.

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Neither Colombia nor Nigeria fit neatly within the democratization thesis or the constitutional thesis. In Colombia, school fee abolition was only weakly connected to democratization, and in Nigeria democracy was not enough to catalyze school fee abolition. Colombia had a strongly rooted tradition of contested multi-party elections well before the decision by the Constitutional

\textsuperscript{183} Socio-Econ. Rights and Accountability Project, supra note 181 at 3, ¶ 13.
\textsuperscript{184} Id. at 7, ¶ 33.
Furthermore, the commitment to eliminate school fees did not emerge from electoral competition. Meanwhile, Nigeria has not effectively implemented the right to education despite over a decade of competitive multi-party elections.

Although both Nigeria and Colombia have similar numbers of INGOs, the role of transnational mobilization has been quite different in each country. The absence of significant transnational mobilization in the Nigeria case, beyond external financial assistance for SERAP, also suggests the significance of transnational civil society partnerships for accelerating the implementation of rights enforcement, as was the case in Colombia. While financing is clearly a significant enabler of civil society efforts to catalyze enforcement of the right to education, it may not be the most important contribution of international allies. The South-South collaboration in the Colombia case went well beyond financial assistance and extended to concrete collaboration to build on the success in neighboring countries and accelerate the implementation of a strong regional norm.

Regional institutions were important actors in both cases, but they were not sufficient to catalyze the implementation of free primary education in either case. Civil society actors framed Colombia as a regional outlier in terms of the right to education by highlighting its regional human rights obligations. Thus, regional actors and regional norms related to the right to education proved more significant than regional human rights institutions in the Colombia case. In Nigeria, despite strong regional treaty obligations regarding the right to education and increasingly assertive regional institutions, the national government has yet to comply with these obligations.

Although the Inter-American Human Rights system has become increasingly active on a range of human-rights questions over the last decade, Colombia has complied with less than one-third of the decisions and recommendations of its bodies. The rate of overall compliance does increase in cases in which INGOs are involved in proceedings, but this limited effect does not counter the high levels of non-compliance. Although the Inter-American system has a longer tradition of engagement with human rights than ECOWAS, the level of compliance by member states is not always better. It is significant that Colombia occupies a region where just about every other country has implemented free primary education, while Nigeria occupies a region in which slightly over one-third of all countries have implemented free primary education. Thus, empowered regional institutions and strong regional legal norms appear to be important causal factors but not necessarily sufficient, by themselves, to catalyze the enforcement of the right to education.

As demonstrated in these case studies, neither the democracy thesis, nor the constitutional protection thesis, nor the INGO thesis can adequately explain the abolition of primary school fees and the enforcement of the right to education. Democracy is rarely a sufficient condition for national enforcement of the right to education—even the most explicit constitutional provisions requiring free primary education are not always effective. The number of INGOs operating in a given country cannot also adequately explain the enforcement of the right to education. Transnational rights enforcement offers a better explanatory approach and reveals a series of causal mechanisms through which civil society actors catalyze rights enforcement.

In the cases examined here, electoral competition was not sufficient to explain the elimination of primary school fees. In Tanzania, limited democratization did not prevent the abolition of school fees, and in Nigeria, democracy was not sufficient to lead to the enforcement of the right to education. In the other cases where school fees were abolished, competitive elections had existed for some time and did not seem to be a decisive factor. Even in an autocracy, significant steps toward school fee abolition seem to be possible. The most important contribution of democratization may actually be that it creates new opportunities for domestic civil society groups to operate freely, form transnational alliances, and leverage government action.

Similarly, even robust constitutional protections often had only a modest impact in the cases examined and were not a necessary condition for school fee abolition. While highly specific constitutional language on implementing the right to education was a crucial factor in the abolition of school fees in Ghana, it was insufficient to catalyze fee abolition in Swaziland. However, countries without clear constitutional provisions requiring free primary education, such as Tanzania and Colombia, nonetheless moved toward free primary education. Strong constitutional protections are most significant when the language on implementation is quite explicit, when strong regional norms reinforce domestic compliance, and when civil society actors have access to forums to enforce these rights.

The INGO thesis fares somewhat better in explaining enforcement of the right to education, although, it too proves inadequate. The INGO thesis seeks to account for the contribution of international civil society actors through a simple quantitative measure of the INGOs operating within each country. Merely counting the number of INGOs would lead one to expect more significant progress on the enforcement of the right to education within the Nigerian case and a less favorable outcome in Tanzania. The cases examined here offer new insight into the causal mechanisms through which INGOs exert influence, a
critical missing dimension of recent research that highlights the significance of these groups.  

In contrast to these leading theories, transnational rights enforcement highlights the role of mobilization by civil society actors in catalyzing human rights enforcement and emphasizes the significance of the strategies adopted by both domestic and international civil society actors. It identifies at least three different causal mechanisms through which these actors often achieve unexpected success in catalyzing rights enforcement despite limited material resources. First, transnational rights enforcement operates by overcoming international constraints to domestic enforcement. Second, transnational rights enforcement utilizes international norms and global frames to leverage domestic commitments and constitutional protections. Third, transnational rights enforcement reflects the diffusion of regional norms and the leveraging of regional treaty obligations and regional institutions.

Transnational rights enforcement matters because it expands the space within which domestic actors can operate by overcoming international constraints. Without the shift in the World Bank’s position on school fees, many of the countries that abolished school fees in Sub-Saharan African would have been less likely to do so. The shift in the World Bank’s formal position opened up significant space for domestic political actors to re-evaluate national implementation of the right to education. Domestic actors are often limited in their ability to alter these international constraints when acting alone, but transnational civil society collaborations can catalyze shifts in the national playing field by altering the positions of international institutions.

Transnational rights enforcement reveals how civil society actors adopt global frames to generate greater leverage for domestic compliance with human rights commitments. Constitutional protections of the right to education generally catalyzed the abolition of school fees only when transnational civil society actors framed these protections in the context of international norms. Some scholars have suggested that the true significance of national ratification of human rights treaties is that it provides new frames of reference for domestic actors to mobilize around with respect to human rights. Arguably, more important than ratification itself, are the linkages enabled by ratification that allow transnational civil society actors to develop frames that empower domestic actors to enforce rights more effectively.

190. See Hafner-Burton & Tsutsui, Justice Lost!, supra note 9, at 418; Neumayer, supra note 5, at 926.

191. Simmons, Mobilizing for Human Rights, supra note 1, at 373 ("Human rights outcomes are highly contingent on the nature of domestic demands, institutions, and capacities. In this highly contingent context, local agents have the motive to use whatever tools may be available and potentially effective to further rights from which they think they may benefit . . . I have emphasized throughout that treaties are not a silver bullet through the heart of the world’s dictatorial regimes. Yet, they offer some leverage where repression itself can be contested.").
Transnational rights enforcement reflects the role of civil society actors in utilizing regional norms and institutions to catalyze human rights enforcement. In Colombia, the formation of a national coalition around the right to education was inspired by collaborations with regional allies who had successfully secured the elimination of school fees elsewhere in the region. Transnational actors successfully highlighted Colombia’s outlier status within Latin America and its regional human rights obligations as a strong basis for national compliance. However, in West Africa, the relative weakness of regional norms with respect to education seems to be an important factor contributing to Nigeria’s limited enforcement of this right despite increasingly assertive regional institutions. Regional effects have been previously highlighted as a factor in the ratification of human rights treaties, such as the International Covenant on Civil and Political Rights, the Rome Statute establishing the International Criminal Court, as well as treaties protecting children’s rights. However, there is still limited understanding of the underlying causal mechanisms which contribute to regional effects.

Transnational rights enforcement poses a challenge to the views put forward by a number of scholars who argue that human rights discourse is often externally imposed on developing countries. These scholars have pointed to the problematic framing of Southern victims and Northern saviors. One important facet of this critique is the failure of INGOs to focus on social and economic rights. However, in challenging the World Bank’s position on user fees, civil society actors portrayed the policies of the North as the underlying problem, and called for greater freedom of action on the part of national governments in the South. The tradition of free primary education in East Africa in the wake of independence, as well as in national constitutions in Latin America, also argues for skepticism that the right to education is essentially an externally imposed construct.

In addition, transnational rights enforcement builds on a growing body of scholarship analyzing the complex interaction between the international and domestic realms and the role of norm entrepreneurs in human rights enforcement. It offers support for the conclusion that international institutions

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192. See generally id.
194. See generally SIMMONS, MOBILIZING FOR HUMAN RIGHTS, supra note 1.
195. See id. at 31. See generally Goodman & Jinks, supra note 1.
197. Id. at 203.
198. Id. at 217.
199. See generally id.
200. See Peter Gourevitch, Domestic Politics and International Relations, in HANDBOOK OF
can be a source of opportunity for civil society mobilization, especially when there is openness to participation by INGOs. While a number of researchers have highlighted the importance of INGOs, and others have emphasized the influence of domestic civil society mobilization, the interaction between these sets of actors may be the most significant dimension. Earlier work on rights enforcement found that the level of organization within domestic civil society was a crucial factor in fostering the enforcement of rights, but recent research has challenged the idea that rights enforcement requires strong civil society support structures.

Transnational rights enforcement offers support for the idea that effective rights enforcement generally requires an extensive civil society support structure.

Transnational rights enforcement similarly builds on work demonstrating how global human rights frames are much more successful in leveraging policy change when translated into relevant local contexts. While transnational civil society mobilization to expand primary education might have been possible without a well-articulated right to free primary education, that obligation provided a shared language that united disparate groups across national boundaries. The contingency of human rights enforcement depends not only on domestic demands, but also on the capacities and frames brought to bear by international actors and the constraints imposed by international institutions.

One of the implications of transnational rights enforcement is that the access of civil society actors to key decision-making institutions proves extremely important. Leading international institutions and national entities are often reluctant enforcers or even obstacles to the effective enforcement of human rights obligations. Yet international and domestic institutions that allow for greater participation by civil society actors may well prove to be a more effective enforcement mechanism. Greater civil society participation within international and sub-national institutions and stronger regional civil society

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201. See Kathryn Sikkink, Patterns of Dynamic Multi-Level Governance and the Insider-Outsider Coalition, in TRANSNATIONAL PROTEST AND GLOBAL ACTIVISM 156 (Donatella Porta & Sidney Tarrow eds., 2005).

202. Hafner-Burton & Kiyotera Tsutsui, Justice Lost!, supra note 9, at 418; Neumayer, supra note 5, at 926.

203. SIMMONS, MOBILIZING FOR HUMAN RIGHTS, supra note 1, at 373.


206. See generally: MERRY, supra note 60.

207. SIMMONS, MOBILIZING FOR HUMAN RIGHTS, supra note 1, at 373.
collaboration appears to catalyze more effective human rights enforcement in a transnational era.

If the World Bank was not subject to influence from donor country institutions that were quite susceptible to civil society engagement, it would have been much less likely to have reversed its formal position on user fees for primary education. Without the access of civil society actors to regional forums and national courts in Colombia, it is again unlikely that the right to education would have been enforced. Among the key normative implications of the foregoing analysis is that institutions that are more responsive to influence by civil society actors are more likely to effectively enforce human rights. More participatory international institutions would be more likely to facilitate transnational rights enforcement.

If the Constitutional Court of Colombia did not have standing rules that allowed citizens to bring suit, the elimination of school fees might never have been taken up by the Court. Citizens in Colombia have standing to challenge alleged violation of their rights in the highest court of the land. More inclusive rules for allowing citizen suits could make other national courts more effective instruments of international human rights enforcement. Recent studies have found that supranational courts are also more effective at enforcing rights when individuals are allowed to directly bring suit. The European Court of Human Rights adopted rules allowing individual claimants much greater access, and subsequently non-state actors have become leading participants in the enforcement of human rights within Europe through the Court. The model of expanded litigant access to supranational courts has since become an important feature of a number of courts around the world. Yet, there remains an important divergence across different regions in the level of participation by NGOs in litigation before human rights courts.

The capacity for transnational civil society actors to overcome international constraints on domestic human rights enforcement will often depend on their ability to influence relevant international institutions. While many international institutions remain the exclusive province of states, a new generation of international institutions is increasingly including civil society as participants in formal governance. More participatory institutions are more likely to be

209. Helfer, Overlegalizing Human Rights, supra note 1, at 1907.
responsive to the transmission belt of concerns from transnational civil society. Just as inclusiveness towards states might contribute toward state compliance through acculturation, \(^{214}\) inclusiveness towards civil society actors can enhance transnational rights enforcement.

While much research in this area has been focused on national level structures, the insight offered by these cases is that a substantial transnational support structure can also be a significant factor in the success of civil society actors in catalyzing rights enforcement. The future of this transnational collaboration is likely to increasingly involve South-South regional collaboration, which can be an important catalyst of compliance for regional laggards in human rights protection. Regional human rights bodies that allow greater participation by regional networks of human rights organizations may be well placed to accelerate national compliance with regional human rights obligations.

CONCLUSION

The gap between the widespread ratification of the right to education and the weak enforcement of this right in many countries around the world highlights the importance of supplemental mechanisms for enforcing human rights. Many robust democracies with competitive multi-party elections still fail to effectively enforce the right to education. Even in countries with strong constitutional text protecting the right to education, governments are often unwilling to comply with specific obligations related to the right to education. Transnational rights enforcement is emerging as an alternative approach to understanding human rights enforcement that can complement the insights of existing theories.

Transnational civil society actors contribute to human rights enforcement by overcoming international constraints, leveraging domestic commitments, and accelerating compliance with regional norms. Transnational mobilization increases the likelihood of national implementation of rights obligations by challenging international institutions that impede rights enforcement, and by enhancing the leverage and influence of domestic civil society actors in moving their own governments toward compliance. Expanding civil participation within international and sub-national institutions and fostering more extensive regional collaboration can enhance transnational rights enforcement in the twenty-first century.

Further research is needed to better understand the dynamics of transnational rights enforcement and the breadth of rights for which this model has significant explanatory power. Although the cases selected were carefully chosen in order to control for key variables, the overall sample nonetheless

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214. Goodman & Jinks, supra note 1, at 144.
remains relatively small. The wider universe of cases of school fee abolition over the last decade offer additional support for the conclusions of the case studies, but future research on human rights enforcement that combines quantitative and qualitative approaches would be extremely valuable. It is possible that some of the specific causal mechanisms highlighted here, such as the importance of overcoming international constraints, will be less essential to the enforcement of some human rights. However, the influence of transnational civil society mobilization is likely to be significant across a range of different rights. With greater attention to the underlying causal mechanisms, future studies can build on the strong foundation of empirical work on human rights enforcement to generate a richer theoretical understanding of state compliance.

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When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation

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When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation

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INTRODUCTION

One of the oldest recorded treaties, the Kadesh Peace Treaty, was signed in the late-thirteenth century B.C.E. between Pharaoh Ramesses II of Egypt and King Hattusili III of the Hittites. The treaty proclaimed that “hostility shall not occur between [Egypt and the land of Hatti]tes] forever.” The everlasting commitment expressed, inscribed in silver, prophesized a future where treaties would express long-term commitments that would be difficult to amend.

Treaties may be difficult to amend, but times change, often requiring a reassessment of obligations in changed circumstances. This apparent paradox is not easily solved. In contemporary international law we see that despite longstanding calls for reform of the United Nations, its Charter has been all but impossible to amend. We also witness stalemates such as the Doha Round of

* International Arbitration Group, Freshfields Bruckhaus Deringer LLP, and Senior Fellow, Vale Columbia Center on Sustainable International Investment at Columbia University. Research for this paper was conducted during a fellowship at the Lauterpacht Center for International Law at Cambridge University, where I received valuable feedback from numerous colleagues at various points during the course of this project. I would like to thank Laurence Boisson de Chazournes, Katherine Del Mar, Donald Donovan, Alicia Elias-Roberts, Aurelia Ernst, Anne Frenette, Olivier de Frouville, Richard Gardiner, Georg Nolte, Anthea Roberts, Judge Mark Villiger, and Marc Weller for feedback and conversations that were of valuable assistance. Earlier drafts of this article were presented at the 106th Annual Meeting of the American Society of International Law, the 40th Annual Conference of the Canadian Council for International Law, the University of Cambridge, and the University of British Columbia, benefiting from comments and questions from fellow panelists and audience members. All views and mistakes remain my own.

1. ANcient neAr eAstern tExTS rElAtING TO tHe oLD tEstAMENT 199-201 (James B. Pritchard ed., 3rd ed. 1969).
2. Id. at 200.
3. For example, the composition of the Security Council and the role of NGOs in the U.N. have long been debated. See, e.g., Rahim Moloo, ***The Quest for Legitimacy in the United Nations: A ***
trade negotiations, where disagreements between developed and developing countries have prevented amendments to World Trade Organization (WTO) obligations that would further reduce trade barriers. In this context, the International Law Commission (ILC) has undertaken a study of treaty interpretation over time.

Subsequent party conduct, after the conclusion of a treaty, may shed some light on that treaty’s meaning, especially with respect to how the treaty ought to be interpreted in changed circumstances. To be clear, however, it is not necessarily the case that long periods of time should lapse before parties’ conduct becomes relevant to interpreting treaties. It may in fact be the case that the application of a treaty in its first few years is particularly important to the parties’ understanding of their obligations. Where treaty terms pose multiple possible meanings, party conduct in implementing the treaty may elucidate the party intentions, indicating the correct interpretation. Indeed, certain terms may be left undefined, to be sorted out as the treaty is implemented over time, in order for parties to finalize their agreement. Alternatively, an ambiguity may be unintentional, and parties only discover it when putting the treaty into practice, deciding to articulate a subsequent understanding as to its interpretation.

This article focuses primarily on two provisions in the Vienna Convention that comprise part of the general rule on the interpretation of treaties. Articles 31(3)(a) and (b) of the Vienna Convention require that treaty interpretation take into account “any subsequent agreement between the parties regarding the
I. GENERAL APPROACH TO TREATY INTERPRETATION

In interpreting treaties, subsequent party conduct is one of many factors that should be taken into account. This first section briefly outlines how Articles 31(3)(a) and (b) fit within the broader framework of the rules applicable to treaty interpretation.

A. General Principles of Treaty Interpretation: The Vienna Convention on the Law of Treaties

It is generally accepted that Articles 31-33 of the Vienna Convention reflect customary principles of treaty interpretation. While this may not have


11. To an extent, there is a bias in the article towards the cases of institutional regimes that make their case law publicly accessible. Given the prominence of the ICJ as the principal judicial organ of the United Nations in resolving disputes between states and offering Advisory Opinions on matters of international law, its jurisprudence is given special attention.

12. On the reference to the provisions contained in Articles 31-33 as principles as opposed to rules, see RICHARD GARDNER, TREATY INTERPRETATION 38 (2008) (noting that "the use of 'rules' when referring to the provisions of Articles 31-33 should not be taken as defining their character" but rather, while Articles 31-33 "are of mandatory application when interpreting treaties . . . their manner of application is to be in the enlightened sense described by Waldock, treating them as regulations, principles, or guidelines as appropriate."). Generally, principles require the weighing of different interests, as opposed to rules, which requires the application of "norms which are always either fulfilled or not." ROBERT ALEYX, A THEORY OF CONSTITUTIONAL RIGHTS 48 (Julian Rivers trans.) (1986).
been the case prior to the adoption of the Vienna Convention in 1969\textsuperscript{13}—indeed there was much debate over the appropriate principles applicable to interpretation—the codification of certain principles in the Vienna Convention have brought normative force and primacy to those rules such that today they have achieved the status of customary international law.\textsuperscript{14} Article 31 provides the general rule of interpretation, Article 32 covers supplementary rules of interpretation, and Article 33 addresses the interpretation of plurilingual treaties. For the purposes of this article, it is helpful to set out in full Articles 31 and 32:

\textit{Article 31}

\textit{General rule of interpretation}

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

\textsuperscript{13} Jan Klabbers, \textit{Virtuous Interpretation, in Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on 17, 27 (Malgosia Fitzmaurice et al. eds., 2010) ("All in all, it seems doubtful whether, prior to the Vienna Convention, there was indeed a general rule, let alone one of customary status.").

\textsuperscript{14} Oil Platforms (Iran v. U.S.), Preliminary Objections, 1996 I.C.J. 803, ¶ 23 (Dec. 12); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 99 (June 27); Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), 1059 I.C.J. 1045 ¶ 18 (Dec. 13); The Legality of Use of Force (Serb. and Montenegro v. Belg.), Preliminary Objections, 2004 I.C.J. 279, ¶ 100 (Dec. 15); Beagle Channel Arbitration (Arg. v. Chile), 21 R. Int’l Arb. Awards [RIAA] 53, ¶ 15 (1977); \textit{Ian Sinclair, The Vienna Convention on the Law of Treaties 153 (2d ed. 1984) ("There is no doubt that Articles 31 to 33 of the Convention constitute a general expression of the principles of customary international law relating to treaty interpretation. The phrase ‘a general expression’ has been used deliberately, since few would seek to argue that the rules embodied in Articles 31 to 33 of the Convention are exhaustive of the techniques which may be properly adopted by the interpreter in giving effect to the broad guidelines laid down in those rules."). With respect to Article 31(3)(a) and (b) specifically, see \textit{Treaties over Time, in Rep. of the Int’l Law Comm’n, 63d Sess., U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10, at 282, ¶ 344, preliminary conclusion 4 (2011) ("All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) [Vienna Convention] are a means of interpretation which they should take into account when they interpret and apply treaties.").
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent
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WHEN ACTIONS SPEAK LOUDER THAN WORDS

43

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Articles 31 and 32 outline a clear hierarchy among the principles to be applied in interpreting treaties, giving primacy to the principles contained in Article 31. Within Article 31, however, there is no hierarchy. Nevertheless, certain tribunals have confused the relevance of the subsequent party conduct in asserting that it is always subordinate to a review of the text of the treaty. For instance, in RSM v. Grenada, a tribunal under the aegis of the International Center for the Settlement of Investment Disputes (ICSID) suggested that “the Vienna Convention reveals an interpretive structure in which subsequent practice and the other two methods of treaty interpretation, subjective and teleological, are supplementary in nature. They are to be used to assist in the interpretation when the textual method is insufficient.”

Similarly, the dissenting opinion in an arbitration between the United States and Italy, with respect to the interpretation of an Air Transport Services Agreement, suggested that “since it is a subsidiary element in interpretation, recourse to the behavior of the Parties can only be justified if literal interpretation does not lead to clear unequivocal results.”

As the ILC noted in its commentary to what later became Article 31 of the Vienna Convention, “the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.” Indeed, “it was

15. RSM Prod. Co. v. Grenada, ICSID Case No. ARB/05/14, Award, ¶ 383 (Mar. 13, 2009). However, the tribunal was simply applying the Vienna Convention principles by analogy, as the relevant claims concerned contract interpretation, not a treaty.

16. Interpretation of the Air Transport Services Agreement of 6 February 1948 (It. v. U.S.), 16 RIAA 75, 107-08 (1965) (Monaco, J., dissenting). See also Beagle Channel Arbitration (Arg. v. Chile), 21 R. INT’L ARB. AWARDS [RIAA] 53, ¶ 169 (1977) (emphasis added) (noting that the tribunal “cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary means of interpretation unless representing a formally stated or acknowledged ‘agreement’ between the Parties. The terms of the Vienna Convention do not specify the ways in which ‘agreement’ must be manifested.”).

17. Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. INT’L COMM’T 187, 219-20, art. 27, comment 8, U.N. Doc. A/CN.4/SER.A/1966/Add.1; Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), ¶ 30 (1975) (“In the way in which it is presented in the ‘general rule’ in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.”). See also Hrvatska Elektroprivreda d.d.
considerations of logic, not any legal obligatory hierarchy, which guided the Commission in arriving at the arrangement in [Article 31].” As such, it is logical to begin the process of interpretation by considering the ordinary meaning of the terms in their context and in light of their object and purpose (Article 31(1)). This would be followed by a consideration of the specific elements of the context surrounding the text (Article 31(2)). Finally, the elements contemplated in Article 31(3)—subsequent agreement as to the interpretation, subsequent practice establishing the agreement of the parties as to the interpretation, and relevant and applicable rules of international law—should be considered as “elements intrinsic to the text.” All of these elements, however, are “of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.”

Within Article 31(3) there is potential for overlap between Articles 31(3)(a) or (b) and Article 31(3)(c). The use of Article 31(3)(c) as a means to promote systemic integration through treaty interpretation has been extensively discussed, given the work of the ILC on the fragmentation of international law. Article 31(3)(c) requires that the process of interpretation take into account “any relevant rules of international law applicable in relations between the parties.” It “deals with the case where material sources external to the treaty are relevant in its interpretation” including “treaties, customary rules or general principles of law.” As noted in the Conclusions of the ILC Fragmentation

v. Republic of Slovenia, ICSID Case No. ARB/05/24, Decision on Treaty Interpretation Issue, ¶ 164 (June 12, 2009) (“there is no legal hierarchy between the various aids to interpretation outlined in article [31]”); “White Van” (Panagua-Morales et al.) v. Guatemala, Preliminary Objections, 23 Inter-America Ct. H.R., (ser. C), ¶ 40 (Jan. 25, 1996) (“the process of interpretation should be taken as a whole.”); Gardiner, supra note 12, at 36 (“a distinct significance does attach to the use here of the singular ‘rule’ . . . emphasizing the unity of its several paragraphs and its intended application as a single operation.”).


19. Id.

20. Id. See also id. at 219, art. 27, comment 8 (“the opening phrase of paragraph 3 [of Article 31] ‘There shall be taken into account together with the context’ is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3.”). Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 22 (June 21) (noting that “a finding of ‘ambiguity’” is not “a precondition for recourse to subsequent conduct as a legitimate mode of enquiry into meaning.”).


22. Koskenniemi, Conclusions of the ILC Fragmentation Study Group, supra note 21, at
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent Rule

Study Group, other treaty-based rules “are of particular relevance . . . where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.” As such, other treaties may be applicable both as relevant rules of international law applicable between the parties, and/or as subsequent party conduct that demonstrates the agreement of the parties with respect to the interpretation of the treaty in question.

The potential for overlap in this regard was recently demonstrated in the Abyei arbitration, where the tribunal considered whether the experts of the Abyei Boundary Commission exceeded their mandate in delimiting the Abyei area in Sudan. As one of its tasks, the tribunal was required to interpret the Comprehensive Peace Agreement (CPA) signed by Government of Sudan and the Sudan People’s Liberation Movement/Army on January 9, 2005. In interpreting this agreement, the tribunal had recourse to certain 2008 agreements which were “designed to bring a final settlement to the Parties’ dispute over the Abyei Area” and “made specific reference to sections of the CPA.” The 2008 agreements—“reaffirm[ing] the relevant provisions of these elements of the CPA”—were found to be relevant subsequent practice pursuant to Article 31(3)(b). The tribunal went on to find that “[e]ven if one were to consider that the 2008 Agreements do not constitute relevant ‘subsequent practice,’ the 2008 Agreements would still inform the interpretation of the CPA as ‘relevant rules . . . applicable in the relations between the parties’ pursuant to Article 31(3)(c) of the Vienna Convention.” As such, any subsequent international legal commitments entered into by parties to a treaty may be relevant under both Articles 31(3)(a) or (b) and Article 31(3)(c) insofar as they concern the interpretation or application of the treaty in question.

Despite resistance from the United States’ delegation, led by Myers McDougal, it was decided that the elements in Article 31 should take priority

conclusion 18.

23. Id. at conclusion 21.


25. Although the agreements in question were not between two state parties, the rules found in the Vienna Convention were agreed to by the parties as applicable to matters of interpretation. Id. ¶ 572.

26. Id. ¶¶ 651, 654.

27. Id. ¶ 654.

28. Id. ¶ 655.

29. See, e.g., Myers S. McDougal, Harold D. Laswell & James C. Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure xvi-xvii (1967). The authors stated:

The primary aim of a process of interpretation by an authorized and controlling
over travaux préparatoires and other forms of evidence that do not explicitly reflect the agreement of the parties. Unlike Article 31, which is a closed list of principles to be taken into account when interpreting treaties in the first instance, Article 32 is open-ended and can include principles such as contra proferentum, a contrario, eiusdem generis, and, in some instances, party conduct. For example, in the case concerning Kasikili/Sedudu Island, the court took into account the subsequent practice of the parties as to the boundary between

community decision-maker can be formulated in the following proposition: discover the shared expectations that the parties to the relevant communication succeeded in creating in each other. It would be an act of distortion on behalf of one party against another to ascertain and to give effect to his version of a supposed agreement if investigation shows that the expectations of this party were not matched by the expectations of the other. And it would be an obvious travesty on interpretation for a community decision-maker to disregard the shared subjectivities of the parties and to substitute arbitrary assumptions of his own. It is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs—the text of the document—the role of serving as the exclusive index of parties’ shared expectations.

Id. at xvi-xvii.

Thoroughly understood, interpretation is a two-pronged and inter-connected process. One approach arranges the manifest content of the statements that appear in relevant texts—including more than a putatively final text—according to harmony or contradictions, and abstractness. The further approach examines each pertinent expression in the order in which it was made and also in relation to any information that helps to establish the perspectives of the communicator and his audience. The interpreter is thereby exposing himself to an agenda of experiences that aid in modifying the initial procedure of the subjectivities of the parties.

Id. at xvii.

See also Myers S. McDougal, The International Law Commission’s Draft Articles Upon Interpretation: Textuality Redivivus, 61 AM. J. INT’L L. 992 (1967) (“The great defect, and tragedy, in the International Law Commission’s final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality.”).

30. Draft Articles on the Law of Treaties with Commentaries, supra note 17, at 220, art. 27, comment 10. The commentary states:

The elements of interpretation in article 27 all relate to the agreement between the parties at the time when or after it received authentic expression in the text. Ex hypothesi this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text.

Id.

31. GARDINER, supra note 12, at 349. This does not mean that all principles of interpretation not specifically articulated in Article 31 are subsumed under “supplementary” means of interpretation. For instance, the principle of effective interpretation—requiring that all words be given meaning—may be relevant to interpreting treaty terms in good faith, as required by Article 31(1). SINCLAIR, supra note 14, at 120 (noting that the principle of good faith “underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable.”). For use of the principle of effectiveness in the WTO context, see Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, 23, WT/DS2/AB/R (Adopted May 20, 1996) (applying the principle of effectiveness to avoid “reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”); Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body, 21 EUR. J. INT’L L. 605 (2010).
Botswana and Namibia, even though that practice did not establish the agreement of the parties as required by Article 31(3)(b). 

**B. Interpretation Principles Contained in the Treaty Being Interpreted**

In some instances, a treaty will contain special principles of interpretation to be applied to the text of that treaty. To the extent that there is any conflict, these specific principles should be given primacy over the general principles articulated in the Vienna Convention. For instance, Article 17.6(ii) of the World Trade Organization (WTO) Anti-Dumping Agreement provides that:

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Arguably, this provision sets out a special interpretive regime to be applied. Recently, this provision has been interpreted as requiring the application of the principles contained in the Vienna Convention in the first instance, and “[o]nly after engaging this exercise will a panel be able to determine whether the second

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32. Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), 1059 I.C.J. 1045, ¶¶ 79-80 (Dec. 13). See Hazel Fox, Article 31(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 59, 71 (Malgosia Fitzmaurice et al. eds., 2010) (suggesting that the court in Kasikili/Sedudu Island “evolved a new method of treaty interpretation by employing ‘factual findings’ of parties on separate occasions over time as to the meaning of the contested words, factual findings which were not disputed, to support the court’s conclusions as to the ordinary meaning of the words . . .”). See infra, Part II.B on the reference to subsequent party conduct as a supplementary means of interpretation under Article 32.

33. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 441 (2009) (“States remain free to agree to employ other means of interpretation.”).

34. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 137, ¶ 274 (June 27) (“In general, treaty rules being lex specialis, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim.”); HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, Book II Ch. 16, § XXIX (1625). (“Among agreements which are equal . . . that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.”); Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, 33 BRIT. Y.B. INT’L L. 237 (1957) (noting that the special law applies “where both the specific and general provisions concerned deal with the same substantive matter.”); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 249 (2d ed. 2007) (“Lex specialis derogat legi generali. A specific rule prevails over a general rule.”). For difficulties with applying the lex specialis principle, see Koskenniemi, Report of the ILC Fragmentation Study Group, supra note 21, ¶¶ 46-222.

sentence of Article 17.6(ii) applies.”36 According to the Appellate Body, the second sentence of Article 17.6(ii) of the WTO Anti-Dumping Agreement then suggests that:

[T]he application of the rules of the Vienna Convention may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.37

Neither WTO Panels nor Appellate Bodies have been faced with “more than one permissible interpretation” that would call for applying this Article.38 However, this type of provision governs the process of interpretation in the first instance.

A treaty provision addressing matters of interpretation does not, of course, exclude the application of the general principles of interpretation contained in the Vienna Convention.39 This is especially the case where there is no conflict between the specific and the general rules.40 An apt example is where treaties

37. Id. ¶ 272.
38. See, e.g., id. ¶ 317; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, supra note 55; Panel Report, European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India, ¶ 6.46, WT/DS141/R (Oct. 30, 2000); Appellate Body Report, European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India, ¶ 65, WT/DS141/AB/R (Adopted Mar. 12, 2001); Appellate Body Report, United States—Final Anti-Dumping Measures on Stainless Steel from Mexico, ¶ 136, WT/DS344/AB/R (Adopted May 20, 2008). See also Donald McRae, Treaty Interpretation by the WTO Appellate Body: The Comundrum of Article 17(6) of the WTO Antidumping Agreement, in THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 164, 183 (Enzo Cannizzaro ed. 2011) (arguing that “the Appellate Body has articulated a process of interpretation whose application leads to the denial of the very object of Article 17(6(ii)—the search to determine whether there are two permissible interpretations of a provision of the Antidumping Act.”). But see ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 70 (2009):

The scepticism of the Appellate Body towards Article 17.6(ii) is understandable in the light of the principle of jura novit curia, as judges are presumed to know the law and its meaning. . . . The Appellate Body seeks the ‘proper’ or ‘correct’ interpretation, not any ‘permissible’ interpretation. . . . However, it seems implausible to say that there is always a right answer, given the complexities of language and context and changing circumstances, often unforeseen.


As a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.

See also Koskenniemi, Report of the ILC Fragmentation Study Group, supra note 21, ¶¶ 98-107.
provide for a means of determining an authentic interpretation. The WTO Agreement contains such a provision:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements . . . . The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.41

It has been suggested that “Article IX of the WTO Agreement has contracted out of Article 31(3)(a) on subsequent agreements ‘between the parties’ regarding interpretation” because it only requires that “three quarters of WTO members agree to an interpretation for the WTO treaty for that interpretation to be authoritative.”42 To the extent that this process is followed, it is true that such an interpretation would be authoritative and “bind[] all Members.”43 This should not, however, exclude the possibility of other forms of subsequent party conduct demonstrating agreement as to the treaty’s interpretation from being taken into account. As such, one may question the statement made in Japan—Alcoholic Beverages II, where the Appellate Body, in referring to Article IX:2, suggested that “the fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.”44 If no authentic interpretation is given under Article IX:2 of the WTO Agreement, a WTO panel is still required to interpret the provision in question. If subsequent party conduct demonstrates the parties’ agreement as to the interpretation of a provision, it would be illogical to discount such evidence in attempting to derive the correct interpretation. In this regard, the Appellate Body’s later decision in EC-Chicken Cuts correctly concluded that there was no lex specialis relationship between Article 31(3) of the Vienna Convention and Article IX:2 of the WTO Agreement.45


We fail to see how the express authorization in the WTO Agreement for Members to adopt interpretations of WTO provisions—which requires a three-quarter majority
A similar issue arises in the context of the North American Free Trade Agreement (NAFTA), where Article 1131(2) provides that “[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”46 The tribunal in Methanex v. United States found that the Free Trade Commission (FTC) interpretation of Article 1105 of NAFTA (on the minimum standard of treatment owed to an investor) falls under Article 31(3)(a) of the Vienna Convention as a subsequent agreement with respect to its interpretation, independent of the effect under 1131(2) of NAFTA.47 As such, Article 1131(2) of NAFTA and specific treaty interpretation provisions found in other treaties do not displace the general law on interpretation if there is no contradiction in terms. Even where the provision in question contemplates a mechanism for authoritative interpretations, this should not mean that an interpreter should ignore subsequent conduct of the parties evidencing their agreement as to the terms of the treaty unless the procedure contemplated by the treaty has been followed. Rather, such evidence should be considered along with the other elements of Article 31.

Some examples show that certain international legal regimes have adopted methods of interpretation not explicitly stated in the treaty, that nonetheless frame the approach to interpretation. The best example of this is the European Court of Human Rights, which takes the approach that the European Convention on Human Rights “is a living instrument which . . . must be interpreted in the light of present-day conditions.”48 This approach to treaty interpretation has, in some cases, supplanted the relatively more conservative approach in the Vienna Convention.49 With respect to subsequent party conduct, the European Court of Human Rights has taken into account, among other things, “continuing international trend[s]” in favor of “increased social acceptance” and “legal recognition” of particular rights.50 As such, while the court has acknowledged

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49. George Letsas, Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer, 21 EUR. J. INT’L L. 509, 513 (2010) (“It is fair to say that the [Vienna Convention] has played a minor role in the interpretation of the ECHR. The European Court of Human Rights created its own labels for the interpretative techniques which it uses, such as ‘living instrument, practical and effective rights’, ‘autonomous concepts’, etc.”).
that the Vienna Convention applies to treaty interpretation,\textsuperscript{51} it plays a less
important role, especially in the context of subsequent party conduct.

\textit{C. Evolutive Approach to Treaty Interpretation}

Sir Hersch Lauterpact aptly commented that “in the relations of States there
arises . . . the question of the continuing validity and the interpretation at any
given time of legal rights arising or created in what may be the distant past.”\textsuperscript{52} This begs the question: Is treaty interpretation an evolutive process where the
meaning of a given provision may change with time? This is, in essence, the
query that the ILC set out to answer in its investigation of treaties over time. In
his proposal to include the matter in the ILC’s long-term programme of work,
Professor Georg Nolte opened with the following remarks:

Treaties are not just dry parchments. They are instruments for providing stability
to their parties and to fulfill the purposes which they embody. They can therefore
change over time, must adapt to new situations, evolve according to the social
needs of the international community and can, sometimes, fall into obsolescence.
The general question of ‘treaties in time’ reflects the tension between the
requirements of stability and change in the law of treaties.\textsuperscript{53}

The answer to this question will dictate the limits of the impact subsequent
party conduct can have on the interpretation of a treaty, and as such, it is an
important preliminary inquiry.

For one who has gone through the process of negotiating and then applying
treaties, the answer to this question may seem relatively obvious. A treaty is the
manifestation of an agreement between parties reached through negotiations and
often detailed discussion over the text in question. That agreement is only
reached in a specific context, and in light of the circumstances known to the
parties at that time. Given the “fundamental rule of interpretation that the
intention of the parties must prevail,”\textsuperscript{54} it seems logical that there be a temporal
limitation on the question of interpretation.\textsuperscript{55} As such, Sir Humphrey Waldock
proposed to include a provision in the Vienna Convention on inter-temporal law.
The proposed language reflected the principle of contemporaneity providing

\begin{thebibliography}{9}
\bibitem{52} \textsc{Hersch Lauterpacht, International Law, Volume 1: The General Works} 129
\bibitem{53} Nolte, supra note 5, ¶¶ 1-2. \textit{See also} Pushpanathan v. Canada (Minister of Citizenship and
Immigration), [1988] 1 S.C.R. 982, ¶ 129 (Can.) (Dissenting opinion of Justices Cory and Major)
(“The interpretation of international legal instruments is a dynamic process which must take into
account the contemporary conditions. To put it another way, the interpretation must respond to the
contemporary context.”).
\bibitem{54} Summary Record of the 729th meeting of the ILC, [1964] 1 \textsc{Y.B. Int’l L. Comm’n} 34, ¶ 13, comment by Mr. Shabatii Rosenne.
\bibitem{55} Id. ¶ 45, comment by Mr. Gilberto Amado (“It seemed difficult to imagine that when two
States jointly drew up a legal instrument expressing the agreement of their wills to the reciprocal
granting of benefits, they would not take account of the legal order prevailing at the time.”).
\end{thebibliography}
that, in the first instance, “[a] treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.” This provision was qualified through a distinction between the interpretation and application of a treaty: “the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.” This language (and the interpretation/application distinction) was not ultimately adopted in the Vienna Convention. The ILC felt it inappropriate to address matters of temporality and interpretation, as the “correct application of the temporal element would normally be indicated by interpretation of the term in good faith.”

Indeed, parties to a treaty may not themselves expect the terms of the treaty to remain frozen in time. An example is the term “investment” in the
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent 2013

WHEN ACTIONS SPEAK LOUDER THAN WORDS

Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In Mihaly v. Sri Lanka, the tribunal noted, “the definition [of investment in the ICSID Convention] was left to be worked out in the subsequent practice of the States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.” The choice of words, with due regard to context and the object and purpose of the treaty, will often demonstrate whether a particular term was meant to have a technical and/or specific interpretation, or whether an evolutive approach would be more appropriate to realize the parties’ intentions.

incorporate in the treaty some legal concept that would remain unchanged, or, if they had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belong. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up.

See also Summary Record of the 729th meeting of the ILC, supra note 54, ¶ 24, comment by Mr. Senjin Tsuruoka (“If the interpretation showed that the parties had wished to follow the evolution of international law, it was international law at the time when the treaty was interpreted which prevailed.”).


61. See, e.g., Mihaly International Corp. v. Sri Lanka, ICSID Case No. ARB/00/2, Award (Mar. 15, 2002). See also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sept. 27, 2001) ("[T]he drafters of the Convention deliberately chose not to define the terms ‘legal dispute’, ‘investment’, ‘nationality’ and ‘foreign control’. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves."); Laurence Boisson de Chazournes, Environmental Treaties in Time, 39 ENV. POL. & L. 293, 296 (2009) (noting that “Environmental treaties sometimes contain words or notions for which States could not reach an agreed definition or for which no definition was considered necessary at the time of their negotiation.”).


There is authority for the rule that when there is a doubt as to the sense in which the parties to a treaty used words, those words should receive the meaning which they bore at the time of the conclusion of the treaty; unless that intention is negatived by the use of terms indicating the contrary, as is illustrated in the paragraph that follows . . . . Expressions such as ‘suitable, appropriate, convenient’, occurring in a treaty are not stereotyped as at the date of the treaty but must be understood in the light of the progress of events and changes of habits of life.

See also Aegean Continental Shelf (Greece v. Turk.), Jurisdiction of the Court, 1978 I.C.J. 3, 32 (Dec. 19) (finding that “territorial status” was used as a “generic term” and as such “the presumption necessarily arises that its meaning is intended to follow the evolution by the law and to correspond with the meaning attached to the expression by the law in force at any given time.”); Rosalyn Higgins, Time and the Law: International Perspectives on an Old Problem, 46 INT’L & COMP. L.Q. 501, 519 (1997) (discussing several cases, including the Aegean Continental Shelf case). Higgins concludes:

In the law of treaties—notwithstanding judicial indication that the Huber rule [reflecting the principle of contemporaneity] is applicable thereto—the intention of the parties is really the key. Attention to that point allows one to see that ‘generic clauses'
A strong indication that a treaty was meant to have an evolving interpretation is when the words chosen reflect party “inten[tion] to key into that evolving meaning without adopting their own idiosyncratic definition (for example, use of terms such as “expropriation” or “continental shelf” in the relevant treaty).” An evolved approach to interpretation may also be appropriate where the object and purpose of the treaty reflects a commitment “to a program of progressive development.” Similarly, “[t]he description of obligations in very general terms” can operate as “a kind of renvoi to the state of the law at the time of its application.” The ILC Fragmentation Study Group highlights the exceptions contained in Article XX of the General Agreement on Tariffs and Trade (GATT) as exemplifying an evolutive approach:

GATT article XX, discussed in Shrimp-Turtle, in permitting measures ‘necessary to protect human, animal or plant life or health’ or ‘relating to the conservation of exhaustible natural resources’, are intended to adjust to the situation as it develops over time. For example, the measures necessary to protect shrimp evolve depending upon the extent to which the survival of the shrimp population is threatened. Although the broad meaning of Article XX may remain the same, its actual content will change over time. In that context, reference to ‘other rules of international law’, such as multilateral environment treaties, becomes a form of secondary evidence supporting the enquiry into science and community values and expectations, which the ordinary meaning of the words, and their object and purpose, invites.

Similarly, in Costa Rica v. Nicaragua the ICJ adopted an evolved interpretation of the term commercio (commerce). In that case, Costa Rica and Nicaragua had entered into a treaty granting Costa Rica freedom to navigate the San Juan River (under the sovereignty of Nicaragua) for objetos de comercio (for the purposes of commerce). Nicaragua contended that this purpose was limited to the transport of goods and did not cover services, such as tourism on

and human rights provisions are not really random exceptions to a general rule. They are an application of a wider principle—intention of the parties, reflected by reference to the objects and purpose—that guide the law of treaties.


- 64. Id.
- 65. Id. (emphasis added).
- 68. The translation of this phrase adopted by the Court was “for the purposes of commerce.” Id. ¶ 56.
the San Juan River. The court found that *comercio* is a generic term that “was likely to evolve over time,” and at the time of judgment “commerce” (reinforced by the practice of the parties) covered both goods and services. 69

The question then is whether the parties’ subsequent conduct can also indicate whether a particular term in a treaty is meant to be evolutive, or whether it is simply indicative of what the evolved interpretation is. The answer to this question would determine the line between interpretation and modification or amendment. 70 In the former scenario, the parties have more flexibility in agreeing to an interpretation. In the latter scenario, however, the agreement is only relevant insofar as it reflects the parties’ intention at the time the treaty was signed. The answer likely depends on the circumstances. As already discussed, the ordinary meaning of the terms, the context in which the terms appear, and the object and purpose of the treaty are no more important to interpretation than the parties’ subsequent conduct. As such, why can subsequent party conduct not also indicate that an evolved meaning was intended by particular terms of a treaty? There may be limitations in this regard, such as where the ordinary meaning, context, or object and purpose suggest that an evolved meaning was *not* intended. However, in ambiguous cases, the principle of contemporaneity, while acceptable as a default position, 71 should not otherwise be applied as a presumption against the effect of subsequent party conduct on interpretation. 72

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69. *Id.* ¶¶ 66-68, 71. See also Award in the Arbitration Regarding the Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 72-74 ¶¶ 79-81 (Perm. Ct. Arb. 2005) (finding that even certain technical rules may have to be interpreted in an evolutive manner where this reflects the object and purpose of the treaty, for instance, to create long-lasting relations between the parties); Case concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 76-80, ¶¶ 132-47 (Sept. 25).

70. According to the Vienna Convention, there is a distinction made between modification and amendment. Amendment of a treaty is an agreement between all of the parties to change the terms of a treaty. *Vienna Convention, supra* note 10, art. 40. Modification, on the other hand, is an agreement to change the terms of the treaty only as between some of the parties. *Id.* at art. 41. This distinction is only applicable for multilateral treaties, as for bilateral treaties, any agreement to alter the terms of the treaty would necessarily involve all of the parties. The distinction adopted by the Vienna Convention is not consistently applied in the literature and case law, and the terms “modification” and “amendment” are often used interchangeably. This article attempts to adhere to the distinction adopted by the Vienna Convention wherever possible.


It has been argued before the Commission that in interpreting the Treaties it should apply the doctrine of ‘contemporaneity.’ By this the Commission understands that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time. The Commission agrees with this approach and has borne it in mind in construing the Treaties.

72. *Nolte, supra* note 5, at 17 (noting that subsequent conduct may itself “indicate[] openness for different shades of meaning.”); *Dispute Regarding Navigational and Related Rights, supra* note 67, at ¶ 64. (suggesting that “the subsequent practice of the parties, within the meaning of Article 31(3)(b) of the Vienna Convention, can result in a departure from the original intent on the basis of
As noted above, this does not mean that subsequent party conduct is only relevant to identifying evolved interpretations of treaties. Certain party conduct taking place shortly after the entry into force of a treaty may be particularly relevant to elucidate party intentions in the first instance. For instance, once a treaty is put into practice it is not unusual for parties to further clarify their mutual understanding as to the interpretation and approach of certain provisions.\footnote{In such circumstances, subsequent party conduct may have the opposite effect of rejecting an evolved interpretation. If the parties engage in consistent conduct over a long period, demonstrating agreement on interpretation, it may entrench the interpretation and make it difficult to demonstrate that an evolved interpretation is permissible.} In such circumstances, subsequent party conduct may have the opposite effect of rejecting an evolved interpretation. If the parties engage in consistent conduct over a long period, demonstrating agreement on interpretation, it may entrench the interpretation and make it difficult to demonstrate that an evolved interpretation is permissible.\footnote{For a discussion on both the overlap and diverse consequences of subsequent practice and evolutive interpretation as treaty interpretation techniques see Julian Arato, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences, 9 L. & PRACTICE OF INT’LCTS. & TRIBUNALS 443 (2010).}

\footnote{\textit{Berkeley Journal of International Law, Vol. 31, Iss. 1 [2013], Art. 2}}

Berkeley Journal of International Law, Vol. 31, Iss. 1 [2013], Art. 2

56 BERKELEY JOURNAL OF INTERNATIONAL LAW [Vol. 31:1

\footnote{tacit agreement between the parties.}); McDougall, Laswell & Miller, supra note 29, at 143-44: In a given case any factor, including the subsequent actions of the parties, may be of paramount importance in determining the relevant expectations False [E]vidence of the parties’ expectations at the time of commitment should of course be given an initial presumption which would hold in the absence of persuasive indices that such expectations had been altered by subsequent explicit communications or implicit acts of collaboration. If such evidence is produced, however, the parties’ contemporary expectations should be respected. It seems of little value to say as a matter of policy that such a choice by a decision-maker marks an ‘avoidance of the act of interpretation’ where in fact it constitutes an effort to determine the parties’ genuine shared expectations.

Lauterpacht, supra note 52, at 132-33:

The provisions of a treaty ought to be interpreted in the light of the law and usage existing at the time of the conclusion of the treaty. . . . At the same time it must be borne in mind . . . that the true intention of the parties may on occasions be frustrated if exclusive importance is attached to the meaning of words divorced from the social and legal changes which have intervened in the long period following upon the conclusion of those treaties. Moreover, the parties to a treaty may by their subsequent conduct put upon the treaty an interpretation which, having regard to changed conditions, may depart from the meaning of the words obtaining at the time of its signature.

73. \textit{See, e.g.}, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), http://www.international.gc.ca/trade-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d (last visited Nov. 13, 2012) (clarifying that Article 1105(1) of NAFTA, relating to the minimum standard of treatment to be accorded to foreign investors “prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party” and that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”); Anthea Roberts, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, 104 AM. J. INT’L L. 210, 225 (2010) (arguing for the use of subsequent party conduct to foster “a constructive dialogue between investment tribunals and treaty parties about interpretation”).

74. For a discussion on both the overlap and diverse consequences of subsequent practice and evolutive interpretation as treaty interpretation techniques see Julian Arato, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences, 9 L. & PRACTICE OF INT’LCTS. & TRIBUNALS 443 (2010).}
II. INTERPRETING THE RULES OF INTERPRETATION: THE RELEVANCE OF SUBSEQUENT PARTY CONDUCT IN INTERPRETING TREATIES

Having given the general context in which parties’ subsequent conduct should be taken into account in treaty interpretation, the article now details the type of subsequent conduct that is relevant to treaty interpretation. Both Article 31(3)(a) and (b) focus on agreement of the parties with respect to interpretation of treaty terms, the former requiring “agreement between the parties” and the latter requiring “practice . . . which establishes the agreement of the parties.” Therefore, while substance is generally preferred over form in international law, the distinction between Articles 31(3)(a) and (b) concerns form rather than substance. The following analysis takes a comparative approach, first defining the type of conduct that satisfies Articles 31(3)(a) and (b) and the relative weight to be accorded to each. This section demonstrates that subsequent party conduct establishing agreement on the interpretation of treaty terms falls on a continuum, with more formal agreement falling under Article 31(3)(a) and less formal agreement falling under Article 31(3)(b). Second, this section considers whether subsequent party conduct that does not result in party agreement can be taken into account for the purpose of treaty interpretation under Article 32 of the Vienna Convention.

A. The Continuum Between Subsequent Agreement and Practice Under Article 31(3)

This section considers the nature of subsequent party conduct that is relevant to treaty interpretation under Article 31(3)(a)-(b). It first considers subsequent party agreement, and secondly, subsequent practice to the extent that it establishes party agreement. In comparing the two, this article theorizes that these two sections of Article 31(3) rest on an evidentiary continuum. While all subsequent conduct demonstrating party agreement as to the interpretation of a treaty is highly probative, more weight should be given to subsequent agreement than to subsequent practice establishing agreement.

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive.
1. Subsequent Agreement

While it has been suggested that “no particular formality is required for there to be an agreement under Article 31(3)(a)”\(^{76}\) it is clear that some degree of formality is, in fact, required. Applying the principle of effectiveness,\(^{77}\) Article 31(3)(a) must not cover agreements on treaty interpretation that are established through party practice, as Article 31(3)(b) otherwise covers this.\(^{78}\) Read in conjunction with Article 31(3)(b), it seems clear that Article 31(3)(a) contemplates a more formal agreement, though not the formal requirements of a treaty itself.\(^{79}\) What, then, is the requirement to satisfy Article 31(3)(a) versus Article 31(3)(b)? To answer this question it is helpful to consider some illustrative cases across a spectrum of international institutional frameworks that have resorted to subsequent party conduct in interpreting treaties.

When parties document their agreement on interpretation in writing, this clearly comes within the ambit of Article 31(3)(a). For instance, in the NAFTA context, as noted above, the FTC interpretation on the minimum standard of treatment “is properly characterized as a ‘subsequent agreement’ on interpretation falling within the scope of the Vienna Convention.”\(^{80}\) Here, the three NAFTA parties, through the FTC, explicitly articulated their joint understanding of the meaning of Article 1105 of NAFTA. Of note, the FTC is specifically designated with the authority to interpret the treaty and is comprised of the ministers for trade from each state party.\(^{81}\)

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77. The principle of effectiveness is a well-established principle of interpretation that treaty terms should be interpreted so as not to render any clause meaningless. See supra text at note 31; Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.C.J. 432, ¶ 52 (Dec. 4); Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 66 (June 21); Case Concerning Border and Transborder Armed Actions (Nicar. v. Hond.), Jurisdiction of the Court and Admissibility of the Application, 1998 I.C.J. 69, ¶ 46 (Dec. 20); Eureko B.V. v. Poland, Partial Award, ¶ 248 (ad hoc Arb. Trib. 2005); Draft Articles on the Law of Treaties with Commentaries, supra note 17, at 219, art. 28 comment 6 (“When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”).
78. See, e.g., McNair supra note 62, at 427 (“The subsequent practice of the parties to a treaty, regarded as evidence of their common intention, must not be confused with the conclusion of a subsequent interpretative agreement.”).
79. GARDINER, supra note 12, at 208 (noting that subsequent agreements under article 31(3)(a) “may be recorded . . . in a less formal record of agreement or understanding on interpretation”).
80. Methanex v. United States, Final Award, Part II, Ch. B, ¶ 21 (NAFTA Ch. 11/UNCITRAL Arb. Trib. Aug. 3, 2005). For now, we put aside the issue of whether the agreement in this regard was actually an amendment. See Charles H. Brower, II, Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105, 46 VA. J. INT’L L. 347 (2006). The distinction between agreement with respect to the interpretation of treaty terms and modification or amendment of the treaty is considered further below. See infra Part III.
81. NAFTA, supra note 46, arts. 1131, 2001(2)(b).
Another example from the investment treaty context is the case of CME v. Czech Republic. In that case, after the issuance of a partial award, the parties to the bilateral investment treaty under which the claims were brought consulted with one another on the interpretation of certain provisions of the treaty. As a result, the parties reached a “common position” on the interpretation and the application of the treaty. In its final award the tribunal applied the common position, as recorded in the agreed minutes, but without referring to the Vienna Convention. Nonetheless, it would be difficult to discount the Respondent’s position (which was uncontested) that “[t]he common positions, representing the interpretation and application of the Treaty agreed between its contracting parties, are conclusive and binding on the Tribunal.”

In the international tax law context, parties to a tax treaty may come together to jointly agree to a technical explanation of the treaty. For instance, the United States Treasury Department and the Canadian Ministry of Finance, the two government agencies responsible for tax matters, have agreed to a technical explanation of the 2007 Protocol to the United States-Canada tax treaty. Given that this agreement was prepared after the treaty had been signed, it would likely be seen as coming within Article 31(3)(a) to the extent that it interprets the treaty. Though not referring to the Vienna Convention, the United States Tax Court held the joint technical explanation to be “particularly persuasive in light of the fact that the Canadian Department of Finance has generally accepted the Technical Explanation as an accurate portrayal of the understandings and in which the Canadian Convention was negotiated.”

83. Id. ¶¶ 87-93.
84. Id. ¶ 437, 504.
85. Id. ¶ 217. For another example in the investment treaty context, see National Grid plc v. Argentina, Decision on Jurisdiction, ¶ 85 (UNCITRAL Arb. Trib. June 20, 2006) (noting that “after the decision on jurisdiction in Siemens, the Argentine Republic and Panama exchanged diplomatic notes with an ‘interpretative declaration’ of the MFN clause in their 1996 investment treaty to the effect that the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.”).
88. N.W. Life Assurance Co. of Can. v. Comm’r, 107 T.C. 363, 385 (USTC 1996). However, there was some debate as to whether the joint technical explanation was consistent with the terms of the treaty itself. See Canada v. Kubicek Estate, [1998] 1 F.C. 0 (Can. F.C.A., 1997) (the court refusing to defer to the United States technical explanation regarding the taxation of capital gains, despite acknowledging that the Canadian Minister of Finance had endorsed the explanation contained therein, because the technical explanation was inconsistent with the intent of the parties as reflected in the treaty). To the extent that the technical explanation is inconsistent with the original treaty, it would be considered an impermissible modification or amendment, discussed further
Parties may also agree to interpretation of particular terms through the exchange of notes. This can be made difficult, however, where different interpretations are offered at different times by different government bodies. An illustrative case involves an arbitration concerning the privileges accorded to the European Molecular Biology Laboratory (EMBL), an international organization with its headquarters in Germany. A dispute arose with respect to EMBL’s tax exemptions under its Headquarters Agreement with Germany. The tribunal found that the interpretation of the decisive provisions turned on a 1977 response of Germany’s Federal Ministry for Research and Technology (BMFT) to EMBL’s earlier request for clarification on the tax issue, and on a 1987 Settlement Agreement with EMBL. Both of those documents reflected Germany’s agreement with EMBL’s interpretation of its rights. Of interest, a 1982 letter from the Federal Foreign Ministry—allegedly revoking the 1977 letter of the BMFT—did not prevent the tribunal from finding that an agreement had been reached on the interpretation.

A question that arises in this context is whether states’ actions at international organizations are relevant conduct for the purposes of treaty interpretation. For instance, in the WTO context, can agreements of the Ministerial Conference come under Article 31(3)(a) when they interpret obligations under existing WTO Agreements? As an example, in 2001 the WTO members negotiated a Declaration on the TRIPS Agreement and Public Health (the Doha Declaration), which served in part to clarify the interpretation of certain provisions of the WTO intellectual property treaty. Paragraph 4 of the Doha Declaration states: “We affirm that [TRIPS] can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.” All of the WTO members agreed to the Doha Declaration through the TRIPS Council, then the General Council, and finally the Ministerial Conference, which issued
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent

the Declaration. In this regard, the primary context in which the WTO membership would be able to come together to agree on an interpretation of a WTO Agreement is a Ministerial Conference. It is logical, therefore, that the actions of state representatives to international organizations be considered party conduct for the purposes of Article 31(3). Especially in the context of multilateral treaties with several parties, it would be difficult to expect all parties to come to an agreement on the interpretation of a treaty provision outside of a formal council or conference established to oversee and implement the treaty. The question here is not about the actions of the international organization per se but rather the actions of the state parties in their activities at the international organization, which may be represented by a decision of the international organization. In this regard, states are still responsible for their own activities when participating within an international organization. As such, when interpreting TRIPS, it would be appropriate to accept the interpretative guidance provided by the Doha Declaration.

The success of an argument that a GATT Council decision of the [Contracting Parties] interprets...the GATT in a manner that is legally binding will depend on factors such as the manner in which the decision was adopted and the scope of the decision. If a decision is reached by a vote rather than by consensus, it is more difficult to argue credibly that a subsequent agreement has been reached or that subsequent practice is common and consistent. Interpretive notes are more likely to find quick acceptance as binding than a decision that alters substantive obligations in a major fashion.

96. Indeed, the Ministerial Conference has the necessary authority to interpret the treaty, given its mandate to “take on decisions on all matters under any of the Multilateral trade Agreements.” WTO Agreement, supra note 41, art. IV(a). See also id., art. IX:2 (granting the Ministerial Conference exclusive authority to adopt interpretations of the WTO Agreements). The interpretation contained in the Doha Declaration, however, was not taken pursuant to Art. IX:2 as the Declaration’s contents went beyond simply interpreting TRIPS.

97. The Assembly of the International Oil Pollution Compensation Fund 1992 has specifically issued a resolution, referencing Article 31(3) of the Vienna Convention, and providing that “the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.” 1992 Fund Resolution No. 8 on the Interpretation and Application of the 1992 Civil Liability Convention and the 1992 Fund Convention (May 2003), at http://www.iopcfund.org/npdf/RES’92E.pdf.

98. See James Crawford, supra note 40, art. 57, comment 5. Article 57, providing that the Articles of State Responsibility are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization,

Similarly, the parties to the Rome Statute of the International Criminal Court (ICC) entered into a subsequent agreement, for the purposes of Article 31(3)(a), to define the “Elements of Crimes” under Articles 6-8 of the Rome Statute. The Assembly of State Parties agreed to the Elements of Crimes in a non-treaty document interpreting Articles 6-8. That document details “Elements of Crimes” that are to be used to assist the court in the “interpretation and application” of the Rome Statute. The ICC has already demonstrated its reliance on the Elements of Crime as decisive to matters of interpretation.

Despite a dearth of contentious cases where a subsequent agreement under Article 31(3)(a) is decisive, there are some common principles that can be taken from the examples discussed above. Specifically there are four important characteristics that allow subsequent party conduct to come within Article 31(3)(a): (1) the agreement is reflected in writing by the parties; (2) the parties’ agreement is related directly to the interpretation and application of the treaty terms; (3) the agreement of all of the parties is demonstrated; and (4) the agreement is entered into by government representatives authorized to interpret the treaty, including those that may represent governments before international organizations with respect to certain treaties that fall within the remit of that organization.

With respect to the requirement that all parties must be in agreement, the cases demonstrate that inter se agreements between some of the parties are not sufficient under Article 31(3)(a). This is the case even if a dispute arises as

102. Id. at Introduction (1).
103. See, e.g., Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-1, Decision on the Prosecution’s Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 128 (Mar. 4, 2009); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶¶ 359-60 (Jan. 29, 2007).
104. Indeed, it is unlikely that a matter would make it before a tribunal where the parties have agreed to the interpretation of the treaty terms.
105. See, e.g., The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts, Award, 19 R.I.A.A. 67, 103, ¶ 31 (May 16, 1980) (finding that neither Articles 31(a) or (b) were satisfied where all of the parties could not be said to have agreed); Mark E. Villiger, The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission, in THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 105, 110 (Enzo Cannizzaro ed., 2011): The means [Article 31(3)] can only be invoked if all the parties to the treaty have been involved in the interpretation of a particular meaning of a treaty term by means of an agreement, or if one of the parties have been involved by means of an instrument or
between only those parties that have agreed. It may be that principles of estoppel apply in such cases, but the treaty cannot be interpreted in different ways as between different parties. There is an assumption that the treaty reflects a common understanding among all the parties and to interpret it differently among some parties would amount to the formulation of several bilateral commitments as opposed to the multilateral regime contemplated by the parties. The same applies a fortiori to Article 31(3)(b).

2. Subsequent Practice Establishing Agreement

Compared to Article 31(3)(a), there is more lenience on the type of conduct that would be categorized as practice under Article 31(3)(b), making 31(3)(b) a catch-all for all other forms of subsequent party conduct that establish party agreement on the meaning of certain treaty terms. As such, while certain general principles can be extracted from the relevant case law, each case has to be determined based on the context of the particular treaty at issue and the specific facts available. Each case asks whether the evidence presented demonstrates an agreement of the parties, even if it does not meet the more formal requirements of Article 31(3)(a).

subsequent practice to which the other parties have agreed.
Alan Boyle, Further Development of the Law of the Sea Convention: Mechanisms for Change, 54 INT’L & COMP. L.Q. 563, 571-72 (2005) (suggesting that the 1995 U.N. Fish Stocks Agreement, which seeks to implement the U.N. Convention on the Law of the Sea, cannot be considered a “subsequent agreement between the parties regarding the interpretation of [UNCLOS] or the application of its provisions” because it had, at that point, only been concluded between 30 States, and a number of important fishing States had no intention of participating. Further suggesting, however, that to come within Art. 31(3)(a) not all UNCLOS parties would have to become party to the other treaty in order to achieve the requisite “consensus support” or “no objection.”). But see Fitzmaurice, supra note 34, at 223 (in referring to subsequent conduct as informing the interpretation of treaty, adopting a slightly less stringent standard: “[i]t is, of course, axiomatic that the conduct in question must have been that of both or all—or, in the case of general multilateral conventions, of the great majority of the parties, and not merely of one.”).

106. See Part III.
107. Christine M. Chinkin, Suspension of Treaty Relationship: The ANZUS Alliance, 7 UCLA PAC. BASIN L.J. 114, 135 (1990) (with respect to the ANZUS Treaty, which is now suspended between the U.S. and New Zealand, noting that inter se subsequent agreements may not be authoritative to the interpretation of the treaty but, such agreements “suggest[] that the two parties in question [a]re prepared to undertake additional mutual obligations, albeit within the framework of the alliance treaty”).

108. R v. Sec’y of State for the Env’t, Transp. & the Regions, ex parte Int’l Air Transp. Ass’n, 3 EUR. L. REP. 811, 818 (UKQB Apr. 16, 1999) (noting with respect to article 31(3)(b) “it is important to observe that practice alone is not sufficient; it has to be such as to establish the agreement with the parties.”); Bouzari & Others v. Iran, 71 OR (3d) 675 ¶ 77-79 (Can. Ont. June 30, 2004), ILDC 175 (CA 2004) (the Ontario Court of Appeal affirming that there was sufficient evidence of state practice to establish party agreement as to the meaning of Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, relying on expert evidence demonstrating “a broad state practice reflecting a shared understanding that Article 14 limits the obligation of a ratifying state to providing the right to a civil remedy only for acts of torture committed within its territory.”); King v. Bristow Helicopters Ltd. Re M (on the
Relevant practice does not necessarily have to relate to the provision in question in order to establish agreement of the parties with respect to the interpretation of the treaty more broadly. For instance, in the case concerning the Constitution of the Maritime Safety Committee, the ICJ considered how to interpret Article 28(a) of the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organization, to determine the eight largest ship-owning nations.\textsuperscript{109} The court found that the parties had relied on registered tonnage to give effect to other provisions of the Convention, which demonstrated the relevance of that criterion for the purposes of Article 28(a).\textsuperscript{110} In this case, the relevance of subsequent practice across different treaty provisions depended on context. It would have been illogical for parties to use one metric for one provision and a different metric for another. Under these circumstances it is reasonable to conclude that agreement was reached on the interpretation of the treaty in more general terms; the parties’ application of the treaty generally suggests that, whenever applicable, registered tonnage ought to be the relevant measure.

A key consideration is the type of conduct that constitutes subsequent practice. While it is clear that subsequent practice is relevant to the interpretation exercise only when all parties have agreed to an interpretation,\textsuperscript{111} a recurrent query is whether inaction by a party can be considered subsequent practice, demonstrating agreement through silence. The ILC specifically considered this in drafting Article 31(3)(b):

The text provisionally adopted in 1964 spoke of a practice which ‘establishes the understanding of all the parties’. By omitting the word ‘all’ the Commission did not intend to change the rule. It considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as a whole’. It omitted the word ‘all’ merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the

application of CM), \textit{supra} note 57, ¶ 80 (“It is . . . legitimate to have regard to subsequent practice in the application of the Convention, if this shows that the contracting parties were in agreement as to its interpretation when it was entered into.”); \textit{R. v. Sec’y of State for the Env’t, Transp. & the Regions, ex parte Int’l Air Transp. Ass’n}, 3 E.U.R. R.EP. 811, 818 (UKQB Apr. 16, 1999), (with respect to Article 31(3)(b) of the Vienna Convention, noting that “practice alone is insufficient; it has to be such as to establish the agreement with the parties.”).


110. \textit{Id.} at 169:

This reliance upon registered tonnage in giving effect to different provisions of the Convention and the comparison which has been made of the texts of Articles 60 and 28(a), persuade the Court to the view that it is unlikely that when the latter article was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest ship-owning nations.

111. \textit{See Schalk and Kopf v. Austria}, 28 Eur. Ct. H.R., (Malinverni, J., concurring) ¶ 1 (2010), (answering whether homosexual couples have the right to marry and finding Article 31(3)(b) was not satisfied when only some states provided for such a possibility).
A relevant case to consider in this regard is *Costa Rica v. Nicaragua*, discussed above, where the ICJ considered whether the permission of commercial activity in the applicable treaty extended to services or was limited to goods. As already discussed, the court alluded to the practice of the parties but based its decision on the treaty’s generic, evolutive language. In a separate opinion, Judge Skotnikov more fully addressed the relevance of subsequent practice, finding that although Nicaragua submitted evidence that it alone controlled the commercial transport of passengers on the San Juan for 100 years after the conclusion of the treaty, Nicaraguan and Costa Rican practice established an agreement allowing Costa Rica to use the river for tourism.

Costa Rican-operated tourism on the San Juan river has been present for at least a decade, and to a substantial degree. Nicaragua has never protested. This is in contrast to Nicaragua’s treatment of police vessels, which it has repeatedly asserted have no right whatsoever to travel on the San Juan. Nicaragua has not only engaged in a consistent practice of allowing tourist navigation by Costa Rican operators, but has also subjected it to its regulations. This can be seen as recognition by Nicaragua that Costa Rica acted as of right.

Judge Skotnikov therefore concluded that “the subsequent practice in the application of the Treaty suggests that the Parties have established an agreement regarding its interpretation: Costa Rica has a right under the 1958 Treaty to transport tourists . . . .”

Silence can suggest agreement in certain contexts, as suggested by Judge Skotnikov in *Costa Rica v. Nicaragua*, where Nicaragua would have been expected to act given the context and its actions with respect to some types of vessels and not others. As suggested by the tribunal in the *Beagle Channel* arbitration, a party’s “continued failure to react to acts openly performed, ostensibly by virtue of the Treaty, tend[s] to give some support to that interpretation of it which alone could justify such acts.”


115. Id. ¶ 10.

116. *Beagle Channel Arbitration (Argentina v. Chile)*, 21 R. INT’L ARB. AWARDS, ¶¶ 169, 172 (1977): [T]he silence of Argentina [relating to Chile’s acts of jurisdiction] permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves . . . . [T]he important point throughout is not whether Argentina was under a duty to protest against Chilean acts in order to avoid the loss of the islands because of unilateral acts performed outside the terms of the Treaty . . . . the important point is that her continued failure to react to acts openly performed, ostensibly by virtue of the Treaty, tended to give some support to that interpretation of it which alone could justify such acts.
Another helpful case to consider is *Vimar Seguros y Reaseguros v. M/V Sky Reefer et al.*, decided by the Supreme Court of the United States.\(^{117}\) In that case, the Court interpreted the Carriage of Goods by Sea Act (COGSA) with reference to conduct of the parties to the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), on which COGSA was based. Although the Court did not directly refer to the Vienna Convention, it found that “Sixty six countries, including the United States and Japan, are now parties to the Convention, and it appears that none has interpreted its enactment of §3(8) of the Hague Rules to prohibit foreign forum selection clauses.”\(^{118}\) Furthermore, the Court found that “other countries that do not recognize foreign forum selection clauses rely on specific provisions to that effect in their domestic versions of the Hague Rules.”\(^{119}\) The Court found that “[i]n light of the fact that COGSA is the culmination of a multilateral effort ‘to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade,’ we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue.”\(^{120}\) In this case, the Court was willing to consider the consistent interpretation of treaty parties that had addressed the provision being considered, even though evidence of explicit agreement as to the interpretation was not necessarily available for all treaty parties. Indeed, agreement resulting from the express practice of all of the parties to a multilateral treaty would be difficult to demonstrate.

In other cases, however, where overt acts of protest would not necessarily be expected if a party disagreed with the interpretation adopted by another party, it would be inappropriate to rely on the silence of a party, even over an extended period of time, as evidence of agreement.\(^{121}\) In the case concerning

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\(^{118}\) Id. at 536-37.

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) In the WTO context, some Panels have even required “overt acts, not mere toleration” in order for party conduct to be considered as subsequent practice for the purposes of Article 31(3)(b).

See also McNair, supra note 62, at 427 (“evidence that both parties adopted the same meaning of a treaty provision before a dispute arises is of higher probative value than evidence as to the view of one party only. But when one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal.”).

See also John H. Knox, *The Judicial Resolution of Conflicts between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 68 (2004) (noting that to come within Article 31(3)(b), “the practice need only be accepted by all, and the acceptance can be tacit.”). But see Bin Cheng, *Properly Speaking, Only Celestial Bodies Have Been Reserved for Use Exclusively for Peaceful (Non-Military) Purposes, but Not Outer Void Space*, 75 INT’L L. STUD. SER. U.S. NAVAL WAR COL. 81, 99 (2000) (cautioning “if every time some foreign State official commits a legal malapropism, one were required to protest, whether or not one’s rights are affected, government offices would hardly have time to do anything else!”). It would be unreasonable, for instance, to establish an agreement of the parties on the basis of the internal action of one party without any protest from the other.
Kasikili/Sedudu Island, the ICJ found that Namibia’s silence did not constitute practice establishing agreement as to the boundary with Botswana, where “the documents . . . to which Botswana refers are internal documents, which, moreover, contain no express reference to Kasikili/Sedudu Island.”

Therefore, in order for silence to be considered relevant for the purposes of Article 31(3)(b), it must be: (1) in response to the consistent conduct of the other party or parties reaffirming a particular interpretation; and (2) conduct that the silent party ought reasonably to be aware of and object to in light of the extent of the party conduct. Where those criteria are not fulfilled, silence cannot be seen as practice that establishes agreement. Assessing these criteria is a fact-specific inquiry, considering the number of parties to the treaty, how many parties have expressly interpreted the treaty provision in question, and how long the treaty has been in effect.

In contrast to the cases discussed above, certain institutions routinely adopt a much stricter approach to the type of subsequent practice that is relevant for treaty interpretation. The WTO and certain municipal courts, for instance, require that party practice be “concordant, common, and consistent” in order to

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[A]greement may be deduced from the affirmative reaction of a treaty party. However, we have misgivings about deducing, without further inquiry, agreement with a practice from a party’s ‘lack of reaction’. We do not exclude that, in specific situations, the ‘lack of reaction’ or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it. However, we disagree with the Panel that ‘lack of protest’ against one Member’s classification practice by other WTO Members may be understood, on its own, as establishing agreement with that practice by those other Members.

123. But see R. v. Sec’y of State for the Home Dept., ex parte Mullen, [2004] UKHL 18 ¶¶ 47-48, [2004], (Appeal taken from Eng.) (relying on the conduct of European parties to the International Covenant on Civil and Political Rights in interpreting Article 14(6) as “establish[ing] state practice, which is relevant to treaty construction” for the purposes of Article 31(3)(b) of the Vienna Convention). It is unlikely that a consideration of the conduct of only a sub-group of the parties to an international treaty would be sufficient to establish the agreement necessary under Article 31(3)(b) of the Vienna Convention.
be considered under Article 31(3)(b). Specifically, the Appellate Body in *Japan—Alcoholic Beverages II*, following Ian Sinclair, noted the following:

Subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice, it is a sequence of acts establishing the agreement of the parties that is relevant.

Subsequent cases have further elaborated on this concept. In *EC—Chicken Cuts*, that Appellate Body noted that consistent party practice does not always require the participation of all parties in a large multilateral treaty regime:

[N]ot each and every party must have engaged in a particular practice for it to qualify as a ‘common’ and ‘concordant’ practice. Nevertheless, practice by some, but not all parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a ‘concordant, common and discernible pattern’ on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the WTO Agreement.

In overturning the Panel’s decision, the Appellate Body found that although the *EC* court’s classification with respect to certain types of frozen boneless chicken cuts had not been opposed in six years, this was not sufficient to establish subsequent practice.

Likewise, investment treaty tribunals have also found that “[t]he value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common, and consistent. A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual applications.” On this basis, the tribunal in *Canadian Cattlemen v. United States* found that “in interpreting the treaty, ‘reference may be made to ‘subsequent practice’ that clearly establishes the understanding of all the parties regarding its interpretation.”

Another important consideration is the scope of actors whose conduct is relevant for the purposes of treaty interpretation. Whereas subsequent


125. SINCLAIR, supra note 14, at 137.


128. Id. ¶ 272-76.


agreements under Article 31(3)(a) generally must be demonstrated by government officials authorized to interpret treaties,\textsuperscript{131} the conduct of any official tasked to implement the subject matter of a treaty may be taken into account under Article 31(3)(b).\textsuperscript{132} For instance, with respect to customs exemptions in a treaty, the actions of border customs agents may be relevant, though that same customs agent would not be able to represent the state in entering an agreement on the interpretation of the same treaty for the purposes of Article 31(3)(a). Therefore, the distinction between Articles 31(3)(a) and (b) is about \textit{whose} conduct as much as it is about the \textit{type} of conduct.

A helpful case in this regard is the case concerning the tax regime governing pensions paid to retired UNESCO officials residing in France, where the arbitral tribunal considered the privileges and immunities afforded to retired UNESCO officials under the UNESCO Headquarters Agreement.\textsuperscript{133} Specifically, the tribunal considered whether, on retirement, the pensions of UNESCO officials continued to be tax exempt. UNESCO argued that the longstanding practice of French tax authorities to not tax such pensions was determinative.\textsuperscript{134} France argued that on at least two occasions, in 1956 and 1994, its State Budget Secretary had officially communicated that the pensions of former UNESCO officials were subject to taxation, and that these communications were decisive.\textsuperscript{135} The tribunal considered whether the actor mattered, finding that it did not so long as the actions reflected the “unequivocal expression” of the state.

[T]he determining factor is the unequivocal expression of the position of the State. This position may result from statements or conduct of authorities vested

\textsuperscript{131} See, e.g., Helmut Philipp Aust and Mindia Vashakmadze, \textit{Parliamentary Consent to Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case}, 9 \textit{Germ. L. J.} 2223, 2230 (2008) (citing the Tornado Case of the German Federal Constitutional Court, suggesting that pursuant to Article 31(3)(a) “it is for the executive branch to contribute to processes by which an international treaty undergoes evolutionary development.”).


\textsuperscript{133} Sur la question du régime fiscal des pensions versées aux fonctionnaires retraités de l’UNESCO résidant en France (France v. UNESCO), Award, 25 RIAA 231 (Jan. 14, 2003). The tribunal here applied the general principles of interpretation, including with respect to subsequent practice, as reflected in both the Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. \textit{Id}. ¶ 41.

\textsuperscript{134} \textit{Id}. ¶ 65.

\textsuperscript{135} \textit{Id}. ¶ 66.
with treaty-making power as well as administrative bodies responsible for the implementation of the treaty. But in both cases, it is necessary that the position of the Contracting State is unequivocal, especially when the treaty creates obligations.136

As such, the actions of both those administrators charged with applying the treaty on a day-to-day basis, as well as those authorities with treaty making power, are relevant for the purposes of subsequent practice. Because multiple authorities could be inconsistent, the ultimate requirement is that the government have an unequivocal position, indicating an agreement on the treaty’s interpretation. In this case, given that France’s position was unclear, subsequent party practice did not result in the requisite agreement as to the interpretation or application of the treaty.137

As discussed above, state conduct at an international organization can be relevant for purposes of interpretation under Articles 31(3)(a) and (b). In its advisory opinion on the Legality of the Use by a State of Nuclear Arms in Armed Conflict, the court explicitly referenced Article 31(3)(b) in assessing whether the question of the legality of the use of nuclear weapons (in view of their health and environmental effects) comes within the scope of the World Health Organization’s (WHO) remit pursuant to its Constitution and the United Nations Charter.138 The court found that the practice of the WHO indicates that it does not fall within the scope of its activities to address the question of the legality of nuclear weapons.139 In interpreting the relevant treaties, the court relied on the practice of the WHO as representative of the practice of the parties to the WHO Constitution.140

136. Id. ¶ 74 (“le facteur déterminant, c’est l’expression non équivoque de la position de l’Etat. Cette position peut résulter tout aussi bien de déclarations ou de conduite des autorités investies du treaty-making power tout comme des organes administratifs chargés de l’application de l’accord. Mais dans l’un et l’autre cas, il est nécessaire que la position de l’Etat contractant soit sans équivoque, surtout quand il s’agit d’un traité entraînant une obligation”) (author translation).
137. Id. ¶ 77.
139. Id. ¶¶ 27, 55-56. The same day, the ICJ issued its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, where the Court considered the subsequent practice of the parties in interpreting the Hague Convention IV (though not referring explicitly to the Vienna Convention). In deciding on the interpretation of “poison or poisoned weapons,” the court found that “[t]he terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.” As such, the court found that the use of nuclear weapons cannot be regarded as specifically prohibited by the provision in question. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶55.
140. See Case regarding Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 160 (July 20) (Considering the type of expenses covered through member contributions pursuant to Article 17 of the United Nations Charter, and finding that “the practice of the Organization is entirely consistent with the plain meaning of the text. The budget of the Organization has from the outset included items which would not fall within any of the definitions of

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Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent
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However, care must be taken when attributing the practice of an international organization to its members. For instance, the South African Constitutional Court relied on an OECD report to interpret certain corruption conventions. Relying on Article 31(3)(b) of the Vienna Convention, the court found that “[t]he OECD Report is not in itself binding in international law, but can be used to interpret and give content to the obligations in the Conventions we have described.” 141 The report relied on, however, specifically provides “[t]his work is published on the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organization or of the governments of its member countries.” 142 Certainly such a report should not qualify as state practice (let alone state practice establishing party agreement) for the purposes of treaty interpretation.

Similarly, several domestic courts have relied on the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status in interpreting the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. 143 For instance, in Pushpanathan v. Canada, the Supreme Court of Canada noted that the UNHCR Handbook “was accepted as a valid source under Article 31(3)(b) of the Vienna Convention.” 144 The UNHCR Handbook, relied on by the lower courts in Pushpanathan, is produced by the High Commissioner’s office but has not been approved by all state parties to the 1951 Convention and the 1967 Protocol. As such, to rely on the Handbook as reflective of state practice establishing party agreement seems unreasonable.

The above reveals that the type of conduct constituting practice varies significantly from case to case. The determinative factor, however, is whether party agreement has been reached as to the interpretation of the terms in question. In this regard, it is best to identify what conduct falls within the scope of subsequent practice for the purpose of Article 31(3)(b) by how it differs from conduct falling within Article 31(3)(a). The above indicates that under Article 31(3)(b), (1) the agreement need not be recorded; (2) generally, the agreement of

141. Hugh Glenister v. President of the Republic of South Africa and others 2011 (CC), Case no. CCT 48/10, ILDC 1712 (ZA 2011), (SACR) ¶ 187 (S. Afr.).
all of the parties must be demonstrated; (3) inaction can reflect agreement in circumstances where action would otherwise be expected in response to the conduct of the other party or parties; and (4) the actions of officials tasked with applying, making or interpreting the treaty is relevant.

3. The Continuum of Party Conduct Demonstrating Party Agreement

The above analysis of relevant case law shows a continuum between Article 31(3)(a) and (b), where sub-article (a) has more stringent requirements, both in terms of form and, to a lesser extent, substance. As such, tribunals will often assess whether party conduct meets the criteria for Article 31(3)(a) before then considering whether, in the alternative, Article 31(3)(b) is satisfied.

In the “re-evaluation of the German mark” case, the tribunal first found that “it is undisputed that the parties to the [Treaty] were unable to agree on a particular interpretation of the clause in question after the [Treaty] had been concluded.” It was only after this finding that the tribunal noted that “[a]n indication of at least a tacit subsequent understanding between the contracting parties on a particular rendering of the term ‘depreciated’ in the clause in dispute might, therefore, at best be found in the relevant practice of the parties concerned.”

Similarly, the award in the NAFTA case Canadian Cattlemen v. United States demonstrates the continuum between Articles 31(3)(a) and (b). That case related to the U.S. import ban on Canadian cattle after the discovery of bovine spongiform encephalopathy (BSE, or “Mad Cow Disease”) in Alberta. At issue was the scope of NAFTA’s coverage under Article 1101. The claimant submitted that there was no relevant subsequent agreement with respect to the interpretation of Article 1101, as the parties had not sought an FTC interpretation pursuant to Article 1131 (as had been the case for the minimum standard of treatment discussed above). The tribunal, however, found that the FTC interpretation “is not the only means available to the NAFTA Parties of reaching subsequent agreement.” The United States relied on Mexico’s

145. VILLIGER, supra note 33, at 110.
146. It is worth noting that the interpretation of courts of a state party can be considered as “subsequent practice.” See, e.g., King v. Bristow Helicopters Ltd. Re M, (on the application of CM), Appeal Judgment, ILDC UKHL 242, ¶ 98 [2002] (Opinion of Lord Hope of Craighead).
147. HICEE B.V. v. Slovak Republic, Partial Award, ¶ 134 (PCA/UNCITRAL Arb. Trib. May 23, 2011) (“In sub-paragraph (a) the agreement is ex hypothesi conscious and express, in subparagraph (b) it arises by implication from the parties’ actions.”).
148. The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2(e) of Annex I A of the 1953 Agreement on German External Debts, Award, 19 RIAA 67, 103, ¶ 31 (May 16, 1980).
149. Id.
151. Id. ¶ 185.
Article 1128 submission in the arbitration (allowing third-party states to intervene in the proceedings) and Canada’s statements in implementing NAFTA and its counter-memorial in another NAFTA case to demonstrate that a subsequent agreement had been reached as to the interpretation of Article 1101. The tribunal found that “[a]lthough there is . . . insufficient evidence on the record to demonstrate [subsequent agreement], the available evidence cited by the Respondent demonstrates to us that there is nevertheless a ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications . . . .’” 152 The tribunal therefore effectively acknowledged that subsequent agreement pursuant to Article 31(3)(a) requires a higher evidentiary threshold than demonstrating that subsequent practice establishes party agreement.

Another investment treaty case, *Vivendi v. Argentina*, involved a challenge to the President of the Annulment Committee. 153 The Annulment Committee considered whether the ICSID rules applicable to arbitrator dismissal also applied to the dismissal of Annulment Committee members. The Committee found that party adoption of an arbitration rule applying all of the rules *mutas mutandis* to annulment proceedings “can be seen, if not as an actual agreement by the States parties to the [ICSID] Convention as to its interpretation, at least as amounting to subsequent practice relevant to its interpretation.” 154 Again, this approach supports the theory that subsequent practice and agreement are on a continuum where establishing relevant practice to be considered for purposes of treaty interpretation requires a lower threshold.

4. Relative Weight to be Accorded to Subsequent Conduct in Interpreting Treaties

As discussed above, there is a higher evidentiary threshold to establish party agreement under Article 31(3)(a) versus Article 31(3)(b). As such, party agreement coming under Article 31(3)(a) should be given more weight in interpreting a treaty. Just as there is a sliding scale between subsequent agreement and subsequent practice establishing agreement, so should there be a sliding scale on the weight accorded to that agreement, based on where it falls along the subsequent conduct continuum. As noted by the ILC when drafting the Vienna Convention, “[t]he value of subsequent practice varies according[ly] as it shows the common understanding of the parties as to the meaning of the terms.” 155

152. *Id.* ¶ 188.
154. *Id.* ¶ 12.
In any event, an agreement of the parties as to the interpretation of terms of the treaty is often decisive in ascribing meaning to those terms. As the ILC noted, “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.”\textsuperscript{156} The same is true for subsequent practice that establishes the agreement of the parties.\textsuperscript{157} The ILC noted with respect to subsequent practice that “[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.”\textsuperscript{158} Indeed, it would be difficult for a tribunal to refuse to adopt a meaning that the parties mutually agree to, especially in state-to-state cases.

A question arising in this context is whether the same weight should be given to subsequent party conduct when third party (non-state) rights are the subject of the treaty being interpreted. For instance, with respect to human rights or investment treaties, which give standing to private individuals or entities, Articles 31(3)(a) and (b) could give the parties significant control over the outcome of the dispute. This concern arose in the NAFTA case \textit{Pope & Talbot v. Canada}, where, after the tribunal’s final award finding Canada liable but prior to its Damages Award, the tribunal was presented with an agreement by the FTC (\textit{i.e.,} between the NAFTA parties) as to the interpretation of the requirement to provide foreign investors with the minimum standard of treatment in accordance with international law, pursuant to Article 1105.\textsuperscript{159} The interpretation was provided pursuant to Article 1131(2) of NAFTA, as discussed above, and was narrower in scope than the interpretation adopted by the tribunal in its final award on the merits. One of the questions the tribunal posed to the parties was the following:

In respect that the Tribunal is required by Article 1131 to decide the issue in

\textit{Id. at comment 14.}

\textsuperscript{156} \textit{Id. at 221, comment 15 (“The Commission considered that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements.”); Mexico v. Cargill, Inc., 2011 ONCA 622 (Oct. 4, 2011), ¶ 84 (“[t]he position of the three Parties was a clear, well-understood, agreed common position, in accordance with Article 31(3)(b) of the Vienna Convention, that prohibited the award of any losses suffered by the investor in its home business operation, even caused by the breach, \textit{it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation of the relevant provisions of Chapter 11.}”) (emphasis added); Fitzmaurice, supra note 34, at 211 (“In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.”). See also Sir Gerald Fitzmaurice, \textit{The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points}, 28 BRIT. Y.B. INT’L L. 1, 9 (1951).}

\textsuperscript{157} \textit{Draft Articles on the Law of Treaties, at 221, comment 15.}

\textsuperscript{158} \textit{Pope & Talbot Inc. v. Canada, Damages (NAFTA Ch. 11 Arb. Trib. May 31, 2002), ¶ 10, 70-73.}
dispute in accordance with the NAFTA Agreement and applicable rules of international law, and it may be taken as a rule of international law that no-one shall be judge in his own cause, and that the purpose of this arbitral mechanism is under Article 1115 to assure due process before an impartial tribunal, is it correct for the Tribunal to apply an interpretation by the Commission so as to affect an award previously made by the Tribunal whereby it has determined an issue in dispute (namely Canada’s liability for a breach of Article 1105) adversely to Canada?\(^{160}\)

The tribunal’s framing of the question demonstrates the tension between the objective decision-making process and the role of states in interpreting treaties granting third party rights. Where a dispute concerns state parties and those parties agree to an interpretation of an applicable treaty, a tribunal would certainly welcome such guidance. In a sense, this would be one step towards settling the dispute between the parties. However, where the agreement on interpretation affects the rights of a third party, a tribunal would be more concerned that the states (in this case all potential defendants to similar claims) were acting to determine the outcome of a dispute in their favor. In the Pope & Talbot case, the tribunal begrudgingly applied the FTC interpretation but nonetheless found that Canada was still in breach of Article 1105. There, the tribunal’s decision turned on the wording of Article 1131(2), requiring that the interpretation “shall be binding.”\(^{161}\) The tribunal suggested that this phrase was “mandatory” in nature.\(^{162}\)

States should still be permitted to agree, through their subsequent conduct, to an interpretation of treaty terms where third party rights are at issue; however, they should be precluded from doing so once a third party has relied on an interpretation that had been accepted previously. This is analogous to contract law in many jurisdictions, where parties to a contract generally cannot act to adversely impact third party rights once the “beneficiary has accepted them or reasonably acted in reliance on them.”\(^{163}\)

With respect to both forms of subsequent conduct, one cannot ignore the other principles of interpretation contained in Article 31 of the Vienna Convention. Although subsequent conduct establishing party agreement carries significant weight, it is still thrown in the same crucible with the other interpretation criteria. Therefore, where subsequent conduct leads to an interpretation that deviates from the ordinary meaning, discerned in context and in light of its object and purpose, such an interpretation would be

\(^{160}\) Id. ¶ 13.

\(^{161}\) Id. ¶ 51.

\(^{162}\) Id.

\(^{163}\) See, e.g., International Institute for the Unification of Private Law, UNIDROIT Principles on International Commercial Contracts, Art. 5.2.5 (2010), http://www.unidroit.org/english/principles/contracts/principles2010/integralversion/principles2010-e.pdf (“The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.”).
impermissible. However, where more than one interpretation is possible, subsequent party conduct demonstrating party agreement will almost certainly be decisive to disputes arising after the agreement has been established.

B. Subsequent Party Conduct as a Supplementary Means of Interpretation

Party conduct can be relevant to treaty interpretation even where no agreement has been achieved. However, reliance on subsequent party conduct in this regard should not be considered as a primary means of interpretation, but rather as supplementary under Article 32 of the Vienna Convention. Article 32 sets out an open-ended list of evidence that can be relied on in interpreting a treaty, in order to confirm the meaning indicated under Article 31, or to be used where the application of Article 31 renders the meaning “ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.”

While most courts and tribunals will limit their analysis under Article 32 to travaux préparatoires, reference to subsequent practice should not be discounted. For instance, in the case concerning Kasikili/Sedudu Island, while the court found that certain subsequent practice did not fall under Article 31, it was still relevant to confirming the court’s interpretation of the applicable treaty. Though the court did not explicitly refer to Article 32, the court noted that:

[O]n at least three occasions . . . surveys carried out on the ground identified the channel of the Chobe to the north and west as the main channel of the river around Kasikili/Sedudu Island. . . . The factual findings made on these occasions were not, as such, disputed at the time. The Court finds that these facts, while not consisting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, para. 2, of the 1890 Treaty in accordance with the ordinary meaning to be given its terms.

Here, the parties’ silence with respect to the factual findings were taken into account by the court to support its interpretation, derived under Article 31.

Similarly, WTO panels have referred to subsequent party conduct to confirm their interpretation of WTO Agreements, even where party agreement could not be demonstrated. In U.S.—Section 110(5) Copyright Act, a WTO

164. The distinction between interpretation and an impermissible modification or amendment is discussed in further detail below. See infra Part III.

165. VILLIGER, supra note 33, at 111 (referring to Articles 31(3)(a) and (b), noting “[t]his means of interpretation is not only particularly reliable, it is also endowed with binding force. It provides ex hypothesi the ‘correct’ interpretation among the parties in that it determines which of the various ordinary meanings shall apply.”).

166. Vienna Convention, supra note 10, art. 32.

167. Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.) 1059 I.C.J. ¶ 80 (Dec. 13); See also D. W. GEIS, INTERTEMPORALITY AND THE LAW OF TREATIES 122 (2001). But see Fox, supra note 32, at 71 suggesting that “the International Court has evolved a new method of treaty interpretation by employing ‘factual findings’ of parties on separate occasions over time as to the meaning of the contested words, factual findings which were not disputed, to support the court’s conclusions as to ordinary meaning of words in article III of 1890 Treaty. [sic]”.)
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct

panel referred to “several examples from various countries of limitations in national laws” that confirmed its interpretation of the Berne Convention (1971).\textsuperscript{168} The panel referred to this practice as “confirm[ing] their conclusion” as to the interpretation of the treaty, without expressing a view on “whether these are sufficient to constitute ‘subsequent practice’ within the meaning of Article 31(3)(b) of the Vienna Convention.”\textsuperscript{169}

Though some authors have expressed concern over the reliance on subsequent party conduct that does not demonstrate party agreement on interpretation,\textsuperscript{170} it is important to note that this reliance simply confirms the interpretation already arrived at through application of the general principles contained in Article 31. One cannot show concern where an interpreter thoroughly considered all facts, finding a degree of consistency among the presented evidence. As suggested by McNair, while party inaction towards interpretation expressed by another party is “not [necessarily] conclusive upon a court which is called upon later to interpret the treaty,” it may nonetheless be “relevant evidence” where it fails to demonstrate party agreement.\textsuperscript{171}

The European Court of Human Rights, among other tribunals, has been much more liberal in its consideration of subsequent party conduct for purposes of treaty interpretation. If it were not for the unique “living instrument” approach to interpretation adopted by the court, one might query, for instance, the consideration of “social acceptance” as a primary tool of interpretation.\textsuperscript{172} In other contexts, such practice would be more appropriate to consider under Article 32 as suggested above (if at all).\textsuperscript{173}

III.
RELEVANCE OF SUBSEQUENT PARTY CONDUCT FOR PURPOSES OTHER THAN TREATY INTERPRETATION

The conduct of parties after the conclusion of a treaty may be relevant to party rights in ways other than simply elucidating the meaning of the treaty. This section seeks to identify some of the areas in which subsequent party conduct may impact the rights of parties under treaties, with a focus on the legal distinction between the interpretation of treaties and the manifestation of other

\textsuperscript{168}. WTO Panel Report, United States—Section 110(5) of the U.S. Copyright Act, ¶ 6.55, WT/DS/160/R (June 15, 2000).
\textsuperscript{169}. \textit{Id.} at 68.
\textsuperscript{170}. Malcolm Shaw, \textit{Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)}, 49 INT’L & COMP. L.Q. 964, 975 (2000) (with respect to the Kasikili/Sedudu Island case, suggesting that “[i]t is perhaps problematic for the Court to accept ‘facts,’ the legal consequences of which were not accepted by the relevant parties, as supportive of legal conclusions reached by the Court.”).
\textsuperscript{171}. MCNAIR \textit{supra} note 62, at 431.
\textsuperscript{172}. \textit{See supra} note 50.
\textsuperscript{173}. \textit{But see} Letsas \textit{supra} note 49, at 541 (suggesting that “International lawyers have much to learn from a close study of Strasbourg’s interpretive ethic.”).
legal obligations. Specifically, this section articulates the distinction to be drawn between treaty interpretation and modification/amendment, while theorizing that reliance on the principle of estoppel is a preferred means of justifying a deviation from treaty rights, where subsequent party conduct justifies such deviation.

Lauterpacht has asked “which of the opposing views interprets the treaty and which revises it?” Sinclair has similarly noted that “[i]t is inevitably difficult, if not impossible, to fix the dividing line between interpretation properly so called and modification effects under the pretext of interpretation.”

It is no surprise, then, that international institutions, cases, and several commentators arguably modified treaty obligations while purporting only to interpret them. For instance, the court in Temple of Preah Vihear confused interpretation and amendment. The case concerned a boundary dispute between Cambodia and Thailand in the area where the Temple of Preah Vihear was located. A 1904 treaty had been signed between the two countries, creating a joint commission to demarcate the border according to the watershed. Cambodia submitted as evidence a map that had been drawn by French authorities subsequent to the work of the commission. The court found that the map, which placed the Temple on the Cambodian side of the border, “was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two governments to the delimitation which the Treaty itself required.” The court found that “the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant

175. SINCLAIR, supra note 14, at 138.
176. See, e.g., AUST, supra note 34, at 239 (suggesting: “Given that the parties can agree later to modify the treaty, they can subsequently also agree on an authoritative interpretation of its terms, and this can amount in effect to an amendment.”); Ibrahim Shihata, The Dynamic Evolution of International Organizations: The Case of the World Bank, 2 J. HIST. INT’L L. 217 (2000) (discussing examples where subsequent practice has resulted in “informal modification” of the World Bank’s Charter); VILLIGER, supra note 105, at 111 (“[T]he parties to the treaty are their own masters; they may be means of the instruments, agreements, or practice mentioned in paragraph 2 and subparagraphs 3(a) and (b) not only give a special meaning to the term at issue but also amend, extend, or delete a text.”); Evan Criddle, The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation, 44 VA. J. INT’L L. 431, 439 (2003-2004) (“courts may deviate from ‘ordinary meaning’ when treaty parties conclude a subsequent agreement that otherwise elucidates or reconfigures ‘the interpretation of the treaty or the application of its provision’ . . . . Like subsequent agreements, parties’ post-ratification practice may reflect an implicit agreement to revise the original treaty document.”); Koplow, supra note 132, at 1023-24 (“parties are free to alter their treaty obligations through the device of unwritten ‘subsequent practice,’ utilizing the opaque process of evolving customary international law to supersed the textual obligations.”).
178. Id. at 34.
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent 2013] WHEN ACTIONS SPEAK LOUDER THAN WORDS 79

clause of the treaty.\textsuperscript{179} Effectively, the court held that subsequent party conduct in applying the treaty can have the effect of deviating from the terms of that treaty.\textsuperscript{180} This finding blurs the line between interpretation and amendment.

Similarly, in the Namibia Advisory Opinion of 1971, the ICJ considered the meaning of Article 27(3) of the United Nations Charter, requiring that a resolution be adopted by the affirmative vote of nine members including the concurring votes of the permanent members. It was argued that the requirement in Article 27(3) had not been met because two permanent members had abstained. The court found that abstention did not invalidate the resolution.

\textbf{[T]he proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions . . . This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations . . .} \textsuperscript{181}

The problem here is how to reconcile the ordinary meaning of the requirement for a “concurring vote” with the practice of abstentions. It may be that the rules of the organization deviate from the United Nations Charter, but to interpret the Charter in a manner that rejects its ordinary meaning is concerning, even if politically expedient.

The process of treaty interpretation and the process of modification or amendment are “legally quite distinct.”\textsuperscript{182} This is best explained by Georg Schwarzenberg, who wrote the following while the Vienna Convention was being finalized:

As distinct from the verification and clarification of consensus by interpretation, the object of revision is a change in the rights and duties of the parties to the

\textsuperscript{179} Id. (emphasis added).

\textsuperscript{180} See Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), Dissenting Opinion of Judge Parra-Aranguren, I.C.J. 1208, 1213, ¶ 16 (Dec. 13) (noting that in the Temple of Preah Vihear case “the effect of subsequent practice . . . was to amend the treaty.”).


\textsuperscript{182} Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.) I.C.J. 1208, 1213, ¶ 16 (Dec. 13) (dissenting opinion of Judge Parra-Aranguren); See also Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 120, 123, ¶ 12 (Sept. 25) (separate opinion of Judge Bedjaoui) (“An interpretation of a treaty which would amount to substituting a completely different law to the one governing it at the time of its conclusion would be a distorted revision. The ‘interpretation’ is not the same as the ‘substitution’ for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed.”); Mamatkulov and Askarov v. Turkey, 2005-I Eur. Ct. H.R., ¶ 5 (Feb. 4, 2005) (joint partly dissenting opinion of Judges Caflisch, Turmen and Kovler), referring to Cruz Vars and Others v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991) (“This ‘subsequent practice’ could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision . . . but not to create new rights and obligations which were not included in the Convention at the outset.”).
treaty. Thus, both tasks start from different major assumptions. That underlying the interpretation of treaties is that once the legal meaning and effects of a consensual engagement have been established, they must have been willed by the parties from the moment when the treaty entered into force. To make such an assumption in the case of the revision of a treaty would be atypical. In other words, whereas interpretation works retrospectively (ex tunc), revision operates as from the present (ex nunc).183

Therefore, where tribunals look back and suggest that party conduct had, at some point in time, modified or amended treaty obligations, the very purpose of entering into formal commitments in the first place is called into question. Indeed, the concept of pacta sunt servanda requires that legal commitments in treaties be kept.184 As Judge Bedjoi stated in his separate opinion in Gabčíkovo-Nagymaros, “[a] State cannot incur unknown obligations whether for the future or even for the present.”185 The concern with subsequent party conduct that purports to apply or interpret a treaty but results in a modification or amendment is most pronounced in the international criminal context. If crimes could be amended through practice, this would violate the most fundamental of rights: nullum crimen sine lege.186 It would be particularly concerning if in a parliamentary democracy, for instance, the legislature was required to approve the text of a treaty only to have the terms informally changed shortly thereafter.187 This would undermine the treaty making process altogether.


184. Vienna Convention, supra note 10, pmbl. (“Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized”); id. art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 113 (1953) (“Pacta sunt servanda, now an indisputable rule of international law, is but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations as well as that of individuals. Without this rule, International law as well as civil law would be a mere mockery. . . . As long as a Treaty remains in force, it must be observed as it stands. It is not for a Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument.”).


186. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), Art. 11(2) (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed.”).

187. For a critique of informal amendments to treaty obligations, including through subsequent practice, see generally Koplow, supra note 132. See also CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE: A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE 176-84 (2001), http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf (suggesting that the Senate has the same role in amending or modifying treaty obligations, as in adopting treaties in the first instance). But see 1 U.N. CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS 214, ¶ 55, U.N. Doc. A/CONF.39/11 (1968) (Waldock stating that “such modified applications of treaties had never raised any constitutional problem. The variations normally did not touch the main basis of the treaty and did not
With respect to amendments, which are changes to a treaty as between all of the parties, many treaties will provide a specific procedure to be followed. Such procedures should be followed in order to provide commitments that cannot otherwise come within the meaning of the treaty as written. Where no amendment provision is present in the treaty in question, the Vienna Convention provides an amendment procedure in Article 39: “[a] treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.” Part II, which outlines the process for the conclusion and entry into force of treaties, applies mutas mutandis to the amendment of treaties. The ILC explained in its commentary to what became Article 39 that “The amendment of a treaty is normally effected through the conclusion of another treaty in written form and this is reflected in the provision that the rules of Part II are to apply to the amending agreement.” Among other things, and for similar reasons, there are also limitations on the persons permitted to enter into amendments. Whereas the practice of a diversity of actors can be taken into account for the purposes of treaty interpretation under Article 31(3)(b), amendment agreements can only be entered into by those with “full powers” under Article 7. Article 40 of the
Vienna Convention provides further procedural rules for amending multilateral treaties.

With respect to modification, which addresses changes to treaty terms as between some of the treaty parties, the parties must adhere to the terms of the treaty governing modification. Alternatively, Article 41 of the Vienna Convention governs. Under Article 41, modification is permitted where the treaty permits such a modification, or where the modification “(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations,” and “(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”

In either instance, the parties must “notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.” At first blush, the modification process appears to be more lenient than the process for amendments, given that Part II of the Vienna Convention is said not to apply. However, there are clear obligations, especially regarding notification to the other parties, which prevent less formal means of agreement, such as agreement resulting from practice. What is more, in drafting the Vienna Convention the ILC contemplated the inclusion of a provision enabling subsequent practice to modify the terms of a treaty. The provision under consideration stated: “A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

For instance, UNCLOS contains provisions that limit the ability of parties to modify treaty obligations. See, e.g., UNCLOS, supra note 189, art. 310 (“Article 309 [limiting the ability of parties to make reservations or exceptions to the Convention] does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.”); id. art. 311 (adopting the modification rules of Article 41 of the Vienna Convention with certain express limitations).

Vienna Convention, supra note 10, art. 41.

Id. art. 41(1)(a).

Id. art. 41(1)(b).

Id. art. 42.

But see Treaties and Other International Agreements, supra note 187, at 178 (“As previously indicated, amendments or modifications to a treaty or international agreement generally have entailed the same procedure as the original agreement unless otherwise specified in the original agreement.”); id. at 184 (“the general rule is that the amendment or modification of an international agreement to which the United States is a party is subject to the same rules as apply to the making of an agreement.”). MARIORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 14, 441 (1970) (“it is a general rule that a treaty cannot be modified except by an instrument brought into force through the treaty processes.”).
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent
2013] WHEN ACTIONS SPEAK LOUDER THAN WORDS 83
to modify its provisions. “199 This provision was rejected, given the uncertainty around the validity of the rule. 200 

The test to differentiate an interpretation from a modification or amendment is whether the subsequent party conduct leads to an agreement as to the interpretation that comes within the ordinary meaning of the words, read in good faith and in accordance with their context and in light of their object and purpose (i.e., whether the outcome of the agreement resulting from the subsequent conduct comes within the four corners of the treaty text). 201 Given that there are often several possible “ordinary” meanings of a word and that there can be multiple objects and purposes to a treaty, subsequent conduct can often be decisive in choosing between several different meanings. 202

Although subsequent party conduct may not necessarily result in a modification or amendment of a treaty, this does not mean that it cannot affect the rights of parties in other ways, such as through the operation of estoppel. Estoppel is viewed generally as a principle of international law. 203 After the

199. Draft Articles on the Law of Treaties with Commentaries, supra note 17, at 236, art. 38. As noted by the Head of Canada’s Treaty and Economic Section of the Department of External Affairs at the time of the Vienna Convention’s adoption, “Whereas practice, to be considered as interpretative under article 31, would have to be consistent with the provisions of the treaty, ILC draft article 38 dealt with the case in which the subsequent practice was inconsistent with the provisions of the treaty.” J. S. Stanford, The Vienna Convention on the Law of Treaties, 20 U. TORONTO L.J. 18, 32 (1970). For a detailed discussion on Draft Article 38 and the implication of not including it in the Vienna Convention, see generally Giovanni Distefano, La Pratique Subséquente des États Parties à un Traité, 40 ANNAIARIE FRANÇAIS DE DROIT INTERNATIONAL 41 (1994).

200. See Elizabeth Zoller, The “Corporate Will” of the United Nations and the Rights of the Minority, 81 AM. J. INT’L L., 610, 616 (1987) (noting that given the rejection of Article 38, “a treaty may not be modified by subsequent practice in applying the treaty, even if that practice should establish the agreement of the parties to modify the provisions of the treaty.”). As Reisman and Arsanjani have noted, the travaux can be especially useful “when a particular draft was discussed and clearly rejected.” Mahnous H. Arsanjani & W. Michael Reisman, Interpreting Treaties for the Benefit of Third Parties: The “Salvers’ Doctrine” and the Use of Legislative History in Investment Treaties, 104 AM. J. INT’L L., 597, 604 (2010).

201. LAUTERPACHT, supra note 174, at 76 (“An international court which yields conspicuously to the urge to modify the existing law—even if such action can be brought within the four corners of a major legal principle—may bring about a drastic curtailment of its activity.”).

202. Gottlieb, supra note 8, at 130 (“The problem of interpretation involves finding guidance for the choice between the rival applications of a text.”); Beagle Channel Arbitration (Arg. v. Chile), 21 R. INT’L ARB. AWARDS [RIAA] ¶ 74 (1977) (“It is clear that the Treaty is controlling, but the critical issue is, what does the Treaty mean? . . . [T]he question in the present case is not one of attempting to change the boundary, but of determining what the boundary is.”).

203. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 153, 643-44 (7th ed. 2008) (noting that estoppel is based on principles of good faith and consistency and is regularly part of the judicial reasoning of tribunals); CHENG, supra note 184, at 141-42 (“[A] man shall not be allowed to blow hot and cold—to affirm at one time and deny at another . . . . Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel,’ or by any other name, it is one which courts of law have in modern times most usefully adopted.”) (quoting England, Court of Exchequer: Cave v. Mills (1862) 7 Hurlstone & Norman, 913, 927); I. C. MacGibbon, Estoppel in International Law, 7 INT’L & COMP. L.Q. 468, 512 (1958) (“[A] State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have
conclusion of a treaty, if a party acts in a way that surrenders its rights and the other party relies on that action to its detriment, then the first party is not permitted to withdraw those statements or actions. As noted by McNair, “It is reasonable to expect that any legal system should possess a rule designed to prevent a person who makes or concurs in a statement, upon which another person in privity with him relies to the extent of changing his position, from later asserting a different state of affairs.” Where such criteria are met, the subsequent conduct of one party should preclude it from asserting certain rights under a treaty. This does not impact the meaning of the treaty, but does impact the rights of a party under that treaty.

Therefore, if some but not all parties to a treaty agree to a particular interpretation of a treaty provision, that agreement may not objectively determine the meaning of the treaty, but it may impact the rights of any party to that agreement which then seeks to adopt a different meaning. Indeed, prior to the Vienna Convention, estoppel often applied to treaty interpretation disputes, raising the issue of whether “one of the treaty partners [had] adopted a position which precluded it from arguing any further for a different interpretation from that propounded by another party.”

adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim allegans contraria non audiendus est.”

204. See Legal Status of Eastern Greenland, Judgment (Denmark v. Norway), 1933, 53 PCIJ (ser. A/B), para. 186 (Sept. 5) (holding that because Norway had previously “reaffirmed that she recognized the whole of Greenland as Danish,” “she has debarred herself from contesting Danish sovereignty over the whole of Greenland.”); D. W. Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, 33 Brit. Y.B. Int’l L. 176 (1957) (“The rule of estoppel, whether treated as a rule of evidence or a rule of substantive law, operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.”); see also Pan Am. Energy LLC v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, para. 159 (July 27, 2006) (“Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.”); AUST, supra note 34, at 55 (citing El-Salvador-Honduras Land, Island and Maritime Frontier, 1990 I.C.J. 92, ¶ 63 (Sept. 13)) (“where a clear statement or representation is made by one state to another, which then in good faith relies upon it to its detriment, the first state is estopped (precluded) from going back on its statement or representation.”).

205. McNAIR, supra note 62, at 487.

206. GARDINER, supra note 12, at 220. See also Case Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Kingdom of Serbs, Croats and Slovenes), 1929, 20 P.C.I.J. (ser. A), para. 80 (July 12) (contemplating, though not finding, the possibility of subsequent party conduct leading to the termination of a treaty obligation by way of estoppel); Fitzmaurice, supra note 34, at 223 (in discussing the requirement that all parties must have engaged in the relevant conduct to be taken into consideration for purposes of treaty interpretation, noting that “the conduct of one party may be evidence against that party”). Estoppel, however, is broader than the principle now contained in Articles 31(3)(a) and (b) of the Vienna Convention, as it depends solely on the action of the party who later seeks to adopt a contrary position, and does not depend on the establishment of agreement between all treaty parties. But see Philippe Kirsch, Canadian Practice in
Moloo: When Actions Speak Louder Than Words: The Relevance of Subsequent
2013] WHEN ACTIONS SPEAK LOUDER THAN WORDS 85

Estoppel should not be confused with modification or amendment of the
treaty itself. The Eritrea-Ethiopia Boundary Commission appear to have conffated amendment and estoppel, as the tribunal suggested that the Temple of
Preah Vihear case was based on principles of estoppel:

[In the Temple case], after identifying conduct by one party which it was
reasonable to expect that the other party would expressly have rejected if it had
disagreed with it, the Court concluded that the latter was estopped or precluded
from challenging the validity and effect of the conduct of the first. This process
has been variously described by such terms, amongst others, as estoppel,
preclusion, acquiescence or implied or tacit agreement. But in each case the
ingredients are the same: an act, course of conduct or omission by or under the
authority of one party indicative of its view of the content of the applicable legal
rule—whether of treaty or customary origin; the knowledge, actual or reasonably
to be inferred, of the other party, of such conduct or omission; and a failure by the
latter party within a reasonable time to reject, or dissociate itself from, the
position taken by the first. Likewise, these concepts apply to the attitude of a
party to its own conduct: it cannot subsequently act in a manner inconsistent with
the legal position reflected in such conduct.207

The Eritrea-Ethiopia Boundary Commission then found that subsequent
party conduct delimiting the relevant boundary had the effect of changing that
boundary, albeit a “relatively small” change.208 It is unclear whether the tribunal
found that the terms of the treaty had changed or that there was some other
overriding legal principle calling for deviation from the treaty text. The tribunal
could have been more explicit about its reliance, for instance, on the principle of
estoppel. In the boundary delimitation context, the legal distinction may be less
relevant but it is important to maintain in other contexts.

The following hypothetical example best explains the concern with
confusing estoppel with treaty amendment. Assume states A and B enter into a
bilateral investment treaty that precludes investments that are not made in
accordance with the law.209 An investor from State A invests in State B, but

It is possible that an estoppel can be created through a course of conduct by treaty
parties that constitute either a subsequent agreement regarding the interpretation of the
treaty or the application of its provisions [Article 31(3)(a)] or any subsequent practice
in the application of the treaty which establishes the agreement of the parties regarding
its interpretation [31(3)(b)].

208. See, e.g., id. ¶ 6.32

“In the view of the Commission, with the exception of the boundary checkpoints at
Bure reflecting a common agreement that the boundary passes between them at that
town, none of the other effectivités adduced by the Parties was of such weight as to
cause the Commission to vary the geometric boundary determined by the Commission
in application of Article I of the 1908 Treaty. In relation to Bure, the adjustment is
relatively small, requiring only a slight variation of the border reflected in the
insertion of Point 40 between Points 39 and 41.”

209. Such a requirement can be found in several investment treaties, often in the definition of
the term “investment.” See generally, Rahim Moloo and Alex Khachatryan, The Compliance with
procures its investment illegally. State B becomes aware of the illegal conduct but decides nonetheless to endorse the foreign investor and its investment due to the various benefits that come with it, making this clear to the foreign investor and its home state, which also supports its investor’s activities in State B. Several years pass and the relations between the foreign investor and State B deteriorate. The foreign investor sues State B under the bilateral investment treaty for what it feels is unfair and inequitable treatment. In its defense, State B argues that the tribunal does not have jurisdiction because the foreign investor’s investment was procured illegally, and as such is not covered by the investment treaty. In this scenario, the foreign investor may argue that State B is estopped or precluded from raising the illegality before the tribunal. Irrespective of the fact that both States may have wilfully ignored the legality requirement with respect to this particular investment, this does not mean that the treaty has been amended to now permit all illegal investments. Rather, the subsequent actions of the parties to the treaty only have a direct impact on the rights of State B vis-à-vis this particular investment. The terms of the treaty, however, remain unchanged. The same would apply a fortiori to multilateral treaties.

CONCLUSION

Those tasked with interpreting treaties should take account of subsequent party conduct insofar as it demonstrates the agreement of the parties as to the meaning of the treaty terms in question. In this regard, the distinction between Articles 31(3)(a) and (b) is somewhat more formalistic than substantive. In both cases, what is relevant is that the parties agree as to the meaning of the treaty. A formal written agreement between the parties agreeing to the meaning of an otherwise ambiguous term would likely fall within Article 31(3)(a). On the other hand, independent actions of both parties, temporally separated, that appear to demonstrate agreement between them on the meaning of the treaty is more likely to come within Article 31(3)(b). There is a spectrum of conduct between these two, and in this regard, Articles 31(3)(a) and (b) sit on a continuum. That continuum also represents the weight to be accorded to the party agreement for purposes of treaty interpretation. The stronger the case for the conduct to come within Article 31(3)(a), the more weight that conduct should receive as expressing an authentic interpretation of the text. The parties’ agreement as to the meaning of the treaty text, however, must still be consistent with the ordinary meaning, read in good faith, in context, and in line with its object and purpose. Otherwise, the parties may be inadvertently (or advertently) modifying or amending the treaty in an impermissible manner. Parties may still act to modify or amend a treaty but must follow the agreed upon procedure for doing so.

210. Id. at 1497-99 (discussing the applicability of estoppel in this context).
Interpreting treaties is a task that international lawyers do on a regular basis. While this article has primarily focused on disputes to draw out general principles as they apply to subsequent party conduct in the context of interpreting and applying treaties, treaty interpretation is more often the task of a lawyer in the office of a foreign ministry or in an international organization than that of a judge or arbitrator. Those lawyers, however, can also have an important impact on the meaning of treaties that they are tasked to interpret. Further, those tasked with implementing treaties also have such an impact. As this article has demonstrated, subsequent party conduct matters when interpreting and applying that treaty. Therefore, when those interpreting a treaty also represent one of the parties to that treaty, they ought to consider if their actions suggesting one particular interpretation over another might bind themselves in the future. Parties should embrace this tool rather than worry about it, because it allows parties to clarify, confirm, and converse with others interpreting the treaty, to their benefit. Perhaps most importantly, it allows for a degree of dynamism in treaty law, with the potential to prevent what are often long-term commitments from going stale.
The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization

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INTRODUCTION

The recognition by the United Nations (U.N.) General Assembly\(^1\) and the U.N. Human Rights Council\(^2\) in 2010 of a human right to safe drinking water and sanitation has propelled awareness of the global water and sanitation crisis to new heights, while also raising a host of challenging issues. This article surveys the evolution of this right by attempting to place it within a broader historical context and by addressing some of the controversies around privatization.

The framing of water and sanitation as a human right can be understood as an affirmation of the fundamental importance of water and sanitation for human dignity, and as a response to global water service trends that have increasingly emphasized efficiency, financial sustainability, and privatization. The concept of a human right to water and sanitation has been an important vehicle for communities around the world to raise attention to perceived inequities and injustice in access to a vital natural resource and to services that have significant public health implications. Part I of this article discusses the history of the


human right to water and sanitation, which was not explicitly included among the rights recognized at the founding of the human rights system. The idea of a human right to water first emerged at international environmental conferences, in response to water justice struggles around the world. However, it was not until decades later that the right to water, along with the right to sanitation, was recognized within the human rights legal framework. In the streets, the human right to water became a rallying call for political and social anti-privatization movements that sought to keep water as a public good that would be accessible to everyone. Although several countries, including the United States and Canada, had historically been opposed to recognizing the right to water, a review of the General Assembly minutes during the 2010 vote on the human right to safe drinking water and sanitation suggests that the politics around privatization may have influenced the positions of these abstaining countries. The Human Rights Council resolution several months later clarified several of these concerns, leading to a consensus decision. While the human right to safe drinking water is arguably recognized in international law, the legal status of an independent right to sanitation is less clear, which is why this article is called the human right(s) to water and sanitation. The debate over the scope of the human right to water and sanitation is not necessarily over, as the recent dialogue on the human right to water and sanitation at the Rio+20 conference, discussed infra, suggests.³

Part II considers the meaning of the human right to water and sanitation under international law. The human right to water and sanitation entitles “everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”⁴ The legal obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are discussed, with a focus on the concepts of progressive realization and nondiscrimination. The section also addresses misconceptions that often arise regarding the enforceability of these rights and the nature of positive and negative rights.

Part III turns to the topic of privatization. Although human rights are neutral with respect to the private sector’s involvement in the delivery of water and sanitation services, human rights are not irrelevant to such decisions. From a human rights perspective, the important question is not whether a private sector entity is involved in the delivery of services, but how the arrangement is structured, implemented, and monitored. While this issue has been central to the debate around the human right to water and sanitation, it is not new from the

Murthy: The Human Right(s) to Water and Sanitation: History, Meaning, and 2013]

HUMAN RIGHTS TO WATER AND SANITATION

perspective of economic and social rights. Given the history of the ICESCR, it may seem surprising that the human right to water and sanitation has been perceived to be so at odds with privatization. Three themes highlighting the tensions between human rights and private sector involvement in the water and sanitation sectors are explored: financial sustainability, efficiency, and dispute resolution. In effect, human rights principles can be understood as guideposts for regulation, monitoring, and oversight, which are critical when the private sector is involved in the delivery of water and sanitation services.

I.
UNDERSTANDING THE HUMAN RIGHT(S) TO WATER AND SANITATION AS A SOCIO-LEGAL RESPONSE TO TRENDS IN WATER MANAGEMENT

Communities around the world have invoked the idea of a human right to water in local struggles to maintain access to traditional sources of water and to improve access to sufficient quantities of good quality and affordable water and sanitation services. Their calls for a human right to water have been grounded in notions of justice and have reflected not only a physical dependence on water for survival, but also a cultural, religious, and spiritual relationship with this vital natural resource. For many, it is almost axiomatic to describe water as a human right because it is so vital for human existence. Yet the recognition of water, and later sanitation, as a human right has been a relatively new feature of our international legal system.

The human right to water and sanitation was not explicitly recognized at the time the founding human rights instruments were adopted by the United Nations. The field of human rights was codified in the wake of World War II, with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. As its name suggests, the UDHR was intended to be declaratory, outlining the aspirations of the international community to respond to the atrocities of the Holocaust. Since then, the international human rights system has evolved, providing a forum for articulating legally binding obligations and aspirational goals through soft law instruments. After the UDHR was adopted, the goal was to create one treaty that would cover the wide range of human rights recognized within it, with no distinction between civil and political rights and economic, social, and cultural rights. However, for a variety of historical and ideological reasons, two covenants were created, reflecting a conceptual divide that still persists today. As this article demonstrates, many of the concerns raised about framing water and sanitation as a human right may seem new to the water and


sanitation sectors, but they reflect longstanding critiques and misconceptions about economic, social, and cultural rights. 7

One of the earliest seminal human rights conventions, the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) of 1966, failed to explicitly recognize a human right to water and sanitation. Matthew Craven, who examined the travaux préparatoires, indicated that water, along with other possible rights, such as transport, were considered in the drafting process of Article 11 on the “right to an adequate standard of living.” 8 Article 11 was intended to be broad, and the three specifically mentioned rights—to food, clothing, and housing—were meant to be illustrative. It also may be that the drafters assumed that water was so essential to life that it was redundant to recognize a right to water. 9 Alternatively, at the time the ICESCR was being drafted in the nineteen fifties and sixties, there were fewer concerns about water scarcity. 10 Given the taboos around discussing sanitation, it is perhaps more understandable why this was not expressly recognized as a right. However, soft law declarations made at a series of international conferences beginning in the nineteen seventies paved the way for the eventual recognition of the right to water and sanitation as within the scope of rights recognized by the Covenant.

The genesis of the right to water discourse, which in turn gave way to discussion of a right to sanitation, can be traced back to the 1977 Mar del Plata conference in Argentina. The conference issued an Action Plan on “Community Water Supply,” declaring that “[a]ll peoples . . . have the right to have access to drinking water in quantities and of a quality equal to their basic needs.” 11 This principle was affirmed in Agenda 21, Chapter 18 of the 1992 U.N. Conference on Environment and Development in Rio de Janeiro. 12 The Mar del Plata conference also recognized that water and disposal of wastewater are essential

7. See Part III.A.
9. Gleick, supra note 8, at 490 (“A detailed review of international legal and institutional agreements relevant to these questions supports the conclusion that the drafters implicitly considered water to be a fundamental resource.”); Stephen C. McCaffrey, A Human Right to Water: Domestic and International Implications, 5 Geo. Int’l Envtl. L. Rev. 1 (1999-93).
10. INGA WINKLER, THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION 42 (2012) (noting that at the time that the Covenant was drafted, the right to water was not included most likely because “water was not perceived to be as scarce as a resource as it is today; its availability was taken for granted—water was considered to be available as freely as is the air to breathe”).
for life and human development. It called for international cooperation so that “water is attainable and is justly and equitably distributed among the people within the respective countries.”\textsuperscript{13} Moreover, the decade between 1981 and 1990 was declared to be the International Drinking Water Supply and Sanitation Decade.\textsuperscript{14}

The right to access clean water and sanitation was further recognized in 1992 at the International Conference on Water and Environment in Dublin, but with an emphasis on affordable services and the economic value of water. The four key Dublin Principles were:

1. Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment;
2. Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels;
3. Women play a central part in the provision, management and safeguarding of water; and,
4. Water has an economic value in all its competing uses and should be recognized as an economic good.\textsuperscript{15}

The fourth principle has been the most influential and controversial:

Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.\textsuperscript{16}

The Dublin Principles recognized the basic right to clean water and sanitation, but also emphasized a link between pricing water appropriately and environmentally sustainable water usage. The basic idea was that if people had to pay for water, it would be used more carefully.\textsuperscript{17}

The idea in the Dublin Principle of managing water as an economic good was controversial. For many, the treatment of water as an economic good would pave the way for greater commodification and privatization, placing control over a vital natural resource in the hands of a few who would sell it for a price.\textsuperscript{18} Yet,
as Part III discusses in greater detail, the story of privatization is not quite so
black and white because of the challenges associated with financing the
expansion of services to the poor, entering into effective concession contract
arrangements, and ensuring appropriate monitoring and regulation.

Although the Dublin Principles sparked controversy, they were very
influential in promoting water services strategies that seek to achieve economic
efficiency, environmental sustainability, and social equity. As Part III
discusses, the delivery of effective water and sanitation services is costly, yet the
tariffs for these basic services historically have been kept very low, often
benefitting the rich who have network access to piped infrastructure. Notably,
the human right to safe drinking water and sanitation under international law
recognizes that services must be affordable, not free, but that no one should be
denied access for inability to pay.

A. Water Management Trends Increasingly Emphasize Economic
   Efficiency

The eventual recognition of the human right to safe drinking water and
sanitation under the ICESCR can be understood as an attempt to keep equity and
equality\(^19\) the central foci of water services delivery, in the wake of an

\(^{19}\) See U.N.-Water, Status Report on Integrated Water Resources Management and Water
   Management] is that given by the Global Water Partnership: ‘IWRM is defined as a process that
   promotes the coordinated development and management of water, land and related resources, in
   order to maximize the resultant economic and social welfare in an equitable manner without
   compromising the sustainability of vital ecosystems.’”); Hugo Tremblay, A Clash of Paradigms in
   the Water Sector? Tensions and Synergies Between Integrated Water Resources
   for the implementation of good water governance that span the areas of policy, legislation,
   institutional capacity and frameworks, financial instruments, social development and scientific
   research. Economic efficiency in water use, social equity and environmental and ecological
   sustainability are considered overriding principles that govern this approach.”).

\(^{20}\) While water management documents emphasize the word “equity,” see Tremblay, supra
   note 19, (noting that human rights documents underscore that the legal obligation is one of
   “equality”). See CATARINA DE ALO UBERQUE, ON THE RIGHT TRACK: GOOD PRACTICES IN
   REALISING THE RIGHTS TO WATER AND SANITATION 145 (2012), available at
equality and nondiscrimination, not equity, are the “most correct terms for describing the objective
of ensuring access to water and sanitation for all according to the needs of each person and for
gaining a better understanding of human rights”). See also General Comment No. 15, supra note 4, ¶
increasing emphasis on economic efficiency and environmental sustainability. Historically, water management focused on increasing supply and access to water, such as through investment in dams and other large-scale infrastructure. However, increasing population, urbanization, agricultural development, and industrial development have created greater demands on water. At the same time, climate change, glacial melt, salinity, and pollution have all negatively impacted the availability of freshwater. Greater demands on water and concerns about scarcity have led to increasing recognition of the need to reduce waste and improve efficiency by managing the demand for water, leading to the rise of the term “demand management.”

Global managers have begun to recognize that “water is often oversupplied relative to demand, generally underpriced relative to its intrinsic and economic values, and governed by institutions geared to augment supply rather than to manage demand.” Improved economic pricing of water has been seen as a way to manage water demand in a way that promotes greater financial sustainability. Demand-responsiveness strategies have also focused on developing solutions and providing services that communities are willing and able to pay for, and that they will sustain into the future.

Water consumption within the agricultural and industrial sectors has been a major source of the need for reform in water management strategies. Globally, the agricultural sector is the largest consumer of water, with estimates suggesting that the sector uses upward of seventy percent of all water, with the

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13 (“[t]he obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations.”); but see id., ¶ 27 (“[e]quity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.”). See also Urooj Quezon, Kayser, Georgia Lyn Kayser, and Benjamin Mason Meier, Workshop Synthesis Report - Human Rights-Based Indicators Regarding Non-Discrimination and Equity in the Access to Water and Sanitation Organized by the U.N. Office of the High Commissioner for Human Rights & the Water Institute, University of North Carolina at Chapel Hill (Oct. 15, 2011), available at SSRN: http://ssrn.com/abstract=2160095 or http://dx.doi.org/10.2139/ssrn.2160095 (“In contrast to equality, the definition of equity usually refers to economic barriers, in which monitoring helps us to understand who is left behind, focusing on the most disadvantaged members of society.”).


24. Id. at 525 (“[I]n most countries, and particularly in developing countries, water demand management is pursued for other goals as well as for saving water. The most important goal is usually saving money (typically, reducing deficits) at the water utility, with getting rid of wastewater a common secondary goal.”).

25. Human Development Report, supra note 21, at 102 (“Governments and donors now stress a demand-responsive approach. At a basic level this simply means that approaches to provision should focus on what users want, on the technologies that they are willing and able to pay for and on what they are able to sustain.”).
remainder used by the industrial and then domestic (i.e., personal use) sectors. In many parts of the world, agricultural and industrial users are not charged for the water that they consume, and they may even receive indirect benefits in the form of subsidized electricity. Even if water does not have an economic value at the time of consumption, it is converted into a commodity when used for agriculture or industrial products. Indeed, the concept of “virtual water” was coined to reflect this phenomenon in the agricultural sector. Part of the goal of water demand management strategies has been to develop a way for the user to value water more and factor water usage into economic decisions about which products to produce.

With respect to municipal water systems, the new paradigm of demand management began to manifest in a drive to improve the efficiency and financial sustainability of operations by increasing water tariffs and reducing subsidies. In most parts of the world, the government has traditionally subsidized water delivery systems. Prices were set to recover operational costs, but they were almost never sufficient to cover long-run maintenance costs and the future costs of obtaining water (which could require building infrastructure, such as dams and aqueducts, to convey water from other areas). Consistent with the water demand management trends discussed above, such as improved economic pricing and developing community-responsive solutions and services, there has been a large push to make water utilities more financially sustainable by increasing tariffs to reflect true costs. Private sector participation has been perceived as a way to improve financially sustainability, often by relieving the government of the politically challenging task of raising water tariffs.


28. DAVID ZETLAND, THE END OF ABUNDANCE: ECONOMIC SOLUTIONS TO WATER SCARCITY 207 (2011) (“In most parts of the world, water’s price reflects the cost of delivery (wells, pipes, treatment, and so on), not water’s value in use. This partial-cost pricing leads to shortage and misallocation.”).


30. See discussion of affordability infra Part III.B.
B. Struggles for “Water Justice” Build Momentum for the Human Right to Water

Overt private sector participation failures in the water and sanitation sectors around the world, combined with frustration at perceived inaction by governments, have given rise to a political movement demanding recognition of a human right to water and sanitation. In many instances, individuals experienced rate hikes and poor service, but faced institutions that lacked sufficient accountability mechanisms and did not communicate effectively. Social protest was a natural outgrowth of the frustration that people felt. The most well-known protest, la Guerra del Agua in Cochabamba, led Bolivia’s third-largest city to cancel its private water concession contract in 2000. The local community rose up after the municipality entered into a private concession contract with a consortium known as Aguas del Tunari, headed by the American company Bechtel, which resulted in skyrocketing water rates and degraded services provision. The local communities in the surrounding neighborhoods were outraged when Aguas del Tunari placed meters on their own private wells. The human right to water was a rallying cry to action in the streets, and the protests ultimately led the municipality to cancel its contract. Several years later, street protests also led the Bolivian twin cities of La Paz and El Alto to cancel their private concession contracts.

31. See, e.g., KAREN BAKKER, PRIVATIZING WATER: GOVERNANCE FAILURE AND THE WORLD’S URBAN WATER CRISIS 165-169 (2010) (summarizing key facts of Cochabamba’s privatization experiment and noting that “Cochabamba’s Guerra del Agua, or ‘water war,’ has become emblematic of the potential power of social movements” even if “a closer examination . . . suggests that there exist significant limits on the power of communities to improve water-supply access for the urban poor”); Rocio Bustamante, Carlos Crespo, & Anna Maria Walnycki, Seeing Through the Concept of Water as a Human Right in Bolivia, in THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES 223, 231-232 (Farhana Sultana & Alex Lochus eds., 2012) (noting the “well-documented Water Wars of Cochabamba became the poster child and impetus for the international Anti-Privatization and Right to Water Movement throughout the 2000s”); PUB. CITIZEN, WATER PRIVATIZATION FIASCOS: BROKEN PROMISES AND SOCIAL TURMOIL 5 (2003) (“In April 2000, after seven days of civil disobedience and angry protest in the streets, the president of Bolivia was forced to terminate the water privatization contract granted to Aguas del Tunari, subsidiary of the giant Bechtel corporation.”); Verónica Perera, From Cochabamba to Colombia: Travelling Repertoires in Latin American Water Struggles, in THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES 241, 243 (Farhana Sultana & Alex Lochus eds., 2012) (highlighting global influence by noting that “Colombians were inspired by the iconic 2000 Cochabamba water war, when the multitude . . . cancelled a privatization contract and evicted a United States-led transnational corporation.”).


33. BAKKER, supra note 31, at 166 (“The company also undertook to place water meters on private wells . . . that rural and peri-urban residents had independently built and financed.”).

34. Laurie & Crespo, supra note 34.
Struggles for water justice have also been seen in other parts of the world. In India, the idea of a human right to water was invoked in public interest litigation to reduce and remedy water pollution, as well as in battles with multinational bottling companies, whose extraction of water from the ground threatened the local community’s ability to rely on water. In South Africa, the human right to water has been employed in constitutional litigation. One of the more well-known cases, Mazibuko v. City of Johannesburg and Others, attempted (ultimately unsuccessfully) to increase the amount of water provided for free and to prohibit the use of prepaid water meters in poor communities, which has been perceived as a commodification of water. In light of the increasing number of water justice struggles around the world, it is perhaps no surprise that water, and later sanitation, became recognized as a human right in the first decade of the twenty-first century.

The human right to water and sanitation as an anti-privatization political rallying call, however, is distinct from its meaning under international law. The human right to water has often been used in street protests as a vehicle for opposing privatization and the increasing treatment of water as an economic good. Because this political movement has played a key and vocal role in raising awareness, the human right to water (and sanitation) has been perceived in some circles to be at odds with privatization. Self-declared “water warriors” took up the mantle of the human right to water (and to a lesser degree, the right to sanitation) as a means to stop the perceived privatization of water. As Part III discusses in more detail, human rights law is neutral with respect to economic modes of delivery, but relevant to how such decisions are carried out. Moreover, despite the vociferous debate about privatization, empirical studies suggest that involving the private sector in the delivery of water and sanitation services has...
been neither a ringing success, nor a universal failure, as advocates of either side might suggest. Nevertheless, from the standpoint of understanding the evolution and origins of the human right to water and sanitation, the role that several disastrous privatization experiments, such as those in Cochabamba, Bolivia, played in fueling the movement to recognize a human right to water and sanitation under the ICESCR cannot be overlooked.

The movement toward a human right to water and sanitation is a modern day parallel to the nineteenth century social reform movement in Great Britain that sought to expand universal access to water and sanitation in the wake of private sector failures. When the developed world initially sought to create water networks, it was the private sector that built them. As unregulated natural monopolies, the private companies focused on providing access to the wealthy, who could afford the high prices. Most companies declined to build sewerage systems, negatively impacting public health, because they were capital intensive and had low profit margins. Social reformers began to understand the importance of water and sanitation for health and began campaigning for universal access, seeking to ensure that every house had access to clean water and an on-site toilet. For some reformers, water supply was a material...
expression of political inclusion: “Citizenship, they argued, must be conceived not only in terms of political representation but also services provision.”

Water was promoted not only because it prevented disease, but also because it was considered critical for a “minimum level of dignity to which all citizens have a right.” In Great Britain, as well as other parts of Europe, the unequal access, distribution, and public health consequences resulting from private sector-controlled water management led, in some instances, to tighter government regulation of the private entities and, in many instances, to municipal governments taking over the distribution of water.

Given this history, perhaps it is no surprise that water and sanitation are now recognized as a human right in a global system grounded in human dignity. Policymakers have realized that unregulated private service providers would not have the incentive to ensure access to water and sanitation for all.

C. Building the Legal Basis for the Human Right to Water and Sanitation

Support has continued to build within the United Nations for a human right to safe drinking water and sanitation. In 1998, the U.N. Economic and Social Council’s Sub-Commission on Prevention of Discrimination and Protection of Minorities issued a working paper outlining the basis for “the right of access of everyone to drinking water supply and sanitation services.” In 1999, the General Assembly issued a resolution on “The Right to Development,” which “reaffirm[ed] that, in the full realization of the right to development, the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.” Then, in 2002, the U.N. Committee on Economic, Social and Cultural Rights adopted General Comment 15 on the Right to Water.

In General Comment 15, the Committee, which is responsible for interpreting and clarifying the provisions of the ICESCR, determined that under the Covenant, the right to water is contained within the right to an adequate standard of living (Article 11.1), and “inextricably related” to the right.

44. BAKKER, supra note 31, at 55.
45. Id.
46. Id.; Salzman, supra note 40, at 112 (noting that “in the Metropolis Water Act of 1852, private water suppliers became regulated entities, required to provide piping into private residences” and that “only in 1902 did municipal water become a public service”).
49. General Comment No. 15, supra note 4.
50. WINKLER, supra note 10, at 40 (noting that the Committee “does not have the authority to create new obligations, but rather interprets and clarifies the provisions of the ICESCR”).
to the highest attainable standard of health (Article 12.1) and the rights to adequate housing and adequate food (Article 11.1). General Comment 15 defined the right to water as every person’s entitlement to “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.” It also stated that “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.” As noted in General Comment 15, support for a right to water can be found in other international instruments. For example, the Convention on the Rights of the Child (CRC) states that children have a right to clean drinking water, while the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) declares that rural women have a right to “enjoy adequate living conditions, particularly in relation to . . . water supply” on an equal basis with men. In addition, certain regional instruments also recognize the right. General Comment 15, however, was not without controversy, as some felt that the Committee had gone too far in creating a “new” right, while others believed it accurately recognized an existing or implied right. Moreover, despite recognizing concerns about water scarcity, the Committee did not attempt to link the emerging right to water to a right to the environment.

51. See Benjamin Mason Meier, Georgia Lyn Kayser, Urooj Quezon Amjad & Jamie Bartram, Implementing an Evolving Human Right Through Water and Sanitation, 15 WATER POLICY 116-133 (2013) (providing an overview of the history of the right to water and sanitation, including a more detailed discussion of General Comment 15); General Comment No. 15, supra note 4, ¶ 3.

52. General Comment No. 15, supra note 4, ¶ 2.

53. Id. ¶ 3. As discussed in more detail below, General Comment 15 discusses sanitation in several places but appears to treat the right to sanitation as derivative from the right to water.

54. Convention on the Rights of the Child art. 24.2(c), Nov. 20, 1989, 1577 U.N.T.S. 3 (requiring states to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking-water”).

55. Convention on the Elimination of All Forms of Discrimination Against Women art. 14.2(h), Dec. 18, 1979, 1249 U.N.T.S. 13 (requiring States to ensure that women have the right to “enjoy adequate living conditions, particularly in relation to . . . water supply”).


58. Eibe Riedel, The Human Right to Water and General Comment No. 15 of the CESCR, in THE HUMAN RIGHT TO WATER 19, 28 (Eibe Riedel & Peter Rothen eds., 2006) (noting that the Committee on Economic, Social and Cultural Rights “was not that bold . . . with respect to the relationship between the right to water and the environment. It felt that since there was quite some dispute on this issue of environmental protection, it should not be raised in this specific General
The U.N. High Commissioner for Human Rights issued a report in 2007 on “the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.” This report further traces the evolution of the human right to water under international law and highlights the growing, but still uncertain, status of sanitation under international law. It also notes that the Millennium Development Goals helped to increase recognition of the need to improve access to water and sanitation, as evidenced by a 2005 status report by the U.N. Millennium Task Force on Water and Sanitation. In November 2008, the Human Rights Council appointed an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation to examine the status of these rights.

Having been the site of anti-privatization water justice struggles, Bolivia introduced a resolution on the human right to safe drinking water and sanitation to the General Assembly in July 2010. Comments made during the General Assembly discussion, and the abstention of forty-one countries from the ultimate vote, suggest that the resolution caught many by surprise. That the United States and Canada abstained was not surprising to many because these countries had long voiced their concerns about recognizing a human right to water under international law. However, a review of the General Assembly minutes Comment, particularly given the breadth of the environmental aspects of water.”).


62. See Laurie & Crespo, supra note 34, at 841 (“In recent years Bolivia has come to play a central and emblematic role in global water debates. Home to both an iconic anti-privatisation movement based in the city of Cochabamba and one of the first large, city-wide private water concessions (La Paz–El Alto, granted in 1997) to be heralded as ‘pro-poor’ by donor organisations, water issues here are hotly contested under an increasingly international gaze.”) (internal citations omitted).


64. Peter Gleick, Implementing the Human Right to Water, in THE HUMAN RIGHT TO WATER 143, 144 (Eibe Riedel & Peter Rothen eds., 2006) (“Some remain opposed to a formal declaration of this right [to water]. . . . Such arguments have been put forward by the British Foreign Office, the U.S. Department of State, and others.”); Matthew Craven, Some Thoughts on the Emergent Right to Water, in THE HUMAN RIGHT TO WATER 37, 39-41 (Eibe Riedel & Peter Rothen eds., 2006) (noting that Canada, a water-rich nation, had taken a stand against the U.N. Committee’s pronouncement in General Comment 15 out of concern for international obligations between states with respect to.
suggests that the abstentions were driven by concerns that were partly
substantive, but largely procedural, in light of the fact that the Human Rights
Council in Geneva had not yet completed its legal examination of the issue,
making the resolution premature. 65

The U.S. and Canadian reactions to Bolivia’s proposed resolution are
instructive. 66 On the one hand, the United States indicated its support for the
work of the Human Rights Council’s Independent Expert on human rights
obligations relating to access to safe drinking water and sanitation, stating that it
hoped to join a consensus on the text of the Human Rights Council Resolution.
On the other hand, the United States found the text of the General Assembly
Resolution problematic because there was “no right to water and sanitation in an
international legal sense as described by the resolution.” 67 The United States
also noted that the resolution had “not been drafted in a transparent, inclusive
manner,” circumventing the process that was already underway in Geneva. 68
Similarly, Canada noted that the text was “premature” and that the non-binding
resolution appeared to declare a right without setting out its scope. 69

Notably, although the General Assembly resolution “recalls” relevant hard
and soft law instruments, such as the ICESCR and General Comment 15, the
active part of the resolution simply recognizes “the right to safe and clean
drinking water and sanitation as a human right that is essential for the full
enjoyment of life and all human rights.” 70 The abstaining states, such as the
United States and Canada, may have been concerned that the right to water and
sanitation was not explicitly tied to rights recognized in the ICESCR. As a
result, the General Assembly resolution could be interpreted as creating “new”
rights. Moreover, the General Assembly resolution was silent on the role of non-
state actors and privatization. Meier et al. observe that:

[Although commentators have discussed a wide range of substantive
concerns underlying state abstentions, from issues of water commodification
to international obligation, abstaining states raised only procedural concerns in their
public objections, reflecting the political resonance of rights-based discourses and
raising the political costs of denying the existence of a human right to water and
sanitation.]

66. Id.
67. Id. at 8.
68. Id.
69. Id. at 17.
70. Id. at 5; G.A. Res 64/L.63/Rev.1*, U.N. Doc. A/RES/64/L.63/Rev.1* (July 26, 2010).
71. Meier et al., supra note 51, WATER POLICY at 121-122.
Despite the forty-one abstentions, 122 countries voted on July 28, 2010 to adopt a resolution “that recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.” 72 Notably, the resolution was orally amended so that the term “declare” was replaced by “recognize,” 73 reflecting the idea that the right was not “new,” but rather an interpretation of existing language. The resolution also called on states and international organizations to provide financial resources, capacity building, and technology transfer, especially to developing countries.

Following on the heels of the General Assembly’s vote, on September 30, 2010 the U.N. Human Rights Council adopted by consensus Resolution 15/9 on human rights and access to safe drinking water and sanitation. 74 In contrast to the General Assembly resolution, the Human Rights Council resolution is much more specific. It “affirm[ed] that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.” 75 The resolution also has several clauses that address head-on the debate around privatization, affirming that states may opt to involve non-state actors provided that they maintain primary responsibility for ensuring the realization of human rights.

In Clause 6 of the resolution, the Human Rights Council “[r]eaffirms that States have the primary responsibility to ensure the full realization of all human rights, and that the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations.” 76 Clause 7 “[r]ecognizes that States, in accordance with their laws, regulations and public policies, may opt to involve non-State actors in the provision of safe drinking water and sanitation services and, regardless of the form of provision, should ensure transparency, non-discrimination and accountability.” Clause 9 then spells out some key ways that states should monitor non-state actors. By grounding the human right to water and sanitation in rights recognized by the ICESCR and affirming that the right is not incompatible with private sector participation, the Human Rights Council resolution appears to have addressed the concerns of countries like the United States and Canada, which abstained during the General Assembly debate on the issue.

After the Human Rights Council resolution passed, the then-Independent Expert on human rights obligations related to access to safe drinking water and sanitation announced that “This means that for the U.N., the right to water and sanitation, is contained in existing human rights treaties and is therefore legally

73. G.A. Res. 64/L.63/Rev.1*, supra note 70.
74. H.R.C. Res. 15/9, supra note 2.
75. Id. at 2.
76. Id. at 3, Clause 6.
While they do not give the human right to water and sanitation the status of customary international law, taken together, Comment 15 and the General Assembly and Human Rights Council resolutions have arguably brought the right to water and sanitation within the scope of the rights recognized under the ICESCR. In 2011, the Human Rights Council re-appointed the Independent Expert as a Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, reflecting the change in international law, and extended the mandate for another three years.\(^78\)

Water development practitioners have received the recognition of the right to water and sanitation within the U.N. system with mixed signals. In qualitative interviews conducted with practitioners at various international development and U.N. agencies, Anna Russell found that “it was repeatedly explained that rights are political and that the entry of rights language into the water sector may be seen to unnecessarily politicize issues.”\(^79\) Although senior staff were comfortable using rights-based language, it was not clear to many technical people what, if anything, the right to water would add to their work.\(^80\)

The declarations issued at the World Water Forums (WWF), which take place every three years and are organized by the World Water Council and the Global Water Partnership,\(^81\) are also instructive. The forum declarations historically have avoided framing water and sanitation in rights language, focusing instead on “needs” and “access.”\(^82\) For example, in 2009 the Ministerial Statement of the World Water Conference in Istanbul acknowledged “discussions within the U.N. system regarding human rights and access to safe drinking water and sanitation,” but then went on to declare that “access to safe drinking water and sanitation is a basic human need.”\(^83\) As a result, the forums

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78. Human Rights Council Res. 16/L.4, The Human Right to Safe Drinking Water and Sanitation, U.N. Doc. A/RES/HRC/16/L.4 (Mar. 18, 2011). See also Annual Report, supra note 59, at 6 (noting that the Commission bestows varying titles on the experts. These include special rapporteurs, independent experts, representatives of the Secretary-General or representatives of the Commission. These different titles neither reflect a hierarchy, nor are they an indication of the powers entrusted to the expert. They are simply the result of political negotiations. The most important issue is the mandate given to the expert as it is formulated in the resolutions of the Commission on Human Rights.).

79. Russell, supra note 64, at 11.

80. See id. at 11-12.

81. SALMAN & McINERNEY-LANKFORD, supra note 11, at 10.

82. See id. for further discussion of this issue. The 1997 Marrakech Declaration recommended “action to recognize the basic human needs to have access to clean water & sanitation.” The 2000 Hague Declaration stated “access to safe and sufficient water and sanitation are basic human needs.” The 2003 Kyoto Declaration stated “we will enhance poor people’s access to safe drinking water and sanitation.” Id. at 11. The 2006 Mexico Declaration reaffirmed that governments have a primary role in “promoting improved access to safe drinking water, basic sanitation.” 4th World Water Forum, Mar. 21-22, 2006, Mexico City, Mex., Ministerial Declaration, 2 (Mar. 22, 2006).

83. 5th World Water Forum, Mar. 16-22, 2009, Istanbul, Turk., Istanbul Ministerial
have been a focal point of criticism and protest by many activists dissatisfied with the increasing focus on economic efficiency, which they perceive to be at odds with the human right to water and sanitation.\(^8^4\) The latest World Water Forum in 2012 recognized the general legal obligations associated with the rights to safe drinking water and sanitation, declaring: “We commit to accelerate the full implementation of the human rights obligations relating to access to safe and clean drinking water and sanitation by all appropriate means as part of our efforts to overcome the water crisis at all levels.”\(^8^5\) However, the WWF was criticized by a number of NGOs and the U.N. Special Rapporteur for not expressly recognizing a human right to safe drinking water and sanitation under the ICESCR, as the U.N. General Assembly and Human Rights Council had done in their 2010 resolutions.\(^8^6\)

In contrast to the reservations of some states, most private water service companies have whole-heartedly embraced the human right to water and sanitation.\(^8^7\) Similarly, AquaFed, a trade organization for private companies, has also endorsed the right to water. “Typically associated with improving access to water in developing countries, the right to water [has been] seen to complement the business sector’s push for improved water governance through better articulation of the value or worth of water.”\(^8^8\) In other words, corporations have supported the right to water because its implementation creates potential business opportunities.\(^8^9\) The recognition of the right to water could enable corporations to expand their operations as governments provide subsidies to the poor. For example, global water services operator Veolia Water, in a submission to the U.N. Office of the High Commissioner on Human Rights, stated that “[n]o one can deny that the right to water is a basic human right,” but emphasized that the right must include identifying who pays: “[i]f the right is to become

\(^8^4\) See \textit{Barlow}, \textit{Blue Covenant}, supra note 18; \textit{Bakker}, supra note 31, at 135-136 (noting that “self-proclaimed ‘water warriors’ protested both inside and outside the [World Water Forum], criticizing the forum’s co-organizers (the Global Water Partnership and the World Water Council) for their close ties to private water companies and international financial institutions”).


\(^8^7\) Russell, \textit{supra} note 57, at 13, n.77 (noting that in her interviews with transnational water corporations and a trade agency, known as AquaFed, all “indicated that a right to water exists. . . . The right was seen to based more on the concept of sustainable development, corporate social responsibility, the MDGs or World Summit on Sustainable Development (WSSD) commitments (or, in the case of the French companies, the Charter of Essential Services) than in any international human rights treaty.”).

\(^8^8\) Id. at 14.

\(^8^9\) Id.
effective, someone has to take responsibility for paying when customers cannot cover the entire cost.”90

D. Rio+20 Summit

The recent Rio+20 summit highlights that the debate on the articulation of water and sanitation as a human right is not entirely over. Prior to the summit, the U.N. Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation sent an open letter to states negotiating the summit’s outcome document, expressing concern that the human right to water and sanitation was at risk of being suppressed in the final text. She warned that “[s]ome States suggested alternative language that does not explicitly refer to the human right to water and sanitation; some tried to reinterpret or even dilute the content of this human right.”91

The draft Rio+20 outcome document, issued at the start of the summit on June 16, 2012, declared, “We recognize our commitments regarding the human right to safe drinking water and sanitation as inextricably related to the right to the highest attainable standard of physical and mental health as well as the right to human life and dignity. . . .”92 In response, Amnesty International issued a statement criticizing the draft outcome document for failing “to acknowledge that the rights to water and sanitation are not merely linked to other human rights, such as the right to health, but they are rights that are derived from the right to an adequate standard of living.”93 In addition, Amnesty criticized the Rio+20 draft outcome document for “affirming the need to focus on local and national perspectives in considering the issue and leaving aside questions of all


91. Press Release, Office of the High Comm’r for Human Rights, Rio+20: U.N. Expert Urges Governments Not to Sideline the Human Right to Water and Sanitation (June 6, 2012) (emphasizing that access to safe drinking water and sanitation “already has been recognized as a human right under international law, including by the General Assembly and the Human Rights Council in 2010”).

92. Press Release, Amnesty Int’l, United Nations: Rio+20 Must Affirm Rights to Water and Sanitation Are Legally Binding—Without Arbitrary Territorial Exclusions (June 18, 2012). See also Draft of U.N. Rio+20 Main Text, ¶ 121, http://www.scribd.com/doc/97339996/Draft-of-UN-Rio-20-main-text-16-June-2012-5-45-pm. The original Rio+20 zero draft stated at paragraph 67: “We underline the importance of the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.” The Future We Want, supra note 3. The text of the draft outcome document circulated on June 16, 2012 had changed as a result of negotiations leading up to the Rio+20 summit. The text was modified through a series of negotiations leading up to the Rio+20 summit. See, e.g., Earth Negotiations Bulletin, Int’l Inst. for Sustainable Dev., 9-10 (June 5, 2012) (“Debate focused on text on the human right to water, with Canada proposing an alternative paragraph on the scope and realization of the human right to water and sanitation, and the G-77/China, the EU and Switzerland preferring the original text.”).

The water section of the final Rio+20 outcome document stated:

We underline the importance of the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights. Furthermore, we highlight the critical importance of water resources for sustainable development, including poverty and hunger eradication, public health, food security, hydropower, agriculture and rural development.

We recognize the necessity of setting goals for wastewater management, including reducing water pollution from households, industrial and agricultural sources and promoting water efficiency, wastewater treatment and the use of wastewater as a resource, particularly in expanding urban areas.

We renew our commitment made in the Johannesburg Plan of Implementation (JPOI) regarding the development and implementation of integrated water resources management and water efficiency plans. We reaffirm our commitment to the 2005-2015 International Decade for Action “Water for Life”. We encourage cooperation initiatives for water resources management in particular through capacity development, exchange of experiences, best practices and lessons learned, as well as sharing appropriate environmentally sound technologies and know-how.

The Rio+20 outcome document represents the first time that countries reaffirmed the right to safe drinking water and sanitation at a major U.N. summit meeting.

Notably, the final document did not reference transboundary issues. Instead, it simply reaffirmed the right to water and sanitation, as well as other key global water management principles, such as integrated water resources management. In response, the U.N. Special Rapporteur stated, “While I cannot praise the document as a perfect one from a human rights perspective and even though—as you know—I had suggested stronger and clearer language, I think that the final text demonstrates all the Member States’ strong commitments to improve the current situation [and I am] really encouraged to see them.”

94. Id.
95. The Future We Want, supra note 3, at 20.
97. Id. ("It is unfortunate that some governments attempted arbitrarily to exclude transboundary water issues from the scope of the right to water," said Savio Carvalho, Demand Dignity program director of Amnesty International. ‘That these attempts were unsuccessful is a win for human rights.’)
II. MEANING UNDER INTERNATIONAL LAW

With the consensus resolution by the U.N. Human Rights Council, many of the potential concerns of the abstaining states during the General Assembly vote about the scope of the legal obligations associated with the right to water and sanitation may have been addressed. The Rio+20 negotiations over the text of the outcome document highlight that there are still some open questions. Nevertheless, the nature of the existing legal obligations can be understood by considering the key provisions of the ICESCR. This next section first focuses on the concepts of progressive realization and nondiscrimination in Article 2 of the ICESCR and then examines the content of the right to water and sanitation under international law.

A. Legal Obligations

State parties under ICESCR Article 2 are not obligated to realize the human right to water and sanitation overnight. Rather, states must use maximum available resources to ensure that the right to water and sanitation, along with all of the other rights recognized within the ICESCR, are realized progressively.\(^99\) This concept of “progressive realization,” which is unique to the ICESCR, acknowledges the constraints due to limited available resources.\(^100\) At the same time, “progressive realization” is not an excuse for inaction, nor does it mean that the obligations are not binding. However, the measurement for determining inaction is different and more difficult to measure.\(^101\) Thus, while the number of


101. CRAVEN, supra note 6, at 16 (noting that “the nature of international law is such that the question of enforceability has never been conclusive as to the existence of international rights or duties”); MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHT: ASSESSING THE ECONOMIC DEFICIT 27 (2004) (“Although the concept of a minimum core content/minimum threshold of Covenant obligations is accepted as juridical theory, the pragmatic elaboration of its content and strategies for its meaningful application to State parties to the Covenant poses a clear, ongoing challenge to the Committee.”).
people with access to safe drinking water and sanitation is critical, progressive realization emphasizes the importance of considering how governments allocate their budgets over time. In addition, the Article 2 requirement that states guarantee that rights “will be exercised without discrimination” means that it is critical to examine how those services are being provided to the population. The concept of nondiscrimination, which is an immediate obligation under the ICESCR, seeks to ensure that everyone has the same ability to access economic, social, and cultural rights, including access to safe drinking water and sanitation.

A state party’s unwillingness to realize the human right to water and sanitation is distinct from its inability to do so. The concepts of progressive realization and nondiscrimination in ICESCR Article 2 can be used as tools to monitor governments’ expenditures over time and to assess whether the obligations to expend maximum available resources to realize rights in a non-discriminatory way are being met. In this sense, human rights may promote accountability and embolden civil society to monitor the government’s progress. By empowering individuals as rights-holders to seek avenues of redress against states, the human rights framework of access to water and sanitation complements good governance and anticorruption efforts seeking to ensure that resources are being used efficiently, fairly, and transparently.

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102. General Comment No. 3, supra note 99.
104. General Comment No. 15, supra note 4, ¶ 41.
105. Rep. of the Independent Expert, supra note 100, at 8:

It is difficult to assess in quantitative terms whether a State is expending ‘the maximum of its available resources’. However, there is an emerging body of research and practice in the field of quantitative assessments of human rights progress, going directly to the question of whether States are dedicating sufficient resources to the realization of their obligations. The human rights framework requires an examination of the fiscal and policy efforts undertaken for the realization of human rights, to assess whether these are sufficient under the given circumstances.

However, effectively measuring state compliance with economic, social, and cultural rights under Article 2 in a meaningful way presents numerous challenges. Human rights norms must be translated into measurable indicators. However, even where such indicators exist, it can be difficult to obtain access to all of the relevant information, to ensure its reliability, and to analyze it properly.

Nevertheless, the recognition of water and sanitation as a human right itself increases the global community’s political, legal, and moral will to address the dire need for water and sanitation. Some argue that an emphasis on human rights in the water and sanitation sector could threaten to divert resources from other development projects, displacing the policy priorities of elected officials who must decide how to allocate precious resources across competing priorities such as water, education, health, roads, and job creation. However, the human right to water and sanitation is embedded within the ICESCR and supported by the Article 2 obligation to progressively realize all rights recognized within the ICESCR.

B. Content of the Human Right to Water and Sanitation

The human right to water and sanitation under international law is guided by the notion that sufficient water and sanitation services must be provided to ensure human dignity, life, and health. General Comment 15 describes the normative content of the human right to water in two related ways. In paragraph

these good programming practices by making them non-negotiable, consistent and legitimate.”).

109. See Henry Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context: Law, Politics & Morals 277 (2007) (“The greatest challenge is to identify effective approaches to implementation – i.e., to the means by which ESCR can be given effect and governments can be held accountable to fulfill their obligations.”); Robert E. Robertson, Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights, 16 HUM. RTS. Q. 693 (1994) (discussing possible standards that could be developed to improve compliance with the ICESCR declaration that each party must devote the “maximum of its available resources” to realizing these rights).

110. See Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, An Index of Economic and Social Rights Fulfillment: Concept and Methodology, 8 J. HUM. RTS. 195 (2009) (discussing a composite index methodology for measuring economic and social rights fulfillment); Benjamin Mason Meier, Georgia Kayser, Urooj Amjad, Joceilyn Getgen Kestenbaum & Jamie Bartram, Drop by Drop: Examining the Practice of Developing Human Rights Indicators to Facilitate Accountability for the Human Right to Water and Sanitation, __ J. HUM. RTS. PRACT. (forthcoming 2013) (describing the process of developing human rights indicators for water and sanitation); Amjad et al., supra note 20 (discussing the measurement of indicators for equity and nondiscrimination).

111. Dowell-Jones, supra note 101, at 185-192 (noting that there “is an evident lack of expertise among the Committee” and that “[t]oo many fundamental issues concerning the scope and practice implications of the Covenant remain unclear. . . . At its most basic, how the interrelationship of a State party’s fiscal, monetary and broad macroeconomic policy and the obligations set out in the Covenant is conceptualized by the Committee has not been systematically clarified.”).

112. General Comment No. 15, supra note 4, ¶ 1.
two, it states that the right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.” In paragraph twelve, it describes the content of the right as requiring: (1) availability, (2) quality, and (3) accessibility. Accessibility is further divided into four subcategories: (a) physical accessibility, (b) economic accessibility, (c) nondiscrimination, and (d) information accessibility. In her report on “good practices,” the U.N. Special Rapporteur built on General Comment 15 by developing two sets of criteria that could be used to evaluate whether a practice was “good” from the standpoint of realizing the human right to water and sanitation. The first set, which she described as the “normative content” of the human right to water and sanitation, consists of: (1) availability, (2) quality/safety, (3) acceptability, (4) accessibility, and (5) affordability. The second set she described as “cross-cutting” criteria because they are applicable to all human rights: (6) nondiscrimination, (7) participation (which incorporates the concept of information accessibility described in General Comment 15), (8) accountability, (9) impact, and (10) sustainability. The cross-cutting criteria contain both substantive and procedural rights, and they are conceptually consistent with the principles of the human rights-based approach to development. The approach used to define the human right to water and sanitation is in line with how other rights recognized in the ICESCR have been treated. A member of the Committee on Economic, Social and Cultural Rights has described this as the “‘ilities’-approach, meaning the availability, accessibility, and affordability and safety of water for every human person within the available resources of the state.” General Comment 15 articulates normative standards, but does not specify actual quantities of water. Paragraph two states that “An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.” Although the exact amounts are supposed to be determined at the national and subnational levels, both General Comment 15 and “good practices” refer to

113. Id. at ¶ 12. See also SCANLON ET AL., supra note 106, at 28.
114. General Comment No. 15, supra note 4, ¶ 12(c).
116. Id. ¶¶ 37-68.
118. Riedel, supra note 58, at 25 (“The strategy of the CESCR was to closely follow the general comments it had drafted on housing, forced evictions, food, education and health. Consequently, the main focus was on equal access to available water services and resources.”).
119. General Comment No. 15, supra note 4, ¶ 2.
guiding principles, such as the World Health Organization’s minimum daily water requirements, which describe twenty liters per capita daily (lpcd) as basic access; fifty lpcd as intermediate access; and 100-200 lpcd as optimal access. As a result, domestic incorporation of the right to water and sanitation, with specific parameters, is now one of the primary public policy challenges.

Like other economic, social, and cultural rights, the implementation of the human right to water and sanitation imposes obligations on states to respect, protect, and fulfill these rights. These duties apply to both positive and negative rights, which General Comment 15 describes as “freedoms” and “entitlements.” States have an obligation to protect individuals’ rights to access from interference by third parties, such as by ensuring that an industry does not pollute a local waterway. They also have an obligation to respect these rights, such as by not arbitrarily cutting off services. Finally, they have a right to fulfill these rights, by using maximum available resources to progressively ensure that everyone has access to the services.

It is sometimes asserted that in comparison to civil and political rights, economic and social rights are primarily positive rights that require financial investment. Nevertheless, “it would be wrong to suggest that civil and political rights themselves are entirely negative or free of cost.” A simple


122. General Comment No. 15, supra note 4, ¶ 10.

123. Id. ¶¶ 23-24, 44(b).

124. Id. ¶ 21, 44(a).

125. Id. ¶¶ 25-26, 44(c).


127. Craven, supra note 6, at 15. See also Alston & Quinn, supra note 127, at 172 (noting that “[t]he reality is that the full realization of civil and political rights is heavily dependent both on the availability of resources and the development of the necessary societal structures. The suggestion that realization of civil and political rights requires only abstention on the part of the state and can be achieved without significant expenditure is patently at odds with reality.”).
example illustrates the point: the classic “negative” right not to be arbitrarily arrested or detained requires a significant expenditure of resources to be meaningful, including an adequately trained police force, an effective judicial system, and state-provided attorneys for the indigent. 129 Similarly, the human right to water and sanitation imposes positive and negative obligations. Of course, in many situations, it may be easier for a judicial body to enforce negative rights by prohibiting actions that would harm access to safe water and sanitation, such as pollution, than it is to affirmatively enforce positive rights. 130 However, human rights require action beyond the judicial branch. It is critical that states incorporate human rights norms into domestic legislation to ensure that they meet their obligations to progressively realize these rights. 131

Although framing water and sanitation as a human right will not on its own solve the challenges of improving access to basic water and sanitation services, the articulation of substantive and procedural goals informs public policy and assists in better targeting resources. By recognizing that individuals have rights, individuals are empowered to seek recourse, which can improve accountability, transparency, and service delivery. 132 The influence that the discourse on the human right to water and sanitation has had on discussions regarding Millennium Development Goal (MDG) targets and monitoring is instructive. The World Health Organization and UNICEF, who together comprise the Joint Monitoring Program, are now considering how to better incorporate human rights criteria into MDG monitoring. 133

129. Alston & Quinn, supra note 127, at 184 (“Some civil and political rights, for example, require more state involvement than do others. An obvious example is the civil right to a fair trial which requires a fully functioning judicial system to be operational. Conversely not all economic and social rights require the expenditure of the same amount of resources as others and some will require a lesser element of state intrusiveness through supervision than others.”).

130. Arnold, supra note 39, at 816.


132. But see Human Development Report, supra note 21, at 102 (“[C]ommunity participation has been used as an instrument for implementing government policies, raising finance and overcoming technological obstacles rather than as a means of empowering people or enabling them to express demand.”).

C. Water versus Safe Drinking Water

Although the phrase “human right to water” is often used, the 2010 U.N. General Assembly and Human Rights Council resolutions refer specifically to the right to “safe drinking water.”\textsuperscript{134} The general international legal consensus, however, is that the human right to water is slightly broader and also includes water for personal and domestic uses, as elaborated in General Comment 15 and by the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation.\textsuperscript{135} General Comment 15 goes one step further, by including several references to agricultural water. In paragraph six, General Comment 15 recognizes that “water is necessary to produce food (right to adequate food),” but that “priority in the allocation of water must be given to the right to water for personal and domestic uses.”\textsuperscript{136} In the next paragraph, General Comment 15 expands on this idea:

The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see General Comment No. 12 (1999)). Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.\textsuperscript{137}

Despite the broad references in General Comment 15 to water for subsistence agriculture, the current understanding of the human right to water focuses primarily on water for drinking, for other basic household needs, and for sanitation, reflecting its origins in the right to health. Moreover, General Comment 12 on the right to adequate food notably does not mention water. As concerns about the water-food nexus rise, however, this may be an evolving area of international law.\textsuperscript{138}

D. A Separate Human Right to Sanitation?

From the standpoint of international law, one open legal question is the status of the right to sanitation, because it is sometimes described as a right derived from water, sometimes as a co-right with water, and at other times as an independent right. As suggested by its title, “The Right to Water,” General Comment 15 primarily focuses on the right to water and references sanitation in

\textsuperscript{134} See G.A. Res. 64/PV.108, supra note 1; H.R.C. Res. 15/9, supra note 2.
\textsuperscript{135} General Comment No. 15, supra note 4, ¶ 2; Progress Report, supra note 108, ¶ 19.
\textsuperscript{136} General Comment No. 15, supra note 4, ¶ 6.
\textsuperscript{137} Id.
\textsuperscript{138} See WINKLER, supra note 10, at 158-168 (discussing links between the right to water, the right to food, and agriculture). See also ALBERTO GARRIDO & HELEN INGRAM, WATER FOR FOOD IN A CHANGING WORLD (2011).
several places primarily as a rationale for ensuring the right to water. Yet General Comment 15 also notes the importance of access to adequate sanitation as “fundamental for human dignity and privacy,” explaining that “State parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.” Thus, although General Comment 15 primarily treats the right to sanitation as derived from the right to water, it does give some indication that it could have greater legal status. In the 2010 resolutions by the General Assembly and the Human Rights Council, the right to sanitation is treated as a co-right with the right to safe drinking water.

In contrast to the formulations in General Comment 15 and the General Assembly resolution, the Special Rapporteur has urged that the right to sanitation be recognized as an independent right. Thus, there are human rights to both water and sanitation. In her first report to the Human Rights Council in 2009, the then-Independent Expert (now Special Rapporteur) discussed the “second class” nature of the right to sanitation and urged that the right be recognized as independent. In her recent book, “On the Right Track: Good Practices in Realising the Rights to Water and Sanitation,” the Special Rapporteur notes that she purposefully employs the plural phrase, the human rights to water and sanitation, except when referring to the U.N. resolutions. She explains:

[W]ater and sanitation should be treated as two distinct human rights, both included within the right to an adequate standard of living and with equal status. There are pragmatic reasons for this approach. All too often, when water and sanitation are mentioned together, the importance of sanitation is downgraded due to the political preference given to water. Naming both water and sanitation as separate human rights provides an opportunity for governments, civil society and other stakeholders to pay particular attention to defining specific standards for the right to sanitation and subsequently for the realisation of this right. Further separating the right to sanitation from the right to water recognizes that not all sanitation options rely on water-borne systems.

The idea of everyone being entitled to access a safe and clean place to relieve him or herself is fundamentally about upholding human dignity, which is at the core of the human rights system. Simply put, having to defecate in the open and/or unsafe, unclean, or otherwise unacceptable place is undignified, evoking feelings of shame, disgust, and fear. In fact, in introducing the draft

139. General Comment No. 15, supra note 4 (describing the right to sanitation as a reason for ensuring that there is an adequate quantity of water available, ¶ 12(a), as “one of the principal mechanisms for protecting the quality of drinking water supplies and resources,” ¶ 29, and as critical for preventing and controlling diseases linked to water, see ¶ 37(i). In this context, sanitation appears to be a right derived from the right to water.).
140. Id.
141. Id., supra note 58, at 29 (“The linkage to article 12 ensured that the issue of sanitation is kept in focus, and this is reflected in the General Comment.”).
142. H.R.C. Res. 15/9, supra note 2.
143. DE ALBUQUERQUE, ON THE RIGHT TRACK, supra note 20, at 27.
General Assembly resolution on the human right to water and sanitation, the representative from Bolivia stated that “more than any other human rights issue, sanitation raised the concept of human dignity.” In the UDHR, the concept of “dignity” is emphasized twice in the Preamble as well as in the first sentence of Article 1. Similarly, “dignity” is repeated twice in the Preamble of the ICESCR.

Recognizing the right to water and sanitation as independent rights, as suggested by the Special Rapporteur, is compelling from the standpoint of human rights theory and public policy.

From the standpoint of developing law and public policy, the Special Rapporteur rightly notes that while every intention may be made to treat water and sanitation together, the primary focus is usually on water, to the detriment of sanitation. In addition, sanitation is not a natural resource in the same way as water. As a result, many of the debates associated with the human right to water, such as ownership of water and effective privatization of a seemingly public resource, are less applicable. Finally, the science of sanitation is changing. As the Gates Foundation goal of “reinventing the toilet” suggests, there is increasing interest in developing low-water or no-water toilets. Urine-diversion toilets that require no water are already being used in places like South Africa and Bolivia. To the extent that these technologies become more prevalent, it is sensible to consider water and sanitation as related but independent rights. Each separately derives from the right to an adequate standard of living and the right to health in the ICESCR.

III.
THE CONTROVERSY OVER PRIVATIZATION

Having reviewed the history and content of the human right to water and sanitation, this section returns to the most controversial issue: privatization. While human rights are fundamentally about the obligations between states and individuals, state responsibility for water and sanitation services does not mean that the services must be provided by the state. As the Special Rapporteur on

144. G.A. Res. 64/PV.108, supra note 1.
147. Davis, supra note 37, at 152, n. 4 (“State responsibility for basic service provision does not, of course, require direct public provision of those services. In many countries, government ensures access to basic shelter and food supply by providing cash transfers to low-income households who avail themselves of those services in the private sector.”).
the Human Right to Safe Drinking Water and Sanitation noted in her 2009 report on non-state actors, which was also cited in the Human Rights Council resolution, “[t]he right to water (less so the right to sanitation) and opposition to private sector participation are frequently linked to each other . . . Yet, the two issues are separate. Human rights are neutral as to economic models in general, and models of service provision more specifically.”148

A 2007 report by the U.N. Office of the High Commission on Human Rights (OHCHR) to the General Assembly further elaborated:

The approach of United Nations treaty bodies and special procedures has been to stress that the human rights framework does not dictate a particular form of service delivery and leaves it to States to determine the best ways to implement their human rights obligations. While remaining neutral as to the way in which water and sanitation services are provided, and therefore not prohibiting the private provision of water and sanitation services, human rights obligations nonetheless require States to regulate and monitor private water and sanitation providers.149

Although concerns around privatization have clearly been at the core of the debate around the human right to water and sanitation, this issue is not foreign to economic and social rights generally, as suggested by the quote above. At the time of its adoption, the ICESCR engendered debate about whether the obligations contained therein were incompatible with certain systems of political economy.150 In particular, concerns were raised that the ICESCR would require a more communist-oriented system, with a “totalitarian” form of state control and forced redistribution of wealth. This was partly the result of the fact that the Soviet Union and other Eastern states championed economic, social, and cultural rights, while Western states believed in the supremacy of civil and political rights, which they considered to be central to upholding liberty and democracy in the “free world.”151 However, as Philip Alston and Gerard Quinn note, “such arguments have been consistently and decisively rejected by the governments of all the Western European and market economy (i.e., mixed capitalist) Third World states that have ratified the Covenant.”152 The ICESCR provides


150. Alston & Quinn, supra note 127, at 181 (noting that economic, social and cultural rights are often critiqued as being “inherently incompatible with a free market economy”).

151. CRAVEN, supra note 6, at 8-9 (noting that civil and political rights are considered “first generation” rights because they derive from the eighteenth century Declaration on the Rights of Man. In contrast, ESCR are considered to be “second generation” rights because they arose from the growth of socialist ideals in the late nineteenth and twentieth century. These rights contrast with the more recently recognized “third generation” rights, which encompass the rights of peoples or groups.).

152. Alston & Quinn, supra note 127, at 182.
governments with a good deal of discretion as to how to promote the relevant rights. In addition, the travaux préparatoires “bluntly contradict” the idea of the ICESCR as promoting one form of political economy.153 In fact, a U.S. State Department official wrote in 1949 that “it is a grievous mistake . . . to assume that . . . these rights must be secured exclusively or even primarily by direct State action.”154 In other words, state responsibility for human rights does not mean state-mandated services.

In 1990, the Committee on Economic, Social and Cultural Rights affirmed the neutrality of human rights toward economic models of activity. In General Comment 3 on “The nature of States parties obligations,” the Committee examined Article 2, paragraph one of the ICESCR:

The Committee notes that the undertaking “to take steps . . . by all appropriate means including particularly the adoption of legislative measures” neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.155

At the same time, the Committee has been concerned that the trend toward laissez-faire market economics and privatization of state properties could exacerbate the position of the vulnerable and disadvantaged in society. To address these concerns, it “has emphasized the need for adequate safety social nets, which should . . . be formulated in terms of rights rather than charity or generosity.”156 As Craven observed, “Although the Committee has tended to look critically upon associated elements of privatization, such as reductions in the proportion of government spending set aside for health and welfare services, it has not gone so far as to declare the process as being incompatible with the obligations under the Covenant.”157 In other words, the ICESCR is not incompatible with a capitalist system or with market-based approaches. The 2010 Human Rights Council Resolution was in line with this historical approach, affirming the neutrality of human rights toward private sector participation while also highlighting their relevance to such decisions.

153. Id. at 182-183.
154. Id. at 183.
155. General Comment No. 3, supra note 100, ¶ 8.
157. Id. at 123.
Given the history of the ICESCR, it may seem surprising that the human right to water and sanitation has been perceived to be so at odds with privatization. Part of the answer lies in recognizing that anti-privatization political and social movements around the world have used the human right to water and sanitation as a rallying call to draw attention to disastrous privatization experiments. Moreover, some countries, like Uruguay and Bolivia, have recognized the human right to water and sanitation while simultaneously taking steps to ban privatization of water and sanitation services, which further conflates the two issues. Part of the answer also lies in the fact that while human rights may be neutral vis-à-vis economic models, they are relevant as to how to engage the private sector in the provision of basic services.

The following analysis illustrates this relevance by focusing on three key themes that highlight the tensions between human rights and private sector involvement in the water and sanitation sectors: financial sustainability, efficiency, and dispute resolution. This analysis discusses several of the most well-known privatization examples in the human rights literature but does not provide in-depth case studies. The analysis bridges together human rights literature with water management and economic literature in an attempt to clarify common misconceptions about how human rights are relevant to the provision of safe drinking water and sanitation by private actors.

The international human rights system’s “neutral” approach, as reflected in General Comment 15 and the Human Rights Council resolution on the right to safe drinking water and sanitation, has not been without its critics. In many ways, the current framing of the human right to safe drinking water and sanitation under international law has been a disappointment to water justice activists, for whom the “neutrality” of human rights toward questions of privatization has been interpreted as an unwillingness to speak truth to corporate


159. The Constitution of Bolivia states in Article 20, Clause III, that access to water and sanitation constitute human rights, that they are not to be the object of any concessions nor forms of privatization, and that they are subject to a licensing and registration regime, in accordance with the law. However, Clause II also states that the state, which has the responsibility to provide basic services, may provide those services through public, mixed, cooperative or community entities. Some social reformers in Bolivia believe that the reference to “mixed” entities leaves open the possibility that the government could engage in public-private partnerships. See REPÚBLICA DEL BOLIVIA, CONSTITUCIÓN DE 2009, available at http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html.

160. See Harvey B. Feigenbaum & Jeffrey R. Henig, The Political Underpinnings of Privatization: A Typology, 46 WORLD POLITICS 185, 186 (1994) (“In shifting responsibilities from government to market, privatization potentially alters the institutional framework through which citizens normally articulate, mediate, and promote their individual and shared interests.”).
power. As Farhana Sultana and Alex Loftus write, rights “are seen as inherently
individualizing and, in the case of human rights, they are seen to neglect the
economic injustices that permit the continued violation of people’s basic dignity,
building instead on a liberal democratic framework that fails to recognize the
reproduction of unequal power relations within capitalist societies.”

Matthew Craven has also suggested that “a blanket refusal to engage with the policies and
politics of water distribution and management is not to make the Committee’s
approach any less ‘political,’” and that “by leaving the matter to other agencies,
the Committee may actually contribute to the further marginalisation of its main
constituency (the poor and dispossessed).”

Given these critiques and the contentious battles over privatization around
the world, perhaps the commonly held principle of neutrality should be
questioned. In other words, should the human right to water and sanitation be
interpreted as incompatible with privatization? On the one hand, as suggested by
water justice struggles around the world, water is a unique resource that plays a
very fundamental role in our lives, both physically and spiritually. The idea of
placing it under private control, commodifying it and selling it to the highest
bidder, is an anathema to many, who fear that the poor and marginalized will be
denied access to this life-sustaining resource. At the same time, trying to create a
bright-line rule against privatization is problematic because it assumes that state
delivery of services is always best, which has not borne true as an empirical
matter. Moreover, as discussed in greater detail below, private sector
involvement in the formal water sector is between five and fifteen percent of all
municipal services. However, millions of people around the world who do not
have access to good quality and consistent services through a municipal service
infrastructure rely on private vendors, such as tanker trucks and bottled water
vendors, many of whom may be small-scale entrepreneurs operating in the
informal sector. The human rights system is state-centric and does not
distinguish between different types of non-state actors, which can range from
nongovernmental organizations, to small entrepreneurs, to transnational
corporations. But even if it was possible to distinguish between different types
of private actors, the question concerns where the line should be drawn. Would
it be based on legal structure (i.e., whether it was a corporation, a sole
proprietorship, or a not-for-profit) or on size of revenues, which could easily
lead to the creation of shell companies? It is easy to see the difficulty of
articulating bright-line rules that would make sense in all situations and that
would not be easily circumvented.

At the same time, real tensions do exist between the idea of respecting,
protecting, and realizing the human right to water and sanitation for all and the

161. THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES 2 (Farhana
Sultana & Alex Loftus eds., 2012).

162. Matthew Craven, Some Thoughts on the Emergent Right to Water, in THE HUMAN
RIGHT TO WATER 37, 46-47 (Elie Riedel & Peter Rothen eds., 2006).
goals that motivate a private company. Human rights law makes clear that states are duty-bearers and have an obligation to protect, respect, and fulfill recognized rights. A state cannot simply assume that by delegating its formal municipal operations to a private corporation, it has discharged all of its responsibilities. Rather, regulation and monitoring is critical to help mitigate tensions between the values that drive privatization and those of the human right to water and sanitation, a topic that will be returned to at the end of this paper. The debate, which is often framed as one of “rights” versus “commodification,” obscures the fact that the delivery of water and wastewater services is a complex process that requires a significant amount of infrastructure. In fact, in some cases, there is an inherent tension between trying to make these infrastructure improvements and providing good quality, accessible, and affordable services to all without discrimination.

A. Trends in Privatization

The global push toward formal private sector participation in water and sanitation services began in the nineteen eighties and nineties as part of a larger trend to involve the private sector in the delivery of all public services. In fact, the rise of the term “governance” reflects the increasing devolution of authority from the state to other actors. This trend was driven in part by a desire to tap the expertise and financial capacity of the private sector and in part by ideology. Both rationales were reinforced by evidence that public utilities

163. This analysis focuses specifically on the provision of services through municipal, piped networks (i.e., the “formal” water sector). As noted elsewhere, millions of people around the world do not have access to piped water, and must rely on private vendors, usually known as “informal” water sector.

164. As a result of the global economic crisis of the nineteen seventies, there was a trend away from Keynesian economics, which emphasized government intervention in markets, and towards neo-classical economics, which promoted limited government interference in markets and supported increased private sector involvement. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 12-13 (2003); STEFAN HALPER, THE BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY 51-54 (2010); DAMBISA MOYO & NIALL FERGUSON, DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA 19-20 (2010).

165. BAKKER, supra note 31, at 45 (“The term ‘governance’ has risen in prominence in recent decades as formal government authority has increasingly been supplemented or supplanted by a reliance on informal authority; roles previously allocated to governments are now (controversially) categorized as more generic social activities carried out either by political institutions or by other actors.”).

166. Davis, supra note 37, at 154 (“The upsurge in private-sector delivery of W&S services in both industrialized and developing countries was driven by a convergence of political and economic forces. Market-based approaches to development gained popularity in the 1980s, embodied most notably by the United Kingdom’s ambitious privatization program. . . . The privatization wave that expanded to the developing world in the following decade was promoted heavily by international development agencies such as the World Bank and its private-sector arm, the International Finance Corporation (IFC).”).

http://scholarship.law.berkeley.edu/bjil/vol31/iss1/3
in many parts of the world were not operating efficiently.\textsuperscript{167} Further, the neoliberal political philosophy and principles that became known as the Washington Consensus played a large role in the promotion of pro-market, pro-privatization international development policies.\textsuperscript{168} The principles of deregulation, market liberalization, and privatization of state assets and services had a significant influence on the policies of the 1980s, particularly through the Reagan and Thatcher administrations, and through structural adjustment programs promoted by the International Monetary Fund and World Bank.\textsuperscript{169} As in other sectors, privatization of the water sector was perceived as a way to improve the efficiency by transferring the financial burden onto the private sector, lowering the overall costs of services.\textsuperscript{170} In some instances, international aid or loans were conditioned on involving the private sector in the delivery of services that historically had been managed publicly, such as water. In fact, between 1996 and 2002, the World Bank conditioned approximately one-third of its water-related loans on the privatization of the water utility.\textsuperscript{171} This was not a phenomenon limited to the developing world; for example, changes in the tax law made it easier for companies to enter the water market in the United States.\textsuperscript{172}

Although the term “privatization” of water is widely used, the actual privatization of water\textsuperscript{173} (i.e., the full-scale divestiture of assets) is rare.\textsuperscript{174} Only

\textsuperscript{167} Id. (“In developing countries, public W&S utilities often have unaccounted-for water (UFW) rates of 40\% or more, are considerably overstaffed, recover only about a third of their costs of service provision, and do not provide services to a substantial proportion of households within their service area.”).


\textsuperscript{170} Emanuele Lobina & David Hall, \textit{Problems with Private Water Concessions: A Review of Experience}, \textit{Public Services Int’l Res. Unit} (Nov. 2003), http://www.psiru.org/sites/default/files/2003-06-W-over.doc (noting that within the water and sanitation sectors, “[t]he advocates of private sector involvement, ranging from international financial institutions (IFIs), bilateral agencies, OECD countries’ governments, transnational corporations (TNCs), professional associations and scholars, have argued that PSP will improve efficiency, enable the extension of water services, raise the necessary investment finance, and relieve governments from budget deficits”); Feigenbaum & Henig, supra note 160, at 188-189; see Bakker, supra note 31, at 42-44.


\textsuperscript{172} Arnold, supra note 39, at 785, 793-96.

\textsuperscript{173} Throughout this discussion, the word “water” is often used alone, and reference is not
a few parts of the United Kingdom and Chile have employed full-scale water privatization. Rather, private sector involvement in water provision complements public provision and includes a range of activities, such as outsourcing particular services for a publicly owned water supply and service system, or contracting with private sector companies to operate, maintain, or construct publicly owned systems. Water service contracts with private companies vary according to asset ownership, responsibility for capital investments, assumption of risk, responsibility for operations and maintenance, and contract length.

Another trend in water privatization is the concentration of market share among a few large companies worldwide. Due to large up-front expenditures and the challenges of promoting competition, only a few large firms dominate the private sector. Most private water companies around the world are made to sanitation. This is largely because the contentious debates have focused on the private sector management of water. Wastewater services may also be included as part of concession contracts, depending on how the arrangement is made.

174. Lobina & Hall, supra note 170, at 4 (noting that “the French model of delegated management is the prevailing form of PSP in any region of the world, and French-based companies are also dominating the global water industry”).

175. Rep. of the Indep. Expert, June 2010, supra note 148, at 6, n.11; THE AGE OF COMMODITY: WATER PRIVATIZATION IN SOUTHERN AFRICA 2 (David A. McDonald & Greg Ruiters eds., 2005): Privatization, in the strict sense of the word, refers only to the outright sale (divestiture) of state assets. Although this was the system of water privatization employed in the UK in the 1980s, there have been no major water service divestments of this kind anywhere else in the world since that time. Subsequent private sector participation in water has followed the so-called ‘French model’ which involves ‘public-private partnerships’ (PPPs) whereby the state continues to own the assets and is involved in the monitoring and decision making of the service delivery, but the actual operations and planning of water services are undertaken by the private entity. See also KAREN BAKKER, AN UNCOOPERATIVE COMMODITY: PRIVATIZING WATER IN ENGLAND AND WALES (2004).

176. Arnold, supra note 39, at 792; Edouard Pérard, Private Sector Participation and Regulatory Reform in Water Supply: The Southern Mediterranean Experience 15 (OECD Dev. Ctr., Working Paper No. 265, 2008), available at http://www.oecd-ilibrary.org/content/workepingpaper/245713883474 (“The seven major types of private involvement are the service contract, the management contract, the lease contract (“Affermage”), the Build-Operate-Transfer (BOT) contract, the concession contract, the joint venture contract and the divestiture").

177. Rep. of the Indep. Expert, June 2010, supra note 148; Eshien Chong et al., Public-Private Partnerships and Prices: Evidence from Water Distribution in France, 29 REV. INDUS. ORG. 149, 150 (2006) (noting that “public-private partnerships (PPPs) present an alternative solution to full privatization. There are a range of organizational arrangements between fully public provision of services and complete privatization. These differ in their allocation of decision prerogatives, risks, and revenues, across the public and the private parties to a contract.”); Davis, supra note 37, at 148–150.

178. Clarke et al., supra note 29, at 347; Lobina & Hall, supra note 170, at 5 (“The global water industry is characterised by a marked concentration, with two TNCs (Vivendi and Suez) dominating almost 70% of world private market; joint ventures between these few dominant companies; and difficulty of entry.”).
subsidiaries of, or are owned by, only a few multinational corporations that have the necessary capital and expertise to operate water and wastewater treatment systems.\textsuperscript{179} As of 2009, the three largest water corporations were Veolia Environment (formerly Vivendi), which operates in over 100 countries and provides water services to 110 million people; Suez, which operates in 130 countries and provides water services to 115 million people; and RWE AG, which provides water services to over seventy million people.\textsuperscript{180} As of 2009, it was estimated that the combined revenue potential of these three corporations was close to three trillion dollars.\textsuperscript{181}

Globally, the rate of private sector involvement in the formal water and sanitation sector ranges between five and fifteen percent.\textsuperscript{182} In 2010, the public sector operated water services in approximately ninety percent of the 400 largest cities in the world (those with populations greater than one million).\textsuperscript{183} Asia is the region with the lowest rate of private sector providers. South Asia has no such providers, and excluding China, there are only three cases of private water provision in the rest of Asia: Jakarta, Manila, and Kuala Lumpur. In the rest of the world (excluding all of Asia), the private sector is involved in approximately fourteen percent of all water service delivery systems.\textsuperscript{184} These rates are comparable in the United States, where about fifteen percent of water customers (measured in volume of water handled) are serviced by a private sector provider.\textsuperscript{185} A survey conducted in 2007 indicated that almost 600 cities across forty-three U.S. states had contracts with private water companies.\textsuperscript{186} In many parts of the world, the rate of private sector participation may be on the decline.

\textsuperscript{179} Davis, \textit{supra} note 37, at 152-53 ("Because the majority of 'deep' PSP arrangements (\textit{i.e.}, leases and concessions) involve just a handful of European-based multinational corporations and their subsidiaries, objections are also raised regarding these companies' repatriation of profits that have been generated through the exploitation of a local natural resource.").

\textsuperscript{180} Arnold, \textit{supra} note 39, at 797. See also Sean Flynn & Kathryn Boudouris, \textit{Democratising the Regulation and Governance of Water in the US, RECLAIMING PUBLIC WATER: ACHIEVEMENTS, STRUGGLES AND VISIONS FROM AROUND THE WORLD} 73, 81 (Belén Balanyá et al. eds., 2005) ("In the private sector, there has been a wave of consolidations that, according to the large water companies, increase the capacity of the companies to meet investment obligations. The largest water companies in the U.S. have, in turn, been targeted for acquisition by far larger European water companies, including RWE/Thames, Veolia (formerly Vivendi) and Suez.").

\textsuperscript{181} Arnold, \textit{supra} note 39, at 797. See also BARLOW, BLUE COVENANT, \textit{supra} note 18, at 63 (noting that the revenue was almost sixty billion dollars for Suez, just under thirty-four billion dollars for Veolia Environment, and more than two billion dollars for Thames Water, recently divested by RWE).

\textsuperscript{182} See Rep. of the Indep. Expert, June 2010, \textit{supra} note 148, at 5, n. 8 (noting that as of 2003, approximately five percent of the world’s population was being served by the formal private sector).


\textsuperscript{184} Id.

\textsuperscript{185} Arnold, \textit{supra} note 39, at 792.

\textsuperscript{186} Id. at 791.
as exemplified by water service figures in cities such as Buenos Aires, La Paz, and Paris, which are returning to the public sector. There has also been a big push to increase public-public partnerships between utilities in different locations to share experience and knowledge. At the same time, as water production technologies such as desalination rise, the Middle East and South Asia, which have had comparatively low rates of private sector participation, are now increasingly turning to private-public solutions.

Privatization in the water and sanitation sector has been a contentious topic in many parts of the world. This section now examines some of those controversies by focusing on three key themes that are relevant to private sector involvement in the delivery of municipal water and sanitation services: financial sustainability, efficiency, and dispute resolution.

These three themes were selected because they highlight the conflict between markets and rights. The trend toward privatization was driven largely by a desire to improve financial sustainability and efficiency, which are the first two themes. This is not to say that these are not good goals from a public policy standpoint, but rather that these choices have trade-offs. For example, raising tariffs significantly to improve the financial viability of a utility may put the services out of reach for the poorest. Cutting municipal or utility employees to achieve efficiency goals can inadvertently decrease the quality of services delivered and responsiveness to complaints.

The third theme of dispute resolution highlights the limited ability of individual citizens, who are the rights-holders, to intervene in a concession contract dispute, even though their access to basic services is placed in jeopardy by a potentially faulty concession contract. As a result, it highlights a conflict with the human rights values of participation, transparency, and accountability.

187. Chong et al., supra note 177.

188. Colin Kirkpatrick, David Parker & Yin-Fang Zhang, An Empirical Analysis of State and Private-Sector Provision of Water Services in Africa, 20 WORLD BANK ECON. REV. 143 (2006) ("Based on the World Bank Private Participation in Infrastructure (PPI) Database for the period 1990–2002, there were 106 such projects in Latin America and the Caribbean and 73 in East Asia and Pacific, but only seven projects in the Middle East and North Africa, and 14 in Sub-Saharan Africa.").

189. Arani Kajenthira & Sharmila Murthy, Urban Water Challenges in the MENA Region: Integrating Islamic Principles with Demand Management Strategies, in WATER GOVERNANCE: AN EVALUATION OF ALTERNATE ARCHITECTURES (A. Guanwansa & L. Bhullar eds., forthcoming 2013) ("More recently, however, countries and cities within the MENA region are turning to the private sector. . . . In fact, according to the market research agency Global Water Intelligence, which maintains a global public-private partnership tracker for projects that are proposed, under bidding, or signed, as of 2010, 16 out of 21 countries in the region have solicited private sector involvement in ongoing projects."); Swaminathan Natarajan, Innovative Indian Water Plant Opens in Madras, BBC NEWS (July 30, 2010), http://www.bbc.co.uk/news/world-south-asia-10819040.
B. Financial Sustainability

Private sector participation in water and sanitation has been perceived to be at odds with the human right to water and sanitation because it often coincides with price increases, bringing issues of affordability to the forefront.\(^{190}\) The outsourcing of historically public services to the private sector strikes a sensitive chord: if transactions are profitable enough to merit private sector interest, then it is often assumed that all tariff increases are going to line the company’s coffers, especially when the price increases do not coincide with increases in services or availability.\(^{191}\) However, what is often overlooked in the debate is that private sector participation often coincides with a policy decision (implicit or explicit) to move from subsidized or operational tariffs to full cost recovery.\(^{192}\) Although many municipalities recognize that their water tariffs are not sufficient to cover full costs, they may not be able to raise rates for political reasons.\(^{193}\) By outsourcing water services to a private company, cities are sometimes able to pass decisions to raise rates onto another entity.\(^{194}\) Thus involving the private sector in the management of water services can provide governments with the political cover they need to raise tariffs and use the revenue for needed investments.\(^{195}\) However, questions of reconciling affordability with financial sustainability still exist, regardless of whether the private or public sector is involved.

Under international law, the human right to water and sanitation does not prohibit pricing water to recover costs. What is crucial, however, is that persons cannot be denied access to safe drinking water or sanitation services due to their

\(^{190}\) See, e.g., Chong et al., supra note 177, at 150 (finding in a study of 5000 local water operators in France “that consumers pay more when municipalities choose PPPs, controlling for other aspects of supply and demand in water distribution that could affect prices. To our knowledge, this is the first empirical study on a large sample with precise details of contracts signed between local authorities and private operators.”).

\(^{191}\) Davis, supra note 37, at 147 (“Public concern about transferring control over essential services to a for-profit company, incurring substantial price increases and poor service from a profit-maximizing monopolist, and ensuring environmental responsibility are at the forefront of debates regarding privatization of W&S services.”).

\(^{192}\) Clarke et al., supra note 29, at 335 (noting that “public utilities often set prices far below long-run marginal costs and rely on subsidies for investment and, often, operating costs”).

\(^{193}\) Davis, supra note 37, at 154 (“The political impediments to charging cost-recovering tariffs leave public utilities struggling just to maintain existing infrastructure, much less keep pace with a growing customer base.”).

\(^{194}\) Nickson & Vargas, supra note 33.

\(^{195}\) For example, in Manila, between 1997 and 2003, rates were raised as much as 400 percent in the West concession and as much as 700 percent in the East concession. One commentator observed that “[c]onsidering the purchasing power of the average citizen of the Philippines and the fact that for the same period prices in general rose 36.9 percent in the country (WDID 2008), it should not be difficult to predict that the privatization of water distribution resulted in a considerable part of Manila’s population being deprived of their right to water.” Manuel Couret Branco & Pedro Damiao Henriques, The Political Economy of the Human Right to Water, 42 REV. RADICAL POL. ECON. 142, 150 (2010).
inability to pay, and that services cannot be disconnected without adequate due process.\textsuperscript{196} This has probably been the most contentious and disputed topic in the human rights discourse on water and sanitation, and it is intertwined with debates about treating water as an economic good and a commodity.\textsuperscript{197} For example, the Cochabamba Declaration, which was adopted in the wake of a successful anti-privatization movement in Bolivia’s third largest city and led to the cancellation of a water concession contract,\textsuperscript{198} stated that “[w]ater is a fundamental human right and a public trust to be guarded by all levels of government, therefore, it should not be commodified, privatized or traded for commercial purposes.”\textsuperscript{199} Similarly, a well-known anti-privatization water activist has written that “[a] mighty contest has grown between those (usually powerful) forces and institutions that see water as a commodity, to be put on the open market and sold to the highest bidder, and those who see water as a public trust, a common heritage of people and nature and a fundamental human right.”\textsuperscript{200} Even General Comment 15 on the Right to Water and Sanitation stated that “water should be treated as a social and cultural good, and not primarily as an economic good.”\textsuperscript{201} However, General Comment 15 does not suggest that water should be free. Rather, it emphasizes the concept of economic accessibility: “[w]ater, and water facilities and services, must be affordable for all.”\textsuperscript{202}

Drawing on the work of Karen Bakker, Verónica Perera offers a concise summary of the problems with conflating the right to water with commodification:

While “human right” is a legal category for individuals, entitling them with rights vis-à-vis the state, “commodity” refers to the property regime of the resource. The

\textsuperscript{196} DE ALBUQUERQUE, ON THE RIGHT TRACK, supra note 20, at 61:

Laws and policies that permit service providers to disconnect water and sanitation users in response to the non-payment of bills must allow for due process. Such disconnection policies per se are not contrary to human rights principles, but authorities must ensure that the person faced with the disconnection is given opportunities for consultation and for rectifying the situation. They must also ensure that basic minimum amounts of water and access to sanitation are made available to the person (and members of his or her household) regardless of their ability to pay, to protect his or her dignity, health as well as other human rights, even where a disconnection is agreed.

See also General Comment No. 15, supra note 4, ¶¶ 21, 23 (discussing steps that should be taken to prevent interference with the right to water); Vivien Foster, Considerations for Regulating Water Services While Reinforcing Social Interests 10 (Oct. 1998) (UNDP-World Bank Water and Sanitation Program Working Paper Series), available at http://www.wsp.org/sites/wsp.org/files/publications/working_foster.pdf.

\textsuperscript{197} See ROGERS & LEAL, supra note 17, at 132.

\textsuperscript{198} See BAKKER, supra note 31, at 165-169.


\textsuperscript{200} BARLOW, BLUE COVENANT, supra note 18, at 102.

\textsuperscript{201} General Comment No. 15, supra note 4, at ¶ 11.

\textsuperscript{202} Id. ¶ 12(c)(ii).
right to access water does not automatically define the character of water as a non-commodity, and thus does not foreclose the provision of water by private corporations.\footnote{Perera, supra note 31, at 243 (citing Karen Bakker, The “Commons” Versus the “Commodity”: Alter-Globalization, Anti-Privatization and the Human Right to Water in the Global South, 39 ANTIPODE 430 (2007)).}

The debate around the commodification of water through pricing often obscures the fact that water is not a true public good. Water has elements of both public and economic goods, and thus is considered an “impure” public good.\footnote{GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 4 (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999); ROGERS & LEAL, supra note 17, at 124-135; BAKKER, supra note 31, at 30.} True public goods cannot be commoditized because they exhibit two key characteristics.\footnote{ROGERS & LEAL, supra note 17, at 130-132.} The first is non-rival consumption, which means that one person’s consumption does not interfere with another person’s consumption. Water consumption is often rivalrous because one person’s consumption can interfere with another’s access. Indeed, this is why water as a common property resource can be subject to the classic tragedy of the commons phenomenon.\footnote{See Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968).}

The second characteristic of a true public good is non-excludability, which means that it is not possible to exclude others from consuming the good.\footnote{BAKKER, supra note 31, at 30.} Water can often be seen as combining this public-good attribute of non-excludability and the private-good attribute of rival consumption. For example, water in a lake or an aquifer is a common-pool resource that may be accessible to all (non-excludable) but that diminishes with use (rival consumption).\footnote{ZETLAND, supra note 28, at 20.} Water also moves from public, to private, to common-property status almost at will, making its public-private classification all the more challenging.\footnote{ROGERS & LEAL, supra note 17, at 131.}

Although a municipal water supply is often conceived of as a public good, people outside the piped network are excluded from this supposedly public resource. At the same time, once individuals have access to piped municipal water (legally or illegally), it is often impossible to exclude them, even if these additional connections reduce the total amount of water available for others.\footnote{Id. at 131-132.} Water and sanitation services provide a private benefit to the user while simultaneously promoting public and environmental health, thereby creating a public good. Thus water possesses many of the classical attributes of a public good while still retaining some characteristics of private possession and rivalry.

The discourse around the commodification of water is further complicated by the fact that providing clean water and sanitation services is expensive, requiring treatment plants, the installation and maintenance of piped infrastructures, and other necessary services.
infrastructure, metering, and other costs.\textsuperscript{211} Water infrastructure investments are “lumpy” because the upfront infrastructure expenditures are estimated to account for about two-thirds of the cost of the water supply.\textsuperscript{212} As a result, upfront financing is needed with payback periods of twenty years or more.\textsuperscript{213} As a result, water and sewerage services tend to be natural monopolies, which can subject them to price gouging if the proper regulations are not in place.\textsuperscript{214} Because a municipal water system is an inherent monopoly, concerns about fairness and predatory pricing arise when a traditionally public good is transferred to private hands. Moreover, the economics of water and sanitation are “more consistent with the longer-term planning horizon of government and not with the risk-minimization and profit-maximization priorities of private firms.”\textsuperscript{215}

Maintaining affordability of water and sanitation can be challenging when expensive infrastructure needs to be built or repaired. Many municipalities have been receptive to private sector involvement in water delivery because it has presented an opportunity for capital investment to upgrade degrading infrastructure or to invest in new sources of water. It is easy to ignore degrading infrastructure, even in developed countries, because water and sewer pipes are underground. For example, over the next twenty to thirty years, it is estimated that the United States will need to invest $140-250 billion in water infrastructure.\textsuperscript{216} During Cochabamba’s brief privatization experiment, the rates rose dramatically, partly because the concession bid included the cost of the Misicuni dam project to improve water supply to the city. Although the project was determined by independent analysis, including by the World Bank, to be

\begin{itemize}
\item \textsuperscript{211} Human rights concerns are often raised in the context of the bottled water industry, which has been accused of commodifying public water, depleting aquifers, and polluting local waterways. As this article focuses on the role of the private sector in the provision of water and sanitation services through municipal networks, it is beyond the scope of this article to address the challenges raised by the bottling industry. For further discussion on this topic, see, e.g., Salil Tripathi & Jason Morrison, \textit{Water and Human Rights: Exploring the Roles and Responsibilities of Business} (Mar. 2009) (CEO Water Mandate Discussion Paper), available at http://ceowatermandate.org/files/research/Business_Water_and_Human_Rights_Discussion_Paper.pdf; Ghoshray, supra note 35; \textit{BARLOW, BLUE COVENANT}, supra note 18, at 82-85.
\item \textsuperscript{212} Clarke et al., supra note 29, at 329.
\item \textsuperscript{213} \textit{Human Development Report}, supra note 21, at 78; Davis, supra note 37, at 151.
\item \textsuperscript{214} Janice A. Beecher, \textit{Privatization, Monopoly, and Structured Competition in the Water Industry: Is There a Role for Regulation?}, in \textsc{Umweltaspekte einer Privatisierung der Wasserversorgung in Deutschland [Environmental Aspects of the Privatization of Water Supply in Germany]} 327, 330 (Fritz Holzwarth & R. Andreas Kraemer eds., 2000); \textit{ZETLAND}, supra note 28, at 89 (“Water utilities’ monopoly power comes from two sources. Water distribution is a ‘natural monopoly’ because it’s hard for a new company to enter the business in competition with an incumbent company that’s already installed the network of pipes for delivery water. . . . The second source of monopoly power is the legal monopoly that governments award in exchange for a promise to deliver water to all members of the public (hence ‘public utility’) in the service area.”).
\item \textsuperscript{215} Davis, supra note 37, at 151-152.
\item \textsuperscript{216} Arnold, supra note 39, at 794.
\end{itemize}
unfeasible, the mayor decided to go ahead with the project. While a private company may provide the needed capital to upgrade infrastructure, the municipality may end up in a worse position, depending on how the debt is structured and the value of the currency in which the debt is held. As a result, residents may have to pay a higher price for services due to poorly structured arrangements. Private sector participation can assist with water infrastructure improvements, but it can also carry economic risks for local governments and residents, in the absence of proper oversight and regulation.

In reviewing empirical studies examining private sector participation in the water and sanitation industry, Jennifer Davis concludes that “involvement of the private sector does accelerate capital investment, but capital improvements often fall short of contractual targets established between the firm and government.” She also notes that in some countries, increased investment was the result of financing secured by international development organizations. Thus, “it could be argued that, although substantial, this investment was not a result of [private sector participation] in itself but rather the cooperation of government with a donor-supported sector reform program that entailed privatization.”

How to finance such water and sanitation service operations, while also ensuring services to the poor, is a critical human rights question. As Phillipe Cullet observed, “the fact that pricing may not be incompatible with a human rights perspective does not indicate whether this is the best strategy for realizing [sic] it for all.” However, some scholars have argued that increasing prices can improve equity by giving water utilities the resources they need to extend

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217. Cochabamba: The World Bank’s Cautionary Tale, FT ENERGY NEWSLETTERS—GLOBAL WATER REPORT, (Financial Times, London, U.K.), Apr. 14, 2000; BAKKER, supra note 31, at 166 (“Government sources and anti-privatization campaigners publicized cases of increases as high as 200 percent (although company officials maintained that average price rises were 35 percent).”); Bustamante et al., supra note 31, at 233 (noting that as of 2012, “communities continue to wait for the long-promised water from the Misicuni Dam project to arrive”).

218. For example, the West Manila concession failed for numerous reasons, including that it had assumed ninety percent of the debt of the prior utility. The Asian financial crisis started just one month after the concessionaires took over. Because most of the debt was in foreign currency, the Western concessionaire found itself in virtual bankruptcy as the Filipino peso lost half of its value. Although both the public and private sector parties sought to terminate the agreement, an arbitration court had determined in 2003 that neither side had the authority to end the agreement. As a result, Manila residents have had to pay a large price for this poorly constructed arrangement. See UNITED NATIONS DEV. PROGRAM & NAT'L COUNCIL FOR PUB.-PRIVATE P'SHIPS, Water/Wastewater Improvements, Manila, Philippines, in SHARING INNOVATIVE EXPERIENCES: EXAMPLES OF SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIPS 181–192 (2009), available at http://tedc2.undp.org/GSSDAcademy/SIE/Docs/Vol15/21Philippines%20States.pdf [hereinafter Water/Wastewater Improvements]; Philippe Marin, Public-Private Partnerships for Urban Water: A Review of Experiences in Developing Countries, TRENDS & POL’Y OPTIONS, no. 8, Feb. 2009, at 56.

219. Davis, supra note 37, at 162.

220. Id. at 163.

services to those who must otherwise rely on purchasing water from private vendors.222 In many parts of the world, the irony is that the poor pay substantially more for water because they are not connected to municipal networks, usually situated in wealthy parts of cities. Even where networks do exist, they may not operate at a level consistent with the human right to water and sanitation.223 Due to the high number of intermediaries, the high transport costs of water, and a lack of regulation, water purchased from informal private vendors is frequently ten to twenty times more expensive than water provided by a utility.224 It has been estimated that over a quarter of the urban population in Latin America and nearly half of the urban population in Africa rely on small-scale vendors to some extent.225 As prices for networked services are kept low for political reasons, utilities do not have the capital they need to expand into slums and other poor neighborhoods.226 In some ways, the drive toward financial sustainability can be understood as promoting a form of intergenerational equity because investments in infrastructure and sustainable water management will benefit future generations.227

Achieving affordability and having safety nets in place for the poor, while simultaneously ensuring that there are adequate finances to make needed investments and expansions in water and sanitation services, are probably the greatest challenges in implementing the human right to water and sanitation. The United Nations Development Program (UNDP) has indicated that targeting full cost recovery, without any subsidizing mechanism for ensuring affordability, would put sufficient amounts of water beyond the reach of millions of people who lack access to water.228 Even in the United States, financing much needed

222. Peter Rogers, Radhika de Silva & Ramesh Bhatia, Water is an Economic Good: How to Use Prices to Promote Equity, Efficiency, and Sustainability, 4 WATER POL’Y 1, 2 (2002):

We argue in this paper that the conventional wisdom is incorrect—increasing prices can improve equity. Higher water rates allow utilities to extend services to those currently not served and those currently forced to purchase water from vendors at very high prices. More surprisingly we argue that price policy can help maintain the sustainability of the resource itself. When the price of water reflects its true cost, the resource will be put to its most valuable uses.

223. BAKKER, supra note 31, at 22 (noting that where networks exist, they do not necessarily operate efficiently or homogeneously).


225. Id. at 11.

226. ZETLAND, supra note 28, at 96.

227. Tremblay, supra note 19, at 32–33 (questioning “is it possible that a situation where drinking water made affordable to all at present entails an inequitable financial burden for future generations given the long depreciation periods and investment cycles for water infrastructures?”); General Comment No. 15, supra note 4, ¶ 11 (“The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.”).

228. Human Development Report, supra note 21, at 97 (“Research in Latin America indicates that full cost-recovery tariffs would present affordability problems for one in five households in the region. For some countries—including Bolivia, Honduras, Nicaragua and Paraguay—reaching cost recovery would imply affordability problems for nearly half the population. Affordability is an
water and wastewater improvements through utility rate increases alone would result in doubling rates across the nation, creating economic hardship for about one-third of the population. In many parts of the world, people in poor neighborhoods who wish to be connected to a water network are expected to pay a much higher price for that connection than those living in already-connected neighborhoods that benefitted from subsidized rates or investments spread over a long period of time. Indeed, “rich countries financed their revolution in water and sanitation more than a century ago by drawing on a wide range of new financing mechanisms, including municipal bonds that spread costs over a long period.” At the end of the nineteenth century, water and sanitation services accounted for about a quarter of the local government debt in Great Britain.

Regardless of the nature of the service provider, governments must consider all policy instruments available for ensuring affordability, including lifeline tariffs and cross-subsidies. The UNDP suggested guidelines for municipalities, such as setting tariffs to cover recurrent costs, with public finance covering capital costs for network expansion. In addition, it advised that tariffs be established so that households spend no more than three percent of their income on water and sanitation. Rising block tariffs can also be an effective way to ensure minimal access while helping to create more financially sustainable operations. However, block tariffs can often burden poor households disproportionately. In many parts of the world, the poor do not have household water access and instead purchase their water from private vendors, who buy it in bulk from the utility at the highest rate (due to the graduated tariff) and then re-sell it at a higher price. In other instances, many poor households have a large number of people sharing water from the same tap, which also results in a higher per capita rate for water.

Given the challenges of financing water and sanitation services while also ensuring that rates remain affordable and that no one is denied services for failure to pay, it may be worth considering how to holistically provide a suite of public services where costs can be cross-subsidized across different sectors. However, the trend has been in the opposite direction. Even within state-owned

equally serious problem in Sub-Saharan Africa, where about 70% of households could face problems paying bills if providers were to seek full cost-recovery.”).

230. Human Development Report, supra note 21, at 70.
231. Id. at 30.
232. Id. at 66.
233. Id.
234. Id.
235. Id. at 10, 39 (noting that in Kibera, Kenya, because “kiosks are categorized as commercial entities, they pay a block tariff twice as high as the household minimum, with costs passed on to the consumer”).
and operated municipal services, there has been increasing emphasis on “corporatization, where water services are ringfenced into stand-alone ‘business units’ owned and operated by the (local) state but run on market principles.”

In many cities, the costs of municipal services, including water and sanitation, have historically been bundled into general rates bills that cannot easily be accounted for separately or itemized out of municipal taxes. The concept of “ringfencing” entails separating out the delivery of one service from all others so that the costs and revenues associated with one service (such as water and sanitation) can be accounted for in a more direct and transparent manner.

While the creation of separate utilities operating at arms-length from the municipality can reduce political interference and improve operational efficiency, it can also make it more difficult to provide affordable services to the poor and marginalized by preventing cross-subsidization across different sectors. To borrow a metaphor from the recent banking industry crisis, some services—like water and wastewater treatment—may be too important to fail.

The question of how to ensure financial viability of a water system while also guaranteeing physical and economic accessibility to the most vulnerable parts of society is probably the most difficult issue. However, municipalities must grapple with the issue of affordability, regardless of whether a private or public actor is providing the services. Even if services are delegated to a non-state private actor, that state still maintains the legal obligation to protect, respect, and fulfill the human right to water and sanitation, which means ensuring affordability.

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237. See, e.g., **DAVID A. MCDONALD, THE BELL TOLLS FOR THEE: COST RECOVERY, CUTOFFS, AND THE AFFORDABILITY OF MUNICIPAL SERVICES IN SOUTH AFRICA, MUNICIPAL SERVICES PROJECT SPECIAL REPORT 7** (March 2002), available at http://www.municipalservicesproject.org/sites/municipalservicesproject.org/files/uploadsfile/Archiv e/MCDONALD_The_Bell_Tolls_for_Thee_Cost_Recovery_Municipal_Services_in_South_Africa_2002.pdf (noting that in South Africa, there are “high numbers of households that do not know what they pay for sewerage and refuse removal—likely because the costs of these services tend to be part of the general rates bill (as opposed to direct tariffs) and are therefore not easily separated out from municipal taxes”).


239. See, e.g., MCDONALD, supra note 237, at 7 (“In the City of Cape Town, for example, it has been estimated that the price of water and sanitation services could increase by 30-50% if these two services are combined into a single, ring-fenced, tariff-based “business unit” separated from other service sectors in the city.”).

240. Credit for this metaphor goes to David McDonald of Queen’s University in Canada.

241. See **Branco & Henriques, supra note 195, at 150.**
C. Efficiency and Human Rights Norms

Privatization in the water and sanitation sectors also highlights the potential tension between human rights and the drive toward financial sustainability and efficiency. As the Special Rapporteur on the Human Right to Water and Sanitation noted in her first report on “good practices”:

Human rights law acknowledges the obligation to make progress in the constraints of limited financial resources and requires moving as expeditiously and effectively as possible towards the full realization of these rights. However, cost efficiency and ease of implementation are not dominant and overarching considerations—to the contrary, human rights may even call for solutions that involve comparatively high costs. For instance, participatory processes, which are considered fundamental from a human rights perspective, may have high costs, but are considered indispensable for the realization of human rights and for achieving a sustainable impact.\footnote{Progress Report, supra note 108, ¶ 12.}

Private service providers have an incentive to operate in a financially efficient manner, which often means cherry-picking the easiest places in which to expand coverage. This could lead to overall statistical improvements in water coverage, but the most vulnerable communities may continue to be excluded from service delivery. For example, from 1997 to 2005, the twin cities of La Paz and El Alto in Bolivia had entered into a concession contract with Aguas del Illimani. That company claimed that it had exceeded the required coverage rates stated in the contract for El Alto, reaching eighty-five percent and forty-three percent for water and sewerage coverage respectively.\footnote{Laurie & Crespo, supra note 34, at 845.} However, a closer examination revealed that the improved coverage and the installation of smaller secondary pipes only occurred in areas where the main network infrastructure of deep pipes had already existed. The concessionaire had not included in the service area the less fortunate communities who had no access to networked water. This was one of the factors that led the government to cancel its contract.\footnote{Id. at 841.}

The concept of cherry-picking highlights a moral hazard: Incentives to be efficient—and generate a profit—do not necessarily result in providing good services to all, which is critical from a human rights perspective. Although the state may envision the private service provider as assuming all of its duty to provide water and sanitation services to its citizens, the reality is that the private service provider will only offer services where it can do so efficiently, which might mean excluding groups of individuals or types of services that will not be profitable. However, solutions that are compatible with human rights are not

\footnote{Id. at 841. The concept of cherry picking also applies to sewage treatment, which is often not as profitable as water. As a result, private companies may be reluctant to invest in sewage services, even when contractually required. For example, the two concession holders in Manila were jointly fined P29.4 million (about US$600,000) for failing to develop sewerage treatment plants despite this having been required by a law passed five years previously. Hall et al., supra note 183, at 5.}
necessarily efficient. As Yamin observes, a human rights perspective “forces us to see the suffering that ... stems from human choices about policies, priorities, and cultural norms, about how we treat each other and what we owe each other.” This does not mean that service providers should not strive toward efficiency. Indeed, a state will be better able to progressively realize its human rights obligations with respect to water and sanitation if the solutions are cost-effective. But, at the same time, the state must ensure that certain groups are not discriminated against. The principle of nondiscrimination is an immediate obligation under the ICESCR. Human rights norms require that special attention be paid to the marginal and vulnerable communities in society, to ensure that they are not left out in the drive toward improving economic averages.

Many water projects that involve the private sector have been motivated by the idea that privatization would automatically lead to efficiency gains. This has not always proven true. In many instances, efficiency gains have been sought by reducing what the industry terms “non-revenue water,” water “lost” to the system either through physical losses, such as leaky pipes, or through economic losses, such as illegal or unbilled connections. Alternatively, efficiency gains have been pursued by reducing operating costs, such as the number of employees. However, efficiency from the standpoint of financial

245. Alicia Ely Yamin, Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care, 10 HEALTH & HUM. RTS. 45, 47 (2008) (noting that “the evolution of human rights during the Cold War meant that, even as rights discourse increasingly came to dominate our collective imagination, suffering due to violations of ESC rights has not always been taken seriously”).

246. See, e.g., Torben Beck Jørgensen & Barry Bozeman, Public Values Lost? Comparing Cases on Contracting out from Denmark and the United States, 4 PUB. MGMT. REV. 63, 72 (2002) (“In November 1998, the City of Atlanta signed a contract with a private company, United Water Services (UWS), Inc., to take over operation and maintenance of the water system and to provide water services to the citizens of Atlanta... In the Atlanta case, the greater efficiency of contracting out was, generally, taken as axiomatic.”).

247. Chong et al., supra note 177, at 166 (noting that the “efficiency of organizational choices is connected to the specific details of contracts, and these may vary even within a type of contract (e.g. lease). Within and across contract types, some contracts may provide more incentives than others, anticipate investments differently, and share risk differently.”).

248. See Francisco González-Gómez, Miguel A. García-Rubio & Jorge Guardiola, Why Is Non-Revenue Water So High in So Many Cities?, 27 INT’L J. WATER RESOURCES DEV. 345, 347 (2011) (“NRW can be defined as the water produced and lost without revenue and it is the sum of three components: Real losses are determined by losses in the service infrastructure, from the raw water to the point at which the water reaches the final user. Apparent losses are associated with unauthorized consumption and metering inaccuracies. The third component of NRW is unbilled but authorized consumption. The higher the levels of NRW, the more inefficient the city’s water management.”).

249. See, e.g., Lorena Alcázar, Lixin Colin Xu & Ana M. Zuluaga, Institutions, Politics, and Contracts: The Privatization Attempt of the Water and Sanitation Utility of Lima, Peru, in THRISTING FOR EFFICIENCY: THE ECONOMICS AND POLITICS OF URBAN WATER SYSTEM REFORM 103 (Mary M. Shirley ed., 2002) (describing efforts to improve efficiency in water utility in Peru by reducing number of workers and outsourcing activities in order to reduce labor costs and decrease the number of workers per 1000 connections. “The reduction in labor expenses and the rise in tariffs allowed [the utility] to make a profit in 1993 for the first time in more than a decade.”).
viability does not necessarily result in a well-run water utility. For example, in Atlanta, Georgia, the private company operating the water system, United Water, sought to cut expenses by reducing workforce and training. However, complaints rose about billing, water metering, and water-main breaks. The water quality suffered, resulting in inadequate pressure and causing the water to sometimes run orange to brown, described as the "color of iced tea." The theory that private sector participation will lead to improved efficiency and service delivery is often belied by the high transaction costs of outsourcing. For example, an analysis of 5,000 water contracts in France found that high transaction costs made the public-private partnerships inefficient. The study found that "the institutional environment in which such contracts take place leaves room open for inadequate ex ante competition and possible collusion between operators. Possible renegotiation and corruption are other concerns. All this may lead to higher prices when the public solution is not retained." Although companies often are forced to prepare proposals with imperfect information, they may have a strategic incentive to bid low with the expectation that the terms will be renegotiated. For example, in its bid to manage Atlanta’s water system, United Water underestimated the amount of work needed to operate, maintain, and upgrade the city’s aging water infrastructure, and overestimated the amount of savings it could generate. When problems arose, United Water blamed the city for allegedly failing to fully disclose the condition of its infrastructure. Water quality deteriorated so

250. Davis, supra note 37, at 161-162 (noting that empirical comparisons between private and public water and sanitation agencies often do not account for the differing policy and regulatory factors that influence behavior).

251. Arnold, supra note 39, at 799-800.


254. See Beecher, supra note 214, at 334-335 (noting that while private contracting arrangements in the waste and wastewater sector have had some achievements, they are fraught with a whole host of challenges, including “more emphasis on bidding process than long-term accountability,” “‘quiet’ (no bid) renewals and sweetheart deals,” obscuring “responsibility for investment decisions,” which “may cause under-investment in infrastructure,” etc.).

255. Chong et al., supra note 177, at 166; Lobina & Hall, supra note 170, at 5 (“A similar pattern of concentration, joint ventures and difficulty of entry is also characteristic of the water market in France, which is the home base of the dominant multinationals and of the system of privatisation by delegation which has been the core means of privatisation in this sector.”).

256. Davis, supra note 37, at 152.

257. BAKKER, supra note 31, at 95; Clarke et al., supra note 29, at 347.

258. PUB. CITIZEN, supra note 31, at 3.

259. Douglas Jehl, As Cities Move to Privatize Water, Atlanta Steps Back, N.Y. TIMES (Feb. 10, 2003), http://www.nytimes.com/2003/02/10/us/as-cities-move-to-privatize-water-atlanta-steps-back.html (“United Water, a subsidiary of the giant French company Suez, has acknowledged problems with its management of the Atlanta system. But it has also said it was stuck with trying to
badly under United Water that the company even had to issue “boil water” notices.\(^{260}\)

Although one of the rationales behind privatization is that it has the potential to reduce the cost burden on governments, in reality many contracts are structured to guarantee a rate of return, thereby shielding the company from risk by shifting risk back to the government. For example, in the Cochabamba case, the concession contract guaranteed that the operating company would receive a fifteen percent profit.\(^{261}\) While there may be legitimate reasons to renegotiate a contract during a contract period to reflect a change in conditions,\(^{262}\) there is often a constant pressure to renegotiate, even in supposedly stable contracts.\(^{263}\) The concession contract for water services in the East Manila project in the Philippines is such a case. There, the government entered into a twenty-five year contract in 1997, but barely three years later, the concession was extended for another fifteen years, without any competitive bidding.\(^{264}\) In effect, the details of how agreements are structured matter, and it cannot be assumed that private sector participation will necessarily improve the operations of a water utility from the standpoint of either efficiency or human rights.

Most municipalities that seek to outsource water and sanitation services to the private sector are motivated to do so because they have not been effective at providing the services themselves and are facing internal or external pressure to change. Municipalities are the least likely to be able to regulate private service providers effectively or to be in a strong bargaining position. As a result, unequal bargaining power between the municipality and the private corporation can lead to contracts that are neither efficient nor geared toward a human rights-oriented solution.

**D. Dispute Resolution**

If a private operator does not provide satisfactory services, which at some level can be understood as inhibiting the state from fulfilling its obligations to run a system in unexpected disrepair, while losing at least $10 million annually under a $22 million-a-year contract that the city refused to renegotiate.”\(^{260}\))

\(^{260}\) Id. (“Atlanta officials, along with customers . . . say almost any change seems preferable to existing service they call poor, unresponsive and fraught with breakdowns, including an epidemic of water-main breaks and occasional ‘boil only’ alerts caused by brown water pouring from city taps.”); Arnold, supra note 39, at 799-800.

\(^{261}\) BAKKER, supra note 31, at 166.

\(^{262}\) Chong et al., supra note 177, at 153.

\(^{263}\) Id. at 153 (noting that “if operators are selected according to price bids, then public authorities are vulnerable to ‘winner’s curse,’ since the best offer may come from the most ‘optimistic’ operator who unintentionally underestimates production costs or overestimates future revenues. Alternatively, public authorities may also be victims of aggressive bids when prospective operators strategically underestimate production costs or overestimate future revenues in order to win the deal and then provoke renegotiations with a ‘captive’ local public authority in the future.”).

\(^{264}\) Water/Wastewater Improvements, supra note 218, at 181. See Hall et al., supra note 183, at 5.
realize the human right to safe drinking water and sanitation, municipalities likely will seek to end the private water concession contract. If the state cancels a water-sanitation contract, the private company usually can bring a claim against the state. However, these disputes generally are resolved by examining the terms of the contract and the relevant bilateral or international investment agreements, which can at times conflict with the state’s human rights obligations, including with respect to water and sanitation.265

In most instances, international private sector contract disputes are brought before the International Center for Settlement of Investment Disputes (ICSID), “the only international arbitration tribunal specifically designed to address complex disputes over foreign investment contracts where one party is a national government.”266 Parties claim jurisdiction on the grounds that relevant investment treaties contain provisions giving consent to ICSID arbitration in the case of investor-state disputes.267 Jurisdiction under a bilateral investment treaty can be invoked even if the private actor changes its corporate citizenship after it entered into the contract.268

In most instances, the state actor, which may be the municipality, seeks to end a contract prematurely on the grounds that services were not provided according to the terms of the contract. Yet even where the private corporation has not provided good services, the state may still face significant liability. For example, in the case of Cochabamba, Bechtel famously claimed that it sought at least twenty-five million dollars to “recover its costs and obtain damages for loss of expected profits.”269 After the case drew significant public attention for its

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268. For example, in the short-lived Cochabamba concession, the majority shareholder in Aguas del Tunari (AdT) was Bechtel Corporation, which was headquartered in San Francisco at the time the contract was signed. However, shortly thereafter, Bechtel moved its headquarters to Amsterdam. As a result, when the city cancelled the contract, Bechtel claimed that the termination violated the terms of the Bilateral Investment Treaty between the Netherlands and the Bolivian Government. The ICSID tribunal rejected Bolivia’s argument that the commission did not have jurisdiction because Bechtel was really an American corporation. See Finnegan, supra note 32 (“The complainant was Aguas del Tunari, but the political weight was supplied by Bechtel. The company’s claim is being made under a bilateral investment treaty between Bolivia and, of all places, the Netherlands. It seems that International Water, which was originally registered in the Cayman Islands (which has no comparable investment treaty with Bolivia), moved its registration to Amsterdam soon after the Cochabamba contract was signed.”); Lobina & Hall, supra note 170, at 41; Susan Sprok & Carlos Crespo, Water, National Sovereignty and Social Resistance: Bilateral Investment Treaties and the Struggles Against Multinational Water Companies in Cochabamba and El Alto, Bolivia, LAW SOC. JUST. & GLOBAL DEV. 7, Oct. 2008, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/sprok_crespo/sprok.pdf.
269. Norris & Metzidakis, supra note 266, at 5.
lack of transparency, Bechtel caved to public pressure and decided to withdraw the lawsuit in March 2004. 270 Although initially refusing to withdraw the lawsuit, Abengoa, a Spanish firm that had the second largest share in the private consortium, also yielded to public pressure and, in January 2006, dropped the lawsuit in exchange for a symbolic sum of two bolivianos (U.S. $0.30). 271 In this context, the political movement that adopted the human right to water as a rallying call no doubt played a role. However, this is a well-known example in part because the outcome was so unusual.

In a different water concession case in the Buenos Aires province of Argentina, the state was found liable for damages. Azurix brought a case against Argentina in which the ICSID tribunal ruled that Argentina had violated several aspects of its bilateral investment treaty with the United States, hindering Azurix’s “use and enjoyment of its investment,” awarding the company U.S. $105,240,753, plus interest. 272 As this case suggests, states seeking to cancel or change water service contracts in light of human rights concerns (or even to comply with national law) may find themselves unable to do so due to a conflict with international investment law. 273

The ICSID forum raises questions relating to transparency, confidentiality, and the role of community groups that may want to intervene in the proceedings. Like other international arbitrations, the ICSID proceedings are generally confidential, and only the interested parties (i.e., the government and private actors) may participate. 274 The flexibility and lack of publicity surrounding private arbitrations make this type of forum attractive to multinational corporations and private actors. 275 At the same time, community groups often have an interest in witnessing and perhaps intervening in disputes over the provision of public services like water and sanitation. Increased transparency is critical, especially where the state may not be adequately representing local concerns. In the Cochabamba case, the tribunal denied the request of interested parties who had sought to intervene and who had wanted the tribunal to make documents and hearings public; it also neglected to address the grounds for transparency, which included arguments on human rights. 276 In contrast, in a case brought by Suez/Vivendi to challenge the Argentine government’s freezing of water tariffs in January 2002, the tribunal allowed community organizations to submit amicus briefs after finding that “these systems provide basic public services to millions of people and as a result may raise a variety of complex

270. Spronk & Crespo, supra note 268, at 8.
271. Id. at 8-9.
273. See generally Vinuales, supra note 265, at 743.
274. See Norris & Metzidakis, supra note 266, at 45-46.
275. Id. at 49-50.
276. Id. at 53.
public and international law questions, including human rights considerations.” The ICSID Secretariat has even noted that “[t]here may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitrations, the other States parties to the treaties concerned.”

Private concession contract disputes draw the parties into a protracted legal battle, which can place a poor country at a disadvantage. At the same time, corporations may face significant public pressure to drop claims. The corporate desire to maintain confidentiality often runs into conflict with human rights concerns about the need for transparency and greater stakeholder participation, including by community members whose access to water and sanitation may be impacted by the tribunal’s decision. Moving forward, the extent to which key stakeholders, such as individuals and community groups, can be involved in the ICSID arbitration will no doubt remain an issue.

In summary, this section examined the relevance of human rights to private sector involvement in the delivery of water and sanitation services. Numerous factors are critical, including the details of the contracts and treaties that inform the public-private agreement, the state’s ability to develop and enforce its own regulations and laws, the private actors’ good faith and fair dealing, and the mechanisms for resolving disputes. The next section furthers this discussion by examining how human rights principles can be understood as guideposts for regulation.

277. Langford, supra note 158; Aguas Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶ 19 (May 19, 2005), available at http://www.escr-net.org/sites/default/files/ICSIDAmicus_June05_English_0.pdf. As a result, five nongovernmental organizations filed an amicus curiae submission on April 4, 2007, according to the procedural details available on the ICSID website: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases; under “Advanced Search,” search for Case No. ARB/03/19, and then click on “Procedural Details”. On July 30, 2010, the ICSID tribunal issued a decision on liability, finding that Argentina had denied the private investments fair and equitable treatment. However, it denied the claims regarding expropriation and denial of full protection and security of those investments. See Suez v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010), available at http://italaw.com/documents/SuezInterAguaDecisiononLiability.pdf.

278. ICSID Secretariat, supra note 267, at 9.

279. See Vinuales, supra note 265, at 743-759 (discussing different ways that the human right to water could be raised in an international arbitration proceeding).

280. See Feigenbaum & Henig, supra note 160, at 189 (noting that “[t]he choice of a particular form of privatization can be less significant than how privatization is actually formulated and implemented.”).
While some social movements to recognize the human right to water and sanitation saw the failures of privatization experiments as reason to prohibit private sector involvement, the international human rights legal regime has focused on increasing private sector regulation and oversight. States still have a responsibility to protect, respect, and fulfill the human right to water and sanitation, even where private actors are involved. Mapping this tripartite human rights framework onto questions of implementation clarifies that private sector participation in the water and sanitation sectors will only be successful from a human rights perspective if there is adequate regulation, monitoring, and oversight.

An inverse relationship exists between the protect and fulfill prongs: The more a state delegates its responsibilities to fulfill to a non-state actor, the greater its duty to protect. Accordingly, governments must confront the question of financial sustainability and affordability. While higher tariffs may be needed to improve water and sanitation infrastructure, long-term financing and some form of subsidy for the poor likely will be required to ensure that no one is denied access to basic services due to an inability to pay.

Within the context of private sector participation in the water and sanitation sectors, “States should not assume that businesses invariably prefer, or benefit from, State inaction. . . . The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice.” As discussed above, in a concession contract for water delivery, the incentives for operational efficiency are supposed to derive from the increased profits that the private operator would generate through efficiency savings. If these efficiencies translate into more reliable and affordable water delivery, then an individual’s human right to water may have been protected and respected. However, a World Bank study has concluded that “[i]f regulation is lax, the operator will have little incentive to make efficiency gains and might seek, instead, to negotiate tariff increases as the easiest means to make profits.” Such tariff increases would be in tension with the need to make water access affordable.

281. Craven, supra note 6, at 123.
283. Marin, supra note 218, at 124.
284. Id.
The Human Rights Council Resolution of 2010 identifies key ways that states should monitor the role of private actors. Clause 9 “[r]ecalls that States should ensure that non-State service providers:

(a) Fulfil[l] their human rights responsibilities throughout their work processes, including by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them;
(b) Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quality and sufficient quantity;
(c) Integrate human rights into impact assessments as appropriate, in order to identify and help address human rights challenges;
(d) Develop effective organizational-level grievance mechanisms for users, and refrain from obstructing access to State-based accountability mechanisms.  

At the same time, the implementation of private sector involvement in water and sanitation services in many states appears to be fraught with problems largely because the states in question do not have the regulatory capacity or incentives to oversee and monitor large private providers. Thus, although human rights remain neutral to the issue of privatization in theory, privatization remains problematic in practice in many instances. In fact, an early public draft of General Comment 15 actually called for the deferral of privatization until sufficient regulatory systems were in place; this language was removed from the final version. At the same time, General Comment 15 highlights the critical importance of regulating of private sector actors.

In the context of a state that does not have significant regulatory capacity, the obligations of private actors to respect human rights, as outlined in the recently endorsed Guiding Principles for Business and Human Rights, become even more critical. At the core of the Guiding Principles, which were adopted by the U.N. Human Rights Council in 2011, is a framework with three pillars of “protect, respect and remedy.” The first pillar (protect) overlaps with the state’s existing duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and...
The second pillar (respect) is addressed to businesses, which have a duty to respect human rights because society has a basic expectation that businesses will do so. To respect human rights means that businesses should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved” or “that are linked to their operations . . .” The third pillar (remedy) reflects the need for greater victim access to effective judicial and nonjudicial remedies, because even the most concerted efforts cannot prevent all abuse. Although the Guiding Principles have received their fair share of criticism from business interests and human rights groups alike, they certainly have moved the discourse forward on the responsibilities of businesses. If a private corporation enters into an agreement to provide water and sanitation services, it should consider its conduct under these newly recognized Guiding Principles.

At the same time, it should be recognized that a human rights approach also suffers from several limitations. As alluded to above, human rights principles place significant emphasis on a state’s ability to regulate and monitor private actor activities, which is not always feasible, especially when the state has limited resources or is corrupt or incompetent. Moreover, the language of human rights, which focuses on state and non-state actors, does not always map well onto the debate over water privatization. For example, some communities have long-standing traditions of managing water as a commons, without any state involvement. In addition, many non-profit, non-governmental organizations

293. Id. ¶ 6.
297. See, e.g., BAKKER, supra note 31, at 173-183 (discussing management of the commons
provide water and sanitation services to poor and vulnerable populations around the world; they are non-state, private actors, but are different from the large corporations involved in the formal water and sanitation sectors.298

Nevertheless, the framing of water and sanitation as a human right complements traditional good governance approaches by clarifying the state’s responsibility for services, while also empowering individuals as rights-holders. The traditional human rights framework (respect, protect, fulfill) and the new framework for business and human rights (protect, respect, remedy) can be understood as guideposts for regulation of private actors operating in the water and sanitation sectors. However, the real challenge ahead lies in better defining how those guideposts can be translated into law and policy, such as through the development of model regulations or model concession agreements.

Although the informal private sector has not been the primary focus of this article, it is worth pointing out that the human rights framework is relevant in that setting as well. The informal sector consists of a variety of water suppliers, including small-scale private vendors, private wells, NGOs, and other community-based organizations for water. In the context of formal service provision, the human right to water and sanitation can be understood as consistent with a “normative networked goal,” meaning that everyone should have access to piped, clean water and to sanitation facilities that remove and treat the waste via a piped system. However, as previously discussed, people without reliable networked access, who often live in rural areas or urban slums, are forced to rely on other non-state sources operating in the informal sector. Without reliable sanitation options, they may be forced to engage in open-defecation. Karen Bakker uses the term “archipelago” to describe these “spatially separated but linked ‘islands’ of networked supply in the urban fabric,”299 which is a useful metaphor to consider from a human rights perspective.

Where the state is unable to effectively provide water and sanitation services through formal provision, “islands” of informal supply fill the gap.300 In this context, the state’s obligation to protect an individual’s right to water and sanitation from third-party abuse becomes even more critical. States must

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298. See BAKKER, supra note 31, at 47 (“Conflating ‘public’ with ‘state’ provision obscures collective forms of action not mediated by states. Equally, conflating ‘private’ with ‘for-profit, corporate’ activity is misleading, as it mistakenly assumes that all non-state activity is necessarily capitalist.”).

299. Id. at 22.


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develop appropriate legal and regulatory environments that allow local initiatives to flourish, while also ensuring quality and deterring predatory practices and corruption. In some instances in many parts of the world, lack of legal title prevents people from gaining access to basic water and sanitation services. The human right to water and sanitation requires states to find ways to ensure that appropriate services are provided, even while the underlying land title issues remain unresolved. Further, significant resources are being spent on NGO initiatives that seek to improve access to water and sanitation services, but bringing these projects to scale requires building governmental capacity. Conceptually, the human right to water and sanitation, with its attendant state duties to respect, protect, and fulfill, can be understood as trying to knit together the “islands” of services into a more coherent framework, so that the “archipelago” can begin to achieve the “normative network goal.”

CONCLUSION

Law is a reflection of social norms, and human rights law in particular is an articulation of global values and aspirations. Declaring a human right to safe drinking water and sanitation will not solve the drinking water and sanitation crisis alone, but it will lend moral, political, and legal momentum to efforts to improve access to these critical services, reinforcing their importance to human dignity. With General Comment 15 and two U.N. resolutions within the last decade, an arguably strong basis now exists for recognizing the human right to safe drinking water and sanitation under the International Covenant on Economic, Social and Cultural Rights.

That water and sanitation have been framed as a human right at this point in history can be understood as a response to global water management trends, which have emphasized the need to improve economic efficiency and environmental sustainability. In addition, the human right to water and sanitation was a rallying call for anti-privatization movements. Yet from the standpoint of international law, the human right to water and sanitation is not incompatible with private sector participation or with market-based approaches. However, real tensions do exist between markets and rights because the goal of a private

301. DE ALBUQUERQUE, ON THE RIGHT TRACK, supra note 20, at 32, 58 (noting that around the world, “[a]uthorities frequently resist allowing people with insecure tenure to connect to the water and sanitation networks because such connections can confer legal rights over the land that they occupy, and thus be seen to encourage the development of informal settlements”).

302. BAKKER, supra note 31, at 46-47 (noting that in Dhaka, Bangladesh, official water policy requires that only legal households with official land permits be connected to the water supply. As a result, three and a half million slum dwellers do not have access and are in many ways, “‘citizens without a city,’ those to whom modern norms of social citizenship do not apply.”). See also Sharmila L. Murthy, Mark K. Williams & Elisha Baskin, The Human Right to Water in Israel: A Case Study of the Unrecognized Bedouin Villages in the Negev, 46 ISR. L. REV. (forthcoming 2013) (discussing how disputes over land title underlie the right to water debate in unrecognized Bedouin villages in Israel).
actor is to create profits. In contrast, a state charged with realizing, albeit progressively, the human right to water and sanitation must take steps using maximum available resources to ensure that everyone, without discrimination, has access to adequate amounts of good quality, accessible, and affordable water.

The challenges of operating an urban water and wastewater system complicate private sector involvement in the delivery of services. The large amount of infrastructure required means that network provision of water is a natural monopoly that is expensive to maintain and upgrade. Moreover, in recent years, there has been a stronger emphasis on full cost-recovery and “ring-fencing” services, which reduces the ability to cross-subsidize across different municipal sectors. While the human right to water and sanitation does not require that services be free, they do need to be affordable and no one should be denied services for inability to pay. This is a difficult goal to reach and requires that states critically assess their tariff structures.

The involvement of the private sector in the delivery of water and wastewater services will not necessarily lead to efficiency. Case studies from around the world highlight that without proper oversight, a private operator’s drive to improve efficiency indicators by reducing costs can have significant impacts on water quality and consistent service delivery. Moreover, there are significant transaction costs associated with outsourcing to the private sector that need to be accounted for when considering proposed efficiency gains. Regulation and monitoring both play a key role in mitigating the tensions between market-based approaches and rights. Yet such oversight also requires strong institutional capacity, without which states are more likely to enter into private arrangements on unequal footing, resulting in terms that are not in the best interests of the public. Another challenge of engaging in private sector water contracts is that the international forums available for addressing such disputes are not transparent and may not provide a vehicle for addressing the concerns of individuals and communities who may seek to raise human rights concerns.

The relevance of human rights to the privatization debate is to affirm that with respect to the human right to water and sanitation, states cannot sidestep their responsibilities by involving the private sector, but instead retain the duties to protect, respect, and fulfill the right. The focus on whether to involve the private sector has obscured more important questions about how and when it can be successful, which requires ensuring that the human right to water and sanitation is protected, respected, and fulfilled. Human rights principles can be understood as guideposts for the critical regulation, monitoring, and oversight that are needed when the private sector is involved in the delivery of water and sanitation services.
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The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?

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Zeynalova: The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?

Yuliya Zeynalova*

INTRODUCTION

Transnational practitioners and litigants are bound to encounter at least one case that will require the recognition and enforcement of either a U.S. court judgment1 abroad, or a foreign court judgment in the United States.2 Upon encountering this situation, these parties may be interested to learn that while the United States has been a signatory of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards3 (“New York Convention”) since 1970, it is not currently party to any international treaty for

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1. This study will use the term “court judgments,” rendered either in the United States or foreign courts, interchangeably with “judgments.”

2. It is well recognized that transnational litigation has become a prominent feature of American jurisprudence; within the group of internationally tinged cases making inroads into U.S. courts are actions against foreign defendants, class actions with absent foreign plaintiffs, Alien Tort Statute claims, and transnational regulatory actions. See Samuel P. Baumgartner, How Well Do U.S. Judgments Fare in Europe, 40 GEO. WASH. INT’L L. REV. 173, 174, nn.2-4 (2008) (describing the current character of international litigation); 28 U.S.C. § 1350 (2000) (granting district courts original jurisdiction of any civil action by an alien for a tort, committed in violation of the law of nations or a treaty of the United States).

the recognition of foreign court judgments. Unlike foreign arbitral awards, which are governed by the New York Convention, no treaty outlines the circumstances under which U.S. courts may recognize foreign awards and vice versa. Transnational litigants are therefore more likely to encounter difficulties enforcing their foreign court awards than parties seeking to enforce their foreign arbitral awards. This disparity is particularly clear because of the almost universal agreement that recognition and enforcement under the New York Convention “works,”\(^6\) and the absence of a comparably reliable mechanism for the recognition and enforcement of foreign court awards. In the United States, for instance, while the principle of Comity of Nations, the common law, and individual states’ laws do allow American courts to recognize and enforce foreign judgments, foreign courts may not necessarily reciprocate.\(^7\) Enforcing U.S. court judgments abroad can prove especially difficult in light of divergent rules on jurisdiction, requirements for special service of process, reciprocity, and some foreign countries’ public policy concerns over enforcing American jury awards carrying hefty punitive damages.\(^8\)

This study has two overarching goals. The first goal is to discern the shortcomings in the current system of foreign court judgment recognition and enforcement in the United States and investigate the reasons why America and its trading partners, while remaining proponents of the New York Convention, have not agreed to a similar treaty governing the recognition and enforcement of foreign judgments. After all, court judgments are promulgated by professional judges operating in the public eye, under restrictive procedural rules and subject to appellate review, while arbitral awards are virtually unreviewable and rendered by private arbitrators who are not necessarily professional judges and are not held publically accountable.\(^9\) Considering the more rigorous procedural


\(^5\) See Committee on Foreign and Comparative Law, Association of the Bar of the City of N.Y., Survey on Foreign Recognition of U.S. Money Judgments 20 (2001) [hereinafter Survey on Foreign Recognition] (“[A] party seeking to enforce a [U.S. Money Judgment] [is] at a distinct disadvantage to parties that have access to the more expedited procedures provided for in legislation, forcing such a party instead to rely on more expensive, procedurally complex, and lengthy proceedings, with far less certainty that a judgment will be recognized.”).


\(^7\) See, e.g., Volker Behr, Enforcement of United States Money Judgments in Germany, 13 J.L. & COM. 211, 222 (1994).


\(\textbf{Berkeley Journal of International Law, Vol. 31, Iss. 1 [2013], Art. 4}\)
standards for court judgments, one might expect the United States and its trading partners to reach an agreement to mutually respect foreign court judgments. The second goal of this study is to make a concrete proposal for a realistic change that could be applied to the system now, without having to wait and bet on the success of future multilateral negotiations.

This study finds that while broad and conclusive empirical evidence of systematic procedural problems in enforcing American court judgments abroad and foreign court judgments in the United States is not currently available, the most recent legal surveys conducted by scholars and practitioners suggest that the perceived problems do exist. In light of these findings, this study concludes that the absence of an international enforceability regime for foreign judgments leaves a void in the realm of private international law that sits in stark contrast to the well-established mechanism for enforcing foreign arbitral awards. However, while acknowledging that a multilateral convention would be the ideal mechanism for addressing the procedural defects in the existing system of recognition and enforcement of U.S. judgments abroad and foreign judgments in the United States, this study reasons that the latest failed attempt at negotiations through The Hague Conference on Private International Law ("Hague Conference") proves that such a treaty is not likely to materialize in the near future. In light of this impasse on the international front, this study puts forth a domestically-focused alternative aimed at first closing the gap in American foreign judgment law with a view toward facilitating future multilateral negotiations. Specifically, it proposes the adoption of a federal statute codifying a single national law that would govern the recognition and enforcement in the United States of judgments rendered in foreign courts. Such a statute, based on a modified version of a pending project of the American Law Institute ("ALI"), would preempt the fifty state laws currently governing the recognition and enforcement of foreign judgments in U.S. courts, and replace them with a clear, uniform standard aimed at increasing the free flow of worthy judgments—

"grudgingly narrow" review of the merits of an arbitral awards based on the four limited bases established in section 10(a) of the Federal Arbitration Act ("F.A.A."), 9 U.S.C. § 10 (2004): (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption by the arbitrators; (3) there was arbitral misconduct, such as refusal to hear material evidence; or (4) the arbitrators exceeded their powers, or so imperfectly executed their powers that they failed to render a mutual, final and definite award.)

10. Hulbert, supra note 9, at 647 ("I]t appears that this is a subject on which reliable evidence is unavailable").

11. See generally infra Part II.B.

12. See generally infra Part III.A.

thus partially accomplishing the goals of a long-sought-after international judgments convention.\footnote{14. See generally infra Part II.}

Before analyzing the merits of this proposed federal statute, this study will first summarize the current system of recognition and enforcement of foreign judgments in the United States and abroad, and the difficulties this system presents to transnational litigants (Part I). Second, it will discuss, from a U.S. public policy perspective, the benefits of adopting an international judgments convention, and analogize to the success of the New York Convention in standardizing the law on recognition and enforcement of international arbitral awards (Part II). Part III will discuss the difficulties heretofore experienced in drafting an international judgments convention by examining the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (“1971 Convention”) and the proposed 1976 U.S.-U.K. Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters (“U.S.-U.K. Convention”) (Part III). Finally, Part IV will propose an alternative solution: a federal statute unifying the state laws currently governing recognition and enforcement of foreign court judgments in the United States (Part IV). This proposal will focus on the reasons that a federal statute—while having no effect on foreign laws concerning U.S. judgments in foreign courts—is desirable on a national level. Particularly, a federal foreign judgments statute will unify and nationalize a set of state laws that fall squarely within the foreign affairs policy sphere, which is inherently suited for federal lawmaking. Part IV also acknowledges the work already accomplished by the ALI in drafting a model federal judgments statute, but recommends a major change to that draft through the removal of its reciprocity provision, which this author believes will address the statute’s main criticisms.

I.

PROCEDURE AND LAW ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS

Whether you are a foreign creditor trying to recover on a claim against a debtor in the United States or a third country, or an American creditor seeking to enforce a U.S.-made judgment abroad, your procedural alternatives and roadblocks will significantly differ. This part of the study will focus on the procedure for enforcing foreign-made judgments in the United States and U.S.-made judgments abroad. Generally speaking, this study finds that a foreign claimant will have a faster and easier time enforcing his or her foreign-made judgment in America, while a creditor possessing a U.S.-made judgment can expect a bumpier ride through foreign court bureaucracy. This is simply a reflection of what many commentators see as a disparity in the willingness of American and foreign courts to recognize and enforce judgments of other
nations. While the United States has been relatively generous in recognizing and enforcing foreign judgments, even without a treaty, there is at least a strong perception that U.S. creditors have been comparatively less successful in their endeavors to enforce their judgments abroad. But even in the United States, meritorious foreign judgments are likely to encounter problems due to the lack of uniformity among the state laws governing their recognition and enforcement, and the resulting number of procedural and substantive defenses a foreign judgment creditor must overcome before a U.S. court will effectuate the creditor’s judgment.

I shall now turn to a general—and by no means exhaustive—discussion of both categories of creditors: first describing a hypothetical foreign creditor’s experience in U.S. courts and subsequently turning to what a U.S. creditor should expect to encounter in courts abroad.

A. System for Recognition and Enforcement of Foreign Judgments in the United States

In the United States, every judgment from another country or another U.S. state is considered to be a “foreign judgment” that cannot be directly enforced without a prior court action “recognizing” that judgment as a domestic one. However, under the Full Faith & Credit Clause of the U.S. Constitution, a judgment rendered in any U.S. state or federal court is given the same recognition and effect in any other U.S. court. This treatment does not apply to judgments made in the courts of foreign countries. However, the principle of Comity of Nations has produced a pro-recognition attitude in U.S. courts that

17. See generally infra Part I.A.
20. See Aetna Life Ins. Co. v. Tremblay, 223 US. 185, 190 (1912) (stating that full faith and credit is not conferred upon the judgments of any foreign nations on the basis of the U.S. Constitution, a federal statute or a treaty); RESTATEMENT (SECOND) OF CONFLICT OF LAW § 98 cmt. b (1971).
21. Comity of Nations is a British doctrine adopted in U.S. courts, which, in the words of Lord Blackburn, is based on the idea that it is an “admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal.” Godard v. Gray (1890) L.R. 6 Q.B. 139, 148. For an elaborate overview of the British cases, which served as authorities for the creation of this doctrine, see FRANCIS T. PIGGOTT, THE LAW AND PRACTICE OF THE COURTS OF THE UNITED KINGDOM RELATING TO FOREIGN JUDGMENTS AND PARTIES OUT OF THE JURISDICTION 4-5 (2d ed., London 1884).
has carried over to foreign-country judgments even in the absence of any bilateral or multilateral treaties. In fact, it has been said that in the United States, foreign judgments are enforced more regularly than in perhaps any other country.

As a preliminary matter, it is important to distinguish between “recognition” and “enforcement” of foreign judgments. To “recognize” a foreign judgment is in essence to domesticate it, thus making it equal to any other judgment produced by a U.S. court, as well as to judgments of other state courts that benefit from the Full Faith & Credit Clause. A recognized judgment is also considered res judicata upon other actions in the recognizing jurisdiction because it is seen as producing the same effect and having the same authority as a case originally decided in the jurisdiction. “Enforcement,” on the other hand, requires the aid of the courts and law enforcement of the enforcing jurisdiction, which may or may not be afforded along with recognition of the judgment.

Here, it is important to note that there is no federal law governing the recognition and enforcement of foreign judgments, and that state law on the topic applies even in federal courts hearing such actions. Thus, even in the case of a foreign plaintiff seeking to enforce a foreign judgment, removal of the enforcement action from state to federal court through reliance on the statutory alienage diversity jurisdiction provision will merely result in the federal court’s application of the same state statute that would have been applicable in the rendering state court. Furthermore, in federal courts, the application of Rule 64 of the Federal Rules of Civil Procedure requires the courts to apply state law for remedies involving seizure of property, which may be integral to an action seeking to collect on a foreign money judgment in a U.S. court. Because there

22. See Platto & Horton, eds., supra note 18, at 123.
24. See Platto & Horton, eds., supra note 18, at 123.
25. See id.
26. See id. at 134-35.
27. Under the Erie doctrine established in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), state law must be applied when federal courts sit in diversity jurisdiction. Because the United States is not a member of a judgment recognition or enforcement treaty and Congress has not enacted federal legislation on the subject, state law, rather than federal law, has continued to govern this area. See Martinez, supra note 23, at 53.
29. While federal courts are courts of limited jurisdiction, the U.S. Constitution gives Congress the power to expand such jurisdiction through statutory enactment. U.S. CONST. art. III, § 2. Congress has used this power to codify diversity jurisdiction in 28 U.S.C. § 1332(a)(3) (granting original jurisdiction to federal courts in civil actions with an amount in controversy exceeding $75,000 and between “citizens of difference States and in which citizens or subjects of a foreign state are additional parties”).
30. Fed. R. Civ. P. 64(a) (“At the commencement of and throughout an action, every remedy
are fifty individual sets of state law describing the circumstances under which foreign judgments are to be recognized and enforced, this multiplicity of laws seems daunting to a foreign litigant’s prospects for obtaining recognition and enforcement, and in fact individual states vary on what is required for recognition. 

At the same time, however, there is also a semblance of uniformity among the states’ approaches to foreign judgment recognition because thirty-one states have adopted the Uniform Foreign-Money-Judgments Recognition Act (“UFMJRA”). Promulgated in 1962 by the Uniform Law Commission, the UFMJRA is an agreement under which the individual signatory states of the United States have mutually committed to recognize and enforce certain money judgments entered by foreign courts. The remaining non-signatory states apply the common law as summarized in The Restatement (Third) of Foreign Relations of the United States (“Restatement”).

The UFMJRA does not prescribe a uniform enforcement procedure and instead provides that, “a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.” This basically extends the benefit of the Full Faith & Credit Clause to the class of foreign court judgments covered by the UFMJRA. The UFMJRA applies to any foreign court money judgment that is “final, conclusive, and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal,” but excluding “judgments for taxes, a fine or other penalty, or judgment for support in matrimonial or family

is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.”

31. See infra notes 42-51 and accompanying text.


34. See Martinez, supra note 23, at 64-65.


36. See infra notes 19-20 and accompanying text.
matters. But even judgments not meeting this definition are generally recognized under the Restatement’s definition, which includes final judgments “granting or recovering a sum of money, establishing or confirming the status of a person, or determining interests in property.”

In essence, the UFMJRA is a codification of common law decisions relating to recognition and enforcement. The most important of these cases is Hilton v. Guyot, in which the U.S. Supreme Court set the criteria for the recognition of foreign judgments when confronted with a French court’s judgment against an American defendant. The Court in Hilton stated that an enforcing U.S. court shall not retry the merits and shall accept the foreign judgment of a case where the foreign tribunal had provided:

1. an opportunity for a full and fair trial;
2. before a court of competent jurisdiction;
3. proceedings following due citation or voluntary appearance of adverse parties;
4. upon regular proceedings;
5. under a system of jurisprudence likely to secure impartial administration of justice between citizens of its own country and those of others;
6. no evidence of:
   a. fraud;
   b. prejudice in the system of laws and the courts; or
   c. any other reason why comity of the United States should not be given to the foreign judgment.

Having laid out these requirements, the Supreme Court nevertheless refused to recognize the French judgment because French courts themselves refused to recognize valid U.S. judgments—and thus failed to meet what came to be known as Hilton’s “reciprocity” requirement. Initially, Hilton’s requirement that recognition of foreign judgments as res judicata be contingent upon reciprocity proved controversial; however, in light of the Erie doctrine, this requirement is no longer binding on state courts reviewing foreign judgments for recognition and enforcement.

37. UFMJRA §§ 2, 1(2) (1962).
38. Platto & Horton, eds., supra note 18, at 124 (citing Restatement (Third) of Foreign Relations Law of the United States § 481(1) [hereinafter Restatement]).
40. 159 U.S. 113 (1895).
41. Id. at 202.
42. Id. at 210.
43. See generally Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see, e.g., Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971); Restatement § 481, Reporter’s Note 1.
With respect to state law on reciprocity, only a minority of the thirty-one states that have adopted the UFMJRA also adopted the reciprocity requirement for recognition of foreign judgments—a requirement absent from the original UFMJRA. Additionally, a minority of the non-UFMJRA states require reciprocity. Thus, although only a minority of all U.S. states requires reciprocity, a foreign litigant should be advised to determine whether the state of the court where the litigant wishes to enforce his or her foreign judgment falls within that overall minority, and whether the foreign court in which the litigant obtained the judgment actually reciprocates.

Although the Uniform Foreign Country Money-Judgments Recognition Act (“UFCMJRA”) revised the UFMJRA in 2005 with the intent of clarifying provisions and correcting problems created by varying interpretations of provisions by courts over the years, the absence of a reciprocity requirement was left intact. The sections of the UFMJRA that the UFCMJRA revised include: the definitions, scope provision, burden of proof requirement, and statute of limitations, as well as the actual procedure for recognition that the UFMJRA had left to the states.


45. William S. Dodge, Breaking the Public Law Taboo, 43 HARV. INT’L L.J. 161, 228, n.446 (2002); Robert L. McFarland, Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project’s Proposed Federal Foreign Judgments Statute, 45 NEW ENG. L. REV. 63, 92, nn.187-92 (2011) (“Most states currently reject a reciprocity requirement for recognition of foreign judgments . . . . A few states have adopted a reciprocity requirement or a limited reciprocity requirement in addition to the provisions of the UFMJRA.”).


47. See Campbell, supra note 39, at 444.

48. See, e.g., Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1002-04 (5th Cir. 1990). In Khreich, the Fifth Circuit affirmed a district court decision refusing to recognize an Abu Dhabi judgment because the Texas Recognition Act treats non-reciprocity as a discretionary ground for non-recognition. The court found as sufficient evidence of non-reciprocity an affidavit by an American attorney practicing in Abu Dhabi, stating that he and other members of his firm were “unaware of any Abu Dhabi courts enforcing United States’ judgments.” Id. at 1005.


50. See generally id.


52. E.g., prior to the adoption of the UFCMJRA, a number of states had adopted a version of the UFMJRA that allowed judgment creditors to simply register their foreign judgment with a court clerk, who would then notify the debtor that he/she had 30 days to initiate an action for non-
The UFCMJRA has been adopted in eighteen states and the District of Columbia, which has certainly increased the variety of recognition and enforcement regimes available to foreign judgment creditors seeking enforcement and recognition in U.S. courts.53

Despite the variations, the procedure for gaining recognition and enforcement of a final foreign court judgment in a U.S. court can be generally outlined as follows. In the majority of states, the procedure first requires the judgment creditor to bring an action against the debtor in a U.S. court, obtaining jurisdiction over the debtor and/or the debtor’s property.54 Most of the cases reviewing whether a foreign judgment should be recognized and enforced resolve the matter through a motion for summary judgment, without the need to first file a complaint.55 To support his or her claim, the foreign-judgment holder needs only to present evidence—such as an affidavit—of a final foreign judgment56 rendered against the U.S. defendant in a proceeding that meets the standards set out by the law of the state of the recognizing court.57 The foreign judgment holder has the initial burden of proving that the foreign judgment is recognition. Steven C. Shuman, *Enforceability of Foreign Country Money Judgments in California*, LOS ANGELES LAWYER, Apr. 2009, at 17. As adopted by the Uniform Law Commissioners and states like California, the new law under the UFCMJRA does away with the registration option by instead codifying the requirement that creditors file an action for recognition to enforce their foreign country judgments. See, e.g., CA CODE CIV. PROC. § 1718(a).


First, there are significant differences between the 1962 [UFMJRA] and 2005 [UFCMJRA] Acts that result in the application of different procedural requirements and substantive standards in different states. And even those states that have adopted the same uniform act have not done so uniformly, modifying requirements to suit local interests. And, of course, many states have enacted neither Act.


54. See Campbell, supra note 39, at 448-49.

55. *See, e.g., NY CIVIL PRACTICE LAW AND RULES § 5303 (modeled on the UFMJRA § 3).

56. In the United States, only final judgments will be enforced, but finality is not affected by the fact that a judgment may still be subject to an appeal. Platto & Horton, eds., *supra* note 18, at 125. A final judgment is one not subject to further action—except execution—by the rendering court, but the court where enforcement is sought will usually stay the proceedings if an appeal is pending. UFMJRA § 6.

57. Campbell, *supra* note 39, at 448 (“If the affidavits conflict with each other in material respects, then a trial becomes necessary in which a finder of fact . . . weighs the credibility of each side’s evidence . . . .”). However, in typical cases, the facts in the record are undisputed because of the detailed record from the rendering court.
authentic and valid, and assuming that there are no questions of material fact, the U.S. court simply decides the legal question of whether the foreign court proceedings can be given effect in the United States under the agreed-upon facts. This process does not require a jury or even a trial, and can be resolved within a matter of weeks or months, depending on the court’s docket.

However, this system is quickly complicated if objections arise regarding the propriety of the foreign rendering court’s procedures in reaching its judgment from the perspective of the recognizing court’s law. For instance, under the UFMJRA, which remains the most widely adopted version of the Uniform Commission’s legislation on this subject, courts are supposed to recognize foreign judgments that meet the enumerated criteria listed in Section 2 of the Act, and failure to meet them is grounds for either mandatory or discretionary non-recognition. The mandatory criteria include an impartial tribunal with procedures satisfying due process and personal jurisdiction over the defendant under the law of the rendering state and international rules. If the defendant successfully proves one of the elaborated procedural or jurisdictional defenses, the U.S. court will refuse to recognize that particular foreign country judgment without a renewed action on the merits. However, even if the foreign judgment meets all the mandatory provisions and is final, conclusive, and enforceable where rendered, the UFMJRA grants U.S. courts discretion not to recognize the judgment in certain circumstances. For instance, if the defendant did not receive notice of the foreign proceeding in sufficient time to defend, or if the judgment was obtained by fraud that deprived the parties of an opportunity to present their case, the court can choose not to recognize the foreign judgment.

The full list of discretionary grounds for non-recognition under the UFMJRA includes:

1. lack of subject-matter jurisdiction by the rendering court;

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58. Id.
59. Id. at 449.
60. For a list of the important exceptions to recognition under the UFMJRA, see supra notes 53-55 and accompanying text. One exception that defendants opposing foreign judgment enforcement in U.S. courts have increasingly relied on with success is the “fraud” exception, UFMJRA § 4(b)(2). See Timothy G. Nelson, Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption, 44 Int’l Law. 897 (2010) (citing to three specific cases of non-recognition and arguing that U.S. courts, while unwilling to infer fraud, will take such allegations seriously and decline to recognize a judgment proven to be the result of fraud).
61. UFMJRA § 3 (“Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money.”).
62. Id. § 4(a) (listing mandatory grounds for non-recognition).
63. See id.
65. UFMJRA § 4(b).
(2) inadequate notice to defendant;
(3) fraud;
(4) violation of the public policy of the recognizing court;
(5) conflict with another final judgment entitled to recognition; and
(6) inconsistency of the foreign proceedings with the parties’ forum selection agreement.66

A foreign litigant seeking recognition and enforcement of his or her judgment in the United States should keep these requirements in mind, along with those articulated in *Hilton*. It is equally important to note their application. For instance, in determining whether a foreign judgment is the product of an impartial judicial system, as required by the UFMJRA, a reviewing U.S. court will not require the foreign court’s procedural and substantive law to mirror its own.67 Thus, the absence of such systemic characteristics as a trial by jury, right to cross-examination, testimony under oath, or evidentiary rules applicable in U.S. courts will not justify non-recognition.68 However, when it comes to proving that the rendering court’s exercise of jurisdiction over the U.S. defendant satisfied due process, *Hilton* and the UFMJRA require the U.S. court to demand that the foreign court had personal jurisdiction meeting the U.S. due process standard established by the Constitution.69 The U.S. Supreme Court set forth the standard for personal jurisdiction in *International Shoe Co. v. Washington*,70 which requires that the defendant have had certain “minimum contacts” with the forum state, “such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice.”71 To establish minimum contacts, the defendant must have carried out systematic and continuous activities in the foreign forum that would make it just and reasonable for that forum’s courts to subject the defendant to a judgment in personam.72

The UFMJRA also establishes rules for determining when a recognizing U.S. court cannot dismiss a foreign judgment for lack of personal jurisdiction. Section 5(a) states that a foreign court may have properly asserted personal jurisdiction over any defendant that:

1. was properly served;
2. voluntarily appeared in court not with the sole purpose of contesting jurisdiction;
3. agreed to submit to the foreign court’s jurisdiction;
4. was domiciled, or if the defendant is a corporation, incorporated in the foreign forum;

66. *Id.*
67. See Ackerman v. Levine, 788 F.2d 830, 842 (2d Cir. 1986) (quoting Judge Cardozo’s observation that, “[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”).
68. Platto & Horton, eds., *supra* note 18, at 127.
70. 326 U.S. 310, 316 (1945).
71. *Id.*
72. *Id.* at 320.
had a business office in the foreign forum and the case arose out of that business;
(6) operated a motor vehicle in the foreign forum, and the case arose out of that operation.\footnote{73}

Section 5(b) also recognizes that the UFMJRA does not prevent a U.S. court from recognizing foreign judgments rendered on “other” un-enumerated bases of jurisdiction, which the Act does not define.\footnote{74}

A recognizing U.S. court will also scrutinize the adequacy of notice of the proceedings and service of process on the U.S. defendant according to U.S. notions of due process,\footnote{75} which require notice “reasonably calculated” to inform the defendant of the action against him or her and provide the opportunity to present a defense.\footnote{76} With regard to the requirement that a rendering court be impartial,\footnote{77} however, the U.S. enforcing courts operate under the presumption of the foreign rendering court’s impartiality, unless there is specific evidence to the contrary.\footnote{78}

Thus, in general, if the mandatory elements are met, a recognizing U.S. court will not reexamine the merits of the foreign-made money judgment, either on grounds of substantive law or evidentiary support, although more scrutiny is given to default judgments.\footnote{79} In summary, foreign-made judgments are recognized and enforced in the United States under the law of the state where the receiving court sits, which can vary in substance from its nearest neighboring state’s law on the subject. Absent a showing of the mandatory or discretionary grounds for non-recognition, such foreign judgments are recognized and enforced through an expedited process. Although the rules dictating mandatory or discretionary non-recognition vary slightly from state to state and may or may not include a reciprocity requirement, the process is generally simpler, faster, and less costly than de novo litigation.

\section*{B. System for Recognition and Enforcement of U.S. Judgments Abroad}

The literature discussing recognition and enforcement of foreign judgments is replete with observations of the contrast between the U.S. courts’ generally

\footnotetext{73}{UFMJRA § 5(a).}
\footnotetext{74}{Id. § 5(b).}
\footnotetext{75}{Campbell, supra note 39, at 446 (citing De La Mata v. American Life Ins. Co., 771 F. Supp. 1375, 1386 (D. Del. 1991)).}
\footnotetext{76}{Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).}
\footnotetext{77}{See, e.g., Hilton v. Guyot, 159 U.S. 113, 202 (1895).}
\footnotetext{78}{See, e.g., De La Mata, 771 F. Supp. at 1389 (stating that the “impartiality criteria only comes into play where plaintiff seeks to enforce a judgment from a country whose foreign policy manifests express hostility to the United States and whose jurisprudence has been molded to reflect such hostility.”); see also Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, 293 F. Supp. 892 (S.D.N.Y. 1968), modified by 433 F.2d 686 (2d Cir. 1970) (involving the East German judicial system).}
\footnotetext{79}{Platto & Horton, eds., supra note 18, at 133; see, e.g., Tahan v. Hodgson, 622 F.2d 862 (D.C. Cir. 1981).}
liberal approach to their recognition and enforcement, and the seemingly reverse approach taken by foreign courts reviewing U.S.-made judgments.\textsuperscript{80} \textsuperscript{81} While it is not the goal of this section to address the reasons behind this general disparity, it will lay out some of the main procedural differences that may be responsible for the relative difficulty that a U.S. judgment creditor can encounter in his or her action in foreign court.

Just as a foreign judgment creditor seeking recognition and enforcement in a U.S. court must look to specific state law in planning his or her enforcement action in a specific U.S. state, so too must a creditor aiming to enforce an American judgment abroad look to the enforcing country’s specific laws on the topic.\textsuperscript{82} This, again, is the product of the absence of a multilateral judgments treaty binding other nations to recognize and enforce U.S.-made judgments abroad. Under these circumstances, a creditor possessing a U.S. judgment must bring an entirely new action on the judgment in order to obtain its recognition and enforcement.\textsuperscript{83} Moreover, many countries do not allow for an expedited process comparable to a summary judgment action that is commonly used for recognition and enforcement of foreign judgments in the United States. Consequently, a U.S. creditor must commence a full-length action in foreign court.\textsuperscript{84}

For instance, in the courts of common law countries like Canada and the United Kingdom, a U.S. money judgment will only receive an expedited process if statutory reciprocal arrangements exist between that country and the United States.\textsuperscript{85} No such treaty exists with the United Kingdom and only a few American states bordering Canada have reciprocal arrangements with respective bordering Canadian provinces.\textsuperscript{86} As a result, in the United Kingdom, American litigants must seek recognition and enforcement through the common law, under which a U.S. judgment is recognized merely as an “implied contract to pay” that must itself be enforced by a U.K. court.\textsuperscript{87} Thus, a hypothetical U.S. judgment

\textsuperscript{80} Matthew Adler, \textit{If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments}, 26 LAW \& POL’Y INT’L BUS. 79, 94, n.86 (1994) (citing several cases in which foreign judgments were found enforceable in several U.S. state and federal courts).

\textsuperscript{81} It should be noted here that, while U.S. courts are reputed to be more generous in recognizing foreign court judgments, this does not diminish this study’s conclusion that the U.S. foreign judgment recognition and enforcement law is ripe for reform. As Part IV of this study will show, there are several strong arguments in favor of unifying the current state-based system of foreign judgment recognition and enforcement under a federal statute.

\textsuperscript{82} \textit{See} Philip R. Weems, \textit{How to Enforce U.S. Money Judgments Abroad}, TRIAL, July 1988, at 72.

\textsuperscript{83} \textit{See} Adler, \textit{ supra} note 80, at 94-95; \textit{see also} Ronald A. Brand, \textit{Enforcement of Judgments in the United States and Europe}, 13 J.L. \& COM. 193, 204-05 (1994).

\textsuperscript{84} \textit{See} Singal, \textit{ supra} note 46, at 955; \textit{Survey on Foreign Recognition, supra} note 5, at 18-19.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{See} Survey on Foreign Recognition, \textit{ supra} note 5, at 18-19.

\textsuperscript{87} Christopher Charlesworth, \textit{Can U.S. Judgments be Enforced in the U.K.?}, ¶ 3, \textit{available at
creditor will have to initiate new proceedings in the U.K. court of enforcement; however, such proceedings are said to be simpler than trial de novo, with U.K. courts generally refraining from reexamining the merits of the underlying dispute.88 Additionally, the U.S. judgment holder may be able to avail himself of an expedited procedure available under Part 24 of the U.K. Civil Procedure Rules, which is comparable to U.S. summary judgment.89

By contrast, countries that have a bilateral arrangement with the United Kingdom are covered by the English Administration of Justice Act 1920 and the Foreign Judgments Reciprocal Enforcement Act 1933, which provide for an expedited registration process that essentially domesticates a foreign judgment in the United Kingdom.90 In Canada, litigants must also seek recognition and enforcement through the common law, which is a federal system where recognition and enforcement is reserved for the laws of the provinces.91 As in the courts of the United Kingdom, a common law suit in Canada will treat the U.S. judgment debt as a “contract containing an implied promise to pay,” and the U.S. judgment creditor will have to seek recognition through an ordinary lawsuit to enforce a debt or file the entire suit de novo.92

In civil law countries such as those of continental Europe, recognition and enforcement is governed exclusively by national statute, and courts pay much less attention to prior jurisprudence than in common law countries.93 Exequatur is the civil law system for enforcing foreign judgments, where a foreign judgment is registered with the court and made to have the same force and effect


91. See 1 ENFORCEMENT OF MONEY JUDGMENTS, at Can-10 (Lawrence W. Newman ed., 2006) (“Legislation which provides for enforcement of foreign judgments upon registration has been enacted in all of the provinces and territories except Quebec . . . . They provide a procedure whereby a foreign judgment from a “reciprocating jurisdiction may be registered and, once registered, enforced as though it were a judgment rendered by the courts in that province.”). The United States is not mentioned as a reciprocating jurisdiction for purposes of Canadian judgment registration. Id.

92. Survey on Foreign Recognition, supra note 5, at 3.

93. Id.
as if it had originally been rendered by that registering court. Exequatur has been described as a “simpler” method than the common law enforcement procedure of requiring an action on the foreign judgment; however, here too a judgment debtor can raise a number of the same bases for non-recognition that are applicable in American courts.

For instance, although each country’s laws will vary to some degree, civil law courts almost universally enforce a judgment if the rendering court possessed proper personal and subject-matter jurisdiction, and gave the defendant proper notice. Foreign courts also require that the foreign judgment sought to be enforced be final, have no conflicts with prior final judgments, and comply with the public policy of the enforcing jurisdiction. When it comes to determining whether the rendering U.S. court had jurisdiction and gave due notice, however, many foreign countries will use much stricter standards than a U.S. court making the same determination. For example, many countries, including China, Japan, and Italy, do not recognize the American “long-arm” basis for personal jurisdiction and will likely refuse to recognize and enforce judgments rendered on such jurisdictional grounds. Furthermore, courts in Greece, Japan, Korea, Mexico, Portugal, South Africa, Germany, and Taiwan will not enforce a judgment “if a local court (i.e., the court of the foreign country) would not have had jurisdiction under the facts.”

Additionally, most civil law countries do not approve of America’s use of “tag” or “transient” jurisdiction, which is jurisdiction based

94. See Dodge, supra note 45, at 194.
96. See id.; Adler, supra note 80, at 95.
97. See generally Survey on Foreign Recognition, supra note 5.
98. See id. at 4-5.
100. See generally Survey on Foreign Recognition, supra note 5, at 5-6.
101. Adler, supra note 80, at 95 (citing Weems, supra note 82, at 74).
102. Id.
103. Burnham v. Superior Court of Cal., 495 U.S. 604, 607-08 (1990) (upholding the constitutionality of transient jurisdiction); see also Linda Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. Rev. 33, 75 (1978) (coining the term “tag jurisdiction” to refer to jurisdiction conferred on a defendant served in the physical boundaries of a state, “no matter how transient the defendant’s presence in the state or how unrelated the cause of action”).
solely upon a defendant’s temporary presence in the forum.\textsuperscript{104} To sum up, as one study noted, the “widely varied concepts of jurisdiction makes the prospect of pursuing a judgment abroad an uncertain proposition.”\textsuperscript{105}

Another noteworthy defense for a party objecting to the recognition and enforcement of a U.S.-made judgment is the lack of proper notice defense.\textsuperscript{106} This defense can be neutralized if the creditor followed the procedural requirements of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters,\textsuperscript{107} which codifies accepted procedures for service of process in civil or commercial matters among its signatories, and eliminates the need to serve defendants through consular or diplomatic channels.\textsuperscript{108} However, there are still a number of countries not party to this agreement where the propriety of service may never be certain. In those cases, if the U.S. rendering court did not employ a locally recognized method of service, the resulting judgment will likely be unenforceable abroad.\textsuperscript{109}

In addition to the aforementioned defenses to recognition, two other important defenses are: (1) the lack of reciprocity by the U.S. state in which the judgment was rendered or whose law governed the claim in federal court; or (2) that the U.S. judgment is in violation of the foreign jurisdiction’s public policy. As to the first, a number of countries require at least some form of reciprocity from U.S. courts—among them are Mexico, Canada, Japan, South Africa, Germany, China, and Spain.\textsuperscript{110} In these countries, as a prerequisite to enforcement, the creditor seeking to give effect to an American judgment will have to furnish proof that a judgment of the receiving foreign court would itself

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\textsuperscript{105} Survey on Foreign Recognition, supra note 5, at 9.

\textsuperscript{106} UFMJRA § 4(b)(1) provides that, “[a] foreign judgment need not be recognized if the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend.”


\textsuperscript{109} E.g., in Korea, service of process must be made through a local court and Japan, Mexico, Panama, Portugal, South Africa, Spain, Taiwan, and Venezuela impose service of process procedures uncommon in the United States. See Weems, supra note 82, at 74.

\textsuperscript{110} Survey on Foreign Recognition, supra note 5, at 18-20.
be recognized by the rendering U.S. court. This is a factual question that is largely beyond the litigant’s control.

The public policy defense may be the most important of the affirmative defenses to the recognition and enforcement of foreign judgments. This defense enables the enforcing court to deny recognition where the foreign judgment is contrary to the enforcing jurisdiction’s public policy or repugnant to its laws, morality, or sense of justice. Its importance stems from the sheer breadth of issues that it can theoretically encompass. However, in practice, both in the United States and abroad courts give the public policy defense a narrow interpretation. Notwithstanding this narrow interpretation trend, the public policy exception still has the potential to curtail the recognition and enforcement of some judgments that would be perfectly legitimate in the United States, because they are contrary to the public policy of other countries. Among the American legal practices that have been “repugnant” to the public policy of other states are “treble damages in antitrust suits, punitive damages in product liability suits, [and] unrestricted and excessive jury awards.”

In addition to the aforementioned defenses to the recognition and enforcement of foreign judgments, one extra obstacle is worth exploring: de novo review by the receiving court. While in the United States there is a presumption against reviewing the foreign judgment on its merits, different countries will—to varying degrees—review the original action de novo, making the prior resolution of the dispute ineffective in the foreign forum. For instance, in Belgium, the courts will review the merits of a foreign suit to determine the facts, law, and statute of limitations, while the courts in Italy will review the

111. See Brandon B. Danford, Note, The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?, 23 REV. LITIG. 381, 384.

112. Id.

113. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 98 cmt. g (1969).


117. Survey on Foreign Recognition, supra note 5, at 26. However, the new Belgian Code has done away with the “revision au fond,” or reexamination of the merits, requirement in 2004. Wet
merits of the case if the original judgment was obtained by default, if the judgment debtor is able to prove that the foreign money judgment is based on an error of fact, or if the judgment debtor was unable to produce a document in the original trial due to force majeure or the act of the judgment creditor. In Portugal, provided that the debtor is Portuguese, the courts may review the merits of the case to the extent that the rendering court did not apply Portuguese law if that law is more favorable to the debtor. It should also be noted that, even though the laws of some countries may not outwardly permit reexamination of a foreign case’s merits, the courts of those countries might still be doing so.

Having laid out the general procedure and defenses to the recognition and enforcement of foreign judgments in the United States, and American judgments in foreign courts, I will next address the question of the value that a comprehensive multilateral convention would bring to the existing system. I will end the next section by summarizing the experience of perhaps the most successful multilateral agreement in private international law—the New York Convention.

II. THE NEED FOR A JUDGMENTS CONVENTION

This study takes the view that as a matter of public policy, the unification of the law on recognition and enforcement through an international agreement would be a positive development. Achieving greater uniformity in private international law is not simply of theoretical significance; the international marketplace craves certainty in the enforcement of commercial agreements and the resolution of contractual disputes. This has been shown by the...
commercial world’s wholehearted embrace of the New York Convention, which offers such certainty through its clear and tested method for recognition and enforcement of international arbitral awards. Empirical data presented in this section also suggest that U.S. court judgments are not optimally enforced in foreign courts—even those of our closest trading partners. In light of these facts, this study finds ample reasons to support the idea that the United States should continue pursuing a multilateral judgments convention paralleling the New York Convention. However, as shown by evidence presented in Part III, the prospect for attaining a viable treaty on the subject is currently bleak and leaves the United States with few options for addressing this issue other than to make internal legal reforms that could facilitate a greater flow of judgments.

A. Public Policy Reasons Supporting a Judgments Convention

As a matter of U.S. public policy, the potential benefit of a multilateral convention is clear: it would unify the law on recognition and enforcement among signatories, providing more certainty to foreign investors with international commercial contracts as well as individual litigants determining the proper country in which to file their international disputes.

A judgments convention can provide considerable clarity to the positions of plaintiffs and defendants alike in international litigation. For instance, by consulting the convention, plaintiffs can determine with relative ease and accuracy where they can bring an action capable of generating a judgment assured of recognition and enforcement under that convention. All they would need to know is whether a certain country had signed on to the convention and enacted any necessary implementing legislation.

See also Nadja Vietz, Will Your U.S. Judgment Be Enforced Abroad?, THE ADVOCATE: THE FLORIDA BAR TRIAL LAWYERS SECTION, Vol. XL, No. 1 (Fall 2010) (attorney licensed in Germany and Spain suggesting several steps to avoiding the “nightmare” of having to re-litigate a case due to the inability to enforce it in a foreign forum).

122. See Baumgartner, supra note 2, at 181-82 ("[In Europe,] judgments emanating from the United States are recognized under the same regime as are judgments from less important, far away nations with which there exist no special trading relationships. Indeed . . . there have been countries in which some of the domestic recognition requirements have been interpreted so as to make recognition of U.S. judgments more difficult . . .").

123. This is the approach provided under the New York Convention. See generally Objectives, 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the "New York" Convention, United Nations Commission on International Trade Law, available at http://www.uncitral.org/uncitral/uncltral_texts/arbitration/NYConvention.html (last visited Mar. 3, 2012) ("the [New York Convention] seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards . . . The Convention’s principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.")

124. Treaties may be “self-executing” in that merely becoming a party puts the treaty and all of its obligations in effect. The Supreme Court has defined a “self-executing” treaty as one for which
Zeynalova: The Law on Recognition and Enforcement of Foreign Judgments: Is It Possible?

BERKELEY JOURNAL OF INTERNATIONAL LAW

[Vol. 31:1

170 token, defendants would know in advance which (non-member) states would not automatically recognize and enforce foreign judgments against them with the same relative ease. Accordingly, basic information needed to make litigation decisions would be more accessible to both parties under a convention regulating recognition and enforcement.

The benefits of a recognition convention are more obvious in light of the increasing globalization of economic and social relationships, which produces an ever-growing number of cross-border legal dispute resolutions, many of which must be enforced abroad. 125 In international trade, for example, the recognition and enforcement of judgments rendered by the courts of other countries is “a central tool of trade integration.” 126 International business and commercial interests place immense value on the protection provided by the enforcement of legal rights and remedies. 127 One scholar suggests that in the absence of a mechanism ensuring a means for securing and effectuating such remedies, international traders may “undervalue” trade gains, discounting them and consequently forgoing otherwise socially and/or economically beneficial commercial opportunities. 128 To the extent that the current recognition and enforcement system lacks clarity or creates apprehension to international trade by raising tension among would-be foreign traders and investors, it is ripe for an inclusive multinational reform effort.

Yet another policy reason favoring a unified approach to the enforcement and recognition of judgments is that a single mechanism would remove political disincentives from private dispute resolution. Scholarly opinion notes that, “the law concerning recognition of foreign country judgments . . . regulates a dispute that, in essence, is private.” 129 This assumes that in a majority of scenarios, a private entity or person seeks to enforce locally a foreign judgment against

“no domestic legislation is required to give [it] the force of law in the United States.” Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). Alternatively, “non-self-executing treaties” require implementing legislation, which changes domestic law to enable the state to fulfill its treaty obligations. Medellin v. Texas, 552 U.S. 491, 504-05 (2008) (a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law) (citing Foster v. Neilson, 27 U.S. 253, 315 (1829)). Thus, while treaties “may comprise international commitments, they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.” Id. (citing Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005)).


127. Id.

128. Id.

another private entity or person. However, public interests and politics come into play because each nation is sovereign, and therefore able to unilaterally decide whether and to what extent it will accept another national court’s judgment. Since economic theory suggests that a nation will only give effect to a foreign judgment if doing so is in that nation’s best interest, a nation’s incentive to allow recognition of foreign judgments is therefore very relevant to the recognizing court’s decision whether to do so or not. Moreover, to the extent that domestic political judgments about competing policies and/or values are embedded in judicial judgments, political tensions may emerge as litigants seek recognition and enforcement of these judgments in foreign states holding divergent policies and/or values. A clearly defined set of internationally agreed-upon rules on recognition and enforcement of judgments would remove a recognizing court’s need to grapple with such conflicting political values and/or incentives in the recognition and enforcement process. Specifically, it would do so by providing a greater measure of independence to courts facing public scrutiny. As a result of being bound by the government’s ascension to a multilateral judgments agreement, the judicial branch would be free to

130. See id.

131. While a civil judgment inherently involves a private dispute, its resolution by a court of a sovereign nation involves a public act, deriving its authority and force from the power of the sovereign over its citizens and territory. See McFarland, supra note 45, at 69-70.

132. Consulted literature describes two competing economic hypotheses as relevant to modeling the incentives of countries to recognize foreign country judgments: the first describes the classical Prisoner’s Dilemma game, while the alternate alludes to the Stagg Hunt game. For a detailed description of each, see Perez, supra note 126, at 59; see also Rotem, supra note 129, at 505.

133. Perez, supra note 126, at 46.

134. Analogous issues have inevitably surfaced in the European Union as it seeks to integrate new members, whose court decisions will be recognizable and enforceable under the Brussels Regime regulating which courts have jurisdiction in civil or commercial disputes between individual residents of the different member states of the European Union and the European Free Trade Association. The Brussels Regime consists of two treaties and one regulation: (1) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32, reprinted in 29 I.L.M. 1417 (consolidated and updated text) [hereinafter Brussels Convention]; (2) Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 O.J. (L 319) 40 [hereinafter Lugano Convention]; and (3) the Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I Regulation].

135. See Lee Epstein and Andrew D. Martin, Does Public Opinion Influence the Supreme Court?: Possibly Yes (But We’re Not Sure Why), Symposium, The Judiciary and the Popular Will, 13 U. PA. J. CONST. L. 263 (discussing the influence of public opinion on the Supreme Court’s decisions, and vice versa) (2010).

136. See Emilia Justyna Powell and Jeffrey K. Staton, Domestic Judicial Institutions and Human Rights Treaty Violation, 53 INT’L STUD. Q. 149 (2009), for a discussion of why many states ratify and adopt human rights treaties yet proceed to disregard their obligations under the same treaties. The authors hypothesize that a state’s evaluation of the costs of doing so depends on the effectiveness of its domestic legal system, which is the primary domestic enforcer of new
recognize foreign judgments that might otherwise have been unpalatable by shifting the blame for an unpopular recognition decision to the government.\footnote{Eli Salzberger and Paul Fenn, Judicial Independence: Some Evidence from the English Court of Appeal, 42 J.L. & ECON. 831, 832 (1999) (“Independent courts can be used to shift blame for unpopular collective decisions, they can decrease the effects of uncertainty from political ramifications of collective decision making, and they help to reduce social choice problems.”).}

While the perceived policy benefits of an international agreement on the enforcement and recognition and foreign judges have been laid out, what must be clarified is the empirical research supporting the notion that the current system is indeed in need of the sort of overhaul that such a treaty would introduce. While such data are indeed mixed, there is nevertheless enough support for such a proposed undertaking in legal scholarship, case law, and among practitioners.

\subsection*{B. Empirical and Other Data on the Need for a Convention}

Empirical data on the need for a judgments convention do not clearly point in either direction primarily because comprehensive, current data are lacking. For instance, in 1998, a member of the Study Group advising the U.S. Department of State on negotiations during an attempt at a judgments convention, discussed infra Part III.A, stated that “the little empirical research conducted to date by the author and others has not demonstrated a great need for a convention.”\footnote{Adler, supra note 80, at 82, n.11 (the author’s comments were based on an informal telephone survey of attorneys throughout the United States with the assistance of the state bar associations of Florida, Texas, and New York and this survey yielded no attorneys with negative experience in enforcing U.S. judgments abroad); see also Weintraub, supra note 15, at 170-71 (“[i]f, as I suspect, judgments obtained by U.S. lawyers who follow proper procedures are readily recognized and enforced abroad, there is little need for a convention . . . ”).}

However, that information is out of date and the number of cross-border transactions and resulting disputes increased substantially between 2000 and 2010.\footnote{Andrew Cook & Gordon Smith, International Commercial Arbitration in Asia-Pacific: A Comparison of the Australian and Singapore Systems, 77 J. INST. ARB. 108, 108 (2011).} Yet an inclusive, verified study on the current treatment of U.S. judgments abroad is still lacking. The little information on which we can rely comes from samples of cases that may or may not be representative, as well as anecdotal evidence of a few countries’ general receptiveness to U.S. judgments.\footnote{Louise Ellen Teitz, The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration, 53 AM. J. COMP. L. 543, 548 (2005) (“While broad empirical evidence regarding the enforcement of American judgments abroad is hard to find, we have significant anecdotal evidence.”).}

In a survey of practitioners conducted by the ABA Section of International Litigation and Practice in October-November 2003, over 98% of those responding indicated that a convention on choice of court agreements would be useful for their practice. Over 70% indicated that a convention would make them “more willing to designate litigation instead of arbitration” in their contracts. The survey is a product of the ABA international treaties. Id. at 150-51.
Generally, scholarly opinion concerning receptiveness to U.S. court judgments abroad holds that such judgments do not fare as well as they could when taken to foreign courts for recognition and enforcement. The studies that are available mainly focus on U.S. judgments in European courts, where the results vary dramatically among the individual countries of the European Union and largely depend on the specifics of each judgment, such as the individual defendant, the underlying facts, and the basis of jurisdiction. For instance, Nordic countries like the Netherlands and Norway, as well as Austria, are severe trouble spots for U.S. litigants seeking to enforce their money judgments. Conversely, U.S. judgments do relatively well in European countries where the written recognition requirements are similar to those under U.S. law, such as in: England, France, Greece, Italy, Spain, and Switzerland, and more recently, Germany. The trend in post-communist Eastern European countries, while still weak, seems to be moving those countries’ judicial practices for recognition and enforcement of foreign court judgments closer in line with the European system under the Brussels and Lugano Conventions.

One practitioner, who is licensed to practice in Germany, Spain, and the state of Washington, noted that despite the fact that all of Europe shares basically the same requirements for recognition and enforcement, her experience is that enforceability of U.S. judgments will still vary widely across the continent, with some countries virtually always enforcing and others virtually

Working Group on the Hague Convention on Choice of Court Agreements... The survey was based on the draft text prior to the December 2003 Special Commission which provided some coverage for non-exclusive choice of court agreements.

Id. at n.16.

141. See Singal, supra note 46, at 958. See generally Baumgartner, supra note 2. See also Kevin M. Clermont, A Global Law of Jurisdiction and Judgments: Views from the United States and Japan, 37 CORNELL INT’L L.J. 1, 13-14 (2004) (“Americans are being whipsawed by the European approach. Not only are they still subject (in theory) to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend (in practice) to receive short shrift in European courts.”).

142. See id. at 184-86, 230.

143. See id. at 227 (“The ensuing practice is most deplorable in the Nordic countries and Austria, where most U.S. judgments simply are not recognized.”); but see ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 109 & n.1 (1996) (stating that absent a treaty, the listed European countries, as well as Brazil, do not regard a foreign judgment as having effect outside the rendering state, but pointing out that Dutch courts often recognize foreign judgments even though they are not required to do so); see also Friedrich K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 AM. J. COMP. L. 1, 38 (1988) (stating that the Netherlands has “advanced from a narrow, ethnocentric position to one of considerable liberality toward judgments rendered outside the Common Market”).

144. See Baumgartner, supra note 2, at 185-86, n.71.

145. See id. at n.73 (citing Gerhard Walter & Samuel P. Baumgartner, General Report, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, 1, 19 (Gerhard Walter & Samuel P. Baumgartner eds., 2000); see infra for further discussion of the Brussels and Lugano Conventions governing recognition and enforcement of foreign judgments in member countries.)
Zeynalova: The Law on Recognition and Enforcement of Foreign Judgments: Is It Never?

Another practitioner, frustrated with the exequatur procedure necessary to obtain recognition of a U.S. judgment in Mexico, stated that U.S. judgments are practically “worthless” there.¹⁴⁷ In China, the enforcement of foreign judgments has also been reportedly challenging in recent years.¹⁴⁸ The “lack of transparency” and absence of a system of case-reporting has resulted in the absence of clear empirical measurement of this problem, but secondary sources conclude that a large percentage of judgments, both domestic and foreign, are never enforced.¹⁴⁹ Additionally, officials from the U.S. Departments of Commerce and Justice have claimed to receive frequent inquiries from litigants having enforcement problems.¹⁵⁰

On the other hand, some scholars believe that there is very little evidence, except for a few “horror stories,” suggesting that a significant percentage of American judgment creditors has been unable to satisfy their domestic judgments abroad.¹⁵¹ One such scholar is Friedrich K. Juenger, who explained that American judgment creditors do not normally need to enforce their U.S. judgments abroad because the typical foreign defendants in American courts are global enterprises with enough domestic assets to satisfy any U.S. judgment domestically.¹⁵² Additionally, Juenger suggests that, “[e]ven medium-sized and smaller foreign enterprises are bound to have open accounts or other assets that American judgment creditors can attach.”¹⁵³ If this is so, the problem of recognizing U.S. judgments abroad is limited to cases in which the foreign defendant is a “fairly small business or an individual.”¹⁵⁴ However, the absence of a study confirming the ratio of small-to-large foreign defendants with local assets makes it difficult to assess the validity of this claim.

In the absence of clear empirical data, this study will assess the need for a convention by looking at the relative procedural difficulty for gaining recognition and enforcement of U.S. judgments in countries of the European Union. It is this author’s contention that the existence of a perceived disparity

¹⁴⁶ Vietz, supra note 121, at 16 (author also qualifies her statements by saying that non-default, non-tort money judgments have a much better rate of recognition and enforcement abroad).


¹⁴⁹ Id.

¹⁵⁰ Adler, supra note 80, at n.11.

¹⁵¹ Friedrich K. Juenger, A Hague Judgments Convention?, 24 BROOK. J. INT’L L. 111, 114 (1998). Juenger made this assertion without citing concrete empirical or secondary support, so this author is unable to verify the information upon which Juenger’s contention is based.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Id. at 114, n.18.
between the recognition and enforcement of European-made court judgments in the United States, and U.S.-made judgments in Europe, if any, is made evident by comparing the aforementioned process that a hypothetical U.S. creditor must undergo in a European court with the same process a European creditor holding a European judgment must undergo in another European country’s court. The relative ease of enforcing European judgments in the courts of other European countries is attributed to the membership of every country in the European Community in either the Brussels Convention or the similar Lugano Convention governing enforcement of judgments between their member states. This European convention regime comprises a comprehensive recognition and enforcement mechanism for member states that is comparable to the Full Faith & Credit system of the American states. Because the United States is an outsider, its judgments receive less favorable treatment in Europe than judgments from the member states, and are subject to local laws, which sometimes require an entirely new action on the merits. It is thus likely that a judgment creditor seeking to enforce his or her U.S. judgment in a European court would take longer to achieve this result than a judgment creditor holding a comparable E.U. judgment.

The length of time required for a U.S. creditor to obtain recognition and enforcement of his or her judgment in a foreign court is one provision that negotiators can try to standardize in drafting a multilateral judgments recognition convention. Granted, it is probably impossible to require each country to limit the length of time its courts will use to recognize and enforce a foreign judgment because of differing procedural rules. However, a convention

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155. See generally supra note 134.
157. See Brand, supra note 83, at 195, 205.
158. In the course of this study, no data were found confirming exactly how long it takes for a U.S. court judgment to gain recognition and enforcement in a European court. However, the time needed to obtain recognition and enforcement of a European court’s judgment has been found to take, in the majority of European jurisdictions, “less than a couple of weeks, if recognition and enforcement are not resisted by the judgment-debtor, and less than one year even if recognition and enforcement is resisted.” Stavros Brekoulakis, Enforcement of Foreign Arbitral Awards: Observations on the Efficiency of the Current System and the Gradual Development of Alternative Means of Enforcement, 19 AM. REV. INT’L ARB. 415, nn.36-37 and accompanying text (citing Burkhard Hess, Thomas Pfeiffer & Peter Schlosser, Heidelberg Report on the Application of Regulation Brussels I in the Member States ¶ 454 (2008), available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf). Given the fact that E.U. judgments must simply be “registered” in the courts of other E.U. countries while U.S. judgments must undergo an entirely new judicial proceeding to gain the same recognition and enforcement, this author contends that the length of time it would take an E.U.-made judgment to become enforceable in another E.U. country is shorter than the respective time period for a U.S. judgment. See Samantha Holland, Enforcing Foreign Judgments, Jan. 19, 2009 (describing the process of registering an E.U. judgment in England as “straightforward and therefore relatively inexpensive and quick”), available at http://www.wragge.com/analysis_3788.asp.
can at least provide for an expedited procedure, such as the summary judgment process that exists in common law countries and under the Brussels and Lugano regimes, where recognition and enforcement can take as short as a few weeks.\textsuperscript{159} Under the existing system of recognition and enforcement, where no multilateral convention applies, a judgment creditor seeking recognition and enforcement in another country may encounter waiting periods of between one to two years just to get a court date, and two to nine years for the entire recognition and enforcement process.\textsuperscript{160} It is this study’s suggestion that such a span of time may be prohibitively long for individuals and institutional judgment creditors doing business in the international economy, and provides additional support for a multilateral judgments convention.

The elaborate reciprocity regime described in Part I is another aspect of the current recognition and enforcement system that stands to benefit from a convention. The reciprocity requirements of many countries and some U.S. states have been called “cumbersome and complex,” resulting in “uncertainty and unpredictability” for creditors seeking to enforce their judgments in the United States and abroad.\textsuperscript{161} This is in total contrast to the comprehensive recognition and enforcement regimes of Brussels and Lugano—where reciprocity is more likely.\textsuperscript{162} Outside this treaty system, empirical evidence suggests that the reciprocity requirement delays the resolution of international commercial disputes in the United States and abroad.\textsuperscript{163}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{159} E.g., in unchallenged exequatur proceedings among member states, the length of time for recognition and enforcement may be summarized as follows: in Austria, one week; in Cyprus, one to three months; in England and Wales, one to three weeks; in Estonia, three to six months; in Finland, two to three months; in France, ten to fifteen days; in Germany, three weeks; in Greece, ten days to seven months; in Hungary, one to two hours; in Ireland, one week; in Italy, up to thirty days; in Latvia, ten days; in Lithuania, up to five months; in Luxembourg, one to seven days; in Poland, one to four months; in Slovenia, two to six weeks; in Spain, one to two months; and in Sweden, two to three weeks. Brekoulakis, \textit{supra} note 158, at nn.36-37.
\item \textsuperscript{160} E.g., in Canada it takes one to two years to get a trial date; in Japan it takes two to nine years to obtain recognition of a foreign monetary judgments; in Italy, the average time may be between two and four years. Survey on Foreign Recognition, \textit{supra} note 5, at 26.
\item \textsuperscript{161} Survey on Foreign Recognition, \textit{supra} note 5, at 20.
\item \textsuperscript{162} See \textit{supra} note 147 and accompanying text.
\end{enumerate}
\end{footnotesize}
A U.S. litigant trying to overcome the reciprocity defense faces yet another complication—the fact that some countries are unitary while others, like Canada and Mexico, are federal in their legal organization. In federal countries, just like in the United States, some provinces or states require reciprocity while others do not. As a result, a foreign litigant trying to enforce his or her judgment in a U.S. state requiring reciprocity must know ahead of time whether the foreign rendering court regularly recognizes and enforces judgments from that state’s courts.

The same is true when an enforcing court in a foreign country requiring reciprocity faces a U.S.-made judgment; that is, that foreign enforcing court must decide whether, if faced with a judgment from the same foreign enforcing court arising from similar facts, the U.S. rendering court, in applying its own law, would grant recognition and enforcement to that foreign court’s judgment. In making this determination, the enforcing foreign court must look at the recognition and enforcement law applied by the rendering U.S. court, and if the U.S. court just happened to be a federal district court sitting in diversity, the foreign court would be faced with additional confusion in deciphering the U.S. federal system and Erie’s application within. Clearly, this is a dizzying exercise because, even though there may be mutual reciprocity requirements between the recognizing and rendering courts, the law and its historical application will rarely provide certainty as to whether those two courts actually reciprocate by regularly recognizing and enforcing each other’s decisions. One can imagine how foreign-domiciled businesses would be sensitive to such uncertainty—uncertainty not only within the applicable law, but also as to which of fifty sets of law actually applies.

Thus, any government intent on maintaining a reputation for being a haven for international business should strive to provide its foreign investors and corporate constituents reassurance in the stability and certainty of its legal requirement.

164. For instance, in Canada and Mexico, like in the United States, the laws of the provinces and territories, not the federal law, govern the recognition of foreign judgments. Survey on Foreign Recognition, supra note 5, at 4, 18.

165. E.g., in Canada, the common law provinces, excluding Quebec, have enacted statutes on recognition of foreign judgments that require reciprocity arrangements with the countries from which the judgment in question emanates. Id. at 18. Similarly, in Mexico, a judge has the discretion to deny recognition to a foreign judgment for lack of reciprocity, although there is no mandatory reciprocity requirement. Id.

166. Brand, supra note 163, at 281.

167. Id. at 282.

168. See Hulbert, supra note 9, at 651 (discussing the general uncertainty and complexity of satisfying the reciprocity requirement, which in many cases will require the presentation of expert testimony on the issue).

Because the aforementioned evidence suggests that a single U.S. law on the recognition and enforcement of foreign judgments would better serve the well-being of U.S. commercial interests than the current disunity offered by the state law system governing this sphere, it is this study’s contention that any normative discussion should focus on providing a unified law on the recognition and enforcement of foreign judgments. Having outlined the empirical evidence supporting the need for some reform of the current judgments recognition system, the next section will briefly summarize the success of the New York Convention in addressing some of the same problems with respect to the recognition and enforcement of foreign arbitral awards.

C. Recognition and Enforcement Under the New York Convention

It is often acknowledged that the most substantial benefit of international arbitration is that in the overwhelming majority of cases it produces an award that is entitled to recognition and enforcement in the 147 countries that have ratified the New York Convention. International arbitration affords the closest thing to certainty of recognition and enforcement of foreign-made legal decisions currently allowed under our transnational legal system. This is because arbitration governed by the New York Convention greatly reduces the uncertainties of litigation in foreign courts by providing those courts with strong guidance and a clear framework in enforcing international arbitral awards. On the other hand, the uncertainties of length, procedure, cost, and, on occasion, bias are ever present in the current system of recognition and enforcement of foreign judgments.

The New York Convention applies to all arbitral awards rendered pursuant to a written arbitration agreement in a country other than the state of enforcement, and arbitral awards not considered as domestic by the enforcing state. If the New York Convention covers an arbitral award, member countries must recognize the award as binding and enforce it in accordance with local procedural requirements. Enforcement must take place unless a party

170. See id. (stating that international business entities desire certainty in legal affairs, and might well prefer to be subject to the laws of one national system of adjudication rather than fifty separate court systems).
174. See generally Survey on Foreign Recognition, supra note 5.
175. New York Convention, supra note 3, arts. I(1), II(1)-(2).
176. Id. art. III. Furthermore, countries party to the Convention cannot impose “substantially
objects to it and proves that one of the enumerated grounds for non-enforcement exists. Article V provides the exclusive grounds for refusing enforcement:

(a) invalidity of the arbitration agreement;
(b) violation of due process;
(c) excess by arbitrator of his or her authority;
(d) defect in the composition of the arbitral tribunal or in the arbitral procedure; and
(e) award not binding, suspended or set aside in the country of origin.\(^{177}\)

Domestic courts can also refuse to enforce the award under Article V(2) if its subject matter is incapable of settlement by arbitration under the enforcing country’s laws, or if recognition or enforcement of the award would violate the enforcing country’s public policy.\(^{178}\)

While the list of grounds for non-recognition in Article V markedly resembles the list of grounds for non-recognition of foreign judgments under the UFMJRA,\(^{179}\) the grounds enumerated in Article V are more limited in number, scope, and amount of discretion afforded to reviewing courts for refusing enforcement of arbitral awards.\(^{180}\) In keeping with the New York Convention’s general policy favoring arbitration, courts narrowly apply these grounds for non-enforcement.\(^{181}\) For instance, the U.S. courts in particular only apply the public policy ground for non-enforcement, “where enforcement would violate our most basic notions of morality and justice.”\(^{182}\) This narrow reading of the seven grounds for non-recognition by national courts, which tends to favor enforcement, allows the New York Convention to remain a standard in the law of recognition and enforcement of international arbitral awards.

Another major achievement of the New York Convention is that it avoids the reciprocity problem. By allowing member states to sign the Convention, while at the same time limiting its application through the “reciprocity” and “commercial” reservations, the Convention avoids confusion among member

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more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” Id.

177. Id. arts. V(1)(a)-(e).
178. Id. arts. V(2)(a)-(b).
179. See supra pp. 10-11.
182. Waterside Ocean Navigation Co. v. Int’l Navigation Ltd., 737 F.2d 150, 152 (2d Cir. 1984); Parsons & Whittomore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (rejecting an American construction company’s public policy defense because “[t]o deny enforcement of this award largely because of the United States’ falling out with Egypt . . . would mean converting a defense intended to be of narrow scope into a major loophole in the Convention’s mechanism for enforcement”).
states concerning reciprocity. The disadvantage of this system is that the permissible reservations may be used both to limit the New York Convention’s applicability to “commercial” disputes under the enforcing state’s laws, and to restrict its scope to the enforcement of arbitration agreements made only on the territories of other signatory countries. The United States is one of the countries invoking both reservations. However, even in light of this disadvantage, the New York Convention’s reciprocity provision is easy to understand and apply because there is no confusion over whether a country reciprocates: it either will or will not adopt the reciprocity reservation at the time of its accession to the treaty. Consequently, this makes the New York Convention’s reciprocity reservation more palatable than the cumbersome reciprocity regime in the existing system of judgments enforcement. Reciprocity is therefore not an issue among member states. Between member and non-member states, member states will specify whether they require reciprocity upon signing the treaty.

An additional major advantage of the New York Convention is the shorter amount of time it takes to get recognition and enforcement in the courts. First, since most arbitral awards are complied with voluntarily, a majority of them simply do not require judicial recognition and enforcement. However, when arbitral awards are challenged and require recognition and enforcement in court,  

183. New York Convention, art. I(3) (allowing a member state making that reservation to apply the Convention to the recognition and enforcement of awards made in the territory of another member state only).  
184. Id.  
185. F.A.A., 9 U.S.C. §§ 202 (limiting the application of the New York Convention in the United States only to arbitration agreements or awards “arising out of a legal relationship . . . which is considered as commercial”), 304 (limiting the recognition and enforcement of foreign arbitral awards under the Inter-American Convention on International Commercial Arbitration only to states that have acceded to the treaty). Seventy-four states have made the reciprocity reservation; forty-five states have made the “commercial” dispute reservation. See Status 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 25, 2012).  
186. Joseph T. McLaughlin, Enforcement of Arbitral Awards Under the New York Convention: Practice in U.S. Courts, 477 PLI/Comm 275, 280 (1988). If a country does not explicitly adopt the New York Convention with the reciprocity reservation in Article XIV, a court of that member state will not then be able to refuse to recognize or enforce a foreign arbitration award from another member state in the absence of any of the narrowly construed range of objections permitted by Article V(1)(a)-(d), (e) of the New York Convention, none of which include reciprocity. See RAKTA, 508 F.2d at 973; 9 U.S.C. § 207.  
187. See Status 1958—Convention, supra note 185 (noting that states designated with the letter “(b)” in the Notes box have indicated that, with regard to awards made in the territory of non-contracting states, such states will apply the Convention only to the extent to which those non-member states grant reciprocal treatment).  
empirical evidence suggests that the time frame is usually shorter than that required for recognition and enforcement of foreign judgments outside a treaty system.\textsuperscript{189} For instance, in England, getting an arbitral award recognized and enforced through the common law system can take three to six months when there is no serious dispute, or nine to twenty-four months for a disputed claim.\textsuperscript{190} In Brazil, the procedure takes two to fourteen months between the application for confirmation and a final decision.\textsuperscript{191} In the European Union, the enforcement of arbitral awards requires less than one year in about fifty-seven percent of cases.\textsuperscript{192} Unlike recognition and enforcement of judgments, these time periods are framed in terms of months, not years.\textsuperscript{193}

Having described the perceived benefits of a judgments convention and the successful experience of the international private law system under the New York Convention, it is useful to highlight prior attempts by the United States to negotiate a judgments convention, and to consider the reasons that such efforts have thus far been fruitless.

III. PREVIOUS ATTEMPTS TO NEGOTIATE A JUDGMENTS CONVENTION

America is no stranger to the idea of negotiating a multilateral convention on the recognition and enforcement of foreign court judgments. As shown in the previous section, the U.S. government’s ascension to the New York Convention has indeed had positive results. Despite the differences between private arbitration and public litigation, there does not seem to be a clear and fundamental reason why a judgments convention would not prove similarly advantageous. However, it seems that practice has proven that despite a multilateral judgments convention’s recognized benefits, the urgency necessary to spur the world to sign one, is absent. The United States, in particular, while leading a number of failed drafting initiatives at the Hague Conference, seems to operate under a historical hesitation and lack of urgency to sign such a binding agreement. Before explaining this lackluster attitude among the negotiating partners, the next section will describe the past few attempts the United States has made to draft a multilateral and bilateral judgments treaty.

\textsuperscript{189} Compare to notes 159-160 supra and accompanying text.
\textsuperscript{192} Brekoulakis, \textit{supra} note 159, at 431.
\textsuperscript{193} See \textit{supra} Part II.B., at 25.
A. Past Treaty Experience

Since 1893, the Hague Conference has worked to conclude multilateral conventions with rules for the exercise of jurisdiction and recognition and enforcement of resulting judgments. One such example is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which came into force in 1971 with only three signatories, none of which made the necessary bilateral agreements to make the treaty operational. The 1971 Convention put forward rules applicable only to the court being asked to recognize a judgment produced in a foreign court of origin; these rules were not applicable to the originating court. This produced questionable results by allowing the enforcing court to review, although indirectly, questions of the originating court’s jurisdiction through review of its judgments. Further, the “unilateral” nature of this agreement left signatories free to claim jurisdiction on their own idiosyncratic grounds, and imposed an additional cumbersome implementation step, which required member states wishing to avail themselves of the agreement’s provision to execute bilateral agreements with one another. While the United States never ratified the 1971 Convention, by 1992, the U.S. State Department joined a second effort to negotiate a multilateral convention on recognition and enforcement of judgments. This second effort addressed the failure in the earlier attempt by having rules of direct jurisdiction applicable to both the court of origin and reviewing courts. The goal of these rules was to remove the need for “indirect consideration of the jurisdiction of the court of origin” by the enforcing court. The envisioned result would thus be something akin to the Brussels and Lugano Conventions.

196. See Brand & Herrup, supra note 195, at 7.
197. See id.
199. See von Mehren, supra note 195, at 282.
200. See Brand & Herrup, supra note 195, at 7-8 (discussing the difference between “single,” “double,” and “mixed” conventions).
201. See id. at 7.
202. See id. (describing the Brussels and Lugano Conventions as “double conventions,” providing “both rules of direct jurisdiction applicable in the court in which the case is first brought
After nearly ten years of negotiations, this early vision proved too contentious to muster a majority consensus. In particular, U.S. drafters worried that its constitution-based jurisdictional system was incompatible with the civil law-oriented Brussels-type convention. After this setback, the Convention working group abandoned its draft agreement and therefore its goal of producing a comprehensive list of required jurisdictional bases, any of which would have automatically entitled a judgment to recognition and enforcement in the courts of contracting states. As a result, any ambitions to produce a successor to the 1971 Convention became a dead letter. The drafters switched gears to writing a jurisdictional convention on a topic that could muster a general consensus—a convention on jurisdiction based on the agreement of the parties, such as judicial forum selection clauses. This change in direction produced the 2005 Convention on the Choice of Courts (“2005 Convention”), which America signed in 2009 but has yet to ratify.

Under the 2005 Convention, any judgment rendered by a court exercising jurisdiction in accordance with an “exclusive choice of court agreement” must be recognized and enforced in the courts of other contracting states, save for a number of specified grounds for non-recognition. In general, the 2005 Convention seems to create a regime of judgment recognition similar to the one established by the New York Convention, but for commercial contracts in which parties specifically agree to a forum. While this agreement presents a commendable stride toward international recognition of domestic court judgments, it stops far short of the goal set out by the U.S. State Department when it initially proposed that the Hague Conference take up negotiations for a multilateral convention with rules applicable to both the exercise of jurisdiction and the recognition of resulting judgments.

An even earlier, and far less ambitious, attempt to ascend into a judgments treaty took place in 1976, when the United States and the United Kingdom ("the court of origin"), as well as rules applicable in the court of another state asked to recognize and enforce the resulting judgment ("the court addressed").

See id. at 9-10.

See id. at 9; see, e.g., Ronald A. Brand, Due Process, Jurisdiction, and the Hague Judgments Convention, 60 U. Pitt. L. Rev. 661, 703-05 (1999).

See Brand & Herrup, supra note 195, at 9.


See Brand & Herrup, supra note 195, at 6, n.19.
Zeynalova: The Law on Recognition and Enforcement of Foreign Judgments: Is It Possible?  

BERKELEY JOURNAL OF INTERNATIONAL LAW  
Vol. 31:1

initiated their own Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters ("U.S.-U.K. Convention"). Unfortunately, that treaty was never ratified. The fact that the United States and the United Kingdom, two countries sharing the same legal traditions, language, and cultural influences, could not agree to a mutually acceptable treaty seriously calls into question the ability to produce anything on a grander scale, for example, through the Hague Conference.

For the United States, the biggest advantage of a judgments treaty with the United Kingdom would have been its removal of the perceived unequal treatment of U.S. judgments under the Brussels Convention in the United Kingdom. The basis of this unequal treatment is that under the Brussels Convention, member states are required to recognize judgments rendered in other member states against non-domiciliaries of the European Community, even when those judgments are reached under certain jurisdictional bases thought to be excessive. This is termed "exorbitant jurisdiction," because it allows judgments against outsiders to be recognized even when the originating court lacked a generally accepted basis for jurisdiction. The United Kingdom, while still a member of the Brussels regime, would have been able to make such a treaty with the United States because Article 59 of the Brussels Convention allows deviation from its jurisdictional provisions. Indeed, this provision


211. Adler, supra note 80, at 92-93.

212. Id. at 91. There is at least one secondary source pointing out that the fear of judgments being enforced in the European Union against Americans rendered on the basis of the Brussels Convention’s exorbitant jurisdiction is purely theoretical and yet to be realized in practice. See Andreas F. Lowenfeld, Thoughts About a Multilateral Judgments Convention: A Reaction to the von Mehren Report, 57 LAW & CONTEMP. PROBS. 289, 303 (1994). However, because this study seems rather dated, its lasting persuasiveness is difficult to determine without new empirical data on the matter.

213. See Smit, supra note 210, at 445.

214. See Russell, supra note 104, at 59 ("Exorbitant’ jurisdiction is jurisdiction validly exercised under the jurisdictional rules of a state that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction"). Catherine Kessedjian describes that "exorbitant jurisdiction" may arise "when the court seised does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the parties to the dispute." CATHERINE KESSEDJIAN, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ¶ 138 (Hague Conference on Private International Law, Prel. Doc. No. 7, 1997).

215. "This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3." Brussels Convention, supra
would have allowed America to avoid the effects of the Brussels Convention through country-by-country treaty negotiation.\textsuperscript{216} However, the fact that the United States could not get a treaty with even this closest of allies does not bode well for its prospects with other E.U. members.

Some of the greatest points of contention arising during the negotiations of the proposed U.S.-U.K. Convention stemmed from U.S. long-arm jurisdiction. This is because at least one British interest group, namely the British insurance industry, was not thrilled about the prospect of British courts having to enforce U.S. judgments made on the basis of this form of jurisdiction.\textsuperscript{217} Even more controversial was the fear that British courts would also have to recognize and enforce what were regarded as “outrageous” American jury awards in products liability cases.\textsuperscript{218} But even after the draft was revised to allow for British review of U.S. jury awards when awards were considered substantially greater than those that a British court would have awarded, British opposition was not appeased, and negotiations officially ended in 1981.\textsuperscript{219}

\section*{B. Historical Apprehensions in the United States}

The United States’ difficulty in negotiating a treaty on reciprocal recognition of court judgments is not solely a result of its negotiating partners’ apprehension to aspects of the U.S. legal system; the problem is far more complex. The impasse may be partially attributed to internal changes in U.S. policies on private and public international law, which have been shaped by its changing role in the international community and the world economy since World War II.\textsuperscript{220} While this study cannot give thorough treatment to this complex topic, it is important to note that the United States once harbored a strong and vocal policy of avoiding international treaties on matters of international law and procedure.\textsuperscript{221} The late nineteenth and twentieth centuries presented a number of missed opportunities to negotiate such treaties with civil law countries eager to engage the United States in a recognition treaty.\textsuperscript{222}

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\item \textsuperscript{216} Brand, supra note 83, at 204.
\item \textsuperscript{217} See Adler, supra note 80, at 93.
\item \textsuperscript{218} \textit{id.}; see also David L. Woodward, \textit{Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Economic Community}, 8 N.C.J. INT’L L. & COM. REG. 299, 312 (1983).
\item \textsuperscript{220} For a detailed account of the origins of U.S. policies on matters of transnational litigation, see \textsc{Samuel P. Baumgartner}, \textit{§ 2; United States, in The Proposed Hague Convention on Jurisdiction and Foreign Judgments}, at 16-46 (Mohr Siebeck 2003).
\item \textsuperscript{221} Id. at 16.
\end{enumerate}
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Although this internal anti-entanglement policy was gradually discarded with respect to private international law after the United States signed the New York Convention and finally joined the Hague Conference as a full member in 1963, the policy may still plague America’s outlook with respect to public international law.\textsuperscript{223}

The difference between private and public international law, and an ongoing fear within the U.S. government of signing an international agreement binding U.S. courts, may partially explain the existence of a highly supported arbitration convention and the simultaneous absence of a similar court judgments convention.\textsuperscript{224} Even while the U.S. government has exercised leadership in the negotiation of a judgments convention,\textsuperscript{225} America still hesitates to surrender its ability to act unilaterally by refusing to make important concessions that could require real changes to domestic legislation or procedural jurisdictional rules.\textsuperscript{226} It is unclear whether this attitude is the product of interest groups’ influence—states’ rights advocates and conservative American jurists have been among the groups opposed to such an agreement—or whether it is simply a relic of a once-held attitude that common law was superior to civil law.\textsuperscript{227} For instance, the United States was likely to have been more partial to ascending to the New York Convention because arbitration decisions do not produce binding precedent and so the body of law produced by enforcing such awards will not invade the system of stare decisis revered by common law jurists.\textsuperscript{228} Under this logic, the United States would be unwilling to accept the prescribed list of jurisdictional bases that would be the foundation of any multilateral judgments convention, because such a list has the potential of clashing with American jurisdictional case law.

Another aspect of the private-public law dichotomy that may be relevant in shedding light on America’s seemingly contradictory attitude toward an arbitration convention on the one hand, and a judgments convention on the other, is the absence of the element of “party consent” in court proceedings and its necessity in arbitral proceedings. Specifically, because arbitration under the New York Convention rests fully upon the agreement of the parties and does not


\textsuperscript{224} See Baumgartner, supra note 220, at 41-43; Burbank, supra note 222, at 103-04.

\textsuperscript{225} See, e.g., supra at 42-44, recounting the State Department’s efforts with respect to negotiating the unpopular 1971 Convention and the resumed negotiation efforts of 1992.

\textsuperscript{226} Baumgartner, supra note 220, at 44-45.

\textsuperscript{227} \textit{Id.} at 24-25.

bind non-parties, it may have been more palatable for the United States to agree to the enforcement of international arbitral awards through a multilateral framework since such awards generally do not affect non-parties who did not agree to be bound by the arbitration. Moreover, it can be argued that the American accession to the New York Convention was done out of economic (and political) necessity for advancing American commercial interests in an essentially globalized economy.229 The U.S. Supreme Court cited international commercial interests and supporting America’s competitiveness in international commerce in its landmark decision to enforce an arbitration agreement in Scherk v. Alberto-Culver Co.230 and subsequent case law231 Scherk advanced the notion that the courts’ reliability in enforcing arbitration agreements specifying in advance the forum for dispute resolution is “almost indispensable” for international business.232 While justifying the vigilant recognition of international arbitration awards, this economic rationale does not similarly apply to the recognition of foreign court judgments—which do not necessarily arise from contractual causes of action or party consent to a specific forum.

Although no longer very persuasive, another reason historically cited to explain the United States’ hesitancy to enter a binding judgments convention was the federal government’s purported lack of power to enter into international treaties binding civil procedure—which was considered a matter of state law.233 Congressional enactment of the Federal Rules of Civil Procedure and the U.S. Supreme Court’s decision in Missouri v. Holland,234 which held that the federal government could bind states by entering into treaties even when Congress lacked the power to legislate on the matter, greatly dispelled this notion.235 Nonetheless, this line of reasoning may still hold some ground for political interests sensitive to states’ rights arguments.

229. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (“The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”).
230. Id. at 516, 519 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972)) (“An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, ‘reflect a parochial concept that all disputes must be resolved under our laws and in our courts’ . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”).
232. 417 U.S. at 507.
233. See Burbank, supra note 222, at 103-07.
234. 252 U.S. 416, 433 (1920).
235. See id.
Paradoxically, ambivalence toward a multilateral convention on recognition and enforcement of foreign judgments may also stem from experience with the New York Convention. On the one hand, the New York Convention has been a success in terms of number of signatories and the regularity with which it is enforced. On the other hand, it has a number of drawbacks that U.S. legal scholars and practitioners raise in opposing a similar agreement on enforcement of court judgments. One such drawback is the difficulty of mustering enough support to modify—through amendment—a multilateral convention to meet new developments in law and technology. Another difficulty lies in the varying interpretations that certain aspects of the New York Convention receive among its numerous member states, thus hampering its very goal of obtaining uniformity of law. A third drawback is that signing a treaty will freeze the law on recognition and enforcement, preventing it from developing through subsequent case law. In this respect, an alternative, such as a federal statute unifying the law on foreign judgments in the United States, may be more advantageous as it will allow case law to continue developing the law on recognition and enforcement of foreign court judgments.

C. Lack of Political Will and Urgency in the United States

Despite the almost unanimous agreement that the United States would benefit from a multilateral judgments convention—perhaps even more than any other party to such a convention—it is difficult to predict whether it will ever accede to such an agreement. The efforts of the last few decades indicate that it is not for lack of trying that such an agreement has not been reached. Moreover, what those past attempts do seem to show for certain is that the U.S. government does, or at least at one point did, take the initiative in pursuing multilateral negotiations through the Hague Convention process.

237. E.g., the courts of several Asian member states of the New York Convention have given different interpretations to the public policy exception in Article V(2)(b), with some interpreting it as including domestic public policy, international public policy and transnational public policy. Erman Rajagukguk, Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on Grounds of Public Policy, Presented in the 3rd Asian Law Institute (ASLI) Annual Conference on “The Development of Law in Asia: Convergence versus Divergence?” at 1-2 (Shanghai May 25-26, 2006).
238. Smit, supra note 210, at 444.
239. See Joseph J. Simeone, The Recognition and Enforceability of Foreign Country Judgments, 37 ST. LOUIS U. L.J. 341, 357 (1993) (stating that “the modern trend in the courts of the United States is to grant recognition of, and conclusive effect to, a foreign judgment if all the elements of due process and civilized procedures are followed . . . .”); compare Adler, supra note 80, at 81 (stating that “the consensus” in academic circles and in the U.S. Department of State is that “individuals seeking enforcement of U.S. judgments abroad have not had the same good fortune as foreign litigants seeking enforcement in the United States”).
240. See, e.g., supra Part III.A.
Furthermore, whatever the reasons motivating the U.S. government for pursuing these negotiations, these reasons are not strong enough to force its hand in making the kinds of concessions that would result in a deal with America’s negotiating partners.

Indeed, while this study has put forth empirical data suggesting that at least in some countries, recognition and enforcement of U.S. judgments is a problem, that problem has not been considered serious enough to warrant widespread attention from U.S. legislators and policymakers. For unknown reasons that opponents to a multilateral treaty have interpreted as evidence of the absence of a significant problem in the current foreign judgments recognition system, there has been no wave of public outcries from aggrieved judgment creditors in the media or at Congressional hearings. Because there is no urgency, there is a lack of motivation and political capital for the U.S. government to consider agreeing to some of the more serious demands from its negotiating partners at the Hague Conference.

Among the most painful of these concessions would likely require the United States to agree to place some of its courts’ commonly used bases of jurisdiction on a “black list,” and to accept some jurisdictional bases rejected in U.S. courts—presenting separate constitutional problems that could later defeat the convention in court. Such a concession would mean that if a U.S. rendering court obtained jurisdiction on the basis of one of the prohibited jurisdictional bases appearing on the black list, then its judgment would not be entitled to enforcement in a contracting state. This would effectively deprive the convention of its intended purpose of making recognition and enforcement of U.S. judgments predictable. While the concession would not apply to...

241. See Danford, supra note 111, at 432.

242. See supra Part II.B; see also Juenger, supra note 151, at 114.

243. See Weintraub, supra note 15, at 185-86. Among the bases of jurisdiction offensive in other legal systems, and primarily in civil law Europe are: tag jurisdiction, and general jurisdiction based on continuous and systematic activities in the forum found constitutional in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). Conversely, the U.S. Supreme Court has rejected bases for jurisdiction that are on the Brussels Convention’s “white list” of exclusive bases of jurisdiction. See Weintraub, supra note 15, at 190. Specifically, in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987), a plurality of the Supreme Court rejected jurisdiction over a component parts manufacturer in a tort suit even though that manufacturer was aware that its product would reach the forum of the accident. The Court explained that because there was no act “purposefully directed toward the forum State,” the mere awareness that a product may reach a remote jurisdiction when put in the stream of commerce was insufficient to satisfy the requirement for minimum contacts under the Due Process Clause. Id. Under Article 5(3) of the Brussels Convention, which provides jurisdiction in tort suits “where the harmful event occurred,” there would have been jurisdiction in Asahi. See Weintraub, supra note 15, at 191; Brussels Convention, supra note 134, art. 5(3). If a judgments convention agreed to by the United States contains a provision similar to Article 5(3) and thus contrary to Asahi, it is possible to envision a due process challenge in a U.S. court to the recognition of a foreign judgment based on such an offending jurisdictional basis. Weintraub, supra note 15, at 193-95.

244. See von Mehren, supra note 195, at 283.
interstate cases already covered by the Full Faith & Credit Clause, its prospective negative effect on the recognition of U.S. judgments abroad would likely be politically costly to an extent that would destroy the necessary domestic support for such a diplomatic compromise. Another serious point of contention that U.S. convention negotiators are likely to encounter concerns punitive damages and large jury verdicts. In fact, this was one of the main difficulties identified by the Hague Special Commission to study the proposal for a judgments convention in June 1994 and June 1996. It is possible that if the United States concedes to a treaty eliminating treble and punitive damages, a due process and equal protection challenge is probable. However, even the prospect of this kind of concession would probably meet intense opposition from U.S. plaintiff’s lawyers sufficient to kill it. These examples again highlight the incongruence between what it takes to obtain a viable convention, and the domestic will to make the necessary sacrifices. But as noted below, there is a general sense that the United States seems to have much more to gain from a convention than its foreign counterparts and it may get nowhere without making some very difficult concessions.

D. Few Incentives for the International Community

While several reasons have been outlined justifying negotiation of a multilateral convention in terms of American interests, there seem to be few incentives for America’s negotiating partners to enter into a judgments convention. For example, one scholar has argued that America’s relative liberalism in recognizing and enforcing foreign money-judgments has “backfired” and that the “reciprocity provisions imposed by foreign nations are, to a large extent, the consequence of the United States’ failure to enter bilateral or multilateral treaties with those nations.” The logic underpinning this argument is that by requiring reciprocity from already pro-enforcement U.S. courts, foreign nations ensure the perpetuation of this pro-enforcement environment, and reap the benefits of a judgments-recognition treaty with the United States without actually having to bargain to get such a treaty. If America will, for the most part, freely enforce foreign judgments, why should other countries rush to bind themselves into a multilateral—or even bilateral—treaty with the United States?

245. See Weintraub, supra note 15, at 201 (“How the United States arranges interstate jurisdiction of state and federal courts is not a concern of other signatories.”); see supra Part I.A.
246. See Weintraub, supra note 15, at 203 (citing Kessedjian, supra note 214, ¶ 192).
247. See Adler, supra note 80, at 103 (stating that “a treaty that eliminated treble and punitive damages could be challenged on due process and equal protection grounds”).
248. See id.
249. See Danford, supra note 111, at 383.
250. See Singal, supra note 46, at 956.
Additionally, it should be recalled that Europe already has a successful internal judgments-enforcement regime in place through the Brussels and Lugano Conventions. In this respect, it seems that the United States would disproportionately benefit from a convention that would place American judgments on a more equal footing with other foreign judgments already being recognized in other foreign courts. On the other hand, Europe is not America’s only trading partner, and other countries lacking judgments-enforcement regimes, like China, may have some incentives to negotiate a convention, such as the desire to do away with mutual reciprocity requirements.

However, a recent trend against application of foreign law in U.S. courts that may extend to the recognition of foreign judgments seems to be on the horizon. Twenty-eight states introduced legislation banning the application of international law (specifically Islamic Sharia law) in 2011 alone.251 If this trend does shift the liberal American approach to the recognition of foreign country judgments, then the potential improvements in recognition practices which would result from a contemplated convention may amount to a bargaining chip for the United States. Still, it is too early to tell whether any of the aforementioned state bills will become law, and if they do, the effect they will have on the current system of foreign judgment recognition and enforcement in the United States. In summary, it is not only the United States that is not storming the halls of the Hague Conference demanding a judgments convention; it is also the international community. Arguably, America has shown initiative in overcoming its historical apprehension to a judgments convention by leading the effort to draft a convention in 1992. However, as shown in Part III.A, that effort quickly fizzled, as there was no support for the very type of convention envisioned. Perhaps what this experience has shown is that while a judgments convention may be an ideal to strive for, in actuality, there is simply not enough urgency within the international community to produce one. Regardless of the lack of initiative within the international community, the United States can take immediate unilateral steps to unify its own recognition law—steps that would not only result in positive domestic legal reform, but also potentially increase

Zeynalova: The Law on Recognition and Enforcement of Foreign Judgments: Is I
192 

America’s negotiation leverage for an eventual convention through the Hague Conference.252

IV. THE ALTERNATIVE OF A FEDERAL STATUTE

Despite the current lack of urgency in the United States and abroad to achieve an international judgments convention, America can take action to rectify the problems in the current recognition and enforcement regime thus far identified in this paper. The United States has a variety of options to resolve the regime’s outstanding issues. Alternatives for increasing mutual recognition of judgments on the international level—although they will not be discussed in detail here—may include bilateral judgment-recognition treaties or bilateral investment treaties requiring resolution of all private transnational disputes between citizens of the contracting states via New York Convention arbitration. However, there are difficulties attendant to the enactment of a bilateral treaty, as shown by the United States’ and the United Kingdom’s failure to agree to a bilateral treaty in 1977.253 Since past experience has shown that the U.S. government may not be able to wield the desired impact over the recognition and enforcement of its judgments abroad through an international agreement, it is certainly capable of addressing the most prominent flaws in its own current state law system of recognition and enforcement of foreign judgments, rather than waiting for an international treaty to materialize.254 The best solution

252. One potential benefit of a federal statute is that it would bring about coherence to the otherwise confused and perhaps even divergent state of law on certain topics that were of particular difficulty for the Hague negotiators. One such area of law is “lis pendens,” which addresses the possibility of the same dispute proceeding simultaneously in two different forums by requiring any court that is not the court first seised of the dispute to decline jurisdiction in favor of that first court. See Brussels Convention, supra note 134, art. 21; Council Regulation 44/2001, 2001 O.J. (L 12) 1, art. 27. Lis pendens is addressed in European courts under the Brussels Convention, but is not specifically treated under U.S. law. See id.; GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 462 (Klewer Law International 3d ed. 1996) (stating that the U.S. Supreme Court has not considered the concept of lis pendens in the international context and few lower court decisions exist on the matter) (citing Advantage Int’l Mgmt. Inc. v. Martinez, 1994 WL 482114 (S.D.N.Y. Sept. 7, 1994)).


254. In fact, the impetus for the ALI’s project of drafting a model federal statute unifying the state laws on the recognition and enforcement of foreign country judgments was not a “sudden realization” that federal law governing the subject would be a positive change. Linda J. Silberman and Andreas F. Lowenfeld, A Different Challenge for the ALI: Herein of Foreign Country Judgments, and International Treaty, and an American Statute, 75 IND. L.J. 635, 635, n.3 (2000) (citing Andreas F. Lowenfeld, Nationalizing International Law: Essay in Honor of Louis Henkin, 36 COLUM. J. TRANSNAT’L L. 121, 127-31 (1997)). The catalyst was the last round of negotiations at the Hague Conference for a multilateral convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments, which would have presumably required federal implementation legislation for the resulting non-self-executing convention to become operative in the United States. Id. at n.4 (citing generally Peter H. Pfund, The Project of the Hague Conference on Private
available to the United States for revamping its judgments regime is a domestic one: a federal foreign judgments statute.

Scholarly opinion on the issue seems divided, but also indicates that one of the most prominently identifiable flaws we can attempt to rectify domestically is the lack of uniformity among the state laws on recognition and enforcement.\(^{255}\) Indeed, for foreign litigants, the prospect of navigating the laws of fifty different jurisdictions seems a daunting task, notwithstanding the adoption of some version of the UFMJRA by a majority of U.S. states.\(^{256}\) To address this problem, several scholars have stated that a federal statute unifying these state laws, while not crucial, may be a step in the right direction.\(^{257}\) In light of these opinions and America’s favorable experience with the New York Convention, as implemented by the Federal Arbitration Act,\(^{258}\) it is this study’s suggestion that Congress strongly consider adopting a federal statute setting a uniform procedure for the recognition and enforcement of foreign judgments. One specific model for Congress to consult, with some suggested changes, is the ALI’s draft proposal, entitled The Foreign Judgments Recognition and Enforcement Act (“FJREA”).\(^{259}\)

A. Why Federalization of the State Foreign Judgment Laws is Preferred

The empirical evidence summarized in this study has shown that achieving greater uniformity in the law on foreign judgment recognition and enforcement “is not of merely theoretical significance.”\(^{260}\) Predictability and efficiency in the

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\(^{255}\) Trooboff, supra note 121; see generally supra Part II.B.


\(^{257}\) See, e.g., Robert C. Casad, Issue Preclusion and Foreign Country Judgments: Whose Law?, 70 IOWA L. REV. 53, 79 (1984) (stating that “although the [U.S.] Republic can survive without federalizing the law of foreign judgment recognition, the arguments in favor of that position are strong and the principal argument against it amounts to little more than inertia”); Brand, supra note 163, at 300 (stating that “federal legislation would seem appropriate in the recognition of foreign judgments”); Bellinger, supra note 53, at 13 (“A federal law would immediately provide uniformity and predictability for recognition of foreign judgments across the United States and would prevent judgment creditors from forum-shopping among the states.”)


\(^{259}\) See Danford, supra note 111, at 424; contra Adler, supra note 80, at 96.

\(^{260}\) For a discussion of the states to have adopted the UFMJRA, in whole or in part, see supra notes 32-47 and accompanying text. Also noteworthy is the ALI’s commentary, as put forth in its introductory note to the ALI Proposed Statute, that “it would strike anyone as strange to learn that the judgment of the English or German or Japanese court might be recognized and enforced in Texas but not in Arkansas, in Pennsylvania but not in New Jersey.” ALI Proposed Statute, supra note 13, intro. note, at 1.
ability to enforce rights is a vital element in the global marketplace and is a matter of international reputation for a leading economic power like the United States. It is this study’s contention that a federal statute is necessary to close the gaps in American foreign judgment law that remain as a result of its decentralization under state law, where decisions of international importance are left to ad hoc development in local legislatures and subsequently in state courts.

Indeed, the U.S. state-law system on recognition of foreign court judgments is almost an oddity in the international legal context, where this issue is considered to be an aspect of the diplomatic relationship between the nation of the court rendering the original judgment, and the nation of the court reviewing it for recognition and enforcement. If foreign judgment law is indeed a matter integrally tied to a nation’s foreign and diplomatic relations, then this law should undoubtedly rise to the realm of national law, which in the U.S. legal system is governed by federal law. Allowing state courts to apply their own state-made laws to questions that implicate U.S. foreign relations implies that state courts have the sovereign authority to decide whether or not to apply the principle of Comity of Nations to foreign court judgments. However, this is simply inconsistent with the comity concept as defined in Hilton v. Guyot, which, although decided pre-Erie, found comity to reside squarely within the body of federal common law. Additionally, while the question of state sovereignty in

261. See Trooboff, supra note 121.
262. See ALI Proposed Statute, supra note 13, intro. note, at 1.
263. "Just as the recognition or enforcement of an American judgment in France or Italy is an aspect of the relationship between the United States and the country where the recognition or enforcement is sought, so a foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties." ALI Proposed Statute, supra note 13, intro. note, at 1. While this assertion has been attacked for overvaluing the public law aspect of foreign judgments and undervaluing or even ignoring states’ interests in the administration of justice and determination of private rights within their borders, see McFarland, supra note 45, at 87-88, 91, this study concludes that the interests of the federal system in preserving exclusive control over foreign relations as well as maintaining a clear divide in parallel state and federal judicial systems, fully support the ALI’s perspective.
264. See McFarland, supra note 45, at 87; infra notes 268-269 and accompanying text.
265. See McFarland, supra note 45, at 64-66, n.15 (discussing the question of sovereignty in the context of U.S. foreign judgment recognition law and the Hilton decision).
266. 159 U.S. 113, 163-64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.").
267. Id. at 163-65 ("The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial
the American federal system of government greatly exceeds the scope of this paper, the federal Constitution clearly preempts areas of foreign policy-making and international diplomacy as well as preventing the individual states from negotiating treaties without Congressional consent.\textsuperscript{268} It is thus clear that a federal statute preempting the state law on foreign judgments is within the constitutional powers reserved for the federal government,\textsuperscript{269} and the federal government should exercise this enumerated power to lift the foreign country judgment law into the national arena where it belongs.

While some opponents of the federalization of foreign judgment recognition law argue that displacement of the current state law regime would undermine federalist interests or reduce the states’ authority over their laws,\textsuperscript{270} such arguments themselves acknowledge the complications that the application of state law to such judgments poses for U.S. foreign affairs.\textsuperscript{271} For instance, courts applying state foreign judgment law based on the UFMJRA can currently reject judgments emanating from countries where the reviewing court believes that fair justice is essentially unavailable.\textsuperscript{272} Such a finding is possible if a reviewing court can show that “corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals.”\textsuperscript{273} While U.S. courts have historically shown restraint in making categorical findings dubbing an entire nation’s judicial system as essentially unjust,\textsuperscript{274} at least four courts decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.”); see also McFarland, supra note 45, at nn.123-25 (comparing the outcome in Johnson v. Compagnie Generale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926), where the New York State Supreme Court found the issue of comity to be one of state law, to Hilton, 159 U.S. at 164, where the U.S. Supreme Court used Justice Story’s Commentaries on the Conflict of Laws to locate comity in the federal law).

\textsuperscript{268}. U.S. CONST. art. I, § 10, cl. 3.

\textsuperscript{269}. Id. art. I, § 8, cl. 3 (granting Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes); see McFarland, supra note 45, at 87. The ALI also agrees that “there is no constitutional problem with the proposed [federal] statute.” ALI Proposed Statute, supra note 13, intro. note, at 3 (“Whether regarded as inherent in the sovereignty of the nation, or as derived from the national power over foreign relations shared by Congress and the Executive, or as derived from the national power to regulate commerce with foreign nations, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-321 (1936), legislation to govern recognition and enforcement of foreign judgments fits comfortably into the power of Congress.”).

\textsuperscript{270}. See McFarland, supra note 45, at 63.

\textsuperscript{271}. See id. at 66 (“If Florida’s law governs, yet another complication emerges because Florida’s judgment may implicate the foreign affairs of the United States.”).


\textsuperscript{273}. UFCMJRA § 4, cmt. 11 (2005).

\textsuperscript{274}. See Nelson, supra note 60, at 903, n.31 (citing In re Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 499 (2d Cir. 2002) (rejecting, in a forum non conveniens application, the claim that the courts of the Ukraine are corrupt); Universal Trading & Inv. Co. v. Kiritchenko, No. C-99-3073 MMC, 2007 U.S. Dist. LEXIS 66317, at *49-50 (N.D. Cal. Sept. 7, 2007) (“[T]he Court finds UTI has not demonstrated that the Ukrainian courts are
have made such findings—denying recognition to judgments from Iran, Liberia, Paraguay, and Nicaragua. It seems that allowing courts to make such sensitive judicial findings of fact, potentially tarnishing an entire nation’s legal institutions, based on state law, should be re-evaluated from the perspective of American foreign policy. While this study does not dispute the necessity of granting U.S. courts the ability to make such controversial findings when considering recognition actions, it suggests that raising this matter to federal statutory law would advance comity by showing America’s diplomatic partners that the U.S. Congress takes the grant of judicial power to make such findings very seriously.

Moreover, the potential for political controversy and local bias that can arise with regard to foreign judgments also warrants the preemption of this issue by federal law. The notion that some areas of law and some litigants require a more neutral forum offered by the federal courts and a national legislature is not new—indeed, it is directly implicated in federal diversity and alienage jurisdiction, which were created to address the same concerns. Foreign so lacking in impartiality, due process, or procedural fairness that the United States courts should disregard all Ukrainian court decisions as a matter of course, or the particular decisions at issue herein.

275. See Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995) (finding that the judicial system of post-1979 revolutionary Iran lacked procedural due process and was inherently biased against the Pahlavi royal family.)

276. See Bridgeway Corp. v. Citibank, 201 F.3d 134, 138 (2d Cir. 2000) (denying enforcement to a Liberian judgment based on the State Department’s finding that “Liberia’s judicial system was in a state of disarray and the provisions of the Constitution concerning the judiciary were no longer followed”).


279. An analogous international legal context dominated by federal law is the “act of state doctrine,” which precludes U.S. courts from inquiring into the validity of public acts a foreign sovereign committed on their own territory. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410, 425 (1964) (“We are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”). The most commonly stated purpose for diversity jurisdiction is the protection of out-of-state litigants from local bias by state courts and state legislatures. See Debra Lyn Bassett, The Hidden Bias in Diversity Jurisdiction, 81, WASH. U.L.Q. 119, 123 (2003) (citing JOHN J. COUNC ET AL., CIVIL PROCEDURE CASES AND MATERIALS 260 (8th ed. 2001) (setting out presumption “that diversity jurisdiction was created to protect out-of-state litigants against local prejudice”); 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601, at 339 (2d ed. 1984) (“Several historians have suggested . . . that the real fear was not of the state courts, but of the state legislatures . . . . The fear of state legislatures may have arisen less from interstate hostility than from a desire to protect commercial interests from class bias.”).
litigants, and particularly foreign business entities with vast economic interests in the United States, have been known to encounter in state courts the influence of nativism and irrational fear of foreign domination of U.S. capital,281 which has manifested itself in outrageous jury awards and punitive damages against some foreign parties.282 Such perceived bias in civil litigation involving foreign parties has the potential to spill over and affect America’s general trade relations.283 In fact, the federal government’s support for alienage jurisdiction shows its view that internationally-tinged domestic adjudication should be reserved for governance under federal law. Specifically, the U.S. State Department’s support for alienage jurisdiction is based on its position that while state courts are competent and impartial, “the availability of civil jurisdiction in federal courts under a single nationwide system of rules tends to provide a useful reassurance to foreign governments and their citizens.”284

A similar argument in favor of federal law can be made with regard to the UFMJRA’s public policy defense, which allows courts to refuse to recognize a foreign judgment if such judgment is “repugnant” to the public policy of the state whose law the reviewing court applies.285 Because “public policy” is a purposely vague, undefined term providing reviewing courts an “escape hatch” when faced with potentially unpopular judgments, defining it in terms of larger federal public policy interests instead of potentially variable, and even idiosyncratic, state policies may make this a more concrete defense.286


285. UFMJRA § 4(b)(3); UFCMJRA § 4(c)(3).

286. See Silberman & Lowenfeld, supra note 254, at 643-44 (comparing two U.S. state court cases denying recognition and enforcement to two English libel judgments, one based on Maryland’s
Therefore, making the recognition and enforcement of foreign judgments a matter of federal law is likely to mitigate the effects of some of the more extreme trends in state public policy on otherwise meritorious foreign judgments. For instance, as already noted in this study, in 2011 a number of state legislatures introduced legislation banning the application of Islamic Sharia law in state courts. The impact that this wave of legislation—clearly undergirded by anti-Islamic sentiment—will have on those states’ foreign judgment-recognition statutes is still unclear. However, one can assume that foreign judgments emanating from Muslim countries, at least where Sharia law is recognized, will likely be implicated. This turn toward anti-foreign-law state legislation seems to highlight that now and more than ever, the state-law system on foreign judgments is prime for unification under federal auspices.

Once it is recognized that foreign judgment law is “properly a national concern and thus appropriately made subject to a national standard,” then such a standard must be established in the form of a federal statute. One such framework that has already been developed is the ALI’s proposed FJREA, a final draft of which was produced in 2006 after some seven years of drafting, research, and thoughtful commentary.

B. The ALI’s Model Federal Statute—the FJREA

The FJREA has thirteen sections: section one covers scope and definitions; section two deals with recognition and enforcement generally; section three explains the effect of a foreign judgment in the United States; section four discusses claim and issue preclusion and the effect of a challenge to jurisdiction in the rendering court; section five covers non-recognition of a foreign

287. See Johnson, supra note 169, at 51 (noting that alienage jurisdiction allows foreign litigants some distance from the xenophobia they may encounter in state courts, particularly because “[u]nlike their state counterparts, federal courts are more likely to be ‘above the fray’ than in its midst.”).

288. See supra note 251 and accompanying text.


290. Sharia is a source of laws in Muslim countries whose constitutions name Islam as the state religion. See Toni Johnson, Council on Foreign Relations Background, Islam: Governing Under Sharia, http://www.cfr.org/religion/islam-governing-under-sharia/p8034#p5 (last visited Mar. 1, 2012), Examples include: Saudi Arabia, Kuwait, Bahrain, Yemen, the United Arab Emirates, Pakistan, Egypt, Iran, and Iraq. Id.

291. Hulbert, supra note 9, at 656.

judgment; section six lists bases of jurisdiction not recognized or enforced; section seven outlines the reciprocity requirement; section eight discusses U.S. court jurisdiction; section nine sets forth the means of enforcement of foreign judgments; section ten covers the registration of foreign money judgments in federal courts; section eleven allows courts to decline jurisdiction when a prior action is pending; section twelve outlines provisional measures for aiding foreign proceedings; and section thirteen discusses foreign orders concerning U.S. litigation.293

The FJREA would redistribute law-making power with respect to foreign judgments by shifting to Congress the ability to legislate on matters that, since the U.S. Supreme Court’s decision in *Erie*, have been left to state legislatures, state courts, and federal courts applying state law.294 The ALI’s Reporters persuasively argue that a federal standard is necessary because “recognition and enforcement of judgments is and ought to be a matter of national concern.”295 The FJREA would preempt state law governing foreign judgments, and essentially eliminate the UFMJRA and its revision—the UFCMJRA—through Congressional adoption of the FJREA.296 The FJREA would also give U.S. federal district and state courts concurrent federal question jurisdiction over actions brought to enforce a foreign judgment or to secure a declaration with respect to recognition under that act.297 Thus, like in arbitration matters governed by the Federal Arbitration Act,298 the FJREA would grant defendants in foreign-country recognition proceedings the ability to remove the action from state to federal court.299

By granting concurrent jurisdiction to state and federal courts, rather than exclusive jurisdiction to federal courts, the FJREA mitigates the statute’s impact on state courts by not fully depriving them of their traditional role in enforcing their respective laws on foreign judgments.300 The FJREA achieves this by leaving the choice between state and federal court to the plaintiff bringing the


295. *Id.* at 3.
296. *See id.* at 4.
297. ALI Proposed Statute, supra note 13, § 8(a).
299. *See* ALI Proposed Statute, supra note 13, § 8(b) (“Any such action brought in a state court may be removed by any defendant against whom the enforcement or declaration is sought to the United States District Court for the district embracing the place where the action is pending . . . ”).
300. The ALI’s Reporters suggest that the drafters may have at one point considered a version of the model federal statute that would give federal courts exclusive jurisdiction. *See* Silberman & Lowenfeld, supra note 254, at 645.
Zeynalova: The Law on Recognition and Enforcement of Foreign Judgments: Is It Time to Move Forward?

It is this study’s contention that adoption of the FJREA at the federal level would be more desirable than a more widespread adoption of the UFMJRA by states. Federal enactment would preempt states from picking and choosing desirable portions of the FJREA, as has been the case with some states that have inserted a reciprocity provision when adopting the UFMJRA or the updated UFCMJRA. If enacted, the FJREA, or a similar proposed federal statute, would be the exclusive avenue for recognition and enforcement of foreign judgments and would thus achieve the sort of procedural uniformity that is currently reserved only for foreign arbitral awards.

Aside from money judgments, the FJREA, as currently worded, would recognize other judgments that have traditionally fallen within the scope of public law, such as judgments for taxes, fines, and penalties, so long as the Act’s other procedural requirements are met. Judgments related to family law, bankruptcy, and liquidation are completely excluded under the FJREA, leaving their recognition and enforcement to state law, as is currently the case. On its face, because the FJREA allows recognition and enforcement of tax, fine, and penalty judgments, it expands the state laws currently based on the UFMJRA and the UFCMJRA, encompassing judgments in the realm of foreign public law, which common law courts traditionally refrained from enforcing. However, practically speaking, although the UFMJRA does not extend to public law judgments, it does not prevent courts from enforcing judgments that it does not cover, which may include some public law judgments falling outside the

301. ALI Proposed Statute, supra note 13, § 8(a)-(b). It is useful to reiterate here, that by allowing the defendant the procedural right of removal, the FJREA diffuses the plaintiff’s sole discretion over the U.S. forum in which to bring his or her recognition and enforcement action. See ALI Proposed Statute, supra note 13, § 8(b).

302. See supra notes 44-45, 51-53 and accompanying text for a discussion of states that in enacting the UFMJRA, have at least partially modified its effect by concurrently adopting a reciprocity requirement.

303. ALI Proposed Statute, supra note 13, § 2(b)(i).

304. See id. § 1(a)(i)-(iii).

305. UFMJRA § 1(2) (explicitly restricting the scope of the Act by defining “foreign judgment” as “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters”) (emphasis added); UFCMJRA § 3(a), (b) (“This [Act] does not apply to a foreign-country judgment, even if the foreign country judgment grants or denies recovery of a sum of money, to the extent that the foreign country judgment is (1) a judgment for taxes; (2) a fine or other penalty; or (3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.”).

306. See Dodge, supra note 45, at 161 (“when the foreign law at issue is public—criminal, tax, antitrust, or securities law, for example—courts will neither apply that law to decide a case nor enforce the decision of a foreign court applying that law. The non-enforcement of foreign public law constitutes a ‘public law taboo.’”). (footnotes omitted).

307. UFMJRA § 5(b) (“The courts of this state may recognize other bases of jurisdiction.”). The Reporter’s Comment to section 5 also notes that “[s]ubsection (b) makes clear that the Act does not prevent the courts in the enacting state from recognizing foreign judgments rendered on the
list of the explicitly prohibited classes of judgments.\textsuperscript{308} As a result, even under the current UFMJRA, U.S. courts may be able to extend recognition to foreign judgments for taxes, fines, and penalties under the Comity of Nations\textsuperscript{309} principle or through “indirect” enforcement.\textsuperscript{310} By analogy, this possibility for broader enforcement under the current UFMJRA regime may make the FJREA’s expanded scope a bit less controversial—at least in theory.

Besides providing foreign judgment creditors a clearer picture of what to expect when bringing their judgments to U.S. courts, a national standard for judgment recognition and enforcement of the type embodied in the FJREA is likely to bring the additional benefit of reducing litigants’ urge to “forum shop” among U.S. states\textsuperscript{311}—although this of course depends on states uniformly interpreting the FJREA if enacted. Additionally, such uniformity is bound to help, not harm, America’s future prospects of entering into a multilateral judgments convention since uniformity will give its negotiating partners a clearer picture of the U.S. legal system, and perhaps alleviate worries of inconsistency in reciprocity requirements among the U.S. states.\textsuperscript{312}

\footnotesize

\textit{Berkeley Journal of International Law, Vol. 31, Iss. 1 [2013], Art. 4}

201

bases of jurisdiction not mentioned in the Act.” \textit{Id.} A number of states to have adopted the UFMJRA have explicitly adopted this savings clause into their foreign judgments statutes. See, e.g., Cal. Code Civ. Proc. § 1723 (“This chapter does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this chapter.”); Tex. Civ. Prac. & Rem. § 36.008 (“This chapter does not prevent the recognition of a foreign country judgment in a situation not covered by this chapter.”).

\textsuperscript{308}. For instance, antitrust and securities judgments, which are considered to fall within the public law realm, are not specifically excluded from recognition under the UFMJRA, while public law judgments concerning, \textit{inter alia}, taxes, fines and family law are specifically excluded. See \textit{supra} note 305. Applying the cannon of statutory interpretation known as \textit{expressio unius est exclusio alterius} (the express mention of one thing excludes all others) suggests that the unenumerated classes of public law judgments are thus excluded from the prohibited class expressly defined in the statute. See William N. Eskridge, Jr., \textit{Dynamic Statutory Interpretation} 323 (President and Fellows of Harvard College 1994); \textit{see also} Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (applying the cannon \textit{expressio unius est exclusio alterius}).

\textsuperscript{309}. \textit{See} Dodge, \textit{supra} note 45, at 176-77, 225, n.58 (citing The Anne, 1 F. Cas., 955, 956 (C.C.D. Mass. 1818) (No. 412) (“It has appeared to me more consonant with national comity, sound morals, and public justice, that courts of all countries should lend their aid to discountenance frauds upon the revenue laws of other countries, and decline to enforce any agreements entered into for the purpose of evading those laws.”)), n.372 (citing Re Sefel Geophysical Ltd. (1988), 62 Alta. L.R. 2d 193, 202 (Can. Alta. Q.B.) (stating that refusal to recognize foreign tax claims in bankruptcy is inconsistent with “present trends of international comity in the recognition of foreign bankruptcy proceedings”)).

\textsuperscript{310}. \textit{See} Dodge, \textit{supra} note 45, at 176, n.465 (citing Re Lord Cable, [1977] 1 W.L.R. 7 (Ch.) at 23-26 (Eng.) (enforcing a foreign tax judgment where failure to do so would subject a trustee to liability)), n.99 (citing Re Sefel Geophysical Ltd. (1988), 54 (4th) 117, 126 (Can. Alb. Q.B.) (holding that “foreign tax claims should be recognized in a Canadian liquidation setting . . . as long as they are of a type that accords with general Canadian concepts of fairness and decency in state imposed burdens”)).

\textsuperscript{311}. \textit{See} Danford, \textit{supra} note 111, at 426.

\textsuperscript{312}. \textit{See id.} (arguing that consolidation of state laws on foreign judgment recognition and enforcement “would be of considerable assistance to the United States if it should seek to accede to a judgments convention because it would be helpful to have a single bargaining platform going into...
C. Proposed Changes to the FJREA

Although the FJREA is generally a solid model for a federal statute on the recognition and enforcement of foreign judgments, one provision of the FJREA in its current form that this study does not recommend for adoption is section seven. Section seven requires a U.S. court examining a foreign judgment for recognition to determine the reciprocal recognition and enforcement of comparable U.S. judgments in the courts of the state of origin when a judgment-debtor raises the “lack of reciprocity” defense.313 This section places the burden of proof on the party resisting recognition or enforcement for lack of reciprocity.314 While support for the FJREA is generally strong, it is this provision that has garnered much controversy in scholarship, as well as among members of the ALI itself.315 Indeed, during the drafting phase, the ALI membership was divided on whether to include the reciprocity requirement, but it nevertheless carried the day in two substantial votes at the ALI’s two successive annual meetings.316 The main arguments against including a reciprocity requirement within the FJREA are the same as the general arguments against reciprocity—mainly that it creates an often-insurmountable hurdle to recognition and enforcement and increases the time, cost, and uncertainty of the entire court recognition process.317 One especially poignant argument against negotiations . . . .” and might even be a “prerequisite to entering into multilateral negotiations in The Hague or anywhere else”).

313. ALI Proposed Statute, supra note 13, §§ 7(a), (b).

314. Id. § 7(b). Having placed the burden on the party resisting recognition and enforcement, it seems that section 7 essentially creates a rebuttable presumption that reciprocity exists. See Singal, supra note 46, at 969.

315. See Singal, supra note 46, at 961 (“Many scholars agree that uniformity in the United States recognition and enforcement of foreign judgments is long overdue and that the ALI’s Proposed Act could be the catalyst for such reform. The heated debate, however, is about whether a reciprocity requirement ought to be included in the Proposed Act.”); ALI Proposed Statute, supra note 13, Reporters’ Preface, at xii (acknowledging that the proposed statute’s reciprocity requirement departs from the general view eschewing reciprocity and describing its own reciprocity requirement as “the most controversial issue” encountered in the project).

316. See generally Publications Catalog, supra note 293; see also Michael Traynor, 82nd Annual Meeting of the American Law Institute, 82 A.L.I. Proc. 94, 159 (2005) (stating that a reciprocity requirement “has been much debated in [the ALI] and included in the FJREA final draft by a vote of sixty-eight to fifty-five).

317. See supra pp. 11-12, 22-23, 35-37; see also McFarland, supra note 45, at 95-100 (laying out five persuasive arguments against accepting reciprocity as part of the ALI Proposed Statute); see generally Singal, supra note 46. For arguments in favor of accepting reciprocity in the ALI Proposed Statute, see ALI Proposed Statute, supra note 13, § 7, cmt. b (“The purpose of the reciprocity provision . . . is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to the recognition and enforcement of judgments rendered in the United States.”); see also Bellinger, supra note 53, at 10-11 (arguing that the current U.S. system, where most states don’t require reciprocity, is “overly generous to other nations,” and that the absence of a uniform reciprocity requirement among the states has had a negative impact on the U.S. State Department’s ability to negotiate an international judgments-recognition agreement).
including reciprocity in the proposed federal statute is that it would be a step backwards from the current trend against reciprocity within the state laws and Restatements.318 This, of course, assumes that the trend against reciprocity is a welcome one, which is this study’s position. Thus, without this reciprocity requirement, the FJREA remains a productive template for a possible statute unifying an often-confusing system, but with it, it may be more beneficial to leave things as they currently stand.

Notably, section 7(a) of the FJREA departs from the discretionary reciprocity standards in effect in most of the states that have adopted a reciprocity requirement319 by mandating that a reviewing U.S. court always refuse recognition and enforcement to a foreign judgment if that court finds a lack of reciprocity with the foreign rendering court.320 The ALI Reporters’ Notes highlight the difference between the discretion currently left to courts evaluating the reciprocity defense under the state foreign judgment laws, and the lack of such discretion afforded to them under the FJREA.321 This departure from the current reciprocity regime is further compounded by the fact that the


319. See Dodge, supra note 45, at n.446 (“In Georgia and Massachusetts, reciprocity is required. See Ga. Code Ann. § 9-12-114(10) (1993) (“A foreign judgment shall not be recognized if . . . [t]he party seeking to enforce the judgment fails to demonstrate that judgments of courts of the United States and of states thereof of the same type and based on substantially similar jurisdictional grounds are recognized and enforced in the courts of the foreign state.”); Mass. Gen. Laws Ann. ch. 235 § 23A (West 1996) (“A judgment shall not be recognized if . . . judgments of this state are not recognized in the courts of the foreign state.”). In Florida, Idaho, North Carolina, Ohio, and Texas, the absence of reciprocity is a discretionary basis for non-enforcement. See Fla. Stat. § 55.605(2)(g) (2000) (“A foreign judgment need not be recognized if . . . [t]he foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state.”); Idaho Code § 10-1404(2)(g) (Michie 1998) (“A foreign judgment need not be recognized if . . . [j]udgments of this state are not recognized in the courts of the foreign state.”); N.C. Gen. Stat § 1804(b)(7) (1999) (“A foreign judgment need not be recognized if . . . [t]he foreign court rendering the judgment would not recognize a comparable judgment of this State.”); Ohio Rev. Code Ann. § 2329.92(B) (2001) (“A foreign country judgment rendered in a foreign country that does not have a procedure for recognizing judgments made by courts of other countries and their political subdivisions . . . that is substantially similar to [Ohio’s] . . . may be recognized and enforced . . . in the discretion of the court.”); Tex. Civ. Prac. & Rem. Code Ann. § 36.005(b)(7) (Vernon 1997) (“A foreign country judgment need not be recognized if . . . the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of ‘foreign country judgment.’”)).

320. See ALI Proposed Statute, supra note 13, § 7(a) (“A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.”) (emphasis added).

321. Id. § 7, Reporters’ Note 4 (“Most of the states that have included a provision on reciprocity in their version of the Uniform Foreign Money-Judgments Recognition Act have authorized, but not required, their courts to deny recognition or enforcement on the ground of lack of reciprocity, thus leaving the decision to the discretion of the trial court. This Act, designed to achieve uniformity throughout the United States, rejects discretion in this context.”).
FJREA would extend the reciprocity requirement beyond money-judgments, because unlike the UFMJRA and the UFCMJRA, the FJREA reaches beyond money-judgments to some judgments traditionally within the realm of public law.\(^{322}\) This expansion of the reciprocity requirement’s reach is likely to increase the length of foreign judgment litigation by producing mini-trials on this issue alone,\(^{323}\) which seems to defeat the very efficiency, clarity, and unity of law that is a central goal of any proposed federal statute—the other main goal being the promotion of reciprocal recognition of U.S. judgments abroad. The irony of this matter was aptly described by Professor Richard W. Hulbert, who noted that in every case in which a foreign judgment is denied on a finding of lacking reciprocity, the judgment creditor is deprived of a victory not because of any procedural or other substantive defect in the proceedings leading to the foreign judgment, but because “the American court refusing enforcement decides that some hypothetical American judgment in some hypothetical case would not, or might not, be enforced by (some or all of the) courts in the country of origin.”\(^{324}\) Thus, it is this study’s position that the FJREA’s broad and mandatory reciprocity provision would levy an unnecessary additional burden on U.S. courts and litigants, and should therefore be excised from any version of a federal foreign judgments statute that Congress considers.

CONCLUSION

This study has attempted to provide a glimpse of the current system of foreign judgment recognition and enforcement in the United States and abroad with the aim of describing why that system is ripe for change. Having found that a number of areas in the existing foreign judgment law would stand to benefit from its standardization and unification, this study concludes that a multilateral convention would be beneficial. However, given the lack of urgency and the political deadlock that has characterized previous failed attempts to negotiate such a convention, this study finds that now may not be the time for another attempt, as few of the past roadblocks have been removed. On the other hand, some have argued that the mere “exercise” of negotiating a convention would be beneficial because it would allow America’s scholars, policymakers, and legal practitioners to evaluate the aspects of the U.S. legal system that even America’s

\(^{322}\) Particularly, it broadens the scope of recognizable foreign country judgments to include judgments for taxes, fines, and penalties. See ALI Proposed Statute, supra note 13, § 2(b)(i); Singal, supra note 46, at 962 (arguing that the reach of the ALI Proposed Statute’s reciprocity provision extends to judgments redressing individual and human rights); see also supra notes 303-310 and accompanying text.

\(^{323}\) See Hulbert, supra note 9, at 651 (arguing that in a suit to enforce a foreign judgment, the difficulty of establishing whether reciprocity exists may pose a great challenge, so much so that it is likely to be raised by any judgment debtor hoping to defend against its enforcement).

\(^{324}\) Id. at 652-53.
closest allies find unacceptable. That option, however, does not move us closer to addressing any of the practical issues identified as problematic within the current judgments recognition system—such as international confusion about the state of U.S. law on a subject of great significance to international commercial interests.

Heeding the calls of scholars, practitioners, and legal experts at the ALI, the U.S. Congress is in the best position to act upon this matter by enacting national legislation preempting the existing medley of state laws—a mélange of adoptions of the outdated UFMJRA or the UFCMJRA. The infusion of certainty and uniformity into the U.S. law of foreign judgments provided by a federal statute will not only benefit judgment creditors vying for recognition and enforcement of their foreign awards in American courts. It also has the potential to bring about a reciprocal increase of foreign enforcement of U.S. court judgments by assuring other countries’ courts of the reliability of America’s foreign judgment law. Looking to the ALI’s proposed FJREA supports this notion, because it creates one rather than fifty places for foreign courts to look when assessing whether their judgments would be enforced in the United States. This issue of reciprocity—an issue integral to every judgment enforcement conversation—offers perhaps the most compelling and widely discussed reason to unify U.S. law in this area. Consequently, it is this study’s assertion that any proposal for a federal statue to Congress, whether it is based on the FJREA or some other prototype, reject the oft-criticized reciprocity requirement in full—lest it entirely overtake the legislative proposal, plunging it into the dust bin of history as has been the fate of so many other unrealized statutes before it.

325. See Weintraub, supra note 15, at 220.
326. It is noteworthy that despite the growing treatment this subject, and particularly the ALI Proposed Statute, have received in scholarship, Congress has yet to take significant steps in analyzing the legislative merits of this proposal. John Bellinger’s recent keynote address to the 2012 Stefan A. Riesenfeld Symposium on recognition of foreign judgments at University of California, Berkeley, School of Law, suggested that the reason behind Congressional inaction in this sphere lies with the Uniform Law Commission’s opposition to the enactment of a federal law that would preempt the existing state law regime. See Bellinger, supra note 53, at 14-15.
327. See Martinez, supra note 23, at 82.
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Symposium: Introduction

John Yoo

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Introduction

John Yoo*

In June 2012, the American Enterprise Institute hosted a symposium, “I Pledge Allegiance to the United ... Nations? Global Governance and the Challenge to the American Constitution.” Scholars and public officials discussed how globalization not only provokes change in the international order, but also the American constitutional and political system. Speakers examined several issues, including whether global governance fundamentally differs from earlier forms of international cooperation, constitutional limits to the United States’ engagement in multilateral cooperation, and the U.S. treaty-making process. The authors featured in the following section all spoke at the symposium, and their papers were selected for publication in this journal.

The book, Taming Globalization: International Law, Sovereignty, and the U.S. Constitution, which I co-authored with Julian Ku, helped provide context for the different panels, though we cannot claim that our theses were met by universal agreement. Our book, which examines the tension between accelerating twenty-first-century globalization and the eighteenth century Constitution, seeks to identify the points of conflict and bring together scholarship of the last decade to suggest potential solutions. In the book, we make two broad claims. First, we identify a series of challenges that globalization creates for the U.S. constitutional system. Those challenges manifest themselves, we argue, in a new and expansive form of international law and new international institutions empowered to interpret and apply that law.

Second, we offer a framework for interpreting the U.S. Constitution in a way that both accommodates the new pressures flowing from globalization, but also maintains the fundamental aspects of American sovereignty. Our framework relies upon giving the Constitution’s political branches—the President, the Congress, and the states—the central roles in the accommodation of globalization.

As for our first claim, all of the panel’s participants agreed that globalization, in the form of international law and international institutions,

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poses a real and serious challenge to the American constitutional system. Indeed, several participants offered new examples of these challenges that we did not address in our book. For instance, Tai-Heng Cheng, Professor of Law at New York Law School and Partner at Quinn Emanuel Urquhart & Sullivan LLP, described how globalization affects the United States and other nations through the International Centre for the Settlement of Investment Disputes (ICSID). ICSID arbitration addresses a classic dilemma for international cooperation: Nations have an interest in advancing foreign private investment in their countries, but investors suffer from the possibility of government expropriation or discriminatory practices favoring local parties. One way for a government to signal a commitment to obey promises against expropriation or discrimination is to adopt a treaty with independent adjudication of disputes—encouraging investment by giving up some sovereignty. On the other hand, such commitments may reduce the ability of nations to correct errors made by international adjudicators. Reviewing past ICSID decisions, Professor Cheng finds no link between a nation’s annulment of arbitration awards and reductions in investment flows. As a result, he argues that considerations of “justice” should have greater place in reviewing ICSID decisions, effectively strengthening national sovereignty at the expense of the independence of international institutions.

Professor Thomas Lee of Fordham Law School attempts to resolve another tension between globalization and national sovereignty: the call of the international community for the use of military force. Under the United Nations Charter, the Security Council has the authority to ask member nations to use force in response to threats to international peace and security. Even then, some scholars have argued that an American President who sends troops under U.N. authorization must still receive congressional consent because of the Declare War Clause.

This debate intersects with the second broad claim of Taming Globalization: The Constitution should be interpreted to favor political branch decision-making on questions of how to accommodate globalization. Taking the 2011 Libyan intervention as his starting point, Professor Lee offers his own approach to interpreting the Constitution, arguing that:

neither the text of the Constitution nor historical precedents foreclose the constitutionality of the President’s discretion to deploy U.S. military forces in a foreign-civilian-protection mission outside of the United States without the express approval of Congress, in a case where such deployment is reasonably justified by international law.

Professor Lee seeks to resolve the tension between globalization and the Constitution by arguing that the Constitution is flexible enough to be interpreted to allow the President to use force when it is consistent with international institutions.

Finally, while Professor Peter Spiro of Temple Law School agrees with our claim that globalization is creating pressure on sovereignty, he concludes that
sovereignty must lose. Professor Spiro acknowledges a conflict between globalization and the Constitution, but unlike Professors Cheng and Lee, he does not try to find an accommodation between the two. Professor Spiro declares: “International law will make its way into U.S. law and practice through one channel or another. The Constitution will not stop the imposition of international law on the United States.” International law may have hit roadblocks in the doctrine of non-self-execution in Medellín, the possible narrowing of the Alien Tort Statute in the Supreme Court’s coming decision in Kiobel, or the insulation of the counter-terror policies of the Bush and Obama administrations from international agreements and judicial review. Nevertheless, Spiro argues, globalization is an irresistible process that will force international norms to filter one way or the other into the United States.

We believe that our second claim—that globalization is best accommodated by a re-commitment to constitutional sovereignty—provides a more effective way for the United States to cooperate with other nations. In our view, the Constitution provides the sole route for managing U.S. sovereignty approved by the American people. Cooperation consistent with the Constitution will not only benefit from the popular legitimacy that only the Constitution can confer, but will also lead to more secure commitments internationally. Nonetheless, we recognize that there are reasonable alternatives to our proposal for reconciling globalization and sovereignty, and we welcome their exploration and development. Indeed, one of the main goals of our work is to spur discussion about how best to reconcile globalization and American sovereignty. We are therefore gratified that the contributors to this symposium have done so.

Globalization and Sovereignty

Julian Ku

John Yoo

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Globalization and Sovereignty*

Julian Ku** & John Yoo†

INTRODUCTION

Globalization represents the reality that we live in a time when the walls of sovereignty are no protection against the movements of capital, labor, information and ideas—nor can they provide effective protection against harm and damage.¹

This declaration by Judge Rosalyn Higgins, the former President of the International Court of Justice, represents the conventional wisdom about the future of global governance. Many view globalization as a reality that will erode or even eliminate the sovereignty of nation-states.

The typical account points to at least three ways that globalization has affected sovereignty. First, the rise of international trade and capital markets has interfered with the ability of nation-states to control their domestic economies.² Second, nation-states have responded by delegating authority to international organizations.³ Third, a “new” international law, generated in part by these organizations, has placed limitations on the independent conduct of domestic policies.⁴

¹ This paper was originally presented at a symposium held at the American Enterprise Institute in Washington, D.C., on June 4, 2012. The symposium was entitled “I Pledge Allegiance to the United . . . Nations? Global Governance and the Challenge to the American Constitution.”

²See DAVID HELD, ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 187 (1999) (“Today, not only tariffs and quota restrictions, but also policies supporting domestic industry and even domestic laws with respect to business competition and safety standards are subject to growing international scrutiny and regulation.”).


These developments place sovereignty under serious pressure. But the decline of national sovereignty is neither inevitable nor obviously desirable. Nation-states maintain the current world order. Sovereignty allows nations to protect democratic decision-making and individual liberties. Nor does robust respect for sovereignty demand the rejection of globalization or international cooperation.

We offer a new framework for accommodating globalization with sovereignty. Our proposal shifts the focus away from Westphalian sovereignty, which grants nations complete autonomy within their territories, and toward “popular sovereignty”—the right of the American people to govern themselves through the institutions of the Constitution. Article VI’s Supremacy Clause creates a hierarchy of federal law that places the Constitution first, followed by “the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States.” This establishes the Constitution’s superiority over all other authorities, including international laws and norms. As long as the Constitution remains the exclusive source of lawmaking authority within the United States, the regulation of globalization must occur through the political and legal system created by the Constitution.

In this essay, we will first define “globalization.” We will then explore its impact on national sovereignty and the rise of international institutions. Finally, we will consider how popular sovereignty can accommodate globalization through the Constitution’s separation of powers and division of authority between the federal and state governments.

I. DEFINING GLOBALIZATION

Few terms are more ubiquitous in public affairs than “globalization.” Countless journal articles and publications analyze globalization in sociology, political science, international relations, and cultural studies. Despite the breadth of interest, there continues to be a substantial lack of consensus on the meaning of the term. As Peter Spiro has observed, “globalization is so broad a phenomenon that comprehensive description now seems almost futile.”

To some, globalization includes the reduction of trade barriers and an accompanying devotion to free markets. In *The Lexus and the Olive Tree*, journalist Thomas Friedman popularized the concept of the “globalization system” as involving the “inexorable integration of markets, nation-states and technologies to a degree never witnessed before.” The system results in the

5. U.S. CONST. ART. VI.
“spread of free market capitalism to virtually every country in the world.”

Much of the public debate has revolved around the consequences of economic liberalization, the reduction of trade barriers, and the global integration of capital markets. But globalization has acquired a meaning broader than economic liberalization. Scholars have also equated globalization with the internationalization of societies and economies, the universalization of a “global culture,” the Westernization of societies along European or American models, and finally the de-territorialization of geography and social space.

These definitions share some basic elements, such as the acceleration in cross-border activity between governments, businesses, institutions, and individuals. While transnational economics has drawn the most attention, globalization also includes the growth of political cooperation, migration, and communications, as well as sharp reductions in transportation costs and the blending of national societies and cultures. Many see the rise of a global civil society, which represents new opportunities for individuals to participate in social and cultural activities that reach beyond the nation. According to this view, the explosion of cross-border interaction has strengthened international institutions and the development of cosmopolitan legal obligations.

In our view, “globalization” refers to the various processes of economic, social, cultural, and political integration across national borders. Globalization has a profound effect on the concept of physical territory as an organizing principle for social, cultural, economic, or political relations. An individual located in an industrialized nation may just as likely communicate, interact, or work with someone abroad versus at home. Physical territory has become less important in defining an individual’s identity, loyalty, or culture. We do not address in this article whether contemporary globalization is fundamentally different from prior periods of high cross-border activity. Nor do we consider which of the various forces—technology, economic exchange, or the end of the Cold War—is the root cause. We believe that all of these forces have contributed to it. For our purposes, it is the consequences, not the causes, of today’s globalization that are central to our analysis.

8. Id.
9. See, e.g., DANIEL DREZNER, ALL POLITICS IS LOCAL 10 (2006); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).
14. For an example of this argument, see PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE (1996).
II. THE RISE OF GLOBAL GOVERNANCE

Most globalization scholarship emphasizes three phenomena that diminish nation-state sovereignty. First, a substantial number of commentators have focused on the impact of the increased levels of trade accompanied by the rise of globalized financial markets. Economic integration has, in the eyes of some, led to the decline of the nation-state as a unit of social organization. Second, globalization has led to an increase in the number and influence of international organizations, which have gained more independence and claimed the power to exercise sovereign powers themselves. Third, globalization has produced a fundamental shift in the nature of international law. The “new international law” purports to create universal, binding obligations regulating a nation-state’s treatment of its own citizens. Some scholars have even suggested that this new form of law should receive a new name: “cosmopolitan law” or “world law.” This new international law has become an important mechanism for NGOs seeking to influence or limit the ability of nation-states to exercise their sovereign powers. All three of these trends contribute to a growing system of “global governance.” We consider each aspect of global governance in turn.

A. The Impact of an Increasingly Integrated Global Economy

Globalization exerts a profound effect on the domestic economy in two main ways. First, the sharp reduction of tariffs and trade barriers since the end of World War II, which has accelerated in the past two decades, has created the free movement of goods and services that is central to globalization. In 1990, the total value of trade in goods was slightly more than 30% of global GDP; by 2009, the value of such trade exceeded 40% of global GDP. In the Eurozone, the value of trade in goods grew from 44% of Eurozone GDP in 1990 to 57% in 2009. For the United States, the overall percentage is lower, but increased from 15% to almost 19% of GDP between 1990 and 2009.

Since the end of the Cold War, international trade has expanded to a much larger group of nations, while its intensity among developed nations has

16. See Steve Charnovitz, Nongovernmental Organizations and International Law, 100 AM. J. INT’L L. 348, 354 (2006) (“NGOs are now often engaged in the review and promotion of state compliance with international obligations.”).
19. Id. at 15.
20. Id. at 220.
deepened. Developing countries have sharply boosted their participation in the world trading system. The lowest-income countries have increased their share of world merchandise trade from about 30% of their GDPs in 1990 to nearly 50% in 2009.  

Second, globalization has spurred the cross-border movement of capital, which has outpaced the level of trade in goods. Foreign direct investment, for instance, has grown from about $212 billion in 1990 to over $1.1 trillion in 2009. Nation-states have facilitated this explosion by easing controls on the movement of capital and tariffs on foreign goods and services. As national barriers to cross-border economic activity have fallen, nation-states have become more vulnerable to global market forces. As international trade becomes a larger and more important part of domestic economic output, nation-states that impose significant tariffs or provide large domestic subsidies face the danger of painful retaliation.

Commentators suggest that international capital markets prevent nation-states from pursuing independent macroeconomic policies. Nation-states, for example, cannot fully control the value of their currencies. Private traders forced the United Kingdom to allow movement in the pound, though more authoritarian nations like China have maintained a tighter grip. Currency fluctuation, in turn, has limited the ability of nation-states to pursue macroeconomic policies that fuel growth by expanding the money supply. International markets may impose similar constraints on fiscal policy. Because national governments issue bonds on the international capital markets, they find their ability to set domestic policy constrained by the value of their securities. The international debt markets may penalize nation-states that run up substantial budget deficits. In the aftermath of the 2008 financial crisis, nations like Greece, Ireland, Portugal, and Spain radically changed their fiscal policies under pressure from international capital markets, the European Union, and the International Monetary Fund.

21. Id. at 10.
22. Id. at 2.
27. HELD, supra note 2, at 229-30.
28. See James Kanter, European Finance Ministers and I.M.F. Reach Deal on Greek Bailout
To be sure, this account might overstate the impact of economic globalization on nation-state autonomy. Nation-states, especially those with large domestic economies—like the United States—are far from powerless to set economic policy. Nation-states are unlikely to disappear simply because of higher trade and capital flows. But economic globalization has constrained the ability of nation-states to adopt domestic economic policies freely, though the scope of this restriction remains contested.

B. The Rise of International Organizations

In addition to cross-border trade and capital movements, globalization has prompted the rise of international organizations (IOs) as a key new actor in international relations. International organizations are legal entities established by more than one nation-state pursuant to an international agreement. They have a legal personality, which enables them to exercise rights and fulfill duties on the international plane independently. Recognition of this special status in the years after World War II represents a significant shift from Westphalian sovereignty.

According to one commentator, interstate relations “are increasingly mediated through rationalized institutional processes” rather than the anarchy of the Westphalian system. The role of IOs can be overstated. Nation-states still make the basic decisions of international politics and possess the personnel,
budgets, and will to pursue policies with real effects in world affairs. But there can be little dispute that independent institutions influence international politics as never before. While a border dispute between two nations once may have produced a bilateral settlement or armed conflict, today global governance regimes might shift the decision to a body like the International Court of Justice. Similarly, a trade dispute that might once have provoked retaliatory tariffs will now be resolved by the WTO.

Although IOs have existed since at least the nineteenth century, their recent proliferation has led at least one provocative study to hail them as the nation-state’s successor. As that study describes it, “sovereignty has taken a new form, composed under a series of national and supranational organisms united under a single rule of logic. This new global form of sovereignty is what we call Empire.” IOs, however, have yet to reach the power and control to justify such claims. Moreover, too simplistic a characterization may suggest either that all IOs are alike or fit into a single political hierarchy. While some IOs may challenge national sovereignty, others do not, and many, in our opinion, have little impact at all.

IOs bear a substantial diversity in both form and purpose. Some IOs take the form of international tribunals that resolve disputes between nations. The commission established by the 1795 Jay Treaty to settle claims arising out of the Revolutionary War is one example. A modern international tribunal is the ICJ, which the United Nations Charter established to resolve disputes between members. Other IOs take the form of agencies designed to administer and implement policies or technical standards arising from an international legal regime. Classic examples are the Universal Postal Union, which administers rules governing international mail, and the International Telecommunications Union. Still, other IOs function as fora for the discussion of issues and joint policies. An example is the U.N. General Assembly (GA), which guarantees member states’ rights to raise and discuss issues of concern. The GA may also pass resolutions and recommendations, but, unlike the U.N. Security Council, it cannot require nations to take action.

33. For a skeptical view of international institutions, see John Mearsheimer, The False Promise of International Institutions, 19 INT’L SECURITY 5 (1994).
35. MICHAEL HARDT & ANTONIO NERI, EMPIRE xii (2000).
IOs pursue a wide variety of purposes. The most basic IO is created by an agreement between two states for a specific purpose. The United States and Great Britain formed a series of boundary commissions between 1794 and 1925 to settle and demarcate the boundary between the United States and Canada. The two countries then established a permanent International Boundary Commission in 1925 to inspect and maintain the boundary line.

At the other end of the power spectrum is the U.N. Security Council. It is composed of five permanent members and ten rotating members authorized to take measures for the “maintenance of international peace and security.” Its legal mandate authorizes it to act on any matter affecting international peace and security in the territory of any nation. The veto right of the five permanent members has prevented the U.N. Security Council from exercising this broad power very often.

Most IOs fall somewhere between the Boundary Commission and the U.N. Security Council. While the U.N. represents the largest network of IOs, other IOs may exist outside it. Although almost all members of the WTO are also members of the U.N., for example, the two are institutionally independent and only loosely associated legally.

It is not possible to maintain the view that there is a single “world government” or single IO that threatens U.S. sovereignty. The closest attempt to create a single overarching IO, the U.N., resulted in more of a conglomeration than a single entity. The principal components of the U.N. system often operate independently of the others without any single administrator. Myriad agencies associated with the U.N., such as the World Health Organization or the U.N. International Children’s Fund (UNICEF), also operate on a quasi-independent basis and do not directly answer to a common administrator.

But the diffuse, diverse, and nonhierarchical nature of IOs does not mean they cannot affect sovereignty. Two IO characteristics diminish nation-state sovereignty: independence and heightened powers. It seems counterintuitive that IOs would ever limit the sovereignty of nations. Principal-agent theory predicts that nation-states will delegate power to IOs when the latter further the formers’


42. U.N. Charter, art. 24, para. 1.

43. Id., arts. 1, 39, 42.


46. See id.
interests. Nation-states establish IOs to resolve interstate disputes, administer technical standards, create fora to discuss policies, or settle various other issues. But IOs must reflect the interests of more than one member, which means they will not be completely beholden to any nation-state. The willingness of nations to create an IO outside of their direct control—one that might issue decisions contrary to their future interests—sends a signal that the nations intend to live up to the commitments of the IO.

Nations may suffer some short-term setbacks from an independent IO, but they may still benefit from longer-term cooperation with other countries. To be sure, the level of independence will vary. An IO like the ICJ needs more independence to resolve border disputes between nations. Otherwise, the parties could simply negotiate a settlement. On the other hand, the parties to the dispute can establish the range of possible outcomes that they will accept before they bring it to the Court.

IOs can achieve independence in a number of ways. First and foremost, IOs can be staffed and led by individuals who are independent from their member states. Such independence is, we argue, reflected in the appointment and removal of officials. ICJ judges are selected by a vote of the U.N. General Assembly with subsequent approval by the U.N. Security Council, which limits the ability of nation-states to place their nationals on the Court. ICJ judges can be re-elected to nine-year terms and can be removed only by a unanimous vote of the other judges. Although there is some evidence that ICJ judges vote in favor of their home states, the method of selecting the ICJ judges can secure greater independence. For example, the sitting American ICJ judge over the past couple decades has supported ICJ decisions against the United States.

48. Statute of the International Court of Justice, art. 2-12.
49. Id., arts. 13, 18.
50. Eric A Posner & Miguel F.P. de Figueiredo, Is The International Court of Justice Biased?, 34 J. LEGAL STUD. 599, 624 (2005) (finding that “[ICJ] [j]udges vote for their home states about 90 percent of the time”).
51. Indeed, in all four judgments involving the United States over the past couple decades, the sitting American judge on the ICJ has voted against American interests. See Request for Interpretation of Judgment of 31 March 2004 in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 3, 20-21 (Jan. 19) (J. Buergenthal with the majority, finding Mexico’s request for interpretation exceeded the scope of the court’s judgment, but finding unanimously that the United States “breached” its obligation under the court’s July 6, 2008 order regarding José Ernesto Medellín Rojas); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 70-72 (Mar. 31) (J. Buergenthal with the majority, finding that the United States breached its obligations to Mexico under the Vienna Convention on Consular Relations); Oil Platforms (Iran v. U.S.) 2003 I.C.J. 161, 218-19 (Nov. 6) (J. Buergenthal with the majority, denying the U.S. counter-claim and finding that while “the actions of the United States . . . against Iranian oil platforms . . . cannot be justified as measures necessary to protect the essential security interests of the United States . . . [the] Court cannot however [find] that those actions constitute a breach of the obligation of the United States”); LaGrand Case (Ger. v. U.S.) 2001 I.C.J. 466, 514-16 (June 27) (J.
At the opposite end of the spectrum, we argue that representatives to the U.N. Security Council neither have nor expect independence. The representatives, usually ambassadors to the U.N., are appointed and can be removed by their home states for any reason. Under these circumstances, U.N. Security Council representatives will vote according to the wishes of their home states. The U.N. would then likely assume that each ambassador will represent the interests of his or her own country, and according to this view, the GA provides a forum where they can air their interests openly.

Even the most independent IO encounters some limits. The ICJ is funded by GA appropriations, so member states exercise some financial leverage over the ICJ. But even the most dependent IOs, like the U.N. Security Council, can adopt measures that are not supported by some of the member states. While this could not apply to the permanent members because of their veto, rotating members may have to follow a policy that they opposed.

What remains clear is that independence represents a challenge to nation-state sovereignty. In at least some cases, IO decision-makers that are shielded from the control of the nation-states they purportedly represent can impose obligations on nation-states without their consent. This, if true, would increase the likelihood of a real conflict between the IO and the nation-states that formed it.

52. Hans Kelsen, Organization and Procedure of the Security Council of the United Nations, 59 HARV. L. REV. 1087, 1087 n.1 (1946) (“The Security Council, like the General Assembly, consists of representatives of the states which are ‘members’ in the sense of being authorized to be represented by certain individuals. These individuals are appointed by the “member” states, not by the United Nations, as are, for instance, the Secretary-General and the members of the International Court of Justice. They are bound to act in conformity with the instructions given to them by the competent organs of their states.”). The list of the current members of the Security Council can be found at http://www.un.org/en/sc/members/. The list of current permanent representatives to the United Nations can be found at http://www.un.int/protocol/documents/HeadsofMissions.pdf.


54. See U.N. Charter, art. 27(3) (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”); U.N. Charter, art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

55. See id.

56. For example, the WTO panel Appellate Body members have an obligation to remain independent from their home countries. Annex 2 of the WTO Agreement, Dispute Settlement Understanding, art. 17 para. 3, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17 (“The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government . . . .”).
Traditionally, IOs did not directly exercise sovereign powers. Instead, the obligations of states were to be carried out through national domestic legal process. An international arbitral tribunal, such as the U.S.-Mexico Claims Commission, might require a party to pay damages for mistreating citizens of a foreign country. But the nation-state, via its own domestic law processes, has the final word on how and whether to comply with the decision. This fits within the traditional Westphalian principle that a state’s consent was necessary to any diminution of its sovereignty.

Recently, however, IOs have begun to acquire sovereign powers previously held by nation-states. Not only does the European Court of Justice (ECJ) have the power to order a nation-state’s compliance with the E.U. treaties, its judgments also have direct effect within domestic legal systems. Unlike traditional IOs such as the U.S.-Mexican Claims Commission, the ECJ is exercising the sovereign power to interpret and apply treaty obligations within the domestic legal systems of its member nation-states.

In the view of the ECJ, E.U. member states have “limited their sovereign rights” and have created a body of law that binds both individuals and E.U. countries. While there has been some controversy over whether ECJ judgments would trump constitutional obligations, the basic framework has largely gone unchallenged. The ECJ, as well as other institutions of the European Union, have acquired sovereign powers from member states to override significant parts of domestic law.

The United States has also experimented with the transfer of sovereign powers in the North American Free Trade Agreement (NAFTA). Prior to NAFTA, the Commerce Department had the absolute and exclusive power to impose duties on foreign imports that it believed were either unfairly subsidized or “dumped” on the U.S. market. Since the passage of NAFTA in 1994, however, U.S. duties on Canadian or Mexican imports have been challenged in NAFTA arbitration panels. No legal appeal to a U.S. court or U.S. agency is permitted.

59. Posner & Yoo, supra note 37, at 57-62.
IOs can influence nation-states without directly exercising sovereign powers. The World Bank and the International Monetary Fund have required borrowers to adopt domestic policies such as raising taxes, cutting spending, or lifting controls on financial flows.\(^{64}\) It is important not to overstate these developments. Transfers of sovereign power are, we argue, in their early stages. The process is furthest along in the European Union, where the member states have, in our opinion, delegated significant authority over a wide variety of matters. Europe itself may not present the clearest picture, because the European Union may signify the creation of what we would describe as a new regional confederation, or even nation, rather, a supranational government. In most areas, IOs still seem to lack their own direct enforcement resources and still seem to rely on nation-states for compliance.\(^ {65}\) But we also see an undeniable trend toward IOs with the legal authority to act directly in areas that used to be the province of nations.\(^ {66}\)

Serious conflicts between an IO and a nation are, we would argue, most likely to occur where that IO both has a meaningful level of independence and exercises sovereign powers. An IO that was independent of a nation-state but did not exercise sovereign powers would not be likely to create any serious conflict. An IO that does exercise sovereign powers but remains completely under the control of a particular nation-state is, according to this argument, also unlikely to create serious problems.

The system of global governance, described by many globalization scholars, reserves an important place for independent IOs.\(^ {67}\) Parallel to the upward shift of power to supranational organizations is a downward shift to subnational governments, nongovernmental organizations, and individuals. A number of scholars have described this phenomenon as the “disaggregation of the nation-state.”\(^ {68}\) One aspect of disaggregation poses serious constitutional difficulties. NGOs have, we claim, increasingly used litigation in domestic U.S. courts to build support for international legal norms, and to depart from the policies set by the legislative or executive branches.\(^ {69}\)

Key to this phenomenon is a new kind of international law, which has two qualities. First, international law’s emphasis on human rights, we believe, has

\(^{64}\) Harold James, International Cooperation Since Bretton Woods 323-25 (1996) (explaining how the terms of IMF loans often require the borrowing country engage in trade liberalization and abide by various budgetary and domestic credit restraints).

\(^{65}\) See, e.g., Ku, Delegation of Federal Power, supra note 3, at 95-99 (describing WTO power to impose obligations on the United States).

\(^{66}\) Id. at 95-114 (describing the role of international organizations in regulating areas such as criminal procedure, domestic chemical production, and trade in wildlife).


\(^{68}\) See, e.g., Spiro, supra note 6, at 657.

\(^{69}\) For a classic statement of the importance of this kind of NGO litigation, see Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347 (1991).
increasingly focused on cosmopolitan or universalist obligations—by which we mean that they appeal to rights held by all of mankind, rather than by individuals in specific political communities. These values demand greater regulation of a government’s treatment of its own citizens, which has traditionally resided exclusively within the sovereignty of the nation-state. Second, influence over the interpretation of international law, which had relied heavily on the practice of nation-states, has shifted toward independent IOs, nongovernmental organizations, and transnational elites.\(^7\)

International law has an ancient pedigree.\(^7\) The classic statement of the traditional approach is found in the *S.S. Lotus* opinion of the Permanent Court of International Justice (PCIJ). “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.”\(^7\) Traditional international law reflects, in many ways, the basic assumptions of the Westphalian system, as we understand it. Its pillar, according to this understanding, is the absolute sovereignty of nation-states, and it binds a state only by consent through formal treaty or practice and custom. No central organization enforces rules on dissenting states. The nation-state is the only actor in this system, as we understand it, because international law applies exclusively to relations between sovereigns.

Private actors are largely excluded from the development of international law. The unlawful detention of an ambassador doesn’t violate her rights as an individual; it violates the sovereign’s right to the inviolability of its diplomatic personnel. A private individual seeking vindication of his rights against a nation must convince his own government to seek a settlement. This principle is part and parcel of the 1945 ICJ statute,\(^7\) and was affirmed by the ICJ as late as 1970, when it rejected the right of shareholders to seek remedies against a state and required instead diplomatic espousal.\(^7\)

Because traditional international law focused on developing rules for states in their relations with one another, an individual harmed by another nation or its citizens would have to seek relief through her own court system. Nothing in international law itself, however, forbids a domestic court from using international rules as a source of guidance or persuasive authority. U.S. courts


\(^{71}\) See, e.g., Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911); David Bederman, *International Law in Antiquity* (2001).

\(^{72}\) The *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).


have applied rules of general international law when no other rules of decision, in the form of treaties, statutes, or executive declarations, governed. As the U.S. Supreme Court has explained: “[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations and as evidence of these, to the works of jurists and commentators.”

C. The New International Law

Recently, commentators have described the rise of a new kind of international law. They have used different terms, such as “world law,” “supranational law,” or “cosmopolitan law,” to distinguish it from traditional international law. There are two noteworthy features of this new international law that raise serious issues under the U.S. Constitution. First, the new international law is openly concerned with the relationship between a nation and its own citizens or between citizens of different nations. The Restatement (Second) of the Foreign Relations Law of the United States (1965) did not take a position on whether international law was limited to state-to-state relations. Twenty-five years later, the Restatement (Third) unequivocally stated that international law includes rules and principles governing states’ “relations with persons, whether natural or juridical.” This represents a significant shift from the ICJ’s assertion that individuals “have no remedy in international law.”

The most prominent example is human rights law, whose most important innovation is its insistence that human rights are universal. Under the traditional conception of international law, as we understand it, if a wrongdoing state was an injured person’s own state, then the individual had no remedy under international law. If France, for example, wanted to deprive its citizens of the right to free speech, that would be, under our understanding of the traditional conception, of no interest to the United States, which could not claim any harm to its own citizens.

75. The Paquete Habana, 175 U.S. 677, 700 (1900).
77. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (1964-65) (defining international law as “those rules of law applicable to a state or international organization that cannot be modified unilaterally by it”).
79. Barcelona Traction, Light, and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 45, 78 (Feb. 5) (“The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.”).
80. Id. ¶ 78 (describing individual’s inability to assert rights under international law).
International human rights law, we think, denies this basic premise. It maintains that harming an individual’s international human rights, even by her own government, remains a violation of international law.81

This inevitably expands the subject matter of international law. The International Convention on Civil and Political Rights guarantees the individual rights of free expression, political association, property, life, and procedural justice, among others.82 Similarly, the International Convention on Economic, Social and Cultural Rights guarantees the right to health care, economic well-being, and work.83 Both agreements operate as a limitation on nations’ domestic policies. For instance, during its recent report on its compliance with the ICCPR, the U.S. government responded to concerns raised by the UNHRC about its protection of the right to vote during the 2000 and 2004 presidential elections.84 NGOs have filed charges with the U.N. alleging widespread violations by the United States of the rights to vote, to a fair trial, to adequate health care, and to adequate housing.85 Whether or not there is merit to these charges, we think that the U.S. government’s acknowledgment that it has international obligations to guarantee individual rights represents a substantial departure from traditional international law’s assumption of a state’s absolute and exclusive sovereignty within its own territory.

The second hallmark of the new international law is that the processes for creating, interpreting, and enforcing international law have changed. Traditionally, the interpretation and application of international law relied heavily on the practice and opinion of nation-states. A nation-state that refused to follow a custom, or refused to recognize it as a legal rule, could not be bound. With respect to treaties, a nation-state controlled whether or not it signed.

The role of state consent in the new international law has become less important because of the combination of jus cogens obligations and international human rights law. Jus cogens obligations consist of those clear and well-established international obligations, such as the prohibitions on genocide, torture, and piracy, which bind nation-states even without their consent.86

81. See, e.g., Paul B. Stephan, International Governance and American Democracy, 1 Chi. J. INTL. L. 237, 241 (2000) (“[Human rights law] asserts that certain humane values, through a process of international dissemination and support, have become binding rules that constrain what states may do to both their own and other countries’ citizens.”).


International human rights law seeks to expand the scope of norms considered *jus cogens*, which reduces the freedom of nation-states to change, interpret, and apply international law.

Non-state actors have come to influence the content and scope of many different kinds of international law, perhaps most so in the area of customary international law (CIL). Unchained from traditional international law’s rigid focus on nation-states, NGOs have become important, sometimes dominant actors in the formation, interpretation, and enforcement of new international law.\(^8^7\) Traditionally, CIL required long-standing, uniform practice of states resulting from the states’ sense of legal obligation (known as “*opinio juris*”).\(^8^8\) NGOs cannot alter the substantive definition of CIL, but they have attempted to change the process by which state practice is identified. In the past, state practice would come to light after decades, if not centuries, of diplomatic conduct by nation-states. NGOs and IOs have sought to accelerate this process by promulgating a new norm of international law, persuading states to adopt it, and then arguing that dissenting states refusing to follow are bound by universal practice.\(^8^9\) Today, multilateral treaties\(^9^0\) and even “diplomatic correspondence, treaties, public statements by heads of state, domestic laws”\(^9^1\) have been accepted as manifestations of CIL, or at least as elements of it. In this way, NGOs outside the control of any nation-state can use their influence to co-opt the process of identifying customary state practice, effectively imposing legal obligations on unwilling nations, further reducing their sovereignty.\(^9^2\)

The possibilities of this non-state method of developing international law have seized the attention of scholars and advocates. Harold Koh calls for a new method of developing international law; his “transnational legal process” emphasizes the central role that private transnational organizations play in the formation of international law.\(^9^3\) Lawyers working in concert, often through transnational nongovernmental associations, can, according to Koh’s account, persuade domestic courts to recognize an international norm without

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\(^8^7\) See Charnovitz, supra note 16.


\(^9^0\) Andrew T. Guzman, Saving Customary International Law, 27 Mich. J. Int’l L. 115, 161-63 (describing how “[t]he ICJ seems to accept that treaties can serve as evidence of CIL.”).

\(^9^1\) Id. at 125-26 (describing various views on what qualifies as state practice for CIL).


intervention or approval by the political branches of a nation’s government.\textsuperscript{94} While traditional international law focuses on state practice, the new international law can be shaped first by domestic litigation driven by NGOs. NGOs have sought, in at least several instances of U.S. litigation, to establish international law obligations imposing aiding-and-abetting liability on corporations, the right to organize workers, freedom from capital punishment, freedom from pollution, and freedom from arbitrary detention.\textsuperscript{95}

The success, or lack thereof, of these litigation strategies is not as important as their goal. Rather than analyzing state practice or seeking diplomatic opinion, the decentralized lawmaking process allows NGOs to set the international lawmaking agenda and win recognition of new international legal norms. This process also allows IOs without any formal sovereign power, such as the UNHRC, to play a significant role in the interpretation and development of international law.

Since the 9/11 terrorist attacks, a combination of transnational NGOs and independent IOs has challenged the legality of various aspects of the U.S. government’s war on terrorism.\textsuperscript{96} Transnational NGOs, for instance, have participated in domestic litigation to argue that the U.S. government’s rendition, detention, interrogation, and trial by military commission of alleged terrorists violates both international human rights law and international humanitarian law.\textsuperscript{97} Buttressed by legal opinions from independent IOs like the Council of Europe and the UNHRC, such litigation has had partial success in overturning some U.S. government policies, despite the government’s contrary views about the interpretation of the relevant international law norms.\textsuperscript{98}

III. RECONCILING GLOBALIZATION AND SOVEREIGNTY

The three aspects of globalization discussed above substantially affect the sovereignty of nation-states. In this section, we distinguish between the most

\textsuperscript{94} See id. at 197 (discussing how various nongovernmental groups pressured President Clinton to change his policy on the extraterritorial return of Haitian and Cuban refugees in 1994).
\textsuperscript{98} See, e.g., Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 723 (D. Md. 2010) (citing such legal opinions to support the proposition that "[t]reaties, conventions, and declarations from around the world further support the global consensus that torture is a violation of the law of nations and is never permitted, even in wartime."), rev’d, Al-Quraishi v. L-3 Services, Inc., 657 F.3d 201 (4th Cir. 2011) (reversing the district court’s denial of defendants’ motion to dismiss on collateral order review grounds), rev’d, Al Shimari v. CACI Intern., Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (ruling that the court did not have jurisdiction over defendants’ interlocutory appeals).
widely used conception of sovereignty—Westphalian sovereignty and popular sovereignty.

A. Westphalian Sovereignty

Nation-state sovereignty is often thought to be synonymous with Westphalian sovereignty. Westphalian sovereignty assumes the absolute control of nation-states over all conduct that occurs within their own territories. As described by Chief Justice John Marshall:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. 99

A nation’s sovereignty, then, can be diminished or limited, but any such limitations must be “traced up to the consent of the nation itself. They can flow from no other legitimate source.”100 Within a country’s territorial jurisdiction, a nation’s sovereignty is “exclusive and absolute.”101 Any limitation on a nation’s sovereignty, such as that arising from international law, can only arise with the consent of the sovereign.102

To be sure, this definition of sovereignty may not always have prevailed, even among the nation-states themselves.103 As Stephen Krasner has pointed out, nations have long been willing to discard certain elements of sovereignty when it suited their purposes.104 But, as Marshall’s statement in the *Schooner Exchange* case suggests, absolute state sovereignty was widely accepted as a description of the world’s political organization in the aftermath of the Peace of Westphalia in 1648.

While many scholars argue that this version of absolute state sovereignty is eroding, this claim is overstated. Global governance may be more dream than certainty. Westphalian sovereignty may be merely a shibboleth for neo-isolationists, rather than a value worth protecting. As we readily admit, the institutions of global governance are only now emerging from their infancy. Some, such as the U.N. Security Council and the ICJ, have existed since the adoption of the U.N. Charter, but have sought to expand their reach only in the last few decades. Proposals for others, such as the World Trade Organization, took a half-century.105 A few, such as the International Monetary Fund and the

100. *Id.*
101. *Id.*
102. *Id.*
104. *Id.* at 7-9.
World Bank, have reoriented their missions and become more interventionist in the domestic affairs of nations.106

We do not deny that new species of international cooperation have emerged. New multilateral agreements regulate the internal as well as external conduct of nation-states. But what makes the current round of treaties different is their marriage of sweeping, universal rules with independent institutions of enforcement. The latest version of the General Agreement on Tariffs and Trade, for example, not only requires national treatment for foreign imports; it also creates a rulemaking body (the World Trade Organization) to develop amendments to the treaty, and a court system (the Dispute Settlement Understanding) to resolve trade disputes.107 The Rome Statute not only outlaws war crimes and crimes against humanity; it also creates a prosecutor’s office to investigate and prosecute crimes, and a court system to try the defendants.108 The Law of the Sea Convention both sets out rules for the free navigation of the high seas, and creates an international tribunal for the resolution of disputes.109 The Chemical Weapons Convention creates a Secretariat that can ban new chemicals and conduct surprise inspections of domestic production sites.110

These new forms of multilateral cooperation challenge U.S. sovereignty by transferring lawmaking authority from the Constitution’s organs of government to international bodies. International agreements have yet to prompt the United States to hand over any truly serious government function, such as the setting of monetary policy. However, future international agreements may. The formal regulation of chemicals under the Chemical Weapons Convention necessitated the creation of an international agency that exercises the power to ban all use of any chemical and to conduct surprise inspections on any chemical site. In our opinion, a similar IO might be necessary for the successful regulation of climate change.111 The creation of durable institutions that can enforce international norms within the American legal system would erode Westphalian sovereignty.

Jeremy Rabkin has forcefully argued that these developments undermine the capacity of nation-states to pursue their national interest.112 Global governance disrupts the relationship between a people and their nation by transferring the locus of legislative and enforcement authority to IOs.113

107. See Posner & Yoo, supra note 37, at 44-51.
108. Id. at 67-70.
109. Id. at 70-72.
112. See generally JEREMY RABKIN, LAW WITHOUT NATIONS (2005).
113. Id.
Citizens with divided loyalties might be less likely to defend national interests. Rabkin believes that this will cause a decline in global welfare, since only nation-states retain the strength to stop aggression by authoritarian regimes or to halt human rights catastrophes.

If the organs of global governance were all institutions such as the U.N. Security Council or the ICJ, Rabkin’s fears would be dispelled. As a permanent member of the U.N. Security Council, the United States maintains a veto. The United States has refused to give ICJ decisions effect in its domestic legal system, and has even taken the position that ICJ judgments can only be enforced against it by a vote of the U.N. Security Council. The United States withdrew from the ICJ’s mandatory jurisdiction because of Nicaragua’s 1986 suit over the CIA’s mining of Managua harbor. More recently, the United States has refused to comply with the ICJ’s decisions ordering review and reconsideration of death penalty verdicts against foreign nationals.

But critics of global governance can point to more than the U.N. Charter, the WTO, or the Law of the Sea Treaty. They can point to the evolution of the European Union as the future of global governance. Initially, the Communities began as a free-trade area, but today the European Union is bound together by a Commission that regulates the economy, trade, consumer safety, antitrust law, and environmental activity throughout the Union; a Council that has its own taxing and spending authority; a Court that exercises judicial review over the legislation of member states; and a Bank that administers monetary policy through a common currency. These core institutions of pan-European governance do not undergo regular elections; the only element of popular representation lies in the European Parliament, which does not have the authority to issue Europe-wide directives that override national legislation. The European Union has given birth to a large bureaucracy that seems so distant from the usual mechanisms of electorate accountability that one of us has previously criticized Europe as having a “democracy deficit.”

Thus, the danger is not just that the ICJ may try to stop an American execution in the odd case, but that such moves are precursors to a more comprehensive system of global governance. The European Union does not create merely a forum for the resolution of disputes between European nations, as the U.N. Security Council does for the great powers. Rather, the European Union creates an independent international institution that can directly regulate...
private individuals and government agencies. It is not dependent on the nation-states to carry out its will. It has no directly elected legislature or executive branch (though there is a European Parliament with limited powers) that exercise the normal powers of a government. It is governed by bureaucrats and judges created by the E.U. treaties. It is, in Rabkin’s words, a “postmodern construction.”121 We do not claim that this has happened in the United States. The Supreme Court has refused to carry out ICJ decisions, though on the other hand, the North American Free Trade Agreement has moved the United States, Canada, and Mexico into a tighter economic unit. Our point is that regardless of the origins of an international organization, it may pose a threat to sovereignty once its powers allow it to directly regulate private citizens and their conduct without the mediation of a national government.

New forms of international cooperation clearly follow the European model as they seek to regulate areas such as pollution, arms control, and trade in services. Just as the European nations sought to create supranational forms of governance that would sublimate the nationalist impulses that led to two destructive world wars, the new forms of global governance seek to submerge national interests. A treaty on the prohibition of land mines, for example, does not create a forum for nations to reach accommodation on the use of certain weapons. Rather, it is an effort primarily driven by NGOs and nations that already do not use land mines and do not conduct significant military operations abroad.122

The International Criminal Court represents the Europeanization of international law and politics. The ICC does not serve as a forum to arbitrate disputes between nations. It has its own prosecutors who may bring cases against the officials of sovereign states before an independent court, which has the power to sentence and imprison the guilty.123 Nations that ratified and have domestically implemented the Treaty of Rome have an obligation to hand over individuals wanted by the ICC, but otherwise the Court does not depend on nations to carry out its decisions. It is true that the Rome Statute allows member states to investigate their own citizens first before the ICC can intervene.124 But this principle of complementarity grants the ICC the ability to decide whether a member state has been unwilling to investigate in good faith—and thus gives the IO the ultimate say on a prosecution.

123. Rome Statute, art. 17 (“... the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution ... ”).
124. Id.
This fundamental change in the nature of international institutions did not evolve naturally, but had been propelled along by expansive academic theories. Leading international legal scholars, such as Abram and Antonia Chayes, celebrate the arrival of the “new sovereignty.”\textsuperscript{125} The international order is governed, not by autonomous nation-states that control all affairs within their borders, but by a “tightly woven fabric of international agreements, organizations, and institutions that shape their relations with one another and penetrate deeply into their internal economics and politics.”\textsuperscript{126} Chayes and Chayes argue that if sovereignty refers to a nation’s ability to govern activity within its borders, then it must move upward to international organizations, because globalization means that no individual state can fully control the people and activity on their territory.\textsuperscript{127}

One way that the “new sovereignty” operates, according to Anne-Marie Slaughter, is through transnational networks of government officials.\textsuperscript{128} Finance ministers meet through organizations like the G-8 and the G-20 to coordinate solutions to international debt crises. Officials of the United States, Canada, and Mexico meet through NAFTA bodies to create a transnational environmental enforcement network. Judges on some national courts increasingly, Slaughter argues, cite precedents from other countries and international tribunals, stitching together, in countries that respect international law, something like a transnational body of law in discrete areas.\textsuperscript{129} These networks share information, build trust between nations, and spread best practices, the combination of which allows them to harmonize and enforce a common set of policies and laws. According to Slaughter, transnational networks will eventually “disaggregate sovereignty” because individual agencies will exercise authority in a nation as part of an international network, rather than as part of a nation-state’s government.\textsuperscript{130}

In this vision, international institutions and international law reverse the traditional understanding of sovereignty. Sovereignty originally meant that a nation-state was free from any other form of governance in its control of activity within its borders.\textsuperscript{131} A nation-state would not be subject to the political claims of a supranational entity, such as the Holy Roman Empire, or a higher authority,
such as the Catholic Church. Whether it chose to cooperate with other nations was a matter of its own consent, usually expressed through the form of treaties and long customary practice. According to the theories promulgated by academics and advocates, however, sovereignty is defined not by independence, but by a state’s ability to fulfill international obligations.

B. Popular Sovereignty

Broad trends in economic integration and shared global governance are eroding Westphalian sovereignty in powerful ways. But a decline in Westphalian sovereignty does not prevent nation-states from maintaining other forms of sovereignty, or that nation-states will necessarily wither away.

We believe that the American concept of popular sovereignty can help sort out these dilemmas. By “popular sovereignty,” we refer to the prevailing theory of sovereignty expressed in the U.S. Constitution. Under this framework, the ultimate sovereign power in the United States is not in the nation’s government, but in its people.

This idea was at the ideological heart of the American Revolution. Rejecting the concept that sovereignty was vested in the Crown or in the government, some revolutionaries believed that governments “deriv[ed] their just Powers from the Consent of the Governed,” and that when a government abused these powers, “it is the Right of the People to alter or to abolish it, and to institute new Government.” Although the true sovereign, according to the political theory of the day, had to possess unlimited, indivisible, and final authority, the American people believed that they could delegate narrower power to the government.

Government officials, however, were not sovereign themselves, but agents of the people.

As James Madison wrote in Federalist No. 46, “[t]he federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.” Madison reminded critics of the proposed Constitution “that the ultimate authority, wherever the derivative may be found, resides in the people alone.” The government can exercise only the power that the people have delegated to it. Any law that conflicts with the written Constitution is illegal, because it goes beyond the delegation of power from the people to the government.

To be sure, the Supreme Court has not always accepted the exclusivity of popular sovereignty. In Curtiss-Wright v. United States, the Court suggested that

132. Id.
133. See CHAYES & CHAYES, supra note 125, at 26.
134. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
136. Id.
the U.S. government might possess powers, at least with respect to foreign relations, which arise out of America’s status as a nation.\footnote{See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16, 318 (1936) (arguing that “the powers of external sovereignty did not depend upon the affirmative grants of the Constitution”).} \textit{Curtiss-Wright} can be understood as an expression of Westphalian sovereignty, but it remains unclear whether it accurately describes the transfer of authority from the people to the government through the Constitution. This aspect of \textit{Curtiss-Wright} has not been developed by subsequent decisions, and scholars have long criticized \textit{Curtiss-Wright} for its extra-constitutional search for sovereignty.\footnote{See, e.g., David M. Levitan, \textit{The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory}, 55 \textit{YALE L.J.} 467 (1946); C. Perry Patterson, \textit{In re The United States v. The Curtiss-Wright Corporation}, 22 \textit{TEX. L. REV.} 286 (1944); G. Edward White, \textit{The Transformation of the Constitutional Regime of Foreign Relations}, 85 \textit{VA. L. REV.} 1, 5 (1999) (describing Curtiss-Wright as a break from enumerated powers doctrine).}

Focusing on popular sovereignty rather than Westphalian sovereignty has a number of consequences. First, analysis of popular sovereignty can draw on U.S. domestic precedent and experience in allocating constitutional powers within the U.S. domestic system. This form of analysis can aid in understanding America’s relationships with foreign and international institutions.

Second, popular sovereignty can provide a more flexible baseline for maintaining national sovereignty. Because of the absolutist claims of Westphalian sovereignty, almost any incursion or limitation on nation-states is a diminution. By contrast, popular sovereignty assumes that sovereign powers can be shared, divided, and limited without giving up on the entire system. In other words, popular sovereignty can coexist with elements of global governance in ways that Westphalian sovereignty cannot.

Popular sovereignty is both more and less restrictive than Westphalian sovereignty. If global capital markets restrict America’s ability to maintain the value of the dollar, her Westphalian sovereignty has been infringed—a nation’s absolute and exclusive power to manage activities within its territory has been restricted. But such a restriction would not create problems for popular sovereignty, because it does not undermine the Constitution’s allocation of powers or its guarantees of individual rights. Indeed, popular sovereignty already assumes that the U.S. government operates under substantial and fundamental constraints within its territory. The difference is that the United States cannot fully control external constraints on its sovereignty generated by the international capital markets, but it can restrict legal limits on its sovereignty by IOs and multilateral treaties by withholding its consent to international regimes. On the other hand, if the U.S. government were barred by international agreement or international law from controlling the value of its currency, the allocation of governmental powers set forth by the Constitution could potentially be undermined.
CONCLUSION

Globalization is a sprawling concept with a wide range of definitions. We have focused on globalization’s acceleration of the movement of goods and services, people, capital, and information in ways that hamper a state’s ability to regulate all activity on its territory—the central definition of national sovereignty. Conduct that crosses state borders gives rise to demands for international cooperation. We argue, however, that efforts to solve globalization’s effects by turning automatically to international organizations and law that take precedence over national sovereignty are premature and inconsistent with the continuing power and relevance of nation-states.

Rather than reject international law, or conjure forth the demise of the nation-state, we propose a middle way. Popular sovereignty establishes the Constitution as the authoritative mechanism for the generation and enforcement of national law within the United States. The Constitution’s structural provisions, such as the separation of powers and federalism, set the stage for making international law and institutions compatible with American democratic government, and thereby allow the United States to benefit from the gains of international cooperation.
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The Role of Justice in Annulling Investor-State Arbitration Awards*

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INTRODUCTION

The World Bank’s International Center for the Settlement of Investment Disputes (ICSID) is shaking at its foundations. ICSID is the principal legal regime that protects corporations doing business overseas from interference by host governments, while preserving the ability of those governments to regulate their own countries without unreasonable concessions to foreigners. ICSID is meant to help balance the competing concerns of investors and host states by arbitrating their disputes under international law and rendering awards. Committees set up to review awards can only set them aside if the tribunal was improperly constituted, was corrupt, lacked authority to decide, violated fundamental due process, or did not give reasons for their decisions.1 However,
some committees have been accused of acting like appellate courts, overturning awards because they disagreed with an award’s findings of fact or determinations of law. So long as the proper scope of arbitral review remains in flux, investors and governments may lose confidence in ICSID. Billions of dollars of existing and potential investments are at issue, as are jobs that depend on corporations entering new markets overseas, and social and economic development in countries that need foreign expertise and capital to build roads, airports, power plants, schools and other key infrastructure projects. Although the systemic impact of annulment decisions on global capital flows may not be seen for a while, if ever, there is too much at stake to ignore criticisms of recent ICSID annulments. This article re-examines the ICSID system of annulment using theories of justice, which no prior article appears to have done in detail. Looking at annulments through the lens of justice brings into focus not only what the appropriate annulment standard ought to be, but also who should set or apply that standard.

2. See Letter from Jose Anselmo I. Cadiz, Solicitor General, Republic of the Philippines, to the ICSID Administrative Council (June 27, 2011) (reproduced in ICSID Annulment Report, supra note 1, at Annex 2).

In addition to criticizing the [Fraport] Award on grounds for which the Ad Hoc Committee concluded there was no basis to annul and that were not relevant to its decision to annul, and thus signaling its apparent disagreement with the conclusions reached in the Award, as if its mandate included providing such purported corrective commentary, the Ad Hoc Committee decided to annul the Award sua sponte for reasons not advanced by either party and announced for the first time in the Annulment Decision itself.

See also Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16 (2011) (Christoph Schreuer said, “I find most problematic, I must say, and I think the Enron case is perhaps symptomatic for this one, where the ad hoc committee tends to go over the entire award and check it through, so to speak, and see if it can find any flaws and decide whether these warrant annulment. . . . There are two more worries. . . . One is a very expansive interpretation of some of the grounds for annulment. . . . and another one is what I would call “hyperactivity” of some ad hoc committees, where ad hoc committees actively look for grounds of annulment, even beyond what the requesting party has put forward.”) Andreas Lowenfield responded, saying “I think Professor Schreuer’s analysis of these cases confirms my uneasiness. You asked, [chairperson Andrea Meneker], is there something wrong with [these annulment decisions]. I think there is.”) (copy on file with author); Mark H. Alcott & Nicole R. Duclos, Foreign Investment Disputes: A Practitioner’s Roadmap, 18 INT’L L. PRACTICUM 147, 151 (2005). For summaries of recent annulment decisions, see Matthias Scherer, ICSID Annulment Proceedings Based on Serious Departure from a Fundamental Rule of Procedure, CZECH & CENTRAL EUROPEAN YEARBOOK OF INT’L ARB. 211 (2011); Promod Nair & Claudia Ludwig, ICSID Annulment Awards: the Fourth Generation?, 5(5) GLOBAL ARB. REV. (Feb. 2011). For discussions of earlier annulment decisions, see Guillaume Aguilar Alvarez & W. Michael Reisman, How Well Are Investment Awards Reasoned?, in THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES 1, 4-27 (G.A. Alvarez & W.M. Reisman eds., 2008); Christoph Schreuer, The ICSID CONVENTION: A COMMENTARY 897-901 (2001) [hereinafter ICSID COMMENTARY].

3. ICSID Annulment Report, supra note 1, at 49 (“While there is agreement on the general standards for annulment, commentators sometimes disagree on whether a specific case has been decided correctly or incorrectly.”).
The writing on annulments has tended to prioritize achieving finality in ICSID awards, including, most recently, a 2012 report by the ICSID Secretariat on annulments. Many of these writings have thus argued that awards should not be annulled easily to avoid undermining the finality of the awards. Academic research and annulment decisions have justified their emphasis on finality with statements in the negotiating documents of the ICSID Convention that stressed the need for finality to encourage foreign investments. It appears that the ICSID Convention favored finality of awards on the assumption that investors require final and binding protections for their foreign investments against the political risks of doing business in host countries.

4. ICSID Commentary, supra note 2, at 893 (“In international arbitration the principle of finality is often seen to take precedence over the principle of correctness.”); Promod Nair & Claudia Ludwig, supra note 2, at 4 (expressing concern that expansive annulments “will significantly lengthen ICSID disputes and seriously undermine confidence in the efficacy of the centre dispute resolution regime”); Eric Schwartz, Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt, in ANNULMENT OF ICSID AWARDS 43, 85 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) [hereinafter ANNULMENT OF ICSID AWARDS] (“In the interest of efficiency and finality, Article 52 does not allow any appeal of ICSID awards.”).

5. ICSID Annulment Report, supra note 1, at 37-38 (collecting dicta from annulment decisions emphasizing finality).

6. Maritime Int’l Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on Annulment, ¶ 4.10 (Dec. 22, 1989) (stating annulment application should be denied where annulment “would unjustifiably erode the binding force and finality of ICSID awards.”); Amco Asia Corporation v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment, ¶ 1.20 (Dec. 17, 1992) (stating that awards should not be annulled if that would “unwarrantably erode the binding force and finality of ICSID awards”).

7. ICSID Commentary, supra note 2, at 1078 (“During the Convention’s drafting there was little discussion on the substance of what ultimately became Art. 53. All drafts embodied the principles of finality and binding force. The later drafts also contained an explicit exclusion of any external appeal.”).

8. ARON BROCHES, SETTLEMENT ON INVESTMENT DISPUTES, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 162 (1963)

And there is no room for doubt that one of the most serious impediments to the flow of private capital is the fear of investors that their investment will be exposed to political risks, such as outright expropriation without adequate compensation, governmental interference . . . and non-observance by the host government of contractual undertakings on the basis of which the investment was made.

See also ICSID Annulment Report, supra note 1, at 7 (“A concern was raised by a legal expert from Germany that annulment posed a risk of frustrating awards and therefore the annulment provision should be made more restrictive.”); 1 ICSID TRAVAUX 2, II.1.4.1-2 (Note by the President to the Executive Directors (Eugene R. Black) on Dec. 28 1961)

Improved methods for the settlement of investment disputes would contribute to an improvement in the investment climate and would thereby tend to promote the flow of private foreign capital, an objective of special concern to the Bank . . . that once a State had voluntarily agreed to submit a specific dispute or group of disputes to the jurisdiction of the Center, this agreement would be a binding international obligation . . . .

See also 1 ICSID TRAVAUX 2, II.1.1.1,3 (Note by A. Broches, General Counsel, transmitted to the Executive Directors: “Settlement of Disputes between Governments and Private Parties” on Aug. 28,
The goal of finality, although important, may have been overemphasized in extant scholarship. Although the ICSID Convention has existed for almost half a century, there is still no concrete empirical evidence that delaying finality affects the volume of foreign investment. The repetition in writings and awards that finality is the prime objective of ICSID arbitration does not, without more, make it a valid legal or policy claim. It simply establishes the goal of finality as folklore of the international arbitration community. Although the scholarship favoring finality is rich, in light of the unproven assumption that finality of awards promotes foreign investments, it may be time to explore the issue of ICSID annulments from some other perspective.

This article contributes to discussions of ICSID annulments by reframing the inquiry in terms of justice. Although largely unnoticed in other academic writings, the negotiating documents of the ICSID Convention are replete with references to concepts of justice. For example, the framers of the ICSID Convention were also explicitly concerned that some aspects of natural justice were not violated in awards. Thus, there is as much historical and legal basis to be concerned about justice as there is with finality in ICSID arbitration. Further, as a policy and normative matter, achieving justice for investors and the people of host states surely must be just as important as achieving finality. Although the finality of arbitral decisions is one aspect of justice, it should not always displace other competing considerations of justice.

This article’s justice-focused inquiry pays off in three principal ways. First, where justice requires finality in ICSID arbitrations, it provides an additional, and possibly stronger normative basis for favoring finality than simply relying on the unproven assumption that finality of arbitral awards promotes direct foreign investments. Where awards apply the law correctly, retributive justice requires that the awards be deemed final to promote the effectiveness of those awards.

The many studies which have been undertaken in recent years concerning ways and means to promote private foreign investment have almost invariably discussed the problem of the settlement of disputes between foreign private investors or entrepreneurs and the Government of the country where the investment is made. In many cases these studies have recommended the establishment of international arbitration and/or conciliation machinery. The nature of the problem, as outlined above, suggests a solution along the following lines: a) a recognition by States that agreements made by them with private individuals and corporations to submit such disputes to arbitration are binding international undertakings.

9. See infra Part III.
10. See infra Part IV.B.
11. See infra Broches at note 264.
12. Cf., Broches, supra note 8, at 354-55 (“Ad hoc committees may be faced with the delicate final task of weighing the conflicting claims of finality of awards, on the one hand, and of protection of parties against procedural injustice, as defined in the five sub-paragraphs of Article 52(1).”).
Second, where other conceptions of justice conflict with finality in certain situations, this article’s justice-focused inquiry gives observers a framework to assess whether the current grounds for review are sufficiently broad. Where awards misapply the law, enforcing them would be retributively unjust. In some situations, injustice might be tolerated in order to promote the efficacy of the ICSID system generally and its ability to promote retributive justice in other disputes. However, in other situations, the substantive injustice of a particular award could be so grave that it would require nullifying the award as a moral matter, even though the award does not meet the annulment standard under Article 52.13 Once the debate about ICSID annulment is reframed in terms of justice, it becomes clear that there could be some situations where awards misapply the law or facts in serious enough ways to result in a miscarriage of substantive justice that should be corrected. If those situations fall outside of the current scope of annulment, then Article 52 review should be expanded. Although the call for some sort of appellate mechanism is not new,14 that view seems to have been drowned out recently by proponents of finality. This article provides a normative basis, grounded in justice, to refocus attention on when broader review might be desirable.

Third, where justice requires broader grounds for review than currently provided in the ICSID Convention, focusing on who ought to promote justice helps to clarify the different roles of arbitrators and government officials in the ICSID system. This article draws on the author’s previously-developed


Particularly in light of the CMS Annulment Decision, which reaffirms Argentina’s obligations to pay hundreds of millions of dollars in compensation, despite the finding of ‘errors’ that ‘could have had a decisive impact on the operative part of the award, the legitimacy of subjecting such core state policy decisions to ad hoc arbitration,’ is questionable.

See also William Burke-White & Andreas von Staden, Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations, 35 YALE L.J. 283, 284 (2010) (“Even from within the system, an annulment committee constituted under the ICSID Convention to review an award rendered by an ICSID tribunal against Argentina has scathingly critiqued the jurisprudential approach of the first-instance tribunal and raised larger questions about the system’s legitimacy.”).

14. Tarcisio Gazzini, Necessity in International Investment Law: Some Critical Remarks on CMS v. Argentina, 26 No. 3 J. ENERGY & NAT. RESOURCES L. 450, 467 (2008) (“Notwithstanding the sharp criticism expressed by the ad hoc Committee, the award almost entirely survived the annulment proceedings. However disappointing, such an outcome is due to the strictly limited jurisdiction of ad hoc Committees and may call for the introduction of an appeal system in investment arbitration.”); Burke-White & von Staden, Priviate Litigation, supra note 13, at 300

In response to the growing perception of a legitimacy deficit in the ICSID system and the threat of state withdrawals from the Convention, commentators have suggested a range of reforms. Perhaps most prominent has been the call for the creation of a standing appellate mechanism with jurisdiction to review errors of law, rather than the far narrower grounds for annulment presently available under Article 52 of the Convention.
international legal theory that examines what different decisionmakers ought to do within their institutional roles, with a view to balancing ideals and what is realistically possible.\textsuperscript{15}

Arbitrators have a special moral obligation to interpret and apply laws strictly, because investors and host states have allocated limited authority to them to resolve disputes according to laws and not according to what arbitrators might personally think is morally right.\textsuperscript{16} It is thus generally not open to arbitrators to turn the review system into an appeals system by lowering the ICSID treaty standards for annulment. Adjustments to the ICSID system are best made by government officials under their authority to create appellate structures through treaties. Unlike arbitrators, officials are charged by the constituents who elect them to exercise their authority not just to apply the law but also to make it.\textsuperscript{17} Government officials have a moral duty to serve the best interests of their constituents and promote the common good.\textsuperscript{18} Officials acting for different countries also have the authority to create an appellate review structure with each other. Such appellate review may be used by their nationals who invest in foreign states and lose an arbitration concerning their investment,\textsuperscript{19} as well as by their government when they lose an arbitration brought by a foreign investor.\textsuperscript{20}

It is unrealistic to try to modify the ICSID Convention because of the difficulties of brokering multilateral consensus among the hundreds of signatory states. However, there is another way to create an appellate mechanism. Investor-state arbitrations are not created by the ICSID Convention alone. The Convention simply provides rules for arbitration if states choose to use the ICSID Convention. It does not mandatorily subject states to ICSID arbitration. States may consent separately to ICSID arbitration through bilateral investment treaties (BITs) that contain substantive laws about how they must treat foreign investments, and provide for ICSID arbitration should a dispute arise under the BIT. Thus, government officials may provide for the appeal of ICSID awards by inserting an appellate review provision into the dispute resolution clauses of their BITs. This would allow erroneous awards to be corrected within the framework of treaties to which states consented, without modifying the ICSID Convention.

These ideas are developed in the following order below. Part I explains why the ICSID arbitration is a key component of the global economy and takes stock of recent criticisms of ICSID annulments. Part II provides the legal history

\textsuperscript{15} Tai-Heng Cheng, \textit{When International Law Works} 73-121 (2012).
\textsuperscript{16} \textit{Id.} at 176-95.
\textsuperscript{17} \textit{Id.} at 196-248.
\textsuperscript{18} \textit{Id.} at 249-93.
\textsuperscript{19} See, e.g., Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award (Aug. 16, 2007); Malaysian Historical Salvors SDN, BHD v. Gov’t of Malay., ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007); Helnan Int’l Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award, ¶ 13 (July 3, 2008).
\textsuperscript{20} See, e.g., Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9.
Cheng: The Role of Justice in Annulling Investor-State Arbitration Award


Having set out what this article does, it is useful to clarify also what it does not claim to do. This article does not address all forms of investor-state arbitration. Although scholarship has tended to focus on ICSID arbitration, in fact many investor state disputes are addressed through other forms of arbitration, such as arbitration under the United Nations Commission on International Trade (UNCITRAL), or under other arbitral institutions such as the International Chamber of Commerce (ICC) in Paris or the Stockholm Chamber of Commerce (SCC). However, it appears that the majority of investment disputes are addressed through ICSID arbitration. Further, arbitrations under these other arbitral systems are private and their awards are not generally available to study. In contrast, ICSID arbitration awards are often public, providing an important glimpse into the otherwise secret world of investor-state arbitration and permitting scrutiny of this important form of arbitration.

This article also does not purport to address all criticisms of ICSID arbitration. For example, it does not address the criticism that awards are inconsistent and result in an incoherent jurisprudence.

24. For a comparison of the ICSID and UNCITRAL rules, see UNCITRAL Arbitration Rules (as revised in 2010) § IV art. 34, ¶ (5) (“An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”).
25. See Stephen Jagusch & Jeffrey Sullivan, A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 79, 96 (Michael Waibel et al. eds., 2010) (“Unlike UNCITRAL arbitration, the existence of an ICSID dispute is public and, as evidenced by the increase in amicus curiae applications in ICSID proceedings, NGOs and other groups have the opportunity to make submissions.”)
26. See, e.g., Burke-White & von Staden, Investment Protections, supra note 13, at 409 (“The
perspective, but there is no room here to consider whether the jurisprudence is actually incoherent or whether there is in place a system akin to precedent, and whether coherence matters when different ICSID arbitrations apply the laws of different, but often similarly-worded, bilateral investment treaties. Thus, the proposal in this article for states to bilaterally agree on an appellate structure for investor-state arbitrations might meet the policy aim of correcting errors in awards, but it would not necessarily address the need for greater coherence, if there is such a need, in “ICSID jurisprudence” involving a web of different states and treaties.

I. THE GLOBAL AND HUMAN DIMENSIONS OF ICSID ANNULMENTS

It is useful to explain why the topic of ICSID annulments is important. Criticisms about the ICSID annulment process must be taken seriously, because ICSID arbitration is crucial to the world economy. ICSID arbitration is a preeminent international venue to resolve foreign direct investment (“FDI”) disputes around the world, which on a global scale amount to $1.66 trillion annually. In recent decades, there has been a dramatic increase in ICSID arbitrations as well as annulments. As shown in Figure 1, below, the number of ICSID awards has grown from four between 1971-1980, to ninety-six in the decade just past. In that decade there were twenty-six annulment decisions, roughly a quarter of the number of awards made. As of September 6, 2012, there were a total of 402 pending and concluded ISCID arbitrations.

Figure 1: ICSID Awards and Annulment Decisions by Decade

The number of annulment applications is on the rise. As shown in Figure 1, there have been ten applications challenging annulments since 2011, a 93% increase in the annual average of applications from the previous ten years. David Caron reports that 22% of contested awards are annulled in whole or in part, and 40% of contested annulment decisions were granted in whole or in part. Pressing questions about the scope of review in annulment proceedings must be addressed.

Although this caseload is miniscule compared to the U.S. federal court docket, many ICSID disputes concern major infrastructural projects crucial to the development of the country in which it was to take place. ICSID disputes involve dozens of countries, and relate to, inter alia, international airports to connect citizens to foreign countries, highways to enable truck drivers to transport goods, power plants and natural gas distribution networks to put an end to electricity shortages, tourist resorts to revitalize towns, and housing.
for university students.\textsuperscript{37} What is at stake is the ability of corporations to confidently make major investments in countries around the world, bringing development to millions of people, revitalizing economies,\textsuperscript{38} and preserving the pensions of workers whose retirement accounts hold stock in these corporations. What is also at stake is the ability of national governments to regulate activities within their borders for the benefit of their citizens, including emergency measures to protect the economy and laws to control the import of toxic materials,\textsuperscript{39} without having to use tax dollars to pay gigantic awards by international tribunals that misapply the law when judging these measures.\textsuperscript{40}

Consider the following example. In 1990, the Filipino government determined as part of a master plan that it required a new international airport terminal in its capital, Manila.\textsuperscript{41} The Philippines entered into a concession agreement with a joint venture company comprised of private Filipino and foreign investors to build such a terminal, which was to be called Terminal 3 of the Ninoy Aquino International Airport (NAIA-3).\textsuperscript{42} The terminal was designed to handle thirteen million passengers annually,\textsuperscript{43} helping connect Filipinos to the world and bring tourists and businessmen to the Philippines.

Fraport, the publicly held company that owns and operates Frankfurt Airport and other airports outside of Germany, became a business partner in the development of NAIA-3. It made a large investment and became a major shareholder in the local joint venture company, Philippines International Air Terminals Co., Inc. (PIATCO), which was set up to build and operate NAIA-3. This project was crucial to Fraport and its twenty-two thousand employees worldwide, given the hundreds of millions of dollars that Fraport invested.\textsuperscript{44} In 2002, when President Macpagal-Arroyo cancelled the concession contract as “a test-case” of her administration’s “commitment to fight corruption” and “to free


\textsuperscript{38} See, e.g., RSM Prod. Corp. & others v. Grenada, ICSID Case No. ARB/10/6, Award (Dec. 10, 2010); Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1.

\textsuperscript{39} See, e.g., Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 82 (Aug. 30, 2000); Ethyl Corp. v. the Government of Canada, NAFTA/UNCITRAL Case, Award on Jurisdiction (June 24, 1998); Methanex Corp. v. United States of America, NAFTA/UNCITRAL Case, Final Award (Aug. 9, 2005).

\textsuperscript{40} CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, ¶ 146 (Sept. 25, 2007) (“[T]he Committee finds it necessary to observe that here again the Tribunal made a manifest error of law.”).

\textsuperscript{41} Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award (Aug. 16, 2007).

\textsuperscript{42} Id. ¶¶ 146-147.

\textsuperscript{43} Id. ¶¶ 91, 98.

the state from the hold of any vested interest,.“**45** Fraport had to write off its investment of €289.5 million, which was the principal cause of its overall loss for that year for the whole company, its employees and its shareholders of €120.8 million.**46**

Fraport then commenced ICSID arbitration against the Philippines on September 17, 2003, claiming that the Philippines had violated the Germany-Philippines bilateral investment treaty. The tribunal declined jurisdiction in 2007, holding that Fraport’s investment was void because Fraport had made secret agreements with local investors of PIATCO to give Fraport effective managerial control over PIATCO.**47** These secret deals violated Filipino constitutional and statutory law prohibiting foreign investors from controlling public utilities in the Philippines, which are key sovereign interests. An ad hoc committee annulled the award, finding that the tribunal had departed from a fundamental rule of procedure by failing to allow Fraport to comment on key evidence that the Philippines introduced late in the hearings.**49** A new ICSID tribunal has been constituted to hear the dispute, which is hardly closer to final resolution than it was almost a decade ago. While the ICSID dispute continues, hundreds of millions of investment dollars remain out of reach for Fraport’s shareholders. As a result of the unresolved dispute, the international air terminal’s opening was delayed by half a decade. Even in 2012, it was not fully operational.**50**

As the Fraport dispute illustrates, and as ICSID annulment statistics reinforce, striking the right balance between finality of ICSID disputes and

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45. Fraport AG Frankfurt, ICSID Case No. ARB/03/25, Award, ¶ 192.  
47. Fraport AG Frankfurt, ICSID Case No. ARB/03/25, Award, ¶ 159; Fraport AG, Annual Report 2, 70, 82 (2002) (stating that Fraport was looking to increase its effective control over the airport project).  
48. Fraport AG Frankfurt, ICSID Case No. ARB/03/25, Award, ¶ 142, 154, 160-61, 166-69.  
49. Fraport AG Frankfurt, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶ 244-47 (Dec. 23, 2010) ("[The tribunal] ought to have provided a further opportunity to the parties to submit evidence on Philippine law and to make submissions thereon relative to this specific question. Its failure to do so underscores the serious departure from a fundamental rule of procedure.").  
50. Fraport AG Frankfurt, ICSID Case No. ARB/03/25, Award, ¶ 59 (noting president said the airport would open at the end of 2002); Ninoy Aquino International Airport Terminal 3 opens, [INQUIRER GLOBAL NATION](http://globalnation.inquirer.net/announcements/announcements/view/20080811-153904/Ninoy-Aquino-International-Airport-Terminal-3-opens; NAI A Terminal 3 Near s Operation, SUNSTAR MANILA](http://sunstar.com.ph/manila/local-news/2012/03/12/naia-terminal-3-nears-operation-210866); Matthew Weiniger and Francesca Albert, Investment Treaty Arbitration: Some Support For Fraport, 6 GAR 2 (2011) (reporting on negative impact of the Fraport dispute on Philippines’ attempt to develop its airport).
rectification of errors in awards is crucial. The balance that was struck in the ICSID Convention, and how arbitrators have interpreted that balance, are described below.

II. THE STRUCTURE OF ICSID ARBITRATION

A. Why Arbitrate International Disputes?

International arbitration is a basic strut of the international legal system and supports its goals. An overriding goal of the international legal system is to promote minimum public order. Minimum public order refers to the baseline requirements of stability in international relations without which reasonable international activities cannot take place.\(^{51}\) It is necessary for the common good, which moral philosopher John Finnis described as the conditions for every actor to reasonably pursue his or her preferred values.\(^{52}\) Internationally, minimum public order promotes the common good because it allows corporations, governments, and other decision makers to cooperate and compete with each other in the pursuit of values for their respective constituents.\(^{53}\)

In international economic relations, corporations and governments engaging each other in cross-border or international activities are better able to deploy resources to pursue their interests when they can transact on the basis of shared expectations that their respective commitments will be carried out. Where any party deviates from its promises, there needs to be a mechanism to rectify that deviation. Rectification might end the errant conduct and provide compensation for the deviation so that the parties can proceed once again with their cooperative arrangement. It might, alternatively, restructure their relations moving forward, or terminate their economic relationship entirely with a transfer of sufficient values from the deviating actor to the wronged party to compensate him. In this fashion, economic actors are able to make decisions about who to work with internationally with an expectation that their arrangements will be carried out or, at a minimum, substituted for adequate compensation.

The mechanisms for rectification are not, however, self-evident. The international legal system assigns primary responsibility on a territorial basis.\(^{54}\)

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51. See CHENG, supra note 15, at 74 (explaining minimum order); Steven Ratner, Between Minimum World and Maximum World Public Order: An Ethical Path for the Future, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN, 195, 196 (M. Arsanjani et al. eds., 2011) (discussing the same).

52. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 156 (1996) (discussing the concept of the common good).

53. See CHENG, supra note 15, at 101 (discussing relationship between minimum world order and common good).

Ultimate authority for the governance of territories is assigned to governments of nation states. Governments make decisions about what activities may take place within their territories. Aside from certain fundamental moral and legal norms, such as the prohibitions of torture and genocide, the decisions of governments about their territories are not generally subject to review by another government or non-state actor. In Europe, this territorial allocation of authority was formalized in the Peace of Westphalia in the seventeenth century. While imperfect, this international design has much to commend to it. Given the difficulties of governing overly expansive lands and the variances in cultural preferences among different communities, it is appropriate for territorial communities that have sufficient resources, land, and people to each govern themselves and pursue their preferred values.

As a result of this territorial allocation of authority, however, the international legal system lacks a comprehensive centralized body to effectively settle disagreements between governments and foreign corporations that invest and carry out economic activities in territories of those governments. Taken to its logical extreme, the concept of state sovereignty subjects foreign investors to the decisions of host governments. Their investments and associated business activities continue only at the pleasure of host governments. This state of affairs would be contrary to minimum public order, because investors could hardly proceed with international transactions with any reasonable assurance that their agreements will be carried out over long periods of time in foreign countries. Ironically, therefore, the division of governing authority around the globe by territories that is so crucial for minimum public order also creates conditions that could undermine the very public order it is meant to promote.

Within this antinomy, international arbitration is one of the few mechanisms to rectify state conduct that deviates from shared international expectations of what agreements governments should abide by and how they ought to treat other actors in international activities. The essence of international arbitration is a privately sponsored system of dispute resolution. Actors from different states, such as two governments, a government and a corporation, or two corporations from different states, agree that they will submit their dispute to third party decisionmakers—a tribunal of arbitrators—to hear their dispute and make a decision about what should be done about it. The parties agree in advance that they will abide by the award of the arbitrators. When they follow...
their agreement, arbitration provides a method to identify and correct deviations from shared expectations of appropriate conduct and agreements between parties about how they will treat each other in international activities. Many investor-state disputes today are resolved by ICSID arbitration.

B. ICSID Arbitration

ICSID arbitration is an elaborate system of dispute resolution whose structure was worked out systematically among states in advance and entered into force through the ICSID Convention in 1966. The purposes of the ICSID Convention were to enhance international cooperation and private international investment in order to promote global economic development. As its title suggests, the Convention sought to promote FDI by providing a facility for the settlement of international investment disputes between foreign investors and host states. It established a conciliation procedure and a binding arbitration procedure. Although the use of ICSID dispute settlement facilities was scant in the first few decades after the Convention went into force, ICSID arbitration is now widely used when an investor-state dispute cannot be resolved without mandatory third-party settlement.

Arbitrations under the auspices of ICSID perform a key function in resolving disputes between foreign investors and host states outside of national courts. Mandatory and enforceable dispute resolution takes place under the framework of the ICSID Convention when investment contracts or bilateral

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57. ICSID Convention, supra note 1, pmbl. (“Considering the need for international cooperation for economic development, and the role of private international investment therein . . .”).

58. See also Aron Broches, Settlement of Financial and Economic Disputes between Governments and Private Individuals or Corporations, in HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 1, 2 (Int’l Ctr. for the Settlement of Inv. Disputes ed., 1968) [hereinafter ICSID History] (stating that a key goal of the designing ICSID convention was to provide “direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with Governments.”).

59. See ICSID Convention, supra note 1, art. 1(2), art. 28-35 (provisions on conciliation), art. 36-55 (provisions on arbitration).

60. Scheurer, ICSID Commentary, supra note 2, at xxvii (“The provisions of conciliation procedure created the ICSID Convention remained scant during its early years.”).


62. W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 46 (1992) (“One of the major objectives of international commercial arbitration has been to keep dispute resolution out of the courts of one or the other of the parties and to protect litigants from the costs of plodding through the long corridors of national judicial bureaucracies, with mandatory calls at each successive cubicle to rehear all or part of the case.”).
investment treaties provide for ICSID arbitration. This mechanism for addressing international disagreements provides the security of a neutral adjudicative forum to investors seeking protection from political and legal risks associated with deploying large sums of capital in foreign countries over long time horizons. It also helps host states—whether from the developing or developed world—attract foreign investments in order to grow their national economies.

Every ICSID arbitration proceeds within the four corners of the ICSID Convention. Arbitration is triggered when any treaty state or national of such a state (whether a person or corporation) files a request for arbitration with the ICSID Secretary-General. In practice, a corporation or individual investor from an ICSID state who has made an investment in another ICSID state files that request. Because the ICSID Convention itself does not provide substantive standards governing the treatment of foreign investors by host states, the causes of action in the arbitration request must be based on another source of law. Most often, the investor alleges that the host state took actions that harmed the investment, in violation of its obligations under a bilateral investment treaty between the host state and the state in which the investor is a national, or in violation of its contractual obligations under the project agreement or contract if that contract stipulated ICSID as the arbitral forum for dispute resolution.

The host state and the foreign investor generally appoint a tribunal of their own choosing, which usually comprises three arbitrators, with each side appointing one arbitrator and a chairperson appointed by agreement of the two

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63. See Aleks Vickovich, *South Sudan Joins ICSID as Armed Conflict Escalates*, COMMERCIAL DISPUTE RESOLUTION (April 25, 2012), http://www.cdr-news.com/categories/icsid/south-sudan-joins-icsid-as-armed-conflict-escalates/ (“The signing of the Washington Convention by South Sudan is a very positive development,” says Winston & Strawn partner Mark Bravin. “In order to attract foreign investors, the government of this new nation has acknowledged the importance of consenting to the use of a neutral forum for resolving investor-state disputes.”).


65. ICSID Convention, *supra* note 1, art. 36(1) (“Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.”).

66. *See*, e.g., CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 4 (May 12, 2005) (investment claims brought under U.S.-Argentina BIT).

67. *See*, e.g., Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 15 (May 17, 2007) (investment claims brought under contract with host state).

68. ICSID Convention, *supra* note 1, art. 37(2).
Where, however, the parties are unable to agree on the arbitrators, the ICSID secretariat will appoint the arbitrators to fully constitute the tribunal. The tribunal is charged with issuing an award in writing that decides every question submitted to it by a majority vote, explaining the reasons upon which the award is based. Any member of the tribunal may append a separate or dissenting opinion. The award must be based on the rules of law agreed upon by the parties, which in practice refers to the governing law of the contract or treaty under which the arbitration is brought. In the absence of such an agreement, however, the law of the host state applies together with applicable international laws.

Unlike a domestic court decision, which is subject to appeal by a higher court, an ICSID award is not open to appeal. It is only subject to rectification, interpretation, revision or annulment, which are all different in nature from appeals.

Within 45 days of the date of the award, either party may request rectification of the award on the narrowest of grounds: that there was a clerical, mathematical or other similar error. Either party may also request interpretation or clarification of the meaning and scope of the award by submitting an application to the ICSID Secretary-General, which will attempt, as far as possible, to refer the question to the original tribunal. If the original tribunal cannot be reconvened, a new tribunal will be constituted.

69. Id. art. 37(2)(b).
70. Id. art. 38; ICSID Additional Facility, Schedule C, art. 9.
71. ICSID Convention, supra note 1, art. 48(1)-(3).
72. Id. art. 48(3).
74. ICSID Convention, supra note 1, art. 42(1).
75. See, e.g., Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 15 (May 17, 2007) (“Any dispute arising under this Contract shall be settled by Arbitration in accordance with the Arbitration Laws of Malaysia. The venue of the arbitration shall be Kuala Lumpur.”).
76. ICSID Convention, supra note 1, art. 42(1) (“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”).
78. ICSID Convention, supra note 1, art. 49. See Soufraki rectification; Noble Ventures rectification; Luchetti rectification; Santa Elena rectification; Maffezini rectification (all granting rectification of clerical errors); Genin rectification; Vivendi I ad hoc committee rectification (both denying request for rectification).
79. ICSID Convention, supra note 1, art. 50.
ambiguities may be discovered much later in the process, there is no time limit on when a party may request clarification.\(^80\)

There are, however, strict time limits on attempts to revise the award. Within three years of the date of the award, if a party discovers some dispositive fact that it could not have reasonably known when the award was rendered, it has 90 days to request that the tribunal revise the award on the basis of that new fact.\(^81\)

Either party may also make an application to annul the award within 120 days of receiving the award.\(^82\) The Secretary-General then approaches an ad hoc committee of three arbitrators from the ICSID panel of arbitrators, to which each member state has designated four arbitrators and the Secretary-General has designated ten more.\(^83\) If an award survives the annulment process, or if there is no request for annulment within 120 days of the date of the award, it is final and not subject to appeal. Each signatory state is obliged under the ICSID Convention to recognize the award as if it were a final judgment of a court in that state,\(^84\) and the prevailing party in the arbitration may seek recognition or enforcement before domestic courts of signatory states.\(^85\)

\(^80\) See Memorandum of the Meeting of the Committee of the Whole, Feb. 23, 1965, SID/65-6, in ICSID History, supra note 58, Vol. 2, Pt. 2, 982, 987 ("Mr. Broches explained that . . . since compliance with an award may extend over a number of years, no time limit was imposed for requests for interpretation.").

\(^81\) ICSID Convention, supra note 1, art. 51.

\(^82\) See ICSID Commentary, supra note 2, at 881-1075 (discussing annulment under Article 52).

\(^83\) ICSID Convention, supra note 1, art. 4.

\(^84\) Id. art. 53. See CMS Gas Transmission, ICSID Case No. ARB/01/8, Annulment Decision, ¶ 15 (quoting the Argentine Republic’s 12 June 2006 written statement, issued in accordance with the Committee’s directions and signed by Dr. Osvaldo César Guglielmino, Argentina’s Attorney-General, stating that “[t]he Republic of Argentina hereby provides an undertaking to CMS Gas Transmission Company that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event annulment is not granted.”).

\(^85\) ICSID Convention, supra note 1, art. 54. See also Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), ¶ 53 (Mar. 5, 2009)

The very fact that the Committee has found that Argentina is under a duty, unconditionally and in good faith, to “abide by and comply with” the Award according to Article 53, together with Argentina’s repeated and uncompromising affirmation that it has no such obligation in the absence of the award creditor submitting the award to a procedure within the State party’s domestic judicial system under Article 54, must necessarily lead to the conclusion that Argentina is not willing to comply with its obligations under Article 53 unless Sempra first seeks enforcement under Article 54. This is an important consideration to be weighed when determining the future of the present stay of enforcement of the Award.
Unlike an appeal from a domestic court decision, which can modify a lower court decision to correct it, annulment of an ICSID award can only nullify it but not correct it. An annulled award is void, and the claimant has to commence arbitration anew.

C. Standards for Annulment

The other key difference between an appeal and an annulment is the scope of inquiry. In an appeal of a court decision, the appeal can be sustained on errors of law or fact in the decision below. In contrast, the grounds for annulment under the review standard of Article 52 of the ICSID Convention are much more narrowly confined. The firestorm that threatens to engulf the ICSID annulment system and ICSID itself concerns annulment under Article 52, which states:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
   (a) That the Tribunal was not properly constituted;
   (b) That the Tribunal has manifestly exceeded its powers;
   (c) That there was corruption on the part of a member of the Tribunal;
   (d) That there has been a serious departure from a fundamental rule of procedure; or
   (e) That the award has failed to state the reasons on which it is based.

In practice, most annulment applications have claimed that the tribunal either manifestly exceeded its powers, that there was a serious departure from serious of fact or law in the decision below, or that a legal principle had been applied incorrectly.
a fundamental rule of procedure,\textsuperscript{93} or that the award failed to state the reasons on which it was granted.\textsuperscript{94} It is less common for a party to claim that there was corruption on the part of a member of the Tribunal, or that the Tribunal was not properly constituted.\textsuperscript{95}

Even a cursory glance at the three grounds on which awards tend to be challenged shows that the precise standards of review on the basis of text alone are unclear. The Vienna Convention on the Law of Treaties states that treaties are to be interpreted according to the ordinary meaning of words in light of the object and purpose of the treaty.\textsuperscript{96} To determine that a tribunal manifestly exceeded its powers requires a determination of what the powers of a tribunal are, whether it has exceeded them or simply misapplied them, and if this excess was manifest. “Power,” “exceed,” and “manifest” are not defined terms in the ICSID Convention, and the ordinary meaning of those words does not provide sufficient specificity that they could be applied in an annulment proceeding without reasonable debate about how they apply to a tribunal’s award or conduct.\textsuperscript{97}

Likewise, in considering whether there was a serious departure from a fundamental rule of procedure in the arbitral proceedings, an \textit{ad hoc} committee will find no explicit guidance in the text of the ICSID Convention about the

was endowed by the terms of the Agreement and the Convention, and that it ‘manifestly’ did so.”).\textsuperscript{93}
See \textit{Aron Broches, Observations on the Finality of ICSID Awards, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW} 311 (1995) (omitting corruption and improper constitution of the tribunal when discussing the common claims for annulment applications). \textit{But see} Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010) (invoking the grounds that the Tribunal was not properly constituted, among other reasons).

\textit{See} Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (stating that words in treaties should be interpreted in good faith according to their ordinary meaning in light of the objects and purposes of the treaty).

\textit{See} Industria Nacional de Alimentos, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment, dissenting opinion of Frank Berman, ¶ 4 (Sept. 5, 2007) (“There is obviously room for some discussion as to what the standard of ‘manifestness’ under Article 52(1) of the Washington Convention should be understood to mean. . .”). \textit{See also} Carlos Ignacio Suarez Anzorena, \textit{Vives v. Argentina: On the Admissibility of Requests for Partial Annulment and the Ground of Manifest Excess of Powers, in ANNULMENT OF ICSID AWARDS, supra note 4, at 175 (“[T]He is impossible to reconcile the meaning that the \textit{ad hoc} Committee assigns to the term ‘manifest’ with the ordinary meaning of that term.”); Statement of Mr. Loukur, World Bank Member from India, \textit{in ICSID History, supra note 58, at 851 (noting that he “failed to see” the meaning of the word “manifestly” in the provision of annulment); Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16 (2011) (Andreas Lowenfield, speaking) (on file with author) (“[T]He use of ‘manifest,’ if I may, is one of those fudge words.”).
meaning of “serious” or “fundamental,” and it is fairly obvious that the ordinary meanings of these words do not provide a bright line standard for when a departure is serious or not quite serious enough to trigger annulment, or when a rule of procedure is fundamental or important but not fundamental.98

A similar analysis applies to the annulment of awards for the failure to state reasons, which is another undefined standard in the ICSID Convention. As the author has explored in prior scholarship, it is unclear when the failure to state adequate reasons amounts to a failure to state reasons sufficient to trigger annulment, just as it is unclear when incongruent reasoning based on errors of law or fact amount to a failure to state reasons.99

However, interpreting the grounds for annulment in the context of the object and purpose of the ICSID Convention also fails to provide sufficient guidance in the interpretation of Article 52.100 The preamble of the ICSID Convention indicates that the purpose of the Convention is to promote “international cooperation for economic development” and recognizes “the role of private international investment” in economic development.101 It also recognizes the need to settle disputes through international arbitration rather than in national courts, if that is what the parties desire.102

It is not self-evident from the text of the preamble whether FDI and economic development would be promoted by interpreting the standards for annulment narrowly or broadly, or what the framers of the Convention thought about this question. Without more guidance from the text, one might speculate that investors and host states prefer narrower grounds of review to reduce the

98. Compare Industria Nacional de Alimentos and Indalsa Peru v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 125 (Sept. 5, 2007) (finding no serious departure from a fundamental rule of procedure justifying annulment, even though it refused to allow Luchetti to file a full memorial on the merits before its decision on jurisdiction that accepted on their factual assertions in a decree by respondent Peru), with id., Dissenting Opinion of Sir Berman, ¶ 16 (concluding that there was a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention because the tribunal “failed to put to the proof by any recognized fact-finding process these factual assertions by the Respondent . . .”).

99. See generally Tai-Heng Cheng & Robert Trisotto, Reasons, Reasoning, and Reasonableness, 32 SUFFOLK TRANSnat'L L. REV. 409 (2009). Compare Industria Nacional de Alimentos, ICSID Case No. ARB/03/4, Decision of the ad hoc Committee, ¶ 129 (holding that the failure of an award to “give a full picture of the various elements which should be taken into account for treaty interpretation” is insufficient to trigger annulment for failing to state reasons where the tribunal left no doubt as to “the legal or factual elements upon which the Tribunal based its conclusion”), with id. Dissenting Opinion of Sir Berman, ¶ 14 (concluding that the same award failed to state reasons because it insufficiently stated “a whole series of steps in the logical chain of its reasoning). See also Pierre Lalive, Concluding Remarks, in Annulment of ICSID Awards, supra note 4, at 308 (“I agree with Christoph Schreuer that the place of this ground for annulment in the ICSID is “not entirely clear’—which is perhaps an understatement.”).

100. ICSID Convention, supra note 1, art. 53.

101. Id. pmbl. ¶ 1.

102. Id.
likelihood of annulment, and therefore narrower review would promote the purposes of the Convention of encouraging private international investments.

Alternatively, one might conjecture that investors and host states prefer wider grounds of review to increase the likelihood that awards were decided correctly according to law, and therefore wider review would promote the purposes of the Convention. A reasonable person might also hypothesize that different investors and host states have different preferences in this regard.

Accordingly, the Convention’s purpose of promoting investments offers limited guidance about how to interpret the ambiguous standards for annulment. Article 52, on its face and in light of the stated purposes of the ICSID Convention, is unclear as to the precise standard for annulment.

D. Annulment Decisions

Although the text of Article 52 is ambiguous, annulment decisions seem to be trending towards a higher annulment standard. In international law, shared expectations of appropriate conduct are not shaped by text alone. The practices of authoritative decisionmakers and how their decisions are received by others in the international community also consolidate social beliefs about appropriate conduct.103 The decisions of ad hoc committees and scholarly responses to those decisions have, over time, clarified that as a matter of social practice, the standard for nullification under Article 52 is much higher than an appellate standard.104

However, as the discussion of ad hoc decisions below shows, this constitutive process of arbitral decisionmaking in ICSID arbitration is volatile, and decisions will occasionally deviate from the higher annulment standard. A cluster of recent decisions applying a lower standard for annulment has provoked afresh anxieties about ICSID annulment.

1. Failure to State Reasons

The first annulment decision in ICSID history is Klöckner v. Cameroon,105 which was decided in October 1983. It interpreted Article 52 as imposing a low standard for annulment for the failure to state reasons. A West German

103. See generally, CHENG, supra note 15, at 73-121.
105. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Introductory Note, ¶ 1 (“In February of 1984, Klöckner applied to have the award annulled under Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). This was the first such application in ICSID’s history.”).
multinational company, Klöckner, initiated ICSID arbitration against Cameroon for payments guaranteed under a supply contract to provide a factory for SOCAME, a fertilizer company, which proved unprofitable and unworkable. The tribunal decided in favor of Cameroon.106 Klöckner filed an application for annulment for, inter alia, the failure to state reasons. The ad hoc committee accepted Klöckner’s argument that the tribunal failed to account for Klöckner’s arguments regarding contractual limitations of Klöckner’s warranties and liabilities, Cameroon’s unconditional acknowledgement of its debt, and applicable French law limiting a supplier’s liability for hidden defects and time barring claims. The ad hoc committee concluded that consequently the award must be annulled in its entirety.107

The committee, chaired by Pierre Lalive, recommended a “searching and detailed examination of every aspect of the ICSID review process.”108 It also instructed that the reasons requirement could not be satisfied by “purely formal or apparent” reasons.109 Instead, the tribunal must provide reasons “having some substance,”110 based on identified sources of law and actual facts.111 The committee believed an award should be annulled for a failure to state reasons when there is an absence of reasons “sufficiently relevant,’ that is, reasonably sustainable and capable of providing a basis for the decision.”112

Scholars responded to Klöckner with a torrent of criticism.113 They believed that Klöckner misinterpreted Article 52, and some even warned that the

106. Klöckner Industrie-Anlagen GmbH, ICSID Case No. ARB/81/2, Award, ¶ 428 (Oct. 21, 1983) (“The faults committed by Klöckner in the performance of their contractual obligations are enough to free the Cameroonian government from their financial investment.”) (translation on file with author).
107. Klöckner Industrie-Anlagen GmbH, ICSID Case No. ARB/81/2, Annulment Decision, ¶ 179 (“The contested arbitral Award must therefore be annulled and, for the reasons given above, annulled in its entirety.”).
110. Id.
111. Id.
112. Id. ¶ 120.
113. Mark Feldman, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID REV.-FILJ 85, 90-94, 97-110, (1987); Alan Redfern, ICSID—Losing Its Appeal?, 3 Arb. INT’L 98, 99 (1987) (“The decisions of three eminent arbitrators, appointed by or on behalf of the parties, have been wiped out by another three eminent arbitrators, appointed by the President of the World Bank, in what might seem like an elaborate and expensive game of snakes and ladders.”); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 64-65 (1992) (“Though the committee was at pains to distinguish this claim from a claim of an erroneous application (error in judicando), it is difficult to escape the impression that the real thrust of the committee’s concern was that the tribunal’s legal conclusion of an obligation imposed on Klöckner de tout reveler constituted a mistake in law.”); Ian Brownlie, 86 Am. Soc’y INT’L L. PROC. 586, 593 (1992) (“A fairly pessimistic view does exist. Michael Reisman, in a brilliant lecture at Duke University in 1989, talked about the breakdown of the control mechanism. He pointed to the
The entire legitimacy of ICSID arbitration was threatened. The ICSID Secretariat put those fears to rest through the careful selection of arbitrators for the next two ad hoc committees.

The next ad hoc decision was *Amco Asia v. Indonesia*, issued on May 6, 1986. Amco Asia, a U.S. company, entered into an agreement with the government of Indonesia to manage and invest capital in a hotel. Amco Asia initiated ICSID arbitration after Indonesia forcefully removed Amco Asia’s hotel management, seized the hotel, and revoked Amco Asia’s license. The first tribunal issued an award in favor of Amco Asia. In the annulment proceeding, the ad hoc committee, chaired by Ignaz Seidl-Hohenveldern, annulled the award in its entirety after a review of the facts and substance of the applicable law. However, it also significantly raised the standard for annulment from *Klöckner*. The *Amco Asia* committee stated:

> “There must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it. The phrase ‘sufficiently pertinent reasons’ appears to this ad hoc Committee to be a simple and useful clarification of the term ‘reasons’ used in the Convention.”

Unlike *Klöckner*, which explicitly stated that reasons were sufficiently relevant only if they were based on identified sources of law and actual facts, *Amco Asia* reformulated the requirement as “sufficiently pertinent reasons” without necessarily requiring pertinent reasons to have been derived from actual rules of law or facts.

The third ad hoc decision raised the threshold for annulment even further. *MINE v. Guinea* was decided in January 1988, almost five years after *Klöckner*. The MINE committee included Aron Broches, chief negotiator of the ICSID Convention, who had also served as an expert on international law for Amco in *Amco Asia*. Mr. Broches’s views strongly favoring finality were not fully adopted in *Amco Asia*, and now he had an opportunity to pronounce and apply his view as a key decisionmaker. The MINE decision held that that an award various problems arising from partial nullification of awards and what may be a questionable approach to the concept of res judicata.”); Pierre Lalive, *Concluding Remarks, in Annulment of ICSID Awards*, supra note 4, at 297, 298 (acknowledging, as the chair of the *Klöckner* ad hoc committee, that its decision “gave rise to interesting negative reactions”).


115. Amco Asia Corp. & others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award, 291 (Nov. 20, 1984).

116. This statement corrects a ministerial error in an earlier article. See Cheng & Trisotto, *supra* note 99, at 419 (stating that Rosalyn Higgins chaired the *Amco Asia* ad hoc committee. In fact, Judge Higgins chaired the second *Amco* tribunal.).

117. *Amco Asia Corporation*, ICSID Case No. ARB/81/1, Award, ¶ 129.

118. *Id.* (“Dr. Broches opined that ‘there is no justification for arbitrarily reading into the Convention a restriction on a party’s right to present claims or counterclaims other than the dispositive one of Arbitration Rule 55(3).’ In this context he referred to Article 46 of the Convention on the presentation of additional claims.”).
may be sufficiently reasoned if it is coherent. It explained that the reasons requirement "implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that."

In other words, it must enable "one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or law." Since MINE, most ad hoc committees have adopted its minimalist approach. For example, in MTD Equity Sdn Bhd and MTD Chile SA v. Chile, MTD had entered into a contract with Chile regarding a mixed-use planned community on land that was currently zoned for agriculture. MTD initiated ICSID arbitration against Chile after Chile denied MTD required zoning changes on the alleged basis that MTD’s proposed plan was inconsistent with the government’s urban development policy. The tribunal held that Chile breached the fair and equitable treatment standard under Article 3(1) of the Chile-Denmark bilateral investment treaty (BIT).

Chile then filed an annulment application on the basis that, inter alia, the award failed to state the reasons upon which it was based. Chile argued that the tribunal failed to explain how it was in fact possible for MTD to have any expectations regarding its investment based on the approval of the project, and failed to specify the “urban policy” upon which the tribunal relied. The MTD ad hoc committee rejected this application for annulment. Although gaps existed among the facts, the tribunal’s reasoning from these facts was sufficiently clear such that an informed reader could understand the reasons given by the tribunal in reaching its conclusion.

Scholars and practitioners believed, for a time, that the issue had been put to rest.


120. Id. ¶ 5.09.

121. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 946-951; Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3. Annulment, ¶ 81 et seq (Aug. 20, 2007); CDC Group plc v. Seychelles, ICSID Case No. ARB/02/14, Decision of the ad hoc Committee on the Application for Annulment, ¶ 32 et seq. (Dec. 17, 2003); MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ICSID Case No. ARB/01/7, Decision on Continued Stay of Execution, ¶ 24 et seq (Jun. 1, 2005); Industria Nacional de Alimentos, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 64 et seq. (Sept. 5, 2007). See also ANNULMENT OF ICSID AWARDS, supra note 4, at 6 et seq. (stating that the Wena decision adopted “a balanced understanding of the scope of the review”). But cf., Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award, ¶ 34 et seq. (Nov. 1, 2006) (annulling award under the low MINE standard).

122. MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ICSID Case No. ARB/01/7, Award, ¶ 93 (May 25, 2004).

123. MTD Equity Sdn Bhd and MTD Chile SA, ICSID Case No. ARB/01/7, Decision on Continued Stay of Execution, ¶ 29 (Mar. 21, 2007).

124. ANNULMENT OF ICSID AWARDS, supra note 4, at 6 (noting that the Wena and Vivendi I annulment decisions, which were both decided in 2002, “deserve the credit for ending the controversy created by the first decisions rendered in the Klöckner and Amco matters,” which were
Recently, however, a string of decisions has once again raised questions about the proper annulment standard. This time, the interpretive issue has broadened to encompass other limbs of Article 52, namely that the tribunal either was not properly constituted, manifestly exceeded its powers, or seriously departed from a fundamental rule of procedure. Each of the key decisions concerning these limbs of annulment raises serious questions of law and policy, and is discussed in turn below.

2. Improper Constitution of the Tribunal

One of the key ad hoc decisions concerning the improper constitution of a tribunal is Compañía de Aguas del Aconquija, S.A. v. Argentine Republic (“Vivendi II”). That dispute arose when Argentina cancelled a thirty-year concession contract between Compañía de Aguas del Aconquija, S.A. and the Argentinean Province of Tucumán. After the first award was annulled, the second tribunal decided that it had jurisdiction over the claims and dismissed the claims. Argentina again applied to annul the second award, arguing that the tribunal was not properly constituted because one of the arbitrators, “lacked the requirements imposed by the ICSID Convention and should have been disqualified during the proceedings.”

Argentina criticized the challenged arbitrator’s conduct, explaining that by accepting a directorship with the bank UBS, which had an interest in the dispute, she “created, objectively viewed, a conflict of interest which was incompatible with the necessary appearance of impartiality required of an ICSID arbitrator.” However, the committee elected not to annul the award, reasoning that because the arbitrator was unaware of her conflict of interest until after she decided the award, her judgment could not have been impaired. In so doing, the committee essentially inserted into Article 52 a harmless error defense,

issued in 1986 and 1994 respectively). But cf., Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment, ¶ 131 (June 5, 2007) (rejecting annulment application for failure to state reasons, but appearing to apply the AMCO standard, explaining that although it “cannot look into [the] correctness” of reasons by an arbitration tribunal, the committee “has to verify the existence of reasons as well as their sufficiency—that they are adequate and sufficient reasonably to bring about the result reached by the Tribunal.”) (Florentino Felicano served on both the AMCO and Soufraki ad hoc committees); CMS v. Argentina, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ¶ 97 (annulling holding on umbrella clauses because reasoning was incoherent) (“In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point.”).

125. See Vivendi, ICSID Case No. ARB/97/3, Introductory Note.
126. See Vivendi, ICSID Case No. ARB/97/3, Award, Annulment.
128. Id. additional opinion of J.H. Dalhuisen, dissenting, ¶ 19.
129. Id. ¶ 77.
130. Id. ¶ 234-238.
although nothing in Article 52 actually states that an application must show harm.

3. **Serious Departure from a Fundamental Rule of Procedure**

_Fraport_ concerned annulment for, _inter alia_, a serious departure from a fundamental rule of procedure. Unlike _Vivendi II_, however, the _Fraport_ committee was unconcerned with whether the error caused harm. As previously described, _Fraport_ invested in PIATCO and contracted to build and operate an NAIA-3. By late 2001, _Fraport_ directly and indirectly owned 61.44 percent of PIATCO. Additionally, _Fraport_ entered into a confidential shareholder agreement to have managerial control over PIATCO. By the time the terminal was almost fully built, the Philippine Supreme Court decided that the concession agreement was null and void _ab initio_ because it seriously violated Philippine law and public policy. _Fraport_ filed a claim with ICSID, alleging that the Republic of Philippines violated its obligation towards _Fraport_ as an investor in the country.

The tribunal issued a partial award stating that it did not have jurisdiction because _Fraport_ had essentially exercised control over the airport project. The investment treaty only protected investments that were in accordance with Filipino law. _Fraport_’s counsel was not in accordance with the Philippines’s “Anti-Dummy” law. Therefore, the project was not an investment under the treaty. Although _Fraport_ presented the tribunal with evidence that a Filipino prosecutor concluded that _Fraport_ did not violate the Anti-Dummy Law, the tribunal discounted that evidence because it determined that the prosecutor did not have access to the same evidence before the tribunal. Accordingly, the tribunal concluded it had no jurisdiction.

_Fraport_ filed an application for annulment, claiming, _inter alia_, that the tribunal seriously departed from a fundamental rule of procedure by failing to

131. _Id._ ¶ 19.
132. _Id._ ¶ 24.
133. _Id._ ¶ 25.
134. _Id._ ¶ 30.
135. _Id._ ¶ 164 (“The Tribunal referred to . . . factual evidence from _Fraport_’s contemporaneous documents . . . and . . . evidence from the Prosecutor’s file [dismissing the ADL complaint].”) ¶ 151 (“Philippines submitted to the Tribunal the Prosecutor’s Resolution dismissing the criminal complaint under the ADL.”). See also Jarrod Hepburn, _Fraport Files New Claim at ICSID Over Expropriation of Airport Terminal Project; Annulment Committee Ruling Paved Way for New Hearing by Finding Breach of Investor’s Right to be Heard_, _Investment Arbitration Reporter_ (Mar. 31, 2011), http://www.iareporter.com/articles/20110331_7 (last visited Sept. 11, 2011) (Prosecutor determined the relevant fact for determining a breach of the ADL was the size of the shareholding held by a foreign investor and not the actual managerial control held by the foreigner).
136. _Id._ ¶ 30.
provide an opportunity to rebut the Philippines’ claim that the prosecutor did not have the evidence that was before the tribunal. The ad hoc committee agreed and annulled the award. It reasoned that Article 52(1)(d) was meant to control the integrity of the arbitral procedure and thus the right to be heard was a fundamental rule of procedure. Because of the tribunal’s treatment of new evidence in the original proceedings, it deprived Fraport of its right to be heard.

This decision is inconsistent with the requirement in Vivendi II that an annulable error must have caused harm for an Article 52 application to succeed. Even assuming that the tribunal departed from a basic rule of procedure by failing to give Fraport an opportunity to rebut the Philippines’ claim that the prosecutor did not have the material evidence before the tribunal, this departure was harmless error. Even if the tribunal had given the Philippines that opportunity, there is no indication in the award that the tribunal would consequently have given the prosecutor’s report sufficient weight to change the tribunal’s conclusion.

4. Manifest Excess of Power

Perhaps the most hotly debated limb of annulment today is the manifest excess of power. While it is accepted that errors of law do not provide a basis for annulment, when a tribunal fails to apply the law entirely it is deemed to have manifestly exceeded its limited authority to resolve the dispute according to law, and the decision must be annulled. However, the line between improperly applying the law and failing to apply the law entirely is neither clear in concept nor in practice.

On one side of the line is the CMS v. Argentina annulment decision, which held, inter alia, that the tribunal had made errors of law in interpreting the necessity defense found in the U.S.-Argentina BIT, but that these errors did not amount to a manifest excess of power or a failure to state reasons. In 1989, Argentina began privatizing “important industries and public utilities” to obtain

138. Id. ¶ 120.
139. Id. ¶ 247.
140. Id. ¶¶ 180, 197.
141. Id. ¶ 218.
142. Id. ¶ 66.
143. Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Annulment, ¶ 164 (June 29, 2010) (“As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers.”).
144. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ¶ 136 (Sept. 25, 2007).
foreign investments.\textsuperscript{145} In 1992 Argentina privatized its natural gas industry.\textsuperscript{146} The state-owned gas company, Transportadora de Gas del Norte (TGN), was opened to private investors, and CMS, a U.S.-based corporation, invested in the company.\textsuperscript{147} At the end of the 1990s, Argentina experienced a severe economic crisis “which eventually had profound political and social ramifications.”\textsuperscript{148} After the crisis, Argentina asked the natural gas companies to defer peso price increases that would have maintained the revenue of gas companies when calculated in U.S. dollars. The value of the Argentine peso fell dramatically. However, although TGN and Argentina had entered into an agreement that the “resulting income losses would be indemnified . . . it became apparent that the agreement would not be implemented.” CMS then filed for ICSID arbitration.\textsuperscript{149}

CMS claimed that it made important investments in the gas transportation sector of Argentina and that it suffered a severe loss as a result of Argentina’s changes to its currency regime. Argentina claimed, \textit{inter alia}, that its actions were excused under the necessity defense clause of the Argentina-U.S. bilateral investment treaty.\textsuperscript{150} After reviewing the parties’ claims, the tribunal rejected Argentina’s necessity defense and found that Argentina breached its obligations to accord the investor fair and equitable treatment guaranteed under Article II(2)(a) of the U.S.-Argentina bilateral investment treaty.\textsuperscript{151} The tribunal awarded CMS over $130 million.\textsuperscript{152}

Argentina then filed for annulment, claiming that the tribunal manifestly exceeded its powers and failed to state the reasons on which the award was based.\textsuperscript{153} The \textit{ad hoc} committee partially annulled the portion of award concerning the umbrella clause in the U.S.-Argentina bilateral investment treaty.\textsuperscript{154} But it left the other holdings intact, despite finding that the tribunal’s analysis of the necessity defense “contained manifest errors of law” and suffered from “lacunae and elisions.”\textsuperscript{155} In particular, the committee faulted the tribunal for analyzing necessity only under customary international law and not under Article IX of the Argentina-U.S. treaty.\textsuperscript{156} Ultimately, however, the committee concluded that under the Article 52 review standard, it could not “substitute its

\begin{footnotesize}

\begin{enumerate}
\item[145] Id. ¶ 53.
\item[146] Id. ¶ 54.
\item[147] Id. ¶¶ 55, 58.
\item[148] Id. ¶ 59.
\item[149] Id. ¶ 61.
\item[150] Id. ¶ 213.
\item[151] Id. ¶ 84.
\item[152] Id. ¶ 151.
\item[153] Id. ¶ 1.
\item[154] Id. ¶ 159.
\item[155] Id. ¶ 158.
\item[156] Id. ¶ 123
\end{enumerate}
\end{footnotesize}
own view of the law and its own appreciation of the facts,” and accordingly it left the award’s finding on necessity intact.157

On the other side of the line are two other disputes against Argentina: Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic and Sempra Energy Int’l v. Argentine Republic.158 Like CMS, both of these arbitrations concern similar facts. Both occurred during Argentina’s debt crisis and both were subject to the same U.S.-Argentina bilateral investment treaty. They also considered the necessity defense under its customary law elements, and, like the CMS tribunal, found that the necessity defense did not apply to excuse Argentina’s currency measures that damaged the U.S. investments.

In those two disputes, however, the ad hoc committees reached different conclusions from the CMS committee. The Enron committee reasoned that the Enron tribunal manifestly exceeded its powers by failing to consider the elements on necessity under the bilateral investment treaty or customary law, and by failing to give reasons.159 The Sempra committee similarly reasoned that the Sempra tribunal manifestly exceeded its powers by failing to apply the correct law, applying customary international law instead of treaty law.160

Aside from these Argentina decisions, which some commentators have attempted to ignore as sui generis,161 there are at least two other decisions annulling awards that misapplied the law, holding that such misapplication amounted to a manifest excess of power.

In Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia,162 Malaysian Salvors brought a claim against the Republic of Malaysia regarding

157. Id ¶ 136.


159. Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision of the ad hoc Committee on the Application for Annulment, ¶ 169 (July 30, 2010).


162. See Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No.
an alleged breach of contract. The parties entered into a contract on August 3, 1991 for Malaysian Salvors to locate and salvage the cargo of a sunken British ship, The Diana, which sank off the coast of Malacca in 1817. Malaysian Salvors was “required, among other things, to utilize its labor and equipment to carry out the salvage operation, and to invest and expend its own financial and other resources, and assume all risks of the salvage operation, financial or otherwise.”\textsuperscript{163} Malaysian Salvors brought an ICSID arbitration after it found a treasure and a dispute arose over the proceeds of the sale of the treasure.\textsuperscript{164}

The sole arbitrator issued an award finding that the tribunal lacked jurisdiction because there was no investment within the meaning of Article 25(1) of the ICSID Convention.\textsuperscript{165} In reaching this decision, he emphasized that the subject matter of the dispute was of a cultural and historical nature, and that Malaysian Salvors had spent little money.

Malaysian Salvors applied to annul the decision, claiming, \textit{inter alia}, that the tribunal had manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention in finding that it lacked jurisdiction.\textsuperscript{166} According to Malaysian Salvors, the tribunal applied an overly-restrictive definition of the term investment, elevated characteristic-based tests to the level of jurisdictional conditions, and improperly introduced a further jurisdictional requirement of “[c]ontribution to the [e]conomic [d]evelopment of the [h]ost [s]tate.”\textsuperscript{167}

A majority of the \textit{ad hoc} committee annulled the award, reasoning that the tribunal had manifestly exceeded its power by failing to account for the expansive definition of “investment” in applying the Malaysia-U.K. bilateral investment treaty, and by failing to consider the \textit{travaux preparatoires} of the ICSID Convention, which show that the drafters rejected a monetary floor in the amount of an investment.\textsuperscript{168}

A member of the committee dissented. The dissenting member, Judge Shahabuddeen, appended an opinion stating that he agreed with the arbitrator, Michael Hwang. Judge Shahabuddeen found that the “economic development of the host State is a condition of an ICSID investment.”\textsuperscript{169} From this premise, he

\begin{itemize}
\item \textsuperscript{163} Id. ¶ 8.
\item \textsuperscript{164} Id. ¶ 3 (According to the terms of the agreement, Malaysian Salvors would collect seventy percent of the proceeds if the “appraised sum of the unsold artifacts and auction value of recovered items sold came to less than U.S. $10 million.”).
\item \textsuperscript{165} Id. ¶ 49 (“[T]he Tribunal concludes that the Contract is not an “investment” within the meaning of Article 25(1) of the ICSID Convention. The Claimant’s claim therefore fails \textit{in limine} and must be dismissed for want of jurisdiction.”).
\item \textsuperscript{166} Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 11 (Apr. 16, 2009).
\item \textsuperscript{167} Id. ¶ 29.
\item \textsuperscript{168} Id. ¶¶ 80-81.
\item \textsuperscript{169} Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, Dissenting Opinion of Judge Mohamed
\end{itemize}
reasoned that “the economic development... had to be substantial or significant,” and that Malaysian Salvors contract did “not promote the economic development of Malaysia in a substantial or significant manner.”\(^{170}\) Accordingly, in Judge Shahabuddeen’s dissenting view there was no investment and the tribunal lacked jurisdiction over the dispute.\(^{171}\)

In *Helnan International Hotels A/S v. The Arab Republic of Egypt*,\(^ {172}\) a Danish hotel management company contracted with a government tourism body to manage a five-star hotel in Cairo. The claimant, Helnan International Hotels A/S, filed an arbitration claiming that Egypt subjected it to unfair, discriminatory, and inequitable treatment by downgrading the status of the hotel from five stars to four as a way to terminate a long-term management contract with the Danish company. Helnan claimed that Egypt orchestrated a series of events that lead to downgrading the hotel, eventually evicting Helnan.

The tribunal agreed that the government had procedural irregularities in handling the situation, but did not find that these irregularities rose to the level of unfair or inequitable treatment.\(^ {173}\) The tribunal also held that although its jurisdiction was not affected by Helnan’s failure to pursue local remedies in Egypt, its failure to exhaust local remedies undermined its claims on the merits.\(^ {174}\)

Upon application for annulment, the *ad hoc* committee chaired by Judge Stephen Schwebel partially annulled the award, nullifying its holding that Helnan failed to establish a claim because it had not exhausted local remedies. The *ad hoc* committee determined that requiring exhaustion of local remedies could not bar a claimant from pursuing direct treaty claims.\(^ {175}\) However, the *ad hoc* committee left the rest of the award intact. Because the annulled portion of the award was not dispositive, the annulment did not change the outcome that Helnan did not prevail in its arbitration claim.

## III. FINALITY IN ICSID ANNULMENTS

Jurists have asserted the importance of authoritative and neutral dispute resolution, through the ICSID Convention, to promote FDI.\(^ {176}\) They have also

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Shahabuddeen, ¶ 38 (Apr. 16, 2009).
170. *Id.*, ¶ 48.
171. *Id.*, ¶¶ 62-65.
173. *Id.*, ¶ 169.
174. *Id.*, ¶ 162.
176. See 1 ICSID TRAVAUX 2, II.1.4.3 (Note by the President to the Executive Directors
Berkeley Journal of International Law, Vol. 31, Iss. 1 [2013], Art. 7
2013] ANNULLING INVESTOR-STATE ARBITRATION AWARDS

267

identified finality as crucial for the proper functioning of such a system of dispute resolution,177 and have said that finality is necessary to support the objects and purposes of the ICSID Convention.178 These objects and purposes, as stated in the preamble of the ICSID Convention, are to promote FDI for economic development.179 Under this line of reasoning, the policy reason for finality is to promote FDI.

Accordingly, it is reasonable to inquire whether, in fact, delays in ICSID arbitration diminish foreign investments. If there is inconclusive evidence for this assumption, then the basis provided for criticizing the recent annulments of ICSID awards is similarly shaky. The law and economics scholarship on the relationship between foreign investment and bilateral investment treaties is

(Eugene R. Black) on Dec. 28 1961) (“Improved methods for the settlement of investment disputes would contribute to an improvement in the investment climate and would thereby tend to promote the flow of private foreign capital . . . ”).1 ICSID Travaux 2, II.1.1.1 (Note by Aron Broches, General Counsel, transmitted to the Executive Directors: “Settlement of Disputes between Governments and Private Parties” on Aug. 28, 1961) (“The many studies which have been undertaken in recent years concerning ways and means to promote private foreign investment have almost invariably discussed the problem of the settlement of disputes between foreign private investors or entrepreneurs and the Government of the country where the investment is made.”). See also, e.g., Andrew T. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT’L L. 639, 658 (1998) (“Any single capital-importing country has an incentive to sign a BIT because such a treaty helps that country attract foreign investment.”); Joel C. Beauvais, Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts, 10 N.Y.U. ENVTL. L.J. 245, 253 (2002) (“[T]he BIT revolution has been accompanied by a major shift in capital-importing countries’ regarding foreign direct investment” and “an explosion in capital imports to developing countries.”). When a dispute arises, among signatory states, pursuant to these BITs, the neutral venue to resolve the disputes is through ICSID.

See Gabriel Eghl, Don’t Get Bit: Addressing ICSID’s Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions, 34 PEPPE L. REV. 1045, 1058 (“The purpose of [ICSID] was to ‘provide proceedings’ for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states.”).

177. Mark. B. Feldman, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 FOREIGN INVEST. L.J. 85, 85 (1987) (“One of the most persistent problem in international arbitration has been the difficulty of ensuring the finality of arbitral awards.”); Christopher Schreuer, ICSID Annulment Revisited, 30 LEGAL ISSUES OF ECON. INTEGRATION 103, 104 (2003) (“The desire to see a dispute settled is often regarded as more important than the substantive correctness of the decision.”).

178. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee, ¶ 3 (May 3, 1985) (“[A]pplication of the paragraph demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention.”) (unofficial translation from French by Edward Barrett]; Hussein Nuan An Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, ¶¶ 21-22 (June 5, 2007) (“Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty.”).

179. ICSID Convention, supra note 1, pmbl. (“Considering the need for international cooperation for economic development, and the role of private international investment therein”).
The research tends to conclude that BITs are associated with higher levels of FDI. However, this research has not considered whether the length of time taken in resolving BIT disputes under the ICSID Convention affects FDI. It appears the closest inquiry into this question was conducted by Todd Allee and Clint Peinhardt in 2011, showing that filing an ICSID arbitration significantly reduces gains in FDI flows from signing BITs, and states that lose an ICSID arbitration experience an even greater loss of inbound FDI. Allee and Peinhardt do not address, however, the effect that the length of time it takes to resolve an ICSID dispute has on FDI flows, or more specifically, whether delays in dispute resolution from annulments have any effect on FDI. Based on this existing research, it appears that there is insufficient evidence and analysis to validate the assumption that higher nullification standards and greater finality promote FDI.

It is reasonable to wonder whether finality in dispute resolution actually supports FDI. Some investors may prefer to have a second chance to win their arbitration by annulling a prior award against them, rather than to lose their disputes with finality once an adverse award is rendered. This view is borne out by the number of arbitral awards where the losing investor applied to set aside the award, such as the Fraport arbitration. Based on this experience, a reasonable hypothesis could be that FDI is actually promoted by broader annulment standards, rather than finality, because investors want the opportunity to set aside a wrongly decided award in order to have another chance at winning their disputes with host states.

Skepticism about how much delays in finality due to annulments actually affect FDI is reinforced by another reasonable hypothesis that the level of FDI depends more on a range of macro-economic factors, such as the expected returns on investment in a country, its political climate, and its anticipated...
economic growth, rather than on finality in resolving an investment dispute. Three short examples support this hypothesis.

A. Argentina

In the case of Argentina, there have been forty-eight ICSID cases filed against it. Of these forty-eight cases, thirteen were subject to annulment proceedings, beginning in 2001. As of September 6, 2011, the Enron and Sempra awards were annulled, five annulment applications were pending, and six were rejected by the ad hoc committee or withdrawn by the applicant.183 Regressions might be able to isolate the annulment proceedings as the dependent variable in order to determine what effect delaying finality had on FDI, if any. However, from a practical standpoint, absent evidence that delaying finality of awards has a significant impact on FDI, policymakers might be more concerned about other established significant variables that contributed to Argentina’s inbound FDI.

In 2001-2002, FDI flows into Argentina plummeted. Although there was one annulment proceeding during this time,184 the IMF and World Bank did not attribute the fall in inbound FDI to delays in arbitral decisions. Instead, they attributed the decline in FDI to the economic downturn in Argentina.185 In 2001, Argentina’s economic growth fell and it faced a currency run, which in turn catalyzed a bank run. Consequently, Argentina suspended convertibility of their bank deposits, which limited cash withdrawals from bank accounts. This was followed by the devaluation of the peso and reprogramming of most bank deposits. As a result, investors withdrew their funds from Argentina and relocated them elsewhere.186

Starting in early 2003, economic growth began to pick up from the currency crisis in 2001-02 and outpaced expectations.187 In fact, FDI inflows have been increasing at a nearly steady rate.188 Although from 2003 onwards there were numerous annulment proceedings concerning Argentina, analyses of

183. ICSID List of Cases in Which Argentina is the Respondent, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pa
gename=Cases Home (follow “Search Cases” hyperlink; then follow “Advanced Search” hyperlink; search “Argentina” as respondent) (last viewed Sept. 6, 2012).


186. MARINA HALAC & SERGIO L. SMUKLER, DISTRIBUTIONAL EFFECTS OF CRISES: THE ROLE OF FINANCIAL TRANSFERS (2003), available at http://www-
wdw.worldbank.org/servlet/WDSCcontentServer/WDSP/BIB/2004/01/20/000160016_20040120172705/
additional/130530322_20041117172611.pdf


Argentina’s economy during that time did not identify these annulment proceedings as having any effect on the economy. Instead, economists concluded that the main factors influencing Argentina’s FDI flows during that time were related to overall economic growth, domestic consumption, high profitability and additional competition.\(^{189}\) The World Bank identifies Argentina’s economic growth as coming from booming textile, automobile, and power industries,\(^{190}\) alongside the opening of China’s markets to certain commodities such as soy beans and crude oil, and an increased presence in the wine market.\(^{191}\)

### B. The Philippines

The Fraport annulment did have any obvious effect on FDI in the Philippines, which has risen steadily. Indeed, Germany, the country of incorporation of Fraport,\(^ {192}\) has remained one of the major sources of FDI inflows to the Philippines.\(^ {193}\) The Fraport award was issued on August 16, 2007 and the annulment application was filed on December 6, 2007, which eventually led to annulment on December 23, 2010. During this period, FDI in the Philippines steadily increased.\(^ {194}\) Economists have attributed the government effort to privatize electric and water power as one of the major factors influencing FDI into the Philippines.\(^ {195}\) The World Bank identified overall

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Between 2004 and 2008, rapid economic growth, increased domestic demand, high levels of profitability, and renewed competitiveness—combined with a favorable international environment—contributed to a vigorous expansion of FDI inflows . . . . The inward FDI stock rose steadily, to reach the 2001 level of US$ 80 billion again in 2008, a level that placed Argentina among the leading FDI recipients in Latin America.


\(^{191}\) Id.

\(^{192}\) Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award, ¶ 1.


economic growth as a result of internal investments in human capital, infrastructure, and an improvement in the Philippines’ investment climate and governance.\textsuperscript{196} Accordingly, it is difficult to conclude that the delay in finality of the Fraport award had a significant impact on FDI.

C. Cameroon

FDI flows in Cameroon similarly continued to rise during the period it was subject to the Klöckner ICSID proceedings.\textsuperscript{197} The Klöckner award was issued in October 1983 and was annulled in May 1985.\textsuperscript{198} During this period, Cameroon was experiencing an economic boom, largely due to an increase in oil production and revenue.\textsuperscript{199} Though FDI flows decreased in 1986,\textsuperscript{200} this decrease may have been related principally to macro-economic crisis caused by declines in value of the country’s major exports—oil, coffee, and cocoa—and an appreciation of its exchange rate.\textsuperscript{201}

In order to draw firmer conclusions about the impact of an annulment on FDI, the macro-economic and political variables discussed above would have to be controlled to isolate how much FDI can be said to diminish as a result of annulments. Nonetheless, even without quantifying the impact, if any, of annulments on FDI flows, policymakers may draw some practical lessons. Government officials may infer from this analysis that they may achieve their target rates of FDI by focusing on macroeconomic factors and specific incentives tailored to attract investors for concrete investment projects. These strategies may have a greater influence on inbound FDI than avoiding annulments of awards. Thus, until stronger proof is discovered that annulments negatively impact FDI flows, policymakers may question whether the desire for FDI provides an adequate basis to favor a high annulment threshold, especially when other strategies exist today to achieve high levels of FDI inflows.

IV. JUSTICE IN ICSID ANNULMENTS

Given the lack of evidence at this time that delaying finality in ICSID disputes through annulment affects FDI, justice may provide an attractive


\textsuperscript{197} United Nations Conference on Trade, \textit{ supra} note 194 (The reader is directed to view the “Inward and outward foreign direct investment flows, annual, 1970-2011” report through the UNCTAD site. Sort by country to see the increase in flows.).

\textsuperscript{198} See Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des engrais, ICSID Case No. ARB/81/2, Introductory Note (1985).


\textsuperscript{200} United Nations Conference on Trade, \textit{ supra} note 194.

\textsuperscript{201} See Ghura, \textit{ supra} note 199.
alternative basis for deciding on the appropriate level of scrutiny of awards. Both legal theory and the negotiating history of the ICSID Convention support taking justice into account in reviewing awards.

A. Scholarship

A review of the literature indicates that, although scholars and practitioners today seem to favor finality in ICSID arbitration, jurists have long wrestled with the competing goal of securing justice through the correct application of laws and promoting finality in awards.\textsuperscript{202} In 2011, a group of scholars and practitioners were impaneled at the Annual Meeting of the American Society of International Law to consider the proper balance between finality and justice in ICSID arbitration. They seemed to agree that finality was the preeminent policy concern. Christoph Schreuer, the author of the leading commentary on the ICSID Convention,\textsuperscript{203} cautioned against an expansive interpretation of the grounds for annulment.\textsuperscript{204} For these reasons, Professor Schreuer assessed the \textit{Enron} decision as “most problematic.”\textsuperscript{205} Andreas Lowenfeld responded to Professor Schreuer with the following concurring statement:

I think there should be—and I think there was intended—a presumption that the tribunal, unless properly constituted—and put that aside—got it right. . . . I think ad hoc committees ought to be—I said maybe given guidelines or have a kind of general notion of the way to behave to say go easy, ask yourself do we really have to do this, do we have to go to every issue.\textsuperscript{206}

Stanimir Alexandrov, a leading arbitration practitioner, stated in that same panel that he found the \textit{Mitchell v. Congo} annulment decision “particularly objectionable.”\textsuperscript{207} He also alluded to the CMS annulment decision and the

\begin{itemize}
\item \textsuperscript{202} See ICSID Commentary, supra note 2, at 893 (“There are two potentially conflicting principles at work in the review process. One is the principle of finality; the other is the principle of correctness.”).
\item \textsuperscript{203} See generally ICSID Commentary, supra note 2.
\item \textsuperscript{204} Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16 (2011), 5 (Christoph Schreuer, speaking) (“There is [sic] two more worries that I have about some of the recent decisions. One is a very expansive interpretation of some of the grounds for annulment. Perhaps I can talk about that later on, and another one is what I would call “hyperactivity” of some ad hoc committees, where ad hoc committees actively look for grounds of annulment, even beyond what the requesting party has put forward.” Stanimir Alexandrov concurred, saying, at 7, “I agree with Christoph’s remarks.” Lowenfield agreed, at 10, saying, “I think Professor Schreuer’s analysis of these cases confirms my uneasiness.” David Caron, at 17, said, “So, very basically, I was all on board [with the panelists’ comments] . . .”).
\item \textsuperscript{205} See Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16 (2011), at 6 (Christoph Schreuer, speaking).
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id. (Stanimir Alexandrov, speaking).
\end{itemize}
difficulties it posed for claimants because the ad hoc committee criticized the award but left it intact:

If you are the prime minister or the minister of finance or the president of a country and you have an award of, say, $100 million against your country and there is—you seek annulment, your government, and the award is not annulled, so the government has to comply with the award and has to write a check for $100 million, and yet . . . [i]n the annulment decision, there is severe criticism of the award, and essentially, the annulment decision says, “The tribunal essentially committed gross errors of fact in law and should have decided otherwise. Regrettably, because of the limited nature of annulment, we cannot annul,” you would be—let me phrase it as a question. Wouldn’t you be in a difficult position explaining to your constituents that your government has to write a check for $100 million for an award that an annulment committee considers deeply flawed and essentially wrong, and how do you explain to your constituents the legal obligation to comply with your obligations under the ICSID Convention and the investment treaty question when your opposition in your parliament is waving this annulment decision against you and is telling you, “See, you have to pay $100 million for an award that is deeply, deeply flawed.”

Professor Loewenfeld agreed, stating, obiter dicta, that pointing out errors in an award but leaving the award intact is “overstepping a wise approach to how a committee should act.” The views of these eminent scholars and practitioners represent a gestalt against recent ad hoc decisions that are perceived as overreaching the scope of review in Article 52.

However, other scholars have emphasized the need to ensure that awards were just, and that the quest for finality did not undermine justice. After the United States began creating appellate mechanisms in dispute resolution under its free trade agreements, scholars suggested that one reason for expanding or supplementing review with appeals was to have “a corrective mechanism in case an arbitration decision is made wrongly.”

Going back a century, the choice between finality and justice was also not so obvious when the American Society of International Law convened a panel to

208. Id. at 27.
209. Id. at 6 (Christoph Schreuer, speaking). See also STEPHAN SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010); Anthea Roberts, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, 104 AM. J. INT’L L. 179 (2010).
210. Schwartz, supra note 4, at 85 ("In the author’s view, the decision in Wena reflects a concern for finality that has been pushed to the extreme, to the detriment of the process and the guarantees that it should be seen to offer.").
consider state-to-state arbitration. At the 1912 Annual Meeting, Mexican diplomat Joaquin D. Casasus said:

[T]he principle of arbitration will be discredited if the arbitration awards cannot be definite and the progress obtained by the efforts of the principal nations of the world will become useless and only diplomacy through its numberless resources could perhaps decide the international conflicts after long discussions which might last years.213

Frederic McKenney, who later served on the Executive Council of the Society, took exception to this analysis. McKenney argued that “[a]rbitration is only an instrumentality of peace because it is an instrumentality of justice.” He explained:

If arbitration is to exist as a compelling or even a corrective force in the intercourse of nations, it must justify its existence by its works. If arbitral tribunals are but insensate machines to be used without reference to considerations of reason or logic merely to put an end to disputes which nations happen to wage, then it would seem that there would be no real cause for their establishment, for the turn of a wheel, the flip of a coin or the roll of dice, by agreement between the contending nations, could be made to accomplish the desired result and to end the dispute with certainty and much less expense.214

Although these debates predated investor-state arbitration, it would seem that the policy discussions apply equally to ICSID arbitration.215

Indeed, the tension between finality and justice in international arbitration generally was recognized even in the formative century of modern international law.216 Hugo Grotius, who is often thought of as the founding father of the modern law of nations, argued that appeals “cannot have place between Kings and peoples.” He explained: “For, in their case, there is no superior power, which can either bar or break the tie of the promise. And therefore they must stand by the decision whether it be just or unjust.”217 In Grotius’s view, international awards cannot countenance appeals because they would disrupt “the stability and orderliness of international society.”218

Likewise, Pufendorf argued that agreements to arbitrate should include commitments by the parties to comply with the award whether or not it was just. In the absence of an international appellate body, if awards were to be reviewed they would have to be scrutinized by merely another arbitral tribunal, whose


214. Revision of Arbitral Awards, 6 AM. SOC’Y INT’L L. PROC. 59, 63 (1912).

215. Schwartz, supra note 4, at 85 (“The annulment mechanism in Article 52 of the ICSID Convention balances considerations of arbitral efficiency against considerations of justice.”).

216. REISSMAN, NULLITY AND REVISION 22-33 (discussing classical views on arbitration).

217. Id. (quoting GROTIIUS, DE JURE BELL ET PACIS 350-51) (Whewell trans., 1853).

218. Id.
decision in turn could be scrutinized by yet another tribunal, and so on without end, undermining finality.\footnote{Id. at 22-23 (quoting Pufendorf).}

However, jurists have also acknowledged that justice plays a role in international dispute resolution. Pufendorf recognized the need for justice, arguing that “when it is said that the parties ought to abide by the award of the Arbitrator, whether he has given it justly or not, that must be accepted with some reservation.”\footnote{Id. at 23 (citing Pufendorf).} For him, the policy of finality ought not to extend to situations where the arbitrator was corrupt.\footnote{Id. (“Yet the award of the Arbitrator will surely not be binding if it manifestly appears that he was in collusion with the other party, or was corrupted by a bribe from him or entered into an agreement for our detriment. For him who openly attaches himself to either side cannot any longer sustain the character of an Arbitrator.”).} Vattel took an even more expansive view of justice. He argued that any award that was “evidently unjust and unreasonable” ought to be invalid.\footnote{Id. at 25 (citing Vattel).}

Then, as now, the great jurists of international law recognized that international arbitral awards ought to be final, as well as just. Then, as now, the difficulty is prescribing the correct balance when the two policies conflict with each other. Vattel’s solution was to prescribe the following: “If the injustice is of little moment, it must be put up with for the sake of peace; and if it is not absolutely evident, it should be borne with as an evil to which the state voluntarily exposed itself.”\footnote{Id.} If these competing views are accepted, the issue in designing the review system in ICSID arbitration is not how best to promote finality at all costs. It is, instead, what balance to strike between finality and justice.

\textbf{B. Negotiating History}

The Vienna Convention on the Law of Treaties instructs that where the meaning of text in light of the object and purposes of a treaty remains ambiguous, it is appropriate to turn to the negotiating history of the treaty, its \textit{travaux preparatoires}, for interpretive guidance. In light of the textual ambiguity of Article 52 of the ICSID Convention, as demonstrated in Part II of this Article, it is appropriate to consult the \textit{travaux preparatoires} of the Convention.\footnote{Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331. See Mahnoush H. Arsanjani and W. Michael Reisman, \textit{Interpreting Treaties for the Benefit of Third Parties: “The Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties}, 104 AM. J. INT’L L. 597, 598 (2010) (recourse to \textit{travaux} is appropriate where text is ambiguous).}

Although the ICSID Secretariat’s report on annulment focused on the ICSID framer’s emphasis on finality in the \textit{travaux},\footnote{ICSID Annulment Report, supra note 1, at 4-11.} a more comprehensive
review of the negotiating history of the ICSID Convention reveals that they were also concerned about justice and how to balance it with finality.

The General Counsel of the World Bank, Aron Broches, who was also the chief negotiator of the ICSID Convention, repeatedly emphasized the importance of effective dispute resolution to promote private foreign investment.226 He favored finality of awards over obtaining the correct outcome in ICSID arbitrations, and chose to temper finality only with a review for the gravest injustice by ad hoc committees.227 However, officials from several countries emphasized that justice was equally important. They also explained that finality should be viewed as a component of justice, and not merely as an instrument to promote foreign investments, which Part II has shown to be of dubious efficacy. Applying this view, the high annulment threshold in Article 52 is justified because it promotes finality—not in competition with justice—but as a requirement of justice. At the same time, it is reasonable to consider constructing an appellate system if it is now believed that the high threshold for annulment in Article 52 fails to rectify errors of law that are sufficiently serious to amount to miscarriages of justice.

Broches reported in 1961 to the World Bank Executive Directors that it was necessary to provide a forum for settling disputes between foreign investors and host states, in order to promote private international investment. He proposed that the World Bank consider establishing a facility to provide investors with direct access to an international tribunal to address such disputes.228 At a meeting of the Executive Directors on March 13, 1962 to discuss Broches’s proposal, the response of the directors was mixed. Nevertheless, there was

226. Aron Broches, Settlement of Disputes between Governments and Private Parties, in ICSID History, supra note 58, vol. 2, 1 (Discussing the importance, as shown by recent studies, of the means to promote FDI and the problem of settlement disputes); Paper prepared by the General Counsel and transmitted to the members of the Committee of the Whole, in ICSID History, supra note 58, vol. 2, 75 (Fear of political risks is the biggest impediment to FDI in areas in need of capital); Summary Record of Proceedings, Consultative Meeting of Legal Experts, in ICSID History, supra note 58, vol. 2, 240 (International investment is crucially important for economic development); Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Addis Ababa, Dec. 16-20, 1963, in ICSID History, supra note 58, vol. 2, 370 (The Chairman discussing the importance of economic development in underdeveloped countries and the impediments thwarting the effort); id. at 373 (The Chairman discussing the importance of economic development in underdeveloped countries and the impediments thwarting the effort); Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Geneva, Feb. 17-22, 1964, in ICSID History, supra note 58, vol. 2, 540 (Summarizing the concern of the treaty on FDI).

227. Aron Broches, Observations on the Finality of ICSID Awards, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 354 (1995) (“Annulment is an essential but exceptional remedy. It is well understood that the grounds listed in Article 52(1) are the only grounds on which an award may be annulled.”).

sufficient interest that Sir William Iliff, the acting chairman, directed Broches to provide a more detailed proposal for their review.\(^{229}\)

Broches provided a proposal for the ICSID Convention three months later, on June 6, 1962. The stated purpose of the Convention was “to promote the resolution of disputes arising between Contracting States and nationals of other Contracting States by encouraging and facilitating recourse to international conciliation and arbitration.”\(^{230}\) The reference to the resolution of disputes suggests that the primary objective of the Convention, even in its earliest draft form, was effective dispute resolution. Article VI corroborates this view, providing that an arbitral award rendered under the Convention is final and that each party “shall abide by and comply with the award immediately.”\(^{231}\)

Although it envisaged revision and clarification by the tribunal on narrow grounds and within a short period of time, it did not provide for any form of review or appeal.\(^{232}\)

The Executive Directors decided to continue exploring the possibility of a convention, and after a series of meetings Broches presented the First Preliminary Draft on August 9, 1963.\(^{233}\) The preamble text seemed to temper the desire to protect foreign investments with “a spirit of mutual confidence, with due respect for the principles of equal rights of States in the exercise of their sovereignty in accordance with international law.”\(^{234}\) While not exactly even-handed in recognizing the interests of investors as well as states, the reference to sovereignty and equal rights suggests that ideas about justice had begun to appear in the Convention. Section 13 of the First Preliminary Draft included, for the first time, a provision for annulling an ICSID award if one of three grounds existed: (1) the tribunal exceeded its powers; (2) there was corruption by a member of the tribunal; or (3) there was a serious departure from a fundamental rule of procedure, including a failure to state reasons for the award.\(^{235}\)

The relevant comment to the article explains:

> It was recognized in the Preamble as a corollary of the principle that an undertaking must be implemented in good faith, that the award of a tribunal must be complied with. As a general rule the award of the tribunal is final, and there is no provision for appeal. However, where there has been some violation of the fundamental principles of law governing the tribunal’s proceedings such as are listed in Section 13, the aggrieved party may apply to the Chairman for a declaration that the award is invalid. […] It may be noted that this is not a


\(^{230}\) Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, in ICSID History, supra note 58, vol. 2, 19, 21, art. I.

\(^{231}\) Id. art. VI (10).

\(^{232}\) Id. art. VI (11)-(12).

\(^{233}\) First Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in ICSID History, supra note 58, vol. 2, 133.

\(^{234}\) Id. pmbl, ¶ 2.

\(^{235}\) Id. art. VI, § 13(1).
procedure by way of appeal requiring consideration of the merits of the case, but
one that merely calls for an affirmative or negative ruling based upon one or other
of the three grounds listed in Section 13(1).\textsuperscript{236}

Broches then carried out a series of meetings with legal experts from World
Bank member states in different regions of the world, thereby avoiding the
difficulties of achieving consensus among all member states in one large forum.
The first meeting was with African states at Addis Ababa in December 1963. At
that meeting, most capital importing states welcomed the ICSID Convention.
For example, the expert from Guinea said that “economic development could
not be achieved without capital and that the developing countries would not
obtain capital unless they provided adequate guarantees.”\textsuperscript{237} They also
supported finality of the award. The draft of the Convention before them
proposed that applications for revision on the basis of a newly-discovered fact
should be made within ten years of the award. Representatives from both
Nigeria and Dahomey (now Benin) stated that this timeline was too long and
ought to be reduced to two or three years.\textsuperscript{238}

Likewise, at the meeting of Latin American countries in February 1964, the
expert from Costa Rica stated that the time periods to revisit the award,
including through an annulment application, “were too long.” Importantly,
however, his reason for promoting finality was not to create a hospitable
investment climate, but to promote justice. The Costa Rican expert stated that in
“Costa Rica, it was a constitutional principle that justice should be executed
promptly.”\textsuperscript{239}

There was some interest in expanding the grounds for annulment to include
“violation or unwarranted interpretation of principles of substantive law,” but
Broches rejected that suggestion to avoid turning review of ICSID awards into
an appellate procedure.\textsuperscript{240}

The issue of annulment was also discussed at the meeting with European
members in Geneva in June 1964. Broches revealed that he had received
suggestions to expand the grounds for annulment to include “a serious departure
from principles of natural justice,” or “a serious misapplication of the law.”\textsuperscript{241}
The notes of the meeting do not record any responses to these proposals, but

\textsuperscript{236}. \textit{Id.} art VI § 15, cmt.
\textsuperscript{237}. \textit{Summary Record of Proceedings, Consultative Meeting of Legal Experts, Addis Ababa,}
\textsuperscript{238}. \textit{Id.} at 271.
\textsuperscript{239}. \textit{Summary Record of Proceedings, Consultative Meeting of Legal Experts, Santiago, Feb.
\textsuperscript{240}. \textit{Id.} at 340.
records that the West German expert expressed concern that the section on annulment be drafted more restrictively to avoid frustrating awards.  

Annulment was also discussed at the meeting with Asian members in Bangkok in July 1964. In response to a question by the Lebanese expert about the French text, Broches explained that annulment for *excès de pouvoir* (excess of power), referred “to the case where a decision of the tribunal went beyond the terms of the compromise.”

Once again, justice concerns were raised. The Indian expert favored clarifying that the narrow scope of annulment for departures from fundamental rules of procedure was to be “limited only to those breaches of procedural rules which would constitute a violation of the rules of natural justice” and that “[t]he award should not be challenged solely because conventional procedural rules had not been fully observed.” Several representatives agreed with Broches that while excess of power included applying the wrong body of law, it did not extend to a mistake of law or fact.

Based on all these consultative meetings, Broches prepared a report on the issues raised and suggestions made. That report of July 9, 1964 noted that there were “no controversial issues of policy” involved in the provision for annulment, and comments were merely of a technical nature. It appears from this evidence that there was at least a loose consensus in favor of the finality of awards, but that finality ought to be delayed where a tribunal had committed an injustice through corruption, departing from fundamental procedures, or exceeding the scope of arbitral authority conferred by the parties.

In short order, on September 11, 1964, the draft ICSID Convention was produced. The provision on annulment, now numbered Article 55, provided five grounds for annulment, instead of three. In addition to the three grounds provided for in the preliminary draft, annulment would now be possible if the tribunal was not properly constituted. Further, the failure to state reasons was now a separate ground for annulment, rather than falling under the ground permitting annulment for serious departure from a fundamental rule of procedure. The draft Convention provided that failure to state reasons would

242. Id.
244. Id.
245. Id. at 517-18 (“Mr. Ghanem (Lebanon) observed that if the parties had agreed to the application of a particular law and the tribunal had in fact applied a different law, the award would be *ultra petita* and could therefore be validly challenged.”); Id. at 518 (“Mr. Tsai (China) stressed that he had in mind the case just mentioned by the delegate from Lebanon and not merely a mistake in the interpretation or application of the applicable law.”).
always be grounds for annulment unless the parties had previously stated that an award would not need to provide reasons.\textsuperscript{248}

The responses of World Bank members to the draft Convention shed light on their intentions regarding the policies of the Convention. By letter dated October 27, 1964, the Ministry of Finance of Turkey objected to the possibility that parties could waive their right to a reasoned award, because “reasons are of such importance to the interested parties that it would be hardly conceivable that parties might willingly waive their right of knowing such reasons.”\textsuperscript{249} At the meeting of the Legal Committee to discuss the draft convention, thirty-nine members voted in favor of rejecting the possibility of waiving a reasoned award, with none opposed.\textsuperscript{250} This voting record suggests a strong consensus during the negotiation of the Convention that basic considerations of justice were so important that they could not be overridden by party consent.

However, various other proposals to amend the grounds for annulment were all defeated. A proposal to delete the word “manifestly” from the excess of power provision was defeated by twenty-three to eleven, a proposal to permit an application to annul only part of an award was defeated by twenty-nine votes to six, a proposal to lower the corruption standard for annulment to simply “misconduct” was defeated by twenty-three votes to three, and a proposal to replace the annulment provision of a serious departure from fundamental rule procedure with a requirement that both parties must have a fair hearing was defeated by eighteen votes to four.\textsuperscript{251} These votes indicate a strong policy preference for finality of awards and correspondingly narrow grounds for appeal. The representative from the Netherlands, with the support of the United Kingdom representative, emphatically stated that he was “disturbed” by the proposals to relax the terms of annulment because “in the ordinary course of events the award should be treated as final.”\textsuperscript{252}

The revised draft of the ICSID Convention was produced on December 11, 1964. Article 52 reflected the decision to delete the possibility of waiving the right to a reasoned award, but was otherwise unchanged from its earlier iteration.\textsuperscript{253} On March 30, 1965, the Executive Directors of the World Bank approved the text of the ICSID Convention by a resolution.\textsuperscript{254}

\begin{itemize}
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Comments and Observations of Member Governments on the Draft, in ICSID History, supra note 58, vol. 2, 664.
\item \textsuperscript{250} Summary Proceedings of the Legal Committee Meeting, December 9, Afternoon, Jan. 4, 1965, in ICSID History, supra note 58, vol. 2, 853, 854.
\item \textsuperscript{251} Id. at 852-53.
\item \textsuperscript{252} Id. at 852.
\item \textsuperscript{253} Revised Draft of the ICSID Convention, Dec. 11, 1964, in ICSID History, supra note 58, vol. 2, 911, 926-27.
\end{itemize}
The foregoing history of the ICSID Convention confirms that the framers of the Convention intended ICSID arbitration to protect the finality of awards, in order to promote private foreign investments and the growth it was thought to bring. At the same time, the policy goal of resolving disputes, even if the law was misapplied, was not unbounded. Where an award violated basic notions of justice, it would be nullified by an ad hoc committee, even if that meant delaying the resolution of investment disputes because the investor would have to file a new arbitration claim.

Considering that justice is embedded throughout the drafting of the ICSID Convention, and that legal theories of international dispute resolution always have taken justice into account, it seems reasonable in considering appropriate standards for the review of ICSID awards to apply conceptions of justice to ICSID arbitration and to clarify the complex relationship between justice and finality.

V. JUSTICE APPLIED

Having shown why justice is historically, legally, and normatively appropriate as a baseline principle from which to design a review system for ICSID awards, it is now possible to elaborate on what such a review system would look like. There are at least three different conceptions of justice.255 Each conception and its application to Article 52 (or lack thereof) is considered in turn.

Distributive justice refers to the fair allocation of values and other resources among individual members and groups in a community.256 Although distributive justice is important in international law,257 it is not the principal concern of the ICSID Convention. This is because the Convention does not

256. JOHN RAWLS, A THEORY OF JUSTICE, 302 (1971) (Rawls’ second principle of justice, part of his theory on how distributive justice can be achieved, says that “Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”); DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 2 (1999) (“[I]n [the Christian] tradition, distributive justice meant the fair distribution of benefits among the members of various associations.”).
Cheng: The Role of Justice in Annulling Investor-State Arbitration Award

 prescribe how to distribute values among peoples and nations. It simply provides a dispute resolution mechanism to address disagreements among investors and states about whether either party has kept to their bargain, under bilateral investment treaties and project agreements. In other words, to the extent distributive justice matters, the proper vehicles to promote that normative ideal are bilateral investment treaties and project agreements, or even human rights treaties. In contrast, the ICSID Convention is concerned with ensuring that investment agreements are followed, without regard for either their impact on distributive justice or their content (unless they violate jus cogens norms).

Procedural justice refers to basic norms of fairness in adjudication. Jürgen Habermas has theorized that procedural justice "focuses exclusively on the procedural aspects of the public use of reason and derives the system of rights from the idea of its legal institutionalization. It can leave more questions open because it entrusts more to the process of rational opinion and will formation." In the context of third party adjudication, procedural justice includes principles that parties must have an adequate opportunity to present their case, that the adjudicator must not be corrupt, that the adjudicator’s decision is confined to subject matter over which it has authority to decide, and that the adjudicator must explain his reasons with sufficient detail so that parties can understand the basis for the decision and be able to check that the decision was made according to the legal framework and substantive rules that he was supposed to apply. As ICSID arbitration is a form of third-party adjudication, it must be designed to promote procedural justice. It achieves this by codifying procedural justice norms in Article 52, and any deviation from these norms create injustices that should be rectified by nullifying the award pursuant to Article 52.

Retributive justice refers to the appropriate correction of behavior that deviates from community standards of acceptable conduct, whether expressed through criminal law, voluntarily created through contractual arrangements,

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260. See Ernst-Ulrich Petersmann, Human Rights, International Economic Law and 'Constitutional Justice,' 19 EUR. J. INT'L L. 769, 769 (2008) (arguing, from Rawls, that justice requires the public use of reason for maintaining a stable and liberal society); Nienke Grossman, Legitimacy and International Adjudicative Bodies, 41 GEO. WASH. INT'L L. REV. 107, 127 (2010) ("Parties must perceive a tribunal as fair and unbiased before they will agree to submit their disputes to it."); Alvarez & Reisman, supra note 2, at 2 ("The reasons requirement, as a control mechanism in other sectors of arbitration, acquires a greater importance in international investment arbitration.").

261. See generally Immanuel Kant, Doctrine of Right (1797); Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1982); William D. Ross, The Right and
or unilaterally assumed through conduct that gives rise to duties of care under law.262 The term ‘retributive justice’ has several different meanings, and some of the ideas it expresses in the realm of criminal law have less relevance here. Thus, further discussion of the importance of retributive justice in the context of ICSID arbitration is necessary.

In the present context, retributive justice is used in Robert Nozick’s sense of promoting justice by rectifying violations of proper acquisition and transfers of property.263 For the purposes of the ICSID Convention, what constitutes a proper transfer or acquisition of property does not depend on whether it was distributively just, because, as explained above, the vehicles to promote retributive justice in international investment law are substantive provisions of bilateral investment treaties. Instead, property is properly transferred or acquired when the transfer is done according to common rules that host states and investors have agreed upon in advance, i.e. the BIT and project agreement. This idea draws support from Hart’s principle of fairness, which states that “When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.”264 Similarly, Rawls argues that “when a number of persons engage in a mutually advantageous cooperative venture . . . to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.”265

Here, as BITs are designed to promote foreign investments to benefit both the host state and the investor, it is reasonable to conclude that the agreements are thought to yield advantages for all, or at least benefit the parties in the joint enterprise. This analysis sets aside questions of whether the people of the host state equally benefit from the foreign investment, since that is, generally speaking, a matter of the host state’s domestic law and politics. If one agrees that property is properly transferred and acquired when it is done according to the rules contained in BITs and project agreements, which the parties entered into voluntarily, and which benefits the parties involved, then it is retributively just to correct violations of BITs through the ICSID Convention. Such


263. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, 153 (1974) (“To turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles.”).


retributive justice is promoted when arbitrators properly apply the applicable law to the facts according to the evidence when rendering an award.

A problem arises when the tribunal misapplies the law, thus failing to properly promote retributive justice. The difficult case is where the tribunal has reached a wrong conclusion, thereby undermining retributive justice, in spite of observing all the principles of procedural justice. Should a procedurally just award that misapplies the law be corrected to promote retributive justice?

A simple answer by those who favor finality of awards to promote foreign investments is that the award should not be corrected because finality overrides retributive justice. However, this article shows that such analysis is questionable for at least two reasons. First, there is insufficient evidence at this time that finality of awards actually promotes inbound foreign investment, and that, conversely, annulments of awards has a negative impact on foreign investment. Second, scholarship on international dispute resolution and the negotiating history of the ICSID Convention also emphasize justice, and it would be preferable, where possible, to harmonize finality with justice rather than to assert one over the other.

Accordingly, an alternative approach to the perceived conflict between finality and retributive justice is to study how the two principles are also complementary. To do so, it is necessary to consider the relationships between finality of award, effectiveness, and justice in international arbitration.

Finality of an award is not the same thing as its effectiveness, albeit the former is a precondition of the latter. The absence of any comprehensive centralized international body is a systemic feature of international arbitration as it is of other international arenas. There is nothing to coerce a state into complying with its arbitration agreement and an award issued by a tribunal. These risks are heightened in investor-state arbitrations under the ICSID Convention, because the losing host state can simply refuse to pay the award in violation of its treaty obligations, and a court of a third party may refuse to enforce the award by seizing the assets of the host state that lost the arbitration on the basis that those assets are protected by sovereign immunity.

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266. CHENG, supra note 15, at 16 (defining effectiveness generally and observing that international legal process scholars use the term “control” interchangeably with “effectiveness”).

267. Vladimir Balas, Review of Awards, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1125, 1148 (P. Muchlinksi et al. eds., 2008) (“[T]he arbitral award must be effective; the necessary prerequisite for its effectiveness is that it is final.”); Thomas W. Walsh, Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?, 24 BERKELEY J. INT’L L. 444, 445 (2006) (“The finality of ICSID awards is central to the Centre’s purpose of acting as a neutral venue providing an effective remedy for investors.”).


It is instead hoped that governments will abide by their agreement to arbitrate because they voluntarily entered into that agreement, presumably after calculating whether the costs of prolonging the dispute outweigh any potential benefits that they might reap from continuing to press their position bilaterally with the government or non-state actor with which they are in disagreement. 270

In order to meet the expectations of parties in arbitration that it will resolve their dispute, the arbitral tribunal must, within a reasonable time period, issue a final decision on the dispute and what rectification, if any, is necessary. If a system of arbitration permitted the parties to require the tribunal, or another third party, to reconsider the award without limitation, the arbitral process could never be effective in resolving the dispute. Such an arbitration system could not promote retributive justice, as its awards would be ineffective and make no practical difference in terms of correcting the conduct of foreign investors or host states when it deviates from standards contained in BITs and project agreements. Such an arbitration system will also soon cease to exist because actors will see no point in using that system to resolve their disputes.

In other words, although finality is in conflict with retributive justice when an award misapplies the law, finality is nonetheless necessary to secure retributive justice systemically in ICSID arbitration. It may be the case that an award that fails to promote retributive justice in its holdings but meets the requirements of procedural justice should nonetheless be deemed final in order to ensure that all other awards that apply the law correctly (and thus promote retributive justice) have a greater chance of effectiveness. Systemic concerns for effectively promoting retributive justice in the ICSID system generally provide reason to leave intact a minority of awards that misapply the law and do not achieve retributive justice.

The practical implications of this analysis are significant. It would provide a basis, in justice as well as law, to endorse the refusal by the ad hoc committee in MINE to annul the award even though the committee thought the tribunal made errors of law. It would also suggest that Malaysian Salvors ought not to have been annulled, because, even accepting that the tribunal misapplied the legal rules defining an “investment,” the award was only retributively unjust but not procedurally unjust. This would have supplemented the systemic importance of ensuring the efficacy of ICSID arbitration so that justice may be done in other disputes. Similarly, the portion of Helnan that misapplied the exhaustion of local remedies rule ought not to have been annulled because that misapplication of central bank property shall not be regarded as in use or intended for use for commercial purposes and that section 14(4) provides “complete immunity from the enforcement process in the UK courts”; Liberian Eastern Timber Corp. v. Liberia, 650 F.Supp 73, 77-78 (S.D.N.Y. 1986).

270. See Lee Kuan Yew, Forward to SHUMUGAM JAYAKUMAR & TOMMY KOH, PEDRA BRANCA: THE ROAD TO THE WORLD COURT xiii (2009) (“If a dispute cannot be resolved by negotiations, it is better to refer it to a third party dispute settlement mechanism, than to allow it to fester and sour bilateral relations.”).
law might have been retributively unjust, but it was not necessarily procedurally unjust because reasons were provided, even if they were wrong reasons.

This analysis also has implications for ad hoc committees that find violations of Article 52 in underlying awards. Operationally, justice is only done to persons if it makes a practical difference to the allocation of values or property. Thus, in an award that violates Article 52, if that violation made no difference to the outcome of the dispute, then it could be said that although the tribunal acted in a procedurally unjust manner, there is no procedural injustice visited upon the parties in that dispute. In such a case, the ad hoc committee should not sacrifice the efficacy of the award and the retributive justice it is designed to promote by annulling the award. Thus, the Vivendi II ad hoc committee was correct in refusing to annul the award after it found that one of the arbitrators may have created an inadvertent conflict but that conflict was harmless error because that arbitrator discovered it only after the award was rendered.

In contrast, in Helnan, because the holding found to be in error was not a dispositive holding, it did not affect the outcome of the dispute, and there was little practical point in annulling it. Likewise, the Fraport annulment committee perhaps went too far in annulling the award because there was no evidence that violation of Article 52 by the tribunal was dispositive in their holding, and thus there was no procedural injustice to correct. In technical legal terms, one might favor a harmless error defense in Article 52 applications.

This analysis of justice in ICSID arbitration, however, is not free from criticism. An observer may take a different view that a miscarriage of justice should never be enforced simply to promote the efficacy of ICSID arbitration and to achieve justice for other investors and host states in future ICSID disputes. Since sovereign interests and vast amounts of investor capital is often at stake in ICSID disputes, it may be more important to achieve a just result through multiple sequential arbitrations, if necessary, than to reach a final outcome quickly through a single arbitration that is not subject to appeal. This view may also find purchase in ideas that justice is incommensurable, or that the rights of a party in one ICSID dispute is incommensurable with the rights of other parties in different disputes. From these perspectives, it may not be appropriate to justify injustice against an investor or host state in a particular dispute with a desire to promote the efficacy of ICSID in general.

One could also argue that even if a procedural or substantive error is not unjust, such as if it made no difference to the disposition of the dispute in the award, such as in CMS and Vivendi II, the committee should nonetheless explain its analysis and even annul an award for its harmless error. This perspective might emphasize the expressive function of the ad hoc committee, both to criticize an unjust decision as an end in itself and to provide guidance for counsel and arbitrators in other disputes. However, a reasonable rejoinder is that claimants and host states should not have to pay for arbitrators to express their
view when it makes no difference to the dispute for which they were hired to resolve.

Even if one subscribes to the principle that individual injustice can be justified by the benefit of justice for others, if it turns out that ICSID awards make errors of law more often than they correctly apply the law, then the argument for preserving the efficacy of the system of ICSID arbitration through finality also breaks down. Without reasonable assurances that awards will be generally just, international actors will have no reason to participate in consensual arbitration and the entire mechanism will be reduced to an obsolete artifact with no practical application.  

If any of these criticisms prevail, then it may become necessary to consider creating alternative mechanisms for broader review in ICSID arbitration, in order to promote greater procedural and retributive justice even at the cost of delaying finality.  

However, the innovations available to arbitrators are limited. As the author has explained in prior research, arbitrators have a strong moral obligation to apply the law strictly because their authority is derived from the limited consent of the parties to resolve a dispute according to the applicable law and the informal norms that the parties have come to accept.  

Applying this analysis to ICSID arbitration here provides guidance that arbitrators should apply Article 52 strictly, which in terms sets high standards for annulments. Although the text of Article 52 is not free from ambiguity, there appears to be an ever-strengthening consensus that the standards for annulment in Article 52 are indeed high, as evidenced by the criticisms of ad hoc decisions that have applied a lower standard for annulment.  

Like all international decision makers, arbitrators have a general moral obligation to promote minimum global order, which stabilizes international relations to allow actors to cooperate and compete for their preferred values. Since there seems to be a consensus that the text of Article 52 creates a high standard for annulment, arbitrators should abide by that informal shared expectation to promote the arbitral order that is predicated on those expectations.  

It is thus not open to arbitrators to turn the review system into an appeals system by lowering the ICSID treaty standards for annulment.  

When sitting on ad hoc committees, they may also consider avoiding obiter

271. See W. Michael Reisman, Systems of Control in International Adjudication and Arbitration 2-3 (1992) (“Much as lawyers cannot practice law without clients, international tribunals cannot decide disputes without litigants. Litigants come on an entirely voluntary basis and have no reason to come to an uncontrolled process.”).


273. See, e.g., note 113, supra.

274. C.f. Cheng, supra note 15, at 182-87 (discussing Feliciano case-study). See generally Reisman, Breakdown of ICSID Arbitration, supra note 114 (emphasizing importance of applying Article 52 strictly to promote minimum world order).

275. Accord Caron, supra note 32, at 194-95 (arguing it is not the task of ad hoc committees to amend the annulment standard).
dictum criticizing portions of underlying awards that they leave intact, when such comments would weaken confidence in the ICSID system and its systemic retributive power. They should also avoid such dictum when the award is generally retributively just, in spite of its errors, so that the losing party is encouraged to abide by the award.

There is nothing, however, in the ICSID Convention to stop arbitrators from circulating draft awards, providing the parties one final chance to comment on perceived errors and giving the tribunal an opportunity to correct errors, if any.\(^{276}\) If tribunals give the parties fair warning in an early procedural order that they intend to circulate a draft award for comment, such a practice would not offend procedural justice. This is indeed the practice in some Energy Charter Treaty arbitrations, including those under ICSID.\(^{277}\) This practice will give parties a final chance to address any issues they wish to address, and would avoid the perceived procedural injustice of the Fraport situation, where one party subsequently claims that it was not given a final opportunity to address findings of fact based on evidence on which the tribunal relied. It would also give parties a chance to make legal arguments about flaws in the tribunal’s reasoning in an attempt to persuade the tribunal to change its mind. The tribunal, in turn, would have a chance to explain in its final award steps in its reasoning that were non-obvious, thereby shielding its award from claims later on that it failed to state reasons. If the parties comment that the draft award applies the

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wrong law, or fails to consider an applicable body of law, the tribunal will also have a chance to address that in the final award. This will reduce the risk that an ad hoc committee will find that the tribunal manifestly exceeded its powers by applying the wrong law. The net effect of this process of circulating draft awards could be to protect awards from annulment by ensuring that tribunals respect procedural justice, thereby harmonizing and promoting the finality of procedurally just awards in ICSID arbitration.

If greater changes to the design of ICSID arbitration are necessary, that must come from government officials responsible for creating and adjusting international regulatory networks. Unlike arbitrators, regulators who negotiate treaties are not morally bound to reinforce the shared expectations codified in prior treaties. Instead, it is their moral obligation to shape expectations in the interests of their constituents and for the common good. They achieve this by modifying treaties where they are obsolete or discovered not to promote the policy objectives of the treaties. While it is unlikely that all the hundreds of signatory states of the ICSID Convention will agree to change Article 52 any time soon, it is open to officials to create an appellate structure in their BITs, which would sit atop the ICSID arbitral process in the dispute resolution clauses of BITs. Such a legislative measure is consistent with Article 41 of the Vienna Convention on the Law of Treaties, which permits two parties to a multilateral treaty to amend the treaty as between themselves only. Alternatively, a group of states could agree to amend the ICSID Convention to create an appellate mechanism, and, pursuant to Article 40 of the Vienna Convention on the Law of Treaties, only those states would be bound by the new appellate mechanism.

Focusing on the option for states to bilaterally agree on an appeals system in their investment treaties also satisfies the concerns of libertarians and sovereigntists that states should not be subject to international processes without consent. When designing an appeals process, officials, as well as corporations that lobby their elected officials, can determine the scope of appeal and timelines, thereby permitting the parties most directly implicated in a dispute to determine for themselves, by agreement, the appropriate balance between finality and justice.

CONCLUSION

Law is a social institution designed to serve the needs of the communities that designed it. When social needs change, law must adjust as well. The original purpose of the ICSID Convention, to promote private foreign investment for developing countries, remains relevant today. However, global political and macroeconomic conditions today are not the same as they were in

280. Id. art. 40.
1965, when the ICSID Convention was designed. There are impressive shifts in economic power from the leading economies in 1965 to the BRIC countries of Brazil, Russian, India and China, as well as more subtle signs of emerging power in other developing nations. The necessity for incentives in the ICSID Convention to encourage private foreign investments, including the finality of awards, may become increasingly less important to promoting FDI than the tremendous opportunities for growth in BRIC and BRIC-like countries, especially as compared to the lower upside potential in developed economies. In this geo-economic context, it may be appropriate to reconsider the ICSID Convention through the lens of justice, rather than just promoting foreign investments. Notably, the changes explored here are neither pro-investor nor pro-host state, since both sides have brought annulment proceedings when they lose an ICSID arbitration. The changes are also neither pro-developing country nor pro-developed country, because FDI is increasingly flowing regionally, from developing country to developing country, or from developed country to developed country. FDI is also flowing in reverse from Russia, China, and India to the United States and Europe. In light of these changing investment patterns, any changes to Article 52 or the practices of arbitrators can thus be made to promote justice for all.


283. ICSID, Background Paper on Annulment For the Administrative Council, ¶ 39 (Aug. 10, 2012), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11 ("The annulment remedy has been pursued by both claimants and respondents to ICSID proceedings. Approximately 57 percent of annulment proceedings were initiated by respondents (in all instances States) while 36 percent of the proceedings were initiated by claimants.").

284. See United Nations Conference on Trade and Development, supra note 194 (third row showing increasing FDI from developing countries into developing economies.).

285. Id. (fifth row showing increasing FDI from developed countries into developed economies).
International Law and Institutions and the American Constitution in War and Peace

Thomas H. Lee
Lee: International Law and Institutions and the American Constitution

International Law and Institutions and the American Constitution in War and Peace*

Thomas H. Lee**

INTRODUCTION

Professors Julian Ku and John Yoo have written a thought-provoking book about the challenges globalization presents to the United States and its Constitution.1 Their basic claim is that we need to renew and update American national institutions, most importantly our understandings of the Constitution, in the face of an unprecedented globalization that promises material benefits but at the same time threatens the surrendering of American popular sovereignty to international institutions. Whether one agrees or disagrees with their thesis, Professors Ku and Yoo have done an admirable job of describing the puzzle and asserting their solution in a clear, thoughtful, and comprehensive manner.

The basic theme of my response to their book in this article is continuity, in contrast to Professors Ku’s and Yoo’s fundamental presumption of discontinuity. My postulation of continuity exists along two dimensions: (1) today’s globalization may be remarkable but it is not, in functional terms, a new puzzle to the American Constitution; and (2) international law and institutions are not, as Professors Ku and Yoo presume, inherently vehicles for progressive sovereignty-killing agendas antithetical to American popular sovereignty. Active participation of the United States in the formulation of international law and international institutions may increase their potential to be consistent with U.S. national interests. Indeed, with respect to the second point, the historical record reveals that international law and institutions have more often than not reinforced and advanced American sovereignty and national interests, and it is

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not unreasonable to believe that they might continue to do so in the future, despite evolution in the character of international law norms.

This article has two parts. The first part addresses the most exigent question relating to the interaction between international law and the American national constitution in the war context: what do international law or international institutions have to do with the authority of the President of the United States under the Constitution to deploy American armed forces in foreign conflicts without congressional approval? Can international law and institutions authorize the President to engage in military operations that he or she could not have done on his or her own authority in the absence of congressional approval? The question has been brought to center stage by President Barack Obama’s intervention in the Libyan civil war on the heels of a United Nations Security Council Resolution, although, as we shall see, the Obama Administration did not rely directly on international law or institutions in its justification of American military action.

The second part of the article focuses on my claim of continuity with respect to globalization in peacetime. The scale of globalization today may seem unprecedented, and in theory a national constitution is concerned with solving national problems, creating the sorts of blind spots that Professors Ku and Yoo urge need to be updated to confront globalization. But the U.S. Constitution is different. It was created by a revolutionary state that craved acceptance by the world community and needed international trade and finance to survive as a nation. As a result, the original U.S. Constitution contemplates globalization and even encourages reliance on international law and institutions because it addresses globalization from the perspective of a materially dependent and militarily weak state. This point should not matter much to non-originalists who do not value the original meaning of the Constitution, but it should matter to originalists in constitutional interpretation—a group that is often the most critical of international law and institutions today.

I.

INTERNATIONAL LAW AND THE PRESIDENT’S WAR POWERS

In spring 2011, President Barack Obama authorized U.S. air strikes in Libya in the aftermath of U.N. Security Council Resolution 1973 (UNSC Resolution). President Obama’s initial report to congressional leaders on March 21, 2011 explicitly invoked the UNSC Resolution:

As part of the multilateral response authorized under U.N. Security Council Resolution 1973, U.S. military forces . . . began a series of strikes against air defense systems and military airfields . . . . Their purpose is to support an international coalition as it takes all necessary measures to enforce the terms

of U.N. Security Council Resolution 1973.\(^3\)

However, the Obama Administration’s ultimate formal defense of the legality of the Libya intervention under U.S. law was much coyer about reliance on the U.N. Security Council’s authorization.\(^4\) International institutions were invoked indirectly through the politically more palatable prism of American national security interests:

In our view, the combination of at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the UNSC’s credibility and effectiveness—provided a sufficient basis for the President’s exercise of his constitutional authority to order the use of military force.\(^5\)

In other words, it was U.S. national security and foreign policy interests—not international institutions or international law—that ultimately justified intervention. The President did not argue that he could intervene in Libya because the UNSC Resolution was a document that gave him legal permission or that the U.N. Security Council’s vote authorized action on his part.

The role of international law and institutions in President Obama’s justification for intervention in the Libyan civil war contrasts starkly with the prominent reliance on international institutions in the factually most analogous precedent, the Korean civil war in 1950. American military operations in Korea, as in Libya, involved a unilateral presidential decision to intervene in a foreign civil war pursuant to a UNSC Resolution without congressional authorization.\(^6\)

In both instances the executive branch had compelling national interests in regional stability and in supporting the credibility of the U.N. Security Council. The latter interest was credibly greater in the Korean case, since the U.N. Security Council was an infant institution at the time—only one year old. But when President Harry Truman sent U.S. combat troops to Korea in June 1950, he and his defenders emphasized the authorizing feature of the U.N. Security Council resolutions and the U.N. at large.\(^7\) International law and institutions were front and center.

What explains the difference in emphasis on international law and institutions between the Korean and Libyan cases? Part of the difference inheres in the fact that the Korean war was viewed at the time as an international war,

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\(^5\) Id. at *10. See also Address to the Nation on the Situation in Libya, 2011 Daily Comp. Pres. Doc. 206 (Mar. 28, 2011) (“The writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution’s future credibility to uphold global peace and security.”).


not a civil war; the crossing of the thirty-eighth parallel by North Korean troops was portrayed as an “act of aggression” by one country against another, despite the fact that Korea had been one country for centuries until the aftermath of the Second World War. Arguably, the interdiction of “an act of aggression” was, and remains, a more broadly accepted norm of international legal justification for war than intervention in an internal conflict to stop human suffering because it poses a “threat to the peace” or a “breach of the peace.” Article 39 of the U.N. Charter is not usually interpreted to create a hierarchy among the three as triggers for U.N. Security Council authorizations of military force or other means to restore peace, although one could infer such a hierarchy from word order.

A second reason for the difference is that sixty years ago, most Americans, including officials in every branch of the government, did not question that international law was really “law” to be enforced. Americans were more positive about the benefits of international institutions like the U.N. toward achieving international peace and prosperity from which Americans would benefit, and less suspicious about the costs of compromising American democratic norms. The reasons for the erosion of this American faith in international law and institutions are too complicated to explain in detail here, what is important for present purposes is to flag the dramatic growth of American skepticism about international law and institutions, even among those perceived to be their fans, like the Obama Administration.

The upshot of the difference between the Truman and Obama administration positions is greater flexibility for today’s President to depart from guidance given by international law or institutions in the commitment of U.S. armed forces. Since a prerequisite to a U.N. Security Council authorization of force would be an act of aggression, or a threat or breach of world peace, it seems likely that a U.N. Security Council resolution would coincide with a reasonable presidential determination of a threat to regional stability. However, in a case where there is a UNSC Resolution but it is clear that the U.N. has sufficient resources to enforce the Resolution without U.S. participation, the


9. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decided what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.


11. Later in the same message, President Truman stated, “Our policy of supporting the United Nations ‘with all the resources that we possess’ must be given effective practical application on a genuinely national, bipartisan basis in every activity of the United Nations.” Id. at 122.
President could choose not to commit U.S. armed forces, in the Obama Administration’s view. In the Truman Administration’s view, the UNSC Resolution would constitute legal authorization for the commitment of American troops without regard to how a failure to commit might affect the credibility of the U.N. Security Council as an institution.

Thus, notwithstanding the theoretical fears of Professors Ku and Yoo, the case of the Obama Administration’s legal defense of the Libya intervention based on national interests appears to afford a very considerable buffer for American sovereignty, with international law and institutions relegated to a secondary role. (Of course, the move gives no comfort to critics of an all-powerful “unitary executive” since the buffer for American sovereignty vis-à-vis the world expands presidential discretion over warmaking.) And the evolving American skepticism about international law and institutions has degraded the ability of an American president to generate domestic support for unilateral warmaking from the backing of international institutions. Indeed, the Obama Administration’s moves to distance itself from the U.N. by invoking the rhetoric of “national interests” reveals the extent to which there is at present a cost, and not just a benefit, to resorting to international law and institutions to justify the use of American military force abroad.

Furthermore, international law and institutions have proved to be a useful means for the Obama Administration not to get involved in certain humanitarian operations blessed by the international human rights movement but arguably contrary to the will of the American people. The Syrian civil war surely poses a similar—if not greater—threat to stability in a region of high priority for U.S. national interests, particularly as deaths multiply. And the growing strength of the opposition movement in Syria has solidified the possibility that intervention might be justified on the grounds of the international law doctrine of invitation by the rebel regime. Of course, in the Syria case, there is no U.N. Security Council resolution like UNSC Resolution 1973 because of Russia’s and China’s vetoes. The absence of a UNSC Resolution thus makes it an easy case for non-intervention on the Truman Administration view, but it also enables non-intervention on the Obama Administration’s rationale. Namely, because there is no UNSC Resolution, the U.N. Security Council’s “credibility” and “effectiveness” would not be put at issue by the United States’ decision to refrain from military operations. In this way, international law and institutions provide a bright-line rule to manage presidential discretion and distinguish prior cases.

The preceding discussion has demonstrated that the Obama Administration, by invoking the filter of national interests, subtly ducked the question we posed

at the start of this article: “Can international law and institutions authorize the President to engage in military operations that he or she could not have done on his or her own authority in the absence of congressional approval?” For the rest of the first part of this article, I would like to attempt an answer to this hard question based on historical practice.13 My answer, in sum, is that the Constitution does authorize the President to use armed force in foreign countries for “protective” missions permitted by international law even if Congress has not pre-approved such missions.

It is worth remembering at the start that the majority of sizeable U.S. military interventions abroad after World War II lacked specific congressional authorization. From 1950 through the 1970s, this would include the substantial U.S. military interventions in Korea, Vietnam before the Tonkin Gulf resolution, Cambodia, and Laos. In the 1980s and 1990s, this would include the invasions of Grenada and Panama by Republican Presidents Ronald Reagan and George H.W. Bush, respectively; and military strikes in Bosnia and Kosovo by Democratic President William Clinton. Thus, however much the idea that the President needs congressional approval (rather than mere notification) to engage in significant military operations abroad is appealing from a normative and commonsensical standpoint, it is belied by reality.

All of these interventions were controversial to some degree, but one category of military intervention abroad by the President without congressional authorization has been around and accepted for a very long time. The category appears to be a version of what Professor Henry Monaghan called the President’s “protective power,”14 namely, the power of the President to use force to protect American persons or property in imminent danger. The heartland of the protective power is the domestic protection of U.S. officials, properties, and “instrumentalities,” but it has been extended as a justification for the use of force to protect U.S. civilians abroad.15 This power seems unproblematic when applied to the rescue or evacuation of U.S. citizens from a foreign country on the brink of systemic violence, but the problem with this use, which Monaghan identifies, is the ease with which it might be used as a pretext to justify military interventions for other reasons. For instance, President Ronald Reagan’s 1983 invasion of Grenada was justified in part by what may be the most aggressive articulation of a U.S. civilian-protection mission, with respect to U.S. medical-school students believed to be at risk given political turmoil in the country.16

13. Curtis Bradley and Trevor Morrison have written a helpful article discussing the executive branch’s practices toward historical glosses on the President’s war powers. See Curtis Bradley & Trevor Morrison, Historical Gloss and the Separation of Powers, 126 HARV. L. REV. 411 (2012).
15. See id. at 70-71.
Coming back to the case of Libya, the U.N. Security Council’s justification for military intervention was framed as civilian protection at American insistence, thereby invoking the burgeoning international law norm of “responsibility to protect” shorthanded as “R2P”. UNSC Resolution 1973 authorized military operations short of occupation in order to “protect civilians and civilian populated areas under threat of attack” and to enforce a no-fly zone over Libyan airspace. Ten members of the U.N. Security Council, including permanent members France, the United Kingdom, and the United States, voted in favor of Resolution 1973. The remaining five U.N. Security Council members abstained, including the other two permanent members—China and Russia. Under a 72-year old customary gloss on the relevant provision of the United Nations Charter, nine affirmative votes coupled with the absence of any negative votes by permanent members constitute U.N. Security Council authorization of military actions.

Although R2P is a relatively new term, there is an undeniably conceptual affinity between the civilian protection mission in international law and the protective-power mission of the President under U.S. constitutional law that has not been explored. At an ideational level, both represent attempts to frame military operations that could be perceived as offensive or aggressive in nature as defensive or reactive. Thus, “humanitarian intervention” or “police action” has become “civilian protection.” Some may think the difference is merely semantic, intended for marketing purposes. But I think that the shift in framing captures a meaningful difference as well, related to the differing intents of the military actor. Words like “intervention” or “suppression” or “policing” more strongly imply confidence in the actor’s moral and material superiority than “protection.” This relative humility mirrors the Obama Administration’s sensitivity to other nations’ dread of American superiority.

Doctrinally speaking, the civilian protection mission articulated in the Libya intervention can be understood as a gloss on the American constitutional doctrine of the protective power in a straightforward way. The Constitution


17. According to reporter Michael Lewis, President Obama believed the no-fly zone that France and Great Britain had initially proposed would have been ineffective in stopping Qadaffi’s slaughter of civilians in Benghazi. Michael Lewis, Obama’s Way, VANITY FAIR (Oct. 5, 2012), http://www.vanityfair.com/politics/2012/10/michael-lewis-profile-barack-obama.


20. Id.


authurizes the President’s unilateral protective power to use U.S. military forces abroad to protect American civilians to the extent that international law permits. Thus, for example, if American civilians are in imminent danger in a foreign country, the President may send military forces to protect or evacuate them without the host country’s consent. But international law would prohibit the United States from invading the entire country or remaining there on a permanent basis, which would be inconsistent with the self-defense rationale of protecting one’s citizens’ lives. Importantly, this civilian protection mission has extended in practice to the protection or evacuation of foreign civilians who are citizens or subjects of third countries who are also in the danger zone. It could be argued that if international law has evolved to authorize countries to use military force abroad to protect foreign civilians who are citizens of the target country with U.N. Security Council authorization (i.e., R2P), then the President’s protective power similarly extends to those own-country aliens as a matter of U.S. law. True, any protective power the President has to use military force abroad for civilians is strongest with respect to U.S. persons and property, but there is nothing in the Constitution foreclosing the President’s power to send U.S. troops abroad on a foreign civilian protection mission blessed by international law.

It is important to make clear the limited nature of my claim. I am not asserting that the President was compelled to act once the U.N. Security Council authorized military action by member states. Rather, my more limited claim is that neither the text of the Constitution nor historical precedents foreclose the

23. Under international law, the protective power presumably falls under the rubric of self-defense, although there is no armed attack per se. U.N. Charter art. 51. There are a number of instances of a state using armed force to defend or evacuate its own nationals from a foreign country: the United States in the Dominican Republic in 1965, Iran in 1980, and Panama in 1989, the United States and Belgium in the Congo in 1964, Israel at Entebbe in 1976, France in C.A.R., Cote d’Ivoire, and Liberia in 2002-03 and Chad in 2006—but there is some doubt as to whether this is a sovereign right under customary international law. See James Crawford, Brownlie’s Principles of Public International Law 755 (8th ed. 2012).

24. American military forces protected and evacuated almost a hundred foreign nationals during the Liberian civil war of 1990-91. See U.S. Marines Evacuate 97 Foreign Nationals, AP, Aug. 14, 1990, http://www.apnewswire.com/1990/U-S-Marines-Evacuate-97-Foreign-Nationals-from-Liberia/id-52b7d54ecf18b38b4b6630216090ccc3. The British evacuated numerous foreign nationals (hailing from twenty-five other countries) from Libya in 2011. See Nicholas Watt & James Meikle, Libya officials bribed by Britain to help evacuate UK citizens, The Guardian, Feb. 25, 2011, http://www.guardian.co.uk/world/2011/feb/25/britain-libya-bribes-evacuation. In both instances the intervenor implicitly asserted a legal right to use armed force despite the absence of formal consent or invitation by the host sovereign. These cases suggest that whatever the contours of a state’s power to rescue its own citizens as a right under customary international law, it extends to rescuing third-country foreign nationals. This idea is further supported by Article 45(c) of the Vienna Convention on Diplomatic Relations, which allows a state that has recalled its mission to entrusted “the protection . . . of its nationals to a third State.” April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. In Libya in 2011, the U.S. suspended its embassy operations, with Turkey and later Hungary acting as the protecting power for the United States. Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, 2011 Digest § 9, at 271.
constitutionality of the President’s discretion to deploy U.S. military forces in a foreign-civilian-protection mission outside of the United States without the express approval of Congress, in a case where such deployment is reasonably justified by international law. Whether such a deployment is prudent—as in the Libya case—is a policy matter, and surely would have stood on a firmer political and legal basis if the President had obtained congressional approval. But it is wrong to say that the President’s acts were unconstitutional if they were plausibly grounded in international law.

In general, the Constitution evinces a concern with the danger of unilateral warmaking by the President, but the constraint it places upon this danger is the requirement of authorization by law. Throughout the history of the Republic, statesmen and constitutionalists have believed that such authorization can be satisfied not just by domestic law (e.g., congressional declarations of war or their equivalents) but also by international law under certain limited circumstances. To demonstrate this, I will discuss the Prize Cases, the most prominent instance in which international law was used as principal justification for the president’s power to order sustained military operations outside of the United States without express congressional authorization.

In fact, the Prize Cases are the one and only instance in which the U.S. Supreme Court has decided on the constitutionality of the President’s use of armed force outside the territory and waters of the United States. In 1863, at the height of the Civil War, the Supreme Court was asked to decide on the constitutionality of President Abraham Lincoln’s executive proclamations to the U.S. Navy to blockade Southern ports in April 1861, before Congress authorized wartime measures in July 1861. A naval blockade was an act of war under international law: the Navy was permitted to stop—by force if necessary—ships in international waters that were bound for or out of ports in seceded or soon-to-secede states. Naval commanders could condemn any ships and cargoes as “enemy property” after a judicial proceeding in a federal district court; officers and crew shared the proceeds of a successful condemnation as “prize money.” Naval ships were authorized to fire upon any ship refusing to stop to be boarded.

The blockade was a belligerent measure with respect to both foreign neutrals (e.g., British merchants trading manufactures for Southern agricultural products) and noncombatant U.S. citizens in seceded or soon-to-secede states like Virginia. Indeed, in some of the Prize cases, Virginia merchants argued that

they were loyal U.S. citizens with constitutional rights that could not be displaced by international law, presumptively the Fifth Amendment right against the taking of property (their ships and cargoes) without due process of law.

The Supreme Court ignored such claims of constitutional rights for allegedly loyal U.S. citizens, not even bothering to assert that the condemnation proceedings in an Article III court satisfied whatever due process the Constitution required. Rather, the Supreme Court framed the principal question as “[h]ad the President a right to institute a blockade of ports in possession of persons in armed rebellions against the Government, on the principles of international law, as known and acknowledged among civilized States?” The answer to that question, according to the majority, was yes. That raised the question of whether the seizure of the ships and cargoes of the litigants, including foreign neutrals and allegedly loyal U.S. citizens resident in Virginia, was justifiable under the international laws of maritime conflict, specifically, the doctrine of “capture on the sea as ‘enemies’ property.” The Court answered that question in the affirmative as well.

The majority’s opinion inspired a fierce dissent by four justices. The dissenters rejected the idea that international law could justify the President’s unilateral proclamation of a naval blockade against foreign neutral merchants and U.S. citizens who lived in Virginia, arguing that “[i]t [was] the exercise of a power under the municipal laws of the country and not under the law of nations.” Instead, they argued that the Constitution required congressional authorization, which was lacking in these cases.

There were congressional enactments that might have justified the President’s unilateral power to blockade before congressional approval was given in a statute enacted on July 13, 1861, but the dissent denied that they supplied adequate authorization. The majority opinion referred to these

29. *Prize Cases*, 67 U.S. at 671-74. See also id. at 637 (“The claimants in their several answers denied any hostility on their part to the Government or Laws of the United States”) (court reporter’s summary of facts).
30. Id. at 665.
31. Id.
32. Id. at 682. Justice Nelson wrote the dissenting opinion and was joined by Chief Justice Taney, Justice Catron, and Justice Clifford.
33. Id. at 692.
34. See id. at 688-89 (“[B]efore this insurrection against the established Government can be dealt with on a footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government.”).
35. An Act further to provide for the Collection of Duties on Imports, and for other Purposes, ch. 3, § 5, 12 Stat. 255, 257 (July 13, 1861).
statutes as well, but in a supplemental fashion. First, there were some statutes from 1795 and 1807 preauthorizing the President to call out the militia and assume command of them as Commander-in-Chief. But, as the dissent noted, these statutes authorized emergency response to invasions and insurrections, not a full-blown war power like the power to blockade against foreign neutral and noncombatant U.S. citizens behind enemy lines.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters.

Second, Congress, which was not in session when President Lincoln ordered the blockade, ended up enacting a statute once it came into session, stipulating that “all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States . . . are hereby approved and in all respects legalized.” The majority cited this August 6, 1861 statute along with the July 13, 1861 statute setting the country on a war footing, but was reluctant to make them the principal basis of the decision. “If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861 . . .” With specific respect to the August 6, 1861 statute, the Court noted it was done out of an abundance of caution (“ex majore cautela”) and “[w]ithout admitting that such an act was necessary under the circumstances.” The problem with the August statute was a concern that it was a constitutionally proscribed “ex post facto Law” because it authorized the taking of property after the fact. Unlike the Fifth Amendment, there was a good argument that the constitutional provision prohibiting bills of attainder and ex post facto laws applied in wartime because it was a reaction to bills of attainders and confiscations of private property state legislatures had passed during the War of Revolution. The ex post facto clause has generally been thought to apply only

37. See id. at 668, 670-71.
39. Prize Cases, 67 U.S. at 693.
40. An Act to increase the Pay of the Privates in the Regular Army and in the Volunteers in the Service of the United States, and for other Purposes, ch. 63, § 3, 12 Stat. 326 (Aug. 6, 1861).
41. Prize Cases, 67 U.S. at 670 (emphasis added).
42. Id.
43. Id. at 671.
44. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).
45. Bills of attainder were legislative or executive acts naming enemies and authorizing their non-judicial punishment to include killing. Despite the contempt early Americans had for heavy-handed English attainders and condemnations of rebel property, several states passed attainders and after-the-fact confiscation acts during the war. The most famous attainder, drafted by Thomas Jefferson, was passed in 1779 by the Virginia legislature against the Loyalist guerrilla Josiah
to criminal proceedings, but prize condemnations appeared functionally similar as applied to U.S. citizens, as the dissent pointed out:

Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words, trade and commerce authorized at the time by acts of Congress and treaties may, by ex post facto legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced.46

To summarize, the Supreme Court in the Prize Cases relied principally on international law to justify President Lincoln’s unilateral order to the Navy to seize ships and cargoes belonging to foreign neutrals and U.S. citizens in international waters at the start of the Civil War. One could argue that his power to give the order flowed from his constitutional authority as “Commander in Chief of the Army and Navy.” But what are the limits of this authority? It was the contemporaneous international laws of war that gave content to what he could and could not do outside of the United States as Commander in Chief. The Court also mentioned congressional acts that supported Lincoln’s orders (which the dissent rejected), but the domestic sub-constitutional sources were secondary to the international laws of war.

What are we to make of the Prize Cases as applied to Libya today? The Supreme Court presumed that as long as it was permissible for President Lincoln to take extraterritorial military actions under international law, that was all the Constitution required. The military actions in Lincoln’s case involved the threat and use of armed force against U.S. citizens and friendly or neutral aliens. It does not seem a stretch to say that this precedent permits President Obama to order air strikes against non-U.S. citizen, non-friendly aliens in the service of an oppressive regime that is killing its own people when authorized by international law. Of course, as we have seen, President Obama did not invoke international law directly but rather through the prism of national interests, but that was a matter of policy choice and not constitutional compulsion.

Phillips, while Patrick Henry was Governor. There was universal support for prohibiting bills of attainder at the federal constitutional convention when the measures were introduced on August 22, 1787 by Elbridge Gerry and James McHenry (the ex post facto prohibition drew some fire), and the Phillips case was explicitly mentioned by Edmund Randolph during the Virginia ratification debates. See W.P. Trent, The Case of Josiah Phillips, 1 AM. Hist. Rev. 444, 453 (1896). See also Note, The Bill of Attainder Clauses and Legislative and Administrative Suppression of “Subversives,” 67 COLUM. L. REV. 1492 (1967); James Westfall Thompson, Anti-Loyalist Legislation During the American Revolution, 3 ILL. L. REV. 147 (1908). The federal bill-of-attainder clause is again in the news because of its deployment in a lawsuit brought by the ACLU alleging the unconstitutionality of the drone-killing of American citizens. See Complaint, Al-Aulaqi v. Panetta (D.D.C. filed July 18, 2012), available at http://www.aclu.org/files/assets/kl_complaint_to_file.pdf.

II. IMPLEMENTING THE U.S. CONSTITUTION IN AN ERA OF GLOBALIZATION

So far the focus has been on the interaction of the U.S. Constitution and international law and institutions in war, but what about the more routine peacetime context? A premise of Professors Ku and Yoo’s book is that fidelity to the Constitution and American values requires us to “tame” globalization and to exercise caution about delegating to the international institutions that globalization has spawned.47 The basic aim of this part of the article is to question this premise as a matter of American constitutional interpretation.

My argument presumes originalism as the mode of constitutional interpretation. By originalism I mean the view that the original meaning of a constitutional provision controls its present meaning. I make this presumption for two reasons. First, it seems that a majority of Justices on the Supreme Court are sympathetic to originalism in constitutional interpretation. Second, many of the same constitutionalists who are hostile to globalization and international institutions are originalists in constitutional interpretation. Accordingly, if a case can be made that the original Constitution tells us to welcome globalization rather than “tame” it, then it is a powerful argument against the thesis of Professors Ku and Yoo’s book. The fact that I make the presumption does not mean that I personally think that originalism is the best mode of constitutional interpretation on these questions.

If we are to be originalists, then what happened from 1787 to 1789, the years in which the Constitution was drafted, debated, and ratified, is incredibly important. This seems particularly true because provisions of the Constitution dealing with foreign affairs and parties were not amended after the Civil War like the constitutional provisions dealing with internal governance and the rights of U.S. persons.48 From 1787 to 1789, the United States was a militarily weak, revolutionary state—a “tobacco republic.”49 The United States as tobacco republic would have had very different preferences in international relations and considered international law in a fundamentally different way than a superpower or an empire. The interest in survival was logically paramount: if the nation could not endure, the individual liberties Americans had fought for would disappear.50

47. Ku & Yoo, supra note 1, at 2.
50. See, e.g., THE FEDERALIST NO. 3, at 13-14 (John Jay) (Cooke ed., 1961) (“Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first. . . . I mean only to consider it as it respects security for the preservation of peace and tranquility . . . from foreign arms and influence [which] comes first
Survival inspired an embrace of international law and institutions by the constitutional founding group for several reasons. First, it was imperative that the national government prevent the states from breaching the 1783 Treaty of Peace with Great Britain to avoid renewed war. The most obvious indication of this priority is the Supremacy Clause of the Constitution, which states in part that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Second, the capacity to make treaties validated the Revolution—only full-fledged, bona-fide countries could sign treaties. Signing a treaty meant that the new United States had personality under international law and were entitled to co-equal sovereign status. This was an important reason why the United States, in its tobacco republic stage, was so very interested in signing as many treaties as it could. Indeed, the founding group drafted a “model” treaty that they shopped around to other countries, starting with the top-tier European powers, then to second-tier powers, and finally to the Barbary republics. Third, these treaties were not only important as affirmations of America’s sovereign status, they enabled the international flow of goods and credit essential for the survival and growth of the agrarian United States.

Professors Ku and Yoo fret that globalization and its evil handmaidens of international law and institutions poses a threat to popular sovereignty as it was enshrined in the Constitution. By way of conclusion, I would like to discuss two specific founding-era examples that illustrate just how much the Americans who made the original Constitution were willing to sacrifice popular sovereignty in the service of participating in the global economy. They are both examples taken from the design and operation of the early national courts.

The first example concerns the Alien Tort Statute (ATS), a part of the Judiciary Act of 1789, which has been a vehicle for international human rights litigation in the U.S. federal district courts since 1980. I have argued elsewhere that the ATS had nothing to do with international human rights law in order.”

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51. U.S. CONST. art. VI, cl. 2.
54. See, e.g., Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428 (1989); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). The U. S. Supreme Court recently heard arguments in a case where it may revisit the reasons why the ATS was enacted. See Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Mar. 5, 2012), 2012 WL 687061 (memorandum restoring case to calendar for reargument).
and international law violations around the world. Rather, the ATS was a simple piece of legislation that gave aliens special rights of access to sue for torts in the newly established national courts that U.S. citizens did not have. In 1789, the First Congress wanted to make sure that English and other European merchants and creditors came back to the United States to carry on business and make loans. So they enacted a statute that said if any friendly or neutral alien (they were specifically thinking of European merchants in America) suffered a non-contract injury to his person or property—an “alien tort”—he could sue in federal district court, and did not have to be stuck in the state courts with their notoriously partisan juries. Out-of-state U.S. citizens were stuck with a $500 amount in controversy requirement, which effectively denied them this right to sue in federal court.

The second case from the founding era concerns state sovereign debt to foreign bankers. The very first case that was put on the U.S. Supreme Court docket was *Van Staphorst v. Maryland*. The case involved a line-of-credit for Maryland negotiated by Matthew Ridley, a Baltimore merchant, with the Van Staphorst brothers, who were two private Dutch bankers during the War of Revolution.

Ridley had negotiated ruinous terms, which Maryland wanted to reform. Their first attempt at dispute resolution was an “international” arbitration in New York. When the arbitration fell through, lawyers for the Dutch bankers filed suit in the U.S. Supreme Court, implicating the biggest constitutional issue of the day: the sovereign immunity of states in suits brought against them by private parties under the U.S. Supreme Court’s original jurisdiction.

When we call the issue state sovereign immunity, it sounds like a U.S. domestic constitutional law issue, but, practically speaking, *Van Staphorst* was a sovereign debt case just like we see in developing countries today. Sovereign debt cases infringe upon the fiscal autonomy of debtor states: a tribunal may decide that a foreign loan takes precedence over domestic creditors and spending priorities. This was exactly what the issue was in *Van Staphorst*,

57. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 78.
59. 5 DHSC, supra, note 58, at 7-8.
60. *Id.* at 14.
61. *Id.* at 7.
63. See, e.g., *id.*
which was why state sovereign immunity was such a momentous controversy in the early republic.

Van Staphorst was ultimately settled before litigation, but its facts give us a sense of just how much globalization was present at the founding of the United States. At the time, the agrarian focus of the American economy made trans-Atlantic maritime trade and commerce essential to the survival of the country. Many manufactured goods had to be imported, paid for by cash crops. In business, merchants used English pounds, Spanish coins, French coins, even Chinese coins—so long as they had gold or silver in them. The Van Staphorsts were Dutch bankers. As important as the reality of economic globalization, the Americans of the founding shared an intellectual heritage with their English, French, and Dutch counterparts. Educated Americans had a classical education and could read Latin; many also commanded a smattering of Greek and French. The revolution itself was inspired by continental European thinkers. 64

In summary, on an originalist view, the Constitution seems permissive of delegation to international institutions with respect to the adjudication of trade and commercial matters, 65 even those that were highly sensitive and constitutional in stature, like state sovereign debt. 66 Another way to think about it, which puts me in conflict with Professor Ku and Yoo’s book, however much we may agree on the open-endedness of the Constitution on questions of interactions with the outside world, is that the Constitution as originally made does not see globalization as a bad and wild thing to be “tamed” but rather as something good to be encouraged and fed, even at the expense of popular sovereignty.


66. I think it is fair to say that delegation with respect to lawmaking or legislation was a different matter.
Sovereigntism's Twilight

Peter J. Spiro
Sovereigntism’s Twilight*

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INTRODUCTION

Sovereigntism is ascendant among foreign relations law scholars. Skeptical of the “new” international law, sovereigntists have worked to fortify various constitutional doctrines as breakfronts against rising international waters.1 At one level, they have been hugely successful. From a first volley launched fifteen years ago in the Harvard Law Review,2 an intellectually energetic and academically entrepreneurial group of legal scholars has vanquished the former conventional wisdom of the Restatement (Third) of Foreign Relations Law,3 a conventional wisdom that was receptive to the incorporation of international law. The sovereigntist view has been elaborated on the pages of prestigious law reviews. On key issues, sovereigntism is also carrying the day in the federal courts, with further major victories likely just over the horizon.

At another level, however, the sovereigntist cause is lost. Massive material changes in the nature of global interaction—captured under the necessarily capacious umbrella of “globalization”—will inevitably overwhelm sovereigntist defenses, which, notwithstanding their constitutional pedigree and apparent gravity, are in the end incapable of stemming the tide. International law is insinuating itself into U.S. law through multiple channels. The Constitution will not be able to plug the gaps. It will inevitably and radically adapt to the changed international context.

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Julian Ku and John Yoo’s *Taming Globalization* fits comfortably into the growing sovereigntist literature. However much the authors attempt to distinguish their approach as “accommodating” globalization, they too are international law skeptics. Ku and Yoo’s constitutional tactics aim to impede the incorporation of international law, albeit more subtly than some of their sovereigntist fellow travelers. They are confident, moreover, that constitutional doctrine will be effective at defeating the imposition of international law on the United States. Call it constitutional hubris. *Taming Globalization* takes constitutional precepts established in the old world and carries them forward to the new. The resulting analysis has surface plausibility but fails to grasp how changes on the ground will ultimately undo these constitutional understandings.

This essay uses *Taming Globalization* as a window into the current state of foreign relations law on the ground and in the scholarship. Part I questions whether Ku and Yoo’s ostensibly neutral institutional analysis is rigged against results favoring the incorporation of international law. This section highlights the omission of tough cases that would appear under their analysis to favor incorporation, including through the exercise of presidential power, the Treaty Power, and the Offenses Clause. Part II examines four clusters of cases that appear to evidence sovereigntism’s continued ascendancy, relating to self-execution, the Alien Tort Statute, the detention of terror suspects, and the use of international law in constitutional interpretation. These clusters appear to vindicate sovereigntist perspectives, but short-term victories are likely to be reversed by material forces of globalization. In the end, globalization is not a quantity to be rejected, accommodated, or accepted as a policy option. Globalization has become a fact of human organization, and the Constitution will bend to it.

### I. SOVEREIGNTISM UNDERCOVER

For those first scholars critically addressing the Restatement positions (John Yoo among them), there was a lot of low hanging fruit. The Restatement had overreached on various elements of the foreign relations law canon; the Restatement itself was the putative canon, but in many respects it was an academic one unsupported by practice. It landed amidst a generation of

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6. See Bradley & Goldsmith, supra note 2, at 821 (critiquing the Restatement for its “doctrinal bootstrapping” on the question of whether customary international law qualifies as federal
constitutional law scholars who matured during the Vietnam era and who were receptive both to international law and to congressional power.\textsuperscript{7} Internationalist and congressional power positions were largely unchallenged in the academy, creating a kind of pent-up demand for critical scholarly perspectives. The end of the Cold War magnified the possibilities for revision, making the intersection of domestic and international law a topical one. These background factors combined to put the whole field of foreign relations law up for grabs. The constitutional law of foreign relations presented multiple opportunities for conservative scholars to make novel arguments on interesting subjects.\textsuperscript{8}

But the low hanging fruit has been devoured. More difficult, second-generation questions—ones on which not all sovereigntists agree—are on the table. Some have been prompted by post-9/11 issues. The George W. Bush Administration took sovereigntism into the inner circles of power, with results (in a “be careful what you wish for” sort of way) that created divisions among sovereigntist scholars.\textsuperscript{9}

There were also continuing, complicating shifts in the international context. Among those shifts is the fact that international law and institutions are here to stay and that they are consequential. In 1997, international law still suffered a somewhat deserved reputation as aspirational and untethered to empirics, especially in the context of human rights.\textsuperscript{10} It has gotten harder to be dismissive of international law.\textsuperscript{11} Perhaps that best explains why Ku and Yoo frame their

\textsuperscript{7} See, e.g., HAROLD HONGU KOH, THE NATIONAL SECURITY CONSTITUTION (1990); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY (1991); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990) (all arguing for a robust congressional role in foreign relations).

\textsuperscript{8} The corpus of this work is large, much of it produced by Bradley, Goldsmith, and Yoo. Other conservative scholars contributing to the first wave of revisionist scholarship (not all of it congruent with sovereigntism) included John McGinnis, Eric Posner, Michael Ramsey, and Ernest Young. See also JEREMY RABKIN, WHY SOVEREIGNTY MATTERS (1998); JOHN FONTE, SOVEREIGNTY OR SUBMISSION (2011); John R. Bolton, Should We Take Global Governance Seriously?, 1 CHI. J. INT’L L. 205 (2000).

\textsuperscript{9} For instance, between Jack Goldsmith and John Yoo on presidential powers, see JACK GOLDSMITH, THE TERROR PRESIDENCY 167-72 (2005) (describing disagreements between Yoo and Goldsmith on presidential power issues).


\textsuperscript{11} See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2006), which provoked a vigorous response from a range of international law scholars; see, e.g., Symposium, The Limits of International Law, 34 GA. J. INT’L & COMP. L. 253 (2005); Oona A. Hathaway & Ariel N. Lavinbruk, Rationalism and Revisionism in International Law, 119 HARV. L. REV. 1404 (2006); Paul Berman, Seeing Beyond the Limits of International Law, 84 TEX. L. REV. 1265 (2005). Eric Posner’s more recent solo effort along the same lines, ERIC POSNER, THE PERILS OF GLOBAL LEGALISM (2011), attracted much less attention, perhaps demonstrating that the debate has been fought and won.
approach as "accommodationist." It seems more credible today to accept (or at least stand agnostic towards) the efficacy of international law.

But that does not mean that Ku and Yoo are accommodating of international law in any concretely apparent way. Most of the argument is framed in terms of institutional capacities. Above all, Ku and Yoo favor the political branches over the courts. They also see room for the states in the context of their traditional areas of regulation, at least relative to the federal judiciary. This is an ostensibly neutral comparative institutional analysis. The doctrinal upshot is to condemn the self-execution of treaties, the Alien Tort Statute, the use of foreign law in constitutional interpretation, and the putative rule of exclusive federal power over foreign relations—anything that enables the courts to act on international law without specific direction from the political branches.

But the approach suspiciously favors results rebuffing international law. Functional capacities aside, Ku and Yoo see danger in the courts as international law first-adopters. Doctrinal prescriptions subordinating the courts to the political branches and to the states have the unstated practical consequence of obstructing the incorporation of international law into domestic law. So much for accommodation. Although Ku and Yoo try to distinguish themselves from other sovereigntists, the anti-internationalist destination is pretty much the same. The tone might annoy those who are ideologically opposed to international institutions (Jeremy Rabkin, for example); chalk that up to the narcissism of small differences. There does not appear to be a single context in which the theory produces a result friendly to international law, at least not on any issue of public policy prominence.

12. Ku & Yoo, supra note 4, at 16.
13. Id. at 8 ("For our purposes, it is unnecessary to take a position on whether international law can legitimately make claim to a universality that binds all nations and persons in the world.").
14. See id. at 162-4 (matrix summarizing relative institutional strengths of Congress, the President, courts, and the states).
15. Id. at 11.
16. Id. at 154-65.
17. Id. at 4-6.
18. See id. at 7-10 (distinguishing "accommodationist" approach from the "revisionist").
20. The sole context in which Ku and Yoo appear to validate the incorporation of international law is with respect to state adoption of such obscure international conventions as the Great Lakes Charter and the Convention on the Form of an International Will. See Ku & Yoo, supra note 4, at 165-72.
But there are real cases at hand with which to test their analytical neutrality. The Medellin case gets a lot of play in Taming Globalization. Medellin involved two questions: first, whether a decision by the International Court of Justice interpreting the Vienna Convention on Consular Relations (VCCR) was self-executing—that is (for these purposes), whether the courts could give effect to the decision in the absence of implementing legislation from Congress; second, assuming it not to be self-executing, whether the President could impose the decision on state courts through his independent powers. It is hardly surprising that Ku and Yoo highlight the Court’s self-execution ruling, which effectively imposed a clear statement threshold to judicial cognizance of treaty terms. Ku and Yoo’s central doctrinal prescription is the adoption of non-self-execution as a default rule in the context of treaty application, a path the Medellin decision appears to take.

But Ku and Yoo hardly mention the Court’s holding on the second question, in which the Court rejected President Bush’s attempt (via memorandum) to impose the ICJ’s decision in the Avena case on state courts. Applying Ku and Yoo’s institutional framework, one can make a good case that the Court reached the wrong result on that point. Ku and Yoo stress the president’s comparative advantage in deciding whether and how international law should be incorporated into U.S. law. President Bush had made that decision, with respect to the limited number of defendants directly covered by the ICJ’s ruling (at the same time that he withdrew from the compulsory jurisdiction of the ICJ over VCCR claims). He had good foreign policy reasons for doing so: the Medellin case was an irritant in relations with our important southern neighbor, and U.S. interests in the reciprocal extension of

21. Id. at 197-208.
23. Medellin, 552 U.S. at 498.
24. See Ku & Yoo, supra note 4, at 87-112. To the same effect, see also Curtis A. Bradley, International Delegations, the Structural Constitution, and Non-Self-Execution, 55 STAN. L. REV. 1157 (2003).
25. Memorandum from President George W. Bush for Attorney Gen. Alberto Gonzalez, Compliance with the Decision of the International Court of Justice in Avena (Feb. 28, 2005). The Avena decision had ordered the United States to “review and reconsider” the convictions and sentences of certain Mexican nationals whose rights to consular notification under the VCCR the United States was deemed to have violated. See Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).
26. Ku & Yoo, supra note 4, at 136-41.
VCCR rights to Americans abroad were potentially compromised. George W. Bush was hardly enamored with international law as a general matter; he was acting against type in attempting to comply with the *Avena* judgment, supplying further indirect evidence that compliance implicated a nontrivial foreign policy interest. In the Ku and Yoo analysis, the courts are ill-equipped to undertake the sort of sensitive balancing that goes into such decision-making. It is thus odd, at least, that they do not push back on this element of the *Medellin* decision. Or perhaps not odd at all, given that the argument would point to facilitating the incorporation of international law.

The same holds true for the federalism aspect of *Medellin*. Ku and Yoo argue for greater state discretion in matters implicating foreign relations and international law, at least with respect to areas of traditional state concern. Here, they target the maximal holding in *Zschernig v. Miller*, in which the Supreme Court barred the states from activities having an indirect or incidental effect on foreign relations, even in the absence of any relevant policy or objection from the federal political branches. But Ku and Yoo are careful to couch their preference for state incorporation in the context of federal primacy, especially presidential primacy. In other words, state incorporation is acceptable so long as the president (not the judiciary) has the power to trump state action detrimental to the national interest. But nor does this element of the Ku-Yoo approach map out onto the Supreme Court’s ruling in *Medellin* part two. Though the state was acting in an area of traditional state concern—criminal law enforcement—the President himself had stepped in to overcome the state action. The Court refused to recognize the president’s decision, in effect denying presidential primacy. Ku and Yoo fail to critique this aspect of the decision, one might suspect because it serves sovereigntist ends. In other words, Ku and Yoo favor presidential power except when exercised to advance the incorporation of international law.

Two other federalism controversies, which would similarly test the authenticity of Ku and Yoo’s ostensibly neutral institutional approach, lie just over the horizon. Ku and Yoo’s book is surprisingly light on the historically longstanding, newly salient scope of the Treaty Power. Likewise, it mostly ignores the more novel but intriguing place of the Offenses Clause. These are obligations).


30. See generally Ku & Yoo, supra note 4.

31. See id. at 154-65.


33. See, e.g., Ku & Yoo, supra note 4, at 176 (“state autonomy is permissible as long as the federal government’s political branches can override or unify inconsistent policies pursuant to a treaty, statute, or executive declaration”).

http://scholarship.law.berkeley.edu/bjil/vol31/iss1/9
potentially capacious entry points for international law, the interpretation of which thus poses key points of contest.

The Treaty Power omission is the more surprising. The arrival of human rights and other more intrusive forms of international law have revived a debate vigorously fought more than a century ago (not coincidentally, at another juncture at which international law at least appeared to have developed more muscle). The question: whether the Treaty Clause of the Constitution is limited by the Tenth Amendment (otherwise stated: whether the federal government’s power under the Treaty Power augments other federal authorities or is coextensive with them). The earlier debate was settled, at least for doctrinal purposes, by the Supreme Court’s 1920 decision in Missouri v. Holland, in which Justice Holmes found an expansive Treaty Power not clearly subject to any Tenth Amendment limitation. But the question remained unsettled through the mid-twentieth century. The Bricker Amendment would have reversed the Holland ruling by expressly confining the Treaty Power to the extent of other federal powers. The Amendment was defeated, but only barely and on the understanding that the political branches would respect its terms. The debate was mothballed by the evolution of the Commerce Clause, which during the second half of the twentieth century ousted the Tenth Amendment. So long as the Commerce Clause supplied a catch-all basis for the exercise of federal authority, the Treaty Power was surplusage.

That, of course, has changed, as the Rehnquist and Roberts Courts have scaled back the Commerce Clause. The Treaty Power is back on stage. In Bond v. United States, the Supreme Court extended standing to a woman to press a Tenth Amendment challenge against her conviction under a federal criminal statute enacted pursuant to the Chemical Weapons Convention. As applied in the Bond case—to small-time, localized criminal conduct—the statute has no constitutional basis other than in the Treaty Power. The case squarely presents an opportunity to revisit Missouri v. Holland, and it is now headed back to the Court.

The logic of Taming Globalization points to sustaining the statute in Bond. True, the statute involves an area of traditional state concern, namely, criminal law. However, the statute is the product of the combined action of the federal political branches, who (according to Ku and Yoo) are better equipped to make

foreign policy. The combined action was not just in the making of the treaty—two-thirds of the Senate consented to ratification by the President—but in its execution. The criminal statute was enacted through the ordinary legislative process, thus enjoying bicameral support. It would be the judiciary—in Ku and Yoo’s view, the least competent actor in this context\(^{39}\)—who would be doing the second-guessing. I suspect that when the case gets argued to the Court, Ku and Yoo will find some reason to situate the law beyond federal power.\(^{40}\) In the meantime, however, they omit an important flash point in the incorporation debate.

The Offenses Clause lies further beyond the horizon, but it, too, would pit the combined power of the political branches against the states and the federal courts. The Offenses Clause supplies a solid textualist basis for empowering Congress to transport international law into federal law, delegating to Congress the power “to define and punish ... Offences against the Law of Nations.”\(^{41}\) An exam question: could Congress enact a ban on the death penalty under this power? This presents the same kind of question as the Treaty Power challenge (minus a \textit{Missouri v. Holland} -type precedent), and it is no clearer how Ku and Yoo would resolve it. There is also the question of the extent to which Congress’ determination of international law under the Offenses Clause is judicially reviewable. Ku and Yoo are none too sanguine about the judiciary’s capacity to undertake international law determinations.\(^{42}\) Once again, however, one might expect reluctance on their part to accept even the legislative incorporation of international law. The death penalty hypothetical obviously remains a thought experiment against the current political landscape. But as conservatives see some utility in international human rights on other fronts,\(^{43}\) it

\(^{39}\) See \textit{Ku & Yoo}, supra note 4, at 11 (“courts should maintain their traditional deference to the executive and legislative branches in affairs of state, in political questions, in foreign relations, and in war”).

\(^{40}\) See John Yoo, \textit{The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause}, 15 CONST. COMMENT. 87 (1998) (questioning the constitutionality of the Chemical Weapons Convention, albeit on other grounds); \textit{Ku & Yoo}, supra note 4, 157-60 (suggesting that anti-commandeering principles constrain exercise of the Treaty Power). The interposition of a formalist doctrine of federalism is methodologically incompatible with the metric of institutional competence and compounds the suspicion that Ku and Yoo will ultimately argue against the incorporation of international law through any and all available tools.

\(^{41}\) U.S. CONST., art. 1, § 8, cl. 10. The clause has also come to be known in recent writing as the “Law of Nations Clause”. See, e.g., Andrew Kent, \textit{Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations}, 85 TEX. L. REV. 843, 847 (2007).

\(^{42}\) See \textit{Ku & Yoo}, supra note 4, at 129-30. For a recent decision finding a federal criminal measure to exceed congressional power under the Offenses Clause, see \textit{United States v. Bellaizac-Hurtado}, 700 F.3d 1245 (11th Cir. 2012) (striking down Maritime Drug Law Enforcement Act as not reflecting customary international law).

\(^{43}\) See, e.g., \textit{Clifford Bob, The Global Right Wing and the Clash of World Politics} (2012) (describing contexts in which conservatives are using international law as a tool, including with respect to the right to bear arms). See also John O. McGinnis, \textit{A New Agenda for International Human Rights: Economic Freedom}, 48 CATH. U. L. REV. 1029, 1030 (1999); Robert McMahon,
is not implausible that the Offenses Clause would be put to work in some other, less headline-grabbing way.\textsuperscript{44}

\textit{Taming Globalization} may skirt these issues precisely because they present the hard cases, and because Ku and Yoo’s institutional orientation would open constitutional doors to the incorporation of international law. In the meantime, their accommodation of globalization looks like window dressing.

II.

\textbf{UNSTOPPABLE INTERNATIONAL LAW}

Ultimately, it does not matter how Ku, Yoo, and other sovereigntists process these issues. In the long run, even the Supreme Court’s decisions will not matter much. International law will make its way into U.S. law and practice through one channel or another. The Constitution will not stop the imposition of international law on the United States. The proposition can be demonstrated with a closer look at four clusters of cases that feature prominently in \textit{Taming Globalization}: Medellín; \textit{Hamdan} and \textit{Boumediene}; \textit{Sosa}; and \textit{Roper}. The stories of these cases are all at some level consistent with Ku and Yoo’s miserly “accommodation,” but in fact they evidence the probability of a much broader assault. These cases demonstrate in turn the possibilities for sub-federal incorporation of international law, corporate incorporation of international law, adoption of international law by the political branches, and \textit{sub rosa} adoption by courts increasingly socialized to international law. Sovereigntists may be winning battles on the doctrine, but the balance is tipping against them on other fronts.

\textbf{A. Medellin and the Sub-federal Incorporation of International Law}

As a doctrinal matter, \textit{Medellin} was a major victory for international law skeptics of Ku and Yoo’s description. Self-execution presented an open question, one that the Court had not engaged in the modern era. The Court adopted an exacting standard under which treaties will become effective as U.S. law—in most cases, only upon the enactment of subsequent “implementing” legislation. While ostensibly falling short of a clear statement requirement, the majority set a high bar for evidence that treaty-makers intended treaty obligations to be self-executing, a bar that many international agreements


\textsuperscript{44} See Michael Stokes Paulsen, \textit{The Constitutional Power to Interpret International Law}, 118 \textit{YALE L.J.} 1762, 1810 (2009) (“the Law of Nations Clause confers on Congress a very broad range of interpretive judgment to say what international law is, and a corresponding national and international lawmaking power”).
Berkeley Journal of International Law, Vol. 31, Iss. 1 [2013], Art. 9
316 BERKELEY JOURNAL OF INTERNATIONAL LAW

(including the VCCR) would be unable to satisfy.\textsuperscript{45} By setting down a two-step process (first the adoption and approval of the international agreement, then the enactment of implementing legislation), \textit{Medellin} puts a brake on the incorporation of international law, as demonstrated by Congress’ failure to adopt implementing legislation for the VCCR in the wake of the decision.\textsuperscript{46}

In practice, however, there will be other points of entry. In the \textit{Medellin} context, the key actors are state and local law enforcement who will be subject to consular notification requirements in the vast majority of cases. \textit{Medellin} refused to enforce a VCCR requirement against the state of Texas, where Texas had violated VCCR rights as interpreted by the International Court of Justice. But \textit{Medellin} and other VCCR cases present a backward-looking optic, mapping the treaty onto a time during which the VCCR was unknown to front-line law enforcement.\textsuperscript{47} Even so, two states backed down from executions that would have violated the \textit{Avena} ruling.\textsuperscript{48} Texas itself has promised to respect \textit{Avena’s} terms in future cases.\textsuperscript{49} Today, the Convention’s requirements are a part of state and local police training.\textsuperscript{50} In some jurisdictions, detainees are informed of rights to consular notification along with Miranda warnings.\textsuperscript{51} On the ground, in

\textsuperscript{45} See generally \textit{Medellin} v. Texas, 552 U.S. 491 (2008) (Breyer, J., dissenting) (citing treaties that would not satisfy threshold for self-execution set in the majority opinion).


\textsuperscript{50} \textit{DEPARTMENT OF STATE OFFICE OF THE LEGAL ADVISER AND BUREAU OF CONSULAR AFFAIRS, CONSULAR NOTIFICATION AND ACCESS} (3d ed. 2010). See also \textit{OUTREACH BY THE STATE DEPARTMENT: STATE DEPARTMENT ACTIVITIES TO ADVANCE CONSULAR NOTIFICATION AND ACCESS AWARENESS AND COMPLIANCE}, available at http://www.travel.state.gov/law/consular/consular_2244.html (describing extensive State Department training and other forms of outreach relating to consular notification regime).

\textsuperscript{51} See, e.g., \textit{CAL. PENAL CODE} § 834c(a)(1) (mandating that “[i]n accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country . . . .”). See also \textit{Final Report and Recommendations of the Study Committee on the Advisability of a Uniform or Model Act to Implement Consular Notification Requirements of Article 36 of the Vienna Convention on Consular Relations and Related Bi-Lateral Agreements}, June 9, 2011 (recommending adoption of state laws requiring consular notification), available at http://www.uniformlaws.org/shared/docs/vccr/Vienna%20Consular%20Convention,%20Report%20t
other words, relevant authorities are being socialized to VCCR obligations; compliance with consular notification requirements has vastly improved since the VCCR made its first appearances in capital cases fifteen years ago. Moreover, the extension of such notification rights may be consequential where, for instance, consular authorities help to secure legal services. The Supreme Court may have stiff-armed the VCCR and international law in Medellín, but international obligations such as these can secure compliance through other institutional channels.

B. The ATS and Corporate Compliance with Human Rights Norms

Alien Tort Statute litigation ostensibly looks to be an even more promising front for the sovereigntists. Sosa was a clean-slate consideration of the ATS and its modern incarnation as a vehicle for human rights claims. The sovereigntists there enjoyed a partial win; though the Court left the door open to ATS claims, it found the statute to be jurisdictional only, enabling claims only for core violations of international law. But a probable, more sweeping victory lies just over the horizon in Kiobel v. Royal Dutch Petroleum. Taken by the Court to consider the important question left open in Sosa of whether corporations are subject to ATS claims, the Court had the case reargued on the broader question of the statute’s extraterritorial application. The Obama Administration itself appears to have retreated on the question. If, as expected, the Court in Kiobel finds the ATS inapplicable to conduct occurring outside the United States, the ATS will be gutted, at least in so-called “foreign-cubed” cases. The prospects for congressional action reversing the decision are nil. The decision would

52. See Janet Koven Levit, The Legitimacy of Delegating Lawmaking to International Institutions: The International Court of Justice and Foreign Nationals on Death Row in the U.S., 77 FORDHAM L. REV. 617, 630 (2008) (describing “bottom up” process through which VCCR compliance has improved at the state and local level).
55. See John Bellinger, Kiobel: Obama Administration Supports Shell, Argues ATS Should Not Apply to Aiding-and-Abetting Suits Against Foreign Corporations, Leaves Open Possibility of Suits Against U.S. Corporations, LAWFARE (June 13, 2012, 9:29 PM), lawfareblog.com. See also Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum. In the brief, the Obama Administration argues the inapplicability of the ATS for claims against foreign corporations for extraterritorial action, leaving open the question of claims against U.S. corporations. However, the Court could well find the ATS inapplicable to both. Cf. EEOC v. Arab American Oil Co., 499 U.S. 244 (1991) (finding Title VII inapplicable to foreign operations of U.S. corporation).
56. That is, cases in which foreign plaintiffs sue foreign defendants for conduct occurring outside of the United States.
57. This is demonstrated by the fact that a key Democrat senator at one point introduced legislation that would have insulated corporations from ATS liability. See Alien Tort Statute Reform
deprive human rights advocates of a major tool for expanding accountability to international law.\textsuperscript{58}

Once again, however, there may be less to the decision than meets the eye. First, the decision on extraterritoriality by its terms will relate to conduct outside the United States. The ATS no doubt presents an incorporation issue, insofar as it enables the courts to use international law as a rule of decision. But in many applications the ATS will have only tenuous connection to the United States (which, of course, is part of the argument on extraterritoriality). That said, as applied to U.S. corporations and their subsidiaries abroad, the ATS impacted U.S. actors (in this respect, a rejection of corporate liability would have been almost as damaging). But it is not as if, spared ATS exposure, corporations will feel free to turn their backs on international human rights. On the contrary, human rights are now a core component of corporate social responsibility, which, at least among major transnational corporations, is no longer optional.\textsuperscript{59}

The United Nations is moving to bring human rights directly to bear on corporations through such initiatives as the U.N. Global Compact and the Guiding Principles on Business and Human Rights.\textsuperscript{60} The ATS helped police and facilitate corporate compliance with international law, but other forms of discipline will work to help fill the gap created by its eclipse.

C. Anti-Terror Practices and the Incorporation of International Law by the Political Branches

The anti-terror cases are less consistent with a sovereigntist orientation. \textit{Hamdan} put international law to work in blocking the military commissions process, although, by its terms, only because the political branches had already incorporated international law.\textsuperscript{61} International law skeptics themselves had an institutional backstop to \textit{Hamdan}, however, as Congress expressly moved to authorize the military commissions process as well as the detentions at Guantanamo.\textsuperscript{62} Meanwhile, the Court’s ostensibly constraining decision in

\begin{itemize}
  \item \textsuperscript{58} The ATS has been a centerpiece in some academic work pointing to expanded incorporation of international law by the United States. See, e.g., Harold Hongju Koh, \textit{Why Nations Obey}, 106 YALE L.J. 2599 (1997) (centering ATS as tool for incorporation of international law into U.S. law).
  \item \textsuperscript{61} Hamdan v. Rumsfeld, 548 U.S. 557, 602 (2006).
Boumediene has been gutted by the courts below, a result the Supreme Court has now condoned.\textsuperscript{63} As a formal matter, U.S. anti-terror policy appears largely insulated from international law, as the courts will not constrain policymakers on that basis.

But international law is nonetheless imposed on executive branch decision-making. Insofar as other international actors care about human rights in the anti-terror context and insofar as they have leverage over the United States, nonconformity with international law creates a foreign policy cost. With the end of the short era of U.S. hegemony, international actors have been able to make the United States pay for perceived human rights violation in the anti-terror context. If nothing else, other countries can withhold cooperation in anti-terror efforts in response to U.S. non-compliance.\textsuperscript{64} As led by prominent human rights NGOs, international publics (especially in Europe) have pressed governments to center the issue in their relations with the United States.\textsuperscript{65} Courts, both national and supranational, have added their condemnation of U.S. practices and in some cases constrained governmental decision making.\textsuperscript{66} Other bodies condemned Guantanamo, black sites, and renditions.\textsuperscript{67} The impact of these efforts was evident in the second Bush Administration. Notwithstanding its hostility to international law, the administration relented on these issues by shutting down black sites, ending renditions where there was a risk that transferred detainees

or by cruel, inhuman, or degrading, whether or not under color of law, shall be admissible in a military commission under this chapter . . . .


\textsuperscript{65} See, e.g., James P. Rubin, Building a New Atlantic Alliance, FOREIGN AFFAIRS, July-Aug. 2008 (describing emergence of a “values gap” between the United States and Europe relating to anti-terror practices).


would be tortured, and ramping down Guantanamo.68 However much the Obama Administration has disappointed its progressive supporters, it has been careful to situate its anti-terror policies in an international law frame.69

D. Constitutional Interpretation and Judicial Socialization to International Law

Finally, there is the troublesome—from a sovereigntist perspective—use of international law as a tool of domestic constitutional interpretation. Here too, the sovereigntists suffered a judicial setback: a trilogy of cases referencing international practice on the way to rights-expanding rulings.70 In Roper v. Simmons, the Supreme Court expounded at length on the near-universality of a norm against the execution of juvenile offenders on the way to banning the practice under the Eighth Amendment. Although the Court was careful to cite foreign and international practice as merely “confirmatory” of a parallel domestic consensus,71 others saw international law doing heavier lifting.72 The case appeared to send an important cue to lower courts with respect to international law in domestic constitutional interpretation.

The case provoked a significant backlash. Roper almost surely represents a high-water mark for the near future, at least with respect to this mechanism of incorporating international law. A resolution was introduced in Congress condemning the citation of foreign and international law materials, with hearings in the House Judiciary Committee.73 More importantly, the controversy has become a staple of Supreme Court nominee confirmation hearings, with both Republican and Democratic nominees since Roper categorically eschewing the practice.74 Since Roper, there has been only one significant deployment of

71. Roper, 543 U.S. at 575.
72. See id. at 604 (O’Connor, J., dissenting) (denying the existence of domestic consensus and thus the possibility of “confirmatory” role for an international one).
74. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 201 (2005) (statement of Judge John G. Roberts, Jr.) (condemning the cherry-picking potential of foreign and international law); Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 471 (2006) (statement of Judge Samuel A. Alito) (“I don’t think foreign law is helpful in interpreting the Constitution.”); Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2010) (troubled by the suggestion that “you can turn to foreign law to get good ideas”).
international law in constitutional rights jurisprudence. In other cases, the Court has almost pointedly ignored international law that would support right-expansive rulings. Sovereigntists would appear to have dislodged international law from a foothold in the Court’s constitutional premises.

But U.S. courts will not be able to insulate themselves from international norms. To the extent that international norms and practices impact domestic norms and practices, when courts look to the latter, they will be indirectly drawing on the former. All U.S. actors are being socialized to international law. Eighth Amendment jurisprudence looks for domestic consensus, if international pressures and international socialization have facilitated that consensus, then international law will have impacted constitutional interpretation. Sovereigntism assumes that such influences can be walled off, that nation states are segmented from each other, and that globalization has had little effect on socio-cultural inter-penetration. Supreme Court justices may also be influenced by international practice unreferenced in decisions. In part because of the Roper trilogy, amicus briefs highlighting international law are now routinely filed. As American judges more closely identify as members of the international community of courts, they too have been socialized in international norms. Individual justices may understand that explicit reference to international law risks domestic institutional standing, while results consistent with international norms will face a friendly reception abroad. To the sovereigntist mindset, this possibility must be most galling, insofar as there is no way to police against it.

Confirmation Hearing on the Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. ("American law does not permit the use of foreign law or international law to interpret the Constitution. That’s a given . . . . ").


76. Including the Boumediene decision, which could have made ample use of international law on the way to extending the writ to detainees at Guantanamo. See Boumediene v. Bush, 553 U.S. 723 (2008).

77. See, e.g., Roper, 543 U.S. at 564.

78. See, e.g., Ku & Yoo, supra note 4, at 23-25 (playing up the economic aspects of globalization, but ignoring completely the transformation of cross-border social interaction).

79. See Scott L. Cummings, The Internationalization of Public Interest Law, 57 DUKE L.J. 891, 985-87 (2008).

CONCLUSION

The sovereigntists appear to have made their mark in limiting the reach of international legal norms. A generation of conservative academic entrepreneurs (Julian Ku and John Yoo among them) are seeing the fruition of their work as the Supreme Court adopts a sovereigntist posture in such cases as Medellín and Kiobel and steps back from internationalist experiments in the context of anti-terror practices and constitutional interpretation. The congratulatory, confident tone of *Taming Globalization* is understandable.

But when the intellectual histories of sovereigntism are written (as surely they will), this may be marked as a high point of influence. The Supreme Court is often a lagging indicator of social and governmental change. The Court’s resistance to the New Deal and the consolidation of federal power present an interesting parallel. *Taming Globalization* tells the New Deal story at length, somewhat incongruously. Constitutional doctrine then proved no obstacle to the eventual rearrangement of governmental authorities in the face of social and economic transformation, a migration of identity, intercourse, and exchange from the state to the nation. A similar rearrangement is unfolding today. As globalization enables and entrenches the transborder identities, intercourse, and exchange, we will witness the inevitable transfer of authorities to the global level. Sovereigntism’s splendid constitutional insulation is unsustainable over the long run, and the Supreme Court will not be able to do anything about it.

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81. Ku & Yoo, supra note 4, at 61-70.