TEXAS INTERNATIONAL LAW JOURNAL

Volume 50 Spring 2016 Number 4

Volume 50, Issue 4

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

TEXAS
INTERNATIONAL
LAW
JOURNAL

Volume 50
Special Issue
Spring 2016

CONTENTS

ARTICLES

APPENDIX

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast and informed of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is among the oldest and best-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the Texas International Law Society.[1] In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue, entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until summer 1971, when the *Journal* adopted its present title and began publishing three or four issues per year. Of the more than one hundred student-published international law journals across the country, only three schools have an older international heritage: Harvard, Columbia, and Virginia.

Over the years, the *Journal* staff has made the most of its established heritage. We have developed international repute by forging close ties with numerous scholars and authors worldwide. As a result, we receive over six hundred unsolicited manuscripts each year and are extremely selective in our publication choices. This position has helped us develop one of the largest student-published subscription circulations of any international law journal in the United States. The *Journal*'s subscription base includes law schools, government entities, law firms, corporations, embassies, international organizations, and individuals from virtually every state in the U.S. and more than forty-five countries.

With over thirty editorial board members and more than eighty staff members made up of full-time J.D. and LL.M. students, the *Journal* maintains a refined and well-organized editing process. As economic integration accelerates and nations forge closer ties in the new millennium, we are confident the *Journal* will continue to provide a significant contribution to the burgeoning field of international law.

DISTINGUISHED AUTHORS

The *Journal* has been fortunate to publish articles from a number of eminent scholars, including:

The Honorable William O. Douglas, former Justice of the Supreme Court of the United States; **W. Page Keeton**, former dean of the University of Texas School of Law; **Thomas Buergenthal**, former president of the Inter-American Court of Human Rights; **Charles Alan Wright**, former professor at the University of Texas School of Law, co-author of the leading treatise *Federal Practice and Procedure*, and former president of the American Law Institute; **Louis Henkin**, former president of the American Society of International Law, chief reporter of the Restatement of Foreign Relations Law of the

1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

United States, and former editor-in-chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, member of the Constitutional Court of South Africa and former chief prosecutor of the United Nations International War Crimes Tribunal for the former Yugoslavia and Rwanda; and **the Honorable Dalia Dorner**, Associate Justice of the Supreme Court of Israel.

OUTSTANDING CONTRIBUTORS

Our submissions consistently reflect the highest degree of quality from outstanding professionals, including:

Robert Reich, former U.S. Secretary of Labor, former professor of government and public policy at Harvard University, and former director of public policy for the Federal Trade Commission; **Joseph Jove**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under President Johnson; **Ewell "Pat" Murphy**, former chairman of the International Law Section of the American Bar Association and respected practicing attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; and **W. Michael Reisman**, professor at Yale Law School and member the board of directors of the American Society of International Law.

MISSION STATEMENT

Practitioners, scholars, and courts of all levels have cited articles from the *Texas International Law Journal* as legal authority since its first issue appeared in 1965. Members of the *Journal* seek to maintain this tradition of excellence for our 44th continuous year of publishing by providing the legal community with the highest quality of secondary source material on current and relevant international legal developments.

COPYRIGHT

The *Texas International Law Journal* (ISSN 0163-7479) is published three or four times a year by University of Texas School of Law Publications.

Cite as: TEX. INT'L L.J.

SUBSCRIPTIONS

Annual subscriptions to the *Journal* are available at the following rates:

$45.00 for domestic subscribers
$40.00 for *TILJ* alumni and current law students
$50.00 for foreign subscribers

To subscribe to the *Texas International Law Journal*, order reprints, or indicate a change of address, please visit www.tilj.org or write to:

University of Texas School of Law Publications
P.O. Box 8670
Austin, TX 78713
www.TexasLawPublications.com

Subscriptions are renewed automatically unless timely notice of termination is received. For any questions or problems concerning a subscription, please contact our Business Manager at (512) 232-1149 or Publications@law.utexas.edu.

BACK ISSUES

William S. Hein & Co., Inc. holds the back stock rights to all previous volumes of the *Texas International Law Journal*. For back issues and previous volumes of the *Journal*, please direct inquiries to:

William S. Hein & Co., Inc.
1285 Main St.
Buffalo, NY 14209
www.wshein.com

THE *FORUM*

The *Texas International Law Journal Forum* is the online companion to our printed volumes. The *Forum* publishes original scholarship on topics relating to recent developments in international law, as well as responses to scholarship printed in the *Texas International Law Journal.*

As with the *Journal*, all submissions are reviewed blindly throughout the year on a rolling basis. For more information regarding the *Forum*, please contact our Managing Editors at tilj@law.utexas.edu or visit www.tilj.org/forum.

ANNUAL SYMPOSIUM

The *Journal* hosts an annual symposium offering in-depth treatment of a topic of international legal concern. The purpose of these symposia is to promote the awareness of important developments in the formation of international law and to forge closer ties among scholars, practitioners, students, and members of the global legal community. We welcome your interest in these events. For more information regarding our annual symposium, please contact our Symposium Coordinator at tilj@law.utexas.edu or visit www.tilj.org/symposium.

MANUSCRIPT SUBMISSIONS AND EDITORIAL POLICIES

In conformity with the standard practice of scholarly legal publications in the United States, the *Texas International Law Journal* holds copyrights to its published works. Neither the Editorial Board nor the University of Texas are in any way responsible for the views expressed by contributors.

The *Journal* welcomes submissions from scholars, practitioners, businesspeople, government officials, and judges on topics relating to recent developments in international law. In addition to articles, the *Journal* also invites authors to submit shorter works, such as comments, book reviews, essays, notes, and bibliographies. All submissions are reviewed blindly throughout the year on a rolling basis.

We accept both hard-copy and electronic submissions. Please send article submissions, accompanied by a curriculum vitae, cover letter, and abstract, to the attention of the Submissions Editor. Manuscripts should conform with *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 18th ed. 2005) and, to the extent feasible, follow *The Chicago Manual of Style* (Univ. of Chicago Press, 15th ed. 2003). Manuscripts should be typewritten and footnoted where necessary.

All submission inquiries and requests for review should be directed to the Submissions Editor at:

Submissions Editor
Texas International Law Journal
The University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705

Tel: (512) 232-1277
Fax: (512) 471-4299
E-Mail: tilj@law.utexas.edu
www.tilj.org

Jenna al-Malawi
Brittany Angelich*
Paige Armstrong-Gutierrez*
Sara Block
Daniel Bradley*
Shelisa Brock*+
Alexander Brown
James Burnett*
Margaret Canell
Kristina Chung*+
Andrew Deas*
Marc-Anthony Delgado
Francesca Di Troia*
Michael Duran
David Fawcett
Lindsay Forbes*
Leslie Gardner
Leah Glowacki
Todd Hartis*
Christopher Hefner
Lindsey Henrikson*
JC Hernandez
Blake Jenkins*
Brittany Johnson*
Sandra Jonas*
Navneet Khinda
Travis Korman
Brendan Lally-McGurl
Jessica Lance*
Craig Lauchner
Sung Hwan Lee
Grace Lentz
Katy Leung
Bobby Levinski*
Cesar Leyva*
Huayang Ma^
Cody Martinez
Nina-Belle Mbayu
Sean McClay
Natalie McDermon*+
Adam Nelson*
Michael Nelson*
Pamela Nickell
Cameron Njaa*
Ashley Nwonuma
Simone Otenaike*
Jade Peterkin
Kristin Petkova
Joseph Piorkowski*
James Quail
Tyler Richardson
Julia Rubio*
Peter Rush
Hayden Schottlaender*
Adelaide Schwartz
Joanna Serrato*
Ayomide Shittu*+
Vidushi Shrimali
Sara Siegel
Maxwelle Sokol*
Victoria Stephen*
Patrick Tatum*
Julie Thompson*
Stephen Villarreal
Meghan Wied*
Anna Ziemnicki
Bryan Zubay

* Third-Year Member + LL.M. Member ^ Abroad/Away

Jenna al-Malawi*
Iman Ali
Brittney Angelich*^
Sara E. Block*
Jonathan Bodle
Alexander Brown*
Ben Brown
Margaret Canell*
Lorenza Cigarroa
Christiaan Cleary
Michael Darling
Marc-Anthony D. Delgado*^
Michael Duran*
Eddie Flores*
Madeline Gaffney
Andrew Gille
Brendan Hammond
Todd D. Hartis*
Christopher Hefner*^
Mike Heitz
Navneet K. Khinda*
Travis Korman*
Brendan Lally-McGurl*^
Rachel Lee
Katy Leung*^
Erika Lopez
Huayang Ma+
Cody Martinez*
Sean McClay*
Sacha Mount
Pamela Nickell*
Ashley Nwonuma*
Jackson Oliver
Karla Perez
Jade Peterkin*
Jack Polisini
James Quail*
Meagan Quejada
Tyler Richardson*
Gregory Roper
Peter Rush*
Stephanie Schmidt
Vidushi Shrimali*
Sara Siegel*
Stephen Villarreal*^
Margaret Wittenmyer
Anna Ziemnicki*
Bryan Zubay*

* Third-Year Member + LL.M. Member ^ Abroad/Away

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ADMINISTRATIVE OFFICERS

WARD FARNSWORTH, B.A., J.D.; *Dean, John Jeffers Research Chair in Law.*
JOHN B. BECKWORTH, B.A., J.D.; *Associate Dean for Administration and Strategic Planning, Lecturer.*
ROBERT M. CHESNEY, B.S., J.D.; *Associate Dean for Academic Affairs, Charles I. Professor in Law.*
WILLIAM E. FORBATH, A.B., B.A., Ph.D., J.D.; *Associate Dean for Research, Lloyd M. Bentsen Chair in Law.*
EDEN E. HARRINGTON, J.D.; *Associate Dean for Experiential Education, Clinical Professor, Director of William Wayne Justice Center for Public Interest Law.*
ELIZABETH T. BANGS, A.B., J.D.; *Assistant Dean for Student Affairs.*
KIMBERLY L. BIAR, B.B.A., C.P.A.; *Assistant Dean for Financial Affairs.*
MICHAEL G. HARVEY, B.A., B.S.; *Assistant Dean for Technology.*
REBECCA MELTON, B.A., J.D.; *Assistant Dean for Alumni Relations and Development.*
MONICA K. INGRAM, B.A., J.D.; *Assistant Dean for Admissions and Financial Aid.*
DAVID A. MONTOYA, B.A., J.D.; *Assistant Dean for Career Services.*
GREGORY J. SMITH, B.A., J.D.; *Assistant Dean for Continuing Legal Education.*

FACULTY EMERITI

HANS W. BAADE, A.B., J.D., LL.B., LL.M.; *Hugh Lamar Stone Chair Emeritus in Civil Law.*
RICHARD V. BARNDT, B.S.L., LL.B.; *Professor Emeritus.*
JULIUS G. GETMAN, B.A., LL.B., LL.M.; *Earl E. Sheffield Regents Chair Emeritus.*
WILLIAM W. GIBSON, JR., B.A., LL.B.; *Sylvan Lang Professor Emeritus in Law of Trusts.*
ROBERT W. HAMILTON, A.B., J.D.; *Minerva House Drysdale Regents Chair Emeritus.*
DOUGLAS LAYCOCK, B.A., J.D.; *Alice McKean Young Regents Chair Emeritus.*
J.S. LEBOWITZ, A.B., J.D., LL.M.; *Joseph C. Hutcheson Professor Emeritus.*
BASIL S. MARKESINIS, LL.B., Ph.D., D.C.L., LL.D.; *Jamail Regents Chair Emeritus in Law.*
JOHN T. RATLIFF, JR., B.A., LL.B.; *Ben Gardner Sewell Professor Emeritus in Civil Trial Advocacy.*
JAMES M. TREECE, B.S., J.D., M.A.; *Charles I. Francis Professor Emeritus in Law.*

PROFESSORS

JEFFREY B. ABRAMSON, B.A., J.D., Ph.D.; *Professor of Government and Law.*
DAVID E. ADELMAN, B.A., Ph.D., J.D.; *Harry Reasoner Regents Chair in Law.*
DAVID A. ANDERSON, A.B., J.D.; *Fred and Emily Marshall Wulff Centennial Chair in Law.*
MARILYN ARMOUR, B.A., M.S.W., Ph.D.; *Associate Professor of Social Work.*
MARK L. ASCHER, B.A., M.A., J.D., LL.M.; *Joseph D. Jamail Centennial Chair in Law.*
RONEN AVRAHAM, M.B.A., LL.B., LL.M., S.J.D.; *Thomas Shelton Maxey Professor in Law.*
LYNN A. BAKER, B.A., B.A., J.D.; *Frederick M. Baron Chair in Law.*
BARBARA A. BINTLIFF, M.A., J.D.; *Joseph C. Hutcheson Professor in Law, Director of Tarlton Law Library and the Jamail Center Legal Research.*
LYNN E. BLAIS, A.B., J.D.; *Leroy G. Denman, Jr. Regents Professor in Real Property Law.*
ROBERT G. BONE, B.A., J.D.; *G. Rollie White Teaching Excellence Chair in Law.*
OREN BRACHA, LL.B., S.J.D.; *Howrey LLP and Arnold, White & Durkee Centennial Professor.*
DANIEL M. BRINKS, A.B., J.D., Ph.D.; *Associate Professor, Co-Director of Bernard and Audre Rapaport Center for Human Rights and Justice.*
J. BUDZISZEWSKI, B.A., M.A., Ph.D.; *Professor of Government.*
NORMA V. CANTU, B.A., J.D.; *Professor of Education and Law.*
LOFTUS C. CARSON II, B.S., M. Pub. Affrs., M.B.A., J.D.; *Ronald D. Krist Professor.*
MICHAEL J. CHURGIN, A.G., J.D.; *Raybourne Thompson Centennial Professor.*
JANE M. COHEN, B.A., J.D.; *Edward Clark Centennial Professor.*
FRANK B. CROSS, B.A., J.D.; *Herbert D. Kelleher Centennial Professor of Business Law, Professor of Law.*
WILLIAM H. CUNNINGHAM, B.A., M.B.A., Ph.D.; *Professor of Marketing Administration.*
JENS C. DAMMANN, J.D., LL.M., Dr. Jur., J.S.D.; *William Stamps Farish Professor in Law.*
JOHN DEIGH, B.A., M.A., Ph.D; *Professory of Philosophy and Law.*
MECHELE DICKERSON, B.A., J.D.; *Arthur L. Moller Chair in Bankruptcy Law and Practice.*
GEORGE E. DIX, B.A., J.D.; *George R. Killam, Jr. Chair of Criminal Law.*
JOHN S. DZIENKOWSKI, B.B.A., J.D.; *Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process.*
DAVID J. EATON, B.A., M.Sc., M.A., Ph.D.; *Professor of Public Affairs.*
ZACHARY S. ELKINS, B.A., M.A., Ph.D.; *Associate Professor of Government.*
KAREN L. ENGLE, B.A., J.D.; *Minerva House Drysdale Regents Chair in Law, Founder and Co-Director of Bernard and Audre Rapoport Center for Human Rights and Justice.*
KENNETH FLAMM, A.B., Ph.D.; *Professor of Public Affairs.*
MIRA GANOR, B.A., M.B.A., LL.B., LL.M., J.S.D.; *Professor of Law.*
CHARLES E. GHOLZ, B.S., B.S., Ph.D; *Associate Professor of Public Affairs.*
JOHN M. GOLDEN, A.B., J.D., Ph.D.; *Loomer Family Professor in Law.*
STEVEN GOODE, B.A., J.D.; *W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor.*
LINO A. GRAGLIA, B.A., LL.B.; *A. W. Walker Centennial Chair in Law.*
BENJAMIN G. GREGG, B.A., M.S., Ph.D.; *Associate Professor of Government.*
CHARLES G. GROAT, B.A., M.S., Ph.D.; *Professor of Public Affairs.*
PATRICIA I. HANSEN, A.B., M.P.A., J.D.; *J. Waddy Bullion Professor.*
HENRY T. C. HU, B.S., M.A., J.D.; *Allan Shivers Chair in the Law of Banking and Finance.*
BOBBY R. INMAN, B.A.; *Professor of Public Affairs.*
GARY J. JACOBSON, B.A., M.A., Ph.D.; *Professor of Government and Law.*
DEREK P. JINKS, B.A., M.A., J.D.; *The Marrs McLean Professor in Law.*

STANLEY M. JOHANSON, B.S., LL.B., LL.M.; *James A. Elkins Centennial Chair in Law, University Distinguished Teaching Professor.*
CALVIN H. JOHNSON, B.A. J.D.; *Andrews & Kurth Centennial Professor.*
SUSAN R. KLEIN, B.A., J.D.; *Alice McKean Young Regents Chair in Law.*
JENNIFER E. LAURIN, B.A., J.D.; *Professor of Law.*
SANFORD V. LEVINSON, A.B., Ph.D., J.D.; *W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, Professor of Government.*
ANGELA K. LITTWIN, B.A., J.D.; *Professor of Law.*
VIJAY MAHAJAN, M.S.Ch.E., Ph.D.; *Professor of Marketing Administration.*
INGA MARKOVITS, LL.M.; *"The Friends of Joe Jamail" Regents Chair.*
RICHARD S. MARKOVITS, B.A., LL.B., Ph.D.; *John B. Connally Chair.*
THOMAS O. MCGARITY, B.A., J.D.; *Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law.*
STEVEN A. MOORE, B.A., Ph.D.; *Professor of Architecture.*
LINDA S. MULLENIX, B.A., M.Phil., J.D., Ph.D.; *Morris and Rita Atlas Chair in Advocacy.*
STEVEN P. NICHOLS, B.S.M.E., M.S.M.E., J.D., Ph.D.; *Professor of Engineering.*
ROBERT J. PERONI, B.S.C., J.D., LL.M.; *The Fondren Foundation Centennial Chair for Faculty Excellence.*
H. W. PERRY, JR., B.A., M.A., Ph.D.; *Associate Professor of Government and Law.*
LUCAS A. POWE, JR., B.A., J.D.; *Anne Green Regents Chair in Law, Professor of Government.*
WILLIAM C. POWERS, JR., B.A., J.D.; *Hines H. Baker and Thelma Kelley Baker Chair in Law, University Distinguished Teaching Professor.*
DAVID A. RABBAN, B.A., J.D.; *Dahr Jamail, Randall Hage Jamail and Robert Lee Jamail Regents Chair, University Distinguished Teaching Professor.*
ALAN S. RAU, B.A., LL.B.; *Mark G. and Judy G. Yudof Chair in Law.*
DAVID W. ROBERTSON, B.A., LL.B., LL.M., J.S.D.; *W. Page Keeton Chair in Tort Law, University Distinguished Teaching Professor.*
JOHN A. ROBERTSON, A.B., J.D.; *Vinson & Elkins Chair.*
MARY ROSE, A.B., M.A., Ph.D.; *Associate Professor of Sociology.*
WILLIAM M. SAGE, A.B., M.D., J.D.; *James R. Dougherty Chair for Faculty Excellence.*
LAWRENCE G. SAGER, B.A., LL.B.; *Alice Jane Drysdale Sheffield Regents Chair.*
JOHN J. SAMPSON, B.B.A., LL.B.; *William Benjamin Wynne Professor.*
CHARLES M. SILVER, B.A., M.A., J.D.; *Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure, Professor of Government, Co-Director of Center on Lawyers, Civil Justice and the Media.*
ERNEST E. SMITH, B.A., LL.B.; *Rex G. Baker Centennial Chair in Natural Resources Law.*
TARA A. SMITH, B.A., Ph.D.; *Professor.*
DAVID B. SPENCE, B.A., J.D., M.A., Ph.D.; *Professor of Business, Government and Society, and Law.*
JAMES C. SPINDLER, B.A., M.A., J.D., Ph.D.; *The Sylvan Lang Pforessor of Law, Professor of Business.*
JANE STAPLETON, B.S., Ph.D., LL.B., D.C.L., D. Phil.; *Ernest E. Smith Professor.*
JORDAN M. STEIKER, B.A., J.D.; *Judge Robert M. Parker Endowed Chair in Law, Director of Capital Punishment Center.*
MICHAEL F. STURLEY, B.A., J.D.; *Fannie Coplin Regents Chair.*
JEREMI SURI, A.B., M.A., Ph.D.; *Professor of Public Affairs.*
JEFFREY K. TULIS, B.A., M.A., Ph.D.; *Associate Professor of Government.*
GREGORY J. VINCENT, B.A., J.D., Ed.D.; *Professor, Vice President for Diversity and Community Engagement.*
SRIRAM VISHWANATH, B.S., M.S., Ph.D.; *Associate Professor of Electrical and Computer Engineering.*
WENDY E. WAGNER, B.A., M.E.S., J.D.; *Joe A. Worsham Centennial Professor.*
LOUISE WEINBERG, A.B., LL.M., J.D.; *William B. Bates Chair for the Administration of Justice.*
OLIN G. WELLBORN, A.B., J.D.; *William C. Liedtke, Sr. Professor.*
JAY L. WESTBROOK, B.A., J.D.; *Benno C. Schmidt Chair of Business Law.*
ABRAHAM L. WICKELGREN, A.B., J.D., Ph.D.; *Bernard J. Ward Centennial Professor in Law.*
SEAN H. WILLIAMS, B.A., J.D.; *Professor of Law.*
ZIPPORAH B. WISEMAN, B.A., M.A., LL.B.; *Thos. H. Law Centennial Professor.*
PATRICK WOOLLEY, A.B., J.D.; *Beck, Redden &Secrest Professor in Law.*

ASSISTANT PROFESSORS

JOSEPH R. FISHKIN, B.A., M. Phil., J.D., D. Phil.
CARY C. FRANKLIN, B.A., M.St., D. Phil., J.D.
JAMES W. MCCLELLAND, B.S., Ph.D.
SUSAN C. MORSE, A.B., J.D.
TIMOTHY D. WERNER, B.A., M.A., Ph.D.

SENIOR LECTURERS, WRITING LECTURERS, AND CLINICAL PROFESSORS

ALEXANDRA W. ALBRIGHT, B.A., J.D.; *Senior Lecturer.*
WILLIAM P. ALLISON, B.A., J.D.; *Clinical Professor, Director of Criminal Defense Clinic.*
WILLIAM H. BEARDALL, JR., B.A., J.D.; *Clinical Professor, Transnational Worker Rights Clinic.*
NATALIA V. BLINKOVA, B.A., M.A., J.D.; *Lecturer.*
PHILIP C. BOBBITT, A.B., J.D., Ph.D.; *Distinguished Senior Lecturer.*
HUGH L. BRADY, B.A., J.D.; *Clinical Professor, Director of Legislative Lawyering Clinic.*
KAMELA S. BRIDGES, B.A., B.J., J.D.; *Lecturer.*
JOHN C. BUTLER, B.B.A., Ph.D.; *Clinical Associate Professor.*
MARY R. CROUTER, A.B., J.D.; *Clinical Professor, Assistant Director of William Wayne Justice Center for Public Interest Law.*
MICHELE Y. DEITCH, B.A., M.S., J.D.; *Senior Lecturer.*
TIFFANY J. DOWLING, B.A., J.D.; *Clinical Instructor, Director of Actual Innocence Clinic.*
LORI K. DUKE, B.A., J.D.; *Clinical Professor.*
TINA V. FERNANDEZ, A.B., J.D.; LECTURER.
ELIZABETH FRUMKIN, B.A., M.A., J.D.; *Lecturer.*
ARIEL E. DULITZKY, J.D., LL.M.; *Clinical Professor, Director of Human Rights Clinic.*
ELANA S. EINHORN, B.A., J.D.; *Lecturer.*
LISA R. ESKOW, A.B., J.D.; *Lecturer.*
TINA V. FERNANDEZ, A.B., J.D.; *Clinical Professor, Director of Pro Bono Programs.*

LAUREN FIELDER, B.A., J.D.; *Senior Lecturer, Director of Graduate and International Programs.*
LYNDA E. FROST, B.A., M.Ed., J.D., Ph.D.; *Clinical Associate Professor.*
DENISE L. GILMAN, B.A., J.D.; *Clinical Professor, Co-Director of Immigration Clinic.*
KELLY L. HARAGAN, B.A., J.D.; *Clinical Professor, Director of Environmental Law Clinic.*
BARBARA HINES, B.A., J.D.; *Clinical Professor, Co-Director of Immigration Clinic*
HARRISON KELLER, B.A., M.A., Ph.D.; *Senior Lecturer, Vice Provost for Higher Education Policy [at the University of Texas at Austin].*
ANDREW KULL, B.A., B.A., M.A., J.D.; *Senior Lecturer.*
BRIAN R. LENDECKY, B.B.A., M.P.A.; *Senior Lecturer.*
JEANA A. LUNGWITZ, B.A., J.D.; *Clinical Professor, Director of Domestic Violence Clinic.*
JIM MARCUS, B.A., J.D.; *Clinical Professor.*
FRANCES L. MARTINEZ, B.A., J.D.; *Clinical Professor.*
TRACY W. MCCORMACK, B.A., J.D.; *Senior Lecturer, Director of Advocacy Programs.*
F. SCOTT MCCOWN, B.S., J.D.; *Clinical Professor, Director of Children's Rights Clinic.*
ROBIN B. MEYER, B.A., M.A., J.D.; *Lecturer.*
RANJANA NATARAJAN, B.A., J.D.; *Clinical Professor, Director of Civil Rights Clinic.*
RACHAEL RAWLINS, B.A., M.R.P., J.D.; *Senior Lecturer.*
SEAN J. PETRIE, B.A., J.D.; *Lecturer.*
ELIZA T. PLATTS-MILLS, B.A., J.D.; *Clinical Professor.*
WAYNE SCHIESS, B.A., J.D.; *Senior Lecturer, Director of The David J. Beck Center for Legal Research, Writing and Appellate Advocacy.*
RAOUL D. SCHONEMANN, B.A., J.D., LL.M.; *Clinical Professor.*
PAMELA J. SIGMAN, B.A., J.D.; *Clinical Professor, Director of Juvenile Justice Clinic.*
DAVID S. SOKOLOW, B.A., M.A., J.D., M.B.A.; *Distinguished Senior Lecturer, Director of Student Life.*
LESLIE L. STRAUCH, B.A., J.D.; *Clinical Professor.*
MELINDA E. TAYLOR, B.A., J.D.; *Senior Lecturer, Executive Director of Center for Global Energy, International Arbitration and Environmental Law.*
HEATHER K. WAY, B.A., B.J., J.D.; *Clinical Professor, Director of Entrepreneurship and Community Development Clinic.*
LUCILLE D. WOOD, B.A., J.D.; *Clinical Professor.*
ELIZABETH M. YOUNGDALE, B.A., M.L.I.S., J.D.; *Lecturer.*

ADJUNCT PROFESSORS AND OTHER LECTURERS

ELIZABETH AEBERSOLD, B.A., M.S.
WILLIAM R. ALLENSWORTH, B.A., J.D.
ANDREW W. AUSTIN, B.A., M.Phil., J.D.
MARJORIE I. BACHMAN, B.S., J.D.
CRAIG D. BALL, B.A., J.D.
SHARON C. BAXTER, B.S., J.D.
KARL O. BAYER, B.A., M.S., J.D.
JERRY A. BELL, B.A., J.D.
ALLISON H. BENESCH, B.A., M.S.W., J.D.
CRAIG R. BENNETT, B.S., J.D.
JAMES B. BENNETT, B.B.A., J.D.
MURFF F. BLEDSOE, B.A., J.D.
WILLIAM P. BOWERS, B.B.A., J.D., LL.M.
STACY L. BRAININ, B.A., J.D.
ANTHONY W. BROWN, B.A., J.D.
JAMES E. BROWN, B.S., LL.B., J.D.
TOMMY L. BROYLES, B.A., J.D.
PAUL J. BURKA, B.A., LL.B.
W. AMON BURTON, JR., B.A., M.A., LL.B.
ERIN G. BUSBY, B.A., J.D.
DAVID J. CAMPBELL, B.A., J.D.
AGNES E. CASAS, B.A., J.D.
RUBEN V. CASTANEDA, B.A., J.D.
EDWARD A. CAVAZOS, B.A., J.D.
LINDA BRAY CHANOW, B.A., J.D.
JEFF CIVINS, A.B., M.S., J.D.
ELIZABETH COHEN, B.A., M.S.W., J.D.
KEVIN D. COLLINS, B.A., J.D.
KASIA SOLON CRISTOBAL, B.A., M.S., J.D.
PATRICIA J. CUMMINGS, B.A., J.D.
KEITH B. DAVIS, B.S., J.D.
SCOTT D. DEATHERAGE, B.A., J.D.
DICK DEGUERIN, B.A., LL.B.
ADAM R. DELL, B.A., J.D.
MELONIE M. DEROSE, B.A., J.D.
RICHARD D. DEUTSCH, B.A., B.A., J.D.
STEVEN K. DEWOLF, B.A., J.D., LL.M.
REBECCA H. DIFFEN, B.A., J.D.
ANDREW S. DREIER
CASEY D. DUNCAN, B.A., M.L.I.S., J.D.
PHILIP DURST, B.A., M.A., J.D.
JAY D. ELLWANGER, B.A., J.D.
EDWARD Z. FAIR, B.A., M.S.W., J.D.
ROSS FISCHER, B.A., J.D.
JOHN C. FLEMING, B.A., J.D.
KYLE K. FOX, B.A., J.D.
DAVID C. FREDERICK, B.A., Ph.D., J.D.
GREGORY D. FREED, B.A., J.D.
FRED J. FUCHS, B.A., J.D.
RYAN M. GARCIA, B.G.S., J.D.
GRETTA G. GARDNER, B.A., J.D.
BRYAN A. GARNER, B.A., J.D.
MICHAEL S. GOLDBERG, B.A., J.D.
MICHAEL J. GOLDEN, A.B., J.D.
DAVID M. GONZALEZ, B.A., J.D.
JOHN F. GREENMAN
DAVID HALPERN, B.A., J.D.
ELIZABETH HALUSKA-RAUSCH, B.A., M.A., M.S., Ph.D.
BARBARA HANNON, B.A., M.S., J.D., Ph.D.
CLINT A. HARBOUR, B.A., B.A., J.D., LL.M
ROBERT L. HARGETT, B.B.A., J.D.
MARY L. HARRELL, B.S., J.D.
CHRISTOPHER S. HARRISON, Ph.D., J.D.
WILLIAM M. HART, B.A., J.D.
JOHN R. HAYS, JR., B.A., J.D.
SUSAN J. HIGHTOWER, B.A., M.A., J.D.
KENNETH E. HOUP, JR., B.A., J.D.
RANDY R. HOWRY, B.J., J.D.
MONTY G. HUMBLE, B.A., J.D.
JENNIFER D. JASPER, B.S., M.A., J.D.
DIRK M. JORDAN, B.A., J.D.
JEFFREY R. JURY, B.A., J.D.
PATRICK O. KEEL, B.A., J.D.
DOUGLAS L. KEENE, B.A. M.Ed., Ph.D.
CHARI L. KELLY, B.A., J.D.
JEAN A. KELLY, B.A., J.D.
ROBERT N. KEPPLE, B.A., J.D.
PAUL S. KIMBOL, B.A., J.D.
MARK L. KINCAID, B.B.A., J.D.
ALICE L. KING, B.A., J.D.
MICHAEL R. KRAWZSENEK, B.S., J.D.
AMI L. LARSON, B.A., J.D.
LARRY LAUDAN, B.A., M.A., Ph.D.
JODI R. LAZAR, B.A., J.D.
KEVIN L. LEAHY, B.A., J.D.
DAVID P. LEIN, B.A., M.P.A., J.D.
ANDRES J. LINETZKY, B.A., LL.M.
JAMES-LLOYD LOFTIS, B.B.A., J.D.
MANUEL LOPEZ, A.B., J.D.
MARIO A. LOYOLA, B.A., J.D.
ANDREW F. MACRAE, B.J., J.D.

ANDREA M. MARSH, B.A., J.D.
HARRY S. MARTIN, A.B., M.L.S., J.D.
LORI R. MASON, B.A., J.D.
PHILIP K. MAXWELL, B.A., J.D.
PETER C. MCCABE, B.A., J.D.
ANN M. MCGEEHAN, B.A., J.D.
BARRY F. MCNEIL, B.A., J.D.
MARGARET M. MENICUCCI, B.A., J.D.
JO ANN MERICA, B.A., J.D.
RANELLE M. MERONEY, B.A., J.D.
ELIZABETH N. MILLER, B.A., J.D.
JONATHAN F. MITCHELL, B.A., J.D.
DARYL L. MOORE, B.A., M.L.A., J.D.
EDWIN G. MORRIS, B.S., J.D.
SARAH J. MUNSON, B.A., J.D.
HENRY C. MYERS, B.S., J.D.
JOHN A. NEAL, B.A., J.D.
MANUEL H. NEWBURGER, B.A., J.D.
HOWARD D. NIRKEN, B.A., M.P.AFF., J.D.
CHRISTINE S. NISHIMURA, B.A., J.D.
DAVID G. NIX, B.S.E., LL.M., J.D.
JOSEPH W. NOEL, B.S.E., J.D., M.S.L.S.
JANE A. O'CONNELL, B.A., M.S., J.D.
PATRICK L. O'DANIEL, B.B.A., J.D.
M. ARIEL PAYAN, B.A., J.D.
MARK L. PERLMUTTER, B.S., J.D.
JONATHAN PRATTER, B.A., M.S.L.I.S., J.D.
VELVA L. PRICE, B.A., J.D.
MARGARET K. REIN, B.A., J.D.
CLARK W. RICHARDS, B.A., LL.M., J.D.
BRIAN C. RIDER, B.A., J.D.
ROBERT M. ROACH, JR., B.A., J.D.
BRIAN J. ROARK, B.A., J.D.
BETTY E. RODRIGUEZ, B.S.W., J.D.
JAMES D. ROWE, B.A., J.D.
MATTHEW C. RYAN, B.A., J.D.
KAREN R. SAGE, B.A., J.D.
MARK A. SANTOS, B.A., J.D.
JAMES J. SCHESKE, B.A., J.D.
MICHAEL J. SCHLESS, B.A., J.D.
SUSAN SCHULTZ, B.S., J.D.
AMY J. SCHUMACHER, B.A., J.D.
SUZANNE SCHWARTZ, B.J., J.D.
RICHARD J. SEGURA, JR., B.A., J.D.
STACEY ROGERS SHARP, B.S., J.D.
DAVID A. SHEPPARD, B.A., J.D.
HON. ERIC M. SHEPPERD, B.A., J.D.
A. HAAG SHERMAN, B.B.A., J.D., C.P.A.
RONALD J. SIEVERT, B.A., J.D.
AMBROSIO A. SILVA, B.S., J.D.
STUART R. SINGER, A.B., J.D.
HON. BEA A. SMITH, B.A., M.A., J.D.
LYDIA N. SOLIZ, B.B.A., J.D.
STEPHEN M. SONNENBERG, A.B., M.D.
JAMES M. SPELLINGS, JR., B.S., J.D.
KACIE L. STARR, B.A., J.D.
MATTHEW R. STEINKE, B.A., M.L.I.S., J.D.
MOLLIE E. STEMPER, B.A., J.D.
WILLIAM F. STUTTS, B.A., J.D.
MATTHEW J. SULLIVAN, B.S., J.D.
GRETCHEN S. SWEEN, B.A., M.A., Ph.D., J.D.
JEREMY S. SYLESTINE, B.A., J.D.
BRADLEY P. TEMPLE, B.A., J.D.
SHERINE E. THOMAS, B.A., J.D.
TERRY O. TOTTENHAM, B.S., LL.M., J.D.
CARLOS R. TREVINO
TRISHA TRIGILIO, B.A., J.D.
MICHAEL S. TRUESDALE, B.A., M.A., J.D.
TIMOTHY J. TYLER, B.A., J.D.
SUSAN S. VANCE, B.B.A., J.D.
LANA K. VARNEY, B.A., J.D.
DEBORAH M. WAGNER, B.A., M.Arch., J.D.
CHRISTOPHER M. WEIMER
WARE V. WENDELL, A.B., J.D.
RODERICK E. WETSEL, B.A., J.D.
THEA WHALEN, B.A., J.D.
DARA WHITEHEAD, B.A., M.S.
RANDALL B. WILHITE, B.B.A., J.D.
TIMOTHY A. WILKINS, B.A., M.P.P., J.D.
DAVID G. WILLE, B.S.E.E., M.S.E.E., J.D.
ANDREW M. WILLIAMS, B.A., J.D.
CHRISTINA T. WISDOM, B.A., J.D.
TRAVIS M. WOHLERS
STEPHEN M. WOLFSON, B.A., M.S., J.D.
DENNEY L. WRIGHT, B.B.A., J.D., LL.M.
DANIEL J. YOUNG, B.A., J.D.
EVAN A. YOUNG, A.B., B.A., J.D.
TREVOR YOUNG, B.A., B.A., M.A., J.D., LL.M.

VISITING PROFESSORS

OWEN L. ANDERSON, B.A., J.D.
ANTONIO H. BENJAMIN, LL.B., LL.M.
VICTOR FERRERES, J.D., LL.M., J.S.D.
ALON KLEMENT
GRAHAM B. STRONG, B.A., J.D., LL.M.

Introduction: Celebrating 50 Years

Marc D. Young[*]

For fifty years, the *Texas International Law Journal* has been a leader in international legal scholarship. International law's importance increases each day as our world becomes increasingly interdependent and integrated. Globalization over this period has elevated international law's importance, accelerated its institutionalization, and increased its compliance.

We have seen critically important legal norms established during the *Journal*'s history, such as the formulation of the Vienna Convention on the Law of Treaties, the development of the World Trade Organization, and the emergence of international criminal tribunals. We have also witnessed a shift in the world's political order—moving away from a world divided between capitalist and communist states to a more complex, multipolar system incorporating human rights, non-state actors, and private institutions. Furthermore, the radical development of technology and transformations in our global transportation and communication scheme has called for significant development of international law and readily agreed-to international standards.

Through all of this, the *Texas International Law Journal* has been at the forefront: Examining the legal issues raised by these changes; asking the necessary and relevant questions of our time; and providing a forum for serious intellectual consideration and discussion of the problems emerging in their wake. With the intersection of diverse, and frequently divergent, financial, political, and cultural systems around the world, it is easy to understand why finding common ground in legal norms and cultural values is critical to peacefully resolving conflicts and humanitarian issues.

Indeed, it was one of the gravest moments of international concern of the twentieth century that gave birth to the *Texas International Law Journal.* In October of 1962, the Cuban Missile Crisis forced the Cold War to a boiling point and led the world to the brink of nuclear war. At the time, E. Ernest Goldstein was teaching an international law class at the University of Texas School of Law. The Bay of Pigs debacle of April 1961 was still on the minds of everyone, as the Cold War simmered. Students were asking critical legal questions early that semester raised by this event, such as: "If the Cubans, with Soviet help, were acting within their legal right of self-defense, what could the United States legally do to counter this move?"[1] The discussions and focus on international law in the wake of the Cuban Missile Crisis led to student interest and discussion that exceeded the time available in class, and students soon chartered the Texas International Law Society to explore these issues

---

[*] Marc D. Young is the 50th Anniversary Executive Editor of Texas International Law Journal and a 2015 graduate of the School of Law.

[1] E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the Texas International Law Journal Were Born*, 30 TEX. INT'L L.J. 223, 223 (1995).

and others in earnest. Professor Goldstein wrote about these events in his article, *Thank You Fidel! Or How the International Law Society and the Texas International Law Journal Were Born.*

Today, the ideas of those pioneering students are still in operation, with a long legacy of students who have followed them. In 1965, what began as a discussion group became the second student-led academic journal to exist at the University of Texas School of Law. The focus of any academic publication is, as it should be, on its scholarship. But it is important, from time to time, to set aside moments to remember and pay homage to the people and the process behind that scholarship.

Twenty years ago, during one of those moments, E. Ernest Goldstein reflected on the beginnings of this *Journal.* In describing the impact the *Journal* and its students left on him, he remarked, "the results of these student initiatives, as seen thirty years later, make me realize that teaching at the University of Texas School of Law was the high point of an exciting and rewarding fifty years of professional life."

This Fiftieth Anniversary is another such moment, to reflect and pay homage to the time, efforts, and passion of the many students and academic advisors who created and have sustained this wonderful publication. Their tireless dedication, while meeting the other demands and requirements of law school and life, has instilled a lasting passion in the study of law to each class that has followed them.

We are publishing this Special Issue to recognize some of these many contributions, offer comment on the present, and, hopefully, inspire another fifty years of leading publication. Professor Goldstein is no longer with us, having passed away in 2010. The late Professor Goldstein was the first faculty sponsor of the *Journal* and certainly his encouragement and support to the early student members of this *Journal* was paramount in their success. We seek to recognize him as well. This Issue, and during this year, we have sought to honor and recognize our alumni, academic advisors, and Professor Goldstein. In addition to this Issue, we held a Fiftieth Anniversary banquet and were delighted to have Professor Goldstein's son and family in attendance as we presented the first E. Ernest Goldstein alumni award in his honor.

In honoring the past, we have republished Professor Goldstein's reflections on the origins of the *Journal* and his experiences with it. Furthermore, we are republishing two seminal articles that have appeared previously in these pages, along with short introductions by guest authors to explain their continued significance and place them in context. These articles comment on pressing issues of our time: Energy, human rights, and terrorism.

In inspiring the future, we offer this Issue as an acknowledgement of how the passion of a few students can culminate in a legacy of fifty years of scholarship and policy influence. Different legal, political, economic, cultural, and religious traditions intersect in pivotal fashion within international law—and the *Texas International Law Journal* has served as an unequalled forum and focal point cultivating this rich and varied topic. A Supreme Court Justice, a former Department of State Legal Adviser, and countless other leaders in the field of international law, have contributed to these pages over the years. We are hopeful that in another fifty years we will be publishing another Special Issue recognizing our centennial and an even deeper impact on this vast and increasingly important field of law.

Thank You Fidel!

Or How the International Law Society and the Texas International Law Journal Were Born

E. ERNEST GOLDSTEIN*

The Cuban Missile Crisis in October 1962 was the catalyst that transmuted my course in international law into the *University of Texas International Law Society.*

From that *Society* sprang the *Journal of the University of Texas International Law Society.* Citators were daunted by that cumbersome title, and the name changed, after Volume 1, Number 2 of June 1965, to *Texas International Law Forum.* Five years later it became, and remains, the *Texas International Law Journal.*

Permit me to say at the outset that the *Texas International Law Society* and the *Texas International Law Journal* were purely student initiatives. Some of those involved in the launching of each of these organizations are mentioned below.

I am proud and gratified that the students asked me to advise them. The results of these student initiatives, as seen thirty years later, make me realize that teaching at the University of Texas School of Law was the high point of an exciting and rewarding fifty years of professional life.

Now, let us return to Fidel Castro's role as the catalyst. When my international law class met in the 1962 fall semester, the April 1961 Bay of Pigs fiasco was still very much on the minds of my students. Also, the media were reporting rumors of increased Soviet activity in Cuba.

---

* Editor's Note: Besides being a highly respected member of the University of Texas School of Law faculty, Professor Goldstein has dedicated much of his time over the years to the *Journal* and the Society. In addition to his role as founding father, Professor Goldstein served as Faculty Advisor of the Society from 1963–65. He was also the Faculty Advisor to the *Journal* for Volume 1, and has been a valued member of the Editorial Advisory Board since its inception. In 1978, Professor Goldstein was named the first recipient of the Carl H. Fulda Award, the *Journal's* award for excellence in the field of international law. Words cannot express the gratitude and admiration of the many generations of *Texas International Law Journal* Editorial Board and Staff members.

Very early in the semester students raised questions as to the legality of our Bay of Pigs invasion of Cuba. One question Socratically produced another. What military activity constituted an illegal aggression, and what constituted a legal self-defense? If the Soviets decided to defend Cuba against future U.S. attacks, and if the Soviets sent troops and missiles to Cuba, would such actions constitute legitimate Cuban self-defense against a hostile United States? If the Cubans, with Soviet help, were acting within their legal right of self-defense, what could the United States legally do to counter this move? Could we legally preempt a potential use of Russian-Cuban force against the United States?

A number of scenarios were suggested and analyzed. The one that the class eventually preferred was grounded on the Monroe Doctrine and the international law doctrines of freedom of the seas and self-defense, as justifications for an embargo and a blockade to cut off the Russian supply line to Cuba. That scenario owed much to my having spent the summer of 1962 as a member of the international law faculty of the Naval War College at Newport, Rhode Island. This classroom exercise and its solutions became a reality in October 1962.

The crystal ball coincidence had a positive effect both in class and in the Law School generally. There was now a realization that international law was something more than a dusty, intellectual exercise.

Fritz Alan Korth, one of the students in the 1962 class, told his father, Navy Secretary Fred Korth, of the class anticipation of the real solution. Subsequently, Secretary Korth and I met and exchanged views concerning the parallels in the development of the classroom exercise and the real one.

Many of the students in the next fall's class approached the study of international law with an unprecedented enthusiasm that can be attributed to the previous year's events. Their interest was greater than that which could be satisfied in three class hours a week. Consequently, early in the semester a group of students began to meet at my home to discuss international legal developments, and they decided that a formal organization was the next step.

In November 1963, the *University of Texas International Law Society* was unanimously chartered by the Association of Student International Law Societies. It began a regular schedule of meetings with guest speakers and developed a moot court team.

In April 1964, that team won the national championship at the Philip C. Jessup International Moot Court, sponsored by the American Society of International Law. Their success came after overcoming teams from Columbia University, Howard University, and the University of Pittsburgh. Members of that team were David Beck, Tom Cady, Jerry Long, Guy Mathews, Dixie Smith, and Russell Wineberg. Beck, Cady, Long, and Smith also served as officers of the *Society* along with J.P. Bryan, Michael Henry, and John Sucke.

Then it was decided that the *Society* should publish a journal. Volume 1, Number 1 of the *Journal* was edited by Michael Henry, Bob McKissick, and Sterling Sorrell. Its articles were the texts of speeches given on February 22, 1964, at the first Regional Meeting of the American Society of International Law to be held at the University of Texas School of Law.

Volume 1, Number 2 of the *Journal* was edited by a staff headed by Bob McKissick and included Jack Gatewood, Adrian de Graffenreid, Vincent Perini, and James Vaughter. An active member who had no title was Alan Harris.

The office which housed the *Society* and the *Journal* was a converted closet with one desk, three or four chairs, and a typewriter. As you will see if you look at Volume 1, Number 1, the editors typed mimeograph stencils in order to "print" their *Journal.*

For the first time the *Texas Law Review* had a rival. Evidence of the rivalry is to be found in the 1965 *Peregrinus* at page 156, which reproduces my photograph which served as the *TLR* dartboard.

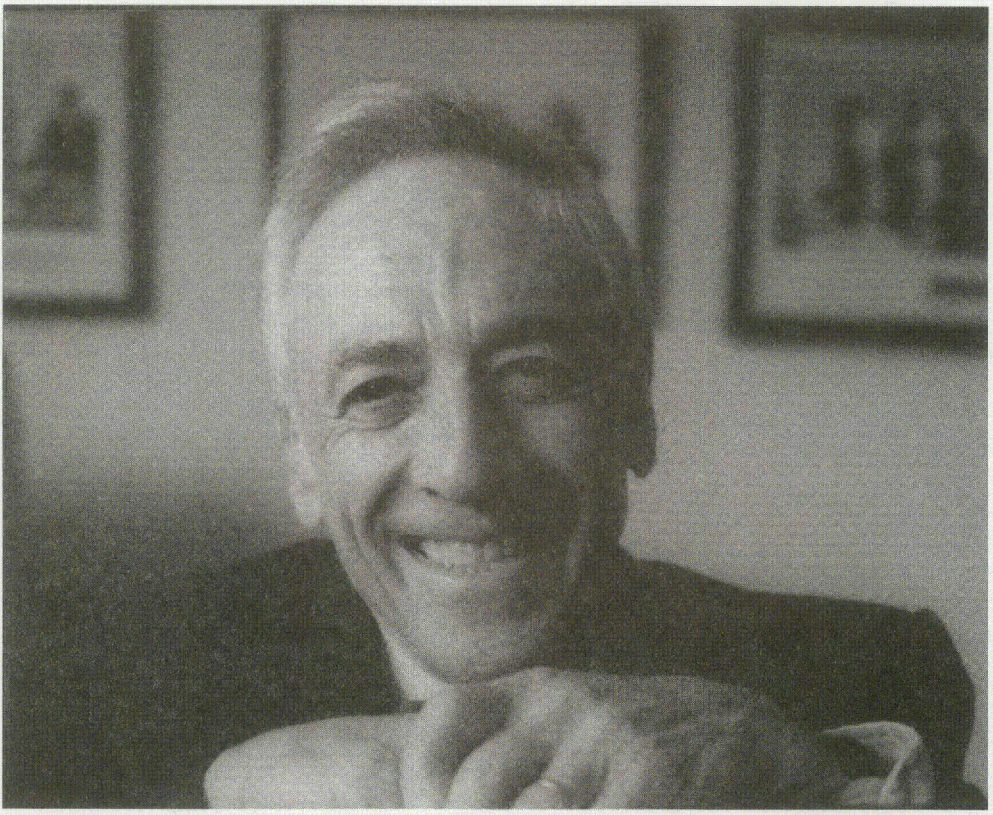
Using the international law right of reprisal, I painted a portrait of the rear end of a horse, colored Law Review green, and branded *TLR.* This painting was given to the editors of what is now the *Texas International Law Journal* under a deed of gift for so long as it is hung in the *Journal* office, with reversion to my heirs if it is removed from that office.

Today, looking at the names cited above, I find a high proportion of foreign service officers and others who have been well-served by their interest in international law. There are also distinguished lawyers, bar leaders, and law teachers. This is what teaching is all about.

I hope that each of those listed, as well as those who succeeded them and benefitted from their affiliation with the *Society* and the *Journal,* will help provide much needed financial support to these worthy and growing organizations. Other publications and societies have proliferated at the Law School since we began our venture more than thirty years ago. The competition for Law School support is fierce. Please think of making a tax exempt gift, through the Law School Foundation, to endow scholarships for either or both of these outstanding student efforts.

Finally, a personal word. I left the Law School in December 1965 to practice law in Paris. I had no fear as to the future of both the *Society* and the *Journal*, and time has proved me right. Because of you who worked with me in the past, I decided to return to the Law School and to resume teaching in 1993.

I cherish the time spent teaching at the Law School and the memory of working with those of you who brought the *Society* and the *Journal* into being. I would very much appreciate hearing from you.



Professor E. Ernest Goldstein

Targeted Sanctions: Resolving the International Due Process Dilemma

JACK I. GARVEY*

TABLE OF CONTENTS

INTRODUCTION

Among the most significant legal impacts of 9/11 was the challenge it brought to the relationship of domestic and international legal process. The Security Council of the United Nations was moved to respond to the terror attack through a series of resolutions mandating "targeted sanctions" against persons and entities deemed to be associated with terrorist networks.[1] This so-called "1267 regime," named after the

* J.D. Harvard Law School, 1968; A.B. Harvard College, 1964. Professor, University of San Francisco School of Law, specializing in public and private international law.

1. *See* Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT'L L. 673, 678–79 (2011), ("[T]he Security Council recently made a qualitative change in the way that it seeks to maintain international peace and security through the use of non-military sanctions .... This new policy of *targeted* or smart *sanctions* has been put to frequent use in the Security Council's struggle to counter the financing of international terrorism *since 11 September 2001*.... [T]he objective of targeted sanctions is to put 'coercive pressure on transgressing parties, leaders and the network of elites and entities that support them, in order to change behaviour or prevent actions contrary to international peace and security.'") (emphasis added) (internal quotation marks omitted).

originating resolution, was designed to capitalize on the near universal condemnation of the 9/11 attacks by capturing the support it afforded for a global response.[2] That legal regime also represented the most prominent move to targeted sanctions, the latest evolution in the use of economic sanctions as an instrument of international policy.[3] But that evolution has engendered increasingly significant due process concerns, manifested as an unprecedented clash of international and domestic legal process.[4] And though the resulting due process controversy is primarily associated with the 1267 regime, it has become a controversy that goes to the very legitimacy and efficacy of all sanctions targeted under the authority of the United Nations Security Council.[5]

---

2. *See* Nawi Ukabiala, *Autocatalytic Regime Theory and UNSC Spawned Cooperative Counterterrorism*, 5 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 33, 35–37 (2015) ("Though it has subsequently been forged into a critical response to the modern, archetypical conception of terrorism—the 9/11 attacks—the rigorous sanctions regime created by UNSC Resolution 1267 actually predates those attacks. . . . [R]esponses to the 9/11 attacks included the invigoration of the 1267 regime."). Resolution 1267 and subsequent related anti-terrorism resolutions (Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), and 2083 (2012)), known collectively as the 1267 regime, have been adopted under Chapter VII of the United Nations Charter. *See* Jared Genser & Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform*, 33 B.C. INT'L & COMP. L. REV. 1–2 & n.3 (2010) [hereinafter Genser & Barth, *When Due Process Concerns Become Dangerous*] (stating that Resolution 1267 and subsequent resolutions have been adopted under Chapter VII). All States are thereby required to impose asset freezes, travel bans, and arms embargoes on any individual or entity associated with al-Qaida, as designated by UN listing. *See* Jimmy Gurulé, *The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorists of Funding*, 41 CASE W. RES. J. INT'L L. 19, 20 (2009) ("[T]he United Nations Security Council devised and implemented a global economic sanctions regime to freeze the funds, financial assets, and economic resources of individuals and entities who finance and support acts of terrorism."). Implementation of the sanctions measures rests with Member States and implementation is mandatory. Craig Forcese & Kent Roach, *Limping into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads*, 42 GEO. WASH. INT'L L. REV. 217, 262 (2010).

3. *See* William Diaz, *Dualist, but Not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime*, 5 LIBERTY U.L. REV. 333, 333 (2011) ("In pursuing a unified policy to combat the threat of global terrorism, the United Nations Security Council (UNSC) took sweeping and innovative measures by adopting Resolution 1267 (1999) and a number of subsequent Resolutions for targeted sanctions against the Taliban, Al-Qaeda, and their associates."). *Cf.* Adeno Addis, *Targeted Sanctions as a Counterterrorism Strategy*, 19 TUL. J. INT'L & COMP. L. 187, 190–91 (2010) ("Until the beginning of the 1990s, the Council had 'imposed sanctions only twice.' Since then the Council has been rather active, imposing comprehensive sanctions on a number of countries with the intent of persuading the regimes of the target countries to alter or modify the challenged behavior or policy.").

4. The following articles each offer varying arguments as to what due process concerns are implicated within the broad use of the 1267 sanctions regime: William Bartholomew, *A Due Process Balancing Act: The United States' Influence on the U.N. al-Qaeda Sanctions Regime*, 59 N.Y.L. SCH. L. REV. 737, 739 (2015) (noting the tension between preserving due process through domestic judicial review and the 1267 regime); Genser & Barth, *When Due Process Concerns Become Dangerous*, *supra* note 2, at 1 (analyzing "the due process concerns inherent to the 1267 regime, which have been increasingly emphasized at both the regional and national court levels, leading to invalidation of some regulations implementing the regime"); Diaz, *supra* note 3, at 343 ("Despite the many amending Security Council Resolutions, the 1267 Regime remains subject to frequent criticism due to its amorphous threshold for listing, and the limited due process afforded to listed parties seeking removal from the Consolidated List.").

5. *See* THOMAS BIERSTEKER & SUE ECKERT, WATSON INST. FOR INT'L STUDIES, ADDRESSING CHALLENGES TO TARGETED SANCTIONS: AN UPDATE OF THE "WATSON REPORT" 4–5 (2012), *available at* http://www.watsoninstitute.org/pub/Watson%20Report%20Update%2012_12.pdf, (hereinafter WATSON REPORT 2012) ("The symbolic significance of persistent [1267 sanctions] litigation should not be underestimated; public opinion may not differentiate between collective UN sanctions and EU autonomous sanctions and can damage the instrument of targeted sanctions overall, as well as the reputation of the EU

UN sanctions targeting specific individuals or entities have become not only a principal response to international terrorism,[6] but also a primary instrument for addressing other critical challenges to international legal order, such as proliferation of weapons of mass destruction,[7] drug trafficking,[8] and related money laundering.[9] Targeted sanctions have also become the leading edge of State-to-State sanctions, as recently and dramatically demonstrated by the response to Putin and company's enlargement of Russia's hegemony into Ukraine.[10] Targeting is preferred over general sanctions because it avoids the collateral consequences to civilian populations that have plagued non-targeted economic sanctions regimes.[11] Targeted sanctions have also become the principal means of avoiding the strategic costs that naturally inhere in unintended consequences of non-declared war making in complex cultural geographies, such as Afghanistan, Iraq, and Syria.[12] But most importantly, what is attractive about targeted sanctions is that they directly impact those who control foreign governmental decisions by employing the relatively precise force of financial attack to undermine bad actors' economic bases.[13]

---

and UN Security Council.").

6. Bartholomew, *supra* note 4, at 744.

7. *See* Kyle Mathis, *The Nuclear Supplier Group: Problems and Solutions*, 4 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 169, 180 (2013) ("Counter-proliferation methods include techniques such as containment, deterrence, border controls, economic sanctions, and pre-emptive military strikes.").

8. *See, e.g.*, Cristian DeFrancia, *Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures*, 45 VAND. J. TRANSNAT'L L. 705, 766 (2012) ("Widespread criminalization of proliferation offenses facilitated through Resolution 1540 enhances the legitimacy of claiming a sovereign right to exercise extraterritorial jurisdiction in exceptional circumstances. Such a process has to some extent already occurred in the context of the global drug and sex trafficking trades."); Nikos Passas, *Financial Controls and Counter-Proliferation of Weapons of Mass Destruction*, 44 CASE W. RES. J. INT'L L. 747, 762 (2012) (discussing the UN Office on Drugs and Crime's position on economic sanctions).

9. *See generally* S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1518, U.N. Doc. S/RES/1518 (Nov. 24, 2003); S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003); S.C. Res. 1527, U.N. Doc. S/RES/1527 (Feb. 4, 2004); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); S.C. Res. 1636, U.N. Doc. S/RES/1636 (Oct. 31, 2005); S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006); S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1988, U.N. Doc. S/RES/1988 (June 17, 2011); S.C. Res. 1989, U.N. Doc. S/RES/1989) (June 17, 2011); S.C. Res. 2048, U.N. Doc. S/RES/2048 (May 18, 2012); S.C. Res. 2140, U.N. Doc. S/RES/2140 (Feb. 26, 2014). *See* Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275, 286 (2008) ("The CTC developed a set of best practices and the Security Council 'strongly urged' all states to implement forty recommendations on money laundering and terrorist financing produced by the Financial Action Task Force.").

10. *See generally* Elise Labott, *U.S., Europe Ready New Sanctions to Deter Putin on Ukraine*, CNN, (June 12, 2015, 1:16 PM), http://www.cnn.com/2015/06/12/politics/ukraine-russia-sanctions-us-eu/index.html.

11. *See* Addis, *supra* note 3, at 191–92 ("[T]he costs of [general] . . . sanctions are often unacceptably high. Ordinary citizens endure massive deprivation in life, liberty, and property, as the sanctions against Iraq after the first Gulf War amply demonstrated. . . . Partly as a response to the mounting evidence that comprehensive sanctions led to massive disruption and even destruction of life of innocent citizens of the target country, the Council developed a system of targeted sanctions—freezing of assets and travel restrictions of leaders of the target country—designed to minimize the unintended adverse effects of sanctions on the innocent and most vulnerable segments of the target country.").

12. *See id.* at 192 (arguing that targeted sanctions "avoid or at least minimize what are euphemistically called 'collateral damages'").

13. *See id.* (noting that targeted sanctions directly impact "the objectionable behavior or actor").

When targets are sanctioned, their financial assets are frozen, limitations are imposed on their access to financial markets, embargoes are placed on goods and arms, prohibitions are placed on their travel, and educational opportunities are denied to them.[14] Targets are identified and added to a "blacklist."[15] For UN-mandated sanctions, this process is administered by a "sanctions committee" made up of representatives of members of the Security Council.[16] There have been a dozen or so such sanctions regimes established by resolution of the Security Council.[17] The listing proceedings are characterized as informal and "behind closed doors," which is said to assure flexibility and confidentiality given the politically sensitive nature of the process.[18] Blacklisting is promoted as a "preventive" tool operating to deprive targets of the resources to support illegal objectives, and serving as a deterrent for those involved in such activities.[19] There have been hundreds of 1267 regime listings, and collectively, UN-targeted sanctions regimes, quite apart from State-mandated sanctions, have involved the listing of thousands of individuals and entities.[20]

The measures employed, such as the freezing of assets, can be severely punitive, hardly distinguishable from the consequences of criminal prohibitions.[21] The punitive consequences of UN-mandated sanctions have left due process challenges to the fairness and accuracy of the targeting process, as well as a resulting lack of enthusiasm for enforcement, in their wake.[22] The increasingly common perception—voiced by public media, human rights NGOs, academic critique, and most significantly by national and regional courts and within the United Nations itself—is that the UN listing process is sorely due-process deficient.[23]

---

14. Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT'L L. 159, 160 (2003).

15. Genser & Barth, *When Due Process Concerns Become Dangerous*, *supra* note 2, at 1.

16. Diaz, *supra* note 3, at 347.

17. Douglas Cantwell, Note, *A Tale of Two Kadis: Kadi II, Kadi v. Geithner & U.S. Counterterrorism Finance Efforts*, 53 COLUM. J. TRANSNAT'L L. 652, 677–78 (2015).

18. Devika Hovell, *The Deliberative Deficit: Transparency, Access to Information and UN Sanctions, in* SANCTIONS, ACCOUNTABILITY AND GOVERNANCE IN A GLOBALISED WORLD 92 (Jeremy Farrall and Kim Rubenstein eds., 2009). *See* Felicia Swindells, *U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter.*, 20 FORDHAM INT'L L.J. 1878, 1924 (1997) ("The Committee, as do all U.N. Sanctions Committees, held its sessions behind closed doors and made little information available to the general public.").

19. Bartholomew, *supra* note 4, at 745; *see* WATSON REPORT 2012, *supra* note 5, at 27–28 (noting that targeted sanctions are supposed to be preventive but do carry punitive effects, which have led to criticism from courts); *see also* Forcese & Roach, *supra* note 2, at 252 (asserting that "[i]f listing [i.e., being placed on a blacklist] is to be accepted as a preventive measure, it cannot be imposed on the basis of stale and inaccurate information").

20. *See Press Releases*, UNITED NATIONS SECURITY COUNCIL SUBSIDIARY Organs, http://www.un.org/sc/suborg/en/sanctions/1267/press-releases (last visited Nov. 3, 2015) (aggregating press releases from the 1267/1989 Committee; the figures noted above were gathered from press releases between Jan. 11, 2002 and Mar. 14, 2014).

21. *See* WATSON REPORT 2012, *supra* note 5, at 29 n.70 and accompanying text (arguing that the process of placing someone on the blacklist and having individual sanctions placed on said person is similar to criminal processes).

22. *See id.* at 11–12 (discussing due process concerns raised by certain States); Gurulé, *supra* note 2, at 26 ("Senior counter-terrorism officials are less enthusiastic about the economic sanctions regime than ever before and Member States are reluctant to submit names for inclusion on the Consolidated List.").

23. In response to the critique, the United Nations, internally through its Office of Legal Affairs, commissioned a study to answer the question, "[i]s the UN Security Council, by virtue of applicable rules of international law, in particular the United Nations Charter, obliged to ensure that rights of due process, or

Many commentators and institutional studies have proposed fixes for the UN listing process,[24] and numerous corrective measures have been tried.[25] But no fix has been found.[26] The consternation about the lack of due process in the listing process not only continues but has intensified.[27]

The cumulating consequence of critique of the UN process is the undermining of targeted sanctions as an instrument of international order by negating the legitimacy needed for their efficacy.[28] This undermining of targeted sanctions as an instrument of international order has similarly become increasingly a matter of international concern. Just this year, a new reform effort was launched at the United Nations.[29] The UN Missions of Australia, Finland, Greece, and Sweden moved to sponsor a High Level sanctions review,[30] similar to a review process that occurred in 2006.[31]

Legitimacy and efficacy for the mandates of targeted sanctions, as for all legal rules, depend upon the perception of the affected communities and individuals that the mandate originates through "right process."[32] Right process is a matter of community standards.[33] The open defiance of targeted sanctions made manifest by the decisions of domestic and regional courts applying their community standards suggests that for UN-targeted sanctions, we have a dramatically wrong process. Finding the right process is the subject of this article.

Finding the right process should begin with understanding why the international and domestic orders are in conflict. What is it about the nature of the respective legal orders that makes the due process dilemma of UN-targeted sanctions apparently inevitable, despite good intentions and repeated efforts to find a fix?

This article argues that the clash is systemic—arising from the abrasion of the political nature of UN listing against the juridical nature of due process as a product

---

'fair and clear procedures,' are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?" For the extensive report on that study, see BARDO FASSBENDER, HUMBOLDT-UNIVERSITÄT ZU BERLIN, *Targeted Sanctions and Due Process*, *available at* http://www.un.org/law/counsel/Fassbender_study.pdf (reporting extensively on the study commissioned by the UN Office of Legal Affairs).

24. *See, e.g.*, THOMAS BIERSTEKER & SUE ECKERT, WATSON INST. FOR INT'L STUDIES, ADDRESSING CHALLENGES TO TARGETED SANCTIONS: AN UPDATE OF THE "WATSON REPORT" 23–33 (2009), *available at* http://www.watsoninstitute.org/pub/2009_ 10_targeted_sanctions.pdf [hereinafter WATSON REPORT 2009] (naming three approaches to fixing the listing process).

25. *See* GEORGE A. LOPEZ ET AL., KROC INST. FOR INT'L PEACE STUDIES, OVERDUE PROCESS: PROTECTING HUMAN RIGHTS WHILE SANCTIONING ALLEGED TERRORISTS 2, 12–13 (2009), *available at* http://kroc.nd.edu/sites/default/files/overdue_process.pdf (providing "a brief summary of the major procedural changes instituted by the [UN Security] Council since 2005").

26. *Id.* at 2.

27. *See id.* at 2, 14–16 (discussing various reports and studies on due process in the listing process).

28. *Id.* at 3.

29. *See* Kristen Boon, *High Level Sanctions Review Launched at the UN*, OPINIO JURIS (June 5, 2014, 8:00 AM) http://opiniojuris.org/2014/06/05/high-level-sanctions-review-launched-un/ ("A new High Level sanctions review has been initiated at the UN. . . . The purpose of the review is to assess existing sanctions and develop forward looking recommendations to enhance effectiveness.").

30. *Id.*

31. *See id.* ("A similar process took place in 2006, known as the Informal Working Group on General Issues of Sanctions, which resulted in some important policy documents for sanctions regimes.").

32. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7 (1995).

33. *Id.*

of domestic legal process. Resolution requires, it is here proposed, adherence to an available alternative to UN listing, now proven superior both in achieving legal legitimacy and political viability. No variation in legal process can eliminate the natural tension between the interests of human rights and national security that inheres in any effort to secure international order, but right process can maximize both objectives and minimize the threat to the legitimacy of targeted sanctions that is now the challenge.

I. UN LISTING AND THE DUE PROCESS DILEMMA

The Taliban/al-Qaida targeted sanctions regime requires all States to freeze funds and financial assets controlled directly or indirectly by the Taliban, Osama bin Laden, or al-Qaida.[34] Additionally, it imposes a travel ban and an arms embargo.[35] The founding resolution also established the 1267 Sanctions Committee (the "Committee").[36] The Committee is made up of representatives of the Member States of the Security Council.[37] It maintains a list of names of individuals and entities associated with al-Qaida.[38] Under Resolution 2083 (2012), the current version of Resolution 1267, any Member State of the Security Council may nominate an individual or entity that it suspects of being "associated with" al-Qaida.[39] On the basis of such designations, the Committee determines who will be on its Consolidated List and monitors compliance.[40] Other UN targeting regimes operate similarly.[41]

Sanctions Committee operations of the various UN targeting regimes have been characterized by secrecy and confidentiality.[42] The reasons are readily evident. It is imperative not to forewarn the target because such notice would encourage evasive action, such as the movement and hiding of assets.[43] Confidentiality is also said to be justified because of the political sensitivity of targeting and the need to prevent political grandstanding.[44] But the collective and overarching justification—and no doubt the ultimate touchstone for maintaining secrecy—is national security, particularly as demanded by the State designating the target.[45]

Because the factual basis for any listing is tied to intelligence that touches on the national security of the governments involved, one's ability to verify the accuracy and

34. S.C. Res. 2083, para. 1(a), U.N. Doc. S/RES/2083 (Dec. 17, 2012).

35. *Id.* paras. 1(b), 1(c).

36. S.C. Res. 1267, *supra* note 9, para. 6.

37. JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 148 (2007).

38. S.C. Res. 1333, para. 16(b), U.N. Doc. S/RES/1333 (Dec. 19, 2000) (supplementing S.C. Res. 1267, *supra* note 9, para. 6); FARRALL, *supra* note 37, at 155.

39. S. Res. 2083, *supra* note 34, para. 10.

40. *Id.* paras. 10–18.

41. *See List of World Heritage in Danger*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, http://whc.unesco.org/en/danger/ (last visited Oct. 30, 2015) (listing the "48 properties which the World Heritage Committee has decided to include on the List of World Heritage in danger in accordance with Article 11(4) of the *Convention*").

42. FARRALL, *supra* note 37, at 202.

43. *See id.* at 203 (stating a concern regarding the sensitive, confidential nature of the issues discussed).

44. *Id.*

45. Jared Genser & Kate Barth, *Targeted Sanctions and Due Process of Law, in* THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 195, 235–36 (Jared Genser & Bruno Stagno Ugarte eds., 2014) [hereinafter Genser & Barth, *Targeted Sanctions*].

sufficiency of the information on which UN listings are based is severely limited.[46] Nations whose citizens may be affected as the result of a listing generally cannot confirm a listed individual's or entity's culpability with reasonable assurance.[47] So there is little, if any, basis for appeal when a listing is advanced on national security grounds and thereby made confidential.[48] Demands for greater transparency are met with denial, as such transparency poses security threats, including the risk of disclosing both human and technical intelligence resources.[49] Listed individuals and entities have no prior notice or opportunity to prevent the listing of their names.[50] The sanctioned individual or entity can submit a subsequent request for delisting, but the evidence on which the listing purports to be based and all final decisions remain absolutely discretionary with the designating State.[51] The government seeking a delisting is normally not the designating government, and the latter is not naturally inclined to reveal the information and intelligence resources that prompted a listing, nor does it want to suffer the embarrassment of a mistaken listing.[52] Disclosure of the grounds for a listing is also subject to control by the responsible UN sanctions committee, which is not an independent and impartial tribunal, in that its members typically include the representatives of the State or States that urged the listing at issue in the first place.[53] The process of delisting is thus characterized by the same avoidance of anything approaching neutral adjudication.

The sum and substance of UN listing and delisting, therefore, is a collation of prosecutor and judge, blatantly at odds with due process and judicial neutrality as valued in domestic constitutional order. This helps explain the lack of commitment by many States, and the number of applications for humanitarian or other exceptions which UN sanctions committees have received.[54]

II. THE FAILED FIXES

UN Member States have sought to have the Security Council amend its procedures in response to the due process dilemma of UN listing, and the United

46. *Id.* at 225, 235.

47. *Id.* at 235–36.

48. An example is the case of three blacklisted Somali-born Swedish citizens, whose assets were frozen following their inclusion on the UN Security Council blacklist in 2001, after first appearing on the U.S. blacklist for the Taliban and al-Qaida sanctions. Serge Schmemann, *A Nation Challenged: Sanctions and Fallout*, N.Y. TIMES (Jan. 26, 2002), http://www.nytimes.com/2002/01/26/world/nation-challenged-sanctions-fallout-swedes-take-up-cause-3-us-terror-list.html. The Swedish government had no way of appealing the Swedes' inclusion on the UN blacklistlist and had to rely on diplomatic recourse with the United States to obtain their removal from the list. *Id.*; *Recent OFAC Actions*, U.S. DEPARTMENTT TREASURY (Aug. 27, 2002), http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20020827.aspx.

49. GENSER & BARTH, *Targeted Sanctions*, *supra* note 45, at 235.

50. *Id.* at 196.

51. *Id.* at 198.

52. *See id.* at 196 ("[T]argets could only hope that their state of residence or citizenship would negotiate with whatever country had recommended their listing . . . to reach a mutual agreement to recommend delisting of the individual.").

53. *Id.*

54. *See* Gian Luca Burci, *Interpreting the Humanitarian Exceptions Through the Sanctions Committees*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 143, 153–54 (Vera Gowland-Debbas ed., 2001) (reaching a similar conclusion).

Nations itself has acknowledged the propriety and need for review of listing decisions.[55] In 2006, the President of the Security Council declared that "[i]nternational, national and regional courts must review Security Council resolutions to ensure that they comply fully with internationally recognized human rights norms and the principles and purposes of the United Nations Charter."[56] Even the Chair of the 1267 Sanctions Committee has found it necessary to declare that "[o]ne cannot ignore the international context.... The Security Council sanctions regimes find themselves increasingly under pressure and have recently been questioned, especially in light of the need for fair and clear procedures for listing, de-listing and the granting of humanitarian exemptions."[57]

The anxiety about UN listing, on occasion, has been manifest even among the responsible UN bureaucracies.[58] It has also resulted in the unusual phenomenon of a bureaucracy calling for constraints on its own powers. In 2004, the Secretary General's Report of High-Level Panel on Threats, Challenges and Change called for reform, noting that the "way entities or individuals are added to the . . . list . . . and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions."[59] In 2006, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Freedoms also

55. G.A. Res. 60/1 para. 106, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

56. U.N. SCOR, 61st Year, 5599th mtg. at 3, U.N. Doc. S/PV.5599 (Dec. 19, 2006).

57. U.N. SCOR, 63rd Year, 6043rd mtg. at 9, U.N. Doc. S/PV.6043 (Dec. 15, 2008).

58. The case of the listing of Mr. Sayadi, a Belgian, demonstrated a conflict between the UN Human Rights Committee (HRC) and the Security Council's targeted sanctioning policies. After Belgium had initiated a listing request to the Security Council's Targeting Committee in 2003, Sayadi was subsequently listed under both Belgian law and Resolution 1267. U.N. Human Rights Comm., Communication No. 1472/2006, 94th Sess., Oct. 13–31, 2008, U.N. Doc. CCPR/C/94/D/1472/2006, para. 2.3 (Oct. 22, 2008). The Belgian government insisted on the position that its targeting measures, as an implementation of UN anti-terror sanctions, were justified and mandated by Belgium's obligation to comply with Security Council decisions adopted under Chapter VII of the United Nations Charter. *Id.* para. 4.12. However, the Court of First Instance ordered Belgium to delist Sayadi and requested Sayadi's delisting from Resolution 1267. *Id.* para. 2.5. After two failed attempts by Belgium to convince the Targeting Committee to delist Sayadi, the petitioner filed a complaint against Belgium with the HRC. *Id.* paras. 2.4–2.5. The HRC, while declaring that it could not rule on the legality of Security Council measures taken under Chapter VII, asserted it was competent to find that Belgium's inability to delist the applicants constituted a denial of its citizens' freedom of movement, and was a violation of the International Covenant on Civil and Political Rights (ICCPR). *Id.* paras. 10.6–10.8. It avoided identifying any conflict between Security Council action and the Covenant by finding that Belgium was not obligated to propose the Complainants' names for listing, and held that Belgium had an obligation to provide a remedy by having the Complainants' names delisted as soon as possible. *Id.* para. 12. However, the HRC did make clear its position that Belgium could not violate the human rights guaranteed under the Convention, even in the course of implementing a Security Council Resolution under Chapter VII of the United Nations Charter. *Id.* para. 10.6. It declared categorically that State measures taken to give effect to Security Council Resolutions must respect human rights regardless of whether or not the Resolutions are per se consistent with human rights, thus recognizing the potential for real conflict between human rights principles and State obligations under Articles 25 and 103 of the UN Charter to comply with Security Council targeted sanctions resolutions. *Id.*

Demonstrating the HRC's concern to avoid the political ramifications of criticizing a fellow UN branch, its findings avoided directly confronting the due process dilemma of UN listing for targeting sanctions. Nevertheless, the United Nations emerges from the decision as structurally unsettled in that Member States may be forced to decide with which of the two UN branches they choose to comply. In the scenario posed, Member States will have to decide whether to risk violating the human rights standards under the ICCPR by implementing targeted sanctions as required under Resolution 1267.

59. UN Secretary-General: Rep. of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, para. 152, U.N. Doc. A/59/565 (Dec. 2, 2004).

called for fundamental due process reform in UN targeting.[60] And also in 2006, the UN Secretary General himself voiced the rising concern by calling on the Security Council to establish "fair and transparent" procedures for listing and delisting.[61]

The due process dilemma of UN listing has now persisted long enough to be acknowledged by the principal organs of the United Nations, the General Assembly and the Security Council. At the United Nations General Assembly 2005 World Summit Outcome, the heads of State and the Government of the United Nations called upon the Security Council to "ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions."[62] The Security Council, the UN organ that authored the UN listing process, has by resolution acknowledged due process shortcomings.[63] There is now general awareness that failure to resolve the due process dilemma of UN listing threatens the very viability of targeted sanctions as an instrument of international policy.[64]

The due process dilemma has generated a variety of studies and related attempts to fix the process of UN listing. These include the "Fassbender Study," officially commissioned by the United Nations to answer the question:

> Is the UN Security Council, by virtue of applicable rules of international law, in particular the United Nations Charter, obliged to ensure that rights of due process, or 'fair and clear procedures,' are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?[65]

The study found the targeting regime to be "untenable under principles of international human rights law."[66] In a similarly categorical denunciation, the Eminent Jurists Panel of the International Commission of Jurists declared in a 2009 consensus of nations and international agencies that the 1267 regime procedures were "arbitrary" and "unworthy" of the United Nations.[67]

---

60. The Special Rapporteur, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/61/267 (Aug. 16, 2006).

61. U.N. SCOR, 61st Year, 5474th mtg. at 5, U.N. Doc. S/PV.5474 (June 22, 2006).

62. G.A. Res. 60/1, *supra* note 55, para. 109.

63. *See* S.C. Res. 1989, *supra* note 9, at 2 (welcoming "improvements to the Committee's procedures and the quality of the Consolidated List").

64. This was the conclusion stated in the May 2008 report of the 1267 Monitoring Team, which declared that the failure of the sanctions regime to measure up to standards of due process in its listing and delisting procedures can "seriously undermine implementation" of the sanctions regime and, unless rectified, "the impact of the sanctions regime will continue to fade." Analytical Support and Sanctions Monitoring Team, U.N. Sec. Council, *Report of the Analytical Support and Sanctions Monitoring Team Pursuant to Resolution 1735 (2006) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, paras. 2, 23–25, U.N. Doc. S/2008/324 (May 14, 2008), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=S/2008/324 [hereinafter Monitoring Report 2008].

65. FASSBENDER, *supra* note 23, at 3.

66. *Id.* at 5.

67. INT'L COMM'N OF JURISTS, ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS 116–17 (2009), *available at* http://www.refworld.org/pdfid/499e76822.pdf; *see also* THOMAS J. BIERSTEKER & SUE E. ECKERT, WATSON INST. FOR INT'L STUDIES, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 10 (2006), *available at* http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf [hereinafter WATSON REPORT 2006] ("[T]he most pressing human rights concerns regarding targeted

Proposed fixes that have actually been implemented include: An enhanced notification process, the establishment of criteria for listing, requiring the release of statements and narrative summaries of reasons for listing, and regular review of listings for currency and accuracy.[68] The fixes have also included introduction of a delisting procedure,[69] provision for humanitarian exceptions,[70] and institution of a so-called "focal point."[71] The most recent and significant fix is the creation of the office of the "Ombudsperson," which might be described as a quasi-adjudicative process.[72]

Concerning informational reform, Resolution 1822 (2008) specified the kind of information to be released, including notification to the affected individual to be posted on the Committee's website.[73] These procedural innovations were replicated in other targeted sanctions regimes, including those of Somalia[74] and the Democratic Republic of the Congo.[75] However, all such attempted fixes that go directly to informational requirements, such as the provision of narrative summaries or information for review of designations, suffer from the same due process shortcomings.[76] The provision of information remains a matter decided by the designating State, which means any review is a matter for negotiation, subject to its veto.[77]

In Resolution 1617, adopted in 2005, the Security Council purported to set forth criteria for the designation process, focusing on the notion of the named person's or entity's association with prohibited activity.[78] "Associated with" was said to mean:

> [P]articipating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

---

sanctions relate to the perceived difficulty for the individual to challenge the sanctions taken against him. . . . The rights to a fair trial and an effective remedy lie at the heart of the debate.").

68. *E.g.*, S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006); S.C. Res. 1735, paras. 1, 5–12, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1822, para. 9, U.N. Doc. S/RES/1822 (June 30, 2008). Resolution 1822 specifies the kind of information to be released, including notification to the affected individual to be posted on the Committee's website. S.C. Res 1822, *supra* note 68, para. 9. These procedural innovations have been replicated in other targeted sanctions regimes, including for Somalia (S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008)) and the Democratic Republic of Congo (S.C. Res. 1857, U.N. Doc. S/RES/1857 (Dec. 22, 2008)).

69. Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of Its Work*, para. 7 (July 22, 2010), www.legislationline.org/documents/id/16014.

70. S.C. Res. 1730, *supra* note 68, para. 1.

71. *Id.*

72. S.C. Res. 1904, para. 20, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

73. S.C. Res. 1822, *supra* note 68, para. 17.

74. S.C. Res. 1844, *supra* note 68, paras. 15–16.

75. S.C. Res. 1857, *supra* note 68, paras. 19–20.

76. *See generally* S.C. Res. 1822, *supra* note 68; S.C. Res. 1844, *supra* note 68; S.C. Res. 1857, *supra* note 68. In each of these resolutions, the Security Council aimed to improve the delisting review process, but the improvements did not supply adequate due process for targets.

77. *See* S.C. Res. 1822, *supra* note 68, paras. 12, 17, 24 (encouraging States to participate in the provision of publicly available information to the Committee).

78. *See* S.C. Res. 1617, U.N. Doc. S/RES/1617, paras. 1–2 (July 29, 2005) (indicating that certain "acts or activities" might lead to a presumption of association).

> supplying, selling or transferring arms and related materiel to;
>
> recruiting for; or
>
> otherwise supporting acts or activities of . . . Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.[79]

Obviously, these criteria did not provide guidance clear enough to cure the concerns. There is an all too troublesome lack of clarity for any effective review of listing, the purported criteria leaving maximum leeway for the designating State(s).

As a structural fix for the due process dilemma, the Security Council in 2006 established by resolution the so-called "focal point" within the UN Secretariat to provide the means whereby a targeted individual or entity could submit a delisting request directly to the United Nations, which would then inform the petitioner of the final decision made by the Sanctions Committee.[80] The target would have a direct right of appeal, without having to rely on its State of nationality to petition.[81] But this did not assure any right to be heard in any review process.[82] The focal point was merely charged with informing the petitioner of the procedures and moving the petition on, by way of the Sanctions Committee, to the designating government(s) and the government(s) of citizenship and residence.[83] Any disclosure of reasons for the listing remained restricted to what the designating State might choose to disclose in response to a request by a State for delisting.[84] And if no State recommended delisting, the listed person's request would be considered rejected, without any requirement to state reasons for the rejection.[85]

So still, despite the changes, the critical due process deficiency was not cured—there remained no guarantee of greater transparency as to the reasons for listing, and no independent review. Resolution 1735, adopted in 2006, elaborated on reasons for delisting (such as mistaken identity or severance of the targeted association), established a procedure for notifying the target, and provided that listing must include a statement of reasons (if available for disclosure).[86] But it left no question that delisting was ultimately and exclusively a matter for determination by the particular sanctions committee involved and the designating State(s).[87]

---

79. *Id.* para. 2. Similar language is reproduced in S.C. Res. 1822, *supra* note 68, para. 2 and S.C. Res. 1904, *supra* note 72, para. 2.

80. *See* generally S.C. Res. 1730, *supra* note 68 (implementing a procedure for contesting listed status).

81. *See id.* at 2 ("Petitioners seeking to submit a request for de-listing can do so either through the focal point process outlined below or through their state of residence or citizenship.").

82. *See generally id.* (describing the delisting procedure, which does not require any communication with a petitioner beyond acknowledging the request and notifying petitioner of the result).

83. *Id.* at 2.

84. *See id.* at 3 (requiring only that the focal point grant or deny the request and confirm that the review procedure was completed).

85. *Id.* at 2–3.

86. S.C. Res. 1735, *supra* note 68, paras. 10, 14.

87. *See generally id.* (failing to provide avenues for other parties to participate in delisting review). The Security Council also established a Monitoring Group composed of experts to assist the Sanctions Committee in achieving effectiveness of the sanctions regime, but without any power to control or amend the listing or delisting processes. S.C. Res. 1526, para. 7, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

A more ambitious institutional fix followed. This was the creation of the Office of the Ombudsperson by Resolution 1904 in 2009, replacing the focal point for anti-terrorism listings.[88] The Ombudsperson was to be the only avenue through which listed individuals could directly petition the United Nations to be delisted under the 1267 sanctions regime, though the focal point was retained for other targeted sanctions regimes.[89] This purported fix addressed directly the due process dilemma by instituting what was touted as independent review of the Resolution 1267 listings.[90] But it remains clear that the Ombudsperson does not have what would be critical to cure the due process dilemma: Independent power to delist or to modify remedies.[91] Resolution 1904 appointed the Ombudsperson to investigate delisting requests, collect new information to present to the Sanctions Committee, and engage in informational dialogue with the petitioner, answering specific questions about Committee procedures.[92] The Ombudsperson communicates the request to the designating government(s), the government(s) of citizenship and residence, relevant UN bodies such as the Sanctions Committee and the "Monitoring Team" established for review of the UN listing process, and any other States deemed relevant by the Ombudsperson.[93] The Ombudsperson then provides a report to the Committee summarizing the reasons for and against delisting, and responds to any questions from the Committee.[94]

In contrast to the previous procedures, the request for delisting can move through the Ombudsperson process whether or not supported by a State.[95] However, the actual determination as to delisting still remains exclusively with the Sanctions Committee.[96] If the delisting request is refused, the Ombudsperson is required to explain the refusal.[97] Any explanation, however, is restricted by confidentiality demands of the States involved.[98]

The Ombudsperson, in her own evaluation of the Office, has stressed its character as a response to the due process dilemma that provides a degree of independent investigative authority.[99] But even the Ombudsperson's own understanding is that the

88. S.C. Res. 1904, *supra* note 72, paras. 20–21.

89. *See id.* para. 21 ("[A]fter the appointment of the Ombudsperson, the Focal Point mechanism established in resolution 1730 (2006) shall no longer receive such requests, and . . . the Focal Point shall continue to receive requests from individuals and entities seeking to be removed from other sanctions lists.").

90. *See id.* para. 20 (requiring the Ombudsperson to review delisting requests "in an independent and impartial manner").

91. The Ombudsperson was mandated to investigate delisting requests according to the procedure set out in Annex II to prepare a "comprehensive report" for the Committee within a set time frame. She is also required to report to the Council twice a year on the operation of her mandate. *See generally id.* at Annex II

92. *Id.* at Annex II, paras. 1–2.

93. *Id.* at Annex II, paras. 2–3.

94. S.C. Res. 1904, *supra* note 72, at Annex II, para. 7.

95. *See generally id.* (indicating that State support is not required for delisting requests).

96. *See generally id.* (granting the Ombudsperson only advisory functions).

97. *Id.* at Annex II, paras. 12–13.

98. *Id.* at Annex II, para. 14.

99. The Ombudsperson has declared in defense of her office,

> In my opinion, the dialogue process and the preparation of the report, as they are operating in practice, bring a form of 'independent review' to the 1267 regime. It is, of course, not a review of any Security Council or Committee decision as such action would conflict directly with the

Ombudsperson has no authority to reveal the identity of the listing State or the intelligence used to justify the listing without that State's authorization.[100] Most importantly, the Ombudsperson fix has not altered the fact that UN listing is fundamentally flawed in relation to national and regional standards of due process in its lack of transparency, inadequate rights of defense, and lack of neutral adjudication.[101] The European Court of Justice (ECJ), one authority among many, has made a special point of noting that the due process inadequacies of UN listing remain unrectified despite creation of the Office of the Ombudsperson.[102]

The Ombudsperson mechanism does appear to afford previously unavailable recourse to petition for review, communication of information to and from the target, and the provision of such reasons for the targeting that the Ombudsperson may be allowed to disclose by the powers that be.[103] But the powers that be, the representatives of the members of the Security Council that make up the Sanctions Committee, retain a decisional monopoly.[104] As with the operation of the focal point, the Ombudsperson mechanism secures no authority, independent of the Sanctions Committee, for affording dispositional review.[105]

Failure to assure the right to be heard makes the UN listing process, at best, a mere shadow of independent judicial review, and assures no right to a remedy

---

> UN Charter. Rather it is a review of underlying information for the purpose of a decision yet to be made by the Committee. It may not be the concept of traditional judicial review as it is known, but it is a form of review. An independent third party is looking at the underlying information and providing views on it to the decision maker.

Kimberly Prost, the Ombudsperson, Lecture at the Institute of Legal Research on the Invitation of the Ministry of Foreign Affairs and the National Autonomous University of Mexico 7 (June 24, 2011), http://www.un.org/en/sc/ombudsperson/pdfs/Mexico%20Presentation%20-%2024%20June%202011%20(English).pdf.

100. Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1904 (2009)*, paras. 51–52, U.N. Doc. S/2011/29 (Jan. 24, 2011).

101. *See* Case T-85/09, Kadi v. Comm'n (Kadi II), 2010 E.C.R. II-5181 para. 128 (discussing some flaws of UN listing).

102. The Grand Chamber of the ECJ summarized the net due process impact of these changes in the *Kadi* case, when it reflected:

> The considerations in this respect . . . remain fundamentally valid today, even if account is taken of the 'Office of the Ombudsperson' . . . . In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee. Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively. . . . For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.

Id.

103. S.C. Res. 1904, *supra* note 72, at Annex II, paras. 1, 12–13.

104. *See id.* paras. 8–13 (indicating that the Committee has sole discretion over delisting requests).

105. *See* Kadi II, 2010 E.C.R. II-5181 para. 25 (noting that the Ombudsperson lacks authority to render dispositions).

independent of the absolute discretion of the particular Sanctions Committee and designating State(s). The Ombudsperson has no authority to simply decide a delisting request, its function being essentially to provide a nexus of communication and review between the petitioner and the decision maker. The Sanctions Committee has no obligation whatsoever to draw any conclusion from the Ombudsperson's report.[106] The critical determination of guilt or innocence is relegated to political process. There are no standards specified, explicit or implicit, which require the Sanctions Committee to grant, or even recognize, the legitimacy of a request.[107] The Sanctions Committee decision remains a matter of confidential exercise of political judgment.

The Reports of the Office of the Ombudsperson submitted to the Security Council note incremental improvements in the Office's process directed at providing neutral review, claiming that "[t]he Office of the Ombudsperson currently provides individuals and entities listed by the ... Committee with a fair and accessible recourse."[108] But this evaluation is belied by the fact that the Reports of the Ombudsperson, from the first in 2011 to the latest Report of 2014, consistently complain of the limitations on access to information, not the least of which is the identity of the listing State.[109] The Ombudsperson's own reports also complain of problems of timeliness and shortcomings in the adequacy of communication of the reasons for listing, as well as lack of transparency both vis-à-vis the petitioner and the States of residence or citizenship, particularly as to States not on the Sanctions Committee.[110]

The Security Council made a significant change in the Ombudsperson process in 2011, reversing the presumption that a listing was valid unless a consensus of the Sanctions Committee found otherwise.[111] The presumption is now that a delisting recommendation by the Ombudsperson should take effect within sixty days unless the Sanctions Committee decides otherwise by consensus, and if there is no consensus, any

106. *See id.* para. 128 ("[T]he creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.").

107. *Id.*

108. Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161 (2012)*, para. 52, U.N. Doc. S/2014/553 (July. 31, 2014).

109. *See generally Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1904 (2009)*, *supra* note 100, paras. 46–52; Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1989 (2011)*, paras. 138–49, U.N. Doc. S/2011/447 (July 22, 2011); Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1989 (2011)*, paras. 137–60, U.N. Doc. S/2012/49 (Jan. 20, 2012); Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1989 (2011)*, paras. 129–57, U.N. Doc. S/2012/590 (July 30, 2012); Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083 (2012)*, paras. 27–60, U.N. Doc. S/2013/71 (Jan. 31, 2013); Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083 (2012)*, paras. 28–29, U.N. Doc. S/2013/452 (July 31, 2013); Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083 (2012)*, paras. 32–74, U.N. Doc. S/2014/73 (Jan. 31, 2014); Office of the Ombudsperson, *Report of the Ombudsperson Pursuant to Security Council Resolution 2161 (2014)*, paras. 34–57, U.N. Doc. S/2014/553 (July 31, 2014).

110. *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1904 (2009)*, U.N. Doc. S/2011/29, *supra* note 100, para. 51; *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083 (2012)*, U.N. Doc. S/2014/73, *supra* note 109, para. 71, (Jan. 31, 2014).

111. *See generally* S.C. Res. 1989, *supra* note 9.

member of the Committee may refer the delisting request to the Security Council.[112] However, notwithstanding the delistings that have occurred,[113] disclosure of evidence and the ultimate power of decision have remained at the discretion of the designating State and the Committee.

The essential critique of the UN listing process as devoid of independent and neutral adjudication thus remains unrefuted.[114] There is still no right to know the identity of the designating State, nor is there access to what might be exculpatory evidence, nor power of the Ombudsperson to grant relief.[115] It is still indisputable,

---

112. *Id.* para. 23. The Ombudsperson requests the delisting of a petitioner, which begins with the submission of a "Comprehensive Report" to the Security Council Targeting Committee. *Id.* The delisting automatically occurs sixty days after the Committee considers the Comprehensive Report, unless either all fifteen Targeting Committee Members vote unanimously against the delisting, or any member of the Targeting Committee refers the delisting request to the Security Council, who then has ultimate authority on the delisting decision. *Id.* The same procedure occurs when the designating State submits a delisting request. *Id.* para. 27.

113. Since the implementation of the Ombudsperson on June 3, 2010, and up through her most recent semi-annual report to the Security Council on July 31, 2014, forty-six reviews (initiated by the listed party) have been completed, thirty-four individuals and twenty-seven entities have been delisted, one entity has been removed, six delisting requests have been refused, and one petition has been withdrawn. *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161 (2012)*, U.N. Doc. S/2014/553, *supra* note 108, para. 6. While some might argue that this demonstrates the effectiveness of the delisting process by pointing out that no delisting requests by the Ombudsperson have yet been denied by the Targeting Committee or the Security Council, there have already been instances in which attempts have been made to vote against the delisting. In one such instance, twelve of the fifteen Targeting Committee Members opposed the petitioner's delisting. While the petitioner was ultimately delisted, this situation demonstrates that the Ombudsperson is not an *independent party capable of granting relief* because the bodies responsible for listing a petitioner (the Targeting Committee and Security Council) still have ultimate authority on whether a petitioner is granted relief. *See* The Special Rapporteur, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, para. 34, *transmitted to the General Assembly*, U.N. Doc. A/67/396 (Sept. 26, 2012) [hereinafter Report of the Special Rapporteur] ("The very existence of an executive power to overturn the decision of a quasi-judicial body is sufficient to deprive that body of the necessary appearance of independence however infrequently such a power is exercised, and irrespective of whether its exercise was, or even could have been, at issue in any particular case.") (internal quotations omitted).

114. *See Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161 (2012)*, U.N. Doc. S/2014/553, *supra* note 108, para. 3 (holding that petitioners' names remain confidential).

115. Report of the Special Rapporteur, *supra* note 113, paras. 26, 32, 44. Note that these are only the *principal* deficiencies in relation to the due process dilemma of UN listing. There are many additional due process deficiencies, some the subject of complaint by the Ombudsperson herself, that continue to support the general perception of UN listing as due process deficient. *See, e.g.*, Kimberly Prost (Ombudsperson), Working Methods Security Council, 7285th Meeting, UN WEB TV (Oct. 23, 2014), webtv.un.org/watch/Kimberly-prost-ombudsperson-working-methods-security-council-7285th-meeting/3854953523001 (containing a video in which the Ombudsperson discusses human rights and 1267 sanctions). For example, petitioners must frequently challenge their listings without legal assistance. Of fifty-five total petitions filed to the Ombudsperson, only twenty-six petitioners are or were assisted by legal counsel. *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161 (2012)*, U.N. Doc. S/2014/553, *supra* note 108, para. 7. In addition, further procedural and administrative problems continue to plague the review process. While translation is a prerequisite for the Ombudsperson's review to be considered by the Targeting Committee, current limits on translation services pose "a serious and direct threat to the independence of the Ombudsperson." *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083 (2012)*, U.N. Doc. S/2013/452, *supra* note 109, para. 56. Ongoing concerns also exist about those who were listed accidentally, based on confusion about their names. This concern is particularly prominent because, despite ongoing problems with the naming process, there is no specific mandate to respond to requests for help in such situations. WATSON REPORT 2006, *supra* note

notwithstanding the refinements in mandates and activities, that the Ombudsperson is not the decision maker and her access is limited by the discretion of the sovereign States in possession of the alleged factual basis for listing. As observed by the U.K. Supreme Court,

> nothing in [the Ombudsperson procedure] affects the basic problems that there exists no judicial procedure for review and no guarantee that individuals affected will know sufficient [information] about the case against them (or even know the [identity] of the Member State which sought their designation) in order to be able to respond to it.[116]

III. INEVITABILITY OF THE DUE PROCESS DILEMMA

The failed fixes, considered collectively, all founder on the same tension. UN listings, being the product of a political process of the Security Council, simply cannot, in fundamental measure, accommodate due process as the juridical product of domestic law.

To the extent the listing process of the Security Council is modified to afford due process, it is an alien endeavor for the Security Council. There was nothing in the UN Charter or its legislative history to suggest that the Security Council could not only mandate sanctions targeting individuals and legal entities, but also have a role as prosecutor and judge through its committees and other bureaucratic substructure.[117] The drafting of the Charter was focused exclusively on the rights and obligations of States.[118] As a highly significant advance in its evolution, the UN Security Council acting legislatively under Chapter VII of the United Nations Charter has certainly gone beyond this original conception.[119] But UN listing for individuals and individual entities goes into realms much more exotic to the Charter, namely judicial and prosecutorial action.[120]

The UN process of listing and the attempts at its due process redemption are at odds, fundamentally, with the character of the Security Council as a reflection of international political reality.[121] The UN Security Council was designed to ensure constitutional insulation of the national security interests of the most powerful States.[122] The veto power of the five permanent members of the Security Council is at

---

67, at 34–37. The Ombudsperson also lacks authority to assist those requesting a humanitarian exemption. Such requests must be made by a Member State. Report of the Special Rapporteur, *supra* note 113, para. 37.

116. HM Treasury v. Ahmed, (2010) [2010] UKSC 2, [239] (appeal taken from Eng.).

117. JACK I. GARVEY, NUCLEAR WEAPONS COUNTERPROLIFERATION: A NEW GRAND BARGAIN 52–54 (2013).

118. *See generally* U.N. Charter.

119. *See* GARVEY, *supra* note 117, at 48–57 (discussing the separation of powers conception between the Security Council and the General Assembly).

120. *See generally id.* at 53–57.

121. Chairman Thomas Mayr-Harting of the UN Committee, charged with implementing the original anti-terrorism resolution of the UN Security Council, has indeed openly acknowledged that it is naturally and inevitably "a political decision based on a political process." Press Release, Security Council, Press Conference on Security Council Al-Qaida and Taliban Sanctions Committee (Aug. 2, 2010), *available at* http://www.un.org/press/en/2010/100802_Sanctions.doc.htm.

122. *See* Francis O. Wilcox, *The Yalta Voting Formula*, 39 AM. POL. SCI. REV. 943, 944 (1945) (acknowledging that the Security Council was designed to give the five great States special power).

the apex of this guarantee, which permeates all subsidiary structure and process. Due process standards of domestic law, to the extent that they are at odds with this political reality, will not be imposed in the Security Council's naturally top-down orchestration of targeted sanctions. But due process in fact arises within the bottom-up constitutionalism of domestic law, designed to insulate the juridical, insofar as feasible, from the political. Consequently, we have an inevitable tension of priority between political and juridical process and between international and domestic legal process that has become the due process dilemma of UN listing.

There is considerable scholarship that implicitly, at least, would resolve the tension between due process and UN listing in favor of due process as internationally binding.[123] It maintains that development of international law has reached a stage wherein even the mandates of the Security Council under Chapter VII of the United Nations Charter are subject to, and subordinate to, the requirements of normative standards of international law.[124] The standards typically invoked are general rights of procedural fairness, as declared in international human rights instruments—ensuring the right to be heard, the right to challenge evidence that is the basis for charges, and a process of neutral adjudication and judicial review.[125] Such principles have been specifically asserted as limiting UN listing.[126] Thus, the International Eminent Jurists Panel, charged with reviewing the UN listing process, has declared that international due process requires clear criteria for listing—that listings be time limited and subject to review, that there be adequate notification to affected parties, and that there be independent judicial review and an available remedy.[127]

A variety of theories has been advanced for insisting that a Security Council targeted sanctions mandate is subject to such standards of "international due process." These range from arguments based in the UN Charter and the International Covenant on Civil and Political Rights (ICCPR) to the assertion that due process is required as *jus cogens* binding all States.[128]

The theories, as they are considered in relation to the listing process of the United Nations, all demonstrate a similar refusal to acknowledge the priority of Security

123. *See, e.g.*, Monika Heupel, *Multilateral Sanctions Against Terror Suspects and the Violation of Due Process Standards*, 85 INT'L AFF. 307, 321 (2009) (concluding it is "reasonable to expect the sanctions regimes ultimately to fall in line with common due process standards"); Genser & Barth, *When Due Process Concerns Become Dangerous*, *supra* note 2, at 23 (stating that current trends have "led to the expectation that the U.N. will observe basic standards of due process").

124. *See, e.g.*, FRANCK, *supra* note 32, at 7 (discussing the Security Council's need for procedural fairness to be effective); FASSBENDER, *supra* note 23, at 6–8 (finding that the Security Council may be harmed by inherent due process requirements of international law).

125. *See* FASSBENDER, *supra* note 23, at 9–32 (discussing the due process requirements of international law).

126. *But see, e.g.*, *id.* at 6 (pointing out that an obligation of the Security Council to comply with standards of due process presupposes that the United Nations is bound by rules of international law).

127. INT'L COMM'N OF JURISTS, *supra* note 67, at 122.

128. *See, e.g.*, Erika de Wet, *The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 7, 13 (Erika de Wet et al. eds., 2003) (arguing that the human rights guaranteed in key UN documents, such as the ICCPR, suggest that the UN has a duty to promote and respect those rights); FASSBENDER, *supra* note 23, at 27–28 (finding that Chapter VII of the UN Charter requires the Security Council to balance its duty to maintain international peace and security with its obligation to respect the human rights of targeted individuals).

Council action as articulated under Chapter VII of the United Nations Charter.[129] They tend to ignore the troubling generality and paucity of "international" due process standards being asserted. They also demonstrate pervasive confusion between the "is" and the "ought" of what standards can be identified as representing international consensus.

To the contrary of what the theories of human rights priority assert, Chapter VII of the Charter indubitably not only authorizes the Security Council to make sanctions mandatory on all Member States, but clearly establishes the priority of any such mandate as a matter of international law.[130] Articles 24,[131] 25,[132] and 103[133] of the United Nations Charter require all States to comply with a targeting mandate, including enforcement of listing against their residents and their own citizens. Article 103 provides that "[i]n the event of a conflict under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[134] Article 25 requires all members to "accept and carry out the decisions of the Security Council in accordance with the present Charter."[135]

This literal instruction of the Charter was affirmed by the International Court of Justice in the *Lockerbie* case.[136] And even though in *Tadic* the International Criminal Tribunal for the Former Yugoslavia denounced UN targeting as materially due process deficient and declared that the Security Council is bound by the human rights related principles and purposes of the Charter, that court also concluded that the Security Council makes the ultimate determination of the propriety of use of Chapter VII mandatory measures.[137] Although the ICCPR does detail core due process principles in Article 14, including notice of charges, the right to cross examination, and the right to a public trial by an independent and impartial tribunal,[138] the priority of Chapter VII over international agreements prevails—if not in the normative view of some theorists, certainly by way of the language of the Charter and international judicial interpretation of that language—reflecting the fundamental political reality of Security Council dominance.

---

129. *See* de Wet, *supra* note 128, at 13 ("[O]rgans of the UN, including the Security Council, will be estopped from behavior that violated the rights referred to in the purposes and principles."); FASSBENDER, *supra* note 23, at 27–28 (noting that all measures of the Security Council must be in accordance with the human rights and freedoms in Chapter VII of the UN Charter).

130. Thomas M. Franck, Editorial Comment, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 521 (1992).

131. U.N. Charter, art. 24, para. 1 ("Members confer on the Security Council primary responsibility for the maintenance of international peace and security.").

132. *Id.* 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.").

133. *Id.* art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

134. *Id.*

135. *Id.* art. 25.

136. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures, 1992 I.C.J. 114, para. 40–42 (Apr. 14).

137. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 28–31 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

138. International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 D.N.T.S. 171 (entered into force Mar. 23, 1976). *Cf.* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (enumerating the same rights as the ICCPR).

The argument that the authority of the Security Council is subordinate to due process as *jus cogens* is similarly and critically flawed. Even granting that a *jus cogens* peremptory norm of intentional law prevails over any treaty, including the UN Charter[139] (a proposition not without meritorious challenge),[140] there is no basis for relying on *jus cogens* as a source of sufficiently precise due process or human rights norms to constitute a meaningful limitation on the targeted sanctions listing process of the Security Council. Given the general disagreement over what in any particularity constitutes a *jus cogens* norm and the vagueness and abstraction invariably involved,[141] *jus cogens* surely does not provide a sufficiently clear guide to address the due process issues of UN listing, let alone to overcome the demands of national security and confidentiality that all would grant are inherent to the listing process.

In contradistinction to the few areas where international human rights norms may reasonably be perceived as having attained *jus cogens* status by way of general consensus of States, such as the prohibitions on genocide or torture, due process in its various manifestations is highly variable among States, subject to radically different degrees of compromise with demands of national security and related secrecy. The presumption of innocence, for example, has never fared well in many countries with developed legal systems claiming due process commitment.[142]

This variation, as it appears in relation to UN listing, reflects the different security realities and perceptions of different governments.[143] The United States, with its far-

139. *See* Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 1993 I.C.J. 407, para. 100 (Sept. 13) (separate opinion of Judge Lauterpacht) (stating that genocide rises to *jus cogens* status and therefore prevails over customary international law and treaties).

140. *See* FRANCK, *supra* note 32, at 44 (explaining international law as it relates to *jus cogens*).

141. *Jus cogens* is defined in Article 53 of the Vienna Convention on the Law of Treaties as: "[A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Neither in Article 53 of the Vienna Convention nor in any other authoritative statement are consensus criteria or examples for the identification of *jus cogens* listed. The prohibition on the use of force, as stated in the UN Charter, probably qualifies as *jus cogens*. Other norms often claimed to have the status of *jus cogens* include the prohibitions on genocide, slavery, and torture. But it is clear that under the Article 53 definition, due process is not *jus cogens* because States regularly, in virtually every respect, derogate from due process. As one authoritative commentary notes, "it would be rash to assume . . . that all prohibitions . . . [contained] in human rights treaties are *jus cogens*, or now at least customary international law. Some rights, such as freedom of association, are not generally accepted as customary law; *and a state can usually derogate from others (*e.g., *due process)* in time of public emergency." ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 319–20 (2d ed. 2007) (emphasis added). See Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 829 (2002) for an illustration of the ongoing debate over what constitutes *jus cogens* status of human rights norms.

142. A recent example, illustrating the absurd extreme, was the conviction and death sentencing of over 500 people in Egypt for the killing of one police officer. David D. Kirkpatrick, *Hundreds of Egyptians Sentenced to Death in Killing of a Police Officer*, N.Y. TIMES (Mar. 24, 2014), http://www.nytimes.com/2014/03/25/world/middleeast/529-egyptians-sentenced-to-death-in-killing-of-a-police-officer.html. At the very least, this absurdity illustrates the difficulty of finding global due process consensus.

143. *See generally* Michael Kilchling, *Tracing, Seizing and Confiscating Proceeds from Corruption (and Other Illegal Conduct) Within or Outside the Criminal Justice System*, 9 EUR. J. CRIME CRIM. L. & CRIM. JUST. 264 (2001).

flung intelligence networks, naturally requires confidentiality of information and protection of sources in ways and degrees wholly different from and inapplicable to smaller countries without significant foreign intelligence requirements.[144] The U.S. legal system, accordingly, in accommodation of its broad strategic stake in targeted sanctions, demonstrates a relatively high level of deference to the executive branch and relatively diminished rights of defendants to discover the evidence against them.[145] Thus, for example, freezing of assets occurs before any disclosure of the evidence on which a listing is based.[146] U.S. federal courts *will* set aside a designation deemed arbitrary and capricious.[147] U.S. law provides that a blacklisting decision can be administratively reconsidered,[148] but the protesting party has no regulatory right of review of the basis for the government agency's actions.[149] Extensive study of U.S. targeting shows that there have been numerous compromises of due process in blacklisting for targeted sanctions, and such compromises are likely to continue to occur.[150] Under U.S. laws, the federal government may prohibit or severely limit the extent to which a targeted individual has any ability to contest his or her listing.[151] Ironically, this has been replicated in Russian law in retaliation for these features of U.S. sanctions.[152] EU listing and delisting procedures, by contrast, reflecting a similar but not so commanding stake in targeted sanctions as that of the United States, include requirements as to the statement of reasons for listing, notification, procedures dealing with requests for delisting, and periodic review of the EU terrorist list.[153]

---

144. *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 619–35 (2013) (discussing the particular challenges the United States faces in controlling information).

145. Wayne McCormack, *U.S. Judicial Independence: Victim in the 'War on Terror,'* 71 WASH. & LEE L. REV. 305, 331–32 (2014).

146. JOHN ROTH ET AL., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 50–51 (2004).

147. *Compare* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003) (precluding collateral review of a designation), *with* People's Mojahed in Org. of Iran v. U.S. Dep't of State, 613 F.3d 220, 230–31 (D.C. Cir. 2010) (requiring further action by the Secretary of State to ensure fairness).

148. 31 C.F.R. § 501.807 (2005).

149. *Id.* § 501.807(c).

150. *See generally* Peter L. Fitzgerald, *"If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This": Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73 (1999) (discussing the procedural issues associated with the blacklisting process).

151. *Id.* at 136–160.

152. *See, e.g.*, Elizabeth Clark Hersey, *No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT'L L. 1231, 1244–47 (2013) (discussing the United States's Magnitsky Act and Russia's retaliatory Yakolev's Law concerning human rights abuses and targeted sanctions).

153. For a detailed discussion of these procedures, and their evolution in response to due process based critique, see MIKAEL ERIKSSON, UPPSALA UNIV., IN SEARCH OF A DUE PROCESS: LISTING AND DELISTING PRACTICES OF THE EUROPEAN UNION (2009), *available at* http://pcr.uu.se/digitalAssets/165/165538_1in_search_091119.pdf. Three Somali-born Swedish citizens had their assets frozen after appearing on European blacklists following their listing on the UN's blacklist; Sweden froze the assets, but "vigorously questioned" the listing, arguing due process issues surrounding the targets' lack of knowledge of the crime and lack of any way to appeal. Peter L. Fitzgerald, *Smarter "Smart" Sanctions*, 26 PENN. ST. INT'L L. REV. 37, 48–49 (2007) [hereinafter Fitzgerald, *Smarter "Smart" Sanctions*]. One of the men, Ahmed Ali Yusuf, sued in the European Court of First Instance for procedural flaws and violations of the European Convention on Human Rights. *Id.* at 49. The court rejected those claims, seeming to view asset blocking as "a foreign policy matter rather than a forfeiture proceeding," meaning due process concerns do not weigh as heavily. *Id.* at 50; *see also supra* text accompanying note 48.

Other State or regional adjudications will resolve the due process concerns far differently, in striking the line between human rights and their particular national security concerns. There will always be such differences because of differing perceptions and realities of national security. That is precisely why a single listing done at the United Nations level, at the behest of one or more designating States, will never be satisfactory as a general resolution of the due process dilemma of UN listing. Within the UN listing process, even the answers to the ostensibly factual questions involved, such as who is a "terrorist" and what constitutes "association" with terrorism, may be different depending on the different national agendas involved, and consequent selective use of intelligence.

The critics of UN listing as due process deficient judge UN listing by the relatively highly developed and articulated standards of the Western democracies.[154] But any fair assessment of those standards must include the realization that even within the most highly developed legal systems, including the Western democracies, due process is often sacrificed to claims of national security.[155] Principles, such as the right to be informed of charges, cross-examination, and neutral adjudication, which are declared in international instruments, as by the enumeration in Article 14 of the ICCPR,[156] are repeatedly and even radically compromised in politically-sensitive domestic adjudications.[157] The resulting evident gap between the "is" of national security litigation and the "ought" of international human rights rhetoric leaves the concept of any *jus cogens* subordination of UN listing without basis in fact. In truth, the due process dilemma of UN listing arises not from conflict with any principle of international due process about which there is sufficiently clear consensus but from conflict with the standards of due process as defined in domestic law as increasingly asserted by national and regional courts in the targeted sanctions litigation of the most due process sensitive legal systems.

This conflict was most prominently exemplified in the challenge to UN listing embodied in the declaration by the ECJ that:

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[158]

---

154. *See* Fitzgerald, *Smarter "Smart" Sanctions*, *supra* note 153, at 48–50 (comparing criminal and civil proceedings in Western democracies to UN blacklisting challenges).

155. *See* U.N. Human Rights Comm., Communication No. 1472/2006, *supra* note 58, para. 10.11. (noting that the State views its sanctions as preventive rather than punitive).

156. In virtual acknowledgement of the consensual limits of Article 14, even the UN Human Rights Committee has rejected the view that the 1267 listing system involves criminal charges that would require full application of Article 14. *Id.*

157. *See* Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT'L. REV. OF THE RED CROSS 15, 16, 19 (2005) (discussing countries' use of national security as justification for indefinite detention despite its violation of Article 14 of the ICCPR).

158. Joined Cases C-415/05, Kadi v. Council (Kadi I), 2008 E.C.R. I-6351 para. 285.

The due process dilemma of UN listing, as the ECJ has thus declared, is its conflict with national or regional law, not international law.[159] And that should not be the revelation it seems to be in relation to the demands for greater "international due process" that have plagued UN listing. Development of due process of law originates in the relationship between the individual and the State, and for the most part, therefore, is articulated in terms of the relationship of the individual to national sovereignty.[160] This remains true even though due process may appear in international administrative contexts or be applied and elaborated upon in international adjudicative contexts, such as international criminal tribunals.[161] Principles of due process—such as notice of charges, the right to representation, the right to an independent and impartial tribunal, fair and public hearing, reasoned judgment, and effective remedy—as they appear in international human rights instruments, such as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[162] *have been* thrust into broader international iteration by way of Article 14 of the ICCPR.[163] But "international due process" remains the progeny of domestic law.[164] As "international law," international due process is relatively newborn, still for the most part defined only in outline, and dependent upon iteration in national and regional law. It follows, therefore, that when UN listing challenges are formulated for affected individuals and entities, the standards asserted are not the relatively vague and generalized principles of international due process declared within human rights instruments, but are drawn from national and regional judicial and administrative processes, where the principles are defined with relative clarity in actual context.

An implicit premise in the demands for greater due process at the level of UN listing is that there is sufficient international due process consensus, whether as international or domestic principle, to guide reform that is feasibly applied. This premise is flawed, however, as evidenced by the wide variety of standards on which domestic law challenges to UN listing are based.[165] The principal reason the due process dilemma of UN listing is so intractable is that national and regional elaboration of what due process requires varies significantly as to both procedure and substance.[166] There is no common standard of general acceptance sufficiently precise to test UN listing. And the standards vary, not only according to different national and regional constitutional embodiments of due process, but also because perceptions of national

159. *Id.* para. 74.

160. *See* FASSBENDER, *supra* note 23, at 6 ("To the extent that rules of customary law exist with respect to such standards, they address obligations of States in the sphere of domestic law, and not obligations of international organizations.").

161. *See id.* at 19 ("The due process rights of individuals recognized as general principles of law are also applicable to international organizations as subjects of international law when they exercise 'governmental' authority over individuals."). *E.g.*, Kadi I, 2008 E.C.R. I-6351, para. 285.

162. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6, 13, 45, Nov. 4, 1950, 213 CETS No. 005 (entered into force Sept. 3, 1953).

163. *See generally* ICCPR art. 14, *supra* note 138 (calling to mind Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in similarly providing for international recognition of due process and fair trial rights).

164. *See supra* Parts II–III (demonstrating deficiencies in due process under international law).

165. *See, e.g.*, Forcese & Roach, *supra* note 2, Part III.B (discussing approaches to UN listing challenges in the European Union, Canada, and the United States).

166. *See, e.g.*, FASSBENDER, *supra* note 23, para. 1.9 ("[E]xpressions and definitions of due process rights in . . . national constitutions vary.").

security vary among governments depending upon how those governments are strategically situated.[167] Transparency and fairness will be balanced against national security and foreign relations considerations differently—even concerning the same targeting—and often with dramatic difference depending on the States involved, their interests and relationships, specific context, and time.

IV. THE CHALLENGE OF NATIONAL AND REGIONAL LITIGATION

As listed individuals and entities continue to press their petitions for delisting, seeking relief under national and regional law, criticism of the UN process continues to intensify.[168] There is a crescendo of challenges, reaching higher levels of judicial consideration, evidencing increasing frustration with the political nature of UN listing.[169] Contrary to the usual inclination of domestic courts to decline to review decisions by international organizations—on some variation of the political question doctrine or other principle of non-justiciability—litigation on grounds of denial of due process has come to strike at the very vitals of targeted sanctions.[170]

It is generally acknowledged that the States designating targets through the UN listing process are few.[171] As could be expected, first and foremost among the designating States is the United States as the principal proponent of targeted sanctions.[172] Indeed, the most high profile challenges have been to listings that the United States has pushed through the UN listing process.[173] In light of the high degree of executive discretion, which U.S. appellate courts have recognized as legitimate in cases concerning national security, it is dubious whether any of these designations would run afoul of U.S. due process constraints.[174] Yet the challenges that have,

167. *See, e.g.*, SUSANNA BEARNE ET AL., RAND CORP., NATIONAL SECURITY DECISION-MAKING STRUCTURES AND SECURITY SECTOR REFORM 5–19 (2005) (discussing the way certain countries' strategic situations influence their national security decision making procedures).

168. *See, e.g.*, Machiko Kanetake, *The Interfaces Between the National and International Rule of Law: The Case of UN Targeted Sanctions* 37–52 (Amsterdam Ctr. for Int'l Law, Working Paper No. 2.4, 2012), *available at* http://ssrn.com/abstract=2188915 (listing cases challenging targeted sanctions including cases from the Unites States, the European Union, Switzerland, Belgium, Pakistan, Turkey, the United Kingdom, and Canada).

169. Genser & Barth, *Targeted Sanctions*, *supra* note 45, at 197–98.

170. *See* WATSON REPORT 2012, *supra* note 5, at 5 (arguing that procedural challenges detract from the Security Council's efforts to maintain international peace and security).

171. *See infra* note 229 and accompanying text.

172. Hersey, *supra* note 152, at 1237 n.28.

173. *See* LOPEZ ET AL., *supra* note 25, at 2 ("Most of the court cases have been brought by individuals who were added to the list in the weeks immediately after the 9/11 attacks in the United States, when the 1267 Committee hastily added more than 250 names to the list, mostly at the behest of the U.S. government.").

174. Typical is the reflection of the D.C. Circuit, a principal venue for such cases: "[W]e reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential." Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007). *Accord* Zarmach Oil Servs., Inc. v. U.S. Dep't of the Treasury, 750 F. Supp. 2d 150, 155 (D.D.C. 2010) (stating that "courts owe a substantial measure of 'deference to the political branches in matters of foreign policy'"). Other circuits agree. *See, e.g.*, Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000) ("[B]ecause the regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context.").

succeeded in foreign courts reflect contrary standards and different resolutions of the tension between individual rights and national security.[175]

Probably the most significant example is the case of Mr. Kadi, an individual targeted by the United States and its EU allies for alleged involvement in terrorist financing.[176] The series of *Kadi* decisions represent the most notable legal challenge to the 1267 sanctions regime, not only because of its EU-wide application, but also broadly in reference to the central tension of the due process dilemma—whether the UN process or due process prevails.[177]

In *Kadi I*, the European Court of Justice at first sought to avoid direct conflict between EU due process standards and the Security Council resolutions orchestrating the 1267 targeted sanctions regime.[178] It determined that although the EU institutions have no discretion under the 1267 regime, there is some discretion in the method of implementation.[179] Making such a distinction between the Security Council targeting resolutions and their national or regional implementation had been the way that a number of jurisdictions sidestepped acknowledging a direct conflict between Security Council targeting resolutions and due process.[180] However, after more than a decade of court battles and appeals, the ECJ could not pursue the option of focusing exclusively on the implementation regulations.[181] In the *Kadi II* holding, the avoidance

175. *See* Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 1 (2010) (arguing that the ECJ's decision to annul impending measures in Kadi "represents a sharp departure from the traditional embrace of international law by the European Union . . . [and] carries risks for the EU and for the international legal order in the message it sends to the courts of other states and organizations contemplating the enforcement of Security Council resolutions").

176. *See* Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n v. Kadi, para. 109, 2013 EUR-Lex CELEX LEXIS 518 (July 18, 2013) ("In the particular case of Mr. Kadi, it is apparent from the file that the initial listing of his name . . . in the Sanctions Committee Consolidated List followed a request by the United States on the basis of . . . a decision in which the Office of Foreign Asset Control identified Mr. Kadi as a 'Specially Designated Global Terrorist'."). *See generally* Landon Thomas Jr., *A Wealthy Saudi, Mired in Limbo Over an Accusation of Terrorism*, N.Y. TIMES (Dec. 12, 2008), www.nytimes.com/2008/12/13/world/middleeast/13kadi.html; *The Kadi Case: Court Decisions on Due Process for Terrorist Listing Differ in EU, U.S.*, CHARITY & SECURITY NETWORK (Apr. 3, 2012), http://www.charityandsecurity.org/litigation/node/768 [hereinafter *The Kadi Case: Court Decisions*].

177 *See generally The Kadi Case: Court Decisions*, *supra* note 176 (discussing how the UN procedure in the *Kadi* decision lacks fundamental due process).

178. *See* Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 E.C.R. I-6351 para. 298 ("[T]he Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.").

179. *Id.*

180. *Id.* paras. 312–14 (noting that while the European Court of Human Rights had previously declined jurisdiction in cases that "involved actions directly attributable to the United Nations as an organisation of universal jurisdiction fulfilling its imperative collective security objective . . . [i]n the instant case it must be declared that the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter").

181. *See* Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n v. Kadi, para. 106, 2013 EUR-Lex CELEX LEXIS 518 (July 18, 2003) ("When the European Union implements Security Council resolutions adopted under Chapter VII of the Charter of the United Nations, on the basis of a Common Position or a joint action adopted by the Member States pursuant to the provisions of the EU Treaty relating to the

of conflict was recognized as transparently unsupportable because the implementing regulation exactly replicated the terms of the Security Council resolution involved.[182]

Kadi II established that full review by the ECJ must remain so long as there is inadequate procedure at the UN level to guarantee due process.[183] The ECJ also found the 1267 regime to be incompatible with the fundamental due process standards of the EU.[184] It held that there had been a breach of those standards by way of a failure to communicate to Mr. Kadi the evidence used against him either before or after measures were enacted against him, and that his right of defense, especially his right to be heard, and the EU principle of effective judicial protection, had been violated.[185]

The Court's opinion could only be understood as addressing the clash of the authorizing Security Council resolution and EU due process standards.[186] So when the ECJ annulled the European Council regulation that implemented the 1267 regime, it de facto annulled the Resolution. Furthermore, and closer to the bone of UN responsibility, it formally concluded that the Sanctions Committee listing procedures lacked sufficient guarantees of judicial protection.[187] Following *Kadi II*, the standard of review to be applied by EU courts must cover both procedural and substantive aspects of EU listing procedures, including review of the reasons for the individual listing.[188]

---

common foreign and security policy, the competent European Union authority must take due account of the terms and objectives of the resolution concerned and of the relevant obligations under that Charter relating to such implementation.").

182. *See* Case T-85/09, Kadi v. Comm'n (Kadi II), 2010 E.C.R. II-5181 para. 116 ("[T]he fact remains that a review of the legality of a Community act which merely implements, at Community level, a resolution affording no latitude in that respect *necessarily amounts to a review . . . of the legality of the resolution* thereby implemented.") (emphasis added).

183. *See* Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n v. Kadi, para. 133, 2013 EUR-Lex CELEX LEXIS 518 (July 18, 2013) ("Such a review is all the more essential since, despite the improvements added . . . at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection.").

184. *See* Kadi II, 2010 E.C.R. II-5181 para. 122 (describing the decision of the Court of Justice as "holding the Sanctions Committee's system of designation to be incompatible with the fundamental right to effective review before an independent and impartial Court").

185. *See id.* para. 181 ("[G]iven the lack of any proper access to the information and evidence used against him and having regard to the relationship . . . between the rights of the defence and the right to effective judicial review, the applicant has also been unable to defend his rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that his right to effective judicial review has also been infringed.").

186. *See* de Búrca, *supra* note 175, at 22 ("In the end, while none of its complicated reasoning provided any relief to Kadi, the judgment presents a provocative picture of a regional organization at once faithful and subordinate to, yet simultaneously constituting itself as an independent check upon, the powers exercised in the name of the international community under the U.N. Charter.").

187. Kadi II, 2010 E.C.R. II-5181 para. 127 (determining that judicial review was proper and necessary "so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection"); *see also* de Búrca, *supra* note 175, at 25 (noting the court's observation that immunity from jurisdiction for Security Council measures would be unjustified because the "Sanctions Committee procedure lacked sufficient guarantees of judicial protection").

188. *See* Kadi II, 2010 E.C.R. II-5181 para. 137 ("The possibility of 'an adequate review by the courts' of the substantive legality of a Community freezing measure, 'particularly as regards the verification of facts and the evidence and information relied upon in support of the measure,' is indispensable if a fair balance between the requirements of the fight against international terrorism, on the one hand, and the protection of fundamental liberties and rights, on the other, is to be ensured.").

Notably, the Security Council delisted Kadi nearly nine months before the release of the *Kadi II* decision.[189] But the court did not address Kadi's delisting in its decision.[190] Though the case was moot, the court nevertheless sought to establish the priority of EU due process and human rights principles over any UN Security Council mandate.[191] *Kadi II*, accordingly, is perceived as a proactive declaration that the European courts must ultimately insist on vindication of their citizens' fundamental rights, which are guaranteed to citizens of the European Union, notwithstanding conflict with a UN resolution.[192] This standard of review has placed EU Member States in the uncomfortable, if not untenable, situation of giving priority to the EU charters over the UN Charter, thereby delegitimizing targeted sanctions.[193]

Kadi II quickly became the vanguard of cases that were sure to follow challenging the absolute authority of Security Council targeting.[194] Thus, in November 2013, in a case concerning the targeting of an Iranian company, Kala Naft, the ECJ set aside a judgment of the General Court of the EU that had annulled various EU restrictive measures targeting persons and entities listed as being engaged in nuclear proliferation, reiterating criteria from *Kadi II*.[195] These criteria included the obligation to review the lawfulness of all EU acts in light of the fundamental rights of the European legal order—including respect for the rights of defense, the right to effective judicial protection, the right to be heard, and the right to have access to the listing file subject to legitimate interests in maintaining confidentiality.[196] Specifically, the standard asserted was that the person concerned must be able to ascertain the reasons for his listing either by reading the decision or by requesting and obtaining discovery of those reasons and facts sufficient to put the court in a position to review the lawfulness of the decision in question.[197]

The level of review now being demanded in such cases requires identification of the designating State and the critical disclosure of evidence and sources.[198] The UN process, however, shows no sign of compromising the deference accorded the

189. Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from Its List, U.N. Press Release SC/10785 (Oct. 5, 2012).

190. *See generally* Kadi II, 2010 E.C.R. II-5181.

191. *See* Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n v. Kadi, para. 23, 2013 EUR-Lex CELEX LEXIS 518 ("[T]he Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions.").

192. *See id.* paras. 119, 126 (concluding that the ECJ can review regulations implementing Security Council resolutions to protect fundamental rights established by the EC treaty).

193. At least one commentator has suggested that *Kadi II* has accordingly made the EU an attractive haven for terrorist affiliates to operate, contending it is less likely that they would have sanctions imposed against them if they are within the EU. Peter Fromuth, *The European Court of Justice Kadi Decision and the Future of UN Counterterrorism Sanctions*, 13 AM. SOC'Y OF INT'L L. (Oct. 30, 2009), http://www.asil.org/insights/volume/13/issue/20/european-court-justice-kadi-decision-and-future-un-counterterrorism.

194. In addition to Case C-348/12 P, Council v. Mfg. Support & Procurement Kala Naft Co., 2013 E.C.R. I____ paras. 65–73 (addressing fundamental rights set forth in *Kadi II*), see, e.g., Case T-318/01, Omar Mohammed Othman v. Council & Comm'n, 2009 E.C.R. II-01627, para. 19 (challenging Security Council resolutions); Nada v. Switz., 2012 Eur. Ct. H.R. 1691, para. 104 (challenging Security Council resolutions).

195. Kala Naft, Case C-348/12 P paras. 65–73.

196. *Id.* paras. 66–67.

197. *Id.* para. 68.

198. *See id.* paras. 68, 73 (requiring that defenders in listing cases have full disclosure of relevant facts and the reason for the listing decision).

designating government(s), as confirmed by the fact that repeated complaints from the Office of the Ombudsperson insist that States have not provided critical information.[199] The in-depth review being demanded is no doubt abhorrent to the designating State(s), and will remain so, given that the designations come from the few States with significant global intelligence resources who bear risks of disclosure, including placing human intelligence resources in danger.[200]

A Canadian case, *Abdelrazik*, demonstrates an even broader implication of the growing judicial challenge to UN listing—an implication even more threatening from the perspective of designating states.[201] When Mr. Abdelrazik, a Canadian citizen, departed to Sudan using a valid passport in 2003, the Canadian government actively blocked his return to Canada even though Canadian authorities lacked evidence proving Mr. Abdelrazik's affiliation with terrorism.[202] Their suspicion of terrorist affiliation, attributed to his Resolution 1267 listing by the United States, resulted in the Canadian government actively preventing Mr. Abdelrazik from returning to Canada from Sudan.[203] The Canadian federal court, considering the factor of guilt by association behind the listing, held that in preventing his return to the country of which he is a citizen, the government breached Mr. Abdelrazik's fundamental rights under the Canadian Charter of Rights and Freedoms.[204] The Court avoided directly disobeying Resolution 1267's travel ban by interpreting the travel ban provision narrowly and as not applying to Mr. Abdelrazik's return to the country of which he is a citizen.[205] However, the opinion of Judge Zinn of the Canadian court went further and denounced the UN listing process as "a denial of basic legal remedies . . . untenable under the basic principles of international human rights."[206] This went well

199. *See, e.g.*, Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083 (2012)*, U.N. Doc. S/2014/73, *supra* note 109, paras. 55–59 (discussing lack of State transparency); Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161 (2014)*, U.N. Doc. S/2014/553, *supra* note 108, paras. 54–55 (noting deficiencies in the transparency of the listing process).

200. *See* Office of the Ombudsperson, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083 (2012)*, U.N. Doc. S/2014/73, *supra* note 109, para. 62 (discussing the hesitancy of States to release classified material).

201. Abdelrazik v. Canada, [2010] 1 F.C.R. 267, 268 (Can. Ont. F. C.) (challenging the prevention of Abdelrazik's return to Canada as a Canadian citizen because circumstances led him to be listed by the 1267 Committee; Canada was found to have engaged in conduct that constituted a breach of Abdelrazik's rights).

202. *See id.* para. 11 (explaining that while Abdelrazik was identified as having a low level of affiliation with two terrorists, the court observed no evidence to reasonably conclude that Abdelrazik had any connection to terrorism or terrorists).

203. *See id.* para. 25 ("There is no evidence before this Court as to the basis on which the United States authorities concluded that Mr. Abdelrazik has provided support to Al-Qaida and poses a threat to the security of the United States of America. There is no evidence before this Court nor, as shall be discussed later, that is currently available to Mr. Abdelrazik as to the basis on which the 1267 Committee listed him as an associate of Al-Qaida. The only direct evidence before this Court is in an affidavit filed by Mr. Abdelrazik in which he swears that he has no connection to Al-Qaida.").

204. *See id.* para. 153 ("[T]he applicant's Charter right as a citizen of Canada to enter Canada has been breached by the respondents in failing to issue him an emergency passport."); *id.* para. 156 (detailing specifically how Canada breached Abdelrazik's right to enter Canada).

205. *See id.* para. 129 ("[P]roperly interpreted[,] the UN travel ban presents no impediment to Mr. Abdelrazik returning home to Canada.").

206. *Id.* para. 51. This broad condemnation was more fully stated, "I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the

beyond the conclusion reached by the ECJ in *Kadi*, which kept its focus on EU law.[207] In a since oft-quoted characterization, Judge Zinn denounced the process as Kafkaesque—"[A] situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime."[208] The holding of the Canadian case projected beyond the finding that Mr. Abdelrazik's UN listing was a violation of the Canadian charter to find his UN listing a violation of international due process.[209] It sent a message to the international community that disregard of Security Council targeting resolutions can be justified on the basis of fundamental human rights. Given the lack of precision and absence of detail in the declaration of those rights, the Canadian decision now constitutes a convenient referent for any government to refuse to comply with Security Council targeting resolutions.

Priority between UN targeting resolutions and domestic due process as a global matter, nevertheless, remains uncertain. For example, although in *A v. HM Treasury*, the England and Wales Court of Appeal concluded that the targeted individual was deprived of an effective remedy under 1267 regime U.K. implementing regulations the court deemed violative of the U.K.'s 1946 United Nations Act,[210] it nevertheless followed a precedent, *Al Jeddah*, as standing for the propositions that UN obligations prevail over international human rights obligations, that Article 103 of the UN Charter leaves no room for any exception, and that ECHR rights fall into the category of obligations as to which the UN Charter must prevail.[211]

Thus the question posed by the due process dilemma of UN listing—whether the UN listing process takes priority over human rights and due process considerations—remains unresolved, even among the governments that are the major players in UN listings.[212] This holds true even among those most closely allied in targeting such as Canada, the United States, and the United Kingdom.[213] Neither the attempts to fix the

---

principles of natural justice or that provides for basic procedural fairness. . . . [T]he 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body [the Security Council's Sanctions Committee] that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge." *Id.*; *see also id.* para. 53 (discussing the burden on listed individuals to prove they "no longer meet[]" the criteria prescribed by the 1267 Committee even though the individuals never met the criteria and were wrongly listed in the first place).

207. *See generally* Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n v. Kadi, 2013 EUR-Lex CELEX LEXIS 518 (July 18, 2013).

208. *Abdelrazik*, [2010] 1 F.C.R. 267, para. 53.

209. *See id.* ("It is a fundamental principle of Canadian and international justice that the accused does not have the burden of proving his innocence, the accuser has the burden of proving guilt.").

210. A v. HM Treasury, [2008] EWCA (Civ) 1187, para. 128 (Q.B.) (focusing on the requirement under Section 1 of the United Nations Act of 1946 that regulations to implement mandates of the Security Council must be either "necessary or expedient").

211. *Id.* para. 18 (stating that "obligations under the [U.N.] Charter take precedence over any other international agreements. Thus human rights under the ECHR cannot prevail over the obligations set out in the Resolutions").

212. *See The Kadi Case: Court Decisions*, *supra* note 176 (examining the difference between EU courts and U.S. courts on UN listing and fundamental human rights).

213. *See* Christina Eckes, *The Role of Judges Confronted with Norms from Different Origins: The Case of Counter-Terrorist Sanctions*, *in* HANDBOOK ON EUROPE AND MULTILATERAL INSTITUTIONS 171, 174–75 (K.E. Joergensen & K. Laatikainen eds., 2013) (discussing the different approaches by different nations on individual sanctions).

UN listing process nor the jurisprudence has been able to reconcile UN listing with due process and human rights principles for any satisfactory level of resolution of the due process dilemma. And the jurisprudence has repeatedly rejected the attempted fixes as inadequate.[214] Even the Ombudsperson, who holds the office created to fix the due process dilemma, continues to complain of due process deficiency.[215] The courts seized of the due process dilemma simply continue to struggle with the irreducible conflict between the domestic and international orders, unable to come to resolution.

The juridical critique and the essential conundrum around which it revolves has spawned an even larger academic controversy.[216] A number of major studies, focusing on the due process challenge to UN listing, have proposed additional due process improvements for the UN listing process.[217] This is despite the record of failure, though sometimes the particular commentator will concede that the political barriers of national security and confidentiality of information and sources are probably insuperable for assuring rights to a fair hearing and effective judicial review.[218]

Altogether, the judicial challenges and critiques inside and outside the United Nations no doubt undermine the legitimacy and efficacy of UN listing targeted sanctions. This has been repeatedly acknowledged, within the United Nations itself, and of particular note by the Monitoring Team charged with reviewing the listing process and reporting on low levels of compliance.[219] And the negative impact is no

214. *See* de Búrca, *supra* note 175, at 31 (discussing different judicial approaches to due process protection, and how the approach of the ECHR is disappointing in its abdication of monitoring compliance with human rights).

215. *See* Genser & Barth, *Targeted Sanctions*, *supra* note 45, at 220–34 (discussing the role of the ombudsperson while acknowledging the limited binding authority of an ombudsperson's decision).

216. *See generally* Eckes, *supra* note 213; Peter Hilpold, *UN Sanctions Before the ECJ: The Kadi Case* at 18–53, Antonios Tzanakopoulos, *Domestic Court Reactions to UN Security Council Sanctions* at 54–76, Jan Wouters & Pierre Schmitt, *Challenging Acts of Other United Nations' Organs, Subsidiary Organs, and Officials* at 77–110, and Jean d'Aspremont & Catherine Brölmann, *Challenging International Criminal Tribunals Before Domestic Courts* at 111–36, *in* CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (August Reinisch ed., 2010).

217. Eckes, *supra* note 213, at 180.

218. *See* ERIC ROSAND ET AL., CTR. ON GLOBAL COUNTERTERRORISM COOPERATION, HUMAN RIGHTS AND THE IMPLEMENTATION OF THE UN GLOBAL COUNTER-TERRORISM STRATEGY: HOPES AND CHALLENGES 19–20 (2008) (discussing how UN Member States must provide relevant parts of the UN and regional bodies with necessary resources and mandates to promote the human rights-based approach to fighting terrorism, and cooperation between UN human rights and UN counterterrorism actors have to improve, particularly through more capable regional bodies in facilitating implementation at the State level); INT'L COMM'N OF JURISTS, *supra* note 67, at 161–162 (recognizing the importance of intelligence agencies gathering confidential information); FASSBENDER, *supra* note 23, at 28 ("Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve."); WATSON REPORT 2009, *supra* note 24, at 19 ("[A]ny advisory mechanism should have clear and specific regulation in place to deal with classified and other sensitive information."); Cameron, *supra* note 14, at 210 (contemplating that States will need to ensure the safety of their confidential information sources in a reformed sanctions regime).

219. *See, e.g.*, Analytical Support and Sanctions Monitoring Team, Thirteenth Report of the Analytical Support and Sanctions Implementation Monitoring Team Submitted Pursuant to Resolution 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, paras. 12, 14, 36 U.N. Doc. S/2012/968 (Dec. 31, 2012) [hereinafter Monitoring Report 2012] (acknowledging that increased due process security is weakening the UN sanctions regime); Analytical Support and Sanctions Monitoring Team, Ninth Report of the Analytical Support and Sanctions Monitoring Team, Submitted Pursuant to Resolution 1822 (2008) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, para. 16, U.N. Doc. S/2009/245 (May 13, 2009) (finding that some States have questioned the effectiveness and legitimacy of the

doubt worldwide,[220] as exemplified by the fact that illegitimacy exposed under the lens of the ECHR also constitutes illegitimacy under similar conventions for Latin America and Africa.[221] This global accounting can be expected to translate at the enforcement level into a lack of enthusiasm among the customs authorities, export control agencies, and financial regulatory and policing authorities worldwide, who naturally are most attuned to local sensibilities of fairness, despite the critique emanating from the courts of the governments most interested in targeted sanctions. Also of note is that the untoward consequences are not limited to difficulties of enforcement. It has been observed that many States are unwilling to propose names to the Sanctions Committee, in light of the due process deficiencies.[222] The net impact, therefore, of implementation of targeted sanctions through UN listing is not the omnipresence claimed to compensate for the due process deficiency of the UN listing process, but universally diminishing effectiveness. It is therefore time to consider whether there is an alternative means that can avoid this undermining of targeted sanctions.

V. THE ALTERNATIVE

For finding the alternative, first, it must be recognized that a Security Council targeting resolution can provide the legitimacy that its ubiquity affords without drawing in the due process dilemma of UN listing. It is not targeting by the United Nations, as such, that is the problem. The due process dilemma results from having the listing process at the level of the United Nations and its sanctions committees.[223] There, the national and regional standards of due process may be awkwardly negotiated to respond to particular due process challenges.[224] But because the UN process is driven by political considerations, it cannot finally be reconciled to those standards. The question, therefore, is whether listing need occur at the level of the United Nations.

In fact, listing need not occur at the UN level because targeting involves few States. On the side of implementation, given that targeting requires the freezing of assets and exercise of financial controls through major banks, the same small group of States is generally involved.[225] Also, *compliance* need not involve a multiplicity of

---

sanctions regime).

220. WATSON REPORT 2009, *supra* note 24, at 5 (noting the trajectory of the case law giving precedence to human rights in the litigation generated under targeted sanctions regimes, the Watson Report concludes: "Should the current trajectory of court challenges continue without adequate response, the Security Council's ability to take action against threats to international peace and security could be severely compromised").

221. *See* Cameron, *supra* note 14, at 214 ("[The ECHR], like the similar regional conventions for Latin America and Africa, constitutes the minimum shared standard of rights for the region. It is a symbol of what the states in question regard as acceptable.").

222. *See* Monitoring Report 2012, *supra* note 219, para. 39 ("[D]espite all these efforts to improve the List and the procedures for listing and delisting, more States have not come forward with the submission of names.").

223. WATSON REPORT 2009, *supra* note 24, at 35.

224. *See id.* (noting some courts' hesitancy to completely invalidate a UN sanctions committee decision even after finding due process violations under national law).

225. Analytical Support and Sanctions Monitoring Team, Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1617 (2005) and 1735 (2006) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, para. 58, U.N. Doc. S/2007/677 (Nov. 29, 2007) [hereinafter Monitoring Report 2007].

States.[226] Most of the assets frozen are contained in only a small group of States.[227] Implementation of a particular targeting does not require action by the multi-score membership of the United Nations. Typically it operates through a bilateral, or not much more than a trilateral, dynamic.[228] On the side of designation, it is usually the United States or a few close allies applying leverage against a target.[229] On the enforcement side, execution must occur in the jurisdiction or jurisdictions where assets are located.[230] Leverage against targets comes largely from the United States and close allies, acting as the designating States by means of the U.S. Treasury Department and allied financial ministries, leveraging the global financial system.[231] The true testing of targeting, therefore, is not at the level of the United Nations Security Council, its sanctions committees, or the broader membership. It is at the level of actual financial implementation where the challenges—not just due process for individual targets, but also for large multinational institutions contending with disclosure issues and the costly compliance and self-policing that may be required—are directly faced.[232] This is where the targeting of sanctions encompasses large complex value transfer systems, such as the Society for Worldwide Interbank Financial Telecommunication (SWIFT) network that connects banks through the U.S. Fedwire, or the U.K. Clearing House Automated Payment System, and credit transfers that may involve multiple transactions that affect the entire global financial system.

Under U.S. domestic law, the power of the federal government to implement targeted sanctions is derived from a panoply of statutes and executive orders.[233] Besides the usual criminal law enforcement bureaucracy, listing of targets by the government of the United States is implemented through a complex, interrelated

226. *Id.* The Monitoring Team also noted in its 2012 Report, "[t]here have been few reports of Member States taking specific action against listed parties, whether by freezing their assets, stopping them at borders or preventing their access to the means of attack.... The Committee has often expressed disappointment at this apparent lack of impact and has questioned the true commitment of States to implement the measures." Monitoring Report 2012, *supra* note 219, para. 27.

227. Thus the UN Sanctions Monitoring Team for the 1267 anti-terrorism regime has estimated that over ninety-five percent of the total value of the assets frozen to that time resulted from freezing actions of only nine States. Monitoring Report 2007, *supra* note 225, para. 58.

228. *See* MIKAEL ERIKSSON, TARGETING PEACE: UNDERSTANDING UN AND EU TARGETED SANCTIONS 1 (2011) (noting the high number of bilateral and multilateral sanctions regimes).

229. *See, e.g.*, Steven R. Weisman, *U.S. Pursues Tactic of Financial Isolation*, N.Y. TIMES (Oct. 16, 2006), http://www.nytimes.com/2006/10/16/world/asia/16sanctions.html?_r=0 (reporting the United States's unilateral imposition of sanctions against North Korea and Iran).

230. *See* Monitoring Report 2012, *supra* note 219, para. 28 ("States often face difficult decisions about how to treat listed parties present within their jurisdiction.").

231. *See, e.g.*, Weisman, *supra* note 229 (reporting how the United States and China applied financial pressure against North Korea).

232. *See* Monitoring Report 2007, *supra* note 225, paras. 72–75 (noting that States face great difficulty in enforcing sanctions against assets held by means of complicated financial instruments).

233. The principal statutes for U.S. unilateral sanctions are the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–06 (2006), and Title III of the USA PATRIOT Act, International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. The principal executive order is Exec. Order No. 13224, 66 C.F.R. 186 (2001). In addition, see generally the Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No 107–197 § 301, 116 Stat. 721, which added to the offenses of material support in 18 U.S.C. § 2339A; the Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103–322, § 120005, 108 Stat. 1982; 18 U.S.C. § 2339B (2009); and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 303, 110 Stat. 1214.

network of bureaucracy and law.[234] This most prominently includes export controls under the Arms Export Control Act of 1976,[235] the U.S. Terrorist Finance Tracking Program,[236] and the Financial Crimes Enforcement Network of the U.S. Treasury Department's Office of Terrorism and Financial Intelligence, which monitors currency transactions.[237] This is the legal foundation that has enabled the United States to develop an enforcement capacity that parallels the UN Chapter VII mandates on the critical matters of anti-terrorism, counter-proliferation of weapons of mass destruction, international drug trafficking, and related money laundering.[238] Yet as to effectiveness, relative to the due process dilemma of UN listing, U.S. domestically orchestrated process has proved remarkably effective without provoking a due process dilemma of the irreducible nature of UN listing.[239]

The Office of Foreign Assets Control (OFAC) of the U.S. Treasury Department is specifically charged with administering and enforcing sanctions against listed persons and organizations suspected of terrorism.[240] But OFAC has a much broader coordinative position in effectuating U.S. targeted sanctions, working in consultation with the State Department and other federal agencies.[241] Key to its efforts is maintenance of what is effectively a blacklist.[242] The "SDN" list of "Specially Designated Nationals and Blocked Persons"[243] is a list of individuals, companies, and other entities whose assets are blocked, generally on the basis that they are owned or controlled by, or acting for or on behalf of, sanctioned countries, or are designated under non-country-specific programs such as programs countering terrorism and narcotics trafficking.[244] U.S. domestic listing is the trigger that precludes U.S. persons from engaging in transactions with targeted individuals or entities.[245]

---

234. Diaz, *supra* note 3, at 352–53.

235. Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified at 22 U.S.C. §§ 2751–99 (1997)).

236. *Legal Authorities Underlying the Terrorist Finance Tracking Program*, U.S. DEP'T OF THE TREASURY, www.treasury.gov/press-center/press-releases/Documents/legalauthoritiesoftftp.pdf (listing legal authorities enabling the U.S. Treasury Department to investigate terrorist networks).

237. FINANCIAL CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/ (last visited Nov. 1, 2015).

238. *See, e.g.*, Diaz, *supra* note 3, at 334–35 (illustrating parallels between UN and U.S. counterterrorism enforcement authority); GARVEY, *supra* note 117, at 80 (recommending a universal approach to nonproliferation); FINANCIAL CRIMES ENFORCEMENT NETWORK, *supra* note 237 (describing "FinCEN's mission . . . to safeguard the financial system from illicit use and combat money laundering and promote national security").

239. Diaz, *supra* note 3, at 360.

240. *Office of Foreign Assets Control*, U.S. DEP'T OF THE TREASURY (Mar. 4, 2015, 4:26 PM), http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx.

241. *OFAC FAQs: General Questions*, U.S. DEP'T OF THE TREASURY (May 11, 2015, 3:26 PM), http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic.

242. *See OFAC FAQs: Sanctions Lists and Files,* U.S. DEP'T OF THE TREASURY (July 10, 2015, 10:35 AM), http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_lists.aspx (explaining that Specially Designated Nationals (SDNs) "are blocked pursuant to the various sanctions programs administered by OFAC").

243. *Specially Designated Nationals and Blocked Persons List*, U.S. DEP'T OF THE TREASURY (Oct. 20, 2015), http://www.treasury.gov/ofac/downloads/t11sdn.pdf.

244. *OFAC FAQs: Sanctions Lists and Files*, *supra* note 242.

245. *Id.*

OFAC and its associated offices in the Treasury have experienced a two-fold expansion in their intelligence and research capabilities in the last two decades.[246] Most significant is the extension of OFAC's reach in influencing the global financial system, as in 2001, when the U.S. Treasury established a key relationship with SWIFT, the primary messaging service for financial transactions communicated between member banks.[247] SWIFT is an organization based in Brussels that holds information for about 10,000 financial institutions and acts as a key facilitator for the millions of electronic financial transactions that take place each day.[248] Also now in the OFAC armory is Clearing House Interbank Payment System (CHIPS), which is the main domestic electronic funds transfer system in the United States for processing U.S. dollar wire transfers between international banks and other financial institutions.[249] About 95% of dollar cross-border transactions are settled through CHIPS,[250] which also operates as a form of private monitoring by financial institutions.[251]

The terms of the relationship with SWIFT authorize the U.S. Treasury to issue detailed subpoenas to SWIFT, "seeking information on suspected international terrorists or their networks" and granting unique access to information on flow of funds.[252] In 2004, the Office of Intelligence and Analysis was created within the U.S. Treasury to efficiently integrate the accumulated financial intelligence.[253] By these means, the Treasury generates leads on illicit activity and criminal or terrorist networks.[254] Investigations pursuing the leads often provide the Treasury with the information that serves as the basis for adding individuals and entities to the SDN list.[255]

---

246. *Terrorist Finance Tracking Program (TFTP)*, U.S. DEP'T OF THE TREASURY (May 7, 2014, 10:24 AM), http://www.treasury.gov/resource-center/terrorist-illicit-finance/Terrorist-Finance-Tracking/Pages/tftp.aspx; FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, FEASIBILITY OF A CROSS-BORDER ELECTRONIC FUNDS TRANSFER REPORTING UNDER THE BANK SECRECY ACT 61–62 (2006).

247. *Terrorist Finance Tracking Program (TFTP)*, *supra* note 246 (noting that SWIFT is the United States's preferred source of information about international transactions).

248. *Company Information*, SWIFT, http://www.swift.com/about_swift/company_information/company_information# (last visited Nov. 2, 2015).

249. *See* FINANCIAL STABILITY OVERSIGHT COUNSEL, 2012 ANNUAL REPORT 146 (2012) (describing Clearing House Interbank Payment System (CHIPS) as "the only private sector system in the United States for settling large-value U.S. dollar payments continuously throughout the day" by financial institutions, including banks).

250. *CHIPS*, FED. RES. BANK N.Y. (Apr. 2002), http://www.newyorkfed.org/aboutthefed/fedpoint/fed36.html.

251. *See* ROBERT T. CLAIR, FED. RES. BANK DALL., THE CLEARING HOUSE INTERBANK PAYMENTS SYSTEM: A DESCRIPTION OF ITS OPERATION AND RISK MANAGEMENT 7–8 (1989) ("The CHIPS inquiry system permits a participant to obtain the status of all the incoming and outgoing payments with respect to an individual account serviced by the participant.").

252. *Terrorist Finance Tracking Program (TFTP)*, *supra* note 246.

253. Press Release, U.S. Dep't of the Treasury, Fact Sheet: Combating the Financing of Terrorism, Disrupting Terrorism at Its Core (Sept. 8, 2011), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1291.aspx.

254. *Terrorist Finance Tracking Program (TFTP)*, *supra* note 246.

255. *See* Press Release, U.S. Dep't of the Treasury, Under Secretary for Terrorism and Financial Intelligence Stuart Levey Testimony (Apr. 1, 2008), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp898.aspx ("The Treasury then considers this information with an eye towards potential action—be it a designation, an advisory to the private sector, or a conversation to alert the private sector and government officials in another country to a particular threat.").

An OFAC designation, as the Treasury explains it, "freezes any assets the designee may have under U.S. jurisdiction, denies the targeted entities access to the U.S. financial and commercial systems and puts the international community on notice about the threat posed to global security."[256] This ability to gather and compile credible information has proved to be the cornerstone of the Treasury's leverage over the international financial system.[257]

In comparing U.S. listing and implementation capability to the UN listing process, what is most remarkable is that U.S. listing demonstrates a distinct advantage, while also proving greater efficiency and efficacy.[258] To some extent this is explained by the institutional difference that makes the UN listing process, involving more States both within and without the sanctions committees, relatively slow and contentious.[259] Although the United States or other designating States may exert significant influence within the Security Council and the sanctions committees, the UN process requires accommodation of the divergent interests of other Security Council members.[260] The multilateral fora of the Security Council and its sanctions committees naturally, therefore, achieve lesser agreement than the direct bilateral negotiation between a designating State and an enforcing State as to any particular target.[261]

Targeting and listing as a UN process was adopted, at least in partial response, to the view that UN multilateralism provides an antidote to national bias.[262] But this naturally facile conclusion was an illusion. The UN process is equally as vulnerable as domestic law to national bias, as illustrated by the all-important role of intelligence and its selective use in listing.[263] UN listing, in its dependence on intelligence, is a process that is secondary to and derivative of domestic law listing.[264] The Security Council does not have the technology or other intelligence resources and expertise to determine what individuals and entities must be sanctioned.[265] The Security Council and its sanctions committees rely on the intelligence capabilities of national

256. Press Release, U.S. Dep't of the Treasury, Fact Sheet: Targeted Financial Measures to Protect Our National Security (June 14, 2007), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp458.aspx.

257. *See* Press Release, U.S. Dep't of the Treasury, Under Secretary for Terrorism and Financial Intelligence Stuart Levey Testimony, *supra* note 256 ("[T]he Treasury became the first finance ministry in the world to develop in-house intelligence and analytic expertise to use this information.").

258. *See* Diaz, *supra* note 3, at 342, 352–53 (comparing the unilateral listing process enacted through the Executive Branch of the United States with the requirement of consensus in the Security Council).

259. *See id.* at 342 ("Listing decisions are generally taken by consensus.").

260. *Id.*; *see also* Ambassador Richard Holbrooke, U.S. Special Rep. for Afghanistan and Pakistan, Readout on the January 28 London Conference on Afghanistan (Feb. 3, 2010), *available at* http://fpc.state.gov/136466.htm (noting that unilateral delisting is impossible since France, the United Kingdom, China, and Russia have a veto on United States efforts).

261. *See* Diaz, *supra* note 3, at 374–75 (discussing the difficulty of achieving a consensus between all members of the Security Council).

262. *See* CHIARA GIORGETTI, LISTING AND DE-LISTING OF TERRORIST ORGANIZATIONS: THE CASE OF THE UNITED NATIONS AND THE UNITED STATES OF AMERICA 8–9 (2006) (noting that any addition or modification to the list is subject to objection by any Member State on the Committee).

263. *See* WATSON REPORT 2009, *supra* note 24, at 7 ("Even if the designation was based on classified intelligence not made available to other members of the Council, as was the case with many of the US designations during this period, there was little or no questioning or opposition.").

264. *See* Addis, *supra* note 3, at 200–01 (noting that domestic executive decisions regarding listing, which depend on intelligence gathered by domestic sources, direct the overall UN sanctions process).

265. *See* Genser & Barth, *Targeted Sanctions*, *supra* note 45, at 225 (noting that the Security Council has "vigorously exhorted" States to provide information concerning listing decisions).

governmental units, particularly the intelligence received from the largest national intelligence bureaucracy, that of the United States.[266] Having the locus of the listing process within the United Nations thus does not assure any more objective evaluation of intelligence and evidence for listing than does national or regional process.[267]

What is surely true is that the U.S. Treasury Department (and occasionally allied financial ministries of other designating States) has the capacity to effectively target sanctions virtually anywhere, independent of UN involvement.[268] This capacity has developed through the interplay of a variety of factors. Whether listing is multinational or national, it is the U.S. Treasury that possesses the tools and expertise to gather critical financial information to target illicit activity that threatens global security.[269] As home to the "most important financial center in the world,"[270] the U.S. Treasury enjoys a unique position as the "primary interlocutor"[271] between various domestic and international financial institutions. This unique position, coupled with global dependence on the U.S. financial system, allows the U.S. Treasury to harness extraordinary implementing power by controlling access to American markets, banks, and dollars.[272] Most importantly, the Treasury leverages this unique position by compelling governments and the private sector to assess the reputational risks and substantial costs of being linked to illicit activity.[273] It is especially of note that OFAC compliance does not require reliance on governmental real-time monitoring,[274] a task generally conceded to be beyond the capabilities of the UN listing infrastructure.[275] Instead, compliance is secured through private sector monitoring of transactions and self-reporting of actual or potential sanctions violations by U.S. and foreign financial institutions participating in the payment systems.[276] A financial institution that receives property in which an SDN listing has an interest, such as a payment instruction, must

266. Listing proposals are initiated by UN Member States, which provide the 1267 Committee with information justifying the listing. GIORGETTI, *supra* note 262, at 8. The United States actively uses 1267 sanctions under the authority of the Security Council. Vanessa Baehr-Jones, *Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions*, 2 HARV. NAT'L SECURITY J. 447, 453 (2011).

267. *See* Baehr-Jones, *supra* note 266, at 452–53 (noting that the 1267 Committee may not have been given concrete evidence to support all listing decisions and describing criticism of the Committee's secretive approach to listing); Addis, *supra* note 3, at 200–01 (stating that the Committee is not "an independent decision maker" because it relies on information from Member States).

268. Henry M. Paulson, Sec'y of the Treasury, U.S. Dep't of the Treasury, C. Peter McColough Roundtable Series on International Economics: A Conversation with Henry M. Paulson, Jr. (June 14, 2007), http://www.cfr.org/international-finance/c-peter-mccolough-roundtable-series-international-economics-conversation-henry-m-paulson-jr/p34270 [hereinafter Paulson Statement].

269. *Id.*

270. JUAN C. ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 150–51 (2013).

271. *Id.* at 137.

272. CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L L. 849, 877–78 (2009).

273. *Id.*

274. *OFAC FAQs: Sanctions Compliance*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx (list updated May 11, 2015, 3:24 PM).

275. *See* Monitoring Report 2012, *supra* note 219, at 12 (lamenting instances of State non-compliance with UN listing).

276. *OFAC FAQs: Sanctions Compliance*, *supra* note 274.

freeze the property or reject a transaction depending on its classification, and report its compliance to OFAC.[277]

The United States remains the world's largest economy, with a GDP almost twice that of China, the second largest economy.[278] The dollar is the dominant currency for international trade,[279] and New York is the most significant financial center in the world.[280] The economic power this represents gives the U.S. Treasury a uniquely significant capacity to influence other finance ministries, central banks, financial regulators, the International Monetary Fund (IMF), the World Bank, regional development banks, and major banks in the United States and around the world.[281] It provides the wherewithal to communicate directly with these institutions without having to notify or obtain prior approval from any home government.[282]

This constitutes a critical significant advantage over UN listing in that effectiveness does not require governmental compliance. A detailed study of the U.S. Treasury's operations concludes that "direct outreach to a country's key private financial institutions can yield results much more quickly than does outreach to that same country's government, which can lack political will or the necessary authority, or may face cumbersome bureaucratic procedures for exercising whatever relevant authorities it does have."[283]

This ability to sidestep State actors also avoids the principal hurdle the United States faces when pursuing sanctions at the UN level.[284] Russia and China, both notoriously averse to targeted sanctions, frequently hinder U.S. efforts for swift, vigorous measures because Security Council Resolutions require member consensus.[285] By contrast, the capacity of the U.S. Treasury to communicate directly with foreign financial institutions allows the Treasury to influence nations from the inside.[286] Financial institutions whose managers are made apprehensive by the U.S. Treasury acting through financial means alone will pressure their political leadership,

---

277. *Id.*

278. Satyajit Das, *Why the U.S. Will Survive the End of Globalization*, MARKETWATCH (May 7, 2013, 12:01 AM), http://www.marketwatch.com/story/why-the-us-will-survive-the-end-of-globalization-2013-05-07.

279. Matthew Boesler, *There Are Only Two Real Threats to the US Dollar's Status as the International Reserve Currency*, BUS. INSIDER (Nov. 11, 2013, 12:04 PM), http://www.businessinsider.com/dollar-as-international-reserve-currency-2013-11?op=1.

280. John Glover, *New York Strips London of Mantle as World's Top Financial Center*, BLOOMBERG BUS. (Mar. 16, 2014, 6:01 PM), http://www.bloomberg.com/news/articles/2014-03-15/new-york-steals-london-s-mantle-as-world-s-top-financial-center.

281. *See generally* Ngaire Woods, *The United States and the International Financial Institutions: Power and Influence Within the World Bank and the IMF*, in US HEGEMONY AND INTERNATIONAL ORGANIZATIONS: THE UNITED STATES AND INTERNATIONAL INSTITUTIONS 92 (Rosemary Foot et al. eds., 2003).

282. *See, e.g., id.* at 111 (noting that the U.S. Treasury uses its staff to influence other members of the International Monetary Fund (IMF)).

283. Orde F. Kittrie, *New Sanctions for a New Century: Treasury's Innovative Use of Financial Sanctions*, 30 U. PA. J. INT'L L. 789, 820 (2009).

284. *See, e.g., id.*,at 792 (giving examples of weak UN sanctions).

285. Rick Gladstone, *Friction at the UN as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES (July 20, 2012), http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html?_r=0.

286. *See* Kittrie, *supra* note 283, at 820 (describing how the U.S. Treasury reached out to foreign private financial institutions to take steps against Iran).

transmuting financial self-interest to an expression of national interest.[287] As a result, otherwise uncooperative governments will often aid compliance.[288]

The dollar is an important element in this exercise of power (and to a lesser degree, the same can be said of other hard currencies, such as the Euro).[289] The Treasury's influence on the international level is supported by global dependence on the dollar.[290] Since global trading occurs in dollars, parties require continued access to this currency through American banks and markets to facilitate their transactions.[291] Even when parties do not directly transact with the United States, they still rely on mechanisms such as dollar-clearing functions to conduct their commercial dealings.[292] "U-turn" transactions, for example, enable a buyer to transfer funds to a U.S. bank and then instantly have those funds deposited into a foreign bank account located abroad.[293] This can be an important vehicle for leverage. In this and many other dollar-dependent ways, international trade transactions touching the U.S. financial system can be affected, providing the U.S. government with the ability to obtain the information and the control necessary for effective enforcement of targeted sanctions.[294]

The U.S. Treasury, of course, exercises direct legal control over U.S. based financial institutions whereby it can require banks and other financial institutions to freeze assets, close accounts, and enforce regulatory measures, such as screening clients and transactions.[295] However, the power of the U.S. Treasury to effectuate sanctions extends globally and goes beyond just the fear of losing access to the U.S. financial system.[296] The Treasury's power to effectuate targeted sanctions on a global basis lies mainly in its capacity to compel private sector interests, and in turn their governments, to assess the substantial costs of the reputational risks of being linked to illicit activity.[297]

Section 311 of the USA PATRIOT Act grants the Secretary of the Treasury the authority to designate a "foreign jurisdiction, institution, class of transaction, or type of account" as a "primary money laundering concern."[298] This designation requires domestic financial institutions to cut ties with designated entities, which effectively shuts these entities out of the U.S. financial system.[299] These designations often make

287. *Id.*

288. *Id.* at 800.

289. *Id.* at 817.

290. *Id.*

291. Das, *supra* note 278.

292. *See* Kittrie, *supra* note 283, at 817–19 (detailing examples of commercial banks converting foreign currency of restricted countries into dollars).

293. *See id.* at 818–19 (describing incidents in which "funds were being channeled through U.S. banks to foreign vendors requesting payment in dollars").

294. *See id.* at 817 (revealing how the U.S. Treasury cooperates with banks domestically and internationally to monitor illicit transactions).

295. ZARATE, *supra* note 270, at 137.

296. *Id.*

297. *Id.*

298. Press Release, U.S. Dep't of the Treasury, Fact Sheet: Overview of Section 311 of the USA PATRIOT Act (Feb. 10, 2011), http://www.treasury.gov/press-center/press-releases/Pages/tg1056.aspx.

299. David Lague & Donald Greenlees, *Squeeze on Banco Delta Asia Hit North Korea Where It Hurt*, N.Y. TIMES (Jan. 18, 2007), http://www.nytimes.com/2007/01/18/world/asia/18iht-

an impact beyond the jurisdictional limits of the United States, in that foreign institutions take their cues from American banks and agencies.[300] Although they are not obligated to screen their customers and transactions against the U.S. list of primary laundering concerns, they do so.[301] Blacklisted entities become "financial pariahs" isolated from the international financial system.[302] Though action under Section 311 is a domestic regulatory action, it enables the U.S. Treasury to extend its reach globally with great effect, rendering U.S. blacklisting de facto international blacklisting.[303]

This will occur even where a government-to-government appeal or a UN Security Council mandate of targeted sanctions is not likely to have been effective.[304] From its Section 311 experience, the U.S. Treasury quickly learned that foreign financial institutions could be sufficiently motivated to effectively enforce targeted sanctions without any official action or involvement of their home government.[305] Capitalizing on this, Treasury officials meet with the CEOs and compliance officers of foreign financial institutions to share critical financial intelligence that can impact that institution's legitimacy for access to the global financial system.[306] Presented with information that suggests illicit activity, these institutions will move on their own.[307] Moreover, such voluntary implementation by the private sector may also impel the home government to impose complementary compliance measures in response to the concerns expressed by its private economic interests.[308] This phenomenon has been characterized by former U.S. Secretary of the Treasury Henry Paulson as "a mutually reinforcing cycle of public and private action."[309]

---

north.4255039.html?emc=eta1.

300. Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 35 (1998).

301. Paulson Statement, *supra* note 268.

302. ZARATE, *supra* note 270, at 240.

303. *See* Paulson Statement, *supra* note 268 (listing examples of how the U.S. Treasury has used Section 311 of the PATRIOT Act to organize financial measures against terrorists).

304. *See* Fitzgerald, *supra* note 300, at 37 ("Blacklisting is very easy to employ, and very amenable to targeting specific parties abroad who might otherwise be beyond the reach of U.S. processes.").

305. *See* Paulson Statement, *supra* note 268 (providing examples of 311 action).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* As Paulson explains it, "When we use targeted financial measures aimed at explicit wrongdoing, the private sector around the world tends to support these measures thereby amplifying their effectiveness. Rather than grudgingly complying with, or even trying to evade our sanctions, we have seen the banking industry in particular voluntarily go above and beyond their legal requirements because they do not want to do business with terrorist supporters, money launderers or proliferators. This is a product of good corporate citizenship and a desire to protect their institution's reputation. Once some in the private sector decide to cut off those we have targeted, it becomes an even greater reputational risk for others not to follow, and so they often do. Such voluntary implementation by the private sector in turn makes it even more palatable for governments to impose similar measures, thus creating a mutually-reinforcing cycle of public and private action. In the end, if we do our jobs well, especially by sharing critical information with the key governmental and private sector parties around the world, there is the potential for us to create a multilateral coalition to apply significant pressure on those who threaten our security. . . . Treasury can effectively use these tools largely because the U.S. is the key hub of the global financial system; we are the banker to the world." Press Release, *Remarks by Treasury Secretary Paulson on Targeted Financial Measures to Protect Our National Security* (June 14, 2007), http://www.treasury.gov/press-center/press-releases/Pages/hp457.aspx.

Most notably, in contrast to UN listing, targeting sanctions through the U.S. Treasury or other financial ministries on the designating side of listing does not provoke any due process dilemma akin to the clash between a Security Council targeting resolution and domestic law standards of the jurisdiction called upon for implementation. In the UN Sanctions regime, each nation involved—the designating State(s) and the State(s) of enforcement—imposes its own due process constraints before any targeting can be imposed.[310] By contrast, targeting by the U.S. Treasury contacting another national ministry does not challenge an international legal process or "international due process." It is a matter of nation-to-nation request—and, in the event of due process contention, negotiation—which may or may not result in compromise of due process.[311] However, the Treasury targeting experience does demonstrate dramatically positive results, against which the uneven cooperation of States in response to UN listing stands in stark contrast.[312]

An outstanding example is when, in September 2005, the U.S. Treasury designated Banco Delta Asia (BDA) as a primary laundering concern under Section 311 of the PATRIOT Act for its role in facilitating North Korean drug trafficking, counterfeiting, nuclear technology, and laundering of hundreds of millions of dollars.[313] This designation required American financial institutions to cut ties with BDA, effectively banning it from the U.S. financial system.[314] But the Treasury designation also signaled to the international financial community that BDA was deeply implicated in illicit activity, sending shock waves throughout the banking world and triggering a run on the bank.[315] Within six days of BDA's designation, panicked customers across eight branches withdrew about $133 million, depleting thirty-four percent of its deposits.[316] After the Treasury's designation of BDA, Treasury officials visited China, Hong Kong, Macao, Singapore, South Korea, and Vietnam to convince other banks to cut ties.[317] The Macao government quickly took control of the bank, freezing about $25 million in accounts related to North Korea, and moved quickly to end the bank's ties with that country.[318] The Bank of China in Macao paralleled that action by freezing a number of its North Korean accounts.[319] This was despite

310. *See* FASSBENDER, *supra* note 23, at 22 (explaining that UN rules are not self-executing, but must be implemented behind the requirements of domestic laws).

311. *Id.* at 6 (noting that "[s]ince the United Nations is not a party to any universal or regional treaty for the protection of human rights, it is not directly bound by the respective treaty provisions guaranteeing rights of due process" in the context of targeted sanctions).

312. *See, e.g.*, WATSON REPORT 2006, *supra* note 67, at 30 (discussing how while "relying on relevant Member States to notify targets works effectively in many instances, it can be ineffective when Member States lack the general capacity or the will to carry out a committee's request for notification").

313. Press Release, U.S. Dep't of the Treasury, Treasury Designates Banco Delta Asia as Primary Money Laundering Concern Under USA PATRIOT Act (Sept. 15, 2005), *available at* http://www.treasury.gov/press-center/press-releases/Pages/js2720.aspx.

314. *Id.*

315. Lague & Greenlees, *supra* note 299.

316. *Id.*

317. *Id.*

318. *Id.*

319. Jay Soloman & Neil King Jr., *How U.S. Used a Bank to Punish North Korea: Nuclear Talks Are Said to Proceed, as Macau Frees Frozen Accounts*, WALL ST. J. (Apr. 12, 2007, 12:01 AM), http://www.wsj.com/articles/SB117627790709466173.

objections from Chinese officials who wanted to support North Korea.[320] The risk of losing access to the U.S. financial system made the freeze effective, despite any governmental reluctance.[321] Similarly, banking centers around the world moved to close or freeze North Korean bank accounts and transactions, fearing any kind of association with the Treasury's blacklisted target.[322] The Treasury's Section 311 action isolated Pyongyang to an unprecedented degree.[323] Very soon, more than two dozen financial institutions across the globe voluntarily cut back or terminated their business with North Korea.[324]

This action was not in compliance with a U.S. freeze order, nor was it pursuant to a UN Resolution, so it did not raise due process issues under domestic law or in relation to the UN listing process.[325] BDA had no assets in the United States and the United States had no power to require Macao to freeze North Korea's $25 million in assets.[326] However, the mere designation by the Treasury prompted a dynamic change in the status and viability of the targeted bank.[327] The private sector acted on its own to protect reputational interest.[328] The result was a resounding implementation of sanctions that sent a message well beyond what UN listing might have accomplished.[329]

U.S. Treasury listing of Iranian interests has shown similar results—similarly in contrast to UN listing.[330] The United States has been sanctioning Iran since the Iran hostage crisis of 1979.[331] However, unlike North Korea, Iran is not commercially isolated and boasts a sophisticated and variegated economy.[332] As a major supplier of energy resources and oil, Iran has maintained strong ties with major economic powers such as Germany, China, South Korea, and other parts of Asia and Europe.[333] The

320. *See* Josh Meyer, *Squeeze on North Korea's Money Supply Yields Results*, L.A. TIMES (Nov. 2, 2006), http://www.latimes.com/world/la-fg-macao2nov02-story.html (explaining that China is "jockeying to someday collaborate with a friendlier North Korea on economic and military issues").

321. *See* Lague & Greenlees, *supra* note 299 ("The United States has not released any evidence to support its accusations against Banco Delta Asia and has yet to make a final ruling, but the bank's fate serves as a warning that a threat from Washington alone can wreak financial havoc.").

322. *Id.*

323. *Id.*

324. *Id.*

325. A senior U.S. official stated that, "What Banco Delta Asia demonstrates is that once you find yourself in this tar pit, it's almost impossible to extract yourself. That has huge implications for banks we've targeted in Iran." Steven R. Weisman, *The Ripples of Punishing One Bank*, N.Y. TIMES (July 3, 2007), http:www.nytimes.com/2007/07/03/business/worldbusiness/03bank.html?_r=0#.

326. *See id.* ("The United States never froze the North Korean funds in the bank.... That was done by authorities in Macao. By labeling Banco Delta Asia a money launderer for the North's illicit activities, no reputable bank would do business with it.").

327. *Id.*

328. *Id.*

329. Kittrie, *supra* note 283, at 800 (discussing how the U.S. Treasury has found ways to maximize its effectiveness by working outside the UN Security Council).

330. *Id.* at 792–93.

331. *Id.* at 804.

332. *See id.* at 796 (noting Iran's integration in and use of the international financial system to support terrorist activities).

333. *See id.* at 812 (naming France, Germany, and Italy as encouraging and facilitating trade with Iran); Naser al-Tamimi, *Why China Is Still Dealing with Iran?*, AL ARABIYA NEWS (Feb. 10, 2013), www.alarabiya.net/views/2013/02/10/265463.html (naming China as a major trade partner with Iran, particularly with regard to oil); I-wei Jennifer Chang, *The Iran Sanctions and South Korea's Balancing Act*, MIDDLE E. INST. (June 2, 2014), www.mei.edu/content/map/iran-sanctions-and-south-korea's-balancing-act

world's dependence on oil has consistently provided Iran with access to international markets and business relationships, and has also served as Iran's greatest defense to financial pressure.[334] However, Iran's global oil trade has depended on its banks having access to dollar-clearing functions, being able to facilitate and sustain its commercial dealings, and being able to provide lines of credit, correspondent accounts, and account access around the world.[335] Thus, despite its economic strengths, Iran has proved highly vulnerable to U.S. financial assault.[336]

In September 2006, the U.S. Treasury blacklisted Bank Saderat Iran after it found that $50 million had been transmitted through a London subsidiary of the bank to a charity affiliated with the Hezbollah in Lebanon.[337] The United States pushed for a UN Resolution to reinforce its efforts, but was met with staunch opposition from Russia and China.[338] Negotiations delayed the process and ultimately watered-down sanction provisions were adopted.[339] U.S. officials, having been unable to develop adequate UN pressure, then employed unilateral sanctions.[340] In 2007, the Treasury added Bank Sepah and Bank Mellat to its listing for alleged financing of projects to develop missiles that could carry nuclear weapons.[341] In 2008, Bank Melli, one of Iran's largest banks, was added for financing Iranian defense industries in violation of UN sanctions.[342] Also in 2008, the Treasury extended its program by designating Banco Internacional de Desarrollo, C.A. (Venezuela) and the Export Development Bank of Iran.[343] By 2012, the U.S. Treasury had targeted sixteen Iranian banks.[344]

The banking community reacted immediately to each designation.[345] Three major Japanese lenders decided to halt dollar business with Bank Saderat Iran in order to stay "in line with US financial sanctions."[346] Several major European institutions,

---

(naming South Korea as a major trading partner of Iran).

334. *See* Emma Farge et al., *Exclusive: Iran Crude Oil Exports Rise to Highest Since EU Sanctions*, REUTERS, (Jan. 31, 2013, 3:04 AM), http://www.reuters.com/article/2013/01/31/us-iran-oil-exports-idUSBRE90U01Y20130131 ("But continuous robust demand from top buyer China and others such as India and Japan, as well as the purchase of new tankers, allowed [Iran] to unexpectedly boost exports late last year.").

335. ZARATE, *supra* note 270, at 289.

336. *See* Kittrie, *supra* note 283, at 817 ("Although [U.S.] Treasury officials tend to downplay it, international private financial institutions have also likely halted Iran-related business in response to [the] Treasury's outreach because those institutions are concerned that continuation of Iran-related business could result in regulatory penalties such as fines or even loss of access to the U.S. market.").

337. *Id.* at 808–09.

338. *Russia, China Block Iran Resolution*, CBSNEWS (Mar. 4, 2008, 8:49 AM), www.cbsnews.com/news/russia-china-block-iran-resolution/.

339. *See* ZARATE, *supra* note 270,at 331 ("It took months of effort, but on June 9, 2010, the United Nations Security Council passed Resolution 1929, which . . . imposed new sanctions on Iran. Though this resolution was not unanimous, it was important . . . .").

340. *See id.* ("The administration had wanted this resolution to validate the additional pressure to come, which was viewed by many in Washington as 'unilateral' without the cover of UN action, and it succeeded in doing that.").

341. *Id.* at 303.

342. *Id.* at 304.

343. *Id.*

344. *Id.*

345. *See* Kittrie, *supra* note 283, at 797 (noting that many banks around the world have halted or scaled back business with Iran).

346. Isabel Reynolds, *Japan's Top Banks to Stop Business with Iran*, JERUSALEM POST (Sept. 16,

including Credit Suisse, UBS Switzerland, HSBC in Britain, and ABN Amro in the Netherlands, announced that they would curb "dealings with Iranian banks and businesses."[347] In 2007, Germany's second-largest bank, Commerzbank, ended its dollar-clearing transactions with Iran.[348] Major "banks in Britain, France, Germany, Japan, and Italy curbed business with Iran."[349] "Even banks in Muslim countries, from Bahrain to Malaysia . . . cut back their" Iranian dealings.[350] By 2008, more than eighty banks around the world had cut back their business with Iran.[351] Moreover, the number of foreign banks with branches in Iran dropped from forty-six to twenty between 2006 and 2008.[352]

Considering the possibility of sanctions, no bank outside Iran would have wanted to be accused of supporting Hezbollah. The banks involved changed their behavior on their own, without any sanctions having to be directed at their own jurisdictions or legally implemented there.[353] The entire process, being private, was devoid of any such due process contention as has plagued UN listing. It proved sufficient that the United States had blacklisted certain entities and thereby generated risks that the banks involved were not willing to bear.[354] Similar results have followed without UN listing when banks inside or outside Iran have been sanctioned by the United States for dealing with Iran.[355]

The banking community was not the only sector of the Iranian economy affected by U.S. targeting of Iran.[356] The financial assault on Iran demonstrates a much broader potential of listing through informal pressures tied to processes of domestic law.[357] The U.S. Treasury proceeded to target more than just banks, extending its focus to the shipping and insurance industries.[358] In 2008, the Treasury listed Iran's shipping line—Islamic Republic of Iran Shipping Lines (IRISL)—and eighteen of its subsidiaries for providing the means for Iran to "ship weapons, parts, and equipment tied to its proliferation program"[359] and for providing support to Hezbollah and other terrorist

---

2006), http://www.jpost.com/landedpages/printarticle.aspx?id=35032.

347. Weisman, *supra* note 229.

348. Glenn R. Simpson & David Crawford, *U.S. Effort to Isolate Iran Gains Ground as European Bank Restrictions Take Hold*, WALL ST. J., (Jan 10, 2007, 12:01 AM), http://www.wsj.com/articles/SB116836322857571555.

349. Robin Wright, *Stuart Levey's War*, N.Y. TIMES (Oct. 31, 2008), www.nytimes.com/2008/11/02/magazine/02IRAN-t.html?pagewanted=all.

350. *Id.*

351. *Id.*

352. Steven R. Weisman, *World Group Tells Banks to Beware Deals with Iran*, N.Y. TIMES (Feb. 29, 2008), http://www.nytimes.com/2008/02/29/world/middleeast/29sanctions.html?pagewanted=print.

353. *See* Wright, *supra* note 349 (arguing that caution motivated banks to withdraw from relationships with Iranian businesses).

354. *See* Steven R. Weisman, *Pressed by U.S., European Banks Limit Iran Deals*, N.Y. TIMES (May 21, 2006), http://www.nytimes.com/2006/05/21/world/americas/21iht-iran.html?pagewanted=all (drawing a connection between "handling business for entities engaged in . . . support for terrorism" and U.S. Treasury sanctions).

355. Following the ABN AMRO settlement involving U.S. authorities and a Dutch bank, other banks, including the London-based HSBC, along with Credit Suisse and UBS in Switzerland limited their dealings in Iran to avoid issues under U.S. controls, even though there was no direct UN or European requirement to do so. *Id.*

356. ZARATE, *supra* note 270, at 304.

357. *Id.*

358. *Id.*

359. *Id.* at 304–05.

groups.[360] Treasury officials also exercised informal outreach by visiting insurance companies' CEOs and officers to warn them of the dangers of insuring Iranian cargos,[361] leveraging the market reality that ships without insurance are generally unable to sail, carry goods, or dock. In 2010, Lloyd's of London, a major provider of such insurance, announced that it would stop insuring refined petroleum shipments into Iran.[362] "Lloyd's's general counsel acknowledged, '[t]he U.S. is an important market for Lloyd's .... Lloyd's will always comply with applicable sanctions.'"[363] Other major European insurers, including Allianz, Munich Re, and Hannover Re, committed to ending their business ties with Iran.[364] Iran's energy sector was similarly struck. By 2010, multiple energy companies reduced their ties with Iran, including European oil giants Total, Royal Dutch Shell, LUKOIL, BP, and ENI.[365] Companies such as Reliance, Glencore, Trafigura, and Vitol withdrew their investments.[366] All of these companies, from a variety of economic sectors, found business with Iran not worth the risk.

The United States continued to weaken Iran's economy with each designation and outreach effort. Then, in November 2008, the Treasury dealt a particularly damaging blow to Iran's oil trade. The United States revoked authorization for U-turn transactions involving Iran, prohibiting non-U.S. banks and other financial institutions from facilitating transactions through correspondent American accounts.[367] Since the oil trade moves in dollars, Iran had no way of clearing transactions to complete business deals.[368] Notably, the isolation included jurisdictions that might normally resist U.S. financial pressure.[369] In 2010, the Reserve Bank of India announced that Indian banks could no longer use the Asian Clearing Union (ACU), a regional clearinghouse, to settle payments for Iranian imports.[370] Even China, publicly opposed to U.S. sanctions, reduced its purchases of Iranian oil.[371]

---

360. *Id.* at 304.

361. *Id.* at 305–06.

362. *See* Market Bulletin, Lloyd's, Iran – Market Direction (July 8, 2010), https://www.lloyds.com/~/media/files/the%20market/communications/market%20bulletins/2010/07/y4409.pdf

363. Matthew Levitt, *Financial Sanctions*, U.S. INST. OF PEACE, iranprimer.usip.org/resource/financial-sanctions (last visited Nov. 2, 2015).

364. Juan C. Zarate, *Beyond Sanctions*, NAT'L REVIEW (Sept. 20, 2010, 4:00 AM), http://www.nationalreview.com/article/247033/beyond-sanctions-juan-c-zarate.

365. *Id.*

366. ZARATE, *supra* note 270, at 337.

367. *Id.* at 308.

368. *Id.*

369. *Id.* at 339.

370. Lydia Polgreen & Heather Timmons, *Move to Curb Transactions for Iranian Oil Leaves Indian Companies Scrambling*, N.Y. TIMES (Dec. 30, 2010), http://www.nytimes.com/2010/12/31/world/asia/31india.html; *see also* Mark Landler & Clifford Krauss, *Gulf Nations Aid US to Choke Off Iran Oil Sales*, N.Y. TIMES (Jan. 13, 2012), http://readersupportednews.org/news-section2/330_131/9412_gulf-nations-aid-us-to-choke-off-iran-oil-sales.

371. *See* Erica S. Downs, *China's Oil Cutbacks May Be Only Temporary*, BROOKINGS (July 2, 2012), www.brookings.edu/research/opinions/2012/07/02-iran-oil-downs (reporting China's Iran oil cutbacks); *cf.* David Blair, *Russia and China Warn Against War with Iran*, TELEGRAPH (Sept. 18, 2007), www.telegraph.co.uk/news/worldnews/1563593/Russia-and-China-warn-against-war-with-Iran.html ("While Russia and China have already supported two earlier sanctions resolutions, both are signaling that

In 2011, the U.S. Treasury designated the Central Bank of Iran as a "primary money laundering concern" under Section 311 of the PATRIOT Act.[372] This marked the first time the Treasury ever targeted a central bank.[373] In an unprecedented move, SWIFT announced that it was expelling as many as thirty Iranian financial institutions, including the Central Bank of Iran, from its services.[374] This move severed a crucial means for repatriation of billions of dollars' worth of earnings from the sale of oil and other exports.[375]

VI. RESOLVING THE DUE PROCESS DILEMMA

The proof is thus at hand. Targeting sanctions, so intractable as a matter of UN listing, has achieved success with respect to Iran and North Korea when orchestrated through domestic legal process and allied formal and informal financial mechanisms.[376] The targeting with respect to Iran and North Korea, the two States whose interests are most prominently and consistently the subject of targeted sanctions, makes for convincing demonstration that domestic law listings, which directly engage financial institutions, provide superior means.[377] Domestic law listing is critically more effective in assuring compliance than relying on criminal law implementation of UN listing by Member States.[378] Domestic law listing is also easier because of the better focus in targeting a particular institution. Insofar as intergovernmental cooperation is deemed useful or necessary, the designating State(s) need only persuade the government of the jurisdiction(s) where enforcement is sought, not the Security Council as represented in a UN sanctions committee, where hostile and diverse interests of governments are multiplied.[379]

---

their support for a third cannot be taken for granted.").

372. Press Release, U.S. Dep't of the Treasury, Fact Sheet: New Sanctions on Iran (Nov. 21, 2011), www.treasury.gov/press-center/press-releases/Pages/tg1367.aspx.

373. Press Release, U.S. Dep't of the Treasury, Remarks by Treasury Secretary Tim Geithner on Targeting Iran's Nuclear and Missile Programs (Nov. 21, 2011), http://www.treasury.gov/press-center/press-releases/Pages/tg1368.aspx.

374. Rick Gladstone & Stephen Castle, *Global Network Expels as Many as 30 of Iran's Banks in Move to Isolate Its Economy*, N.Y. TIMES (March 15, 2012), www.nytimes.com/2012/03/16/world/middleeast/crucial-communication-network-expelling-iranian-banks.html.

375. *Id.* SWIFT officials maintain that they were forced by EU sanctions to impose this measure, although the timing suggests the move was also in response to informal pressure. *Id.* According to the *New York Times*, SWIFT's announcement came "a day after [President] Obama, meeting in Washington with Prime Minister David Cameron of Britain, warned Iran to negotiate in good faith at the talks, expected to take place in the coming weeks." *Id.*

376. *See* Kittrie, *supra* note 283, at 819 ("Treasury's conduct-based, intelligence-grounded, targeted financial sanctions have thus far proven to be among the twenty-first century's most effective and important new counterterrorism and counterproliferation tools.").

377. *See generally id.*

378. *See* Gurulé, *supra* note 2, at 62 (arguing that UN economic sanctions suffer from legal challenges and lack of enforcement); Paulson Statement, *supra* note 268 (explaining how the private sector effectively complies with sanctions in order to follow the law and maintain its reputation).

379. *See* Weisman, *supra* note 229 (describing how one official of the U.S. Treasury was able to individually convince governments of foreign countries to exert economic pressure on the targeted nations). Of note in this regard is that any Member State of the United Nations can become a member of the Security Council—even States suspected of supporting terrorism or involvement in money laundering. *See* U.N. Charter art. 23, para. 1 (explaining membership to the Security Council). This also demonstrates the fundamental incompatibility of the political institution of the Security Council and the legitimacy of listing

The big fix for the due process dilemma of UN listing, therefore, is the elimination of UN listing. In its stead, there should and can be reliance on domestic law listings to effectuate the targeting of sanctions. The relative virtue of relying on domestic process is that it works, and it works without generating the due process dilemma of UN listing.

This is true whether compliance is sought directly through governmental cooperation or indirectly through commercial incentive.[380] The targets have full recourse to applicable domestic guarantees of due process, without due process issues being framed as a clash between the regimes of domestic law and international law.[381] Listing exclusively through domestic legal process and bilateral negotiation, of course, does not dispel the due process issues that naturally arise from the tension between national security and individual rights, or assure against denial of due process, as amply evident from the extent and vigor of litigation over targeted sanctions under the various sanctions programs of the United States.[382] But it does avoid the due process dilemma of UN listing that currently undermines targeted sanctions.

Moreover, there are a number of reasons to conclude that due process would be fundamentally enhanced if the United Nations ceased listing and, instead, designating governments and implementing jurisdictions connected to address due process issues exclusively through their bilateral economic and political relations. In such a system, due process issues can be resolved with the legitimacy of the imprimatur of each national or regional legal system. At home is where due process originates and at home is where it can best be evaluated and legitimized—not as a conflict of domestic and international law, but realistically in relation to State-to-State political and national security accommodation. As is normally the situation in bilateral relations, a government called upon to enforce targeted sanctions can assert its constitutional and due process concerns on behalf of any citizen or resident, whether on the initiative of its executive power, or through its courts.[383] And bilateral executive regulation does not require elimination of independent judicial review.[384] For example, in 2001, when three Swedish citizens found their assets frozen under European Community regulations implementing the 1267 sanctions regime, two were removed as a result of negotiations between the Swedish government and the United States, as the

---

and delisting, particularly insofar as it involves disclosure of evidentiary basis and safety of sources.

380. *See* Paulson Statement, *supra* note 268 (explaining that the U.S. Treasury can influence "the private sector and other governments" to place pressure on targeted individuals and entities).

381. The resolution of the due process dilemma proposed here might result in a domestic court clearing a target of charges, but the individual may still be targeted by another State or States. But that would be no different than the current reality whereby domestic judicial results may conflict with persisting political objectives. Thus, though the Swiss Attorney General dropped the charges against Kadi that alleged his financing of the 9/11 attacks, and though a Swiss court formally cleared Kadi of any links to the 9/11 attacks, Kadi remained on the UN and EU terrorist list for years, attempting to remove the listing. *See* LOPEZ ET AL., *supra* note 25, at 4.

382. *See* Fitzgerald, *supra* note 150, at 143–44 (discussing a U.S. Supreme Court case in which the Court found that targeted sanctions are subject to the Fifth Amendment).

383. For example, in *Kadi II*, the ECJ exercised jurisdiction over Mr. Kadi because of due process concerns in the UN sanctions process. Case T-85/09, Kadi v. Comm'n (Kadi II), 2010 E.C.R. II-5181, para. 125.

384. See Case T-306/01, Yusuf v. Council, 2002 E.C.R. II-3544, paras. 260–83, 318 (allowing the Court of First Instance of the European communities to exercise jurisdiction over two individuals despite a bilateral agreement to remove those individuals from targeted sanctions).

designating State, but legal proceedings were nevertheless brought before the European Community courts because of the listings.[385]

For implementation in jurisdictions enjoying an independent judiciary, challenged domestic law listings would draw in judges as arbiters of the factual predicate of a listing, providing quality control over the listing process. As arbiters of due process, domestic judges have much greater capability to provide quality control over the listing process than the UN Office of the Ombudsperson or any alternative "quasi-judicial" substitute at the UN level. Domestic legal systems can employ means such as *in camera* inspection and security cleared counsel, or other domestically authorized processes[386] simply not available at the United Nations, where the risks to confidentiality of sources and national security are multiplied.[387]

Also, the protection of intelligence resources that domestic listing can secure allows a much greater measure of disclosure of evidence than the multilateral forum of the United Nations, and hence it provides more meaningful review.[388] The direct diplomatic and economic connections through which domestic law listing operates makes space for meritorious challenges and production of evidence, in contrast to the Kafkaesque remoteness of the UN listing process.[389] Confidential information is more likely to be given on a bilateral basis where relationships of trust can be relied upon, avoiding the risk of broader dissemination in the multinational formats of the United Nations and its procedures, especially given that membership of the Security Council may include hostile States—the justification often advanced for non-disclosure of evidence and sources in UN listing.[390] The bilateral context, in contrast, allows for the opportunity to control which governments receive information, and to what extent, thus encouraging its provision.

The adjudications exposing the due process dilemma of UN listing demonstrate that domestic law judges are willing, though with various degrees of rigor, to review listings and demand evidentiary support before allowing enforcement and will unfreeze assets if sufficient evidence is not forthcoming.[391] Domestic judiciaries are also willing to find that due process trumps a claim of national security, though

385. *Id.*; *see also supra* notes 47, 151 and accompanying text.

386. *See generally* Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT'L L. 3 (2009) (discussing how the United Kingdom, Canada, Israel, and the United States deal with due process concerns related to secret evidence in terrorist detentions).

387. *See* Genser & Barth, *Targeted Sanctions*, *supra* note 45, at 223, 225–26 (discussing due process concerns related to transparency of evidence and information and highlighting States' concerns over disclosure of their confidential sources).

388. *See, e.g.*, Bartholomew, *supra* note 4, at 757–58 ("These U.N. courts would face the problem that much of the intelligence countries rely on to add a name to the Consolidated List is classified. Countries will likely be unwilling to offer such classified intelligence as evidence to an international court.").

389. *See, e.g.*, *id.* at 753–56 (discussing three different cases challenging the application of sanctions that have been brought in U.S. courts by parties subject to the 1267 regime).

390. *Cf.* SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE AT NYU SCH. OF LAW, THE SECRECY PROBLEM IN TERRORISM TRIALS 6 (2005) ("The government inevitably has secrecy concerns related to intelligence activities—both its own intelligence activities and those of other countries.").

391. For example, in 2005, a Dutch citizen filed suit against U.S. officials after being targeted; when the U.S. government refused to release any evidence in support of its action, the Dutch government unfroze his assets. P.K. Abdul Ghafour, *Aqeel Sues US Officials*, ARAB NEWS (May 14, 2005), http://www.arabnews.com/node/266915.

generally domestic courts defer to executive prerogative when claims of national security are involved.[392] This is in sharp contrast to the UN process whereby refusal of the designating State to provide information on grounds of national security is absolutely preclusive, and there is no appeal or other recourse.[393]

Domestic law listing also serves to avoid the anonymous designation problem that has plagued UN listing. Listing under domestic law of a developed legal system either follows or is subject to investigation in some form and an indictment issued by a national court, which has reviewed evidence according to a juridical standard.[394] The indictment can be sealed to preserve secrecy and yet assure the surprise that may be necessary to make a freeze effective.[395] UN listing, given the multiplicity of players that may be involved and the consequent greater concern of the designating government(s) to preserve confidentiality, operates on mere designation by choice of one or a few States that also control the ultimate determinations of whether to list or delist.[396] This naturally assures the primacy of political bias.[397] In a bilateral dynamic, instead, the government of the jurisdiction where the assets are located will be aware of the source of listing and is likely to be considerably more successful in seeking evidentiary substantiation before it complies.[398] Also, because the designating State is

392. *See, e.g.*, Nada v. Switz., 2012 Eur. Ct. H.R. 1691, para. 198 ("[T]he interference with his right to respect for private and family life was not proportionate and therefore not necessary in a democratic society."); Prosecutor v. Blaskic, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, paras. 64–67 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29, 1997) (noting that customary international law protects States' national security); Tinnelly & Sons LTD v. U.K., App. No. 20390/92, 27 Eur. H.R. Rep. 249, para. 77 (1999) (referring to Chahal v. U.K., App. No. 22414/93, 23 Eur. H.R. Rep. 413, para. 131 (1997); Devenney v. U.K., App. No. 24265/94, 365 Eur. H. R. Rep. 24, paras. 26–28 (2002); KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F.Supp.2d 637, 658 (N.D. Ohio 2010). *But see, e.g.*, Haig v. Agee, 453 U.S. 280, 307 (1981); Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007).

393. *See* Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203, 208 (2007) ("As opposed to the formulation of customary international law or treaty law, where a state can opt out of the regime, the UN Charter obliges all states to abide by Security Council decisions. . . . Article 103 operates to ensure that these obligations are superior to any other conflicting obligations that a state may have under an international agreement or customary international law.").

394. *See* Forcese & Roach, *supra* note 2, at 272, 274 ("Any move towards full merits-based domestic review of particular listing decisions will inevitably require experimentation with a range of domestic measures, including selective redaction, security-cleared special advocates, and adjudicators who are more inquisitorial [and] . . . [i]t is no accident that most indirect challenges to listing have come from Europe and other advantaged nations, such as Canada. Judicial challenges to listing in developing countries are less likely to occur for a variety of reasons.").

395. *See, e.g.*, Mike Levine, *President Obama's Surprise Revelation of Sealed Benghazi Indictment*, ABC NEWS (Aug. 9, 2013), http://abcnews.go.com/Politics/president-obamas-surprise-revelation-sealed-benghazi-indictment/story?id=19920474 ("President Obama surprised aides when he revealed today the existence of a sealed indictment in the Benghazi, Libya, attack.").

396. Forcese & Roach, *supra* note 2, at 254.

397. *See id.* ("The accuser is also the judge."); *id.* at 275 ("[T]hey do not take decision-making power away from the 1267 Committee and the Security Council and such decision-making remains, as candidly and recently conceded by the head of the 1267 Committee, intergovernmental and political in nature.").

398. *See, e.g.*, Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT'L ORG. 385, 395 n.16 (2014) ("The Swedish government's request was initially blocked by three permanent members of the Security Council. Sweden then entered into bilateral negotiations with the United States and eventually all three names were removed from the list.").

known to the government called upon for enforcement, reputational risk to the designating State can be more easily avoided.[399]

If targeting of sanctions can be made to depend exclusively on the dynamics of national and regional listing—if that reorientation is accomplished—such negotiation between individual governments that now takes place behind closed doors for UN listing would occur outside those doors. No longer would designation go through the obscuring lens of the UN political process. Transparency, by which legitimacy is obtained, would be enhanced without risk of greater prejudice to the targeted individual or entity than is now the situation. And since the United Nations does not afford the technology or expertise to secure and evaluate the intelligence behind UN listings, but relies on the intelligence capabilities of Member States, why not address quality and credibility of intelligence directly through national administrative and judicial channels rather than the smokescreen of the UN listing process, wherein even the designating State cannot be identified if it so chooses?

Moreover, within the bilateral dynamic of domestic law listing, the designating State can choose the degree of disclosure in accordance with the degree of trust it shares with the enforcing State. In contrast, UN listing entails dissemination at least to all States represented on the Sanctions Committee.[400] At the UN level, disclosure accordingly will be only at the lowest common denominator of trust.[401] Disclosure by way of the State-to-State suasion on which domestic listing depends would also serve to assure a government not represented on the Security Council or its sanctions committees that its national interests would be protected without the preference naturally now enjoyed by members of the Security Council, who exclusively control the decision to list or delist.

Lack of transparency and access to information continues to be an enormous—now shown to be insuperable—barrier to achieving legitimacy for UN listing.[402] The current regime allows for the possibility of the petitioner, and even the Ombudsperson, to be kept in ignorance not only of the identity of the designating government(s), but of information that is decisive to the outcome of a delisting petition, and potentially the source of allegedly incriminating information. Without disclosure of source, there is no means to determine reliability. In light of disclosures of the use of torture in connection with the war on terrorism,[403] a presumption against reliability without identification of source might even be warranted. Given that the mandating of targeted sanctions may be part of counter-terrorism or other critical strategic

399. *See, e.g.*, Beth Elise Whitaker, *Compliance Among Weak States: Africa and the Counter-Terrorism Regime*, 36 REV. INT'L STUD. 639, 645 (2010) ("Reputation concerns are fairly constant throughout the regime; few states want to be perceived as supporters of terrorism.").

400. S.C. Res. 1735, *supra* note 68, para. 5.

401. *See* Peter Margulies, *Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime After Kadi II*, 6 AMSTERDAM L. F. 51, 52 (2014) ("As in any other endeavor requiring collective action, regulation is only as good as the regulatory scheme's weakest link.").

402. *See Issue Brief, The Global Regime for Terrorism*, COUNCIL ON FOREIGN RELATIONS (June 19, 2013), http://www.cfr.org/terrorism/global-regime-terrorism/p25729 ("Yet, a fierce controversy over a lack of transparency in the nomination of individuals to this consolidated list . . . significantly weakened its potency. . . . Other commonly cited problems with the Consolidated List include a large number of listed individuals and organizations lacking basic address information . . . and the lack of fundamental information related to entities associated with al-Qaeda.").

403. *See generally* SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (2014).

objectives, such as counter-proliferation of nuclear weapons or countering international drug trafficking, non-disclosure of source may be well justified. But the resolution in any particular case better comes from a court that considers the reconciliation of security and individual rights and factual accuracy of listings through the domestic law lens of national and regional constitutional standards. That resolution is surely superior to, as far as achieving legitimacy, the subordination of due process that characterizes the politically driven process of UN listing.

Relying exclusively on domestic law listing for targeting sanctions does not require sacrificing the advantages of multilateral action. Intergovernmental cooperation, where it is forthcoming, can be secured on a continuing basis. This can be done through cooperation agreements between trusted allies such as those that currently exist between finance ministries and national intelligence services for contending with the same challenges of terrorism, money laundering, and international drug trafficking, which become the battlegrounds of targeted sanctions.[404] Moving all listing and delisting to domestic legal process need not undermine the present multifaceted elements of international cooperation as to any aspect of targeted sanctions. There is no reason that relocation of all listing out of the UN should compromise current cooperation involving Interpol, the Financial Action Task Force concerning counter-terrorism and anti-money-laundering, or various regional and governmental meetings and training exercises that presently join together intelligence and security services involved with targeted sanctions.[405] There is also no reason to think that removing UN listing, though key to resolving the due process dilemma, would negatively impact the ongoing joint efforts to refine and perfect targeted sanctions, such as have occurred through sanctions policy roundtables like those sponsored by the Swiss, German, and Swedish governments (known as the "Interlaken," "Bonn-Berlin," and "Stockholm" processes).[406] The same efforts can be accomplished like any other coordination between national governments, without any need for the UN listing process, simply on the basis of shared national security interest.

Listing at the UN level rests on the premise that UN listing is the best means to assure compliance, given the global cooperation necessary to make targeted sanctions

404. For example, one such agreement between the National Bank of Slovakia and the Ministry of the Interior of the Slovak Republic aims to "coordinate the procedure by which the contracting parties . . . share information . . . for the purpose of preventing and detecting money laundering and terrorist financing." *Cooperation Agreement Between the National Bank of Slovakia and the Ministry of the Interior of the Slovak Republic*, NARODNA BANKA SLOVENSKA (Nov. 26, 2013), http://www.nbs.sk/_img/Documents/_Dohlad/ORM/AML/2013_11_29_Konecna_verzia_dohody_bez_prilo h_EN.pdf. For additional examples, see generally KRISTEN ARCHICK ET AL., CONGRESSIONAL RESEARCH SERVICE, EUROPEAN APPROACHES TO HOMELAND SECURITY AND COUNTERTERRORISM (2006), *available at* https://www.fas.org/sgp/crs/homesec/RL33573.pdf.

405. *See, e.g.*, Shira Shamir, *Post 9/11 International and Regional Cooperation in Counter-Terrorist Financing: An Overview*, INT'L INST. FOR COUNTER-TERRORISM (Sep. 23, 2012), http://www.ict.org.il/Article/1094/Registration.aspx (describing efforts of private non-governmental actors, the European Union, the Financial Action Task Force (FATF) and similar regional bodies, and the United States to counter terrorist financing).

406. *See, e.g.*, DEP'T OF PEACE AND CONFLICT RESEARCH, UPPSALA UNIVERSITY, MAKING TARGETED SANCTIONS EFFECTIVE: GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS para. 164 (Peter Wallensteen et al. eds., 2003) ("Building on the Interlaken and Bonn-Berlin processes, this section summarizes 'best practices' for the implementation of the range of targeted sanctions imposed by the Security Council.").

effective.[407] However, from the initiation of UN listing to the present, the reality has been that the designating States are few, and the States called upon for freezing assets and finances are few.[408] Even as late as 2012, the Sanctions Monitoring Team established for the anti-terrorism regime acknowledged in its report to the Security Council:

> One disappointment for the Security Council and the [1267 Sanctions] Committee must be that, despite all these efforts to improve the List and the procedures for listing and delisting, more States have not come forward with the submission of names. It is still generally the same small group of countries that is most active in proposing new entries (or deletions).[409]

It is also reported that it is few States that take action in compliance with UN targeting.[410] To some extent, this may be attributed to lack of legal infrastructure or technical means in much of the world.[411] But it is also clear that targeted sanctions, because listing is principally by the United States and its major allies, are simply not perceived as a universal mandate despite the legal obligation of all States as members of the United Nations to comply with the Chapter VII mandates of the Security Council.

Though relatively few States are involved on either the designating or implementing side of targeting sanctions, the due process dilemma of UN listing has had truly global impact. When the *Kadi I* case was on appeal, the Sanctions Committee cautioned that holding the implementation regulation invalid "would trigger similar challenges that could quickly erode enforcement,"[412] a warning repeated by courts and other critics alike.[413] As warned, the due process dilemma posed by UN listing has resulted in increasing unwillingness of States to cooperate and be engaged in that process.[414] It is generally observed, especially in the context of the anti-terrorism targeted sanctions regime, that there has been a decline both in the willingness of States to submit names for listing and the willingness of enforcing countries to freeze the assets of names on the list.[415] It is not only ironic, but also counterproductive, that

---

407. *See* Analytical Support and Sanctions Monitoring Team, *Sixth Report of the Analytical Support and Sanctions Monitoring Team Appointed to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, para. 14, U.N. Doc. S/2007/132 (Mar. 8, 2007) ("The Committee and the Monitoring Team have consistently encouraged as wide a range of States as possible to submit names for listing. The List can be most useful, and attract most support, when it is recognized as a fair reflection of the threat as perceived by the international community at large.").

408. *Id.* paras. 15, 52.

409. Monitoring Report 2012, *supra* note 219, para. 39.

410. *Id.* para. 27.

411. *See id.* para. 56 (discussing how the FATF is addressing "jurisdictions that have weaknesses in their systems and procedures to counter money-laundering and terrorist financing").

412. Monitoring Report 2008, *supra* note 64, para. 40.

413. *See, e.g.*, de Búrca, *supra* note 175, at 48–49 (concluding that the ECJ's holding in *Kadi I* provides an example for States to challenge the UN sanctions regime's due process requirements).

414. *See* Monitoring Report 2012, *supra* note 219, para. 27 ("There have been few reports of Member States taking specific action against listed parties, whether by freezing their assets, stopping them at borders or preventing their access to the means of attack.").

415. *See, e.g.*, Gurulé, *supra* note 2, at 19, 24 (noting that each year fewer names are being submitted and fewer assets are being frozen).

a process originally sought to create legitimacy for targeted sanctions has had the reverse effect.

The UN listing process is increasingly challenged and delegitimized because of the due process dilemma it cannot avoid. The strategic motivation of the designating State(s) will inevitably often drive that process contrary to national and regional courts and other institutions and communities with different concerns of fairness and different perceptions of national security interest. And the resulting criticism from domestic, regional, and international bodies condemning the current implementation of targeted sanctions is no doubt diminishing the credibility and authority of Security Council targeting.[416] Reforms being made at the UN level are failing to transform the listing process into a procedure that conforms to the variety of due process standards and fundamental rights established by national and regional courts, with courts and commentators now joined in a rising chorus complaining of due process deficiency.[417] So why continue with a design that undermines the legitimacy of targeted sanctions and creates justification for non-compliance, when the alternative of domestic law listing is not only available, but has proven to be, in all important respects, superior?

Achieving the global good, which is the objective of the international programs of anti-terrorism, counter-proliferation, and dismantling the operations of international drug trafficking and money laundering, requires that these programs be legitimized as universal. Security Council authorizing resolutions under Chapter VII of the UN Charter remain the strongest available expressions of such universality and are certainly appropriate to maximize the reach of targeted sanctions. Universality is best served, however, by a listing process for targeted sanctions that allows national variation in listing and makes compliance a matter of government-to-government negotiation, whereby due process concerns can be best addressed. This will not, of course, eliminate the tension between security and justice. It will not eliminate compromise of due process in favor of national security. But listing of targets, hidden in the hallways of the United Nations, unnecessarily undermines the legitimacy and efficacy of targeted sanctions. Listing by overt transparent acceptance of inter-governmental responsibility can, instead, achieve the necessary legitimacy and efficacy to best support sanctions. The lesson may be paradoxical, but has proven true. Enlightenment as to mistaken good intentions is never easily obtained. It is now, however, before us, and marks the path for a better means to global order and justice.

416. *See* DAVID CORTRIGHT ET AL., SANCTIONS AND SEC. RESEARCH PROGRAM, HUMAN RIGHTS AND TARGETED SANCTIONS: AN ACTION AGENDA FOR STRENGTHENING DUE PROCESS PROCEDURES 1 (2009) (noting that criticism from various institutions is eroding the legitimacy of the targeted sanctions regime).

417. *See, e.g., id.* at 2 ("Despite these improvements, Security Council procedures still do not meet fundamental human rights standards for procedural fairness, including the right to be heard and the availability of a judicial remedy for those wrongly harmed.").

A New Era for Energy in Mexico? The 2013–14 Energy Reform

TIM R SAMPLES*

ABSTRACT

The 2013–14 Energy Reform is arguably Mexico's most significant structural change in the last fifty years. As the fiscal backbone of the Mexican state, the energy sector is critically important to Mexico's future. But the outcome of the Energy Reform also has powerful implications for North America and global energy markets.

This Article analyzes key legal issues in Mexico's current Energy Reform, with a particular emphasis on newly established contracting frameworks for private investment. In doing so, this Article considers Mexico's approach within the greater context of natural resource development priorities around the world, which often involve important tradeoffs between sovereignty and government revenues.

This Article ultimately concludes that the Energy Reform is a vital and enabling—but incomplete—step towards more rational approaches to energy law in Mexico. In other words, the Energy Reform was necessary but not sufficient for a better energy future in Mexico. Crucial work remains to take the reforms from potential improvements to real benefits.

TABLE OF CONTENTS

* Assistant Professor of Legal Studies, Terry College of Business, University of Georgia.

"[This] [e]nergy reform is the most important economic change in Mexico in the last 50 years."

—President Enrique Peña Nieto[1]

INTRODUCTION: MEXICO'S "SIGNATURE ISSUE"

Behind high metal barricades surrounding the legislature, the Mexican Congress passed a historic constitutional reform to open the energy industry in December 2013.[2] The current Energy Reform was hailed as the most important economic change in Mexico in the last fifty years.[3] Little doubt remains that this Energy Reform is the most transformative moment for Mexico's energy industry since 1938. For decades, Mexico maintained one of the most strictly protected energy industries in the world. But after severe declines in oil production, calls for change grew increasingly urgent. From the beginning, this Energy Reform has been the "signature issue" of the Peña Nieto presidency.[4] In a recent trend towards more liberal foreign investment frameworks in some of the world's most important energy jurisdictions—including Algeria, Argentina, Iran, Iraq, and Libya—Mexico is by far the biggest story.[5]

Recent trends—most notably, plunging oil prices—illustrate the interconnected nature of global energy markets. Booming shale oil production in the United States has dramatically altered the energy landscape worldwide.[6] In Mexico, the Energy Reform is projected to increase long-term domestic oil production by seventy-five percent.[7] Mexico's energy future has major strategic and economic consequences for North America and global energy markets alike.[8] Having led an international

---

1. *Energy Reform is the Most Important Structural Change in Mexico in the Past Fifty Years: EPN*, MÉXICO: PRESIDENCIA DE LA REPÚBLICA (Mar. 19, 2014), http://en.presidencia.gob.mx/articles-press/energy-reform-is-the-most-important-structural-change-in-mexico-in-the-past-fifty-years-epn/ [hereinafter *Structural Change*].

2. CLARE RIBANDO SEELKE ET AL., CONG. RESEARCH SERV., R43313, MEXICO'S OIL & GAS SECTOR: BACKGROUND, REFORM EFFORTS, AND IMPLICATIONS FOR THE UNITED STATES 4 (2015), *available at* http://fas.org/sgp/crs/row/R43313.pdf.

3. *Structural Change*, *supra* note 1. Throughout this article, "Energy Reform" will refer to the constitutional reform passed in December 2013 as well as the implementing legislation and supplementary regulations enacted throughout 2014. *See infra* notes 208–211.

4. Carlos Manuel Rodriguez & Adriana Lopez Caraveo, *Mexico Oil Opening First Time Since 1938 Shows Revival: Energy*, BLOOMBERG (Apr. 26, 2012, 9:32 AM), http://www.bloomberg.com/news/2012-04-25/mexico-oil-opening-first-time-since-1938-shows-revival-energy.html.

5. *See, e.g.*, Benoît Faucon, *Oil Nations Put Out Welcome Mat for Western Companies*, WALL ST. J. (May 18, 2014, 4:58 PM), http://online.wsj.com/articles/struggling-oil-producing-nations-woo-western-firms-1400088670 (identifying Mexico's reform as the "biggest shake-up" of all); Benedict Mander, *Argentina Seeks Its Own Shale Boom*, FIN. TIMES (Oct. 30, 2014, 3:35 PM), http://www.ft.com/intl/cms/s/0/1ecbb792-6044-11e4-88d1-00144feabdc0.html (describing Argentina's recent energy law reforms).

6. Oil production in the United States now rivals production in Saudi Arabia, a trend that has shifted the economics of oil globally. *See The New Economics of Oil: Sheikhs v Shale*, ECONOMIST (Dec. 6, 2014), http://www.economist.com/news/leaders/21635472-economics-oil-have-changed-some-businesses-will-go-bust-market-will-be (discussing the impact of the recent increase in American oil production on the world economy).

7. Linda Doman & Laura Singer, *Energy Reform Could Increase Mexico's Long-Term Oil Production by 75%*, U.S. ENERGY INFO. ADMIN. (Aug. 25, 2014), http://www.eia.gov/todayinenergy/detail.cfm?id=17691.

8. *See infra* Part I.A.

movement towards energy sovereignty and resource nationalism almost eighty years ago, Mexico has played a pivotal role in world energy history.[9] Now, with the Energy Reform, Mexico is moving away from energy nationalism with a drastically different legal framework. As a model for energy development, Mexico's situation offers important insights and implications for the trajectory of international energy markets.

Energy reform did not become Mexico's most important issue overnight. Oil revenues have been the fiscal backbone of the Mexican state for decades.[10] The country's fortunes have been closely tied to the oil industry and—by extension—to the state-owned oil company, *Petróleos Mexicanos* (Pemex), which is wholly owned by the Mexican state.[11] Pemex usually generates between thirty and forty percent of the Mexican government's revenues.[12] But oil production in Mexico has plunged by a quarter since 2004.[13] Declining production means declining public finances, which has serious consequences for all Mexicans. Oil revenues support public spending on everything from schools and poverty-alleviation programs to counter-narcotics efforts.[14]

Potential is abundant. Mexico has significant untapped resources—among the world's most promising—particularly in unconventional and deepwater areas.[15] But challenges are abundant too. In order to successfully attract needed investment in the energy sector, Mexico must create (1) a clear framework for private investment with attractive economic terms, (2) competent and independent regulatory authorities, and (3) an efficient bidding process with balanced contracts and adequate transparency. By opening the energy sector to private investment, Mexico aims to develop new areas of the industry and generate fiscal income for the Mexican government.[16] At the same time, major efforts to modernize Pemex, overhaul the electricity sector, implement a new regulatory framework, and create a sovereign wealth fund are also all underway.[17] Meeting these challenges simultaneously on an accelerated timeline will require tremendous efforts.

---

9. *See infra* Part II.A–B.

10. Symposium, *Energy and International Law: Development, Litigation, and Regulation*, 36 TEX. INT'L L.J. 1, 58 (2001) [hereinafter Symposium].

11. *Id.* ("Since 1938, all upstream and downstream oil and gas activities have been exclusively owned by the Mexican government. The only agent that is allowed to exploit and produce it is Petroleos Mexicanos (PEMEX), a state-owned company. This company has a board of directors, and all the members of the board are also members of the cabinet of the Mexican government. This company is controlled mainly through a budgetary arrangement; the government decides how much money this company should spend every year in different aspects of the industry, and also decides how much of the revenue of the company has to go to the government as taxes.").

12. Clifford Krauss & Elisabeth Malkin, *Mexico Oil Politics Keeps Riches Just out of Reach*, N.Y. TIMES, Mar. 8, 2010, http://www.nytimes.com/2010/03/09/business/global/09pemex.html.

13. Jude Webber, *Mexican Energy Bill Set for Rough Ride*, FIN. TIMES (Dec. 8, 2013, 8:18 PM), http://www.ft.com/intl/cms/s/0/802adbbc-602c-11e3-b360-00144feabdc0.html#axzz3I6s32F4T [hereinafter Webber, *Rough Ride*].

14. *See* Krauss & Malkin, *supra* note 12 ("Oil money is used for everything from building schools to fighting the war against drug cartels.").

15. *See infra* notes 42–55 and accompanying text.

16. Diana Villiers Negroponte, *Mexico's Energy Reform Becomes Law*, BROOKINGS (Aug. 14, 2014), http://www.brookings.edu/research/articles/2014/08/14-mexico-energy-law-negroponte.

17. *Id.*

The emergence and evolution of legal frameworks for energy investment around the world have been documented in seminal works.[18] Academic literature has also explored the particularities of Mexico's pre-reform framework, which stood for decades as one of the most restrictive legal environments for energy investment in the world.[19] Legal issues emerging from the 2008 energy reform have been explored in academic literature as well.[20] This article contributes to the existing body of legal scholarship by addressing the current Energy Reform—the most significant development in Mexican energy law since 1938, when the petroleum industry was nationalized and Pemex was formed.[21] Ultimately, this Article concludes that the Energy Reform was a necessary but not sufficient step towards more rational approaches to problems facing Mexico's energy sector. These reforms succeed in enabling a viable investment framework for the energy industry, but long-term success will require responsible leadership, institutional maturity, capable regulation, and good governance.

This Article is organized as follows. Part I provides context on the significance, potential, and primary aims of the Energy Reform. Part II explains the evolution of energy law in Mexico leading up to the Energy Reform. Part III analyzes key changes and major legal issues emerging from the Energy Reform, with a particular emphasis on the resulting framework for private investment in exploration and production projects. Finally, the Article offers concluding observations on the impact of the reform and the future of Mexico's energy sector.

I. END OF AN ERA: THE ENERGY REFORM IN CONTEXT

Energy reform was the top priority for the Peña Nieto administration from the beginning.[22] But liberalizing the energy industry in Mexico has long been a political taboo.[23] Reform efforts only overcame oil nationalism after alarming declines in

18. *See generally, e.g.*, Ernest E. Smith, *From Concessions to Service Contracts*, 27 TULSA L.J. 493 (1991) [hereinafter Smith, *From Concessions*]; Ernest E. Smith & John S. Dzienkowski, *A Fifty-Year Perspective on World Petroleum Arrangements*, 24 TEX. INT'L L.J. 13 (1989); Note, *From Concession to Participation: Restructuring the Middle East Oil Industry*, 48 N.Y.U. L. REV. 774 (1973) [hereinafter *Concession to Participation*].

19. *See generally, e.g.*, Kenneth S. Culotta, *Recipe for a Tex-Mex Pipeline Project: Considerations in Permitting a Cross-Border Gas Transportation Project*, 39 TEX. INT'L L.J. 287 (2004); Gary B. Conine, *Mexico: Energy Development and the State Oil Company*, 27 TULSA L.J. 625 (1992); Christopher C. Joyner, *Petróleos Mexicanos in a Developing Society: The Political Economy of Mexico's National Oil Industry*, 17 GEO. WASH. J. INT'L L. & ECON. 63 (1982); Ewell E. Murphy, Jr., *The Prospect for Further Energy Privatization in Mexico*, 36 TEX. INT'L L.J. 75 (2001) [hereinafter Murphy, *Further Energy Privatization*]; Ewell E. Murphy, Jr., *The Echeverrían Wall: Two Perspectives on Foreign Investment and Licensing in Mexico*, 17 TEX. INT'L L.J. 135 (1982).

20. *See generally, e.g.*, Pedro Resendez, *New Legal Framework for Oil Contracts in Mexico*, 5 TEX. J. OIL GAS & ENERGY L. 399, 431 (2010); Tim R Samples & José Luis Vittor, *Energy Reform and the Future of Mexico's Oil Industry: The Pemex Bidding Rounds and Integrated Service Contracts*, 7 TEX. J. OIL GAS & ENERGY L. 215 (2012) [hereinafter Samples & Vittor, *Energy Reform*]; Tim R Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697 (2013) [hereinafter Samples & Vittor, *Prospects for Reform*].

21. *Structural Change*, *supra* note 1.

22. *See* SEELKE ET AL., *supra* note 2, at 3 ("At his inauguration, President Peña Nieto announced a reformist agenda aimed at bolstering Mexico's competitiveness that included energy sector reform.").

23. *Energy Reform in Mexico: Giving it Both Barrels*, ECONOMIST (Aug. 17, 2013),

production.[24] As explained in this Part, Mexico's future depends on the outcome of the Energy Reform. By extension, the significance of the Energy Reform transcends Mexico's borders, with crucial regional and international implications. In addition to being arguably the most important structural change in Mexico in fifty years, the Energy Reform has important implications for North America and for the energy industry worldwide. This Part explains the significance, potential, and primary aims of the Energy Reform.

A. Significance of the Energy Reform

Mexico's future is closely tied to energy. Though less dependent on oil than during the devastating oil shocks in the 1980s, oil still keeps the Mexican government afloat.[25] Taxes from Pemex provide between thirty and forty percent of the Mexican government's income.[26] The oil industry represents around eleven percent of Mexico's economy.[27] After recent declines in production, improving government revenue, or "take," by increasing taxes and royalties on the hydrocarbons industry is an urgent aim of the reform.[28] The government estimates that the Energy Reform could add one percentage point in gross domestic product (GDP) growth by 2018 and two points by 2025.[29] Official estimates of the potential for job creation resulting from the Energy Reform are similarly extraordinary.[30] Mexican capital and local energy firms are also poised to take advantage of investment opportunities under the Energy Reform.[31] Additionally—and also very importantly—the Energy Reform aspires to address inefficiencies in Mexico's energy markets, some of which significantly burden other areas of the country's economy.[32]

---

http://www.economist.com/news/Americas/21583664-government-has-made-promising-start-it-may-struggle-bring-historic-reform.

24. *See* SEELKE ET AL., *supra* note 2, at 7, 21 (noting that energy production and economic competitiveness have been improved by the Energy Reform after a decade-long decline in production).

25. *See* JAMES A. BAKER III INST. FOR PUB. POLICY, RICE UNIV., POLICY REPORT NO. 48, THE FUTURE OF OIL IN MEXICO 3–4 (2011), [hereinafter FUTURE OF OIL], *available at* http://bakerinstitute.org/files/7704/ (discussing Mexico's current and historical reliance upon hydrocarbons and relevant economic projections).

26. Richard Fausset, *Mexico's Senate Passes Sweeping Oil Industry Reforms*, L.A. TIMES (Dec. 11, 2013), http://articles.latimes.com/2013/dec/11/world/la-fg-wn-mexico-senate-reform-oil-industry-20131211.

27. Juan Montes & Laurence Iliff, *Mexico Outlines New Oil Sector Policies for Private Firms*, WALL ST. J. (May 1, 2014, 9:46 AM), http://online.wsj.com/news/articles/SB10001424052702303948104579533790440136238.

28. *See* David Alire Garcia, *Mexico to Keep Pumping Pemex for Tax Money Despite Promised Reforms*, REUTERS (Oct. 30, 2013, 1:01 PM), http://www.reuters.com/article/2013/10/30/mexico-reforms-pemex-idUSL1N0IB0OI20131030 [hereinafter Garcia, *Mexico to Keep Pumping*] ("But the reform aims to introduce a new royalty based on the value of the oil, gas or condensates produced, indexed to market fluctuations. Pemex would also have to pay Mexico's 30 percent corporate income tax.").

29. Enrique Peña Nieto, *Our Reform Programme Will Build a Better Future for Mexico*, FIN. TIMES (Aug. 20, 2014, 5:28 PM), http://www.ft.com/intl/cms/s/0/86196824-285c-11e4-9ea9-00144feabdc0.html#axzz3JHpOxA7n.

30. *See Reforma Energética: Beneficios*, MÉXICO: GOBIERNO DE LA REPÚBLICA, http://reformas.gob.mx/reforma-energetica/beneficios (last visited Dec. 12, 2015) (claiming energy reforms will create 500,000 jobs by 2018 and 2.5 million by 2025).

31. *See, e.g.*, Lindsay Esquivel, *Reforma Energética Cambia el Modelo Empresarial en México*, LA RAZÓN (Dec. 22, 2014), http://razon.com.mx/spip.php?article240765 (discussing how the Energy Reform has created new business opportunities for firms).

32. *See infra* Part I.E.

The importance of the Energy Reform extends well beyond Mexico's borders. As the financial bedrock of the Mexican state, the Energy Reform has strategic significance and important security implications, not just for the United States, but for North America and global markets as well.[33] Mexico is among the most important producers in the world that is not a member of the Organization of the Petroleum Exporting Countries (OPEC).[34] North American energy integration could deepen with an opening of Mexico's energy industry through increasing cross-border investment and stronger industry ties.[35] Mexico is already a top three supplier of crude oil to the United States.[36] Mexico is also a major—and growing—destination for energy products from the United States, including natural gas and refined products.[37] Mexico has significant potential for renewable energy development.[38] Cross-border investment and cooperation in renewables and clean energy hold promise as well.[39] For private and state-owned energy companies around the world, Mexico's energy offers highly attractive opportunities.[40] China, for example, has shown significant interest in energy and infrastructure investments in Mexico.[41]

---

33. *See* SEELKE ET AL., *supra* note 2, at 1, 17 ("Having a neighbor who is a growing oil producer to the south, as the United States has to the north with Canada, could provide a reliable supplier for the long term and it would also contribute to North American energy independence.").

34. *Id.* at 7 ("Mexico lags only behind Russia, the United States, China, and Canada as an important non-OPEC oil producer.").

35. Christian Gómez, Jr., *North American Energy Integration and the NALS*, QUARTERLY AMERICAS (Feb. 19, 2014), http://www.americasquarterly.org/content/north-american-energy-integration-and-nals.

36. Elisabeth Malkin, *Mexican Congress Approves New Rules for Oil Industry*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/business/international/mexican-congress-approves-new-rules-for-oil-industry.html?_r=0.

37. *See* SEELKE ET AL., *supra* note 2, at 13 ("Mexico was the destination for 44% of U.S. exports of motor gasoline in 2013 . . . ."); Laurence Iliff, *Oil-Rich Mexico Becomes Net Importer of U.S. Petroleum Goods*, WALL ST. J. (May 14, 2014, 6:03 PM), http://online.wsj.com/articles/SB10001424052702304908304579562400748296622 [hereinafter Iliff, *Mexico Becomes Net Importer*] ("Mexico still exports more than a million barrels a day of crude oil, but it imports just about everything else: [N]atural gas, gasoline, diesel, liquefied petroleum gas, and petrochemicals. In the first three months of the year, the country posted a petroleum deficit of about $551 million with the U.S. . . . .").

38. For a discussion of Mexico's particularly abundant natural advantages in wind, solar, hydropower, and geothermal resources, see U.S. Embassy—Mexico City, *Renewable Energy Factsheet*, U.S. DEP'T OF STATE (Jan. 2014), http://photos.state.gov/libraries/mexico/310329/april2014/2014_01_Renewable-Energy.pdf.

39. *See* SEELKE ET AL., *supra* note 2, at 15 ("The U.S. and Mexican governments share a mutual interest in developing renewable energy sources, particularly those capable of serving rapidly growing population centers along the U.S.-Mexico border. As part of that effort, since 2011 the North American Development Bank has provided loans worth at least $677 million for projects related to wind and solar energy."); *Mexico and Central America – Emerging Clean Energy Powerhouses*, BLOOMBERG NEW ENERGY FIN. (Aug. 11, 2014), http://about.bnef.com/press-releases/mexico-central-america-emerging-clean-energy-powerhouses/ [hereinafter *Emerging Clean Energy Powerhouses*] ("Plentiful resources of wind, solar, geothermal, and hydro-electric energy, combined with a need for new, more economical power capacity, are fuelling strong momentum in clean energy investment in Mexico and the six main countries of Central America . . . .").

40. Antonio Garza, *Mexico's Energy Reform to Attract International Interest*, HOUS. CHRON. (Aug. 7, 2014, 8:14 PM), http://www.chron.com/opinion/outlook/article/Mexico-s-energy-reform-to-attract-international-5675187.php.

41. Gerry Shih et al., *China, Mexico Eye $7.4 Billion in Investment Funds*, REUTERS (Nov. 13, 2014, 2:05 AM), http://www.reuters.com/article/2014/11/13/us-china-mexico-idUSKCN0IX0IF20141113; *see also North America's Energy Revolution Will Have a Ripple Effect Around the Pacific*, ECONOMIST (Nov. 15, 2014), www.economist.com/node/21631798/print (noting China's interest in Mexico's energy sector).

Mexico's most significant energy potential lies in deepwater[42] and unconventional[43] opportunities, which have been virtually untapped until now.[44] While the United States side of the Gulf of Mexico has been heavily exploited for decades,[45] the Mexican side remains almost untouched.[46] Pemex estimates that there are 27 billion barrels of untapped crude oil on the Mexican side of the Gulf of Mexico.[47] After considerable delay, an agreement between Mexico and the United States was finally reached concerning exploration and production in the transboundary area of the Gulf of Mexico.[48]

Potential in unconventional resources is remarkable, but complicated. Mexico is home to huge formations of technically recoverable shale resources; it is sixth in the world in shale gas and seventh in shale oil.[49] Many of these unconventional resources are located in areas of the onshore Chicontepec basin, which may hold as much as forty percent of Mexico's oil reserves.[50] But the formations of Chicontepec have proven technically complex and expensive to develop.[51] Recovery rates are low and water is scarce in areas with unconventional resources, which will further strain the viability of

42. Though definitions have evolved over time, the "deepwater" range for exploration and production is currently considered 1,000 to 5,000 feet. A more recent category, "ultra-deepwater" is considered beyond 5,000 feet of depth. OFFICE OF FOSSIL ENERGY, U.S. DEP'T OF ENERGY, DEEPWATER RESOURCES (2012), *available at* http://energy.gov/sites/prod/files/deepwater_resources_factcard.pdf.

43. Though shale oil and shale gas are the most widely known types of unconventional hydrocarbon resources, others include tight oil, tight gas, and coalbed gas. *See* MICHAEL RATNER & MARY TIEMANN, CONG. RESEARCH SERV., R43148, AN OVERVIEW OF UNCONVENTIONAL OIL AND NATURAL GAS: RESOURCES AND FEDERAL ACTIONS 1 (2015), *available at* http://fas.org/sgp/crs/misc/R43148.pdf (noting that "other types of unconventional production" include coalbed methane and tight gas).

44. Jim Polson & Mike Lee, *Oil Producers See Untapped, Unconventional Fields Meeting Demand*, BLOOMBERG (Mar. 6, 2012, 11:50 PM), http://www.bloomberg.com/news/articles/2012-03-07/oil-producers-see-untapped-unconventional-fields-meeting-demand.

45. *See The History of Offshore Oil and Gas in the United States (Long Version)* 1–2 (Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Staff Working Paper No. 22), *available at* http://www.eoearth.org/files/154601_154700/154673/historyofdrillingstaffpaper22.pdf (stating that offshore oil drilling in the Gulf of Mexico near the United States began in 1938 and remains important today).

46. *A New Mexican Revolution*, ECONOMIST (Nov. 15, 2014), http://www.economist.com/news/business/21632504-countrys-energy-reforms-may-transform-not-just-oil-and-gas-business-whole-its.

47. Carlos Manuel Rodriguez & Nacha Cattan, *Pemex May Have 10 Billion Barrels in Perdido Oil Deposits*, BLOOMBERG (Aug. 29, 2014, 3:55 PM), http://www.bloomberg.com/news/2012-08-29/pemex-may-have-10-billion-barrels-in-perdido-oil-deposits.html.

48. For a review of legal issues involved, see generally Miriam Grunstein, *Unitized We Stand, Divided We Fall: A Mexican Response to Karla Urdaneta's Analysis of Transboundary Petroleum Reservoirs in the Deep Waters of the Gulf of Mexico*, 33 HOUS. J. INT'L L. 345 (2011); Karla Urdaneta, *Transboundary Petroleum Reservoirs: A Recommended Approach for the United States and Mexico in the Deepwaters of the Gulf of Mexico*, 32 HOUS. J. INT'L L. 333 (2010); Jorge A. Vargas, *The 2012 U.S.-Mexico Agreement on Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico: A Blueprint for Progress or a Recipe for Conflict?*, 14 SAN DIEGO INT'L L.J. 3 (2012).

49. U.S. ENERGY INFO. ADMIN., TECHNICALLY RECOVERABLE SHALE OIL AND SHALE GAS RESOURCES: AN ASSESSMENT OF 137 SHALE FORMATIONS IN 41 COUNTRIES OUTSIDE THE UNITED STATES 10 (2013), *available at* http://www.eia.gov/analysis/studies/worldshalegas/pdf/overview.pdf.

50. *See* U.S. ENERGY INFO. ADMIN., MEXICO 4, *available at* http://www.eia.gov/beta/international/analysis_includes/countries_long/Mexico/mexico.pdf (last updated Sept. 21, 2015) [hereinafter EIA Report] (noting that Chicontepec is home to 637 million barrels of proved crude oil reserves and 15 billion more barrels of probable and possible reserves).

51. *See id.* at 5–6 (describing the percentage of oil development funding necessary to develop the Chicontepec oil fields).

projects.[52] Formations are also spread out widely in small pockets across hundreds of miles, adding to the costs and technical complexity of developing those areas.[53] Security is also a concern in some of these areas.[54] Pemex has already spent billions of dollars on projects in Chicontepec but missed production targets by wide margins.[55]

B. Previous Reform Efforts: Against All Odds

Energy reform is no easy task in Mexico. Oil is much more than a natural resource, just as Pemex is much more than an oil company in Mexico. Tampering with the status quo of Pemex's virtual monopoly over the energy industry would have amounted to "political suicide."[56] Indeed, opening the Mexican energy sector has long been a political taboo.[57] Nationalism runs deep when it comes to energy: Oil is closely associated with notions of sovereignty and independence in Mexico.[58] Pemex is a cherished symbol, on par with national icons like the Virgin of Guadalupe and the Mexican flag.[59] Celebrated every year on March 18, a national holiday commemorates the government's expropriation of foreign oil interests in Mexico.[60]

Peña Nieto was not the first Mexican president with energy reform ambitions. Previous administrations proved unable to enact major overhauls, each facing increasingly urgent needs for reform.[61] Those administrations—including Salinas, Zedillo, Fox, and Calderón—recognized needs for reform in the energy sector, but

52. FUTURE OF OIL, *supra* note 25, at 4 (discussing the low recovery rates at Chicontepec); Dolia Estevez, *Fracking: Could Mexico's Water Scarcity Render its Energy Sector Reforms Self-Defeating?*, FORBES (June 11, 2014, 12:08 PM), http://www.forbes.com/sites/doliaestevez/2014/06/11/fracking-could-mexicos-water-scarcity-render-its-energy-sector-reforms-self-defeating-2/ (discussing the issues created by water scarcity and energy production needs in Mexico).

53. David Luhnow, *Mexico Tries to Save a Big, Fading Oil Field*, WALL ST. J. (Apr. 5, 2007, 12:01 AM), http://www.wsj.com/articles/SB117570687954959825.

54. *See, e.g.*, Steven Dudley, *Two Attacks on PEMEX Highlight Increasing Dangers*, INSIGHT CRIME (Mar. 7, 2011), http://www.insightcrime.org/news-analysis/two-attacks-on-pemex-highlight-increasing-dangers?highlight=WyJwZW1leCIsInBlbWV4J3MiXQ== (describing attacks on state oil workers in Mexico).

55. Lawrence Iliff, *Pemex Attracts Few Bids for Drilling Contracts*, WALL ST. J. (July 11, 2013, 9:30 PM), http://www.wsj.com/articles/SB10001424127887324425204578600314165342682 [hereinafter Iliff, *Pemex Attracts Few Bids*].

56. Vanessa Buendia, *Mexican Oil: Creating Investor Opportunities*, IJGLOBAL (Nov. 18, 2011, 2:31 PM), http://www.ijonline.com/genv2/Secured/DisplayArticle.aspx?articleid=73796.

57. Tracy Wilkinson & Richard Fausset, *Mexico's President on Dangerous Ground as He Pushes Pemex Reform*, L.A. TIMES (Aug. 5, 2013), http://articles.latimes.com/2013/aug/05/world/la-fg-mexico-pemex-20130805.

58. *Id.*

59. Mica Rosenberg, *Mexico Election Favorite Faces Stiff Test on Oil Reform*, REUTERS (June 12, 2012, 4:54 PM), http://www.reuters.com/article/2012/06/12/us-mexico-oil-idUSBRE85B16M20120612.

60. *See* John Paul Rathbone, *Enrique Peña Nieto Takes on National Pride in Mexico Energy Reform*, FIN. TIMES (Aug. 11, 2013, 2:12 PM), http://www.ft.com/intl/cms/s/0/edb0ed38-0263-11e3-a9e2-00144feab7de.html#axzz3JFDcIeid ("[S]choolchildren still celebrate the oil industry's nationalisation every March 18 . . . .").

61. *See, e.g.*, Juanita Darling, *Mexico's Giant Takes Big Steps into a New Era*, L.A. TIMES (July 29, 1990), http://articles.latimes.com/1990-07-29/business/fi-1506_1_crude-oil (describing Salinas's efforts to liberalize Mexico's energy industry and modernize Pemex).

proposals for major overhauls failed to gain traction.[62] In 2008, President Calderón overcame impassioned political opposition to pass a modest reform.[63] But the impact of the 2008 reform was primarily limited to internal changes for Pemex and a regulatory shakeup.[64] Although the 2008 reform created a new bidding framework for private sector collaboration with Pemex in exploration and production projects through service contracts, the framework was handicapped by then-existing laws and, ultimately, impact on production was minimal.[65]

C. Declining Production, Declining Revenues

Steep declines in oil production created urgency for reform. Between 2004 and 2011, crude oil production fell by roughly a quarter, plunging from 3.4 million to 2.5 million barrels per day.[66] In 2014, Mexico saw its lowest level of production since 1986.[67] Waning production is largely due to the aging of Cantarell, Mexico's famous supergiant field in the shallow waters of the Bay of Campeche.[68] Cantarell is the largest field ever discovered in Mexico[69] and was once among the largest in the world.[70] Cantarell produced sixty-three percent of Mexico's crude oil in 2004, but accounted for just seventeen percent in 2013.[71] Unfortunately, Cantarell is not Mexico's only field in decline. Some eighty percent of Mexico's fields are currently in advanced or declining stages of production.[72]

Even after these declines, Mexico remains among the ten largest producers of crude oil in the world.[73] Pemex is the second largest company in Latin America[74] and among the largest oil companies in the world.[75] With revenues of about $126 billion,

---

62. *See* Conine, *supra* note 19, at 640 (describing reform efforts under Salinas); Marcelo Páramo, *Meeting Mexico's Energy Needs—Reconciling Sovereignty with Economic Development*, 8 LAW & BUS. REV. AM. 447, 447–48, 450 (2002) (describing efforts by the Zedillo and Fox administrations to reform energy laws).

63. Martin Miranda, Note, *The Legal Obstacles to Foreign Direct Investment in Mexico's Oil Sector*, 33 FORDHAM INT'L L.J. 206, 212 (2009).

64. *See infra* Part II.D.

65. *See* George Baker, *Pemex's Mature Fields Awards: The First Bidding Round Under the New Pemex Law*, 1 MEX. L. REV. 183, 188–96 (2012), *available at* http://biblio.juridicas.unam.mx/revista/pdf/MexicanLawReview/9/cmm/cmm6.pdf (describing the then-existing laws and addressing problems in the initial bidding round following the 2008 reform).

66. Eric Martin & Carlos Manuel Rodriguez, *Mexico May Finally Get a Modern Oil Industry*, BLOOMBERG (July 12, 2012), http://www.bloomberg.com/bw/articles/2012-07-12/mexico-may-finally-get-a-modern-oil-industry.

67. EIA Report, *supra* note 50, at 2.

68. SECRETARÍA DE ENERGÍA DE MÉXICO, ESTRATEGIA NACIONAL DE ENERGÍA 2013–2027 40 (2013) [hereinafter ESTRATEGIA NACIONAL], *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37957550.

69. Samples & Vittor, *Prospects for Reform*, *supra* note 20, at 703.

70. Martin & Rodriguez, *supra* note 66.

71. EIA Report, *supra* note 50, at 3.

72. ESTRATEGIA NACIONAL, *supra* note 68, at 41.

73. Andrew Bergmann, *World's Top Oil Producers*, CNN MONEY, http://money.cnn.com/interactive/news/economy/worlds-biggest-oil-producers/ (last visited Dec. 13, 2015).

74. *Ránking Las 500 Mayores Empresas de Latinoamérica 2014*, AMÉRICAECONOMÍA (last visited Dec. 13, 2015), http://rankings.americaeconomia.com/las-500-mayores-empresas-de-latinoamerica-2014/ranking-500-latam-1-50/.

75. EIA Report, *supra* note 50, at 2.

Pemex ranked thirty-sixth in the *Fortune* Global 500 in 2014.[76] Despite a crippling tax burden, a restrictive legal environment, and enormous responsibilities, Pemex has managed to fund the Mexican government for decades.[77] But these burdens have taken a toll on the company's ability to adapt to Mexico's current exploration and production challenges.[78]

The era of "simple oil" or "easy oil" in Mexico is well into its twilight stage. Going forward, the future of oil exploration and production in Mexico lies primarily in three areas: (1) managing mature fields more effectively through enhanced oil recovery techniques; (2) exploring and producing deepwater resources in the Gulf of Mexico; and (3) onshore unconventional resources spread primarily across the northeast of Mexico. While promising great potential, all three of these frontiers are outside of Pemex's traditional strengths in exploring and producing in shallow water offshore fields. A primary aim of the Energy Reform is to stem declining production—and, consequently, restore government take on the industry—by harnessing private investment and strengthening Pemex.[79]

D. The "Pemex Situation"

The Energy Reform will have huge consequences for Pemex. Emilio Lozoya, CEO of Pemex, remarked that "[this reform] is, by all means, the most important transformation Pemex has suffered in our entire 76 years."[80] Indeed, the Energy Reform aims to transform Pemex in important ways. Pemex should benefit from reforms that increase autonomy from the government and improve governance practices. But Pemex will also face a more competitive business environment for the first time ever. Pemex remains among the largest companies in the world and the fifth largest producer of crude oil, even after recent declines.[81] And Pemex is still a world leader in offshore oil exploration and production.[82] But overprotective laws and the Mexican government's reliance on Pemex for tax revenues have hindered Pemex in crucial ways.[83]

---

76. Stephanie N. Mehta, *Global 500 2014*, FORTUNE, http://www.fortune.com/global500/2014/pemex-36/ (last visited Dec. 13, 2015).

77. Jeffrey Ball, *The Drama of Mexico's Black Gold*, FORTUNE (Aug. 14, 2014, 7:05 AM), http://www.fortune.com/2014/08/14/pemex-oil-black-gold/.

78. *See* ESTRATEGIA NACIONAL, *supra* note 68, at 19–20 (discussing some of the challenges Pemex faces with regard to economic loss and noting the need for cost-efficient investments to reduce economic loss); Adam Williams & Dan Murtaugh, *Mariachis, Tacos, $100 Billion Oil Debt as Pemex Opens in Texas*, BLOOMBERG (Dec. 14, 2015), http://www.bloomberg.com/news/articles/2015-12-15/pemex-expands-to-houston-as-it-nears-100-billion-in-debt (citing Pemex as one of the world's most indebted oil companies).

79. Samples & Vittor, *Prospects for Reform*, *supra* note 20, at 725–26.

80. Ball, *supra* note 77.

81. Adam Williams, *Pemex's March Crude Production Falls to Lowest Level Since 1995*, BLOOMBERG (Apr. 1, 2014, 2:04 PM), http://www.bloomberg.com/news/2014-04-01/pemex-s-march-crude-production-falls-to-lowest-level-since-1995.html [hereinafter Williams, *Pemex's Crude Production Falls*].

82. *See id.* (stating that, despite recent declines in production, Pemex is the world's fifth largest producer of crude oil).

83. For example, before the Energy Reform, foreign firms could only deal with Pemex through "service contracts, in which companies were paid for services and were not allowed shares or profits derived from the hydrocarbon resources . . . ." EIA Report, *supra* note 50, at 3. Mexican law limited "Pemex's ability to form partnerships and joint ventures with other energy companies." Samples & Vittor, *Prospects for*

Pemex is currently unequipped to confront Mexico's new, more challenging operating environment alone. Stemming declines in oil production will require development of deepwater and unconventional resources as well as more effective management of mature fields. Pemex lacks the technology, know-how, and capital to develop deepwater resources in the Gulf of Mexico.[84] As of 2012, Pemex had drilled twenty-three deepwater wells with only two commercially successful results.[85] Success rates in deepwater drilling typically range from twenty to fifty percent.[86] Unconventional projects have also frustrated Pemex.[87] Despite Pemex investing several billion dollars in unconventional areas of Chicontepec, production fell well short of targets and provoked political controversy.[88] Though the Energy Reform will increase operational independence and reduce the company's tax burden,[89] Pemex must also adapt to a new and more competitive business environment.

1. Cash Cow and Sacred Cow: The Dual Burdens of Pemex

For decades, Pemex has simultaneously acted as the "cash cow" and the "sacred cow" of Mexico.[90] As a cash cow, Pemex routinely provides over a third of the government's revenues.[91] As a sacred cow, Pemex is a revered icon that stirs deep passions in Mexico.[92] But the tensions of these dual roles have taken their toll on the company. Pemex has been hindered for decades by the collective weight of an unsustainable tax burden, politicized governance, complicated relationships with the government and labor, and a highly protective but stifling legal environment.[93] Viewed

---

Reform, *supra* note 20, at 708. Pemex is Mexico's biggest taxpayer. Adam Williams, *Pemex, Mexico's State Oil Giant, Braces for a the Country's New Energy Landscape*, WASH. POST, June 7, 2014, http://www.washingtonpost.com/business/pemex-mexicos-state-oil-giant-braces-for-a-the-countrys-new-energy-landscape/2014/06/04/07d171d6-ea69-11e3-93d2-edd4be1f5d9e_story.html [hereinafter Williams, *Pemex Braces*].

84. *See* Adam Williams, *Mexico Oil Opening May Release Gusher for Foreigners*, BLOOMBERG (May 12, 2014, 11:01 PM), http://www.bloomberg.com/news/articles/2014-05-13/mexico-oil-opening-may-release-gusher-for-foreigners [hereinafter Williams, *Mexico Oil Opening*] ("The failure of Pemex and its government overseers to invest in the latest drilling and exploration technology is partly to blame for the decline.").

85. JUAN CARLOS ZEPEDA, COMISIÓN NACIONAL DE HIDROCARBUROS, E&P IN MEXICO: STRENGTHS, WEAKNESSES, AND THE NEED FOR A REFORM 13 (2012), *available at* http://www.platts.com/IM.Platts.Content/ProductsServices/ConferenceandEvents/2012/pc229/presentations/Juan_Carlos_Zepeda.pdf.

86. Jude Webber, *Energy Reform Stirs Mexico's Deepwater Opportunities*, FIN. TIMES (Nov. 25, 2014, 1:44 PM), http://www.ft.com/intl/cms/s/0/b18db5c4-55b6-11e3-96f5-00144feabdc0.html#axzz3LwMljt9c.

87. *See* Iliff, *Pemex Attracts Few Bids*, *supra* note 55 (relating that Pemex was unable to attract many bids from international oil companies on service contracts for unconventional drilling).

88. *Id.*

89. *See* Negroponte, *supra* note 16 (delineating the Energy Reform's positive impact on Pemex through a simplified fiscal regime, capped cost deductions, lowered taxes, and pension fund liabilities).

90. Samples & Vittor, *Prospects for Reform*, *supra* note 20, at 698.

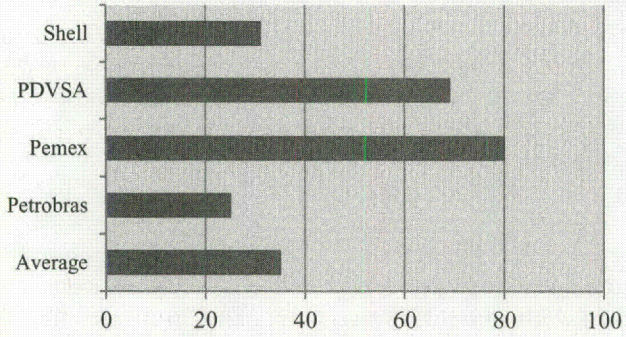
91. Symposium, *supra* note 10, at 58 ("The government has a formula in which about sixty-three percent of the gross revenue of [Pemex] goes to the Mexican treasury. That number represents about thirty-three percent of the total fiscal revenue of the country.").

92. *See* Duncan Wood, *The Administration of Decline: Mexico's Looming Oil Crisis*, 16 LAW & BUS. REV. AM. 855, 863 (2010) (observing that even "[t]he slightest mention of reforming [Pemex] immediately solicits calls to defend sovereignty and *la patria*").

93. *Conine*, *supra* note 19, at 631–36; *see also* Darling, *supra* note 61 (describing the detrimental effects of taxation and legal regulation on Pemex).

alongside its many burdens and challenges, the successes of Pemex are actually quite remarkable. At the same time, Pemex lacks the expertise, technology, and capital to confront a more challenging modern operating environment.

Figure 1: Tax Burdens of Oil Companies



Source: Bloomberg (2014) and Reuters (2013)

The Mexican government's fiscal dependence on Pemex translates into a crippling tax burden for the company.[94] Among energy companies, Pemex ranks behind only ExxonMobil in pre-tax profits, but falls to eighty-sixth place after taxes.[95] Despite raking in $126 billion in revenues, Pemex posted a $13 billion loss in 2013, paying $16 billion in taxes in the final quarter alone.[96] Pemex has been subject to exceptionally high tax rates for decades.[97] In recent years, Pemex has endured a nearly eighty percent tax burden.[98] Compared with peer companies, these numbers are remarkable, as illustrated in Figure 1 above.[99] Without Pemex, the Mexican government's relative fiscal deficit would more than triple.[100]

Pemex compensates in part for the Mexican government's poor tax collection rates, which are among the worst in Latin America.[101] But heavy taxing has handcuffed

94. Samples & Vittor, *Prospects for Reform*, *supra* note 20, at 705–06.

95. Jude Webber & John Paul Rathbone, *Energy: Back to Black*, FIN. TIMES (June 23, 2014, 6:05 PM), http://www.ft.com/intl/cms/s/0/b14f4110-f546-11e3-91a8-00144feabdc0.html#axzz3JFDcIeid.

96. Williams, *Mexico Oil Opening*, *supra* note 84.

97. *See* Samples & Vittor, *Prospects for Reform*, *supra* note 20, at 704 ("Pemex is arguably the most important company in Mexico and—mainly through taxes and direct payments—has historically been responsible for a remarkably large portion of the Mexican government's revenues while compensating for one of Latin America's weakest tax collection regimes.").

98. Jude Webber, *Pemex Rises to the Challenge of Reinventing Itself*, FIN. TIMES (Nov. 12, 2014, 6:50 AM), http://www.ft.com/intl/cms/s/0/973784ea-586a-11e4-a31b-00144feab7de.html?siteedition=intl#axzz3JHpOxA7n [hereinafter Webber, *Pemex Rises*].

99. The average tax burden for integrated oil companies is 35 percent. Carlos Manuel Rodriguez, *Death of 99% Pemex Tax Soothes Oil Monopoly Fate: Mexico Credit*, BLOOMBERG (Sep. 27, 2013, 12:23 PM), http://www.bloomberg.com/news/2013-09-27/death-of-99-pemex-tax-soothes-oil-monopoly-fate-mexico-credit.html; Garcia, *Mexico to Keep Pumping*, *supra* note 28.

100. Michael D. Plante & Jesus Cañas, *'Reforma Energética': Mexico Takes First Steps to Overhaul Oil Industry*, SOUTHWEST ECON., Second Quarter 2014, at 16, 19, *available at* http://www.dallasfed.org/assets/documents/research/swe/2014/swe1402.pdf.

101. *See How Many Mexicans Does it Take to Drill an Oil Well?*, ECONOMIST (Oct. 1, 2009), http://www.economist.com/node/14548839 (observing that Pemex taxes compensate "for one of Latin

Pemex in many ways, limiting expenditures on exploration, research and development, infrastructure, technology, and other strategic investments.[102] Pemex has been focused on maintaining short-term production rather than developing new resources.[103] Compared with state-owned peers, such as Petrobras and Statoil, the rate of investment in exploration per barrel of production at Pemex is remarkably low.[104] Making matters worse, Pemex has lost billions to theft by organized crime in recent years.[105] Over time, inadequate investment has taken a toll on reserves.[106] After a remarkable run in the 1970s, new discoveries have plateaued.[107]

Though highly protective of Pemex, Mexican law also shackles Pemex with onerous restrictions. Restrictions on foreign investment in the petroleum industry prohibit Pemex from entering into truly horizontal arrangements—such as joint ventures or production sharing agreements—with peer companies, which is common practice in the energy industry.[108] Risk sharing in the energy industry is particularly common for projects that require massive capital expenditures and carry substantial risk, like deepwater exploration and production.[109] But Pemex has been limited to partnering with other companies through service contracts.[110] As a consequence, Pemex has primarily worked with oilfield service companies in arrangements that essentially resemble subcontracting relationships.[111] Limiting Pemex to service contracts has restricted opportunities for learning from peer firms and sharing risk while also "deskilling" Pemex.[112]

2. Asking the Impossible

Pemex has been asked to do the impossible for Mexico. To be sure, the monopoly approach has created serious inefficiencies and problems in the Mexican energy

---

America's weakest tax regimes (which collects just 11% of GDP)").

102. *See id.* ("From 1983 to 2000 Pemex's annual investment budget was a paltry $3 billion. Until recently Cantarell's bounty disguised this."). *See generally El Diagnóstico: Situación de Pemex, Presentado por la Sener; un Diagnóstico Insuficiente y Tendencioso*, ANÁLISIS PLURAL, Primer Semestre 2008, at 56 (2008) (Mex.), *available at* http://rei.iteso.mx/bitstream/handle/11117/1298/AP%202008-1%20SEM_El%20diagnostico.pdf?sequence=2 (assessing the effects of Mexico's taxation policies on Pemex).

103. *See Señores, Start Your Engines*, ECONOMIST (Nov. 24, 2012), http://www.economist.com/news/special-report/21566782-cheaper-china-and-credit-and-oil-about-start-flowing-mexico-becoming ("[S]uccessive [Mexican] governments have milked Pemex rather than let it invest in technology.").

104. ZEPEDA, *supra* note 85, at 5.

105. Luke B. Reinhart, Comment, *The Aftermath of Mexico's Fuel-Theft Epidemic: Examining the Texas Black Market and the Conspiracy to Trade in Stolen Condensate*, 45 ST. MARY'S L.J. 749, 750–51 (2014).

106. *Señores, Start Your Engines*, *supra* note 103.

107. *See* ZEPEDA, *supra* note 85, at 5–6 (illustrating Pemex's low levels of exploratory investment and the corresponding increase in oil fields in plateau or declining).

108. Urdaneta, *supra* note 48, at 355.

109. Katie Mazerov, *Deepwater Trend Pushes Risk Management to Forefront*, DRILLING CONTRACTOR (Oct. 30, 2009), http://www.drillingcontractor.org/deepwater-trend-pushes-risk-management-to-forefront-1768.

110. Urdaneta, *supra* note 48, at 361.

111. Ognen Stojanovski, *The Void of Governance: An Assessment of Pemex's Performance and Strategy* 8 (Program on Energy and Sustainable Dev., Stanford Univ., Working Paper No. 73, 2008), *available at* http://iis-db.stanford.edu/pubs/22156/WP_73,_Stojanovski,_Pemex,_12_Apr_08.pdf.

112. *See id.* ("Overall, the strategy of partnering with other companies only through subcontracting has led to the deskilling of Pemex itself.").

industry.[113] But, considering the weight of the challenges, Pemex has been remarkably successful in many ways. In addition to financing the Mexican government and sponsoring social programs, Pemex ensures Mexico's energy security and provides for nearly all of Mexico's energy needs[114]—all while employing some 150,000 workers with generous pensions.[115] In comparison, Shell and ExxonMobil each employ fewer than 100,000.[116] As a virtual monopoly, Pemex was responsible for covering all of Mexico's hydrocarbon needs—upstream, midstream, and downstream—regardless of expertise or profitability.[117] Unlike a private company that could spin off an underperforming unit, Pemex had no choice but to continue operating highly unprofitable areas of business, like refining.[118] Complicated governance has also hindered Pemex, which has been run more like a ministry of government than a business enterprise.[119]

Despite the difficulty of being Mexico's cash cow and sacred cow, Pemex has considerable strengths, particularly in offshore exploration and production in shallow waters.[120] Pemex is the world leader in shallow water oil production and tends to be very profitable in shallow water projects.[121] Almost three quarters of Mexico's crude oil is produced in the offshore areas of the Bay of Campeche alone.[122] But since the 1970s, new discoveries in Mexico have tapered off dramatically.[123] Currently, Pemex is poorly adapted for Mexico's energy future. Strengthening Pemex is crucial to the success of the Energy Reform.[124] However, at the same time that Pemex will be granted increasing autonomy and independence, it will also be subjected to greater competition and a vastly different legal environment, complicating the task of reforming Pemex for the future.

---

113. Conine, *supra* note 19, at 635 ("In the absence of competition and with little reason to be concerned with profits for its government owner, the company has lacked adequate incentive to promote efficiency.").

114. *See id.* at 632–35 (discussing social and political aspects of Pemex governance).

115. *See* David Alire Garcia, *Mexico's Pemex in Talks with Oil Workers over Pension Reform -CEO Lozoya*, REUTERS (April 16, 2013, 7:11 PM), http://www.reuters.com/article/2013/04/16/mexico-pemex-idUSL2N0D32M720130416 (discussing Mexico's "generous pension scheme" for Pemex's 150,000 workers).

116. Shell employs 94,000. *Shell at a Glance*, SHELL GLOBAL, http://www.shell.com/global/aboutshell/at-a-glance.html (last visited Dec. 13, 2015). ExxonMobil employs 75,000; including employees of company-operated retail sites, that figure grows to 85,000. EXXON MOBIL CORP., ANNUAL REPORT (FORM 10-K), at 1 (Dec. 31, 2013).

117. *See* Conine, *supra* note 19, at 635 (noting the tensions and difficulties that come with Pemex's monopoly on the petroleum industry); Joyner, *supra* note 19, at 77 ("The composite body of these laws imbues Pemex with near exclusivity in exploration, exploitation, production, and marketing of petroleum and natural gas in Mexico.").

118. ConocoPhillips, Marathon, and Hess are prominent examples of oil companies that have spun off downstream units. *E.g.*, Christopher Helman, *As ConocoPhillips Spins Off Refining Assets, Think Twice Before the New Phillips 66*, FORBES (Apr. 30, 2012, 9:58 AM), http://www.forbes.com/sites/christopherhelman/2012/04/30/as-conocophillips-spins-off-refining-assets-should-you-own-the-new-phillips-66. Pemex suffered a $10 billion loss on downstream business in 2013. David Alire Garcia, *Analysis: A New Hope or False Dawn for Mexico's Oil Refiners?*, REUTERS (Jan. 3, 2014, 2:45 AM), http://www.reuters.com/article/2014/01/03/us-mexico-oil-analysis-idUSBREA0205O20140103.

119. *See infra* Part III.C.

120. *See* ZEPEDA, *supra* note 85, at 8–11 (showing Pemex's strengths in exploring shallow waters).

121. *Id.* at 9.

122. EIA Report, *supra* note 50, at 3.

123. ZEPEDA, *supra* note 85, at 3.

124. Webber, *Pemex Rises*, *supra* note 98.

E. Inefficiencies Versus Opportunities in Mexico's Energy Sector

A highly restrictive energy law framework has given rise to some unfortunate inefficiencies and problems in Mexico's energy sector.[125] Mexico is facing an increasingly problematic balance of trade scenarios in energy.[126] Growing domestic consumption combined with declining crude oil production led to projections that Mexico will soon become a net importer of oil.[127] Mexico is already a net importer of petroleum products from the United States.[128] Because of inadequate refining capacity at Pemex, Mexico already imports half its gasoline.[129] Finally, despite impressive reserves, Mexico imports a third of its natural gas.[130] Shortages in natural gas production, pipeline capacity, and transportation infrastructure are to blame.[131] As a result, Mexico often turns to expensive liquefied natural gas imports.[132]

Natural gas supplies are also closely tied to the government's goals of improving the electricity sector by reducing emissions and costs.[133] This effort has huge implications for other areas of the Mexican economy.[134] Lower electricity prices in Mexico would improve an already competitive industrial sector that has been restrained by the high cost of power.[135] Manufacturing in Mexico has been a strong point in the post-NAFTA economy and now employs a quarter of the Mexican workforce.[136] But electricity prices for the industrial sector have almost tripled since 2002 and currently cost almost twice as much as those in the United States.[137] Meanwhile, residential electricity rates are low—among the lowest in the world—but only because they are heavily subsidized, which strains public finances and distorts the

125. For a discussion of Mexico's energy law framework prior to the Energy Reform, see *infra* Part II.

126. *Id.*

127. *See* KENNETH B. MEDLOCK III & RONALD SOLIGO, JAMES A. BAKER III INST. FOR PUB. POLICY, RICE UNIV., SCENARIOS FOR OIL SUPPLY, DEMAND AND NET EXPORTS FOR MEXICO 25 (2011), *available at* http://bakerinstitute.org/files/514/ (projecting that Mexico could become a net importer of oil as soon as 2016).

128. Iliff, *Mexico Becomes Net Importer*, *supra* note 37 ("Mexico has become a net importer of petroleum products in its trade with the U.S. for the first time in at least 40 years, a significant industrial shift for a country that has long been proud of its status as one of the world's top crude-oil exporters.").

129. Webber & Rathbone, *supra* note 95.

130. *Id.*

131. Jeremy Martin, *Mexico: Shale Gas Becomes Priority*, LATINVEX (Oct. 23, 2012), http://www.latinvex.com/app/article.aspx?id=312.

132. Laurence Iliff, *Pemex Rejects Sole Pipeline Bid*, WALL ST. J. (Oct. 15, 2013, 8:42 PM) http://www.wsj.com/articles/SB10001424052702304561004579138080419933794 ("[Liquefied natural gas] costs four-to-five times the price of gas brought into Mexico via pipeline from the U.S., where the shale-gas boom has reduced prices.").

133. LISA VISCIDI & PAUL SHORTELL, INTER-AMERICAN DIALOGUE, A BRIGHTER FUTURE FOR MEXICO: THE PROMISE AND CHALLENGE OF ELECTRICITY REFORM 5 (2014), *available at* http://archive.thedialogue.org/uploads/IAD9603_MexicanEnergyFINAL.pdf.

134. *Id.* at 1 (suggesting that electricity sector reforms are "arguably more critical to the country's economic growth, trade and fiscal budget" than the oil and gas reform).

135. Anthony Harrup, *Electricity Sector Set to Benefit from Mexico's Energy Overhaul*, WALL ST. J. (Dec. 29, 2013, 1:21 PM), http://www.wsj.com/articles/SB10001424052702304361604579288451706618072 (suggesting that the competitive advantages of Mexico's energy sector are hampered by high electricity costs). *See generally* Jorge Alvarez & Fabián Valencia, *Made in Mexico: Energy Reform and Manufacturing Growth* (International Monetary Fund, Working Paper No. 15/45, 2015), *available at* https://www.imf.org/external/pubs/ft/wp/2015/wp1545.pdf (assessing the Energy Reform by analyzing the importance of electricity costs for Mexico's manufacturing sector).

136. VISCIDI & SHORTELL, *supra* note 133, at 1.

137. *Id.*

market.[138] In 2006, electricity tariffs charged to customers covered just sixty-eight percent of the cost to provide service.[139]

Mexico's power grid is heavily reliant on expensive oil-fired generation, which is economically and environmentally more costly than natural gas generation.[140] A critical objective of the Energy Reform is to spur production of natural gas within Mexico and, more immediately, develop pipelines for importing natural gas from the United States.[141] But grids and infrastructure are lacking too.[142] Mexico's grids are inefficient and plagued by theft, losing as much as a fifth of power at the distribution stage.[143] The Energy Reform will enable private investment in these key areas and lift the state-run electrical utility's (*Comisión Federal de Electricidad* or "CFE") monopoly over electricity generation.[144] While resolving electricity bottlenecks is crucial for Mexico's substantial manufacturing sector, residential electricity prices will influence the perceived success of the Energy Reform among the public.

II. THE EVOLUTION OF ENERGY LAW IN MEXICO

Prior to the Energy Reform, Mexico maintained one of the most restrictive legal frameworks for energy investment in the world.[145] By way of comparison, Cuba and Venezuela had more open frameworks for private investment in energy prior to the Energy Reform.[146] Like most countries, Mexico reserves ownership of hydrocarbon resources to the state.[147] But Mexican law restricted private activity in the energy sector far beyond worldwide norms, maintaining state monopolies over most aspects of the energy industry.[148] For decades, private participation in the petroleum sector

---

138. CTR. FOR ENERGY ECON., BUREAU OF ECON. GEOLOGY, UNIV. OF TEX. AT AUSTIN & INSTITUTO TECNOLÓGICO Y DE ESTUDIOS SUPERIORES DE MONTERREY, GUIDE TO ELECTRIC POWER IN MEXICO 4, 30 (2d ed. 2013), *available at* http://www.beg.utexas.edu/energyecon/2013%20E.pdf.

139. Kristin Komives et al., *Residential Electricity Subsidies in Mexico: Exploring Options for Reform and for Enhancing the Impact on the Poor* 3 (World Bank, Working Paper No. 160, 2009), *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/5959/471070PUB0MX0E101OFFICIAL0USE0ONLY1.pdf?sequence=1.

140. *See Emerging Clean Energy Powerhouses*, *supra* note 39 (discussing options that are cleaner and less costly than oil-fired power generation).

141. Everett Rosenfeld, *Mexico to Receive Major Economic Jolt, Experts Say*, CNBC (Aug. 26, 2014, 4:23 PM), http://www.cnbc.com/id/101948520.

142. VISCIDI & SHORTELL, *supra* note 133, at 2.

143. *Id.*

144. *Reform to Support Long-Term Mexican Growth, Energy Sector*, FITCHRATINGS (Aug. 7, 2014, 3:27 PM), https://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/Reform-to-Support?pr_id=847074 ("CFE . . . will see increased competition in generation while retaining the electricity distribution and transmission monopoly.").

145. CARLOS ELIZONDO MAYER-SERRA, JAMES A. BAKER III INST. FOR PUB. POLICY, RICE UNIV., STUCK IN THE MUD: THE POLITICS OF CONSTITUTIONAL REFORM IN THE OIL SECTOR IN MEXICO 9 (2011), *available at* http://bakerinstitute.org/media/files/Research/705e68da/stuck-in-the-mud-the-politics-of-constitutional-reform-in-the-oil-sector-in-mexico.pdf.

146. Miriam Grunstein, *Ahí viene el dolor . . .* [*Here Comes the Pain . . .*], ESTE PAÍS (Oct. 1, 2013), http://estepais.com/site/2013/ahi-viene-el-dolor/.

147. Canada and the United States are two of the only exceptions in the world—albeit very important ones—to the majority rule of outright state ownership. ERNEST E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS 30 (3d ed. 2010).

148. *See, e.g.*, MAYER-SERRA, *supra* note 145, at 9 ("Mexico remains one of—if not *the*—most restrictive oil regimes in the world."); Conine, *supra* note 19, at 632–34 (describing the Mexican government's

was limited to fixed-fee, cash-only service contracts—an anomaly among significant petroleum producing jurisdictions worldwide.[149] This Part analyzes the evolution of energy law in Mexico, highlighting major historical events and important issues leading to the Energy Reform.

A. Revolution and Expropriation

Foreign investment in the oil sector was welcomed with open arms under General Porfirio Díaz, who ruled over Mexico from 1887 to 1911.[150] During the Díaz era—often referred to in Mexico as the *Porfiriato*—foreign companies enjoyed ownership rights over oil and gas resources that resembled common law concepts of fee simple ownership.[151] At a time when international oil companies were extracting highly favorable terms from host governments across the world, Mexico was no exception.[152] But after the Mexican Revolution, which led to the overthrow of Díaz in 1911, natural resource policies in Mexico grew increasingly nationalistic.[153] The Constitution of 1917 laid the groundwork for Mexico's strictly protective energy law framework: Articles 27 and 28 prohibited most private activity in the energy sector and granted Pemex a legal monopoly over almost every phase of the oil and gas industry.[154]

In practice, however, the oil business carried on almost as usual for several years even after the Mexican Constitution of 1917 was adopted.[155] Foreign companies remained active and Mexico became the world's second largest producer, producing a quarter of the world's oil in 1921.[156] Newly minted constitutional restrictions were, at most, lightly enforced.[157] The full impact of the new laws was not felt until 1938, when relations between the Mexican government and foreign investors soured dramatically.[158] As a dispute between oil companies and state-controlled labor unions

---

motivation in creating Pemex); Murphy, *Further Energy Privatization*, *supra* note 19, at 76–77 (relating the historical monopolies of Pemex and the *Comisión Federal de Electricidad* (CFE) over the petroleum and electricity industries respectively).

149. Even after the 2008 reform, Pemex could only enter into service contracts that compensated other parties in cash. *See infra* note 201 and accompanying text. Under a fixed-fee service arrangement, a contractor receives a fixed cash payment for the performance of specific services, as opposed to receiving compensation based on the results of the project. For further explanation of Mexico's unusual approach to contracting frameworks, see *infra* Parts II.D and III.A.4.

150. *See* Jonathan C. Brown, *The Structure of the Foreign-Owned Petroleum Industry in Mexico, 1880–1938*, *in* THE MEXICAN PETROLEUM INDUSTRY IN THE TWENTIETH CENTURY 1, 5 (Jonathan C. Brown & Alan Knight eds., 1992) ("The Díaz government wanted new industries and changed the property laws to encourage foreign investment in Mexico.").

151. Smith, *supra* note 18, at 23–24.

152. *See id.* at 17–26 (discussing the asymmetrical terms of early petroleum arrangements between oil companies and host governments).

153. *See* JONATHAN C. BROWN, OIL AND REVOLUTION IN MEXICO 172 (1993) (noting that the Mexican Revolution "enhanced economic nationalism in Mexico"); Conine, *supra* note 19, at 627–28 (explaining how constitutional changes after the Mexican Revolution placed minerals under state control).

154. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, arts. 27–28, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

155. Smith & Dzienkowski, *supra* note 18, at 27.

156. Murphy, *Further Energy Privatization*, *supra* note 19, at 76.

157. Conine, *supra* note 19, at 629; Smith & Dzienkowski, *supra* note 18, at 27.

158. *See generally* Alan Knight, *The Politics of the Expropriation*, *in* THE MEXICAN PETROLEUM INDUSTRY IN THE TWENTIETH CENTURY 90 (Jonathan C. Brown & Alan Knight eds., 1992).

escalated, President Lázaro Cárdenas ordered the expropriation of foreign-owned oil and gas interests on March 18, 1938.[159] Pemex was formed by decree soon thereafter.[160]

B. Mexico's Expropriation: Ahead of the Curve

During the early era of the international petroleum industry, oil companies often commanded highly favorable terms in agreements with host governments.[161] Through concession agreements, sovereigns—particularly in the developing world—ceded control and broad rights over their oil industries.[162] Early concessions, including those granted in Mexico, offered extensive rights to oil companies but provided little in the way of compensation and work obligations owed to the sovereign.[163] The terms of Mexico's concessions were asymmetrical, strongly favoring the interests of energy companies.[164] Some companies were accused of misusing privileges and favorable tax rules.[165] Negative associations surrounding the word "concession" linger in Mexican politics today, reflecting Mexico's history with asymmetrical concessions.[166] For example, even today, the idea of offering concessions to private companies triggers "alarm bells" in Mexico.[167]

Mexico's expropriation in 1938 was a sequel to the Mexican Revolution and a prequel to a broader wave of recalibration between oil companies and sovereigns that was catalyzed by the formation of OPEC.[168] Among OPEC's key legacies was catalyzing the departure from traditional concessions towards participatory models for collaboration between sovereigns and multinationals.[169] Part of the movement towards

---

159. For contrasting views of the expropriation, compare GOVERNMENT OF MEXICO, THE TRUE FACTS ABOUT THE EXPROPRIATION OF THE OIL COMPANIES' PROPERTIES IN MEXICO 11–13 (1940) (arguing that the expropriation was legal and that Mexico intends to compensate the oil companies whose interests have been expropriated), with STANDARD OIL CO., THE REPLY TO MEXICO 1–6 (1940) (arguing that the expropriation was an illegal "confiscation" of the oil companies' property without compensation).

160. Decreto que Crea la Institución Petróleos Mexicanos [Decree Establishing the Institution Petróleos Mexicanos], *as amended*, Diario Oficial de la Federación [DO], 20 de Julio de 1938 (Mex.).

161. Smith, *From Concessions*, *supra* note 18, at 495–98.

162. SMITH ET AL., *supra* note 147, at 435–36; *see also* Smith, *From Concessions*, *supra* note 18, at 495–98 (relating the breadth of early Mexican and Middle Eastern concessions); Smith & Dzienkowski, *supra* note 18, at 17–23 (comparing early concession arrangements in the Middle East with oil and gas leases in the United States).

163. JESÚS SILVA HERZOG, PETRÓLEO MEXICANO: HISTORIA DE UN PROBLEMA 64 (1941); *see also* WENDELL C. GORDON, THE EXPROPRIATION OF FOREIGN-OWNED PROPERTY IN MEXICO 57–58 (1941) (discussing the terms of Mexico's early petroleum concessions).

164. *See, e.g.*, *id.* at 64–66 (describing the way companies benefitted from concessions); Smith & Dzienkowski, *supra* note 18, at 23–26 (detailing the generous benefits oil companies received from earlier concessions and comparing their rights to fee simple ownership).

165. GOVERNMENT OF MEXICO, *supra* note 159, at 13.

166. *Cf.* Webber, *Rough Ride*, *supra* note 13 (reflecting the negative attitudes towards concession).

167. *Id.*

168. For background on the formation of the Organization of the Petroleum Exporting Countries (OPEC), see generally Laurence Stoehr, Note, *OPEC as a Legal Entity*, 3 FORDHAM INT'L L.J. 91 (1979).

169. SMITH ET AL., *supra* note 147, at 437 ("The long-term influence of OPEC on the sovereign's ability to renegotiate the old concessions cannot be overstated. . . . This equalization of bargaining power made the renegotiation process a serious vehicle for a major restructuring of the traditional concession system."); *see also* Smith & Dzienkowski, *supra* note 18, at 32 (stating that negotiations between OPEC nations and oil companies resulted in "completely new petroleum arrangements that in many instances were more favorable to the countries than the renegotiated concessions"); *infra* note 254 and accompanying text.

greater local participation involved the creation of state-owned national oil companies (NOCs) by oil producing sovereigns.[170] Pemex was not the first NOC in Latin America, but Pemex was the first NOC in the world to emerge from a direct expropriation of foreign interests.[171] Renegotiations of concessions—and to a lesser extent, nationalizations—phased out the era of drastic investor-sovereign asymmetry in the petroleum industry.[172] While Mexico and Iran opted for single acts of expropriation to reclaim control over the oil industry,[173] most countries took a gradual approach.[174] Venezuela's national control over oil resources was incrementally exerted over the course of decades.[175] Several Middle Eastern countries, including Saudi Arabia, modified their original concessions through multiple rounds of renegotiations.[176] Mexico's expropriation emboldened the national aspirations of petroleum producing countries in the developing world.[177] But most modifications came decades later.[178]

Together, Mexico and Pemex embody the most successful example of a major oil sector expropriation. Though perhaps the lone exception, Mexico's expropriation proved that a state-owned oil company in a former colony could develop petroleum resources on a major scale—largely independent of foreign investment.[179] For decades, Pemex managed to finance the Mexican government and provided Mexico with a relatively high level of energy independence.[180] In doing so, Pemex became an oil giant and made Mexico a significant petroleum exporter.[181] Pemex remains a leading NOC worldwide.[182] However, over the course of history—and, particularly, with the current production situation—Mexico's experiment also illustrates potential limitations.[183]

---

170. *See* MATTHEW E. CHEN, JAMES A. BAKER III INST. FOR PUB. POLICY, RICE UNIV., NATIONAL OIL COMPANIES AND CORPORATE CITIZENSHIP: A SURVEY OF TRANSNATIONAL POLICY AND PRACTICE 3 (2007), *available at* https://bakerinstitute.org/media/files/page/935cea60/noc_cc_chen.pdf (discussing the creation of many NOCs within the international oil market).

171. Conine, *supra* note 19, at 630.

172. SMITH ET AL., *supra* note 147, at 436–37; *see also* Smith & Dzienkowski, *supra* note 18, at 26–32 (detailing the changes in the concession system); Smith, *From Concessions*, *supra* note 18, at 499 (discussing the tendency for most countries to limit the scope of oil agreements with third parties more narrowly than in the past).

173. Smith & Dzienkowski, *supra* note 18, at 29–30 (discussing Mexico's expropriation in 1938); Farshad Ghodoosi, *Combatting Economic Sanctions: Investment Disputes in Times of Political Hostility, A Case Study of Iran*, 37 FORDHAM INT'L L.J. 1731, 1735–39 (2014) (discussing Iran's expropriation of the Anglo-Iranian Oil Company).

174. Smith & Dzienkowski, *supra* note 18, at 30–31.

175. *See generally* Luis E. Cuervo, *The Uncertain Fate of Venezuela's Black Pearl: The Petrostate and Its Ambiguous Oil and Gas Legislation*, 32 HOUS. J. INT'L L. 637 (2010).

176. SMITH ET AL., *supra* note 147, at 436–37; Smith & Dzienkowski, *supra* note 18, at 30–31.

177. *See* George Philip, *The Expropriation in Comparative Perspective*, *in* THE MEXICAN PETROLEUM INDUSTRY IN THE TWENTIETH CENTURY 173, 179 (Jonathan C. Brown & Alan Knight eds., 1992) ("[T]he fact that Mexican nationalization did not turn out to be a complete failure was one of several factors gradually moving the balance of bargaining away from foreign companies and toward host governments.").

178. Iran expropriated foreign oil interests in 1951. Ghodoosi, *supra* note 173, at 1738. A broader wave of notable nationalizations in the 1970s included Nigeria, Venezuela, Saudi Arabia, and Libya. *See generally* Smith & Dzienkowski, *supra* note 18. For an overview of this movement in the Middle East, see generally *Concession to Participation*, *supra* note 18.

179. Joyner, *supra* note 19, at 64.

180. Symposium, *supra* note 10, at 58.

181. Bergmann, *supra* note 73; EIA Report, *supra* note 50, at 3.

182. *See* ZEPEDA, *supra* note 85, at 8–11 ("Pemex is the leading company in shallow water oil production worldwide . . . ."); Mehta, *supra* note 76 (listing Pemex as number 36 on Fortune's Global 500 list in 2014). *See generally* EIA Report, *supra* note 50.

183. *See supra* Part I.D.

C. *Before and After the Petroleum Law of 1958*

Even with a nationalized oil sector and constitutionally enshrined restrictions, Mexico continued to allow private investment through risk-service contracts under the Petroleum Law of 1940.[184] While concessions were clearly prohibited by the Mexican Constitution, other types of arrangements, including risk-service contracts, remained constitutional and permissible under existing law.[185] Through these hybrid arrangements that resembled risk-service agreements, contractors received compensation based on the production yield of a project, as opposed to a flat fee in a pure service contract.[186] Risk-service arrangements became widely used in Latin America as concessions and title to petroleum resources increasingly became politically sensitive terms in conflict with national sovereignty.[187] Risk-service contracts were especially important in Mexico during the late 1940s and early 1950s when Pemex sought capital and technology through private sector investments.[188]

But restrictions on private participation in Mexico's energy industry were tightened further with the enactment of the Petroleum Law of 1958, which banned even risk-service contracts.[189] So began the most restrictive era of energy law in Mexico, which lasted up until the current Energy Reform.[190] The Petroleum Law of 1958 expressly prohibited compensation based on a percentage of production, participation, or the results of exploration.[191] Petroleum investment arrangements were thus limited to "pure" service contracts with fixed cash payments for the performance of specific services.[192] As a consequence, fixed-fee service contracts became the only option for partnering with Pemex and investing in Mexico's oil sector.[193] Additionally, the Petroleum Law of 1958 extended the Pemex monopoly further downstream to include the manufacture, transportation, storage, distribution, and initial sale of petroleum products.[194]

---

184. HARRY K. WRIGHT, FOREIGN ENTERPRISE IN MEXICO: LAWS AND POLICIES 126–27 (1971). For an explanation of risk-service arrangements, see *infra* Part III.A.4.

185. Conine, *supra* note 19, at 641.

186. Miriam Grunstein, *Mexico*, *in* UPSTREAM LAW AND REGULATION: A GLOBAL GUIDE 255, 258 (Eduardo G. Pereira & Kim Talus eds., 2013) [hereinafter Grunstein, *Mexico*] ("[T]he permitted contracts were of a hybrid kind between production sharing agreements and risk service contracts, as compensation was paid in kind or in cash depending on specific circumstances established in the law.").

187. *See* Smith, *From Concessions*, *supra* note 18, at 519–21 (discussing the use of risk-service contracts in Latin America).

188. *See* RICHARD POWELL, THE MEXICAN PETROLEUM INDUSTRY, 1938–1950 48–49 (1956) (discussing contractual efforts by the Mexican government to encourage private investment).

189. Conine, *supra* note 19, at 641; Murphy, *Further Energy Privatization*, *supra* note 19, at 84–85.

190. *See* Grunstein, *Mexico*, *supra* note 186, at 259 (detailing the restrictions that the Petroleum Law of 1958 created).

191. Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [Petroleum Law of 1958], *as amended*, art. 6, Diario Oficial de la Federación [DO], 29 de Noviembre de 1958 (Mex.).

192. Murphy, *Further Energy Privatization*, *supra* note 19, at 84–85; WRIGHT, *supra* note 184, at 126.

193. Murphy, *Further Energy Privatization*, *supra* note 19, at 84–85; WRIGHT, *supra* note 184, at 126–27.

194. Petroleum Law of 1958, art. 6 (Mex.); *see also* Murphy, *Further Energy Privatization*, *supra* note 19, at 85 (stating that regulations implementing the Petroleum Law of 1958 "detail[ed] Pemex's monopoly position in specific sectors of the hydrocarbon industry").

D. The 2008 Reform

Faced with significant declines in oil production, the Calderón government attempted to modernize Mexico's energy sector with a new framework for private investment and greater flexibility for Pemex.[195] Despite significant political backlash, the reforms passed in November 2008.[196] For Pemex, this reform increased autonomy from the Mexican government in budgeting and operations, albeit slightly.[197] Pemex was granted a new contracting framework for arrangements with the private sector for exploration and production projects.[198] The 2008 reform also made important changes within Pemex and reshaped the regulatory landscape.[199] Despite improvements over the previous system, the contracting framework emerging from the 2008 reform was far from a meaningful liberalization of the energy sector.[200] Available contracting options were still limited to service contracts with cash compensation mechanisms because restrictions enshrined in the Mexican Constitution remained intact.[201]

Under the 2008 reform, Pemex was permitted to contract with private companies by offering projects through public bidding rounds.[202] But standard investment contracts—such as concessions, production sharing agreements, profit sharing agreements, and even risk-service contracts—remained prohibited after the 2008 reform.[203] As a result, Pemex remained limited to offering glorified service contracts when partnering with other energy companies.[204] The so-called integrated service contracts enabled by the 2008 reform were essentially service contracts with bonus payments when certain predefined production goals were met.[205] Interests resembling a share in production, which may have allowed contractors to book reserves, remained prohibited.[206] Ultimately, the post-2008 bidding rounds failed to generate serious interest or competitive bids from leading independent and major oil companies.[207]

III. EVALUATING THE CURRENT ENERGY REFORM

The Energy Reform proceeded in three phases, beginning with a constitutional overhaul, which passed Congress in December 2013 and cleared the way for a new investment framework by removing key restrictions in the Mexican Constitution.[208]

---

195. Ley de Petróleos Mexicanos [Pemex Law 2008], Diario Oficial de la Federación [DO], 28 de Noviembre de 2008 (Mex.) (enacting reforms to the Petroleum Law of 1958 during Felipe Calderón's presidency); Samples & Vittor, *Energy Reform*, *supra* note 20, at 218, 224–25.

196. Pemex Law 2008, arts. 51–53 (Mex.); Samples & Vittor, *Energy Reform*, *supra* note 20, at 224–25.

197. Samples & Vittor, *Energy Reform*, *supra* note 20, at 224–26.

198. Pemex Law 2008, arts. 51–52 (Mex.); Samples & Vittor, *Energy Reform*, *supra* note 20, at 217.

199. Samples & Vittor, *Energy Reform*, *supra* note 20, at 224–25.

200. Samples & Vittor, *Prospects for Reform*, *supra* note 20, at 718.

201. Pemex Law 2008, art. 61 (Mex.); Grunstein, *Mexico*, *supra* note 186, at 257–58; Samples & Vittor, *Energy Reform*, *supra* note 20, at 227.

202. Pemex Law 2008, arts. 51–53 (Mex.); Samples and Vittor, *Energy Reform*, *supra* note 20, at 217–18.

203. Samples & Vittor, *Energy Reform*, *supra* note 20, at 227, 229.

204. *Id.* at 228–30.

205. *Id.*

206. *Id.* at 230.

207. Baker, *supra* note 65, at 189–92; Samples & Vittor, *Energy Reform*, *supra* note 20, at 228.

208. *See generally* Decreto por el que Se Reforman y Adicionan Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía [Decree to Amend the Mexican Constitution on

Absent the constitutional restrictions, the legislative phase went forward when Congress passed the so-called "secondary" energy laws in August 2014.[209] The secondary legislation established models for private investment in the energy sector, defined the roles of regulatory authorities, created sovereign wealth funds to manage oil revenues, and more.[210] Finally, the regulatory phase of the reform took shape in October 2014 with the issuance of regulations that provide detail to the secondary legislation.[211] This Part evaluates key changes and major legal issues emerging from the Energy Reform, with a particular emphasis on the new contracting framework for private investment.

A. Contracting Models for Private Investment

Contracting models for private investment have evolved dramatically since the early era of the petroleum industry. Early concessions granted during the 1930s were often negotiated between newly independent developing countries and powerful multinational oil companies.[212] These early agreements were lopsided, providing meager rights and benefits for sovereigns.[213] Mexico's early concessions with private companies exemplified the asymmetrical nature of these early arrangements.[214] But throughout the twentieth century, the creation of OPEC and other developments emboldened host governments to demand more favorable terms from oil companies.[215] Traditional concessions gave way to renegotiated concessions with more balanced terms.[216] At the same time, completely new contract forms emerged as sovereigns demanded greater participation in the development of their natural resources.[217]

Many resource rich countries around the world have faced a classic dilemma involving tradeoffs between developing resources (and therefore, increasing tax revenues) versus maintaining sovereignty over natural resources.[218] Until recently, Mexico's answer to this core development question for the energy industry has been

---

Energy Matters], Diario Oficial de la Federación [DO], 20 de Diciembre de 2013 (Mex.).

209. Negroponte, *supra* note 16.

210. *Id.* The Energy Reform established sovereign wealth funds to manage oil revenues with which to stabilize government budgets and bolster long-term savings, among other goals. Laurence Iliff, *Mexico Launches Fund to Administer Oil Income*, WALL ST. J. (Sept. 30, 2014, 3:38 PM), http://online.wsj.com/articles/mexico-launches-fund-to-administer-oil-income-1412105898. For a review of current issues for sovereign wealth funds in international finance, see generally Salar Ghahramani, *Sovereign Wealth Funds, Transnational Law, and the New Paradigms of International Financial Relations*, 8 YALE J. INT'L AFF. 52 (2013).

211. *Mexican President Peña Promulgates Regulations to the Secondary Laws of the Energy Reform*, JONES DAY (Nov. 2014), http://www.jonesday.com/mexican-president-pena-promulgates-regulations-to-the-secondary-laws-of-the-energy-reform/.

212. Smith & Dzienkowski, *supra* note 18, at 17–18 & n.27.

213. *Id.*; SMITH ET AL., *supra* note 147, at 429–30; Smith, *From Concessions*, *supra* note 18, at 495–98.

214. *See supra* notes 152, 162–164 and accompanying text.

215. *See infra* notes 254–259 and accompanying text.

216. SMITH ET AL., *supra* note 147, at 436–39; *see also* Smith & Dzienkowski, *supra* note 18, at 26–34 (characterizing the evolution away from the concession system).

217. Smith & Dzienkowski, *supra* note 18, at 34–35; *see also infra* Parts III.A.2–4.

218. *Concession to Participation*, *supra* note 18, at 774; *see also* Juan Carlos Palau, *Transactional, Social, and Legal Aspects of Oil Exploration and Extraction in Colombia*, 22 NW. J. INT'L L. & BUS. 35, 36–37 (2001) (addressing Colombia's efforts to cope with fiscal dependency on oil revenues by attracting foreign investment with a more attractive legal framework).

firmly in favor of national ownership.[219] Although Mexico and Pemex instituted arguably the most successful oil nationalization in the world, national ownership has limited production and, consequently, hurt public finances in recent years.[220] With the expropriation of 1938, Mexico broke the ice in a movement towards greater energy nationalism in many petroleum-producing countries, marking a decisive departure from an era of asymmetrical arrangements with petroleum companies.[221] This Energy Reform is the most transformative moment for Mexico's energy sector since then—a total paradigm shift and a huge departure from the incremental adjustments of past energy reforms.

Newly established contracting frameworks are a critical feature of the Energy Reform. To a large extent, the success of the Energy Reform will depend on attracting private investment to develop new areas of the energy industry, which could broaden and diversify the Mexican government's take beyond Pemex. Early in the reform process, it appeared that the Peña Nieto administration would settle for incremental change by adding profit sharing agreements as a contracting model for private investment.[222] Enabling profit sharing alone would have been a fairly significant departure from Mexico's longstanding service contract model. But instead, lawmakers negotiated a drastic overhaul to Mexican energy law, which established a vastly different contracting framework administered by a new regulatory system.[223]

The Energy Reform created a contracting framework that is both enabling and flexible. New legislation enables Mexican regulators to choose from a full array of contractual models: (1) license agreements, (2) production sharing agreements, (3) profit sharing agreements, and (4) service contracts.[224] While each of these agreements has the common purpose of governing private investment in the energy sector, they offer varying approaches to the allocation of risks and rewards between sovereigns and contractors.[225] Regulatory agencies have discretion to select from these options when bidding out a particular project.[226] Prior to the Energy Reform, only fee-based service contracts were available for investment by private companies.[227] As a result, Mexico will go from being one of the most limited major jurisdictions for energy investment to being among the more flexible.[228] This section analyzes the newly available models for private investment in the exploration and production of hydrocarbons under the current Energy Reform.

---

219. *See* Páramo, *supra* note 62, at 448 ("[T]he [oil and gas] industry has become a matter of national pride; and a symbol of the wealth and patrimony of the Mexican people. It is considered a strategic activity by the Mexican Constitution, which means that it is strictly reserved to the state. No private participation is allowed, with few exceptions."); Smith & Dzienkowski, *supra* note 18, at 227 (stating that even after the 2008 reform, the legal constraints imposed by the Petroleum Law of 1958 and the Mexican Constitution remained intact).

220. *See supra* Part I.C.

221. *See supra* Part II.B.

222. Juan Montes, *Mexico Seeks Deeper Revamp of Energy Sector*, WALL ST. J. (Nov. 5, 2013, 5:11 PM), http://www.wsj.com/articles/SB10001424052702303936904579179993847537308.

223. *See infra* notes 391–404 and accompanying text.

224. Ley de Hidrocarburos [Hydrocarbons Law], art. 18, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

225. For an analysis of these types of agreements, see *infra* Part III.A.1–4.

226. *See infra* Part III.D.

227. *See supra* notes 108–112 and accompanying text.

228. LOURDES MELGAR, SECRETARÍA DE ENERGÍA DE MÉXICO, MEXICO'S ENERGY REFORM (2014), *available at* http://www.jsg.utexas.edu/lacp/files/Energy-Reform-Houston_MLMP20140207_2.pdf.

1. License Agreements

Licenses, which are essentially a modern incarnation of concessions, are widely used in the international petroleum industry.[229] Establishing license agreements as an available contracting model is an important—and somewhat controversial—aspect of the Energy Reform.[230] Although these licenses will likely resemble a modern version of the concession agreement, granting concessions for petroleum exploration and production remains explicitly prohibited by the Mexican Constitution.[231] Political sensitivities around concessions reflect lingering memories of Mexico's early history with foreign oil companies.[232] But Mexico is not alone in this approach to concessions terminology.[233] Pejorative associations with the word "concession" have prompted the labeling of modern concessions as "licenses" around the world.[234] European countries have been issuing exploration and production licenses for almost half a century.[235] History also shows that political controversy over the terms of concessions is not limited solely to developing countries.[236]

As relations between oil companies and sovereigns evolved, modern concessions became far more symmetrical than their predecessors from the early era of international petroleum investment. Though the fundamental structure of the agreements remains intact, the terms of modern concessions are more balanced.[237] For one, government take from investment activities—usually paid through royalties and taxes—is much higher.[238] In early Mexican concessions, royalties were just ten percent.[239] Under Mexico's new system, government take will likely land near the higher side of the industry standard range of fifty to seventy-five percent.[240] Other crucial terms have shifted as well. In modern concessions, sovereigns retain greater control over operational decisions.[241] Obligations for companies, such as minimum

229. SMITH ET AL., *supra* note 147, at 429, 447–48.

230. *As Mexico's Energy Reform Nears, Optimism Abounds*, OIL & MONEY (June 6, 2014), http://oilandmoney.net/interactive/agenda-topics/as-mexicos-energy-reform-nears-optimism-abounds/ (explaining the controversy of licensing agreements).

231. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

232. *Cf.* Webber, *Rough Ride*, *supra* note 13 (reflecting the negative attitudes towards concession).

233. Smith, *From Concessions*, *supra* note 18, at 497–501.

234. *Id.* at 501.

235. *See, e.g.*, SMITH ET AL., *supra* note 147, at 454–63 (detailing the licensing systems used in the United Kingdom, Norway, Denmark, and the Netherlands); William H. Millard, *The Legal Environment of the British Oil Industry*, 18 TULSA L. REV. 394, 418–30 (1983) (discussing license agreements offered by the British government from the 1960s through the 1980s); Tore Tønne, *Energy Policy: A Norwegian Perspective*, 5 NW. J. INT'L L. & BUS. 722, 732–33 (1983) (detailing the licensing framework utilized by the Norwegian government).

236. License agreement terms have created controversy even in the United Kingdom. *See, e.g.*, Millard, *supra* note 235, at 419 (noting criticism of the British government's efforts at creating fair license terms).

237. Smith, *From Concessions*, *supra* note 18, at 501.

238. SMITH ET AL., *supra* note 147, at 451–52.

239. Smith, *From Concessions*, *supra* note 18, at 497 n.16.

240. Webber & Rathbone, *supra* note 95. By way of comparison, government take is seventy-eight percent of net profit in Norway and seventy-five percent in Colombia. *See* Garcia, *Mexico to Keep Pumping*, *supra* note 28.

241. *See, e.g.*, Michael Likosky, *Contracting and Regulatory Issues in the Oil and Gas and Metallic Minerals Industries*, 18 TRANSNAT'L CORPS. 1, 8 (2009), *available at* http://unctad.org/en/docs/diaeiia20097a1_en.pdf ("Control over projects is premised on partnership, not dominance.").

investment requirements, are also more demanding.[242] Modern concessions, frequently lasting less than thirty years, have also become much shorter than early concessions, which often lasted six or seven decades.[243] Mexico's licenses will certainly reflect this evolution towards more balanced terms.

Under a concession arrangement, the contracting company receives rights to oil produced in exchange for obligations to pay taxes plus a royalty on production to the government.[244] Signing bonuses, rental fees, and other payments may apply as well.[245] An important characteristic of the concession arrangement is that the contracting company receives direct rights to the oil produced (minus the applicable government take) as compensation.[246] In Mexico, title to hydrocarbons will transfer to the contractor at the wellhead once the oil is extracted and applicable payments have been made.[247] Some countries have implemented dual category systems that distinguish between exploratory licenses and production licenses.[248] As with other international petroleum investment arrangements, key terms include minimum investment obligations, duration, and government take.[249] Requirements for participation by the NOC or domestic industry may also be included in licenses.[250]

The scope of rights granted under concessions can vary significantly from system to system and even from project to project.[251] Brazil recently opted to leave an existing concession system in place while establishing a production sharing model specifically for pre-salt areas.[252] Mexican regulators may opt to offer licenses for projects that present special challenges for attracting investment. Areas involving significant risk or capital requirements—shale in Chicontepec or deepwater, for instance[253]—are likely candidates for bidding under the license model. As with other systems around the world, Mexico's license agreements are likely to allocate more control to contractors over operations than alternative arrangements, like production sharing and service agreements.

---

242. *E.g.*, SMITH ET AL., *supra* note 147, at 448–50.

243. *Compare id.* at 448 (giving examples of typical modern concession agreements with twenty and thirty-five year terms), *with id.* at 429–32 (giving examples of six or seven decade long concession agreements from the early twentieth century).

244. *Id.* at 447–48.

245. *Id.* at 448, 451; *see also infra* Part III.B.3.

246. Smith & Dzienkowski, *supra* note 18, at 36–37.

247. Dictamen de las Comisiones Unidas de Puntos Constitucionales; de Energía, y Estudios Legislativos, Primera, con Proyecto de Decreto por el que Se Reforman y Adicionan Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos en Materia de Energía [Report of the Joint Committee on Constitutional Issues; of Energy and Legislative Studies, First, Draft Decree to Reform and Add Diverse Energy Regulations to the Political Constitution of the United Mexican States], 16, Senado de la República [Mexican Senate], Diciembre de 2013 (Mex.), *available at* http://energiaadebate.com/wp-content/uploads/2013/12/proyectoreformaenergetica.pdf.

248. Smith, *From Concessions*, *supra* note 18, at 506; *see also*, *e.g.*, Tønne, *supra* note 235, at 732–33 (explaining Norway's dual category licensing system).

249. *See* SMITH ET AL., *supra* note 147, at 447–51 (describing the terms in modern license agreements); *infra* Part III.B.

250. SMITH ET AL., *supra* note 147, at 442.

251. *See, e.g.*, Dewey J. Gonsoulin, Jr. et al., *Representing Clients in International Energy Projects*, HOUS. LAW., Nov./Dec. 2012, at 10, 11–12 (describing how legal rights in concession agreements vary based on the investment treaties, local laws, and "petroleum legislation" of the host country).

252. Bryan W. Blades, *Production, Politics, and Pre-Salt: Transitioning to a PSC Regime in Brazil*, 7 TEX. J. OIL GAS & ENERGY L. 31, 32–34 (2012).

253. *See supra* notes 42–55 and accompanying text.

2. Production Sharing Agreements

With the formation of OPEC and the broader recalibration of bargaining power between international oil companies and sovereigns, production sharing agreements emerged as an alternative to concessions.[254] Indonesia is often credited with pioneering the first production sharing agreement in the 1960s.[255] Many oil-producing countries at that time—particularly in the developing world—were making efforts to increase domestic participation in production through NOCs.[256] As a result, national participation and collaboration with NOCs are common features in production sharing models.[257] Often, these arrangements serve as a framework for partnership between a sovereign's NOC and the private sector.[258] With management rights and ownership interests often remaining in the hands of the NOC, production sharing agreements allowed sovereigns to exert more control over foreign investment in the energy industry while bolstering domestic industry.[259]

Under production sharing arrangements, a company is contracted to develop resources in exchange for a share in production.[260] The contracting company receives a percentage of the production that a project yields, payable in kind, in exchange for undertaking risk and providing financing for and management of a project.[261] Production sharing arrangements often reimburse contractors for certain recoverable costs with a portion of the total production, often referred to as "cost oil."[262] The remaining oil, known as "profit oil," will be shared between the sovereign and the contractor according to a predetermined formula established in the production sharing agreement.[263] Without guaranteed profits, the company bears the risk in the event that the project fails to produce.[264] Production sharing arrangements provide narrower rights to contracting companies than traditional concessions but still allow contracting companies to be paid in kind.[265] A sovereign (or its NOC) obtains all oil produced from the project and then shares specified percentages of the oil with the contracting

254. Smith & Dzienkowski, *supra* note 18, at 31–32. In the 1960s, Iran and Indonesia were among the first countries to move away from concession models and towards production sharing arrangements. *Id.* at 37. Formed in 1960, OPEC was a critical influence on the recalibration of bargaining power between sovereigns and international oil companies. *Id.* at 31–32; SMITH ET AL., *supra* note 147, at 437–38. For background on the formation of OPEC, see generally Stoehr, *supra* note 168.

255. For an extensive discussion of Indonesia's movement towards production sharing arrangements and the emergence of Indonesia's NOC, see generally Robert Fabrikant, *PERTAMINA: A Legal and Financial Analysis of a National Oil Company in a Developing Country*, 10 TEX. INT'L L.J. 495 (1975), and Robert Fabrikant, *Production Sharing Contracts in the Indonesian Petroleum Industry*, 16 HARV. INT'L L.J. 303 (1975) [hereinafter Fabrikant, *Production Sharing*].

256. *Concession to Participation*, *supra* note 18, at 780–81. NOCs are now a dominant force in the energy industry worldwide. For a broad discussion of NOCs and their role in the international energy industry, see generally CHEN, *supra* note 170.

257. SMITH ET AL., *supra* note 147, at 463–64.

258. *Id.*

259. *Id.*

260. Smith, *From Concessions*, *supra* note 18, at 514.

261. *Id.* at 517–19.

262. *Id.* at 517.

263. *Id.* at 518.

264. SMITH ET AL., *supra* note 147, at 463.

265. Smith, *From Concessions*, *supra* note 18, at 514–16.

company.[266] Like modern concessions, minimum investment and work obligations are common in production sharing models.[267]

For decades, production sharing agreements were explicitly prohibited by Mexican law.[268] For the first time, the Energy Reform has enabled participation agreements,[269] which will be formed between the National Hydrocarbons Commission and either a contracting company or a consortium of companies.[270] Pemex may be the lead contractor in the agreement or a member of the contracting consortium.[271] Production sharing models are generally less controversial than concessions with respect to sovereignty concerns.[272] For one, sovereigns generally retain greater control over the operations and management of projects under production sharing arrangements.[273] Rights to hydrocarbons in the ground are not conveyed to contractors under production sharing agreements.[274] Also, because production sharing gained prominence after the emergence of OPEC and the broader recalibration of bargaining power between sovereigns and oil companies, production sharing is not associated with lopsided or asymmetrical terms to the extent that concessions are.[275]

Unveiled in December 2014, the first projects offered in Round One under the new legal framework were production sharing agreements in fourteen shallow-water blocks in the southern Gulf of Mexico.[276] These contracts will be granted with a twenty-

266. *Id.* at 518.

267. *See* SMITH ET AL., *supra* note 147, at 471–73 (discussing the use of minimum investment and work commitment clauses in production sharing agreements). In the fourteen shallow water projects unveiled in the first phase of Round One under the Energy Reform, minimum investment levels were projected at $1 billion per project. Adam Williams et al., *Mexico Expects $14 Billion Spending in First Oil Blocks*, BLOOMBERG (Dec. 11, 2014, 3:13 PM), http://www.bloomberg.com/news/articles/2014-12-11/mexico-output-sharing-contracts-set-for-25-years-in-oil-opening [hereinafter Williams et al., *First Oil Blocks*].

268. *See infra* Part II.C–D.

269. "The term 'participation agreement' has no fixed definition, but merely refers to one of the documents setting out the terms on which the host country (or usually the NOC) participates in the venture with the foreign operator. Thus, it is not so much a separate form of development arrangement as an agreement which is an adjunct to a concession, [production sharing agreement], or even a risk-service contract. Its closest American analogue may be the joint operating agreement, although even this analogy is quite inexact." SMITH ET AL., *supra* note 147, at 492.

270. DAVID L. GOLDWYN ET AL., ATL. COUNCIL, MEXICO'S ENERGY REFORM: READY TO LAUNCH 12, 14–16 (2014), *available at* http://www.atlanticcouncil.org/images/files/MexEnRefReadytoLaunch_FINAL_8.25._1230pm_launch.pdf. Pemex and private companies may submit bids on contracts "individually, in consortium, or in a participatory association." JOHN B. MCNEECE III ET AL., MEXICO'S ENERGY REFORM PROVIDES SIGNIFICANT OPPORTUNITIES IN OIL AND GAS EXPLORATION AND PRODUCTION 5–6 (2014), *available at* http://www.pillsburylaw.com/siteFiles/Publications/Advisory20140828CSMexicosEnergyReform.pdf.

271. *See* MCNEECE ET AL., *supra* note 270, at 5–7 (stating that a private company may submit joint bids with Pemex or enter into a joint venture with Pemex after it has already won a contract or received an assignment).

272. Many sovereigns perceive that their sovereignty will be compromised if they concede their property interests to foreign corporations. Smith, *From Concessions*, *supra* note 18, at 500. Unlike concessions, production sharing agreements do not require sovereigns to concede any ownership of land or minerals. *Id.* at 515.

273. *See* SMITH ET AL., *supra* note 147, at 463–64 (describing that the NOC or another government agency will often act as an "overseer" and assume significant operational and managerial responsibilities during the term of a production sharing agreement).

274. Smith, *From Concessions*, *supra* note 18, at 515.

275. *See* Smith, *From Concessions*, *supra* note 18, at 513–14 (explaining that third world countries prefer production sharing agreements to concessions).

276. *Mexico Uses PSCs in First Round One Step*, OIL & GAS J. (Dec. 19, 2014), http://www.ogj.com/articles/2014/12/mexico-uses-pscs-in-first-round-one-step.html. The model production

five year term, subject to various conditions.[277] Minimum investment requirements vary somewhat from project to project, but at approximately $1 billion per block, the projects are expected to generate over $14 billion in aggregate investment.[278] Though key aspects of the production sharing agreements are pending—among them, the fiscal terms[279]—the agreements unveiled at the beginning of Round One are well-drafted and approximate international standards in many key areas.[280]

3. Profit Sharing Agreements

In the early stages of the Energy Reform, it appeared that the overhaul would enable profit sharing agreements but stop short of production sharing agreements and licenses.[281] Instead, profit sharing agreements became one of several contracting options available to Mexican regulators for public bidding.[282] Relatively few countries have relied exclusively—or even primarily—on profit sharing agreements to manage investment in the petroleum industry.[283] In a profit sharing model, the sovereign receives all oil produced in exchange for compensating the contracting company with a share of production revenue.[284] A key distinguishing characteristic of profit sharing is that payment to the contracting company is determined by the results of production

sharing agreement for these initial projects was made available in December 2014. Contrato para la Exploración y Extracción de Hidrocarburos bajo la Modalidad de Producción Compartida, Modelo Individual [Production Sharing Agreement for the Exploration and Extraction of Hydrocarbons, Individual Model], COMISIÓN NACIONAL DE HIDROCARBUROS (Dec. 11, 2014) [hereinafter Round One Model PSA], *available at* http://ronda1.gob.mx/wp-content/uploads/2015/09/R01L01_Contrato-individual_20141211.pdf.

277. Round One Model PSA, *supra* note 276, cl. 3; Laurence Iliff, *Mexico Offers First Oil Blocks to Private Firms*, WALL ST. J. (Dec. 11, 2014, 7:44 PM), http://www.wsj.com/articles/mexico-offers-first-oil-blocks-to-private-firms-1418345088.

278. Williams et al., *First Oil Blocks*, *supra* note 267.

279. Round One Model PSA, *supra* note 276, cl. 21.

280. For specific comments on the Round One Model PSA, see *infra* Part III.B.

281. *See* Montes, *supra* note 222 (indicating that President Nieto's initial timid reform proposal only called for the introduction of profit sharing agreements).

282. Ley de Hidrocarburos [Hydrocarbons Law], art. 18, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.); GOLDWYN ET AL., *supra* note 270, at 15–16.

283. Ecuador and Iran are among the most prominent examples. *See* Richard Fausset & Nancy Rivera Brooks, *Mexico Oil Reform Appears to Take Approach of Iran, Ecuador*, L.A. TIMES (Aug. 12, 2013), http://articles.latimes.com/2013/aug/12/world/la-fg-wn-mexico-oil-reform-20130812 (noting that Iran, Ecuador, and Bolivia are the only countries who use the profit sharing approach).

284. MARTIN S. RAYMOND & WILLIAM L. LEFFLER, OIL AND GAS PRODUCTION IN NONTECHNICAL LANGUAGE 74 (2006).

revenues, but is not made in kind from production.[285] It remains to be seen what purpose the profit sharing model will serve under the Energy Reform.

4. Service Agreements

Service contracts are widely used in international petroleum transactions.[286] Not all energy companies prefer to receive interests in oil production and management responsibilities in a project.[287] Service companies tend to specialize in providing specific oil field services—from seismic imaging and cement jobs to directional drilling services—often for a cash fee.[288] Service contracts may provide contractors with compensation in kind or in cash.[289] International and local service companies have been active in Mexico for decades; Pemex has relied extensively on the technical skills, human capital, and know-how of such companies to explore and produce oil in Mexico.[290]

There are essentially two types of service arrangements: Risk-service contracts and "pure" service contracts.[291] A typical pure service contract obligates the contractor to provide a specified service in exchange for a fixed fee.[292] Bonus structures, special incentives, and cost reimbursement provisions may also play a role in remuneration.[293] But a contractor's compensation is not dependent upon the results of the project.[294] The risks and rewards of exploration and production remain primarily with the state or NOC rather than being shared with the contractor.[295] Service contracts do not provide contractors with title to oil in the ground.[296] Nor do pure service contracts offer companies rights to oil production.[297] Prior to the Energy Reform, Mexico was among

---

285. *See, e.g.*, Sergio A. Ramirez, *Los Contratos Se Adjudicarán Mediante Licitación Pública a Quien Otorgue las Mejores Condiciones para el Estado [Contracts Will Be Awarded to the Public Bid that Gives the Best Conditions for the State]*, ENERGÍA A DEBATE (July 1, 2014) (discussing Mexico's oil contract taxation scheme).

286. *See* Smith, *From Concessions*, *supra* note 18, at 519–22 (describing service contracts used in the United States and Latin America).

287. *See The Unsung Masters of the Oil Industry*, ECONOMIST (July 21, 2012), http://www.economist.com/node/21559358 (discussing oil field service firms that are willing to contract with NOCs to provide technological services).

288. *Id.*

289. Grunstein, *Mexico*, *supra* note 186, at 255.

290. *See* James Osborne, *For Texas Companies, Pemex Contracts Have Meant Billions*, DALL. MORNING NEWS (July 11, 2014, 2:58 PM), http://www.dallasnews.com/business/energy/20140711-for-texas-companies-pemex-contracts-have-meant-billions.ece (reporting that Pemex awarded as much as $180 billion in contracts to outside firms between 2002 and 2011). In addition to significant volume, Pemex also makes use of a "limited variety" of service contracts. Grunstein, *Mexico*, *supra* note 186, at 255.

291. Smith, *From Concessions*, *supra* note 18, at 519–20.

292. *Id.* at 519.

293. *See, e.g.*, Samples & Vittor, *Energy Reform*, *supra* note 20, at 229 (stating that a model service contract used by Pemex and the Mexican government after the 2008 reform provided performance-related bonus payments for contractors).

294. SMITH ET AL., *supra* note 147, at 482.

295. *Id.*

296. *See* Smith & Dzienkowski, *supra* note 18, at 41 (noting that service contracts allow a country to obtain assistance in developing "its own resources").

297. *Id.*

only a few countries in the world to rely on a pure service contract model to manage private investment in the oil industry.[298]

Risk-service contracting models differ in important ways from pure service contract models. Under risk-service arrangements, instead of receiving a fixed fee, the contracting company's compensation depends on the results of the project.[299] Under a risk-service arrangement, the contractor provides capital, technology, and equipment in assuming the risk of developing a project.[300] Remuneration mechanisms for contractors vary widely in risk-service models but are usually linked to the results of production.[301] Risk-service agreements typically provide compensation for contractors only if and when commercial production occurs.[302] Remuneration does not include a direct share of production but may involve preferential purchase rights to the oil produced.[303] For most energy companies, risk-service contracts are less attractive investment agreements than production sharing and concession agreements.[304]

Risk-service models have been employed most extensively in Latin America.[305] Some countries opted for risk-service models when sovereignty concerns made concessions or production sharing arrangements politically undesirable.[306] When sovereignty concerns also extended to production and foreign currency was scarce, countries sometimes provided purchase rights to specified amounts of oil produced to the contractor as a workaround.[307] When packaged with such purchase rights, a risk-service arrangement begins to resemble a production sharing agreement.[308] Mexico relied on risk-service contracts to attract technology and capital prior to the Petroleum Law of 1958, which limited private investment to fee-based service arrangements.[309] From that time until the current Energy Reform, Mexico relied on a pure service

298. Dictamen de las Comisiones Unidas de Puntos Constitucionales; de Energía, y Estudios Legislativos, Primera, con Proyecto de Decreto por el que Se Reforman y Adicionan Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos en Materia de Energía [Report of the Joint Committee on Constitutional Issues; of Energy and Legislative Studies, First, Draft Decree to Reform and Add Diverse Energy Regulations to the Political Constitution of the United Mexican States], 16, Senado de la República [Mexican Senate], Diciembre de 2013 (Mex.), *available at* http://energiaadebate.com/wp-content/uploads/2013/12/proyectoreformaenergetica.pdf.

299. Smith & Dzienkowski, *supra* note 18, at 41.

300. Smith, *From Concessions*, *supra* note 18, at 520.

301. *Id.* at 520–21.

302. *Id.* at 520; Smith & Dzienkowski, *supra* note 18, at 41.

303. Smith, *From Concessions*, *supra* note 18, at 521; *see also*, *e.g.*, Marilda Rosado de Sá Ribeiro, *The New Oil and Gas Industry in Brazil: An Overview of the Main Legal Aspects*, 36 TEX. INT'L L.J. 141, 146–47 (2001) (noting that non-Brazilian companies contracting with Petrobras often have a preferential right on a limited amount of the oil produced).

304. ZHIGUO GAO, INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS 203 (1994).

305. Smith, *From Concessions*, *supra* note 18, at 519–21.

306. Abbas Ghandi & C.-Y. Cynthia Lin, *Oil and Gas Service Contracts Around the World: A Review* 3 ENERGY STRATEGY REVIEWS 63, 64 (2014).

307. Smith, *From Concessions*, *supra* note 18, at 521.

308. *Id.* at 522. Because service contracts are not based on receiving actual ownership of the resource, but rather a set profit from the venture, mechanisms inside of service contracts to provide for ownership of methods or results of production can change the dynamics of the arrangement. *See* Smith & Dzienkowski, *supra* note 18, at 35–36 ("It is important to note, however, that some existing agreements have borrowed clauses and concepts from two or more of the types of arrangements. Thus, precise categorization of a country's arrangements is not always possible.").

309. *See supra* notes 188–190 and accompanying text.

contracting model, a rarity among petroleum investing frameworks worldwide.[310] Though it remains likely that Pemex will continue to rely on service contracts for certain oilfield services, the future role of the service contract model in Mexico's energy sector remains to be seen.

B. Key Terms in Mexico's Investment Agreements

Though agreements vary widely, certain key terms are common to almost all international petroleum arrangements around the world. Among the most commonly important provisions are national content, tax and royalty structures, minimum work obligations, and dispute resolution.[311] As previously discussed, some critical terms—including ownership rights and title, rights to production, and control over operations—tend to vary by agreement model.[312] As bargaining power between oil companies and sovereigns evolved, the terms of petroleum investment arrangements became more balanced between the interests of sovereigns and international oil companies.[313] In today's energy investment environment, sovereigns balance the need to attract desirable investments with the goal of maximizing take and benefits for domestic interests.[314] Though early signals reflect a concerted effort by Mexico to produce a contracting framework and model contracts that approximate international industry standards, important issues await clarification and final resolution.

1. Minimum Investment Requirements

Channeling capital into strategic areas of the economy while maximizing take and meeting development objectives for domestic industry are common end goals for sovereigns seeking to develop natural resources.[315] Minimum investment requirements provide means to those ends by establishing commitments by contractors to invest a minimum predetermined amount in developing a project.[316] These types of obligations are standard in modern petroleum investment agreements.[317] Minimum investment amounts are determined on a project-by-project basis to ensure adequate investments in exploration by the contractor. Currently referred to as the "minimum work program" in Mexico's production sharing agreements, these requirements for minimum exploration activities are set forth in Annex 5.[318] In the first shallow water

310. Grunstein, *Mexico*, *supra* note 186, at 255; *see also supra* note 298 and accompanying text.

311. A detailed evaluation of all the important terms in the current Round One Model PSA is beyond the scope of this article. For a thorough industry critique of the Round One Model PSA, see generally PEDRO VAN MEURS & J. JAY PARK, REPORT ON PROPOSED MEXICO MODEL CONTRACT AND BID CONDITIONS FOR FIRST SHALLOW WATER BID ROUND (2014), *available at* http://energiaadebate.com/wp-content/uploads/2014/12/VanMeurs.pdf (recommending substantial changes to the Round One Model PSA in order to maximize oil and gas development in riskier fields in the wake of constitutional and legislative changes in Mexico).

312. *See supra* Part III.A.

313. *See supra* notes 237–243 and accompanying text.

314. SMITH ET AL., *supra* note 147, at 506.

315. *Id.*

316. *Id.* at 471.

317. *Id.* at 449–51, 471–73 (describing the common inclusion of minimum investment requirements in international petroleum contracts and giving examples of license and production sharing agreements with minimum investment clauses).

318. Round One Model PSA, *supra* note 276, annex 5.

projects tendered under Round One, the minimum work programs averaged roughly $1 billion per project.[319]

2. National Content

National content requirements enable sovereigns to leverage foreign investment to accomplish strategic goals for domestic industry.[320] As with other terms, sovereigns must balance national interests with the need to attract investment. Overzealous content requirements may actually be self-defeating: Recently, onerous local content requirements have stifled investment in Brazil's oil sector.[321] Local content policies emerged alongside production sharing systems to diversify and enhance the impact of petroleum investment in host countries.[322] Norway has been a world leader in local content policy and has opted for flexible content requirements.[323] Instead of creating target percentages for local participation, Norway established mechanisms in the bidding process that grant preferences for competitive local firms.[324]

Mexican law establishes a minimum national content target of thirty-five percent for exploration and production activities.[325] This target is an overall industry average, as opposed to a minimum target applicable to each project.[326] Specific content requirements for a project are determined on a case-by-case basis by the Secretariat of the Economy in consultation with the Secretariat of Energy.[327] Deepwater and ultra deepwater projects are expressly excluded from the national content requirements in recognition of the lack of local experience in such areas.[328]

Increased flexibility and pragmatism marks an improvement over previous rounds. In rounds following the 2008 energy reform, national content targets were fixed at forty percent from the beginning of the contractual period.[329] Rather than applying a fixed target across all projects, national content rules under the Energy Reform establish an industry-wide target, which allows customized targets for

319. *See* Williams et al., *First Oil Blocks*, *supra* note 267 (describing the cost of such projects).

320. National content requirements (often referred to as local content clauses in international petroleum contracts) require oil companies to subcontract with local firms for goods and services. SMITH ET AL., *supra* note 147, at 524–25. These requirements allow countries to promote foreign investment in the national economy as well as supply jobs and training to the local labor force. *Id.*

321. Jeremy Martin & Alexis Arthur, *Latin America 2014: Top Energy Stories*, LATINVEX (Dec. 15, 2014), http://www.latinvex.com/app/article.aspx?id=1781.

322. SMITH ET AL., *supra* note 147, at 524–25; *see also, e.g.*, OLIVIA LESKINEN ET AL., HARVARD BUS. SCH., NORWAY OIL AND GAS CLUSTER: A STORY OF ACHIEVING SUCCESS THROUGH SUPPLIER DEVELOPMENT 18–22 (2012), *available at* http://www.isc.hbs.edu/resources/courses/moc-course-at-harvard/Documents/pdf/student-projects/120503%20MOC%20Norway%20final.pdf (discussing the impact of local content policies on Norwegian petroleum support organizations and suppliers).

323. *Norway: A Local Content Success Story*, OIL & GAS IQ (Mar. 26, 2010, 12:00 AM), http://www.oilandgasiq.com/strategy-management-and-information/articles/norway-a-local-content-success-story/.

324. LESKINEN ET AL., *supra* note 322, at 18–19 (discussing preferential bidding policies and other local content requirements implemented by Norway).

325. Ley de Hidrocarburos [Hydrocarbons Law], art. 46, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

326. *Id.*

327. *Id.*

328. *See id.* (stating that deepwater and ultra deepwater are excluded from these requirements).

329. Samples & Vittor, *Energy Reform*, *supra* note 20, at 234.

individual projects.[330] Further, in Mexico's first model production sharing agreements for shallow water areas under Round One, national content requirements are established on a progressive scale, which allows domestic industry to adapt to new demands and opportunities for goods and services.[331] The targets are reasonably attainable and increase progressively through 2025, which should allow contractors and the domestic industry sufficient time to achieve targets.

3. Fiscal Terms and Government Take

Plunging oil prices have complicated bidding aspirations for Round One, particularly for unconventional projects in Chicontepec, but longer-term investment decisions are unlikely to be derailed by immediate price trends alone.[332] Fiscal terms are a critical element in designing foreign investment systems because government take is a top priority for sovereigns seeking investment in natural resource industries.[333] Fiscal terms are equally critical to contractors because they define the economics of a project.[334] As with other key terms, sovereigns will seek to maximize national benefits—in this instance, government take—while still offering enough margin for profit to attract desirable investment.[335] A wide variety of tax and non-tax mechanisms for capturing petroleum industry rents are available to sovereigns.[336]

Mexican law establishes a number of government take mechanisms applicable to petroleum investment contracts: Royalties, bonuses, rental fees, and general corporate taxes.[337] Royalties typically specify levies based on either the volume of oil produced or the value of oil produced.[338] In Mexico, royalties apply to license, production sharing, and profit sharing arrangements.[339] Royalties in Mexico will be calculated based on market prices and will vary among oil, gas, and condensates.[340] For oil royalties, if the price per barrel is under $48, the royalty rate is fixed at 7.5 percent.[341] If over $48, the rate is calculated according to the following formula:

$$\text{Rate} = [(0.125 \times \text{contractual oil price}) + 1.5] \text{ percent.}$$[342]

330. Hydrocarbons Law, art. 46 (Mex.).

331. Round One Model PSA, *supra* note 276, cl. 19.3.

332. Adrián Lajuos, *The Impact of Lower Oil Prices on the Mexican Economy*, COLUMBIA CENTER ON GLOBAL ENERGY POL'Y (Dec. 9, 2014), http://energypolicy.columbia.edu/sites/default/files/energy/CGEP_The%20impact%20of%20lower%20oil%20prices%20on%20the%20Mexican%20economy.pdf.

333. SMITH ET AL., *supra* note 147, at 506–07.

334. *Id.* at 507.

335. *Id.* at 506; Emil M. Sunley et al., *Revenue from the Oil and Gas Sector: Issues and Country Experience*, *in* FISCAL POLICY FORMULATION AND IMPLEMENTATION IN OIL-PRODUCING COUNTRIES 153, 154 (J. M. Davis et al. eds., 2003).

336. *E.g.*, Sunley et al., *supra* note 335, at 155–63 (discussing the different ways in which governments collect revenue); SMITH ET AL., *supra* note 147, at 505.

337. Ley de Ingresos Sobre Hidrocarburos [Hydrocarbons Revenue Law], art. 6, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

338. Sunley et al., *supra* note 335, at 155.

339. Hydrocarbons Revenue Law, arts. 6–20 (Mex.).

340. *Id.* arts. 23–24, 44.

341. *Id.*

342. *Id.*

Rental fees may also apply to the contractual area during the project.[343] Rental fees are typically calculated by applying a fee per acre of the contractual area, providing the lessor or the host government with a minimum income even if the project fails to become commercially viable.[344] Signature bonuses, payable to the government by the contractor, apply upon the execution of a license agreement.[345] Signature bonuses ensure immediate income for the government, no matter the results of the project.[346] The Secretariat of Finance (*Secretaría de Hacienda y Crédito Público* or "Hacienda") is responsible for determining the specific fiscal terms for a project on a case-by-case basis.[347] General corporate taxes also apply to companies carrying out exploration and production activities in Mexico.[348] Though many countries impose a higher profit tax rate on the oil industry than the general corporate rate, oil companies will pay the standard thirty percent Mexican corporate tax.[349]

4. Dispute Resolution

Investor-state disputes have a long and sometimes painful history in Latin America.[350] These disputes have often involved sovereign debt defaults and the expropriation of natural resource assets, including some particularly high-profile examples in recent years.[351] Due to the long-term and capital-intensive nature of oil and gas investments, expropriation risks are especially common in the energy industry.[352] Though the nature of investor-state dispute resolution has evolved dramatically since the era of "gunboat diplomacy," investments in extractive industries

---

343. *Id.* art. 55.

344. *E.g.*, *id.*

345. SMITH ET AL., *supra* note 147, at 448.

346. Sunley et al., *supra* note 335, at 155 ("Bonuses can ensure some up-front revenue for the government and may encourage companies to explore and develop contract areas more rapidly. They are usually suitable only in highly prospective areas where there is strong competition among investors for petroleum rights.").

347. Ley de Hidrocarburos [Hydrocarbons Law], art. 30, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

348. Ley de Ingresos Sobre Hidrocarburos [Hydrocarbons Revenue Law], art. 4, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

349. *Id.* The standard thirty percent corporate income tax is established in Mexico's Income Tax Law. Ley de Impuesto Sobre la Renta [Income Tax Law], art. 9, Diario Oficial de la Federación [DO], 11 de Diciembre de 2013 (Mex.).

350. *See, e.g.*, Kris James Mitchener & Marc D. Weidenmier, *Supersanctions and Sovereign Debt Repayment* 14–16, (Nat'l Bureau of Econ. Research, Working Paper No. 11472, 2005), *available at* http://www.nber.org/papers/w11472.pdf (describing different historical investor-state disputes in Latin America).

351. *See, e.g.*, Julian Cardenas Garcia, *The Era of Petroleum Arbitration Mega Cases: Commentary on* Occidental v. Ecuador, *ICSID Award, 2012*, 35 HOUS. J. INT'L L. 537, 539 (2013) (describing large scale arbitration disputes arising from petroleum investments in Latin America); Tim R Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law*, 35 NW. J. INT'L L. & BUS. 49, 52–55 (2014) (explaining the evolution of sovereign debt disputes from the "gunboat diplomacy" era to modern times).

352. George K. Foster, *Managing Expropriation Risks in the Energy Sector: Steps for Foreign Investors to Minimize their Exposure and Maximize Prospects for Recovery when Takings Occur*, 23 J. ENERGY & NAT. RESOURCES L. 36, 37 (2005); *see* Kyle Doherty, Comment, *From "The Oil is Ours!" to Liberalization: Resource Nationalism and the Mexican Energy Reform*, 53 HOUS. L. REV. 245, 259 (2015) (underscoring the importance of dispute resolution mechanisms for foreign investors).

still account for many such disputes arising in Latin America.[353] Mexico, for its part, has been party to some landmark expropriation disputes.[354] In recent decades, investor-state arbitration has become the industry standard dispute resolution mechanism for international petroleum investments.[355]

Though Mexico offers a relatively stable and welcoming investment climate, dispute resolution provisions are nonetheless crucial.[356] Mexico's model production sharing agreements provide for the arbitration of disputes in accordance with the arbitration rules of the United Nations Commission on International Trade Law.[357] Legislation requires that investment contracts be subject to Mexican federal law and that arbitration must be in Spanish.[358] Although the arbitration proceedings will be conducted in Spanish, the site of arbitration is The Hague, Netherlands in the current production sharing agreements.[359] This dispute resolution provision represents an improvement from previous bidding rounds when contracts provided for arbitration in Mexico City.[360]

However, there is a significant exception carved out of arbitration for disputes related to administrative rescission.[361] Under the first model production sharing agreements in Round One, disputes related to administrative rescission will be resolved through the federal courts of Mexico rather than through arbitration.[362] Legislation defines the government's right to administrative rescission as allowing regulators to terminate the contract in certain events that are considered serious breaches of the agreement.[363] Potential bidders may consider these provisions as a source of uncertainty and risk, especially if the only legal recourse available is through federal courts in Mexico. Though the rights for contractual rescission are broader and arguably more problematic for bidders than those for administrative rescission, disputes related to contractual rescission can at least be taken to arbitration.[364]

---

353. Alexia Brunet & Juan Agustin Lentini, *Arbitration of International Oil, Gas, and Energy Disputes in Latin America*, 27 NW. J. INT'L L. & BUS. 591, 610 (2007).

354. *See generally* Patrick del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35 (2003).

355. *See* Brunet & Lentini, *supra* note 353, at 599 ("Most Latin American countries realized that in order to attract foreign investment, they would need to embrace arbitration by ratifying international conventions encouraging international arbitration and amending their domestic legislation.").

356. *E.g.*, *MOC Urges Mexico to Protect Chinese Firms' Interests*, ECNS.CN (Feb. 6, 2015, 10:38 AM), http://www.ecns.cn/business/2015/02-06/153953.shtml (citing the importance of dispute resolution clauses in a China Railway Construction Corporation contract for infrastructure investments in Mexico).

357. Round One Model PSA, *supra* note 276, cl. 26.4.

358. Ley de Hidrocarburos [Hydrocarbons Law], art. 21, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

359. Round One Model PSA, *supra* note 276, cl. 26.4.

360. Samples & Vittor, *Energy Reform*, *supra* note 20, at 232 (suggesting that *situs* in Mexico City was excessively adverse to foreign investors).

361. Round One Model PSA, *supra* note 276, cl. 23.1.

362. *Id.* cl. 26.3.

363. The regulatory agency responsible for these determinations is the National Hydrocarbons Commission (CNH). Hydrocarbons Law, art. 20 (Mex.).

364. CNH's broad rights to contractual rescission will likely be a source of concern for potential bidders. Round One Model PSA, *supra* note 276, cl. 23.2.

C. *Pemex as a Productive State Enterprise*

NOCs play a dominant role in modern energy markets.[365] In worldwide rankings, NOCs comprise the entire top ten in oil and gas reserves and account for a majority of the top twenty producers.[366] Even after flagging production in recent years, Pemex remains among the largest oil companies and one of the most important NOCs in the world.[367] But overly restrictive laws, complicated governance, and heavy tax burdens have hindered Pemex for decades.[368] Pemex has essentially been run as a ministry of the government, and strategic investments have been shortchanged for immediate revenues.[369] Reinvigorating Pemex and fostering competition in the energy sector are key aims of the Energy Reform.[370] But enabling Pemex to thrive in a newly competitive business environment requires a break from the past. Improving governance and tax burdens for Pemex are major steps towards that goal.

Before losing its monopoly, Pemex had the opportunity under the Energy Reform to retain rights to exploration and production areas in a process known as "Round Zero."[371] Pemex submitted requests for existing fields and reserves in March 2014 for approval by regulators in what essentially amounted to an internal bidding round for Pemex.[372] The purpose of Round Zero was to determine which prospects Pemex should keep and which should be opened for public bidding.[373] Mexico's Round Zero approximates similar approaches undertaken by Brazil and Colombia in recent energy liberalizations.[374] When requesting assets, Pemex was required to provide proof of the technical and financial capacity required to develop the resources.[375] Pemex received almost all of the reserves it requested under Round Zero, which amounted to eighty-three percent of Mexico's so-called proved and probable reserves and twenty-one percent of potential reserves.[376]

---

365. *National Oil Companies Now Dominate World Oil*, REAL CLEAR ENERGY (July 9, 2012), http://www.realclearenergy.org/charticles/2012/07/09/sovreign_oil_companies_now_dominate_world_oil_106619.html.

366. JAMES A. BAKER III INST. FOR PUB. POLICY, RICE UNIV., POLICY REPORT NO. 35, THE CHANGING ROLE OF NATIONAL OIL COMPANIES IN INTERNATIONAL ENERGY MARKETS 1 (2007), *available at* http://bakerinstitute.org/media/files/Research/5be0c5c4/BI_PolicyReport_35.pdf.

367. *See supra* notes 73–75 and accompanying text.

368. *See supra* Part I.D.

369. *See* Stojanovski, *supra* note 111, at 38 (explaining that governmental interference and control of Pemex "shifted the company's focus to activities that yielded a prompt financial return").

370. Peña Nieto, *supra* note 29.

371. Decreto por el que Se Reforman y Adicionan Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía [Decree to Amend the Mexican Constitution on Energy Matters], Diario Oficial de la Federación [DO], 20 de Diciembre de 2013 (Mex.) (allowing for Pemex to retain limited rights in areas where it had made commercial discoveries or investments in exploration prior to the Energy Reform); GOLDWYN ET AL., *supra* note 270, at 10–12.

372. David Alire Garcia & Ana Isabel Martinez, *Mexico May Trim Pemex's Oil Field Wish List*, REUTERS (Mar. 25, 2014, 9:33 PM), http://www.reuters.com/article/mexico-reforms-oil-idUSL1N0MN29P20140327.

373. *Id.*

374. Jeremy Martin, *Mexico Energy: Round Zero, End of Beginning*, LATINVEX (Apr. 2, 2014), http://www.latinvex.com/app/article.aspx?id=1301.

375. Adam Critchley, *Pemex Could Lose Oil Fields Awarded in Round Zero*, BNAMERICAS (May 7, 2015), http://www.bnamericas.com/en/news/oilandgas/pemex-could-lose-oil-fields-awarded-in-round-zero.

376. GOLDWYN ET AL., *supra* note 270, at 11; Adam Williams, *Pemex Granted All Probable Reserves Sought in Oil Opening*, BLOOMBERG (Aug. 13, 2014, 6:28 PM), http://www.bloomberg.com/news/2014-08-

The Energy Reform restructured Pemex as a "productive state enterprise," a conceptually new legal entity under Mexican law.[377] The productive state enterprise model is a theoretical departure from the "ministry" approach of past governance: Pemex will have greater latitude to place a greater emphasis on generating profits and value for its sole shareholder, the Government of Mexico.[378] Meanwhile, the tax burden shouldered by Pemex is expected to decrease from 71.5 percent to 65 percent within five years.[379] These adjustments are long overdue.[380] The Energy Reform consolidates important governance transformations that began in 2008.[381] Prior to the 2008 reform, the board of Pemex was composed entirely of political appointments, six made by the President and five by the Petroleum Workers Union of Mexico.[382] The current Energy Reform eliminated the Union's board seats altogether,[383] enhanced requirements for independence and expertise among directors,[384] and modernized the board's committee structure.[385]

Historically, business decisions at Pemex were often motivated as much by politics as by geology and economics.[386] The company has often been burdened with unprofitable projects in pursuit of national development policies.[387] Though Pemex has been granted greater discretion to pursue profits under the Energy Reform, how this new approach will actually take shape remains uncertain. Pemex also received significantly more autonomy from the government than before in budgeting and financial operations, including debt issuances.[388] Although the concept of productive state enterprise remains vague, improved governance practices and professionalization of the board are sensible improvements. Reforms granting Pemex genuine independence and autonomy should be positive in the long-term.

13/pemex-s-production-future-set-at-21-share-of-potential-deposits.html.

377. Ley de Petróleos Mexicanos [Pemex Law 2014], art. 2, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

378. *Id.* art. 4.

379. Negroponte, *supra* note 16.

380. *See* Samples & Vittor, *Prospects for Reform*, *supra* note 20, at 730–31 (proposing a value-driven corporate model for Pemex with greater emphasis on independence, accountability, and transparency).

381. The 2008 reform created four independent, professional positions on the board of directors of Pemex. Ley de Petróleos Mexicanos [Pemex Law 2008], art. 8, Diario Oficial de la Federación [DO], 28 de Noviembre de 2008 (Mex.).

382. Alejandro López-Velarde, *The New Foreign Participation Rules in Each Sector of the Mexican Oil and Gas Industry: Are the Modifications Enough for Foreign Capitals?*, J. WORLD ENERGY L. & BUS. 71, 76 (2010).

383. Williams, *Pemex Braces*, *supra* note 83.

384. Nicolas Borda, *Energy Reform in Mexico: Navigating New Mexican Energy Laws Will Be Challenging*, OIL & GAS FIN. J. (Jan. 13, 2015), http://www.ogfj.com/articles/print/volume-12/issue-1/features/energy-reform-in-mexico.html.

385. Ley de Petróleos Mexicanos [Pemex Law 2014], arts. 20–21, 40–45, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

386. Conine, *supra* note 19, at 633.

387. Laurence Iliff, *Mexico's Pemex Adjusts Structure to Compete With Private Companies*, WALL ST. J. (Aug. 20, 2014, 12:11 PM), http://online.wsj.com/articles/mexicos-pemex-adjusts-structure-to-compete-with-private-companies-1408569077 ("Pemex has been burdened by the costs of unprofitable projects that the company carried out because they were deemed necessary for reasons of national development policy."); *see also, e.g.*, Conine, *supra* note 19, at 632–33 (explaining the politically-driven structure of Pemex).

388. Pemex Law 2014, arts. 100–08 (Mex.).

D. Regulatory Framework and Bidding Process

Mexico, like most sovereigns, has delegated oversight powers and the administration of public bidding rounds for hydrocarbon projects to regulatory agencies. The Energy Reform transferred bidding responsibilities from Pemex to several regulatory agencies.[389] Currently, the primary energy regulators in Mexico are the National Hydrocarbons Commission (CNH), the Energy Regulatory Commission (CRE), and the Secretariat of Energy (SENER).[390] CNH was established under the 2008 reform to regulate exploration and production activities.[391] CRE was formed in 1995 to regulate certain aspects of the downstream energy industry.[392] SENER, historically, has acted in both policymaking and regulatory oversight roles.[393] Finally, the Energy Coordinating Council was established under the Energy Reform to ensure consistency in the regulatory efforts of CNH and CRE in the more complex post-reform environment.[394]

Responsibility for administration of the bidding process is divided among several regulatory bodies. First, with assistance from CNH, SENER selects areas and the appropriate contracting model for a particular project.[395] SENER also designs commercial and technical terms for the contracts, including bidding requirements, national content, and minimum work obligations.[396] Hacienda sets the economic and fiscal terms for the contracts.[397] Hacienda also determines the criteria for selecting winning bids.[398] After SENER establishes the guidelines for the bidding process, CNH sets up data rooms and carries out the bidding process.[399] Finally, CNH executes the contracts with winning bidders and oversees the operational stage after projects have been awarded.[400]

Capacity and independence are crucial factors for effective regulatory administration in Mexico's new energy landscape. The interests of Mexican citizens and foreign investors alike depend on fair and transparent regulatory administration of the new bidding process. Mismanaged public bidding can result in political scandal,

---

389. Between the 2008 energy reform and the current Energy Reform, bidding rounds were administered by Pemex Exploración y Producción (PEP), the exploration and production division of Pemex. Samples & Vittor, *Energy Reform*, *supra* note 20, at 217.

390. *See* Jacint Jordana, *Autonomous Regulatory Agencies in Democratic Mexico*, 16 L. & BUS. REV. AMERICAS 753, 764–66 (describing the primary energy regulators in Mexico).

391. *Id.* at 765.

392. *Id.* at 764.

393. CRISTOPHER BALLINAS VALDÉS, TAMING THE BEAST WITHIN: THE MEXICAN ENERGY REGULATORY COMMISSION 11 (2011), *available at* https://bakerinstitute.org/files/489/.

394. Ley de los Órganos Reguladores Coordinados en Materia Energética [Coordinated Energy Regulatory Bodies Law], arts. 2–3, 41–42, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.); MIRIAM GRUNSTEIN, JAMES A. BAKER III INST. FOR PUB. POLICY, RICE UNIV., COORDINATED REGULATORY AGENCIES: NEW GOVERNANCE FOR MEXICO'S ENERGY SECTOR 2–3 (2014), *available at* http://bakerinstitute.org/media/files/files/275f4a5c/BI-Brief-061014-Mexico_NewGovernance.pdf [hereinafter GRUNSTEIN, NEW GOVERNANCE].

395. Ley de Hidrocarburos [Hydrocarbons Law], art. 29, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

396. *Id.*

397. *Id.* art. 30.

398. *Id.* art. 24. For a review of selection criteria in Pemex bidding rounds following the 2008 reform, see generally Baker, *supra* note 65.

399. *See* Hydrocarbons Law, art. 31 (Mex.) (detailing the bidding process).

400. *Id.*

wasted resources, and inefficient investments.[401] A recent public bidding scandal involving a high-speed rail project between Mexico City and Queretaro provided timely reminders that transparency and fairness cannot be taken for granted.[402] Fairness and transparency are constant requirements that will not be taken lightly, especially for potential bidders that are subject to rigorous anti-corruption laws.

Challenges for Mexico's new energy regulatory system are abundant. With ambitious timeframes,[403] a lack of experience will make early rounds a serious test. Then, as more projects are bid on and enter operational stages, capacity will be tested in new ways. In the longer term, coordination and consistency among moving parts in the new regulatory landscape will remain important. In addition to legal frameworks that establish appropriate mandates and autonomy, adequate funding and staffing of agencies is also critical.[404]

As explained above, the Energy Reform places great responsibility and discretion in the hands of key regulatory agencies. Flexibility is a crucial feature of the Energy Reform and represents a significant departure from past practices in Mexico.[405] On one hand, flexibility enables regulators to customize investment terms based on the particular economics and geology of a project. Flexibility is especially advantageous when projects are as varied as those offered in Round One, which range from mature fields to deepwater projects.[406] With flexibility, regulators can tailor bidding rounds to attract investment where Mexico needs it most. Likewise, flexibility enables regulators to respond to industry feedback or market conditions. For instance, after failures in the first phase of Round One, regulators fixed enough flaws to make the second phase a success.[407] But with flexibility comes greater responsibility and discretion for regulators—a crucial test for a new legal framework under the pressure of ambitious timetables. Ultimately, implementing the Energy Reform properly is more important than implementing it rapidly.

CONCLUSIONS: THE FUTURE OF ENERGY IN MEXICO

In large part, the Mexican government met the challenge of creating a viable legal framework for energy investment, which was no easy task. The new contracting framework approximates peer standards for energy investment models around the world—a vast departure from the previous status quo in Mexico. Even with certain quirks *a la mexicana*, the Energy Reform has enabled more sensible approaches to the

401. *See* GOLDWYN ET AL., *supra* note 270, at 12 (noting the importance of Energy Reform provisions ensuring transparency in the bidding process in order to address corruption concerns).

402. *See* José de Córdoba & Dudley Althaus, *Mexico Pulls High-Speed Train Contract from China-Led Group*, WALL ST. J. (Nov. 7, 2014, 7:06 PM), http://www.wsj.com/articles/mexico-pulls-high-speed-train-contract-from-china-led-group-1415345475 (explaining the controversy concerning the fairness and transparency of the bidding process for the rail line after Mexico canceled a $3.7 billion contract it had previously awarded to a Chinese-led group of companies with close ties to Mexico's ruling party).

403. *See* GOLDWYN ET AL., *supra* note 270, at 5 (laying out the timetable for implementation of the Energy Reform).

404. *See generally* GRUNSTEIN, NEW GOVERNANCE, *supra* note 394.

405. *See* discussion *supra* Part III.B–C.

406. *The Revival of Mexico's Oil Sector*, STRATFOR (September 30. 2015, 10:58 PM), https://www.stratfor.com/analysis/revival-mexicos-oil-sector.

407. Adam Williams & Andrea Navarro, *Mexico's Flirt with Big Oil Gets Italian Nod as Eni Wins Bid*, BLOOMBERG (Sept. 30, 2015, 1:34 PM), http://www.bloomberg.com/news/articles/2015-09-30/mexico-defies-oil-price-slump-as-60-percent-of-fields-auctioned.

energy law and regulation in Mexico.[408] But implementation remains critical. Some early indications are positive, but important challenges remain. In Round One of the investment auctions, regulators unveiled production sharing agreements and bidding documents that largely reflect industry standards.[409] Other investment terms were not as well received, but regulators responded to market feedback in time to hold a successful auction in the second phase of Round One.[410] Industry standard investment agreements and responsiveness amount to a far cry—and a significant improvement—from bidding rounds following the 2008 energy reform, when a lack of flexibility and responsiveness led to multiple bidding failures.[411]

But the rule of law in Mexico remains a serious and persistent source of concern.[412] Insecurity and lawlessness, exacerbated by gaps in government, complicate the economics of unconventional areas in Chicontepec, which are already challenging due to geology alone.[413] But rule of law concerns extend even further than the direct costs of insecurity. Sanctity of contract and legal certainty lie at the heart of investment decisions, especially long-term and capital-intensive investments like many energy projects.[414] Will sanctity of contract withstand changes in the political climate? Are Mexico's institutions—from the judiciary to newly formed energy regulators—prepared to uphold transparency and maintain accountability during and after bidding rounds? Though most disputes arising under energy investments will be resolved through international arbitration, the rule of law within Mexico's borders has broad implications for the business climate and the long-term political viability of the Energy Reform.

Mexico looked to other legal systems for guidance, from Norway to Brazil, particularly during the drafting and design stages of the Energy Reform.[415] Mexico should look again to Brazil—but this time as a cautionary tale. Brazil's energy reform has been stifled by overzealous political intervention and self-defeating rules.[416] Making matters worse, Petrobras is currently mired in a multi-billion-dollar corruption scandal.[417] These missteps have had huge costs for the Brazilian people and the

---

408. *See generally* Alejandro Ibarra-Yunez, *Government Versus Governance as a Framework to Analyze Mexico's Energy Reform Initiative and Key Comparisons in the World*, 5 LATIN AM. POL'Y 115 (2014) (comparing Mexico's approach with models in Brazil, Colombia, and Norway).

409. *See supra* Part III.A.2.

410. Market conditions, financial guarantee requirements, and certain quirks in the bidding process contributed to a failed debut auction in the first phase of Round One. *See* Williams & Navarro, *supra* note 408 (describing changes to bidding terms after the phase one failure).

411. *See generally* Baker, *supra* note 65.

412. *See* LUIS RUBIO, WILSON CTR., A MEXICAN UTOPIA: THE RULE OF LAW IS POSSIBLE 2 (2015) (addressing the historic lack of the rule of law in Mexico).

413. *See generally* KATHRYN HAAR, WILSON CTR., ADDRESSING THE CONCERNS OF THE OIL INDUSTRY: SECURITY CHALLENGES IN NORTHEASTERN MEXICO AND GOVERNMENT RESPONSES (2015), *available at* https://www.wilsoncenter.org/sites/default/files/Addressing%20the%20Concerns%20of%20the%20Oil%20Industry_3.pdf (surveying security threats to various oil fields in Tamaulipas and Veracruz, including the Chicontepec basin).

414. *See* RUBIO, *supra* note 412, at 139 (highlighting the importance of institutional strength for long-term energy investment commitments); *see also* Foster, *supra* note 352, at 37 (emphasizing that the capital-intensive and long-term nature of such investments involves greater risk exposure).

415. *See generally* Ibarra-Yunez, *supra* note 408.

416. *See Pitfalls at Petrobras*, ECONOMIST (Feb. 5, 2015), http://www.economist.com/news/business/21642180-changing-boss-will-not-fix-problems-brazils-oil-giant-pitfalls-petrobras (underscoring the negative consequences of government intervention in Petrobras's operations).

417. *See* Rogerio Jelmayer & Luciana Magalhaes, *Banker Takes Helm of Brazil's Troubled Oil Giant*,

Brazilian economy.[418] Mexican leaders should pay heed. Corruption remains a serious issue at Pemex.[419] Improving transparency, independence, and accountability at Pemex is critical to achieving the goals of the Energy Reform. Following recent revelations about corruption, an initiative to revisit Pemex's regulatory environment is already underway.[420] Even greater efforts are needed.

Without a doubt, the Energy Reform represents a total paradigm shift in Mexico's approach to energy development questions. Mexico's leaders deserve credit for undertaking bold reforms enabling the government to address urgent problems in the energy industry. But laudatory proclamations are premature. The ultimate success of the Energy Reform depends on responsible leadership, institutional maturity, capable regulation, and good governance. Also, for the reforms to be effective in the long-term, the government must demonstrate "social legitimacy" and broader social benefits of the Energy Reform.[421] The stakes are high for Mexico, and major setbacks will have costly consequences for all Mexicans. The Energy Reform was no doubt a necessary—but, on its own, insufficient—step towards a better future for Mexico. The future of the Energy Reform is now in the hands of Mexico's regulators and institutions.

WALL ST. J. (Feb. 6, 2015, 7:22 PM), http://www.wsj.com/articles/banco-do-brasil-chief-under-consideration-for-top-petrobras-post-1423229592 (observing that, following the scandal, Petrobras lost 305 billion reais, which is seventy percent of its market value—approximately eighty-three billion dollars).

418. *See* Will Connors, *Petrobras CEO and Five Other Executives Resign*, WALL ST. J. (Feb. 4, 2015, 5:04 PM), http://www.wsj.com/articles/petrobras-ceo-and-5-other-executives-resign-1423055419 ("The company's swoon has paralyzed critical sectors of Brazil's economy, thrown thousands of Brazilians out of work and sparked public outrage at the alleged looting of Brazil's most important company by some businessmen and politicians.").

419. *See* Elinor Comlay, et al., *Special Report: Mexico Looks the Other Way as Contractors Fleece Oil Giant Pemex*, REUTERS (Jan. 23, 2015, 9:03 AM), http://www.reuters.com/article/2015/01/23/us-mexico-pemex-contracts-specialreport-idUSKBN0KW1LZ20150123 (identifying more than one hundred Pemex contracts cited with serious allegations, including outright fraud).

420. Reports of systematic corruption at Pemex prompted the Mexican government to revisit internal investigation mechanisms across all government bodies. Elinor Comlay, *Mexico to Consider Changes to Pemex Regulatory System*, REUTERS (Feb. 4, 2015, 10:10 PM) http://www.reuters.com/article/2015/02/05/mexico-pemex-contractors-idUSL1N0VF06620150205.

421. *See* Grunstein, *Mexico*, *supra* note 186, at 274 (observing that a lack of "social legitimacy" has undermined other energy liberalizations around Latin America).

Introduction: Compelling Questions, for Decades

*Juan Pablo Bohoslavsky**

The fundamental questions on human rights and finance raised by Antonio Cassese in this Article, originally published in 1979 by the *Texas International Law Journal*, embodied issues with dramatic implications at that time: Did the foreign economic assistance consolidate the Pinochet regime? Did the repression in Chile attract more foreign investment which, in turn, helped the regime endure?

In 1977 Cassese was appointed as Special Rapporteur by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities with the mandate of assessing the link between financial aid then being allocated to Pinochet's regime and the human rights violations suffered by the Chilean population. He submitted his report in 1978,[1] which contained findings that are summarized in the republished Article.

To my knowledge, Cassese was the first scholar to systematically raise these questions at the international human rights level. However, the questions he posed and the sophisticated methodology he developed in his report in order to assess the links between foreign economic aid and human rights in the context of a regime engaged in gross violations of human rights have been blatantly ignored by governments, lenders, NGOs, and scholars for decades. Actually, as Philip Alston has recently pointed out, "*Cassese failed in his bid for re-election to the Sub-Commission and the study disappeared from sight.*"[2] Thirty-seven years after his report was delivered to the United Nations, the same questions are still unanswered and the same problems are still unsolved, but there is a renewed importance in addressing these complications given the growing role of sovereign financing in government affairs and the more institutionalized nature of and concern for international human rights.

Why has Cassese's study been ignored? He devised a convincing case on how foreign finance can abet and sustain criminal regimes with all the human suffering that this entails: he undressed the political and financial interests that benefited from and/or facilitated gross human rights violations. It is understandable why powerful stakeholders wanted to put this study in a chest and just lock it. It is more difficult to understand why scholars and NGOs have not utilized Cassese's mine of knowledge,

---

* United Nations Independent Expert on Foreign Debt and Human Rigths.

1. Special Rapporteur on Prevention of Discrimination and Protection of Minorities, *Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile*, Vols. I-IV, U.N. Doc. E/CN.4/Sub.2/412 (1978), (by Antonio Cassese).

2. Philip Alston, *Forward by Philip Alston*, MAKING SOVEREIGN FINANCING & HUMAN RIGHTS WORK ix (Juan Pablo Bohoslavsky & Jernej Letnar Cernic eds., 2014) (emphasis added).

reflection and information to formulate how human rights can best be championed in the face of corrupt and unethical dealings in financial markets. That is why the *Texas International Law Journal*'s decision to republish this study is so important.

It is worth recalling that the insights offered by Cassese's study do not only rely on scientific robustness, innovative approaches, and pointed tenaciousness on the topic, but also on the courage of its author. Criticizing Pinochet, when he had very powerful foreign friends and a number of Western countries and banks that aided the dictatorship, gives us a clue about Cassese's moral caliber. Pinochet's reach even extended to ordering his secret service personnel to assassinate former Chilean Ambassador Orlando Letelier, a political opponent of Pinochet who sought to apprise the public of Pinochet's atrocities, with a car bomb in Washington, D.C. in 1976,[3] which also killed Letelier's 26-year-old American assistant, Ronni Moffitt.

Needless to say, Cassese's study has been notably inspiring for my own work (*see* the report on financial complicity in this same Issue's Appendix).

3. *See generally* JOHN DINGES & SAUL LANDAU, ASSASSINATION ON EMBASSY ROW (1981).

Foreign Economic Assistance and Respect for Civil and Political Rights: Chile—A Case Study*

ANTONIO CASSESE**

I. INTRODUCTION

The question of whether foreign economic assistance to states grossly disregarding human rights has an impact on the enjoyment of civil and political rights in those states is undoubtedly very complex. The nexus between economic assistance and human rights is often indirect and subtle. In addition, there arises the thorny question of evidence: Upon what elements can one show the multifaceted yet elusive nexus between foreign economic aid and various forms of human rights that on the surface appear to have few economic implications?

Without attempting to address all problems that fall within the purview of the subject-matter, I have limited the discussion to five questions that appear crucial:

1) Have human rights violations within a state discouraged governments, international agencies, or private institutions from sending economic assistance to that state?
2) Might a state's human rights violations actually attract foreign economic assistance in some situations?
3) Have restrictions on civil and political rights caused inefficiencies in or had an adverse consequence on the utilization of foreign economic aid?
4) Do the benefits of foreign economic assistance reach those persons who have been victims of human rights violations, particularly the families of persons arbitrarily detained or imprisoned?
5) To what extent has foreign economic assistance supported the recipient state's social and economic policies which have an adverse impact on the enjoyment of civil and political rights?

---

* This paper is based on a revised version of a section of a report prepared by the author for the United Nations. Notes 2, 4 *infra*.

** Professor of International Organizations, Department of Political Science, University of Florence; Director, Post-Graduate School of International Affairs; Member of the Italian Delegation to various U.N. bodies, including the Commission on Human Rights and the General Assembly.

II. A CASE STUDY: CHILE

This article will briefly address these five questions specifically in regards to Chile. The reasons for this choice stem from the fact that there is sufficient documentation available, both from the Chilean authorities and from the United Nations, to analyze the relationship between foreign economic assistance and civil and political rights in that nation.

This analysis assumes that the various pronouncements of the U.N. General Assembly regarding Chile's poor human rights record are indeed correct.

A. Violations of Civil and Political Rights in Chile and the Withholding of Foreign Economic Assistance

The first of the five questions referred to above can be broached on the basis of replies of various governments to information requests sent in 1977 by the Secretary-General of the United Nations[1] and by the Rapporteur on Chile of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[2] Reference is made here only to the official comments of a few Western governments concerning their economic relations with Chile since the military *golpe de estado* of September 11, 1973.

In its reply to the Secretary-General's information request, the Federal Republic of Germany stated that as a consequence of the disregard for human rights in Chile, "[T]he Federal Government has not provided Chile with any more development aid. It has discontinued supplies of weapons and military equipment. In negotiations for the rescheduling of debts, harder terms have been imposed. University partnerships have not been continued."[3]

The government of Italy, in response to the request for information of the Rapporteur on Chile, stated:

> Economic, financial, and cultural and technical cooperation between Italy and Chile have been strongly influenced since September 1973 up to the present—both at the multilateral and the bilateral level—by the attitude adopted by our country towards the military Government [*sic*] headed by General Pinochet. In keeping with the unequivocal positions it has taken at the political level, Italy has gradually broken off all forms of collaboration, so that it can now be said that official aid by Italy to the Chilean Government is virtually non-existent.
>
> As to economic and financial co-operation within the competent multilateral organizations in regard to loans granted to Chile . . . Italy's position has always been negative; in particular, [in the World Bank] Italy

1. G.A. Res. 31/124, 31 U.N. GAOR, Supp. (No. 39) 104–05, U.N. Doc. A/31/39 (1976).

2. The Sub-Commission on Prevention of Discrimination and Protection of Minorities directed the Rapporteur to undertake a study on the "Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile."

3. Report of the Economic and Social Council: Protection of Human Rights in Chile, Report of the Secretary General, 32 U.N. GAOR (Agenda Item 12) 9, U.N. Doc. A/32/234 (1977) [hereinafter cited as Report of the Secretary General].

> voted against the grant of a loan to Chile in January 1974 and in May 1975 ($20 million for an agricultural reorganization programme), and it abstained from voting on the decision concerning three other loans to Chile in February ($33 million) and December 1976 ($25 million and $35 million).
>
> In the Inter-American Development Bank . . . , the position adopted with regard to the grant of two loans to Chile . . . was as follows: Abstention on an integrated technical assistance programme which also includes Bolivia and Peru, and a vote against the grant of a loan $20 million exclusively to Chile.
>
> With regard to multilateral technical co-operation . . . Italy has not failed to express reservations concerning programmes for Chile, in view of the non-observance by the Chilean Government of the resolutions adopted by various United Nations bodies which call for respect for human rights and the restoration of fundamental freedoms in that country.
>
> As regards the consideration of economic and financial relations on a bilateral basis, it must be pointed out that, during the period in question, Italy suspended the privileges enjoyed by Chile under the Insurance and Export Credit Law and that, consequently, no request concerning that country has been considered by the competent organizations.
>
> A similar attitude has been adopted in regard to bilateral technical co-operation. In September 1973, various programmes were being executed in fields such as occupational training, university education and building, together with volunteer programmes, chiefly in education. Today, there is only one volunteer programme (nine persons), for occupational retraining of personnel of the Curanilahve coal mines, which has not been discontinued because of its distinctly social character. . . .
>
> This consistent over-all attitude . . . is also reflected in the refusal by our authorities to take part in multilateral talks held within the Club of Paris with a view to restructuring Chile's external debt.[4]

The government of the Netherlands responded to the information requests by declaring that it had taken,

> a number of concrete steps which it hopes will contribute to the restoration and safeguarding of human rights and fundamental freedoms in Chile. Financial assistance in the framework of development co-operation has been suspended. Aid is provided only in respect of certain small welfare projects, directly benefiting the poorest section of the population. This aid is channeled through non-governmental organizations. . . . In the field of

4. Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile, 31 Sub-Comm'n on Prevention of Discrimination and Protection of Minorities (provisional Agenda Item 13) para. 407, U.N. Doc. E/CN.4/Sub.2/412 (1978) [hereinafter cited as Foreign Economic Aid Study].

> trade, credit guarantees by governmental bodies for export transactions by Dutch companies have been discontinued as from 1973.[5]

In a note to the United Nations on December 21, 1977, the Government of the Netherlands informed that body that it had not provided any bilateral aid to the Chilean Government since the *golpe de estado* of 1973, but that "[t]hrough some non-governmental organizations funds are supplied for activities which are directly benefiting the most distressed groups of the Chilean population."[6]

Norway, in a note to the United Nations dated November 25, 1977, stated that as a result of the suppression of democratic institutions in Chile,

> Bilateral aid given to Chile from Norway has been suspended. Together with the Governments of the other Nordic countries the Norwegian Government has voted against loans to Chile from the World Bank. At the twenty-third session of the Governing Council of UNDP, held in January 1977, the Norwegian representative and those of the other Nordic Governments in a joint statement made clear that the land programme of Chile did not enjoy their support because of the failure of Chilean authorities to concur with past United Nations resolutions to improve the human rights condition in Chile.[7]

The degradation of human rights in Chile since the 1973 military *golpe de estado* has also severely strained relations between Chile and the United States. A recent study submitted to the United Nations Ad Hoc Working Group on the situation of human rights in Chile stated:

> Since 1974, Congressional critics of the United States Chilean policy have legislated limitations on military and economic aid to Chile on the grounds of its human rights violations.... Thus far, when all military aid and most forms of bilateral economic aid have been denied to Chile by the United States Congress and it has become increasingly evident that very little aid would be available, the Chilean Government has responded by renouncing any United States bilateral assistance. The complete rejection of this aid came in response to the State Department's decision to delay for 30 to 60 days $9.3 million of the $27.5 million economic assistance package for 1977

---

5. Report of the Secretary General, *supra* note 3, at 12–13.

6. Foreign Economic Aid Study, *supra* note 4, para. 409.

7. *Id.* para. 410. In its reply of 5 December 1977 to a request for information sent by the Rapporteur on Chile, the Government of Sweden stated the following:

> The Swedish Government extends no aid to the present Chilean authorities. The Swedish policy in this regard is illustrated by the following facts: On 31 August 1973, an Agreement, called the Development Co-operation Agreement of 1973, was signed in Santiago de Chile between the Government of Sweden and the Government of the Republic of Chile. The preamble of this Agreement states that the objective of the Agreement is to enable the respective Governments to continue 'their co-operation for the purpose of economic development and social and economic justice in Chile as envisaged in the Development Plan of Chile for 1971–76.' The resources made available by Sweden according to the Agreement were intended to contribute to the achievement of these goals as stated in the Plan.

Id. para. 412.

> to express disapproval of human rights violations by the Chilean Government of President Augusto Pinochet.... The Chilean junta issued a note which formally spurned the proposed $27.5 million economic aid package [and] angrily react[ed] against the Carter Administration's attempt to use human rights as a factor in considering foreign aid distribution.[8]

However, economic relations between Chile and the United States improved somewhat in 1978. According to press reports, on April 24, 1978, the Commodity Credit Corporation, a private corporation under the auspices of the Department of Agriculture, approved thirty-eight million dollars in commercial export credits to farmers and ranchers in Chile. The *Washington Star* reported:

> State Department officials confirmed ... that approval of the credits was delayed for some time, but they denied that the credits reflect a departure from the administration's emphasis on human rights.
>
> Officials emphasized that the credits were for private parties rather than the Chilean Government, and were intended primarily to aid American farmers. They also stated that the credits reflected approval of what was described as 'encouraging political developments' within Chile's military Government [*sic*].
>
> One State Department official cited the recent amnesty for many political prisoners in Chile and the government's decision to turn over to United States authorities Michael Vernon Townley, the 35-year-old American who has been charged with conspiracy in the murder of former Chilean Ambassador Orlando Letelier in 1976.[9]

Senator Edward Kennedy, however, felt that the credit would have been more appropriately used if allocated specifically to the improvement of human rights in Chile.[10]

From the above, it is clear that most of the states that have commented on their economic relations with Chile after the *golpe* have either discontinued or substantially decreased their economic assistance to Chile as a direct consequence of its suppression of civil and political rights. Thus the introduction of a repressive system has resulted

---

8. CENTER FOR INTERNATIONAL POLICY, CHILE: AN ANALYSIS OF HUMAN RIGHTS VIOLATIONS AND UNITED STATES SECURITY ASSISTANCE AND ECONOMIC PROGRAMMES 1–2 (July 1978).

9. Washington Star, May 5, 1978, at A-5.

10. In a speech from the Senate floor, Senator Kennedy said:

> I am disturbed by the Administration's recent approval of $38 million in Commodity Credit Corporation credits for Chile. [I]t would have been much wiser for the United States to loan this much money on the basis of substantial human rights movement in Chile.
>
> I am now consulting with the Administration to ensure that this action will not be misunderstood, or repeated in the absence of further progress. Let us not lose this opportunity to make a critical difference in the lives of the Chilean people—and to demonstrate that the United States can be an effective force for human rights in Latin America.

124 CONG. REC. S6,983 (daily ed. May 4, 1978) (remarks of Sen. Kennedy).

in much of the international community denying economic aid to Chile in the hopes of using such pressure to force the present Chilean authorities to restore human rights.

Although the aforementioned change recently occurred in United States policy, this change has been justified primarily by emphasizing that the Chilean authorities are in the process of improving the human rights situation in that country. While I do not pass judgment on the United States assessment of the Chilean situation, one must recognize that even this new stand reveals that a close link exists between foreign economic assistance and respect for human rights in Chile.

B. Repression of Human Rights as a Means of Attracting Foreign Economic Assistance

The relationship between foreign economic assistance and the economic policy of the present Chilean Government on the one hand, and Chile's current repression of civil and political rights on the other, is quite visible. Gross violations of human rights, particularly of trade union rights, have become an important factor in attracting foreign economic investment to Chile.

Chilean authorities regard attracting foreign investment as a "central economic principle."[11] Among the most important aspects of this effort to attract foreign capital are the offer of cheap labor and the strict enforcement of industrial discipline. Immediately after the military takeover, editors of the highly influential *El Mercurio* began to advocate "the perfecting of the labour market," suggesting, among other things, that "the cost of hiring labo[u]r should be reduced substantially in relation to that of capital."[12] The elimination of virtually all trade union rights, including the rights to elect trade union representatives freely, to bargain collectively, and to strike, have put Chilean workers in a position of impotence with few means of asserting their rights to decent living and working conditions. This distressing situation has been amply documented in reports by the International Labor Organization (ILO") and the United Nations Commission on Human Rights, which have urged the Chilean Government to "promulgate new trade union legislation as soon as possible and to repeal Legislative Decree No. 198 in order to ensure the normal functioning of trade union activities."[13] Minister of Economy Sergio de Castro explained in a seminar on the Chilean policy on foreign investment: "We think that foreign investors take their capital from one place to the other, looking for the highest profitability. This is why they have to periodically evaluate the most important variables for their companies' profits, such as wage-levels, taxes and customs tariffs."[14] Thus Chilean authorities offer foreign investors the economic benefits derived from violating the rights of Chilean workers—rights that have been universally agreed upon at the United Nations.

---

11. El Mercurio (Santiago), *Informe Económico*, Aug., 1976, at 16, col. ___.

12. El Mercurio (Santiago), __, 1973, at __, col. __.

13. Report of the Ad Hoc Working Group to Inquire into the Situation of Human Rights in Chile, 34 U.N. ESCOR Annex (provisional Agenda Item 5) 66, U.N. Doc. E/CN.4/1266 (1978) [hereinafter cited as Human Rights Study].

14. El Mercurio (Santiago), Sept. 22, 1975, at 6, col. __ (int'l ed.). This is a recurrent theme in the Chilean Government's attempts to attract foreign investment. An advertisement in The Wall Street Journal entitled "Chile: Safety Zone for Foreign Investors," pointed out "Tranquility and stability in all sectors of the labor force, plus a high standard of technical and professional skills [are] readily available," and assured readers that, "It is safe to invest in Chile." Wall Street Journal, June 8, 1977, at 16, cols. 1–6 (eastern ed.).

Foreign investors are openly invited to translate the transgression of these human rights into increased profitability.

C. *Impact of the Restrictions on Civil and Political Rights on the Utilization of Foreign Economic Assistance*

The serious violations of human rights that are still occurring in Chile have adverse consequences on the actual use of the foreign economic aid flowing into Chile. Grave restrictions on freedom of expression, freedom of association, and trade union rights prevent most Chilean people from taking part in the decision-making process. The government can request and use foreign economic assistance without close scrutiny by the Chilean population. This lack of freedom of expression and the existence of a ruling group which makes all the basic decisions affecting the lives of the people permits neither a free exchange of ideas nor the introduction of improvements or corrections in the execution of economic policies, including the utilization of foreign economic assistance.

The Permanent Committee on the Episcopal Conference of Chile, in a statement issued on March 25, 1977, has forcefully analyzed this situation. After stressing that "for many families, especially those who are unemployed or earning a minimum wage, the extremely precarious and difficult conditions in which they are living are becoming almost intolerable" and that "the peasants, workers and settlers appear to be bearing an excessive and disproportionate burden," the Permanent Committee said:

> Economic development depends on decisions taken at the national level, and the right of participation defended by the Catholic social doctrine is also applicable to the economy. In the economic sphere it is easy to create a technocratic élite which aspires to make all the decisions itself.... To maintain that economic problems have only one solution, without any alternative, is to establish the rule of science and the scientific élite over human responsibilities. It is also to assume that the decisions made are based only on scientific reasons and that no part is played in them by reasons of dogma or group interest. But this is not the case: Doctrinal positions and group interest often play a part in making decisions, though somewhat unconsciously.
>
> In the name of human rights and the right of participation, the Church asks that *the various economic options should be the subject of open discussion,* and *that access to decisions and the possibility of exerting influence should not be reserved to a single scientific school or to a few more privileged economic groups.* Without a great national debate, the reasons given by the specialists lack full credibility. There is usually more wisdom in the discussion of differing opinions than in a single opinion which is affirmed dogmatically and without contradiction (emphasis added).[15]

Workers feel this same need to participate in the economic decision-making process. In a letter dated April 29, 1977, to the President of the Republic of Chile, a

15. El Mercurio (Santiago), March 26, 1977, at __, col. __.

group of trade union leaders cited the "historical failure of private enterprise," and called for worker participation in the development of a new national "investment plan."[16]

The views expressed in general terms by the Permanent Committee of the Episcopal Conference and by trade union leaders also apply to the subject of this article. Since the junta allows no political parties or political groups in Chile, and strictly controls trade unions, only members of the ruling group participate in the decisions concerning the type of economic assistance to be requested abroad; the choice of the states, international institutions, or private groups which may furnish economic assistance; the conditions under which such assistance can be accepted; and the social or economic areas targeted for foreign assistance. Fresh ideas and perspectives from excluded groups could correct the major defects in foreign assistance schemes which at present greatly limit the beneficial influence foreign economic assistance could have.

D. Foreign Economic Assistance and the Condition of Those Suffering from the Present Disregard of Civil and Political Rights in Chile

In its February 1, 1978 report, the United Nations Ad Hoc Working Group on the Situation of Human Rights in Chile, established by the Commission on Human Rights, pointed out that Chilean authorities "continue to refuse to respect the liberty and security of persons believed to be opposed to the present régime. The system of intimidation through arrests, detention, torture, or ill-treatment and harassment continues to be used to repress those sectors of the Chilean population."[17] According to the Ad Hoc Working Group, "Persons detained by the security agencies continue to disappear, though at a rate significantly less than in the past."[18]

The fate of political detainees and of relatives of missing persons or political detainees raises particularly serious problems. Their lot has been aptly described by the representative of Amnesty International. In a statement before the Commission on Human Rights on February 24, 1978, he pointed out:

> Often, the victims of arbitrary arrest and imprisonment were from the poorer sectors of society. They could be divided into four different groups. The first consisted of prisoners charged with political offenses, the greatest number of whom were in the three major prisons of Santiago, and their families. Where the prisoner has been the chief breadwinner, the family lived in the utmost need and poverty. The second category comprised political prisoners charged with and tried for a common law offense. That was a phenomenon particularly noticed in recent months and which Amnesty International had only recently begun to investigate, and it had not always been possible to ascertain beyond all reasonable doubt that there were political reasons behind the arrest. The third category was composed of former political prisoners and former detainees who had

16. Report of the Economic and Social Council: Protection of Human Rights in Chile, Note by the Secretary General, 32 U.N. GAOR, LII Annexes (Agenda Item 12) 286, U.N. Doc. A/32/227 (1977) [hereinafter cited as Human Rights Report].

17. Human Rights Study, *supra* note 13, at 73.

18. *Id.*

> been held without trial under the provisions of the state of siege. On release they faced common problems and underwent extreme hardship. Finally, there were the families of missing persons, possibly the most tragic group, who suffered severe psychological disruption and often serious financial stress. It was estimated that over 10,000 persons had been affected.[19]

In 1978 the Ad Hoc Working Group received the report of a mission that visited Chile in 1977 under the auspices of the World Council of Churches. According to the Ad Hoc Working Group, this report stated that "the mental and physical health of the families, especially the children, of persons who have disappeared has been severely affected. The information provided to the Group in this report concerning 145 specific cases of children revealed somatic disorders, psychological problems, and retardation of development. . . ."[20]

It appears that medical doctors detained for political reasons often lose their right to work when released.[21] In addition, the families of the "disappeared" frequently undergo hardship even in the field of education.[22] No less serious is the fate of persons who oppose the government's social policy or who are regarded by the authorities as potential opponents. Thus trade union leaders and members often lose their jobs or encounter great difficulty in obtaining employment.[23]

Up to now relief agencies have aided relatives of missing persons, or political detainees and opponents.[24] These groups have also received financial and other forms of support from some governments and private institutions. It seems, however, that the financial means available to these people are not sufficient. Sources of foreign economic assistance do not design their programs to help the victims of political detention, and the Chilean government does not direct aid to this group.[25] The conclusion therefore seems warranted that at present foreign economic assistance provided to the Chilean authorities does not benefit those people who suffer directly or indirectly from deprivation of liberty for political reasons (*i.e.*, detention, disappearance). These persons receive assistance from relief agencies operating in Chile through *direct funding* from foreign governments or private organizations.

---

19. 34 Comm'n on Human Rights (1456th mtg.) 4–5, U.N. Doc. E/CN.4/SR.1456 (1978) (remarks of Mr. Rodley).

20. Human Rights Report, *supra* note 16, at 111.

21. Foreign Economic Aid Study, *supra* note 4, para. 172.

22. *Id.* para. 238.

23. *Id.* para. 171.

24. Relief has been provided by the Vicaría de la Solidaridad, the Fundación de Ayuda Social de la Iglesia Cristiana (FASIC), and the Ayuda Cristiana Evangélica (ACE), as well as by the Intergovernmental Committee for European Migration, the Office of the United Nations High Commissioner for Refugees and the International Committee of the Red Cross.

25. *See* Foreign Economic Aid Study, *supra* note 4, chs. III and IV.

E. Socio-Economic Policies Adopted in Chile: Repression of Civil and Political Rights and Foreign Economic Assistance

Chilean authorities seek the following social and economic goals: (a) enhancement of the role of private enterprise in the national economy; (b) opening of the Chilean market to imported products and reducing customs tariffs and duties; (c) removal of present price controls; and (d) drastic reduction of state expenditure, including the reduction of staff wages and salaries.[26] These socio-economic policies have had certain consequences for the Chilean people, including: (a) increase in unemployment; (b) reduced income of wage earners; (c) decreasing purchasing power of wage earners; (d) bankruptcies of small and medium-sized national enterprises; (e) serious deterioration of public services such as the health services; (f) food shortages for the poor; and (g) reduction of categories of persons economically eligible for admission to university education.[27]

Discontent and a profound sense of dissatisfaction are byproducts of these policies. Actually, some groups in Chile have voiced strong protests. Recall the important statement issued on March 25, 1977, by the Permanent Committee of the Episcopal Conference of Chile,[28] and the letter sent to the President of the Republic of Chile by Chilean trade union leaders.[29]

Significantly, the Government has not prevented public expression of dissent or criticisms by prominent groups. In more democratic societies, however, when governmental authorities draw up and implement economic and social measures that disadvantage the interests and needs of the less privileged strata, usually trade unions oppose those measures through strikes, walk-outs, public protests, and so forth. Lack of freedom of assembly, association, and, in particular, trade union rights, prevent this reaction in Chile. A close link apparently exists between the kind of policies carried out by the present authorities in the socio-economic field, and repression in the field of civil and political rights. In short, without suppression of or serious restrictions on civil and political rights, the military government could not impose and enforce its economic and social policies.[30]

---

26. *Id.* paras. 88–112.

27. *Id.* paras. 113–248.

28. *See supra* Part C.

29. *See id.*

30. It is necessary to point out that this view does not constitute a novelty. Actually, as early as 1970, Jorge Cauas, one of the main economic policy-makers in Chile, who was Minister of Finance to the military government and is now Ambassador to the United States, showed himself to be aware that only political repression can allow a free market system to survive in such a society as that of Chile. In 1970 he described the political measures that should accompany the implementation of his economic theories and of the monetary policy he advocated (control of the money supply through restriction of domestic credit, a single exchange rate and a balanced budget, etc.), warning that serious problems were to be faced in applying that policy, most of them deriving from the need for discipline to ensure that the measures would be respected. "The main pressure factors to be taken into account are the actions of organized groups of workers in connection with wage policy and the ambitious governmental programmes which must be financed by non-inflationary means." He concluded that "in a democratic system . . . , there are obviously both conceptual and practical difficulties" in applying the proposed scheme, but these disappear as soon as it is agreed to use "other measures, *in the form of the establishment of a centralized system, with the consequent loss of freedom.*" Cauas Lama, *Política Económia de Corto Plazo*, in 2 BANCO CENTRAL DE CHILE: ESTUDIOS MONETARIOS 25, 41–42, 44–45 (1970) (emphasis added).

Foreign economic assistance to a great extent serves to prop up the present governmental authorities in Chile.[31] The assistance, through design or implementation, supports the policy that the authorities choose and carry out in the field of socio-economic relations. The economic policy fosters repression of basic human rights because implementation is only possible without dissent.

It follows from the above considerations that foreign economic assistance, to the extent that it reinforces the present government in Chile and its socio-economic strategy, contributes to consolidating and perpetuating the repressive system which to a great extent is a counterpart of the socio-economic policies of the Chilean authorities.[32]

III. CONCLUDING REMARKS

The present gross violations of human rights in Chile are related to economic assistance in two respects. First, and most apparently, the bulk of this assistance helps to strengthen and maintain power in a system which pursues a policy of large-scale violations of human rights. This applies to some forms of economic assistance concerned with development as well as to most forms of economic assistance that shown no concern either with human rights or with development. The same holds true for many cases of assistance directly related to human rights (assistance given with the specific aim of improving the situation of the population in the fields of housing, sanitation, hospitals, health centers, and so forth).[33] Often the government uses this

31. *See* Foreign Economic Aid Study, *supra* note 4, chs. I and II.

32. It is necessary to underscore that this conclusion has already been reached by other persons who have dealt with the problems of Chile. In this connection, it is worth citing a statement made April 29, 1976, before the Sub-Committee on International Organizations of the Committee on International Relations of the United States House of Representatives by Mr. Leonard C. Meeker, a prominent lawyer and former Legal Adviser to the United States Department of State. Although Mr. Meeker refers only to the economic assistance furnished to Chile by the United States, his conclusions can also apply to the assistance provided by other states. After surveying the various forms of economic assistance provided by the United States to Chile, he stressed that this assistance did not go to those who are most in need, and concluded, "Under present programs, U.S. Government assistance is simply shoring up and easing the problems of a brutally repressive régime." *Chile: The Status of Human Rights and its Relationship to U.S. Economic Assistance Programs: Hearings before the Sub-comm. on Int'l Organizations of the House Comm. on Int'l Relations.* 94th Cong., 2d Sess. 7 (1976) (statement of Leonard C. Meeker). Replying to a question by United States Representative A.T. Moffet, Mr. Meeker said:

> The U.S. Government needs to make it clear in its own statements to the Government of Chile that it is deeply offended by the treatment that that government is meting out to human beings, that it is a kind of treatment that we simply cannot condone. We will not support that government in its policies, and we will not give it the practical sinews to continue its repression through grants of foreign aid that go to the government to be dispensed by the government at its discretion.

Id. at 12.

On May 4, 1978, Senator Edward M. Kennedy, speaking on "Challenges to Human Rights in Chile," stated before the United States Senate that: "The economic assistance tragically continues which, in so many instances, is being used to perpetuate in power those particular forces and those particular interests which we state are alien to our own traditions and our own basic and fundamental principles." 124 CONG. REC. S6,987 (daily ed. May 4, 1978) (remarks of Sen. Kennedy).

33. For details on this form of economic assistance, see Foreign Economic Aid Study, *supra* note 4, paras. 472, 476.

assistance to replace national resources, which are diverted to other ends, including that of financing the repressive system. In all these cases economic assistance often appears instrumental in perpetuating or at least maintaining the current situation of gross violations of human rights.

The second aspect is no less important. In order to obtain the assistance which it seeks abroad, the government has to ensure a favorable presentation of the indices by which an economy is normally held to be "healthy." It must appear to be "creditworthy" (*i.e.*, it must have, among other things, a favorable balance of payments, controlled or diminishing inflation, a reduction of public expenditure). This domestic policy does not take into account the human factor and, in fact, creditworthiness can only be obtained by a redistribution of income which is unfavorable to the vast majority of the population. Furthermore, to the extent that it is not only foreign economic assistance in the form of loans (bilateral or multilateral), but investment that the government wants to attract, the state of poverty or backwardness of the working sector of the population does not appear as a negative factor. Instead, it appears as a positive element that may lead foreign enterprises, attracted by cheap labor and the low cost of production in the country, to make the decision to invest. In this respect, a deterioration in the benefits that workers and their families receive in other than monetary form also plays a major role in investment decisions. The absence of social unrest and restrictions on trade unions are important added advantages of a regressive system to foreign investors.

If the two aspects of the relationship between economic assistance and the violation of human rights are considered, one can see that in the second aspect the causal relationship is inverted: Repression encourages investment. Thus, together, they make up a closed circle of "cause" and "effect:" Economic assistance to a very great extent permits the perpetuation of violations of human rights, and such violations, in turn, bring about the necessary conditions to obtain economic assistance.

Introduction: Setting the Agenda for Thirty Years of U.S. Foreign Relations Law

*Derek Jinks**

In *Civil Remedies for Uncivil Wrongs: Combating Terrorism through Transnational Public Law Litigation*, Harold Hongju Koh first articulates his agenda-setting approach to the role of domestic courts in the development and enforcement of international law. Koh is, of course, a towering figure in U.S. and international law. He is the Sterling Professor of International Law at Yale Law School, where he has also served as the Dean. He was the Assistant Secretary of State for Democracy, Human Rights, and Labor. And he served as the Legal Advisor of the U.S. Department of State in the Obama administration. Given that Koh has been such a central figure in the academy, government, and human rights litigation and advocacy over the last thirty years, his early writings on transnational litigation—particularly in the context of terrorism—should interest all those interested in international law, U.S. foreign relations law, and national security law. Koh's work combines comprehensive, detailed doctrinal analysis; rigorous theorizing about how law, norms, and institutions function; and an unwavering commitment to the rule of law. All of this is on display in this piece. Indeed, the Article, surely one of the most influential in the distinguished history of the *Texas International Law Journal*, envisioned and framed many of the most important debates of the last generation in these fields.

More specifically, Koh argues for what he calls "transnational public law litigation" as an important tool in the fight against terrorism. In short, he makes the case for suits brought in U.S. courts by individual and governmental litigants challenging terrorism as a violation of international law. The most important example, perhaps, is international human rights suits brought by aliens against foreign and U.S. governments and officials under the Alien Tort Statute. This litigation strategy, Koh argues, promotes public rights and values through judicial remedies in multiple ways. In this way, "transnational public law litigation" combines the traditional model of domestic public law litigation with the traditional approach to international litigation. This litigation not only seeks to obtain compensation and redress for individual victims, but also seeks to activate domestic courts, and ultimately other political actors, to articulate norms of transnational law. These norms might, in turn, be deployed in other judicial and political fora to promote public rights and values. The focus of the piece, of course, is how U.S courts might be mobilized in this way to combat international terrorism. In making his case, Koh masterfully identifies and addresses

* Marrs McLean Professor in Law, University of Texas School of Law.

several then-entrenched obstacles to litigants seeking to enforce international law in U.S. courts. The Article serves as a blueprint for a broad-based litigation strategy and a theoretical defense of how such a strategy might promote a deeper commitment to rule-of-law values on the international plane.

These ideas would be worked out in far greater detail—and with ever-greater sophistication and erudition—over the course of Koh's career. But this early piece, in many respects, set the agenda for international law, U.S. foreign relations law, and national security law for the next thirty years. The Article made numerous important contributions. In international law, Koh's theory on the role of courts in transnational legal process continues to frame debates about how best to promote compliance with international law. This work would evolve into one of the most influential schools of thought on how international law matters, the conditions under which it matters, and how such insights might be harnessed to strengthen the role of law in global politics. In U.S. foreign relations law, this work triggered numerous foundational debates about the status of international law in U.S. law, the proper role of courts in foreign affairs, and the propriety of U.S. courts enforcing international law against foreign defendants. And, of course, in national security law, the Article has shaped debates about the role of international law and courts in counter-terrorism. All these issues no doubt strike the contemporary reader as some of the most pressing concerns in U.S. and international law. The conversations that Koh started almost thirty years ago continue.

FEATURE: THE UNITED STATES AS WORLD FORUM

Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation

HAROLD HONGJU KOH*

SUMMARY

* Associate Professor of Law, Yale University; B.A. 1975, J.D. 1980, Harvard; B.A. 1977, Oxford University. This essay grew out of presentations delivered at the panel on "Terrorism: The Issues Confronting a Free Society" at the 1986 American Bar Association Annual Meeting and at the panel on "Civil Remedies Against Terrorists and Nations Supporting Terrorists" at the 1986 American Bar Association National Conference on the Law in Relationship to Terrorism. While an attorney-advisor at the Office of Legal Counsel, Department of Justice, I helped draft the United States amicus brief urging denial of certiorari in *Tel-Oren v. Libyan Arab Republic*. The views expressed here do not, however, necessarily represent those of the Department of Justice. I dedicate this essay to the late Professor Ted L. Stein of the University of Washington School of Law.

I. INTRODUCTION

How do we respond to terrorism? In my view, we must distinguish among three possible legal responses—direct action, criminal remedies, and civil remedies—or, if you prefer, countering terrorism, making terrorists pay, and making terrorists pay up.[1]

The first category—direct action, or countering terrorism—encompasses a wide variety of responses: Monitoring terrorist groups, detecting terrorist attacks before they happen, coping with terrorist incidents while they occur, and formulating appropriate responses in the immediate aftermath of terrorist strikes. Although this type of response raises numerous troubling legal problems,[2] the most difficult questions posed are political and logistical. At the international level, how can the United States coordinate a unified and effective multilateral political and economic response against terrorism?[3] At the national level, how can the United States Government best mobilize its military, intelligence, and state and federal law enforcement organizations to respond effectively to particular terrorist incidents?[4]

Criminal and civil responses differ in kind from direct antiterrorist action, inasmuch as they seek not to combat terrorism directly, but rather, to remedy its effects (and by so doing, to contribute to the counterterrorist effort). Criminal remedies address the apprehension, prosecution, and punishment of terrorists. Although frequently overlooked, a relatively comprehensive and complex international legal

---

1. When this essay was first prepared, I had not yet pondered a fourth possible response to terrorism: Namely, paying terrorists off. *But see* N.Y. Times, Mar. 27, 1987, at 8, col. 3 (remarks of President Reagan) (conceding that the recent United States policy of selling arms to Iran "sort of settled down to just trading arms for hostages, and that's a little like paying ransom to a kidnapper").

2. Difficult questions of international legality arise, of course, when a state resorts unilaterally to force in order to rescue its nationals, to apprehend terrorists, or to retaliate against states supporting terrorism. Three recent United States' actions raise these questions: President Carter's unsuccessful effort in April 1980 to rescue American hostages in Tehran; the October 1985 interception of an Egyptian aircraft carrying the *Achille Lauro* hijackers; and the April 1986 bombing raid against the headquarters of Libyan leader Qaddafi. For analyses of these questions, see generally Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 138–41 (1986); Note, *Toward a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 724 (1986); Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality Under International Law*, 21 VA. J. INT'L L. 485 (1981). *Compare Sofaer, Terrorism and the Law*, 64 FOREIGN AFFAIRS 901, 921–22 (1986) (justifying the United States' April 1986 bombing raid against Libya on grounds of self-defense) *with* Fried & Boyle, *The Tokyo Summit Declaration Does Not Support the U.S. Attacks on Libya*, 35 INT'L PRAC. NOTEBOOK 9 (1986) (challenging that justification).

Perhaps the most important question of *domestic* law raised by such unilateral responses is whether the President must consult with Congress before taking counterterrorist action. *Compare* Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 636 (1986) (testimony of Legal Adviser Abraham Sofaer that the consultation and reporting requirements of the War Powers Resolution do not necessarily apply to antiterrorist acts such as the United States' 1986 military actions against Libya) *with* Glennon, *Mr. Sofaer's War Powers "Partnership,"* 80 AM. J. INT'L L. 584 (1986) (criticizing this assertion).

3. Numerous commentators have addressed this question. *See, e.g.*, TERRORISM: HOW THE WEST CAN WIN (B. Netanyahu ed. 1986).

4. For a treatment of this question, see generally W. FARRELL, THE U.S. GOVERNMENT RESPONSE TO TERRORISM: IN SEARCH OF AN EFFECTIVE STRATEGY (1982).

framework already exists to grapple with these tasks. Four tiers comprise this international legal framework: (1) global conventions such as the Tokyo,[5] Hague,[6] and Montreal[7] Conventions on aircraft hijacking and sabotage, and the recent conventions condemning hostage-taking[8] and crimes against internationally protected persons;[9] (2) regional pacts, such as the European[10] and Organization of American States[11] Conventions on the Suppression of Terrorism; (3) bilateral treaties, particularly those facilitating extradition;[12] and (4) national laws, such as United States federal legislation criminalizing attacks against aviation[13] and internationally protected persons,[14] hostage-taking,[15] and theft of nuclear materials.[16]

---

5. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

6. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 106.

7. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *opened for signature* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

8. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 39) at 23, U.N. Doc. A/34/39 (1979), *reprinted in* 18 I.L.M. 1456 (1979).

9. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 [hereinafter Convention on Internationally Protected Persons]. For a description of these five global conventions, and the problems of obtaining effective enforcement through them, see generally Note, *Legislative Responses to International Terrorism: International and National Efforts to Deter and Punish Terrorists*, 9 B.C. INT'L & COMP. L. REV. 323, 326–44 (1986).

Although not expressly directed against terrorism, two other multilateral conventions also attempt to criminalize the possession, diversion, or use of especially dangerous or poisonous materials: Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062 (applying controls on toxic weapons that are of potential use to terrorists); Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, *opened for signature* Mar. 3, 1980, reprinted in 18 I.L.M. 1419 (1979) (requiring assurances that nuclear materials traded and used for peaceful purposes will be protected during international transport). The texts of the most significant multilateral terrorism conventions are reproduced in TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY (R. Lillich ed. 1982).

10. European Convention on the Suppression of Terrorism, Nov. 10, 1976, *opened for signature* Jan. 27, 1977, Eur. T.S. No. 90. The European Convention has been supplemented and stiffened by the Agreement on the Application of the European Convention for the Suppression of Terrorism, *reprinted in* 19 I.L.M. 325 (1980) ("Dublin Agreement").

11. Organization of American States Convention on Terrorism, *opened for signature* Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 [hereinafter OAS Convention].

12. For a description of the law of extradition specified by these bilateral treaties, see RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 475–478 (Proposed Final Draft 1986) [hereinafter REVISED RESTATEMENT]. In addition to the Tokyo, Hague, and Montreal Conventions, a number of bilateral agreements on aircraft hijacking also exist. *See, e.g.*, Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, Cuba-United States, 24 U.S.T. 737, T.I.A.S. No. 7579.

13. *See, e.g.*, Aircraft Sabotage Act, 18 U.S.C. § 1201, 49 U.S.C. §§ 1301, 1472 (Supp. III 1984) (extending United States antihijacking law to reach alleged violators of the Montreal Convention).

14. 18 U.S.C. §§ 112, 878 (Supp. III 1979) (implementing Convention on Internationally Protected Persons, *supra* note 9).

15. As part of the Comprehensive Crime Control Act of 1984, Congress approved the Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (Supp. III 1984). That Act implements the international obligations assumed by the United States under the International Convention Against the Taking of Hostages, *supra* note 8.

16. Although the Convention on the Physical Protection of Nuclear Material, *supra* note 9, has not yet entered into force, the United States has already amended its criminal statutes to criminalize the acts

Because this fairly well-articulated legal framework exists, the legal questions regarding criminal remedies usually fall into one of three categories. First, how may nations better utilize existing regional and bilateral extradition arrangements, employ methods of rendition other than extradition (e.g., exclusion and deportation), and invoke other forms of international judicial assistance in criminal matters (e.g., exchange of information, evidence, and prisoners)?[17] Second, how may nations supplement the existing framework through negotiation of new global treaties, regional conventions and bilateral agreements,[18] or enactment of additional national criminal legislation against terrorism?[19] Third, how may citizens ensure that their law enforcement officials' understandable desire to punish terrorists will not lead them to ride roughshod over the civil rights and civil liberties of the accused?

Of the available legal responses to terrorism, civil remedies are far and away the least understood. In contrast to direct action and criminal remedies, civil remedies seek neither to counter terrorism at an international or national level nor to punish individual terrorists directly for their crimes. Broadly construed, the term "civil remedies" encompasses all nonforcible, noncriminal means of sanctioning terrorists and states who support terrorists. Unlike direct action, civil responses to terrorism raise questions that are quintessentially legal, not political and logistical. At the same time, civil remedies differ from criminal remedies in that no highly developed international legal framework governing civil recovery against terrorists currently

---

proscribed by the agreement. *See* 18 U.S.C. § 831 (1982). For a compendium of other national laws regarding terrorism, see LEGISLATIVE RESPONSES TO TERRORISM (Y. Alexander & A. Nanes eds. 1986).

17. For a recent work examining this question, see J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES (1985).

18. For a recent, controversial example of such an attempt, see Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, *reprinted in* 24 I.L.M. 1104 (1985) (Senate advice and consent July 17, 1986). This agreement expressly amends the preexisting extradition treaty between the United States and the United Kingdom to exclude from the list of nonextraditable "political offenses" serious offenses typically committed by terrorists. These include aircraft hijacking and sabotage, crimes against diplomats, hostagetaking, murder, manslaughter, malicious assault, kidnapping, and specified firearms, explosives, and serious property damage offenses. *See* Gilbert, *Terrorism and the Political Offense Exception Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985) (rehearsing arguments for and against applying the political offense exception to terrorism). *See generally* Note, *Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty*, 26 VA. J. INT'L L. 755 (1986) (describing treaty's key provisions).

19. Before 1984, the United States had passed only one statute pertaining specifically to antiterrorist activities. *See* Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801, 1801(c) (Supp. V 1981) (authorizing electronic surveillance procedures for the gathering of intelligence information regarding terrorists). In late 1984, Congress enacted three antiterrorism bills proposed by the Reagan Administration: The Aircraft Sabotage Act, 18 U.S.C. § 1201, 49 U.S.C. §§ 1301, 1472 (Supp. III 1984) (extending United States antihijacking law to reach alleged offenders of the Montreal Convention); the Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (Supp. III 1984) (implementing the international obligations assumed by the United States under the International Convention Against the Taking of Hostages, *supra note* 8); and the 1984 Act to Combat International Terrorism, 18 U.S.C. § 3071 (1984) (authorizing the Attorney General to reward individuals who furnish information regarding certain terrorist acts). Two of these bills are described in Leich, *Four Bills Proposed by President Reagan to Counter Terrorism*, 78 AM. J. INT'L L. 915 (1984).

Title V of the International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, 99 Stat. 190 (1985), imposes additional prohibitions on assistance to and imports from countries supporting international terrorism, particularly Libya. For the most recent U.S. legislation designed to counter terrorism, see the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986), *discussed in infra* note 77.

exists.[20] Moreover, unlike criminal remedies, which look solely toward punishment and deterrence, civil remedies additionally contemplate making terrorists "pay up"—that is, directly or indirectly compensating the victims of terrorist crimes by affording victims or their governments an economic recovery from terrorists or their state supporters.

This essay outlines and explores the questions raised under United States law when individuals and governments invoke civil remedies to make terrorists pay up. Parts II and III argue that the questions of whether and to what extent terrorists should pay for their uncivil wrongs through civil remedies have inspired two ongoing debates. The first concerns questions of *availability* and *obstacles*. Participants in this first debate[21] ask: What civil remedies are currently *available* against terrorists and nations supporting terrorism, and how can parties injured by terrorists overcome the numerous legal *obstacles* that currently restrict the availability of those civil remedies and reduce their practical chances of recovery? As Part II elaborates, two famous circuit court cases mark the polar positions in this debate: The Second Circuit's 1981 decision in *Filartiga v. Pena-Irala*[22] and the District of Columbia Circuit's 1984 ruling in *Tel-Oren v. Libyan Arab Republic*.[23]

Although the debate over availability and obstacles has achieved a high public profile, it is not the only debate relevant to the subject of civil remedies against terrorism. Part III of this essay argues that those who focus with tunnel vision on the availability of particular civil remedies and the elimination of particular obstacles to recovery risk losing sight of a second, more fundamental debate concerning civil remedies that looms behind the first, namely, the debate over *objectives* and *institutions*. This debate also revolves around two questions: What *objectives* do the recognition and enforcement of civil remedies against terrorism serve and what *institutions* within the national government are best situated to create and enforce these remedies—the courts, Congress, or the Executive Branch?

Parts II and III jointly explain why those concerned about making terrorists "pay up" should refocus their energies from the first debate to the second. As the District of Columbia Circuit's decision in *Tel-Oren* reveals, the questions of whether and to what extent terrorists should pay up through civil remedies implicate competing national policy objectives. In my view, Congress is the national institution constitutionally and functionally best-suited to balance these competing objectives. For that reason, I believe that the ideal solution to the civil remedy problem would be for Congress to resolve these important policy questions by enacting comprehensive legislation creating civil remedies against terrorism.

Given that the optimal, legislative solution may not be soon forthcoming, however, the question remains whether the federal courts can, without further

20. For example, the family of Leon Klinghoffer, the hostage killed aboard the *Achille Lauro*, can cite no treaty or international convention explicitly affording a civil recovery against the Palestine Liberation Organization (PLO) in an international judicial forum.

21. Litigators in the field commonly address their attention to this debate. *See, e.g.*, Bazyler, *Litigating the International Law of Human Rights: A "How To" Approach*, 7 WHITIER L. REV. 713 (1985) (enumerating litigation problems commonly encountered in human rights cases).

22. 630 F.2d 876 (2d Cir. 1980). *See infra* notes 39–40 and accompanying text.

23. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). *See infra* notes 35–44 and accompanying text.

legislative guidance, provide a "second-best" solution to the second debate. Part IV argues that individual and state litigants have recently asked the courts to do precisely that in a growing number of domestic lawsuits, which comprise a burgeoning phenomenon that I call *transnational public law litigation*. Part IV suggests that the competing policy concerns raised by civil suits against terrorists, such as *Tel-Oren*, are not *sui generis*, but rather, are implicated by this entire class of litigation. Reviewed in this light, *Tel-Oren* ultimately proves less important for its refusal to make terrorists pay up than for its failure to articulate and enunciate new legal *norms* regarding international terrorism. In *Tel-Oren*, the court refused to promote the use of transnational public law litigation to combat terrorism, thereby throwing back to Congress the task of developing civil antiterrorist remedies. Part IV concludes that, after *Tel-Oren*, Congress should respond to the missed opportunity by enacting legislation that promotes the nascent transnational public law litigation genre.

II. THE FIRST DEBATE: AVAILABILITY AND OBSTACLES

A. *What Civil Remedies are Available Against Terrorism?*

When Americans think about civil remedies, they tend reflexively to think first of remedies provided by the courts, usually the federal courts. Yet the federal civil judicial remedies currently available against terrorists remain relatively few in number.[24] If one looks beyond the courts and thinks imaginatively, however, the

24. The most prominent remedy available to alien plaintiffs against individual terrorists acting under color of state law is found in the Alien Tort Statute, 28 U.S.C. § 1350 (1982), discussed in greater detail in *infra* notes 34–58 and accompanying text. Deportation and exclusion are also applied as civil sanctions against alleged individual terrorists in so-called "disguised extradition" proceedings (*i.e.*, efforts to deport terrorists after the failure of criminal extradition proceedings). *See, e.g.*, McMullen v. Immigration and Naturalization Service, 658 F.2d 1312, 1313–14 (9th Cir. 1981) (I.N.S. attempt to deport member of Provisional Irish Republican Army to Ireland after failing to extradite him to the United Kingdom).

The principal civil judicial remedies available to the United States Government against groups supporting terrorists are found in the Foreign Agents Registration Act, 22 U.S.C. §§ 611–621 (1984) [hereinafter FARA] and the civil remedies provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (1984) [hereinafter Civil RICO]. FARA establishes a comprehensive scheme of registration, reporting, and disclosure requirements for "agents" of "foreign principals." Under FARA, the Attorney General has compelled the Northern Irish Aid Committee to register as a foreign agent, to disclose its purposes, to make revelations regarding its political propaganda activities and to account for its expenditures. *See* Attorney General v. Irish N. Aid Comm., 465 F.2d 1405 (2d Cir.), *cert denied*, 409 U.S. 1080 (1972).

Civil RICO authorizes government suits and private treble damage actions by persons injured in their business or property against RICO "enterprises" engaging in a "pattern of racketeering." *See* 18 U.S.C. § 1964(c) (1982). RICO defines "pattern of racketeering" to include the commission of a series of predicate acts, including "any act or threat involving murder, kidnapping . . . arson, . . . or extortion," within a ten-year period. *Id.* §§ 1961(1), (5). For RICO purposes, an "enterprise" is further defined to include "any . . . group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). The United States has brought criminal RICO actions against Serbo-Croatian terrorists extorting contributions from United States residents. *See* U.S. v. Bagaric, 706 F.2d 42 (2d Cir. 1983). Recently, the United States Attorney's Office for the Southern District of New York has considered invoking Civil RICO to seek injunctions limiting the activities and obtaining forfeiture of the assets of other organizations supporting terrorist groups. *See* Summary of Panel on Civil Remedies Against Terrorists and Nations Supporting Terrorists, American Bar Association National Conference on the Law in Relationship to Terrorism (June 6, 1986) (remarks of Carl

nonforcible, noncriminal remedies available to combat terrorism span a far broader range than one might first assume.

The array of possible "civil" antiterrorist responses run the gamut from those remedies directed primarily against terrorist individuals and groups to those intended primarily to sanction their state supporters. Immigration measures and curtailment of travel rights are prime examples of nonforcible, noncriminal actions targeted against individual terrorists.[25] A listing of the available nonforcible, noncriminal sanctions against state supporters of terrorism, by contrast, encompasses nearly every tool of economic warfare currently available to nations:[26] denial of import benefits,[27] export

T. Solberg, Chief of Civil Division, Office of United States Attorney for the Southern District of New York) (copy on file with *Texas International Law Journal*). At least one criminal RICO prosecution has been brought against a foreign "enterprise" based on its overseas activities. *See* United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Under these RICO precedents, private citizens could conceivably seek treble damages, costs, and attorney fees from groups supporting foreign terrorists, claiming injury from the overseas activities of those groups.

25. The seven major democracies and the European Community agreed to take such actions at the May 1986 Tokyo Summit. *See* Tokyo Economic Summit, Statement on International Terrorism, May 5, 1986, ¶ 4, *reprinted in* 25 I.L.M. 1005 (1986). Shortly after the summit, Great Britain expelled three Syrian diplomats because of their refusal to answer questions about their reported role in a plot to blow up an Israeli airplane. *See* N.Y. TIMES, May 14, 1986, at A26, col. 1. The United States also recently took deportation measures against suspected terrorists. *See supra* note 24. For an example of legislation recently proposed to authorize the exclusion of aliens affiliated with terrorist organizations from the United States, see H.R. 3903, 99th Cong., 1st Sess. (1985).

26. For a survey of these sanctions, see J. JACKSON & W. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 911–52 (2d ed. 1986). For a criticism of their effectiveness, see generally G. HUFBAUER & J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED (1985).

27. Section 502(b)(7) of the Trade Act of 1974, which authorized the creation of the United States Generalized System of Preferences, bars any country that "aid[s] or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism" from eligibility for duty-free treatment. 19 U.S.C. § 2462(b)(7) (1982 & Supp. III 1986). Although the Statute permits the President to waive application of this provision, he may do so only after determining that granting such a country developing country status "will be in the national economic interest of the United States" and reporting that determination to Congress. *Id.*

Subject to consultation and reporting requirements, the International Security and Development Act of 1985, Pub. L. No. 99-43, § 505, 99 Stat. 190 (1985), authorized the President to ban the importation into the United States of any good or service from any country that supports or harbors terrorists. *See* 22 U.S.C. § 2349aa-9 (1986). Moreover, following the murder of American Leon Klinghoffer aboard the *Achille Lauro,* Senator Bentsen introduced S. 1778, a bill designed to deny trade preferences, including most-favored nation privileges, to any country listed by the Secretary of State as supporting terrorism. *See Sen. Bentsen Introduces Bill To Deny MFN Benefits to Terrorist Countries*, 2 INT'L TRADE REP. (BNA) 1340 (Oct. 23, 1985).

controls, [28] financial embargoes and economic boycotts,[29] withholding of foreign aid,[30] termination of arms sales, [31] and suspension of air flights by both official and nongovernmental institutions,[32] to name but a few.

---

28. The Fenwick Amendment to the Export Administration Act of 1979 [hereinafter EAA] required the Secretaries of Commerce and State to notify key congressional committees at least 30 days before licensing the export of goods or technology valued at more than $7 million to any country that the Secretary of State determined "has repeatedly provided support for acts of international terrorism," if "such exports would make a significant contribution to the military potential of such country . . . or would enhance the ability of such country to support acts of international terrorism." Pub. L. No. 96-72, § 6(i), 93 Stat. 513 (1979). *See generally* Note, *Export Controls and the U.S. Effort to Combat International Terrorism*, 13 LAW & POL'Y INT'L BUS. 521 (1981).

The 1985 amendments to the EAA strengthened this provision so that once made, such a determination may not be rescinded unless the President first certifies to Congress that the target country has not provided support for major terrorists during the preceding six months and that the country has provided assurances that it would not support acts of international terrorism in the future. *See* 50 U.S.C. app. § 2405(j)(2) (Supp. 1987). Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399 § 509, 100 Stat. 853 (1986) (to be codified at 50 U.S.C. app. § 2405(j)(1)), further amends that provision to require presidential notification for any sale of goods or technology valued at more than $1 million. The 1986 amendment further prohibits export of any item on the United States Munitions List to any country that the Secretary of State determines engages in or provides support for international terrorism. The same amendment permits the President to waive this prohibition for ninety days, however, if he determines that the proposed export is important to national interests and submits a report to Congress justifying the determination and describing the proposed export. *Id.* Arguably, the Reagan Administration violated all of these provisions by its recent conduct during the Iran-*Contra* affair. *See supra* note 1.

29. Recent examples include the economic sanctions imposed by President Reagan against Libya in January 1986 and against Syria in November of the same year. *See generally Documents Showing the Evolution of Sanctions Against Libya,* 25 I.L.M. 173 (1986); *Administration Announces Economic Moves Against Syria, Citing Terrorism Support*, 3 INT'L TRADE REP. (BNA) 1382 (Nov. 19, 1986). Sanctions were imposed in both of these cases following presidential declarations of national emergency and executive orders issued pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (1982).

The Terrorist Subsidy Prevention Act, another bill in the 99th Congress proposing financial embargoes against terrorists, would have amended the EAA to allow the President to control capital transfers from United States banks to countries defined as supporting international terrorism. The list of such countries currently includes Syria, Libya, Southern Yemen, Iran, and Cuba. *See Measure to Control Capital to Terrorist List Nations, Garn, Moynihan Bills to be Combined*, 3 INT'L TRADE REP. (BNA) 893 (July 9, 1986). Three other measures introduced in the 99th Congress would have taken a different tack, applying government financial boycotts to private parties who do business with terrorists. *See Pentagon Backs Bill Denying Contracts To Firms With Ties To Terrorist Nations*, 3 INT'L TRADE REP. (BNA) 618 (May 7, 1986).

30. *See, e.g.*, § 503 of the International Security and Development Act of 1985, 22 U.S.C. § 2371 (1977) (prohibiting foreign assistance to countries supporting or granting sanctuary to terrorists under the Foreign Assistance Act of 1961, the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act, or the Arms Export Control Act); the 1976 Terrorism Amendment to the Foreign Assistance Act of 1976, 22 U.S.C. § 2371(a)(1976) (requiring the President to terminate all assistance under the Foreign Assistance Act to any government that aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism), *discussed in* Lillich & Carbonneau, *The 1976 Terrorism Amendment to the Foreign Assistance Act of 1976*, 11 J. INT'L L. & ECON. 223 (1977); *see also* Bretton Woods Agreements Act—Financing Facility, (codified at 22 U.S.C. § 286e-1 1(1982)) (barring International Monetary Fund from assisting any country harboring international terrorists); Omnibus Multilateral Development Institutions Act of 1977, 22 U.S.C. § 262d (1977)) (requiring United States Executive Directors of the World Bank group and the International Monetary Fund to oppose assistance or loans to any state providing refuge to individuals committing acts of international terrorism by hijacking aircraft, unless national security necessitates otherwise); 1978 Amendment to the Export-Import Bank Act, Pub. L. No. 95-481, § 607, 92 Stat. 1601 (1978) (barring foreign governments that aid, abet, or grant sanctuary from prosecution to any individual or group which commits an act of international terrorism from receiving funds appropriated by the Export-Import Bank).

31. The International Security Assistance and Arms Export Control Act provides: "Unless the

The existence of this unusually broad range of remedies counsels against imposing a "*New Yorker* magazine view of the world" upon the topography of "available" civil remedies.[33] We must beware of myopically depicting the landscape of civil remedies as dominated by courts and damage awards, with nonjudicial remedies sketched only dimly in the distance. A broader construction of the term "civil remedies" would recognize the availability to the Executive Branch and private organizations of a wide range of noncriminal, nonforcible remedies against terrorists and their state supporters, with judicial remedies representing only the tip of the iceberg.

All of this having been said, public attention nevertheless returns almost invariably to the judicial remedy as the civil remedy best adapted not only to making terrorists "pay" in some general sense, but also to making them literally "pay up," in the specific sense of compensating the victims of their acts. Whether compensation is in fact likely or possible, however, depends upon the extent of the legal obstacles to civil recovery, the other issue dominating this first debate.

B. Tel-Oren's Legacy: Obstacles to Civil Recovery

Under existing United States law, the obstacles to civil relief comprise a veritable minefield of difficulties for parties seeking recovery from terrorists and their state supporters. This situation results primarily from the District of Columbia Circuit's 1984 ruling in *Tel-Oren v. Libyan Arab Republic*,[34] which splashed cold water on efforts by victims of terrorism to obtain a civil recovery against their assailants in federal court.

President finds that the national security requires otherwise, he shall terminate all sales under this chapter to any government which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism." 22 U.S.C. § 2753(f)(1) (Supp. 1986). The recent Reagan Administration arms sales to Iran may also have violated this provision. *See supra* note 1.

32. At the 1978 Bonn Economic Summit Conference, the seven major industrialized nations signed a nonbinding agreement to suspend air service to and from countries that refuse to extradite or prosecute hijackers or to return hijacked aircraft or passengers. *See* Bonn Economic Summit Declaration, Joint Statement on International Terrorism, July 17, 1978, 14 WEEKLY COMP. PRES. DOC. 1308–09 (July 24, 1978), *reprinted in* 17 I.L.M. 1285 (1978). Eight years later, the heads of the same seven nations and representatives of the European Community agreed in Tokyo to "make the 1978 Bonn Declaration more effective in dealing with all forms of terrorism affecting civil aviation". *See* Tokyo Economic Summit, Statement on International Terrorism, May 5, 1986, ¶ 5, *reprinted in* 25 I.L.M. 1005 (1986); *id.* ¶ 2 (urging nations to collaborate in international fora such as the International Civil Aeronautics Organization and the International Maritime Organization to take countermeasures against terrorism).

In accordance with these multilateral declarations, President Reagan and Secretary of Transportation Dole recently responded to the hijacking of a Trans World Airliner in Athens by invoking various provisions of the Federal Aviation Act. Those orders barred Lebanese air carriers from flying to and from the United States and prevented United States and foreign air carriers from carrying passengers to and from Lebanon. *See* Sofaer, *Fighting Terrorism Through Law*, 85 DEP'T STATE BULL. 38, 40–41 (1985). Shortly after the same incident, a private, nongovernmental organization, the International Airline Pilots Association, proposed a worldwide pilots boycott against governments found responsible for terrorist acts against airplanes. *See* N.Y. TIMES, Apr. 3, 1986, at A8, col. 4.

33. I refer, of course, to the famous *New Yorker* magazine cover that shows Fifth Avenue in the immediate foreground, with New Jersey, Los Angeles, and Japan visible in the distance and Chicago and Hawaii reduced to tiny bumps on the horizon. *See* THE NEW YORKER, Mar. 29, 1976.

34. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1000 (1985).

By now, the facts of *Tel-Oren* are familiar.[35] *Tel-Oren* arose out of a March 1978 terrorist attack by thirteen members of a Palestine Liberation Organization (PLO) faction on more than 100 Israeli civilians traveling on an Israeli highway. During that attack, the terrorists seized, tortured and shot hostages, eventually killing thirty-four and seriously wounding nearly eighty others. Several years later, Israeli plaintiffs who were either personally injured in the attack or who survived those killed in the attack, sued the PLO, the Libyan Arab Republic, and three Arab-American groups in the United States District Court for the District of Columbia. The plaintiffs asserted subject matter jurisdiction based, *inter alia*, on the Alien Tort Statute.[36] That Statute, first enacted in 1789, grants the federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[37]

Tracking the Statute's language, the *Tel-Oren* plaintiffs alleged that they were aliens victimized by torts authored by the PLO and supported by Libya and the three private groups; these torts, they claimed, amounted to torture and terrorism in violation of United States treaties and the "law of nations."[38] At first blush, the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*,[39] seemed to compel acceptance of their claim. In that famous case, the Second Circuit held that the Alien Tort Statute conferred subject matter jurisdiction over a tort suit brought by aliens against aliens for official torture occurring overseas.[40] Nevertheless, the district court dismissed the

35. *Tel-Oren* has already attracted reams of commentary. *See, e.g., Agora: What Does Tel-Oren Tell Lawyers?*, 79 AM. J. INT'L L. 92 (1985); Recent Development, *Separation of Powers and Adjudication of Human Rights Claims Under the Alien Tort Claims Act*, 60 WASH. L. REV. 697 (1985); Comment, *Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211 (1985); Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163 (1985); Note, *Limiting the Scope of Federal Jurisdiction Under the Alien Tort Statute*, 24 VA. J. INT'L L. 941 (1984).

36. 28 U.S.C. § 1350 (1982). Plaintiffs also claimed subject matter jurisdiction under the general federal question provision, *id.* § 1331 (1982); the federal diversity provision, *id.* § 1332 (1982); and the Foreign Sovereign Immunities Act of 1976, *id.* §§ 1330, 1602–1611 (1982). *See* Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 545 (D.D.C. 1981).

37. Congress originally enacted the Statute as part of the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). The Statute's obscure provenance led Judge Friendly to dub it a "legal Lohengrin; . . . no one seems to know from whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). *But see* Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 11–31 (1985) (arguing that drafters intended the Statute to extend federal authority over certain tort actions brought by aliens in which federal jurisdiction might otherwise have been unavailable).

38. The plaintiffs construed this term to mean universally recognized norms of customary international law not codified in treaties or international conventions, as they existed at the time of the lawsuit. On appeal, only Judge Edwards endorsed this meaning of the "law of nations." *See* 726 F.2d at 777 (Edwards, J., concurring).

39. 630 F.2d 876 (2d Cir. 1980).

40. In *Filartiga*, two Paraguayan citizens invoked the Alien Tort Statute to sue a Paraguayan police official who had tortured their relative to death in Paraguay. 630 F.2d at 878. The district court originally dismissed the action for lack of subject matter jurisdiction, but on appeal the Second Circuit reversed. Judge Kaufman, writing for the court, construed the words "violation of the law of nations" in the Statute to embody evolving notions of customary international law. *Id.* at 881. Under this interpretation, all individuals, regardless of their nationality, possess a fundamental human right to be free from "deliberate torture perpetrated under color of official authority." *Id.* On remand, the district judge then awarded the two Paraguayan citizens a default judgment against the Paraguayan police chief of nearly $10.4 million in compensatory and punitive damages. *See* 577 F. Supp. 860 (E.D.N.Y. 1984). For further description and discussion of *Filartiga*, see Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims:*

Tel-Oren action against all defendants for want of subject matter jurisdiction,[41] the D.C. Circuit unanimously affirmed in a per curiam opinion,[42] and the Supreme Court denied certiorari.[43]

The voluminous concurring opinions in *Tel-Oren,* authored by Circuit Judges Edwards, Bork, and Robb, presented mutually conflicting rationales for affirming the district court's judgment.[44] Although two of those opinions expressly declined to undercut *Filartiga*,[45] their import clearly was to the contrary. Taken together, the three *Tel-Oren* opinions present an array of legal doctrines that dramatically restrict the practical availability of federal civil judicial remedies to victims of terrorism.

After *Tel-Oren,* ten distinct obstacles confront victims seeking a tort recovery from terrorists and their state supporters in federal courts. First and foremost, substantial barriers exist to subject matter[46] and personal *jurisdiction.*[47] A second

---

The Alien Tort Claims Act after Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53 (1981); Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981).

41. *Tel-Oren,* 517 F. Supp. 542 (D.D.C. 1981). The district court reasoned that § 1350 "serves merely as an entrance into the federal court and in no way provides a cause of action to any plaintiff." *Id* at 549. The judge further concluded that none of the treaties cited by the plaintiffs nor the law of nations conferred a private right of action on individuals to enforce those international obligations in domestic courts. *Id.* at 545–50. On appeal Judge Bork essentially endorsed the district court's view. *See* 726 F.2d at 799 (Bork, J., concurring) ("I believe, as did the district court, that in the circumstances presented here appellants have failed to state a cause of action sufficient to support jurisdiction False . . . .").

42. 726 F.2d at 775 (per curiam). Before issuing the ruling, the D.C. Circuit held the case under submission for nearly two years. *See id.* at 774.

43. 470 U.S. 1003 (1985). In response to the Court's invitation, 469 U.S. 811 (1984), the Solicitor General filed an amicus brief urging that review be denied. That brief argued against review, largely because of the lower court judgment's lack of clarity and the absence of a circuit conflict. *See* Brief for the United States as Amicus Curiae, Tel-Oren v. Libyan Arab Republic, *reprinted in* 24 I.L.M. 427 (1985) [hereinafter Government *Tel-Oren* brief].

44. *See* 726 F.2d at 775–98 (Edwards, J., concurring); *id.* at 798–823 (Bork, J., concurring); *id.* at 823–27 (Robb, J., concurring). The extent of the judges' disagreement was so vast that Judge Bork concluded that "it is impossible to say even what the law of this circuit is" with respect to the meaning and application of the Alien Tort Statute. 726 F.2d at 823 (Bork, J., concurring).

45. Judge Edwards claimed to "adhere to the legal principles established in *Filartiga* but [found] that factual distinctions preclude reliance on that case to find subject matter jurisdiction in the matter now before us." *Id.* at 776. Judge Bork, by contrast, distinguished *Filartiga* from *Tel-Oren* on three grounds: The *Filartiga* defendant "was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive." *Id.* at 820. For these reasons, Judge Bork concluded that "not all of the analysis applied here would apply to deny a cause of action to the plaintiffs in *Filartiga*." *Id.*

46. A court relying on the district court's opinion in *Tel-Oren,* as generally approved by Judge Bork on appeal, *supra* note 41, would dismiss claims under the Alien Tort Statute unless plaintiffs could demonstrate that either the law of nations or a treaty of the United States explicitly conferred a private right of action. *See infra* note 50. Furthermore, the court would likely dismiss any federal question claims on the ground that neither federal common law, federal criminal statutes against terrorism, nor treaties of the United States expressly created a civil cause of action on behalf of plaintiffs and that the case therefore did not "arise under" the Constitution, laws, or treaties of the United States for purposes of 28 U.S.C. § 1331 (1982). Finally, alien plaintiffs invoking diversity jurisdiction would face constitutional problems, because Article III of the Constitution does not recognize federal jurisdiction over suits brought by aliens against other aliens on nonfederal causes of action. *Cf.* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) (sustaining constitutionality of the Foreign Sovereign Immunities Act against a challenge based on this ground).

47. Serious problems of personal jurisdiction arise when defendants are terrorists or groups supporting

question, seemingly mundane but critical in practice, is how does one *serve* a terrorist with the process required to perfect personal jurisdiction?[48] Third, even assuming that a United States court is willing to assert jurisdiction, how may an alien plaintiff defeat a foreign defendant's inevitable motion to dismiss a suit alleging terrorist acts committed on foreign soil, based on the revitalized doctrine of *forum non conveniens*?[49] Fourth, may victims of terrorist acts *state a claim* sufficient to survive defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and if so, under what body of law would that cause of action arise?[50] Fifth, who, if anyone, would have *standing* to sue terrorists in a federal court?[51] Sixth, in a case alleging state-

---

terrorism who are neither present within the United States nor possess minimum contacts with it sufficient to satisfy the due process standard stated in International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See, e.g.*, Asahi Metal Indus. Co. v. Superior Ct., 55 U.S.L.W. 4197, 4200 (Feb. 24, 1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."). In *Filartiga*, the defendant Pena was arrested in New York for violating his visitor's visa and ordered deported. The plaintiffs were fortunate enough to serve the defendant with a summons and a civil complaint while he was in a New York detention center awaiting deportation. The district court then stayed the deportation order to ensure Pena's availability for trial. 630 F.2d at 879. The Second Circuit, *id.* at 880, and the Supreme Court then denied further stays, Filartiga v. Pena-Irala, 442 U.S. 901 (1979), after which the defendant was deported to Paraguay. Obviously, however, the defendant will rarely be so readily available.

48. This problem arose in *Tel-Oren,* in which there was doubt as to whether the PLO or Libya had been properly served. 517 F. Supp. at 545 n.1. This defect, highlighted by the Solicitor General in his amicus brief urging denial of certiorari, probably contributed to the Supreme Court's decision not to hear the case. *See* Government *Tel-Oren* brief, *supra* note 43, 23 I.L.M. at 434 ("In these circumstances, we question whether this Court should exercise its discretionary jurisdiction to construe a statute as complex and little understood as the alien tort statute in a context in which the outcome of the case is unlikely to be affected.").

49. Since the Supreme Court's decision in Piper v. Reyno, 454 U.S. 235 (1982), the doctrine of *forum non conveniens* has become increasingly important in all types of transnational lawsuits, particularly in those involving transitory torts. *See, e.g.*, Tompkins, *The Doctrine of* Forum Non Conveniens *in the Litigation of Foreign Aviation Tort Claims in the United States,* 2 NOTRE DAME INT'L & COMP. L.J. 1 (1984). In an order upheld in large part on appeal, Judge Keenan recently invoked that doctrine to dismiss the suit brought in the Southern District of New York against Union Carbide by the Government of India and Indian plaintiffs injured in the Bhopal tragedy. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part*, 809 F.2d 195 (2d Cir. 1987). *See generally* Weinberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX. INT'L L.J. 307, 313–15 (1985).

50. This was the heart of the controversy in *Tel-Oren.* Judge Bork argued against assertion of subject matter jurisdiction on the ground that the plaintiffs had "failed to state a cause of action sufficient to support jurisdiction under either of the statutes on which they rely." 726 F.2d at 799 (Bork, J., concurring); *id.* at 801 ("The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel."). For Article III reasons, the alien plaintiffs in *Tel-Oren* could not rely solely upon state tort law to sue other aliens in United States federal court. *See supra* note 46. In Judge Bork's view, no federal statute gave the plaintiffs a cause of action against the terrorists, 726 F.2d at 811, and the treaties upon which plaintiffs relied had either never been ratified by the United States or, even if ratified, were not self-executing. *Id.* at 808–10. Finally, he concluded that separation of powers concerns counseled against federal courts' inferring private rights of action directly from emerging norms of customary international law condemning terrorism. *Id.* at 801–08, 810–19. Judge Bork left open the possibility, however, that these concerns would not "deprive an individual of a cause of action clearly given by . . . Congress." *Id.* at 804.

In response, Judge Edwards argued that the Alien Tort Statute provides both a right to sue and a forum. *Id.* at 777, 780. Accordingly, in his view, plaintiffs need not look to the "law of nations" as a source of a cause of action. *Id.* at 779.

51. For instance, many governments sue on behalf of their citizens as *parens patriae,* as India recently chose to do in the Bhopal litigation? The similar question of whether the Republic of the Philippines has standing as a "person" to sue ex-President Marcos under the RICO Statute, 18 U.S.C. § 1961 (a), is currently pending in Republic of the Philippines v. Marcos, Nos. 86-6091 & 86-6093, *appeal pending*, 9th Cir. 1986 (appeal from Republic of Philippines v. Marcos, No. 86-3859 MRP (GX) (C.D. Cal. 1986)) (ruling that a

sponsored terrorism, how would prospective plaintiffs overcome any immunities the defendants might possess against civil suit—*diplomatic immunity* in the case of foreign individuals[52] or *foreign sovereign immunity* in the case of foreign governments?[53] Seventh, would the United States court abstain from reviewing the subject matter of the suit as *nonjusticiable* under the Act of State Doctrine, the political question doctrine, or both?[54] Eighth, even assuming that any given suit could survive these pretrial obstacles, how could a plaintiff obtain *discovery* of the evidence necessary to prove causation of a terrorist attack?[55] Finally, how could plaintiffs *attach* assets of

---

foreign government has standing).

52. Article 31 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 3240–41, T.I.A.S. No. 7502, 500 U.N.T.S. 95, grants diplomatic agents immunity from criminal jurisdiction and most civil actions in the receiving state. A number of commentators, however, have recently called for revision of this rule to divest terrorist diplomats of immunity. *See, e.g.*, Note, *Insuring Against Abuse of Diplomatic Immunity,* 38 STAN. L. REV. 1517, 1523–26 (1986) (describing recent incidents of abuse of diplomatic immunity by terrorist-diplomats); Reston, *Reflections on Terror*, N.Y. TIMES, May 14, 1986, at A27, col. 5.

53. In the United States, such immunity is, of course, conferred by the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. §§1330, 1602–1611 (Supp. 1987) [hereinafter FSIA]. Despite their many disagreements in *Tel-Oren*, Judges Bork and Edwards did agree that the plaintiffs' suit against Libya was barred by the FSIA's noncommercial tort exception, which permits a plaintiff to recover against a foreign state only for noncommercial torts that cause injury, death, or property damage "occurring in the United States." *Id.* §1605(a)(5). *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d at 775–76 n. 1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). A number of courts have recently held that FSIA provides the exclusive basis for withdrawal of foreign sovereign immunity and have therefore dismissed Alien Tort Statute suits against foreign governments on that ground. *See, e.g.*, Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986), *appeal pending* (suit by Liberian corporations against Argentina arising out of bombing oil tanker during Falklands war); *In re* Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613 (D.D.C. 1984), *appeal pending*; Siderman v. Republic of Argentina, No. CV 82-1772-RMT (MCx) (C.D. Mar. 7, 1985).

54. As interpreted by Justice Powell's concurrence in Goldwater v. Carter, 444 U.S. 996 (1979), the political question doctrine bars federal courts from hearing suits that "involve resolution of questions committed by the text of the Constitution to a coordinate political branch of Government"; that "demand that a court move beyond areas of judicial expertise"; and in which "prudential considerations counsel against judicial intervention." 444 U.S. at 998 (1979) (Powell, J., concurring). In *Tel-Oren*, Judge Robb concluded "that the political question doctrine controls. This case is nonjusticiable." 726 F.2d at 823 (Robb, J., concurring). Judges Edwards and Bork each hotly disputed Judge Robb's claim. *See id.* at 796–98 (Edwards, J., concurring); *id.* at 803 n.8 (Bork, J., concurring). *See generally* Henkin, *Is There a "Political Question" Doctrine*, 85 YALE L.J. 597 (1976) (arguing against strict exemption from judicial review for certain enumerated "political questions").

Similarly, the Act of State doctrine precludes the federal courts from inquiring into the validity of public acts of recognized foreign sovereigns committed within their own territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). That doctrine could theoretically bar examination of state-supported terrorism occurring within a foreign nation's territory. Indeed, a number of recent Alien Tort Statute cases brought by Filipinos charging ex-President Marcos with human rights violations have been dismissed on Act of State grounds. *See* Trajano v. Marcos, Civ. No. 86-0207 (D. Haw. July 18, 1986); Hilao v. Marcos, Civ. No. 86-390 (D. Haw. July 18, 1986); Sison v. Marcos, Civ. No. 86-0225 (D. Haw. July 18, 1986); Ortigas v. Marcos, No. C 86-0975 SW (N.D. Cal. Jan. 22, 1987); Clemente v. Marcos, No. C 86-1449 SW (N.D. Cal. Jan. 22, 1987).

55. Even if the Executive Branch should possess the hard evidence necessary to prove that a particular terrorist or terrorist group was responsible for a particular attack, a federal court would not likely order the Government to produce such evidence to a private party seeking compensation against the terrorists in a civil suit. This would be particularly true if the release of that information might jeopardize national security interests or disrupt planned counterterrorist measures. *See* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to

states supporting terrorism before judgment and *enforce* any civil judgments ultimately obtained, notwithstanding the restrictive attachment and enforcement provisions of the Foreign Sovereign Immunities Act?[56]

It is no accident that these ten headings sound uncomfortably like a syllabus of topics covered in a first-year Civil Procedure course. This enumeration of the legal obstacles to civil relief against terrorists or states supporting terrorists serves primarily to illustrate that such suits strain the capabilities of the civil adjudication system at each and every step of the litigation process.[57]

Yet to dwell at length on any particular obstacle is probably misguided. A myopic focus on the debate over availability and obstacles too quickly yields a simple, two-part prescription: That courts should solve the problem of availability by construing existing judicial remedies to reach terrorist acts, even when those remedies were arguably never intended to reach those acts,[58] and that judges should reduce the obstacles to civil relief in terrorist cases by creating judicial exceptions to existing obstacles to civil recovery whenever terrorist acts are alleged.

Unpopular defendants, however, often make bad law. An understandable desire to make civil remedies more effective against terrorism may trigger unprincipled, ad hoc judicial expansion of the available civil remedies and, ad hoc judicial elimination

---

the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences.").

56. *See* 28 U.S.C. §§ 1609–1611 (declaring general rule of immunity of foreign state assets from prejudgment attachment and postjudgment execution, subject to limited exceptions). The problem of collecting a judgment against terrorists and states supporting terrorism has plagued victims and their families. Following the 1976 car-bombing of former Chilean Foreign Minister Orlando Letelier, for example, his family recovered $5 million in a wrongful death action in a District of Columbia District Court. *See* Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980). When plaintiffs attempted to enforce that judgment against Chile's wholly-owned state airline, however, the Second Circuit barred enforcement on the ground that the airline, as a juridical entity distinct from Chile, could not be held accountable for the parent's debt. *See* Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984). The court concluded that "under the circumstances at issue in this case Congress did in fact create a right without a remedy." *Id.* at 798. Furthermore, the two most prominent Alien Tort Statute cases that have gone to judgment—*Filartiga* and Von Dardel v. U.S.S.R., 623 F. Supp. 246 (D.D.C. 1985)—resulted in default judgments that have yet to be collected. *See* Comment, *Alien Tort Claims* in the 1980's: Von Dardel v. Union of Soviet Socialist Republics, 12 BROOKLYN J. INT'L. L. 469, 502–03 & n.167 (1986); *supra* note 40.

57. Indeed, based upon recent rulings, four of these obstacles to civil relief—subject matter jurisdiction, stating a claim, justiciability, and enforcement of judgments—have grown increasingly prominent in restricting the practical availability of civil judicial remedies to victims of terrorism. *See supra* notes 46, 50, 54 & 56.

58. It seems clear, for example, that none of the civil remedies described *supra* note 24 were originally enacted with the intention of targeting groups supporting international terrorism. Now that *Tel-Oren* has restricted the practical availability of relief under the Alien Tort Statute, victims of terrorism seem likely to turn to other civil remedies. The use of those alternatives, however, also raises serious policy concerns. Ironically, suggestions that Civil RICO be construed to combat terrorism arise amidst growing public concern that civil litigants are abusing that Act's broad and vaguely worded provisions. *See, e.g.*, Boucher, *Bill Curbing RICO'S Use Advances*, NAT'L L.J., Sept. 1, 1986, at 15, 19, col. 4 (charging that "[t]he federalization of thousands of mere commercial disputes . . . threatens to swamp a federal judiciary never designed to handle such cases."). Similarly, the United States Government's use of "disguised extradition" proceedings to expel suspected terrorists, see *supra* note 24, has stimulated serious protests from civil libertarians claiming abuse of the deportation process. *See, e.g.*, NAT'L L.J., Sept. 29, 1986, at 3, col. 1 (describing objections to Justice Department claims that deportation of an Irish Republican Army member to Ireland would be "prejudicial to the national interest," after the Department had failed to win defendant's extradition to Great Britain).

of particular litigation obstacles. Without a broader understanding of the policy concerns implicated by civil suits against terrorists, such an outcome would ultimately prove both unwise and uninformed. However important the debate over availability and obstacles may be, it is not the only debate relevant to civil recovery against terrorism.

III. THE SECOND DEBATE: OBJECTIVES AND INSTITUTIONS

A. The Objectives of Civil Remedies

What larger objectives are served by recognizing and enforcing remedies against terrorism? Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.

At the same time as judicial remedies against terrorists promote these objectives, however, they simultaneously raise two sets of serious concerns: Judicial competence concerns and separation of powers concerns. The former address the possibility that individual courts might lack the competence to conduct either the fact-finding or the legal analysis necessary to decide particular civil suits against terrorists, as well as the larger fear that the federal court system as a whole might be incapable of controlling the potential docket-flooding posed by such cases. Separation of powers concerns suggest that federal courts cannot adjudicate cases involving allegations of state-sponsored terrorism, which have heavy foreign policy overtones, without exceeding their constitutionally defined role or interfering with the foreign relations function of the coordinate political branches.

While traditional tort law and public international law objectives generally cut in favor of granting civil remedies against terrorism, judicial competence and separation of powers concerns cut in exactly the opposite direction. Thus, the task of enforcing civil remedies against terrorists is inherently double-edged. Just as judges enforcing criminal remedies against terrorists must balance the desirability of swift and sure punishment against the need to protect the rights of the accused, judges enforcing civil remedies must balance traditional tort and public international law objectives against bona fide concerns about judicial competence and separation of powers.

It is important to recognize that where one stands in the debate over objectives and institutions ultimately determines where one sits in the debate over availability and obstacles. Perhaps more than any other factor, this reality explains the deep division among the judges who decided *Tel-Oren*. In that case, Judge Robb argued that the court should dismiss the Israeli plaintiffs' suit against the PLO and Libya on

political question grounds essentially because of judicial competence concerns.[59] In his concurring opinion, Judge Robb emphasized the inability of individual judges to find the international law and determine the facts necessary to decide individual terrorism cases, as well as the incompetence of the federal system as a whole to handle such cases.[60] Judge Bork's concurring opinion, on the other hand, relied almost entirely on separation of powers concerns. In arguing against jurisdiction, Judge Bork expressed his fear that judicial implication of private civil rights of action in terrorism cases would inevitably create a clash between the judicial and political branches of government, thereby violating the principle of separation of powers.[61] Judge Edwards offered two theories of the Alien Tort Statute which demonstrated a greater willingness to apply civil remedies to promote the broader objectives of traditional tort and public international law.[62] In the end, however, his opinion also ultimately denied

59. *See* 726 F.2d at 823–27 (Robb, J., concurring). Although any judicial reliance on the political question doctrine usually reflects a mix of separation of powers and judicial competence concerns, Judge Robb's opinion focused on the "inherent inability of federal courts to deal with cases such as this one," *id.* at 823, because "[t]he conduct of foreign affairs has never been accepted as a general area of judicial competence." *Id.* at 825.

60. Judge Robb's opinion suggested that *Tel-Oren* "involve[d] standards that defy judicial application," *id.* at 823, and that such cases "are not susceptible to judicial handling." *Id.* at § 826. Thus, his central concern was that "the *pragmatic* problems associated with proceedings to bring terrorists to the bar are numerous and intractable." *Id.* (emphasis added).

61. *Id.* at 801–08 (Bork, J., concurring). Judge Bork identified three doctrines that might serve to address these separation of powers concerns: The Act of State doctrine and the notion that such concerns should act as "'special factors counselling hesitation'" militating against judicial implication of a cause of action. *Id.* at 801–03 (quoting Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971)). Judge Bork chose to rely on the third doctrine, refusing to recognize any cause of action not expressly granted to plaintiffs by the Constitution, a statute, a treaty, or the law of nations. 726 F.2d at 801–08. Outside the realm of self-executing treaties, Judge Bork conceded that the Alien Tort Statute might support federal court jurisdiction in three types of cases: Those involving piracy, violations of safe conducts, and attacks on ambassadors. Each of these, he argued, were violations of the law of nations that were universally recognized when the First Judiciary Act of 1789 was first enacted. *Id.* at 813–14 ("One might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations.").

62. Judge Edwards explicitly rejected the two limiting principles offered by his colleagues: Judge Robb's political question approach, *supra* notes 54, 59–60, and the "no private right of action" approach endorsed by both Judge Bork and the District Court, *supra* notes 41, 46, 50 & 61. In their stead, Judge Edwards offered two alternative limiting principles: A "forum-shifting" approach, 726 F.2d at 780–88, and an "international crimes" approach, *id.* at 777–80.

Under the forum-shifting approach, an alien plaintiff would derive his affirmative right to sue from state tort law. If plaintiff could further allege that torts were "committed in violation of the law of nations," that allegation would suffice to shift his tort suit (which would otherwise have to be heard in state court) into federal court, where it would be tried under either state tort law or the law of the situs of the tort. Thus, this approach would treat 28 U.S.C. § 1350 as providing a *federal* remedy for a right originally created by *state* law.

Under the "international crimes approach," which Judge Edwards dubbed the "*Filartiga* formulation," 726 F.2d at 781, the court would approach the statute much differently. It would read the words "tort only, committed in violation of the law of nations" in 28 U.S.C. § 1350 to encompass a few peculiarly heinous acts (*e.g.*, official torture, genocide, slave trade, and summary execution) that customary international law has come to recognize as "international crimes." 726 F.2d at 781. Under the Alien Tort Statute, the federal court would in effect be authorized to create a federal common law of torts compensating victims of those international crimes. *See infra* note 64. Those crimes are so universally condemned that every nation is deemed to have jurisdiction to prescribe domestic remedies against them. *See* REVISED RESTATEMENT, *supra* note 12, § 404. Thus, unlike the forum-shifting approach, the "international crimes" approach would view 28 U.S.C. § 1350 as a congressionally authorized *domestic* remedy for a right originally created by *international* law.

jurisdiction. Despite some claims to the contrary,[63] none of the three *Tel-Oren* opinions fully reflected the Second Circuit's view in *Filartiga* that, at least with respect to established international crimes, federal courts should promote traditional tort and public international law objectives: Namely, to compensate victims, deter perpetrators, and enunciate norms of law condemning such violations.[64]

I elaborate below why I believe that *Tel-Oren* was wrongly decided.[65] For present purposes, however, *Tel-Oren* teaches that federal judges will encounter severe difficulties when attempting to cope with terrorism by construing statutes not legislatively designed to deal with that problem. Certainly, dangers abound when federal courts manifest their general opposition to terrorism by engaging in an unprincipled, ad hoc expansion of civil remedies and loopholes to existing obstacles to

---

Both of Judge Edwards' approaches were more receptive to Alien Tort claims than were those of his colleagues, insofar as both Edwards' approaches treated such claims as justiciable and neither required plaintiffs to identify a private right of action expressly conferred upon them by treaties or the law of nations. *Id.* at 788 (Edwards, J., concurring) ("under neither [approach] must plaintiffs identify and plead a right to sue granted by the law of nations"). Nevertheless, Judge Edwards refused to find jurisdiction in *Tel-Oren* under either of his approaches, reasoning that neither terrorism nor torture conducted by a nonstate actor such as the PLO constituted "offenses against the law of nations" for purposes of the Statute. *Id.* at 788, 791–96; *see also infra* note 116.

63. *See supra* note 45. Judge Edwards, in particular, claimed to be "endorsing" *Filartiga* in his "international crimes" approach. 726 F.2d at 777–82 (Edwards, J., concurring).

64. Although both of Judge Edwards' approaches to the Alien Tort Statute, described *supra* note 62, would promote the compensatory objectives of traditional tort law, only an international crimes approach fully promotes traditional tort law's deterrence objective, as well as the objectives of public international law. Under the forum-shifting approach, an alien would assert an international law violation solely as a jurisdictional device to shift a state tort case into federal court. Because state tort law or the law of the situs would then determine liability and damages, however, the federal forum would award the plaintiff no additional compensation for the international law violation and would not award punitive damages if the governing law did not so authorize.

When *Filartiga* returned to the district court on remand, however, the district judge took a markedly different approach. The judge first allowed plaintiffs a wrongful death recovery of compensatory damages, costs, and fees in the amount of $385,364 based on Paraguayan law. *See* 577 F. Supp. at 864–65. Although recognizing that Paraguayan law did not provide for recovery of punitive damages, the district judge then awarded an additional $10 million in punitive damages relying on United States cases, as well as international law. *See id.* at 864–67.

The *Filartiga* court's award suggests that a federal court applying an "international crimes" approach would effectively treat the Alien Tort Statute as statutory authority to develop a specialized federal common law of "torts only committed in violation of the law of nations." Such a federal common law would be similar to that created by the federal courts in the area of collective bargaining contracts after Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) (reading the grant of federal jurisdiction in § 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185, as authorizing federal courts to fashion a federal common law of labor-management). Thus, unlike the forum-shifting approach, the international crimes approach would authorize the federal court first, to declare that an international norm has been violated, and second, to punish the perpetrator and compensate the victim directly for the international law violation. In this sense, of the four approaches offered by the judges in *Tel-Oren*, the *Filartiga*, or international crimes, approach is the judicial approach most fully sensitive to the full range of traditional tort law and public international law concerns.

65. In Part IV, I argue that Judge Edwards missed an opportunity in *Tel-Oren* to use the *Filartiga*, or international crimes, approach described in *supra* notes 62 & 64 to balance *all four* sets of competing policy concerns. See *infra* note 114–125 and accompanying text. Although *Tel-Oren* may preclude the future use of this approach in the District of Columbia Circuit, I see no reason why future litigants could not urge this approach upon other federal courts, particularly those in the Second Circuit, which are already bound to follow *Filartiga*.

civil recovery. But in *Tel-Oren*, I would argue, Judges Robb and Bork erred too far in the other direction. By adopting approaches that would practically eliminate access to existing civil remedies, neither judge considered, much less accounted for, either the public international law concerns or the traditional tort concerns central to any award of civil remedies against terrorism.[66] *Tel-Oren* demonstrates that one cannot resolve the debate over availability and obstacles without striking a delicate balance among all four competing policy objectives.[67] This leads then to my next question, namely, which national institution is best-suited to conduct this delicate balancing?

B. Which Institution Should Ideally Create Civil Remedies?

Which institution within the federal government can best balance the diverse objectives and concerns outlined above? In reviewing the three broad types of responses to terrorism, there seems little doubt that the Executive Branch, and not the federal courts or Congress, is the institution within the national government best suited to engage in direct action, or counterterrorism. Similarly, the courts, and not Congress or the President, appear institutionally best equipped to *enforce* civil and criminal remedies against terrorists, to the extent that such remedies already exist.

Which institution, however, should *create* these remedies, in the process balancing the diverse policy objectives and concerns that determine whether victims

---

66. Under Judge Robb's political question approach, no court would ever award compensatory or punitive damages against a terrorist or ever declare a norm condemning a terrorist act under the Alien Tort Statute, because no court would ever reach the merits of such a civil claim. Under Judge Bork's "no private right of action approach," a court could issue such a ruling, but only in those few cases in which plaintiffs relied upon a self-executing treaty or based their claim on what Judge Bork treats as the three "recognized" law of nations violations: Piracy, violations of safe conduct, or attacks on diplomats. *See supra* note 61.

Judge Bork's view that aliens may not sue under the Alien Tort Statute without a private right of action expressly created by treaty or customary international law reflects two fundamental misconceptions about modern public international law: First, that only states and not individuals may seek to enforce international law norms and, second, that private remedies against international crimes exist only to the extent that nations have chosen to create such remedies through positive international law. In the post-Nuremburg era, it has become widely accepted that individuals, as well as states, have international human rights. *See generally* REVISED RESTATEMENT, *supra* note 12, Part VII, Introductory Note; Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L.S. L. REV. 11 (1978). Moreover, in asserting rights recognized by customary international law, individuals are not necessarily limited solely to the few remedies that nations are able to agree upon by treaty. Until recently, for example, the United States had not ratified the Genocide Convention, a multilateral treaty applying only to states and providing for only one effective remedy, namely, extradition. Under Judge Bork's analysis, an individual would have no civil cause of action based on genocidal acts, even though customary international law has long recognized both an individual human right to be free from genocide and the universal jurisdiction and obligation of all nations to punish it. *See generally* REVISED RESTATEMENT, *supra* note 12, § 702 comment d & Reporters' Note 3; *id.* § 404; *id.* § 907 comment a ("If a rule of customary international law has become a part of United States law, a domestic remedy may be available for its enforcement.").

67. Indeed, the confusion among the opinions in *Tel-Oren* stirs uncomfortable memories of the Supreme Court's post-*Sabbatino* rulings regarding the Act of State doctrine, see *supra* note 54, which have regularly resulted in confusing fractured rulings and plurality opinions. *See generally* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 330–44 (1986) (describing these cases); *see also id.* at 344 ("The Justices cannot agree on the meaning of the doctrine, on the role the Executive should play in its application by the courts, or on the status of the various exceptions to the doctrine."). This confusion, I believe, reigns for much the same reason that confusion resulted in *Tel-Oren*, namely, because judges deciding Act of State cases hold differing personal views of the weight to be given traditional tort law and public international law objectives and competing judicial competence and separation of powers concerns.

of terrorism should receive a civil judicial remedy? Both the language of the Constitution and functional considerations point to Congress, and not the federal courts, as the most appropriate institution.

Article I, section 8, clause 10 of the Constitution specifically authorizes Congress to "define and punish . . . Offences against the Law of Nations." That little-discussed provision may be read to confide in Congress the principal domestic responsibility for creating remedies to enforce under enforced norms of international law.[68] Congress has invoked that provision on several occasions as a constitutional basis for enacting civil and criminal statutes that have targeted problems related to terrorism.[69] Pursuant to this constitutional authority,[70] Congress could pass comprehensive legislation (1) defining the term "terrorism" (*i.e.*, prescribing the scope of the legislation);[71] (2) clarifying the extent to which it believes that the federal courts should punish terrorism through civil, rather than criminal, remedies; (3) striking the proper balance between civil and criminal remedies; (4) defining the proper role of government and private plaintiffs in enforcing those remedies; and (5) prescribing specific rules regarding some of the specific jurisdictional and procedural obstacles to civil recovery described above.[72] Statutes as diverse as the civil rights laws,[73] the federal antitrust laws,[74] or the federal RICO Statute[75] might serve as models for this type of comprehensive

68. For various preliminary drafts of this provision, see 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 168, 182 (rev. ed. 1937).

69. The statutes enacted by Congress under its Art. I, § 8, cl. 10 authority include the FSIA, *supra* notes 53 & 56; various statutes criminalizing attacks on aircraft and internationally protected persons, see statutes cited in *supra* notes 13–16 & 19; and the statute criminalizing piracy. 18 U.S.C. §1621 (1982).

70. Congress could supplement its power to define and punish offenses against the law of nations with its authority to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3; to "constitute Tribunals inferior to the supreme Court," *id.* art. I, § 8, cl. 9; and to prescribe the jurisdiction of the federal courts, *id.* art. III, § 2.

71. The definition of international terrorism most frequently found in the United States Code derives from the provision in the Foreign Intelligence and Surveillance Act of 1978, 50 U.S.C. § 1801(c) (1982). At this writing, however, the Federal Bureau of Investigation, the Central Intelligence Agency, and the State Department all employ different definitions of terrorism. *Compare* UNITED STATES DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM: 1984 2 (1985) *with* R. CLINE & Y. ALEXANDER, TERRORISM: THE SOVIET CONNECTION 109–10 (1984).

72. *See supra* notes 46–56 and accompanying text. As a model, Congress could use the FSIA, *supra* notes 53 & 56, which provides comprehensive statutory rules governing subject matter and personal jurisdiction, service of process, venue, immunities, and prejudgment attachment and postjudgment enforcement in all suits against foreign sovereigns.

73. *See* Civil Rights Act of 1964, 42 U.S.C. § 1971 (1982); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982); Civil Rights Act of 1968, 18 U.S.C. §§ 241–242, 245 (1982); Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(b) (1982).

74. As currently comprised, the federal antitrust laws provide a complex scheme of private and public enforcement. The Department of Justice may criminally prosecute violators of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1982 & Supp. 1986). The Federal Trade Commission may, through administrative proceedings, order parties to cease and desist from practices that violate the Sherman Act, the Clayton Act, 15 U.S.C. §§ 12–27 (1984), or § 5 of the FTC Act, 15 U.S.C. § 45 (1973 & Supp. 1986). The Sherman and Clayton Acts further authorize the Justice Department to bring civil actions to prevent and restrain antitrust violations and to obtain injunctions and decrees ordering divestiture of assets. Other sections of the Clayton Act authorize a private party who has been "injured in his business or property by reason of anything forbidden in the antitrust laws" to sue for treble damages and reasonable attorney's fees and to introduce a relevant decree in a government-initiated action as prima facie evidence of an antitrust violation. *See* Clayton Act §§ 4–5, 15 U.S.C. §§ 15, 16 (1973 & Supp. 1986).

75. *See supra* note 24.

legislation. Each of these bodies of law defines a new federal offense, articulates how that offense should be punished by private and governmental plaintiffs through a combination of civil and criminal remedies, and prescribes procedural rules for obtaining those remedies.

Article I, section 8, clause 10 aside, there can be little doubt that, as a matter of policy as well as law, Congress is also the institution within the federal government *functionally* best equipped to balance the competing national policy objectives described above. To inform its policy deliberations, Congress can hold hearings at which human rights activists, victims of terrorism, representatives of foreign governments, and officials of the Executive Branch could appear and testify. At those hearings, all interested parties could engage in a wide-ranging debate, designed to discern what specific civil remedies should be available to victims of terrorism and what specific obstacles to civil recovery Congress should eliminate or reduce.

The last Congress witnessed the introduction of a spate of legislative proposals designed to address various facets of the terrorism problem.[76] Yet even a cursory examination of those proposals reveals that the prevailing legislative approach to the problem of terrorism has been piecemeal and noncomprehensive. Once we recognize that a coordinated legal response to terrorism requires a unified package incorporating all three of the responses described thus far—counterterrorist measures, criminal remedies, and civil remedies—there seems little sense in developing such a plan in a haphazard fashion. Thus, the ideal solution to the problem of civil remedies against terrorism would be for Congress to address that problem within the framework of omnibus antiterrorism legislation.[77]

Practical politics, however, naturally dictate serious limitations upon obtaining any form of omnibus legislation. For that reason, a second-best legislative alternative would consist of developing a package of statutory civil remedy provisions that could be attached to any of a number of bills pending before Congress. The two most obvious vehicles for such legislation would be amendments to the Alien Tort Statute[78]

---

76. For a listing of just some of the bills proposed, see generally 20 INT'L LAW. 1083, 1086–87 (1986) (listing fourteen terrorism bills considered by the 99th Congress).

77. My colleague Michael Reisman has also suggested a comprehensive legislative approach as the preferred solution to the problem of civil remedies. *See* Reisman, *Tel-Oren: Toward an Integrated Strategy of National Judicial Enforcement of International Human Rights*, 1985 PROC. AM. SOC'Y INT'L L. 368.

In September 1986, President Reagan signed an antiterrorism bill that purported to be "omnibus" in nature. *See* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986). That Statute did take initial steps toward an integrated national position regarding direct action against terrorists. Its key titles included provisions regarding diplomatic security, *see id.* tits. I-IV; rewards for information relating to terrorism, *see id.* tit. V; actions to combat international nuclear terrorism, *see id.* tit. VI; security of shipping and military bases, *see id.* tits. IX-XI; and calls for multilateral cooperation in antiterrorist measures ranging from the use of diplomatic privileges and immunities for terrorism purposes, *see id.* § 704, to criminal cooperation, *see id.* tit. XII. But as one key participant in the drafting of that legislation conceded, "this particular piece of legislation . . . if nothing else is piecemeal." Panel on "Terrorism: The Issue Confronting a Free Society," 1986 American Bar Association Annual Meeting (Aug. 11, 1986) (remarks of Joel Lisker, Chief Counsel, Senate Judiciary Committee, Subcommittee on Security and Terrorism) (copy on file with *Texas International Law Journal*). Indeed, the only title of that statute that deals expressly with civil remedies, the grandly named Victims of Terrorism Compensation Act, is in fact quite modest in scope. *See* Note, *supra* note 69, at 387–89 (describing this legislation).

78. 28 U.S.C. § 1350 (1982).

and the Foreign Sovereign Immunities Act of 1976,[79] both of which have recently been proposed for legislative revision.[80]

In sum, the second of the two ongoing debates over civil remedies seems far more fundamental than the first. The debate over availability and obstacles is about where we are now; the debate over objectives and institutions is about where we should be. Furthermore, the first debate cannot be intelligently conducted without constant reference to the second. One cannot meaningfully discuss which civil remedies against terrorism should be available and which obstacles to civil recovery should be eliminated without some consensus on what mix of policy objectives these civil remedies should serve and what national institutions should most appropriately provide them. To immerse ourselves only in the first debate ignores the fact that what is really needed is legislative architecture, not judicial patchwork.

Ideally, Congress would address the problem of civil remedies against terrorism as part of a comprehensive statute that targeted the entire terrorism problem through a combination of criminal and nonjudicial civil remedies, in addition to judicial civil remedies. Even without such a comprehensive approach, however, Congress could openly balance tort and public international law objectives against judicial competence and separation of powers concerns by considering and adopting a narrower bill that solely addressed the issue of civil remedies.

IV. A SECOND-BEST SOLUTION TO THE SECOND DEBATE: TRANSNATIONAL PUBLIC LAW LITIGATION

Given that the optimal, legislative solution to the problem of civil remedies against terrorism may not soon be forthcoming, it is important to consider whether courts acting without further legislative guidance can provide a "second-best" *judicial* solution to the second debate. Absent an explicit legislative balancing of the four competing policy objectives described above, judges asked to construe existing statutes to provide civil remedies against terrorism have no choice but to conduct the balancing themselves. But how can judges conduct that balancing in a principled, rather than ad hoc, fashion, without giving overriding or undue weight to any one of the competing policy objectives?

In my view, one cannot fully answer that question without reexamining the three concurring opinions in *Tel-Oren,* and contemplating their broader social implications.

---

79. 28 U.S.C. §§ 1330, 1602–1611, 1391(b), 1441(d) (1982) (discussed in *supra* notes 53 & 56).

80. The 99th Congress considered both the Torture Victims Protection Act of 1986, S. 2528, 99th Cong., 2d Sess., 132 CONG. REC. 7062 (1986) (a proposal put forward by human rights activists to amend the Alien Tort Statute to create a private tort remedy for torture in violation of the law of nations), as well as a comprehensive bill to amend the FSIA. *See* S. 1071, 99th Cong., 1st Sess. (1985); H.R. 3137, 99th Cong., 2d Sess. (1985) (companion House bill introduced by Congressman Glickman (July 31, 1985)); H.R. 4592, 99th Cong., 2d Sess. (1986) (introduced by Congresswoman Mikulski). The proposed amendments to the FSIA would, *inter alia*, modify some of the existing rules discussed above, including the Act of State doctrine, *supra* note 54, prejudgment attachment and postjudgment execution of foreign sovereign assets, *supra* note 56. For commentary on these legislative proposals, see Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position,* 20 INT'L LAW. 1289 (1986); Feldman, *The Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L. Q. 302 (1986); Hoffman & Brackins, *The Elimination of Torture: International and Domestic Developments*, 19 INT'L LAW. 1351, 1360–63 (1985) (describing Torture Victims Protection Act of 1985).

As I have already noted, the opinions in that case reflect considerable tension among the participating judges regarding the weight to be given traditional tort law and public international law objectives and to countervailing concerns about judicial competence and separation of powers.[81] Yet these same objectives and concerns invariably arise whenever governments and private citizens sue one another in federal courts seeking compensation for alleged violations of international law. When viewed in a broader historical context, it becomes clear that the *Tel-Oren* plaintiffs' attempt to secure judicial condemnation of PLO terrorism represented merely one example of a much larger, ongoing phenomenon.

A. The Emerging Phenomenon of Transnational Public Law Litigation

The question of how federal judges may properly balance these competing policy objectives and concerns did not originate with *Tel-Oren.* To the contrary, this question has consistently plagued United States courts in the context of transnational *commercial* litigation since 1964, when the Supreme Court decided *Banco Nacional de Cuba v. Sabbatino.*[82] The Foreign Sovereign Immunities Act of 1976, far from eliminating the balancing problem in transnational private law litigation, has only multiplied its complexities.[83] In recent years, federal judges have been called upon increasingly to address this problem when confronted by the new, burgeoning type of suit: What I call *transnational public law litigation.*[84]

---

81. *See supra* text accompanying notes 59–64.

82. 376 U.S. 396 (1964). Although the Supreme Court decided a number of significant Act of State cases before 1964, in *Sabbatino* the Court recast the Act of State doctrine into its modem form. *See supra* note 54. Declaring that the doctrine had "'constitutional underpinnings'" in the principle of separation of powers, 376 U.S. at 423, the Court held that:

> the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id. at 428. In its current form, however, the doctrine is riddled with exceptions. *See generally* Bazyler, *supra* note 67.

83. For a discussion of some of the numerous problems of statutory interpretation that have arisen under the Act, see generally Feldman, *Amending the Foreign Sovereign Immunities Act, supra* note 80; Feldman, *The Foreign Sovereign Immunities Act of 1976 in Perspective, supra* note 80. Many of the practical problems that arise in transnational suits against terrorists first arose in the context of commercial litigation. *See* von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984 (1985) (discussing litigation issues highlighted in *supra* text accompanying notes 46–56 in the context of private transnational lawsuits).

84. *See* Koh, *Responsibility of the Importer State, in* TRANSFER OF HAZARDOUS TECHNOLOGY: THE INTERNATIONAL LEGAL CHALLENGE (G. Handl & R. Lutz, eds. 1987) (forthcoming) (describing the litigation following the Bhopal tragedy as an example of this phenomenon). The term "public law litigation" was coined in Abram Chayes' article, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). *See also* Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation And the Burger Court*, 96 HARV. L. REV. 4 (1982). Not coincidentally, Professor Chayes is also the architect of one of the prime recent examples of transnational public law litigation, Nicaragua's suit against the United States in the International Court of Justice. *See* Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985). The argument in this Part largely derives from a forthcoming article on the relationship between transnational public law litigation and the Revised Restatement. That article will sketch both the striking parallels as well as the clear distinctions that may be drawn between Professor

Transnational public law litigation melds two modes of litigation traditionally thought to be distinct. In traditional *domestic* litigation, private individuals bring private claims against one another based on national laws before a competent domestic judicial forum. They seek both enunciation of norms and damages relief in the form of retrospective judgments.[85] In traditional *international* litigation, state parties bring public claims against other states based on treaty or customary international law before international tribunals of limited competence. Although state litigants ostensibly seek enunciation of public international norms by such tribunals, their primary goal is usually prospective "relief" in the form of a negotiated political settlement.[86]

In transnational public law litigation, these two modes of litigation merge. Private individuals, government officials, and nations sue one another directly and are sued directly in a variety of judicial fora, most prominently domestic courts. In these fora, the actors invoke claims of right based not purely on private or public, domestic or international law but rather on a composite body of "transnational" or "foreign relations" law.[87] Moreover, contrary to the classical "dualist" vision of international jurisprudence, which views international law as binding only upon nations in their relations with one another,[88] individual plaintiffs engaged in this mode of litigation usually claim that their personal rights arise directly from this body of transnational law.

As in traditional domestic litigation, the announced focus of a transnational public lawsuit is redress for individual victims, not states. As in traditional international law litigation, however, the transnational public law plaintiff's underlying aim in bringing the action is not so much retrospective as it is prospective. In transnational public law litigation, plaintiffs invoke the court's jurisdiction not so much to extract a binding monetary judgment as to provoke a political settlement in which

---

Chayes' model of domestic public law litigation and the emerging genre of transnational public law litigation. *See infra* note 104.

85. For the classic statement of this model of adjudication, see Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

86. *See generally* M. KATZ, THE RELEVANCE OF INTERNATIONAL ADJUDICATION 145–61 (1968). Perhaps the archetype of this form of international adjudication is litigation before the International Court of Justice seeking an advisory opinion pursuant to art. 96 of the United Nations Charter. Such an opinion does not purport to be a binding judgment; rather, it enunciates public international norms in a way that gives some litigants a greater claim of right in subsequent settlement negotiations.

87. The Revised Restatement, *supra* note 12, may be thought of as the most complete compendium of this hybrid body of private and public, domestic and international law.

88. International law scholars distinguish between "monism"—a school of international jurisprudence that views international and domestic law as together constituting a unified legal system—and "dualism," the school that views international law as a discrete system of law for nations, operating "wholly on an international plane." Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987). *See also* Starke, *Monism and Dualism in the Theory of International Law*, 1936 BRIT. Y. B. INT'L L. 66. Under a strictly dualist view of international law, individuals injured by foreign states would have no right to pursue claims directly against those states. Their governments would pursue those claims for them on a discretionary basis and would subsequently determine the rights of those injured individuals to redress as a matter of domestic law. As noted above, however, substantial inroads into this strictly dualist view of international law have been made in recent years, particularly in the area of international human rights. *See supra* note 66. Viewed in this light, *Filartiga* promoted a distinctly monist view of international law, while Judge Bork's opinion in *Tel-Oren* advocated the dualist counterpoint. *Compare supra* note 64 *with supra* note 66.

both governmental and nongovernmental entities will participate. Thus, although plaintiffs may request retrospective damages or prospective injunctive relief, a declaratory judgment or default judgment that announces the violation of a transnational norm will serve their purpose. Regardless of whether the plaintiff may directly enforce the judgment against the defendant in the rendering forum, the judgment's value rests principally in its potential use as a judicially-created bargaining chip in other political fora.

The numerous recent examples of this phenomenon may be divided into two distinct categories: Those cases involving state plaintiffs and those involving individual plaintiffs. The litigation brought by the Government of India against Union Carbide in United States and Indian courts in the wake of the Bhopal tragedy provides perhaps the most dramatic example of the first kind of case.[89] Following an environmental disaster, a state sued a private multinational entity in domestic courts, rather than international courts, making complex claims based on transnational law.[90] India claims to seek judicial reparations for its citizens' injuries, but its apparent motivation in turning to domestic courts is not to obtain enforceable judicial relief, but rather to obtain a judicial declaration of Union Carbide's liability for the disaster. India could then employ such a declaration to provoke a political settlement that would bind Union Carbide, India, the United States, as well as the private Indian plaintiffs.[91]

Similarly, Nicaragua's ongoing attempt to enforce its recent International Court of Justice judgment[92] against the United States in United States courts marks another

---

89. *See generally* Koh, *supra* note 84. The facts of the Bhopal tragedy are well-known. In December 1984, highly toxic methyl isocyanate gas leaked from a pesticide factory located in Bhopal, India, killing more than 2,000 Indian citizens and injuring at least 200,000 others. Many of the victims lived in shanty towns just outside the gates of the factory, which was owned and operated by Union Carbide India, Ltd., a company incorporated and licensed under the laws of India and fifty-one percent owned by Union Carbide, a United States multinational enterprise.

The Union of India and private plaintiffs filed suit against Union Carbide in American courts. In September 1986, after the United States suit was dismissed on grounds *of forum non conveniens*, see *supra* note 49, India and the State of Madhya Pradesh sued Union Carbide in a Bhopal district court; three months later, Union Carbide countersued, charging both governments with contributory responsibility. For descriptions of the legal issues raised by the tragedy, see generally Symposium, *The Bhopal Tragedy*, 20 TEX. INT'L L. J. 267 (1985); Note, *International Mass Tort Litigation:* Forum Non Conveniens *and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 GA. J. INT'L COMP. L. 109 (1986).

90. In the United States, and now in India, the plaintiffs have offered a novel theory of "multinational enterprise liability." They claim that, notwithstanding traditional notions of limited shareholder liability, a parent multinational corporation controlling a majority interest in a foreign subsidiary that in turn runs a hazardous local production facility has a nondelegable duty to ensure that the activity causes no harm. *See* Union of India's Complaint, *reprinted in* MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE 1 (U. Baxi and T. Paul eds. 1986).

Plaintiffs have asserted this theory as a novel way to pierce the corporate veil under domestic law. *See* Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 631 (1986) (discussing possible domestic law theories of piercing the corporate veil in the Bhopal case). Arguably, however, such a theory could derive support from emerging principles of public international law (*e.g.*, international codes of conduct directed at guiding the conduct of multinational enterprises). *See* Westbrook, *Theories of Parent Company Liability and the Prospects for International Settlement*, 20 TEX. INT'L L.J. 321, 326–27 (1985).

91. Most commentators anticipate that India will ultimately obtain redress not so much by winning a binding monetary judgment as by provoking the negotiation of a complex international settlement in which Union Carbide, India, and the United States will participate. *See, e.g.*, Westbrook, *supra* note 90, at 330–31 (discussing the possibility of a diplomatic settlement); Magraw, *The Bhopal Disaster: Structuring A Solution*, 57 U. COLO. L. REV. 835, 844–47 (1986) (proposing such a settlement).

92. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)

nation's parallel attempt to claim violations of transnational law in domestic courts.[93] Nicaragua, like India, sued with the announced aim of obtaining redress for its citizens. Yet having already secured an international judicial declaration that the United States has violated international norms, Nicaragua's domestic litigation appears prompted by its desire to obtain a similar *domestic* judicial declaration, which it could then use to provoke a political settlement with the United States in various political fora.[94]

The Bhopal and Nicaragua cases have migrated from traditional adjudication into the realm of transnational public law litigation. But since *Filartiga*, the most intense transnational public law litigation activity in the United States courts has arisen not from suits by state plaintiffs, but rather from suits by alien plaintiffs against governments and government officials under the Alien Tort Statute. This trend began with *Filartiga* in 1980, when an alien obtained a federal court declaration that another alien, a government official acting under color of state law, had violated plaintiffs' internationally recognized human rights.[95] Although to this author's knowledge no *Filartiga*-type plaintiffs have actually received compensation for their injuries, some have been satisfied simply with default judgments announcing that defendants have transgressed universally recognized norms of international law.[96] These small successes encouraged other Alien Tort Statute plaintiffs to pursue a second class of

---

Merits, 1986 I.C.J. Rep. 14 (Judgment of June 27). For commentary on this judgment, see generally *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (H. Maier ed. 1987).

93. Nicaragua's counsel will attempt to enforce the World Court's judgment directly in United States courts. *See* N.Y. TIMES, June 28, 1986, at 1, col. 2, continued at 4, col. 4; Effron, *Nicaragua Likely to Press on Ruling*, NAT'L L.J., July 14, 1986, at 3, col. 1. In addition to Nicaragua's efforts to enforce the judgment, a group of United States citizens living in Nicaragua, several United States organizations which send travelers and aid to Nicaragua, and two world peace organizations have sued United States Government officials in a federal district court. These groups charge that the Reagan Administration's noncompliance with the World Court's judgment is "not in accordance with law for purposes of the Administrative Procedure Act, 5 U.S.C. §§ 701, 706 (1982), and constitute[s] an unjustified exercise of state power in violation of plaintiffs' Fifth Amendment due process rights to life, liberty and personal security." Committee of U.S. Citizens Living in Nicaragua v. Reagan, Civ. No. 86-2620 (D.D.C. 1986) (motion for summary judgment filed Nov. 5, 1986).

94. *See* R. FALK, REVIVING THE WORLD COURT xvi (1986) ("Nicaragua's recourse to the [World] Court is at the very least a brilliant move in the struggle to convince world public opinion that they are victims of illegal U.S. activities and that their approach is to seek peaceful settlements to the conflict."); Chayes, *Nicaragua, the United States and the World Court*, *supra* note 84, at 1477 ("I think it is evident that the actions of the [World] Court to date and the efforts of the [Reagan] Administration to escape adjudication have already influenced the debate about whether and on what terms to continue financial assistance to the contras."); Effron, *supra* note 93, at 12 (statement of Professor Michael J. Glennon) ("This is a legal battle and a political battle, and a victory in one realm reinforces the battle in the other.").

95. *See supra* notes 39–40 & 64. For subsequent cases presenting this fact pattern, see, e.g., Ortigas v. Marcos, No. C 86-0975 SW (N.D. Cal. Jan. 22, 1987); Sison v. Marcos, Civ. No. 86-0225 (D. Haw. July 18, 1986); Hilao v. Marcos, Civ. No. 86-390 (D. Haw. July 18, 1986); Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985). *See generally* Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 5–6 nn. 17, 19 (1985) (collecting post-*Filartiga* Alien Tort Statute cases).

96. *See, e.g.*, cases cited in *supra* note 56. At this writing, the Filartiga family has still not collected the default judgment in its case. The defendant, Pena-Irala, has not as yet been tried in Paraguay, to which he was deported. *See* N.Y. TIME, Mar. 28, 1986, at A34 (Letter to the Editor from R.H. Hodges, Pelham, New York).

defendants: Not just foreign government officials, as in *Filartiga*, but foreign governments as well, as in *Tel-Oren*.[97]

Most recently, aliens, frequently joined by United States citizens and Congressmen, have begun to file such suits against yet a third class of defendants—the United States Government and its executive officials.[98] Plaintiffs in these suits seek not just to obtain individual redress for past wrongs, but prospectively to curb particular United States foreign policy programs—for example, the Reagan Administration's support of the *contras*[99] or its policy or detaining Cuban and Haitian refugees[100]—on the ground that those programs contravene treaties or customary international law. As in *Filartiga*, the plaintiffs seek not so much to win judgments as to reach the merits and provoke judicial declarations calling on American officials to account for their activities under international law.[101] To the extent that plaintiffs may

97. *See, e.g.*, Martin v. the Republic of South Africa Transvaal Dep't of Hosp. Services, 84 Civ. 9094 (CES) (S.D.N.Y filed Dec. 17, 1984) (suit by black American dancer denied emergency medical treatment by two state-funded hospitals in South Africa) (decision pending); Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986) (suit by Liberian corporations against Argentina arising out of bombing of oil tanker during Falklands war); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985); *In re* Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613 (D.D.C. 1984), *appeal pending* (action arising from the deaths of passengers killed when Korean aircraft was shot down by Soviet military aircraft); Siderman v. Republic of Argentina, No. CV 82-1772-RMT (MCx) (C.D. Cal. Mar. 7, 1985) (action by Argentine citizens against Argentina for claims of torture; $2.6 million default judgment originally rendered, but subsequently vacated after reconsideration on grounds of foreign sovereign immunity).

98. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (suit by twelve Nicaraguans, twelve Congressman, and two other Americans challenging U.S. policy in Nicaragua); Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985); Ramirez de Arellano v. Weinburger, 724 F.2d 143 (D.C. Cir. 1983), *rev'd*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *judgment vacated*, 471 U.S. 1113 (1985); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (suit by Congressmen challenging legality of United States military presence in and military assistance to El Salvador); Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (2d Cir. 1985) (suit brought by association of British women, United States citizens living in England, and two United States Congressmen challenging legality of United States deployment of cruise missiles in Great Britain); Chaser Shipping Corp. v. United States, 649 F. Supp. 736 (S.D.N.Y. 1986) (suit against United States by foreign shipowner seeking $1.6 million in damages for striking a mine laid by United States in Nicaraguan harbor).

99. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Ramirez de Arellano v. Weinburger, 724 F.2d 143 (D.C. Cir. 1983), *rev'd*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *judgment vacated*, 471 U.S. 1113 (1985) (remanded for reconsideration in light of Foreign Assistance and Related Programs Appropriations Act) (challenging occupation of plaintiffs' Honduran land for use as training facility).

100. *See, e.g.*, Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 289 (1986); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985); Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (excludable Cuban refugee sought habeas corpus relief from federal detention); Haitian Refugee Center v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987); Orantes-Hernandez v. Smith, 541 F.Supp. 351 (C.D. Cal. 1982).

101. The question whether United States officials have a constitutional duty to obey international law has recently generated substantial literature. *See, e.g.*, Henkin, *supra* note 88; *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986); Kreisberg, *Does the U.S. Government Think That International Law is Important?*, 11 YALE J. INT'L L. 479 (1986); Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986); Glennon, *Raising* The Paquete Habana: *Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321 (1985); Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 321 (1985); Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS L.Q. 719 (1982).

be said to have won such judicial declarations, they have sought to use them primarily as political constraints upon the defendants' future conduct.[102]

Transnational public law litigation thus constitutes a novel and expanding effort by both state and individual plaintiffs to fuse international legal rights with domestic judicial remedies. Lawsuits which do not fit neatly into the confines of either traditional international or traditional domestic litigation have migrated into this third litigation realm. Moreover, the realm of transnational litigation, which itself originated in the context of private commercial suits against foreign governments, has now expanded to include public human rights suits against the United States, foreign governments, and United States and foreign officials. The new breed of transnational public law litigants seeks to couple an evolving substantive notion—the principle of individual and state responsibility for violations of public international law[103]—with a familiar process—domestic adjudication in a United States federal court.

Why this phenomenon has only recently arisen deserves far more extensive treatment than can be offered here.[104] Broadly speaking, however, there seems little

---

102. *See, e.g.*, Chayes, *Nicaragua, the United States and the World Court*, *supra* note 84, at 1481 (arguing that "in rendering judgment in the *Nicaragua* case, the [World] Court will . . . exercise its function as a spokesman for universal values" and act as "teacher to the citizenry"); Gerstel & Segall, *Conference Report: Human Rights in American Courts*, 1 AM. U. INT'L L. & POL'Y 137, 143 (1986) (quoting statement of human rights lawyer) ("Where the President is aiding in the torture of others, we want the judiciary to be able to come in against the President. The purpose of continuing lawsuits which may be frivolous, therefore, is to attempt to bring the action into a legal context. It is necessary to create a means for dialogue even if you know you are going to lose.").

103. In no small measure, this notion of individual and state responsibility owes its origin to the Nuremburg trials. For recent discussion of the lessons of Nuremburg for the Nicaraguan World Court case, see Kahn, *From Nuremburg to the Hague: The United States Position in* Nicaragua v. United States *and the Development of International Law*, 12 YALE J. INT'L L. 1, 4–12 (1987). For a consideration of the broader significance of those trials, see Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179, 199 (1985). For broader analyses of the significance of recent developments in international law to the relationship between the state and the individual and the decline of the "dualist view" of international law discussed in *supra* note 88, see Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U.L. REV. 929 (1986); Sohn, *supra* note 66; Higgins, *supra* note 66.

104. A brief outline, however, may lend some clarity to the picture painted above. In a forthcoming article, I argue that the Supreme Court's 1964 decision in *Sabbatino*, *Filartiga*, and *Tel-Oren* mark three watersheds in the development of transnational public law litigation. Not coincidentally, *Sabbatino* and *Tel-Oren* also coincide roughly with the appearance of the first Restatement of Foreign Relations Law (in 1965) and the Revised Restatement) (which will appear in its final form in 1987).

In *Sabbatino*, the Court explicitly linked the Act of State Doctrine to the concept of separation of powers for the first time, casting a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of public international law. *Sabbatino* was decided at a time when courts were beginning to embrace "the passive virtues." *See* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961). Understandably, federal courts read the Supreme Court's opinion in *Sabbatino* together with notions of judicial deference to executive discretion in foreign affairs, see Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948), and political question notions imported from the domestic electoral context, Baker v. Carr, 369 U.S. 186 (1962), as a general directive to stay out of foreign affairs adjudication. This chill stimulated a period of judicial withdrawal from the arena of international norm-enunciation that lasted for more than a decade.

In the 1960s and 1970s, however, the domestic civil rights movement and the international human rights movement coincided with the two other trends: A declining faith in the International Court of Justice as an instrument of international dispute resolution and a growing willingness by domestic courts to subject the commercial conduct of foreign sovereigns to legal scrutiny. At the domestic level, the federal courts directed the rise of the "new" equal protection; the "due process revolution" triggered by Goldberg v. Kelly, 397

doubt that the decision of transnational plaintiffs to shift the locus of their litigation activity from international to United States judicial fora was inspired by two complementary trends: Growing acceptance by litigants of United States courts as instruments of social change[105] and declining faith in international adjudication as a meaningful process for enunciating international norms or curbing national governmental misconduct.[106] The former trend encouraged cases to migrate from traditional domestic litigation into the transnational realm; the latter trend forced state plaintiffs to file suits that otherwise would have been brought in international fora as transnational cases. In the 1970s, *domestic* public law litigants first undertook *Bivens* and Section 1983 litigation in federal courts to provoke the reform of state and federal institutions through the enunciation of constitutional norms.[107] Today, individual and state litigants undertake transnational public law litigation primarily to achieve clarification of rules of public international conduct and to provoke reform of national

---

U.S. 254 (1970); the growing accountability of government officers for officially inflicted injuries through the decline of sovereign and official immunities; and the growth of the *Bivens* doctrine and Section 1983 litigation. *See generally* J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 657–772 (1975). These trends fostered both greater public acceptance of the notion that federal courts may—and indeed should—restructure wrongful systems, such as schools, prisons, and hospitals, and increased confidence in the courts' ability and expertise to engage in such reform.

This growing faith in the capacity of the domestic courts to engage in domestic public law litigation coincided with an explosion of transnational *commercial* litigation. As nations entered the marketplace and the United States adopted the doctrine of restrictive sovereign immunity by statute, see Foreign Sovereign Immunities Act, *discussed in supra* notes 53 & 56, federal courts became increasingly obliged to adjudicate business actions brought by individuals and private entities against foreign governments. This plethora of transnational suits not only returned domestic courts to the business of adjudicating international law (from which they had excluded themselves since *Sabbatino*), but also stimulated a reawakening interest in the black-letter doctrine of international and foreign relations law. That interest at least in part triggered the legal community's call in the late 1970s for a Revised Restatement of Foreign Relations Law.

The increased willingness of courts to adjudicate domestic public and transnational commercial law cases in the 1970s, however, enhanced growing national frustration at the courts' apparent paralysis and impotence in the public realm of foreign affairs, particularly with regard to adjudication of the constitutionality and international legality of the Vietnam War. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973). The Second Circuit's 1980 decision in *Filartiga*, spurred in part by a government *amicus* brief pressing the Carter Administration's human rights policy, finally signaled an invitation to private litigants to venture into the field of transnational *public* law litigation. Although the Burger Court and the Reagan foreign policy have since sought to dampen the zeal of transnational public law litigants, plaintiffs have now turned precedents such as *Filartiga* into vehicles to urge domestic courts to enunciate norms of public international and foreign relations law that restrain the conduct of United States Executive Branch officials in the world arena. The D.C. Circuit's ruling in *Tel-Oren* (particularly Judge Bork's opinion), however, has now at least partially withdrawn *Filartiga's* invitation.

105. Two famous articles capture the social goals and functions of this changing conception of the role of domestic courts. *See* Chayes, *The Role of the Judge in Public Law Litigation*, *supra* note 84; Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

106. *See, e.g.*, R. FALK, *supra* note 94, at 1–24 (1986) (describing the decline in reliance upon international adjudicative processes since 1930); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 240–43 (3d ed. 1985) (describing the "World Court Crisis" of the 1970s and 1980s).

107. *See generally* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). In *Bivens* suits, federal courts have implied private rights of action for damages directly from the United States Constitution. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 278 (1979).

governmental conduct.[108] Just as *Bivens* provoked judicial creation of the United States law of "constitutional torts,"[109] *Filartiga* raised both expectations and fears that the judicial creation of a parallel law of "international torts" might be forthcoming.[110]

B. The Opportunity Tel-Oren Missed

Set against this historical background, it becomes clear that the refusal of all three judges in *Tel-Oren* to hear plaintiffs' claims on the merits has implications not only for the current availability of civil remedies against terrorism, but also for the broader question of whether transnational public law litigation in United States courts will flourish or die out. All three opinions in *Tel-Oren* promote views that seem likely to discourage the development of transnational public law litigation. Yet all three are also fundamentally flawed. Upon closer examination, two of the opinions fail to offer a principle for construing the Alien Tort Statute that would permit judges to balance all four of the competing policy objectives outlined above. Both Judge Bork and Judge Robb make the overbroad claim that transnational public law cases are, by their very nature, not susceptible to domestic adjudication. Each judge succumbs to what could be called "jurisdictional overkill caused by doctrinal oversight." Each judge articulated a principal underlying concern—judicial competence in the case of Judge Robb and separation of powers in the case of Judge Bork—and then answered that concern by proposing a rigid, blanket approach to the Alien Tort Statute that would

---

108. Recently, transnational public law litigation has also become a type of "institutional reform" litigation in the sense that litigants seek to use the courts not to reform prisons or school systems, but rather to alter the manner in which the President and Congress carry out United States foreign policy. In both cases, litigants have viewed the institution of domestic adjudication as a mechanism for encouraging social change and inducing government compliance with legal norms. *See, e.g.*, Chayes, *Nicaragua, the United States, and the World Court*, *supra* note 84, at 1479–80 (comparing the World Court's *Nicaragua* decision with Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

109. *See generally* P. SCHUCK, SUING GOVERNMENT (1983); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 69 (1980).

110. As Judge Bork's opinion in *Tel-Oren* implicitly recognized, Alien Tort Statute suits urge nothing less than the creation by domestic courts of a system of public tort remedies to combat international crimes. Such a system would be closely analogous to the system of public remedies developed by the federal courts to combat constitutional wrongs in the context of Section 1983 and *Bivens* litigation. *See* 726 F.2d at 801 (Bork, J., concurring) (concluding that separation of powers concerns should operate in *Tel-Oren* as "special factors counselling hesitation," quoting *Bivens*, 403 U.S. at 396, in the judicial implication of implied rights of action). Some commentators also view the development of such a public international tort system with alarm. *See, e.g.*, Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 474–78 (1986). In fact, however, such a system might be particularly desirable in the international realm because of the pronounced diversity that exists with respect to degrees of political development, national culture, and economic systems. In such a realm, the two principal alternative systems of creating norms and influencing state behavior toward individuals—contract and regulation—both tend toward impotence. International contracts often prove unacceptable means for creating norms because of gross disparities in bargaining power. Coordinated international regulation often proves inefficient or impossible because of conflicts in national regulatory philosophies, value systems, and discrepancies in administrative structures. Thus, a system of transnational public law litigation, which places special emphasis on the evolution of tort principles by domestic courts as a means of structuring national incentives and creating international norms, may ultimately prove to be the most effective means of promoting what I have called public international law objectives. I am grateful to my colleague Peter Schuck for this insight.

not only inhibit its use against terrorism, but would also strip it of virtually all contemporary validity.[111]

Both judges failed to recognize, however, that the severity of their primary concerns will vary from case to case. Judge Robb failed to recognize that a federal court's competence to decide a particular transnational suit will turn critically upon the particular facts and law relevant to the decision.[112] Similarly, Judge Bork overlooked the fact that the intensity of the separation of powers concerns in a public transnational law case will also vary from case to case, depending upon whether the defendants are aliens acting under color of state law, foreign governments, or the United State Government or its officials.[113] By prescribing a blanket rule to govern *all*

---

111. Judge Robb's political question approach and Judge Bork's rigid "no private right of action" approach both effectively reduce the Alien Tort Statute to a dead letter. It is difficult, however, to reconcile Judge Robb's refusal to interpret the Statute with the Supreme Court's recent pronouncement that "under the Constitution one of the judiciary's characteristic roles is to interpret statutes and we cannot shirk this responsibility [on political question grounds] merely because our decision may have significant political overtones." Japan Whaling Association v. American Cetacean Society 106 S. Ct. 2860, 2866 (1986).

Similarly, although Judge Bork concluded that courts cannot exercise Alien Tort Statute jurisdiction without invading the exclusive domain of the political branches, he implicitly conceded that some suits brought under the Statute's "law of nations" language would not create separation of powers problems. *See supra* note 61. If Judge Bork did not intend for even those cases to be heard, instead construing the Statute to authorize the federal courts to hear only alien suits for torts in violation of self-executing treaties, then he has all but read the words "in violation of the law of nations" out of the Statute. Under 28 U.S.C. § 1331 (1982), federal courts may already exercise federal question jurisdiction over cases "arising under" self-executing treaties of the United States. Thus, in the name of separation of powers, Judge Bork would have rendered 28 U.S.C. § 1350 totally redundant. In my view, a judicial approach to a statute that effectively reads it out of the books creates, rather than alleviates, separation of powers concerns. *Cf. Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring) ("Vigorously waiving in one hand a separation of powers banner, ironically, with the other [Judge Bork] rewrites Congress' words and renounces the task that Congress has placed before him.").

112. *Tel-Oren* revealed that federal judges may alleviate concerns about judicial incompetence on a case-by-case basis without giving 28 U.S.C. § 1350 an unduly constricted reading. Although Judge Robb argued that federal judges could not determine the facts necessary to decide *Tel-Oren*, 726 F. 2d at 823 (Robb, J., concurring), he overlooked that all facts in that case were essentially uncontroverted. In *Tel-Oren*, the PLO had publicly taken credit for the terrorist attack, and Libya had endorsed and ratified it. *See id.* at 799 (Bork, J., concurring) (PLO "claimed responsibility" for the attack and Libya gave terrorists a "hero's welcome"). Moreover, although Judge Robb further argued that federal judges cannot handle the difficult questions of international law necessary to decide cases like *Tel-Oren*, Judges Bork and Edwards effectively rebutted that concern by engaging in extended subtle analyses of international law issues.

Nor was Judge Robb's political question approach justified by a broader fear that a finding of justiciability in *Tel-Oren* would inundate the courts with Alien Tort Statute suits. As noted above, the doctrines of personal jurisdiction, *forum non conveniens*, and exhaustion of local remedies, combined with practical limits on the availability of service of process, attachable assets, and discovery in Alien Tort cases would screen out virtually all such suits before they reached the merits. *See supra* text accompanying notes 46–56. Only the rare meritorious case without fatal procedural infirmities, such as *Filartiga*, would go all the way to judgment. Given that federal judges regularly apply these doctrines of civil procedure to ensure that individual cases are justly and efficiently decided, it seems anomalous for courts to abstain from deciding all Alien Tort cases on political question grounds, citing "pragmatic problems" and "judicial incompetence as the rationale. *See supra* notes 59–60.

113. The separation of powers concerns implicated by a federal court's consideration of an Alien Tort Statute case rise dramatically, depending upon whether the defendant is (1) an alien acting under color of state law, (2) a foreign state or head of state, or (3) a United States official of the United States itself. As one moves along this spectrum, however, the number of doctrines of federal jurisdiction available to address these concerns on a discretionary, case-by-case basis also increases. For example, in a case such as *Filartiga*, in which an alien sues another alien acting under color of state authority for an international crime, federal court adjudication would not necessarily interfere with the conduct of foreign affairs by the Executive

transnational public law cases, each judge overlooked the possibility that the federal courts might be able to accommodate all four policy objectives underlying the civil remedies debate by hearing some Alien Tort Statute cases, while selectively applying existing doctrines of civil procedure and federal jurisdiction to target judicial competence and separation of powers concerns as they legitimately arise.

In a different vein, Judge Edwards' concurring opinion in *Tel-Oren* did not so much turn a deaf ear to transnational public law claims as it missed an opportunity to clarify the international legal norms condemning torture and terrorism conducted under color of state authority. In *Filartiga*, the Second Circuit construed the Alien Tort Statute as authorizing federal courts to hear claims by aliens that alien officials acting under color of state authority had committed official torture, an act that civilized nations now recognize as a universal crime.[114] Although adopting the *Filartiga* approach in theory,[115] Judge Edwards nevertheless denied jurisdiction in *Tel-Oren,* relying on the curious reasoning that neither terrorism nor torture conducted by a nonstate actor such as the PLO constituted offenses against the law of nations.[116]

Branch. By definition, an international crime is one condemned not only by the United States, but also by the governments of all civilized nations, including the country in whose territory and by whose national the crime was committed. *See* Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 605 (1980) ("The compatibility of international law and Paraguayan law [condemning official torture] significantly reduces the likelihood that court enforcement would cause undesirable international consequences and is therefore an additional reason to permit private enforcement."). *See also supra* note 62. Thus federal courts may make rulings in such cases without necessarily touching upon national nerves or embarrassing the Executive Branch in the conduct of its political functions. *Cf. Sabbatino*, 376 U.S. at 428 ("the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it").

In the second class of cases, when an alien sues a foreign government or a foreign head of state directly for an international crime, separation of powers concerns become more serious. In those cases, however, federal courts may address these concerns by applying existing doctrines designed specifically to address them. Where appropriate, courts may dismiss suits against heads of state on grounds of head of state or diplomatic immunity. *See generally* Note, *Resolving the Confusion over Head of State Immunity: The Defined Right of Kings*, 86 COLUM. L. REV. 169, 170–71 (1986). *See also supra* note 52. Courts may dismiss suits against foreign states on grounds of foreign sovereign immunity or the Act of State doctrine as those principles appropriately apply. *See supra* notes 53–54, 56.

Finally, when an alien sues the United States Government and its officials for their alleged violations of international law, Judge Bork's separation of powers concerns will be at their height. Yet here again, however, courts may apply the law of domestic sovereign immunity and the Federal Tort Claims Act to protect the United States on a case-by-case basis. The law of official immunities developed in the *Bivens* and Section 1983 context will answer those concerns as they legitimately arise. *See generally* P. SCHUCK, *supra* note 109 (describing these doctrines). *Cf. Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (applying these various doctrines to dismiss claims against various United States defendants). In short, because federal courts have ample avenues available to them to target separation of powers concerns on a case-by-case basis, no justification arises for dismissing suits that do not raise those concerns on jurisdictional grounds, as Judge Bork would do.

114. *See supra* notes 40, 62, 113.

115. *See supra* notes 45, 62–63 and accompanying text.

116. *See supra* note 62. Judge Edwards found no universal consensus that terrorism constituted a violation of the law of nations, 726 F.2d at 795 (Edwards, J., concurring), or that international law imposes obligations on nonstate actors, such as the PLO, when they commit torture. *Id.* at 791–95. Judge Edwards' reasoning thus leaves a curious anomaly: After *Tel-Oren*, aliens may sue terrorists who torture them overseas while acting under color of state authority by direct analogy to *Filartiga*, but may not sue foreign states or nonstate actors such as Libya or the PLO for the same acts, so long as those acts are committed overseas. *See supra* note 53 (barring suit against Libya because tort occurred overseas). Nor, according to

In my view, all of the judges in *Tel-Oren* overlooked an approach that would have allowed them to promote traditional tort law and public international law objectives, without raising undue judicial competence and separation of powers concerns. That approach, which provides a principle whereby judges could balance these four competing policy objectives on a case-by-case basis, grows directly out of *Filartiga.* Under this approach, a federal court would read the Alien Tort Statute to authorize federal courts to incorporate into *federal common law* the notion that certain forms of terrorism constitute international crimes.[117] At least with respect to those international crimes which are subject to universal jurisdiction,[118] the Alien Tort Statute arguably confers upon the federal courts authority to fashion a federal common law of public tort remedies.[119] Moreover, *Sabbatino* would provide judicial precedent for the development of such a body of federal common law.[120] Applying

---

Judge Edwards, may those plaintiffs sue even terrorists who act under color of state law for terrorism (as opposed to torture), because there is no international consensus condemning terrorism.

In my view, Judge Edwards overlooked two key questions. First, even if the PLO is not itself a state, did that organization in fact *torture* the *Tel-Oren* victims "under color of state authority" (as Pena tortured Filartiga) by virtue of the Libyan government's alleged support for the terrorist attack? Second, even assuming no international consensus condemning "terrorism," as that term is broadly defined, does an international consensus nevertheless condemn an organized and deliberate attack upon innocent civilians without a collateral military target, as occurred in *Tel-Oren*? *Cf.* REVISED RESTATEMENT, *supra* note 12, § 404 comment a ("Universal jurisdiction is increasingly accepted for . . . indiscriminate violent assaults on people at large."). Had Judge Edwards applied the *Filartiga* "universal crimes" approach to these two questions, see *supra* notes 62 & 64, he might have upheld Alien Tort Statute jurisdiction in *Tel-Oren.*

117. *Cf. supra* note 116. This approach, which the district judge applied on remand in *Filartiga*, is the approach most fully sensitive to both traditional tort law and public international law objectives. *See supra* note 64. It would permit an alien to sue in federal court under the Alien Tort Statute only for those torts that rise to the level of international crimes, as those crimes are defined by modern customary international law. *See infra* note 118.

118. *See, e.g.*, REVISED RESTATEMENT, *supra* note 12, § 404 (defining crimes subject to universal jurisdiction as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism); *see also id.* § 702 (declaring that a state violates international law if, as a matter of state policy it practices, encourages, or condones official genocide, slave trade, murder, torture, prolonged arbitrary detention, or systematic racial discrimination).

119. With respect to the international crimes enumerated in *supra* note 118, the Alien Tort Statute arguably confers upon the federal courts authority to fashion a federal common law of tort remedies for international crimes. That body of common law would be analogous to the constitutional common law of tort remedies for constitutional wrongs developed in the *Bivens* context. *See* Monaghan, *The Supreme Court, 1974 Term-Foreword Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). The federal courts' authority to create such a narrow body of federal common law would derive directly from the jurisdictional grant in the Alien Tort Statute, 28 U.S.C. § 1350. *Cf.* Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) (reading jurisdictional provision of the Taft-Hartley act to authorize the federal courts to create a federal common law of labor-management contracts). Alternatively, one might justify creation of a federal common law of tort remedies for international crimes based on the theory of "protective jurisdiction" urged by Professor Mishkin. *See* Mishkin, *The Federal "Question" Jurisdiction in the District Courts*, 53 COLUM. L. REV. 157, 184–96 (1953) (reading a jurisdictional statute as a "law of the United States" under which a case may arise for federal question jurisdiction purposes even in the absence of a statutorily created cause of action, so long as Congress exercises substantial legislative power in the field). *See also* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948). As noted above, Congress has substantial legislative power to "define and punish offenses against the law of nations." *See supra* text accompanying notes 68–80. In either event, 28 U.S.C. § 1350 would provide both a federal right and a remedy, thereby obviating Judge Bork's concern about the absence of a federal cause of action. *See supra* notes 50, 61.

120. *See supra* notes 54, 82. In *Sabbatino,* the Supreme Court declared that, notwithstanding Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the national Executive in ordering our relationship with other members of the

this approach, federal courts could take jurisdiction over Alien Tort suits brought by aliens against terrorists and their state supporters. If practical problems rendered particular cases unsusceptible to judicial disposition, judges could apply civil procedure doctrines to address these judicial competence concerns in a discretionary manner.[121] If the identity of the particular defendant made separation-of-powers concerns peculiarly intense, judges could similarly apply doctrines of federal jurisdiction to address those concerns on a on a case-by-case basis.[122] In short, had the judges in *Tel-Oren* sensitively applied the *Filartiga* approach, together with existing doctrines of civil procedure and federal jurisdiction, they could have paved the way for at least a default judgment against terrorists—thereby promoting traditional tort and public international law objectives—without raising undue judicial competence and separation of powers concerns.[123] By refusing to apply such an approach in *Tel-Oren,* the District of Columbia Circuit dampened hopes raised by *Filartiga* that transnational public law litigation might provoke a broader integration of United States federal common law and the emerging customary international law of international crimes. Such a ruling would have served three salutary functions. First, it would have spurred further dialogue among United States, foreign, and international courts regarding the content of emerging international norms against terrorism.[124] Second, it would have

international community must be treated exclusively as an aspect of federal law." 376 U.S. at 423–25. If federal courts may fashion federal common law to articulate rules governing judicial abstention from terrorist cases, there seems no reason why the judges in *Tel-Oren* could not have found similar judicial authority to develop a specialized federal common law of "torts only committed in violation of the law of nations" under the Alien Tort Statute.

121. *See supra* note 112 and accompanying text.

122. *See supra* note 113 and accompanying text.

123. Under the approach urged in the text, the D.C. Circuit would still have directed the district court to dismiss the *Tel-Oren* plaintiffs' suit against Libya on grounds of foreign sovereign immunity. *See supra* note 53. Moreover, if the PLO had been improperly served, the suit against that entity would also have been dismissed on that ground, without prejudice to the filing of a new complaint after proper service or attachment of PLO assets. But if service was proper, the District Court would have had jurisdiction to proceed to the merits against the PLO. The District Court could then have held the PLO civilly liable based upon its acts of official torture and indiscriminate terrorist attacks on innocent civilians. *See supra* note 116. By defining those acts as international crimes subject to universal jurisdiction, the federal court could have concluded that those acts gave rise to federal common law tort claims which conferred a compensatory and punitive damages remedy on behalf of plaintiffs. *See supra* notes 64, 117–120. Even assuming that the PLO did not appear to defend, and that plaintiffs were not actually able to collect on the default judgment, the court would still have declared a norm of United States law condemning torture and terrorism, thereby promoting public international law objectives. Moreover, the PLO would have been deterred in the future from placing its financial assets in the United States. *See generally* D'Amato, *Judge Bork's Concept of the Law of Nations Is Seriously Mistaken,* 79 AM. J. INT'L L. 92, 93–94 (1985). *See also* Panel on Civil Remedies Against Terrorists and Nations Supporting Terrorists, American Bar Association National Conference on the Law in Relationship to Terrorism (June 6, 1986) (remarks of Steven Schneebaum) (copy on file with *Texas International Law Journal)* ("Even if it's the case . . . that a lawsuit against a terrorist is ultimately not effective to get real money damages for a plaintiff who has been injured, it may still result that after cases like *[Tel-Oren],* it will be that much more difficult for terrorists to find safe haven in the United States to be protected from their victims False.").

124. Had *Tel-Oren* fostered the development of a federal common law of tort remedies for international crimes, that common law could not only have defined compensable offenses, see *supra* note 110, but also set federal standards of civil liability, appropriate measures of punitive damages and standards of official immunity. *Cf.* Harlow v. Fitzgerald, 457 U.S. 800 (1981) (setting a comparable judicial standard of official immunity against constitutional tort claims). Moreover, by encouraging interaction between domestic and international law through transnational public law litigation, such a decision would have furthered the trend toward state responsibility for international crimes and movement toward a "monist" view of international

better served public international law and traditional tort law objectives by enunciating a domestic norm against international terrorism and increasing the likelihood that victims of terrorism could secure compensation and deterrence through civil remedies. Third, it would have expanded the federal courts' role in enforcing such civil remedies, thereby making the federal courts a more significant player in the war on terrorism.[125]

In sum, the judges in *Tel-Oren* missed an important opportunity to construe the Alien Tort Statute to provide a civil remedy against a modem social problem, terrorism. Even if the District of Columbia Circuit had not made the PLO "pay up," it could at least have promoted the ends of transnational public law litigation by articulating and enunciating a transnational norm condemning international terrorism. Taken together, the three opinions in *Tel-Oren* leave little room for victims of terrorism to secure civil remedies in United States courts through transnational public law litigation.[126] Yet, as noted above, the equally ancient constitutional authority to "define and punish offences against the law of nations" authorizes and indeed challenges Congress to address the same problem through legislative enactment of civil remedies.[127] Whether Congress soon rises to that challenge and legislatively modifies the ruling in *Tel-Oren* will determine the extent to which future victims can turn to transnational public law litigation to combat terrorism.

---

law. *See supra* notes 88 & 103. By refusing to embark on such a judicial task, however, the *Tel-Oren* judges have effectively thrown the task of creating such a comprehensive body of civil remedy law back to Congress. *But see supra* note 65 (suggesting that litigants might still urge this approach upon courts that follow *Filartiga*).

125. Such an expanded role for the federal courts in enforcing international law norms would reaffirm the evolving international law rule that all individuals have fundamental human rights to be free from certain state-sponsored conduct *(e.g.*, genocide, torture, and certain forms of terrorism). *See supra* note 118. By implication, such a ruling would also constitute a general judicial endorsement of the use of transnational public law litigation to temper the actions of national decisionmakers. Indeed, one immediate and palpable consequence of *Tel-Oren* has been a reduction in the exposure of United States Government officials to Alien Tort Statute liability. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (dismissing Alien Tort suit brought against Reagan Administration officials based in part on the reasoning of *Tel-Oren).*

126. *See supra* text accompanying notes 46–56. As noted above, however, litigants might still urge the approach endorsed in *supra* text accompanying notes 117–23 upon courts that still follow *Filartiga. See supra* notes 65, 124; *see also* Gerstel & Segall, *supra* note 102, at 158–59 (citing suggestion of conference participant that "a tort suit brought against the PLO by the family of Leon Klinghoffer and aliens held hostage on board the *Achille Lauro* would present a fact pattern similar to that considered in *Tel-Oren.* National outrage at the brutal murder of an American in a wheelchair, however, might produce sufficient pressure to yield a markedly different result.").

127. *See supra* notes 68–80 and accompanying text. Indeed, perhaps the most favorable reading that one can give to Judge Robb's opinion in *Tel-Oren* is as a judicial call for congressional reenactment of the Alien Tort Statute in order to ensure that it continues to fit within our nation's current statutory topography. 726 F.2d at 827 (Robb, J., concurring) ("When a case presents broad and novel questions of this sort, courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President."). As Dean Calabresi has suggested, when a judge is asked to construe a statute as obscure and as ancient as the Alien Tort Statute, perhaps his most proper role would be to "ask, cajole, or force another body (usually the legislature. . .) to define the new rule or reaffirm the old" in order to ensure that the Statute enjoys contemporary legislative support. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 166 (1982).

V. CONCLUSION

"Rights," one commentator has written, "preoccupy a Don Quixote; remedies are the work of a Sancho Panza."[128] The District of Columbia Circuit's decision in *Tel-Oren* both restricted the availability of civil recovery by victims against terrorists and their state supporters and erected obstacles to such recovery. In the process, the three opinions in that case dramatically limited the role of federal courts in combatting terrorism through transnational public law litigation and retarded the development of a transnational norm recognizing an individual human right to live free from terrorism. *Tel-Oren* has forced both advocates and opponents of civil remedies against terrorism to reconsider what broader objectives civil remedies should serve and which institutions within the national government are best positioned to create and enforce those objectives.

Tel-Oren was wrongly decided, and each of the judges failed properly to balance the four competing policy objectives that underlie all civil litigation in this field. All three judges missed the opportunity to apply a principled approach to *Tel-Oren* that would have satisfied all four of those policy objectives. After *Tel-Oren,* Congress and not the courts must now play the role of Sancho Panza with respect to civil remedies against terrorism. Absent further legislative action, *Tel-Oren* will prevent transnational public law litigation from playing a substantial role in encouraging the development of domestic and international norms against terrorism. In the wake of *Tel-Oren,* only renewed legislative attention by Congress—the institution constitutionally and functionally best qualified to formulate national responses to terrorism—can sustain the momentum of transnational public law litigation and produce a balanced national statement about how we want to make terrorists both pay and pay up.

128. P. SCHUCK, *supra* note 109, at 27.

Introduction to *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*

*Michael Goldberg**

Although forms of arbitration have existed for hundreds (or thousands) of years, the modern era can generally be divided into two phases: The developmental period from WWII to approximately 1995 and the growth period since then. In W. Laurence Craig's 1995 article, Craig analyzed the development of arbitration through the pre-1995 era. The thoroughness of his research is confirmed by the multitude of times his article has been cited by other leading arbitration experts. Craig's article not only stands the test of time, but also was prescient about the issues and development of the international arbitration world for the following decades.

As Craig noted 20 years ago: "While the traditional [European] arbitration institutions and arbitration sites will continue to get their share of arbitration, more dramatic areas of growth can be seen in those regions of the world where arbitration has a shorter history . . . ."[1] The exponential growth of institutions and arbitrations in recent years in new venues like Singapore, Hong Kong, and Dubai confirms Craig's predictions.

Even the hot issues of today would not have surprised Craig in 1995. Craig noted: "The possibility of the recognition in an enforcement state of an award annulled where it was rendered has remained for the most part an academic construct."[2] Although no longer just an academic construct today, his discussion on enforcement in 1995 demonstrates the awareness of issues to come for our field.

For younger practitioners, this Article should be read for another, less academic, reason. Today, every large international firm has or is trying to develop an arbitration presence. Twenty years ago, this was not the case, and international arbitration was a niche practice populated by a relatively small number of practitioners who made it their life long vocation. Craig was one of the early stars of the practice and remains one of its most respected experts. The nostalgic benefit of going back to this Article is to see who Craig cites throughout his work. Like Craig, we see that many of the titans of two decades ago are still leading today. From those still active today to those recently passing, the directory of the respected arbitration "Mafia" is found

* Senior Trial Partner and Practice Group Chair – International Arbitration & Dispute Resolution (Firmwide), Baker Botts. J.D., The University of Texas School of Law 1982; B.A., Rice University 1979.

1. W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 54 (1995).

2. *Id.* at 57.

throughout the citations: Lalive, Mustill, Paulsson, Bockstiegel, Salans, Van Den Berg, etc. are, like Craig, the historians and the leaders of today's modern international arbitration.

Some Trends and Developments in the Laws and Practice of International Commercial Arbitration

W. LAURENCE CRAIG*

SUMMARY

A number of articles in this symposium examine current issues on the international commercial arbitration scene and explore possible solutions to the problems raised. It seemed useful to the present author to put these issues in context by looking at the progress made in international commercial arbitration in recent years and to summarize some of the recent developments in arbitration rules and legislation. These developments will continue to influence the practice of arbitration in the future and the relationship between arbitral proceedings and the courts. As will be seen from a comparative sampling, developments in the laws and practice of international

* Partner, Coudert Frères, Paris; member of the bars of New York and Paris.

commercial arbitration demonstrate a converging trend on certain key issues. In other areas diversity in national laws and practices remains.

I. HISTORICAL MILESTONES

A. Normalcy of International Commercial Arbitration

"By the mid-1980s, at least, it had become recognized that arbitration was the normal way of settlement of international commercial disputes."[1] This observation will not surprise anyone familiar with modem complex international transactions and the contracts that govern them. The inclusion of an arbitration clause to govern future disputes has become a routine step, and drafters are required to have a working knowledge of the various international arbitration institutions and options.[2] Still, it is necessary to ask how we have come to this state of affairs. The answer to this question reveals that the rise of international commercial arbitration as a matter of routine is surprisingly recent.

The growth of international commercial arbitration is largely a post-World War II phenomenon, fueled by the explosive growth of international trade and commerce and foreign investment in both developing and developed countries. While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In many jurisdictions the judiciary was slow to change, ill-informed about modem commercial and financial practices, and hesitant to abandon local traditions and procedures that often seemed arcane or unbusinesslike to outsiders. Moreover, judicial procedures and formalities built on accepted national traditions have a very different impact on foreign persons and entities, to whom not only the procedure but frequently the language is foreign, than they do on their local contracting partners. Finally, there is always the possibility, or at least the perception, that local courts will be biased in favor of domestic parties and less protective of foreign interests.

In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdictions language and procedures, preferences of the judge, and possibly even national bias.

---

1. *See, e.g.,* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 293 (Pieter Sanders ed., 1987); Yves Derains, *The Impact of International Political Crises on International Contracts and International Commercial Arbitration*, 1992 RUVUE DE DROIT DES AFFAIRES INTERNATIONALES [R.D. AFP. INT'L.] 151, 151 (text in French and English): "arbitration is recognized as the normal way of settlement of international commercial disputes"; Klaus P. Berger, *Party Autonomy in International Economic Arbitration: A Reappraisal*, 4 AM. REV. INT'L ARB. 1, 7 (1993) (citing other commentators).

2. *See, e.g.,* Whitmore Gray, *Drafting the Dispute Resolution Clause, in* COMMERCIAL ARBITRATION FOR THE 1990s 140 (Richard J. Medalie ed., 1991).

While the viewpoint outlined above may be stark and simplified, it seems likely that thoughts of this nature, if not necessarily of this degree, frequently motivate parties to choose international arbitration. Concerns about litigation in a foreign country are not limited to the result obtained in the court of first instance. There is the additional risk that a national court judgment will be subject to one or more layers of appellate review, causing further delay and uncertainty in the ultimate disposition of the matter.[3] And even if a foreign court's decision is satisfactory, there is often doubt about whether the decision can be enforced in another country.[4]

The absence of any multilateral convention for the recognition of foreign judgments,[5] and the existence of very few bilateral treaties with such provisions, makes the arbitral solution not only attractive but compelling. This is due to the existence of an international mechanism for the enforcement of foreign arbitral awards. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[6] which entered into effect in 1958, has put into place a system which assures the recognition in member countries of arbitral awards rendered abroad and which excludes any judicial review of the merits of the arbitral award by the court where enforcement is sought.[7] In the absence of any international court for the resolution of private international disputes, arbitration has provided the participants in international commerce with a decision-making process which, if not international in the legal sense, is a least internationalized, and which leads to an award which will ordinarily be enforceable internationally. It is for this reason that commercial arbitration is much more common in international dispute resolution than in domestic dispute resolution.[8] Nicholas Katzenbach, former Attorney General of the United States and former General Counsel for IBM, commented on the importance of the private international dispute resolution system in dealing with the increase in world trade, investment, and finance, and the underlying technological developments which made multinational activities both inevitable and desirable:

> As national laws of contract, property, commercial paper developed and grew domestically to make a variety of types of promises enforceable in national courts in accordance with common commercial understanding, so too has it become essential to the same activities that promises and understandings on international or transnational scale be enforced in the same way. While we have experienced commercial arbitration in domestic trade for many years and this has been successful and helpful in a variety of ways, I suggest that arbitration in international commerce is really of a

3. See Justice Blackmun's dissent in Shearson v. McMahon, 482 U.S. 220, 257–58 (1987).

4. Michael J. Mustill, *Arbitration: History and Background*, J. INT'L ARB., June 1989, at 43.

5. A significant exception now exists in Europe where the Treaties of Brussels and Lugano provide for the recognition of judgments within the EC and EFTA. For a discussion of these treaties, see Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L. 559, 569–89 (1993). The existence of the treaty and a growing sense of a community of shared values among the Convention countries increase the possibility that contracting parties will accept judicial resolution of disputes, even by a court of one party's nationality.

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention].

7. *Id.* arts. I-III.

8. Nicholas de B. Katzenbach, *Business Executives and Lawyers in International Trade*, *in* SIXTY YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 67, 67–68 (ICC Int'l Court of Arbitration ed., 1984) [hereinafter SIXTY YEARS OF ICC ARBITRATION].

> wholly different order of importance. Here to get effective and reasonably predictable and fair resolutions arbitration has become *essential* in a way it never has been in domestic matters. It is fair to say that arbitration in international commercial matters is today–and certainly should be–the norm, not the exception.
>
> . . . While much can be said for arbitration in domestic transactions as an effective alternative to litigation, it is an alternative–a choice. Commercial promises can usually be effectively enforced in national courts. But in international matters the risks of failure of effective enforcement are considerable and the existence of predictable commercial results far less False [L]awyers and businessmen who are not experts in international transactions must acquire an understanding of the enormous advantages of arbitration in most circumstances.[9]

The preeminence of arbitration as the method of settling international commercial disputes has had an effect on the vocabulary of alternative dispute resolution (ADR). In the United States, where the growth of various ADR techniques has been driven by the expense and burden of domestic litigation,[10] arbitration is considered to be within the scope of ADR, although separate from the "core" devices of mediation, conciliation, and other negotiated settlement techniques. Outside of the United States, on the other hand, arbitration cannot even be considered "alternative," because it is so generally accepted as the *normal* way of settling international commercial disputes. In the international arena, ADR should be considered to include all the settlement devices aside from litigation and arbitration.[11] Some commentators outside of the United States–somewhat bemused, it must be confessed, by the onslaught of ADR publicity[12]–have suggested that ADR should not stand for "alternative dispute resolution" but rather for "additional dispute resolution."[13] This term is appropriate because, while one cannot totally oust the jurisdiction of national courts, the parties should always provide for some obligatory and binding dispute

---

9. *Id.*

10. *See* W. Laurence Craig, *Relationship Between ADR and Arbitration: Some Observations*, 57 ARBITRATION 178, 178 (1991).

11.

> Arbitration is a universally understood, readily definable process, recognised as such amongst the domestic and the international trading community. Indeed, in the international arena arbitration is and always has been the primary mechanism with litigation very much in second place except in the exercise of strictly limited supervisory or appellate powers and enforcement of awards. In consequence there has developed an increasing consensus in dispute resolution usage that ADR comprises the whole body of procedures not properly classifiable either as litigation or as arbitration. This degree of consensus is now such that we can and should discard any further suggestion that ADR is to be understood as including arbitration.

Sir Laurence Street, *The Language of ADR–Its Utility in Resolving International Commercial Disputes–The Role of the Mediator*, 58 ARBITRATION 17, 18 (1992) (special ed.).

12. A vice president (and subsequently president) of the Chartered Institute of Arbitrators, moved perhaps by the traditional obligations of after-party speakers, has suggested the acronym "ADR" might possibly stand for "Another Drain on Resources." Bruce Harris, *Arbitration: A Normal Incident of Commercial Life–But for How Long?*, 58 ARBITRATION 153, 156 (1992).

13. Street, *supra* note 11, at 17.

resolution device–usually arbitration-to which recourse may be had should the consensual methods of ADR fail.

In any event, the proponents of international commercial arbitration have aspired for fifty years to create a dispute resolution system that produces obligatory awards which are enforceable internationally.[14] The process is generally characterized by several steps:

i) a contractual agreement to arbitrate;

ii) agreement by the parties on the arbitrators or their method of selection;

iii) agreement on the procedures to be followed by the arbitrators, either in detailed contractual terms or by the incorporation of institutional rules or statutory terms;

iv) the rendering by the arbitrators of an award agreed to be binding on the parties;

v) the localization of the arbitration in a jurisdiction where the award will be considered final and binding, generally with only limited possibility of judicial review, and no possibility of appeal on the merits of the award;

vi) the possibility of enforcing the arbitral award abroad, with only very limited grounds for refusal, generally as prescribed by the terms of international conventions.[15]

B. Arbitration as a Self-Contained Process

The arbitration of disputes between traders of different nationalities is by no means a recent development. Roman law, for instance, provided for the institution by contract of arbiters and arbitrators as private judges.[16] More generally, private dispute resolution amongst commercial men is as old as commerce itself. The history of the development of private justice systems, and their conflicts with state justice systems, would extend beyond arbitration to the history of legal institutions in general.[17]

---

14. For a discussion of international enforceability of obligatory awards, see RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 366–72 (1985).

15. *See generally id*; Street, *supra* note 11; Gray, *supra* note 2.

16. DAVID, *supra* note 14, at 84. The difference between the award of the *arbiter*, which did not have any effect in law, and that of the arbitrator, which created a contractual obligation (although without executory force), was destined to have an influence on the concept of arbitration as spelled out in modem civil codes, and the issue of whether arbitration is a matter of contract or of procedure. Professor David's magisterial study of arbitration from a comparative law point of view is a unique resource. For an overview, see René David, *David on Arbitration in the International Trade. A Book Review*, *in* THE ART OF ARBITRATION, 89 (Jan C. Schultsz & Albert J. van den Berg eds., 1982). For a view of arbitration from earlier times based on classical sources, see DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 203–11 (1978).

17. For comparative views of the early history of arbitration, see, e.g., CHARLES JARROSON, LA NOTION D'ARBITRAGE 1–5 (1987); Jerzy Jakubowsky, *Reflections on the Philosophy of International*

An important chapter in the development of private dispute resolution systems can be traced back to medieval Europe, when merchants and traders from different regions would assemble at markets and fairs to do business.[18] The brevity of the time when disputing parties were in one place and the lack of understanding of mercantile matters by ordinary courts led to the development both of special procedures for dealing with mercantile matters and a substantive law of merchants–the lex mercatoria.[19] In England this led to the establishment of courts of fairs and boroughs, also known as pie powder courts, particularly to adjudicate such matters.[20] While these courts were eventually absorbed into the ordinary courts of England,[21] the initial practices, and the needs they responded to, were akin to those that have led to modem arbitration. In England, the first arbitration act dates from 1698, formalizing a practice of informal arbitration by members of trade guilds, the need for which was reinforced by the inefficiency of common law courts in applying mercantile law.[22]

Meanwhile, outside England merchant fairs and markets on the continent led to the establishment of various informal tribunals responding to the same needs.[23] These ancient tribunals were eventually absorbed into a system of commercial courts, as distinguished from ordinary civil courts, which exists to the present day. These commercial courts are marked by the fact that judges are not chosen from career magistrates but rather are elected by those who act as merchants (*commercants*) either individually or through participation in companies. These developments were accompanied by a parallel tradition of encouraging or tolerating private contractual justice, and provisions concerning arbitration found their way into the civil codes and the codes for civil procedure of a number of European countries, with varying degrees of success.[24]

The development of international commercial arbitration over the last fifty years is also rooted in more recent history. The Industrial Revolution and increasing economic specialization led to the development of trade and industry associations whose rules provided for and encouraged the use of arbitration by its members. The purpose of these specialized arbitral institutions was to provide for the resolution of disputes by respected members of the same profession who would have extensive personal experience in the subject matter of the dispute. Many arbitration clauses, or rules of trade associations, specifically required that the arbitrators be "commercial men."[25] The existence of well-defined customs in the profession or trade, the expertise of the arbitrators, and the pressure on members to respect the rules of the professional or trade association all encouraged respect for the arbitral process and for arbitral awards. Indeed, many of those factors are still at work today in specialized arbitration in maritime, commodities, textile, and insurance matters.

Commercial Arbitration and Conciliation, *in* THE ART OF ARBITRATION, *supra* note 16, at 175; Mustill, *supra* note 4, at 43. For a good summary, see Derek Roebuk, *A Short History of Arbitration*, *in* KAPLAN ET AL., HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS xxxiii-ixv (1994).

18. *See generally* DAVID, *supra* note 14, at 14.

19. *Id.*

20. HAROLD POTTER, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 35, 187–91 (Albert K.R. Kiralfy ed., 4th ed. 1958).

21. GEOFFREY R.Y. RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 246 (6th ed. 1977).

22. *Id.* at 251.

23. ROMUALD SZRAMKIEWICZ, HISTOIRE DU DROIT DES AFFAIRES 59–60.

24. *See* DAVID, *supra* note 14, at 89–106.

25. *See generally id.* at 44–45.

Especially in the case of arbitration under the auspices of a specialized arbitral institution between members of a close-knit trade or professional group, it is intended and confidently expected that the contractually chosen procedure will be definitive and will replace all recourse to courts. These arbitration proceedings are viewed by the parties as being an essentially independent process, and not the adjunct of any court system. Having agreed to participate in an arbitral process to resolve a dispute, the parties agree to carry out the resulting award, and to respect that award as final and binding between them. Indeed, where two parties have agreed to submit their dispute to a wise outsider for resolution, how can one of them later refuse to defer to the wisdom applied?[26]

The same spirit which motivated the choice of arbitration by close-knit professional groups has also motivated its promotion by broader arbitration associations. In its early attempts to promote arbitration, the International Chamber of Commerce (ICC), which has become the foremost international arbitration association in the world, did not foresee the need to provide for judicial enforcement of awards. The ICC Arbitration Rules of 1923 provided only that the parties were "honor bound" to carry out the award of the arbitrators. It was expected that moral norms and "the force that businessmen of a country can bring to bear upon a recalcitrant neighbor"[27] would be sufficient to ensure respect of arbitral awards.

While this view may seem somewhat quaint today, the success of international arbitration as a self-contained process should not be underestimated. The vast majority of disputes which go to arbitration are resolved without any judicial recourse whatsoever. This may be due to settlement negotiations during the course of the proceedings or by the rendition of an award and its satisfaction. The ICC estimates that more than 90% of its awards are satisfied voluntarily.[28] Evidence is not available as to the voluntary settlement of awards in ad hoc arbitrations, but at least where these arbitration proceedings are specifically agreed to *after* the dispute arises—and hence where the parties have agreed to submit a defined dispute to a designated tribunal—it would stand to reason that voluntary respect of awards would be even greater than in the case of arbitration pursuant to a preexisting arbitration clause.[29]

---

26. It may appear ironic that it is precisely the fields of maritime, commodities, and insurance arbitration, considered "special categories" in English arbitration law, that the parties cannot agree in advance to exclude judicial recourse from awards. This is the result of a long history in which the development of these areas of commercial law in England was largely developed by the courts, pursuant to the "case stated" powers of earlier legislation in which issues of law were certified by arbitral tribunals to the court for decision. Current restrictions on exclusion of judicial review in these matters are based in large part on the fact that many of the arbitration clauses in these fields are found in form contracts or general conditions over which the trade user will have no control. Despite all this, the number of cases accepted for judicial review in these categories of arbitration since the 1979 amendments to the English Arbitration Act remains very small. By and large, parties do accept the decisions of arbitrators who are fellow professionals in the same field of commerce.

27. GEORGE RIDGEWAY, MERCHANTS OF PEACE 322 (1938), *quoted in* W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION xxi (2d ed. 1990).

28. Pierre Lalive, *Enforcing Awards*, *in* SIXTY YEARS OF ICC ARBITRATION, *supra* note 8, at 318, 319 [hereinafter Lalive, Enforcing Awards].

29. One suspects, however, that most ad hoc arbitrations today take place pursuant to contractual clauses providing for the arbitration of future disputes. For example, a common clause provides for arbitration under the UNCITRAL Arbitration Rules which in turn provide for a noninstitutional, unsupervised arbitration regime. *See generally* Pierre Lalive, *Advantages et inconvénients de l'arbitrage ad hoc*, in ETUDES OFFERTES Á PIERRE BELLET 301, 310 (1991).

Another example of arbitration as a self-contained process has been the increasingly common use of arbitration in disputes between government entities and private parties.[30] Here the parties will have envisaged arbitration, from the outset, as the sole and final dispute resolution device, each for its own reasons. The private party will typically be hesitant to accept judicial determination in the courts of its sovereign partner. The government entity, on the other hand, will find it unacceptable to submit to the jurisdiction of the private party's native court system, and indeed is likely to resist suits in foreign courts through the doctrine of sovereign immunity.[31]

Arbitration agreements between private parties and the state itself represent a quite small, and shrinking, category of agreements,[32] but the important role played by state enterprises in international trade, commerce, and investment has been a fertile source for the expansion of international commercial arbitration.[33] The ICC recently estimated that fully 30% of its cases involve at least one party which is either an organ of the state, a public enterprise, or an entity owned and controlled by the state.[34]

In all these contexts the parties intend that the contractually chosen procedure—arbitration—will be completely self-contained. The agreement to arbitrate a dispute entails an agreement to voluntarily satisfy the arbitral award. However, it is not clear that moral norms, which may be sufficient to ensure respect of arbitral awards rendered within the framework of domestic trade associations and professional groups, will be sufficient to ensure the satisfaction of arbitral awards between parties who have no relationship other than the contract by which they are linked. Consequently, as arbitration becomes a *generalized* solution for the resolution of international commercial disputes, additional incentives to respect arbitral awards may be necessary. Where arbitration clauses either fill a vacuum—that is, take the place of no choice of forum in the contract, which would permit a claimant to bring suit in any court where it could get jurisdiction over the defendant—or replace a choice of a national court, the parties are not inspired by any of the positive sentiments which promote the voluntary respect of awards. They are not motivated by the wisdom of the particular arbitrators chosen nor by a corporative attitude of cooperation. Indeed, the very fact that international arbitration clauses and arbitration have become

30. *See generally* CRAIG, PARK & PAULSSON, *supra* note 27, at 643–55 (discussing state contracts and arbitration).

31. *Id.* at 152 (discussing the waiver of jurisdictional sovereign immunity by agreement to arbitrate).

32. Natural resource concession agreements have in the past given rise to a number of important and well- documented ad hoc and ICC arbitration cases involving governments. Today, foreign investment agreements between investors and states frequently provide for arbitration under the rules of the International Centre for the Settlement of Investment Disputes (ICSID) where the parties are from states which are members of the Washington Convention of 1965. Such arbitrations take place under procedures provided by international convention and are not subject to the procedural law of any state. State courts may not intervene in these arbitrations in any way. Accordingly, ICSID arbitrations constitute a special category outside the general purview of international commercial arbitration. Other than such investment agreements with the state, states in general are increasingly reluctant to enter into commercial agreements with private parties, and instead seek to have such contracts entered into by separate public enterprises. Sometimes, however, the state is called upon to guarantee the obligations of its public enterprises and these guarantees frequently contain arbitration clauses. See generally, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereinafter ICSID].

33. Karl-Heinz Bockstiegel, Arbitration and State Enterprises 11 (1984).

34. *See* Craig, Park & Paulsson, *supra* note 27, at 8.

routine—a development Yves Derains terms the "banalisation of arbitration"[35]—leads to the result that the most intractable disputes, involving the most complicated fact and law situations, no longer are resolved in court proceedings, but in arbitration. In these circumstances, it is no longer unusual that a party may fail to cooperate in the arbitral process, or even actively obstruct it, and will fail to voluntarily execute an award when rendered. This in turn leads to the necessity to consider judicial assistance to the arbitral process and, to assure respect of the award obtained, recourse to the enforcement powers enjoyed only by the State.[36]

Conceptually, the desire to obtain an award enforceable by the courts—both nationally and internationally—lies at the heart of a conflict inherent in the arbitral process. Designed as a system of private justice, arbitration is a creation of contract, and parties may, through arbitration agreements, dispose of their right to sue in court to the same extent that they can, through other contracts, dispose of other legal rights.[37] The contractual origin of arbitration proceedings allows for great flexibility. This flexibility is threatened, however, by the desire of the winning party to enlist the power of the state to compel compliance with the award. This requires recourse to the courts because only national courts have the power of the state to compel performance and execute against a party's assets. Before it is willing to use these powers, however, a national court may want to scrutinize the procedures that led to the arbitral award. The possibility of this sort of scrutiny raises a number of questions. What procedures must the arbitrators have followed, and the award comply with, in order that the court will give it the desired effect? Should any document having the form of an award be as easily recognized and enforced as a promise to pay, in the form of a bill of exchange or other negotiable instrument? Or should the recognition and enforcement court view the award as if it were a judgment of an inferior, albeit exceptional, tribunal, and satisfy itself at least as to the procedures followed by the tribunal in reaching its award? The requirement of enforceability has both national and international consequences. During the early postwar period, the first priority of the international business community was to assure international recognition of agreements to arbitrate and of arbitral awards. On the international level this could be accomplished only by treaty.[38]

C. Conventions for the Recognition and Enforcement of Arbitral Awards

Early efforts to assist arbitration by international convention met with partial success in the Geneva Protocol on Arbitration Clauses,[39] initiated by the ICC and adopted under the auspices of the League of Nations. The Geneva Protocol was designed to assure the validity of clauses providing for the arbitration of future

35. Mustill, *supra* note 4, at 55.

36. *See generally*, Berthold Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective, in* SIXTY YEARS OF ICC ARBITRATION, *supra* note 8, at 257, 257–85.

37. An example of this in modern arbitration law is provided by article 177 of the Swiss Arbitration Law which provides: "Any dispute of financial interest may be the subject of an arbitration." Federal Statute on Private International law, ch. 12, art. 177, SR 291.435.1 (1987) [hereinafter Swiss Arbitration Statute], *translated in* Switzerland's Private International Law Statute 1987, at 155 (Pierre A. Karrer & Karl W. Arnold trans., 1989).

38. *See generally* Howard M. Holtzmann, *Commentary, in* SIXTY YEARS OF ICC ARBITRATION, *supra* note 8, at 361, 362 (discussing the importance of the enforcement of arbitral awards).

39. Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158.

disputes; it provided that where parties from contracting states agreed to submit a dispute to arbitration, the courts of those contracting states would decline to adjudicate the merits of that dispute and would refer the parties to arbitration. The Protocol was ratified by twenty-four states in Europe, but only a handful outside of Europe.[40] Although the Protocol helped ensure respect of agreements to arbitrate, it did not ensure that resulting arbitral awards would be enforceable. Consequently, a complementary treaty was required: The Geneva Convention on the Execution of Foreign Arbitral Awards.[41] The Convention, open for ratification by states which had signed the Protocol, was ratified by even fewer states than the Protocol, and suffered from the disability that an award rendered in a Convention state was required to be recognized in another Convention state only if it had first been judicially recognized where it had been rendered. This requirement of "double *exequatur*" greatly limited its utility.

It was only after World War II that a major movement was undertaken to adopt a multilateral arbitration convention which would remedy the defects of the Geneva Convention and obtain the adherence of the major trading countries. The ICC presented an initial draft of such a convention to the United Nations Economic and Social Council in 1953, and the United Nations Conference on International Arbitration, held in New York, followed in 1958. Interestingly, the ICC draft, consistent with the ICC's role as the principal international arbitration institution, advocated the concept of "international" or "stateless" awards, because such awards would have to be recognized in Convention countries without regard to their status under the law of the country where rendered.[42] This concept was not accepted by the Conference, however, and the Convention, as its title suggests, provides for the recognition of *foreign* arbitral awards.[43]

The New York Convention was prepared and entered into force in 1959.[44] Among the early parties to the Convention were France, Russia, Morocco, India, Israel, Egypt, Czechoslovakia, and the Federal Republic of Germany. The United States was a relative latecomer, ratifying the New York Convention only in 1970.[45] As of April 1994, ninety-six states have ratified the New York Convention, making it the cornerstone upon which the value of international arbitral awards is based.

The New York Convention requires both the recognition of agreements to arbitrate and the recognition and enforcement of arbitral awards.[46] The means for assuring recognition of arbitration agreements is the Convention's requirement that national litigation be stayed in favor of Convention arbitration and that the parties be referred to arbitration.[47] This is spelled out in article 11(3), which provides: "The

40. *Id.* at 161. Outside of Europe, only the countries of Brazil, India, Japan, Thailand, Israel, and New Zealand ratified the Geneva Protocol.

41. Convention for the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302 [hereinafter Geneva Convention].

42. International Chamber of Commerce, Enforcement of International Arbitral Awards, Report and Preliminary Draft Convention, ICC Brochure no. 174, *reproduced in* U.N. Doc. E/C.2/373 (1953).

43. For a discussion of the negotiating history, see ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981).

44. New York Convention, *supra* note 6.

45. Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201–208 (1988)).

46. New York Convention, *supra* note 6, art. I.

47. *Id.* art. II(3).

court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[48]

The principal provision concerning enforcement of wards is article V(1), which provides that a party to the Convention may refuse to recognized and enforce an arbitral award only if the party opposing enforcement can establish one of five procedural defenses:

1. there was not a valid arbitration agreement;
2. there was a lack of notice or denial of the opportunity to be heard;
3. the decision rendered was beyond the jurisdiction of the arbitral tribunal;
4. the composition of the tribunal, or the arbitral procedure, was contrary to the parties' agreement (or, failing agreement, to the law of the country where the arbitration took place; or
5. the award lacks binding effect, or has been set aside or suspended by competent authority in the country in which, or under the law of which, that award was made.[49]

Article V(2) provides two additional defenses to recognition of an award which, unlike the defenses set out in article V(1), may be raised by the recognition and enforcement court itself: That the subject matter is not arbitrable or that enforcement would violate the forum's public policy.[50]

The New York Convention was designed to give international currency to arbitral awards. Any award rendered and binding in a New York Convention country can, under the Convention, be enforced in any other New York Convention signatory.[51] What the Convention did not do, however, was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.[52]

To international legal advisers, the message of the New York Convention was dear: To maximize the enforceability of an arbitral award, either at the domicile of the defendant or in other countries where its assets might be found, it was usually desirable to agree that the arbitration would be held in a New York Convention country.[53] The more difficult question was: Which one?

---

48. *Id.*

49. *Id.* art. V.

50. *Id.* art. V(2).

51. *Id.* art. III.

52. For a general review of the powers of courts at the seat of arbitration, see W. Laurence Craig, *Uses and Abuses of Appeal in International Arbitration*, *in* 1987 PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS ch. 14, *revised and reprinted in* 4 ARB. INT'L 174 (1988) [hereinafter Craig, *Uses and Abuses*]; *see also* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L.REV. 647 (1989) [hereinafter Park, *National Law and Commercial Justice*].

53. While the basic text of the New York Convention requires the enforcement by member states of awards *wherever* they are rendered, a sufficient number of states have subjected their ratification to the reciprocity condition permitted under article I(3) of the Convention, so that it is prudent to provide that the place of arbitration will be in a Convention state. New York Convention, *supra* note 6, art. 1. It could also

D. The Search for Acceptable Arbitral Fora

The ratification of the New York Convention increased the popularity of arbitration as the appropriate remedy for international commercial disputes. At the same time it made more acute the international counsel's mission to determine where the arbitration would be held. The Convention forces counsel to abandon the familiar perception that international arbitration proceedings are sui generis and may be conducted pursuant to their own terms of reference; to ensure recognition of the award abroad, counsel must examine the status of arbitral proceedings and awards at the place of arbitration. Drafters of arbitration agreements must accept that the state where arbitration is held has legislative jurisdiction to dictate procedural rules for arbitral proceedings in that state, and that the state's courts have the power to enforce such provisions. Respect, or lack thereof, for any mandatory provisions of procedural law applicable to arbitration at the seat of arbitration could affect the enforceability of the ward abroad under the terms of the Convention.[54] Increasingly, counsel advising clients on the provisions of an arbitration agreement focused on two issues: The neutrality of the arbitration site and the site's laws affecting arbitral proceedings.

The importance of the neutrality of the arbitration site depends on the nature of the case. In some cases it may not loom as an important factor. In ordinary cases—sales of goods, determinations of the effects of transport or shipping documents, and the like—arbitration can usually be held in the domicile of either party with satisfactory results. Other cases are much more problematic. Parties from capital exporting countries are traditionally uncomfortable holding arbitrations at the domicile of their contract partners in developing countries; by the same token, the developing country partners are suspicious of arbitration in a more developed country. The political controversies that clove East and West also drove parties from those groups to agree to arbitrate in countries not clearly identified with either centrally-controlled economies or Western capitalism. In today's world, political controversies and the possible intervention of state interests may take different forms, but the promise of a neutral site can serve as insurance against biased arbitration forums or resistance to arbitration based on the perception of bias.

---

be relevant to verify the status of the award for protection under the Geneva Convention (superseded in all cases where the New York Convention applies) *supra* note 41; the European Convention on International Commercial Arbitration, April 21, 1961, 484 U.N.T.S. 349 [hereinafter European Convention] (initiated by the EEC and adhered to by 19 states, of which several are non-European); or any applicable bilateral treaty. Since the ratification in 1976 (1990 for the United States) of the Inter-American Convention on International Commercial Arbitration (also known as the Panama Convention), one must now check that convention when Latin American countries are concerned. Inter- American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 449, Pan-Am. T.S. 42. In the specialized area of foreign investment disputes involving a state, it is also necessary to verify the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, (known as the ICSID or Washington Convention), although since the *lex arbitri* in ICSID arbitrations is the Convention itself, and since member states are bound by the Convention to recognize ICSID awards, the choice of the place of arbitration does not have its usual significance. ICSID, *supra* note 32, art. 53.

54. This is the effect of art. V(1)(d) and (e) of the New York Convention, which permits a member state not to enforce an award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place," or if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, *supra* note 6, art. V(1)(d)–(e).

Pierre Lalive has emphasized that a neutral arbitration site has three characteristics: Equal treatment of the parties (*concrete neutrality*); non-allegiance to any relevant political "bloc" (*political neutrality*); and an appropriate legal environment (*judicial neutrality*).[55] As to the first two aspects of neutrality, he states:

> The first is obvious and reflects a common concern for concrete equality of the parties; settlement of disputes in a third country (whether by litigation or arbitration) offers a fair sharing of inconvenience, whereas arbitration in one party's country is likely to give to it substantial advantages of a practical, psychological and perhaps even legal character. There exists therefore, quite understandably, in the international trade community, "a very strong inclination" to choose a "neutral" country (particularly if the other party happens to be a State enterprise or organization) —"neutral," of course in relation to the parties. . . .
>
> . . . .
>
> The second aspect of neutrality may here be described by the loose term of "political," in the sense that the country of arbitration does not belong to a political "bloc," group or alliance of nations, with regard to the parties (whatever the nature be of such an alliance, be it military political or economic), or in the sense that it has no colonial past, has not taken sides in a recent conflict affecting the country of one of the parties, etc. Here one finds again what, in relation to the arbitrator, was aptly called the *symbolic* aspects of "national neutrality": Reference may be made here, in passing, to the Final Act of the Helsinki Conference on Security 1975, which expressly invites all States to permit arbitration in a *third country*. . . .
>
> Perhaps even more relevant than such "external policy aspects" of neutrality of the place of arbitration is the "internal neutrality"—a convenient short term which covers or sums up various characteristics of the local environment, i.e., its social, political, religious and ideological pluralism, its atmosphere of tolerance and freedom of expression, etc. In such an environment, parties and their advisers, as well as the arbitrators, are likely to find congenial surroundings for their work, free from outside pressures and better suited to a proper understanding of the specific needs of international trade.[56]

Judicial neutrality depends on a number of factors. A local tradition of judicial independence may have an effect not only on any judicial review of an arbitration award but also on the conduct of arbitrators and members of the bar acting in that jurisdiction. Also relevant would be whether the courts recognize the modern principle of the arbitral panel's jurisdiction to determine, as an initial matter, its own jurisdiction (*compétence de la compétence*), and the courts' attitude towards judicial assistance to, and intervention in, the arbitral process. Judicial neutrality is

55. Pierre Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, *in* SWISS ESSAYS ON INTERNATIONAL ARBITRATION 23 (Claude Reymond & Eugène Bucher eds., 1984) [hereinafter SWISS ESSAYS].

56. *Id.* at 30–31.

increasingly understood to require that courts exercise restraint in judicial review, accept that an arbitrator is not required to apply the arbitration site's local conflict-of-laws rules, and generally respect party autonomy, limited only by the limits of international public policy, which is a narrower restraint than the public policy constraint applied to domestic arbitrations.

In the 1960s and 1970s there was considerable debate about which European country provided the best legislative conditions for international commercial arbitration.[57] During this period, the United States was not a popular site for international arbitration because it did not ratify the New York Convention until 1970. Moreover, U.S. global economic and political interests were so pervasive that it was rarely considered to be a neutral site for arbitration, and foreigners contracting with U.S. parties were reluctant to agree to arbitration in the United States. These parties feared the imposition of burdensome U.S. litigation procedures, the intervention of U.S. courts, and the possible complexities of interactions between state and federal law in the United States, a subject considered incomprehensibly difficult by many foreigners. European sites were generally considered acceptable not only in disputes with European parties, but also with parties from Africa or the Middle East, in part because many African and Middle Eastern legal systems were derived from European civil codes. U.S. parties generally found European sites acceptable, at least in comparison with the alternatives that were offered, and developing countries generally shared this feeling.

The most logical choice for many was Switzerland. Most of the cantons, except Zurich, were parties to the Intercantonal Arbitration Concordat, which entered into effect in 1969 and provided the framework for any arbitral proceedings taking place in a signatory canton.[58] The Concordat generally permitted the arbitration to be conducted as the parties had agreed, which included, of course, agreements to conduct arbitration according to the rules of an arbitral institution.

Others chose France. French law did not provide any special procedures for international arbitration, but where the parties had not expressly chosen to be governed by French procedural law, the arbitrators were free to apply the arbitration procedures agreed to by the parties, including the procedures of foreign arbitration law if the parties so agreed.[59]

In cases where one of the parties came from a civil law jurisdiction, England was generally considered an unattractive arbitration site because parties from civil law jurisdictions felt that English courts were prone to excessive interference. When an English arbitrator was faced with a disputed issue of law, the arbitrator could seek its resolution by the High Court in the form of a "stated case"; or, a party could require

57. *See* Mustill, *supra* note 4, at 53–54.

58. Swiss Intercantonal Concordat on Arbitration SR 279 (1960) [hereinafter Intercantonal Concordat], *translated* in SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE 1972, *supra* note 37, at 196. Zurich joined the Concordat in 1986.

59. Judgment of July 5, 1955 (Monier v. Scali Frères), Cour d'appel de Paris, *reprinted in* 1956 REVUE DE L'ARBITRAGE [REV. ARB.] 48. A dispute regarding the quality of sale of goods arose under a contract providing for arbitration in Paris which was "to follow English jurisdiction exclusively. The court found that the parties had waived any right to appeal under French law as they had agreed that the arbitration was to be governed by English procedural law which the court found (perhaps erroneously) did not provide for appeal in the circumstances. *Id.* at 49.

that this step be taken by obtaining an order from the court.[60] This could result in a succession of trips from the arbitral tribunal to the courts and back. Moreover, an award rendered in England was subject to fairly rigorous standards of judicial review. The 1950 Arbitration Act provided numerous grounds upon which an award could be annulled or set aside, including error of fact or law on the face of the award and arbitrator misconduct.[61] The "misconduct" ground was construed very broadly to include procedural mishaps of every kind. In addition, England did not ratify the New York Convention until 1975.[62] Despite these problems, however, England remained an important arbitration center in areas where English law and customs dominated—such as shipping, commodities, and insurance—and for disputes amongst parties from common law jurisdictions.

The effect of these perceptions is not easily measured. The growth in international commercial arbitration during the 1960s and 1970s led to the development of preferences about arbitration locales and the recognition of certain cities as international arbitration centers.[63] Because arbitrations are private, and may be conducted ad hoc without ties to any arbitral institution, statistics are not available to confirm the anecdotal evidence. However, statistics from the International Court of Arbitration of the ICC from the years 1980–82 indicate that nearly 30% of arbitrations supervised by that institution were held in Switzerland, and over a third were held in France (Paris being the headquarters of the ICC).[64] During the same period, England hosted fewer than 10% of all ICC arbitrations.[65]

In addition to the preferred sites for ICC arbitration, other neutral forums gained popularity based on political and geographical preferences. For instance, Vienna, the location of the International Arbitral Centre of the Federal Economic Chamber, became an important center for East-West arbitrations because of its proximity to Eastern European countries and its acceptability to COCOM members. Stockholm, site of the Arbitration Institute of the Stockholm Chamber of Commerce, became an important center for International arbitrations involving Russia and the other states of the Soviet Union, and subsequently China as well.

Acceptance of Stockholm- and Vienna-based arbitration among U.S. traders and investors was fostered by a series of agreements between the American Arbitration Association (AAA) and Soviet and Eastern European arbitration associations which encouraged arbitration at a mutually agreeable neutral site. The first of these agreements was the 1997 U.S.A-U.S.S.R. Optional Clause agreement.[66] Under this agreement, the AAA and the Soviet Chamber recommended to their members an arbitration clause calling for arbitration under the UNCITRAL Arbitration Rules in Stockholm. In the event of default or absence of agreement, arbitrators would be appointed by the Arbitration Institute of the Stockholm Chamber from an agreed list

60. Arbitration Act 1950 § 21 (Eng.).

61. *Id.* §§ 21, 23.

62. Arbitration Act 1975 (Eng.).

63. *See* CRAIG, PARK & PAULSSON, *supra* note 27, at 18.

64. *Id.* at app. I, tbl. 7.

65. Even in a more recent period, the percentage of ICC arbitrations held in England has not changed perceptibly; in 1992, only 6% of ICC arbitrations were held in England. Jean-François Bourque, *Ten Years of ICC Arbitration (1982-1992): A Statistical Survey*, ICC INT'L CT. ARB. BULL. May 1993, at 3, 7.

66. The U.S.A.-U.S.S.R. Optional Clause Agreement is discussed and reprinted in *Arbitration Clause for Optional Use in U.SA.-U.S.S.R. Trade*, 3 Y.B. COM. ARB. 299 (1978).

of neutral arbitrators.[67] These neutral arbitrators were nationals of third countries agreed upon by the AAA and the arbitration association in the relevant countries.[68] Similar agreements calling for arbitration in Vienna were concluded by the AAA with arbitration associations in Czechoslovakia, Poland, Hungary and Bulgaria.[69]

While a number of the European sites could be characterized, depending on the parties involved, as neutral sites in the international sense, they did not necessarily fill the other criteria for a desirable arbitration site. They did not have modem arbitration statutes clearly setting out those mandatory requirements of local procedural law which had to be followed in an arbitration taking place on the state's territory.[70] Nor did they make a legislative distinction between international arbitrations and domestic arbitrations, creating the risk that procedural provisions intended to apply to purely domestic concerns—consumer protection provisions, for instance, or local evidentiary procedures—might be applied to an international arbitration taking place in that jurisdiction. Moreover, in the absence of modem legislation providing a reduced role for judicial supervision of international arbitration, the parties could find themselves—at the instance of the party unwilling to arbitrate or dissatisfied with the arbitration process or result—repeatedly before the local court. Placing the seat of arbitration in a country other than those of the contracting parties avoids the danger of a partisan, even xenophobic, judge taking the side of one party but does not avoid all the other dangers of judicial intervention in the arbitral process: Procedures and customs not familiar to either party, language difficulties, and the submission of complex commercial disputes to a judiciary that may not be highly qualified to handle them.

In addition, should be remembered that international arbitration is not confine to the well-known arbitration sites. International arbitration—particularly as promoted by the major international arbitration institutions—is designed to be conducted anywhere in the world, wherever geographically convenient. Indeed, from 1980 to 1988, the ICC supervised arbitrations in sixty-three countries around the world.[71] Parties attracted to these varied sites by geographical convenience or political acceptability may be completely unfamiliar with the sites' local laws concerning arbitration, and probably did not intend to be subject to them.

In all these cases whether in examining the comparative attractiveness of potential arbitration sites or in examining the consequences of choices already made through an arbitration clause, counsel should examine, under the law in effect at the arbitral situs, the status of international arbitrations taking place there as well as the effect of the agreements made by the parties as to the procedures to be followed, including their adoption of rules of arbitration.

---

67. Howard M. Holtzmann, *Five Ways the American Arbitration Association Can Assist in Resolving Disputes in Trade with the Soviet Union, in* 1988-1989 ARBITRATION AND THE LAW: AAA GENERAL COUNSEL'S ANNUAL REPORT 160, 164.

68. *Id.*

69. Recent Developments, *Trilateral Agreement Involving the American Arbitration Association, the Bulgarian Chamber of Commerce, and the Federal Economic Chamber of Austria,* 1985 ARBITRATION AND THE LAW: AAA GENERAL COUNSEL'S ANNUAL REPORT 152.

70. An exception was the Swiss Intercantonal Concordat which specified which procedural provisions were mandatory (provisions of a due process nature), and stated that a failure to respect them could lead to annulment or impossibility of recognition and enforcement of an award. Intercantonal Concordat *supra* note 58, arts. 25, 36(d).

71. CRAIG, PARK & PAULSSON, *supra* note 27, at 10.

II. DEVELOPMENTS IN ARBITRATION RULES AND LEGISLATION

A. Attempts to Delocalize Arbitration Procedure

The best starting place for examining how an international arbitration should be conducted is the rules which the parties have agreed to apply. If arbitration is presently accepted as the normal way of settling international commercial disputes, it is because there is a general agreement as to what international commercial arbitration is: A means of arriving at a final and binding award by the application of an agreed set of rules. Members of the business community think of their agreement to arbitrate as the submission to a generally accepted regime for dispute resolution. To that extent their intentions are universalist in nature. They do not consciously envision their submission as being to one of a hundred or more different national arbitral regimes depending on the choice of the place of arbitration and the national law applicable there; nor do they envision that the procedures within the arbitral process, or the results to be obtained, may be varied because of that choice. It is both as a reaction to such sentiments from the business community and as a promoter of a universal arbitral remedy that international arbitration institutions have provided arbitration rules designed to be self-contained, of general applicability, and to obviate reference to local arbitration practices, resulting from national arbitration laws, which vary from place to place.

One of the principal examples of such an attempt to delocalize the arbitration practice is found in the 1975 modification by the ICC of its Arbitration Rules, specifically article 11, "Rules governing the proceedings," to provide that:

> The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, *and whether or not reference is thereby* made to a municipal procedure law to be applied to the arbitration.[72]

This replaced article 16 of the 1955 Rules, which had provided:

> The rules by which the arbitration proceedings shall be governed shall be these Rules and, in the event of no provision being made in these Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceeding.[73]

The modification was inspired by practical goals. The ICC's experience in supervising arbitrations in over sixty countries had shown that parties picked

72. INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES OF ARBITRATION art. 11(a), ICC Pub. No. 291 (1988) [hereinafter ICC Rules] (*emphasis* added) reprinted in CRAIG PARK & PAULSSON, *supra* note 27, app. II-7.

73. INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION art. 16 1995 (emphasis added).

arbitration sites without knowledge of local arbitral procedure law.[74] The 1975 amendment was intended to permit the parties to free themselves from the constraints of local procedures and to follow such other procedures as they might agree upon.[75] This modification, while inspired by pragmatic concerns, nevertheless looked in the direction of delocalization or denationalization of arbitration procedure in international matters. To this extent it might be said to share the same outlook as the ICC Draft Convention on Recognition and Enforcement of Awards, which provided in essence for an "international" award—an initiative which, as we have seen, did not succeed.[76]

This effort towards denationalization of arbitral procedure has been criticized by some as a misguided attempt to free the arbitration from the application of *any* national procedural law.[77] However, article 11 of the Rules is not that ambitious. Under the Rules, an arbitrator is implicitly obliged to respect any public policy rules in effect at the seat of arbitration, if not to apply the local arbitration law as such.[78] This narrows the effect of the provision.[79]

The ICC procedure seems to have been on the right track. Its attempt to avoid, where possible, the application of local arbitration rules to international arbitration was followed in the UN's UNCITRAL Arbitration Rules, a set of rules designed to govern non-supervised arbitration throughout the world.[80] Article 15(1) of the UNCITRAL Rules provides in extremely general fashion that "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[81]

The public policy limitation, only implicit in the ICC Rules, is made explicit in article 1(2) of the UNCITRAL Rules, which provides: "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the

---

74. *See* CRAIG, PARK & PAULSON, *supra* note 27, at 271.

75. For an explanation of the reasons for the modification, see Frederic Eisemann, *The Court of Arbitration: Outline of its Changes from Inception to the Present Day, in* SIXTY YEARS OF ICC ARBITRATION, *supra* note 8, at 391, 398. Eisemann was Secretary General of the ICC Court of Arbitration at the time of the modification. Note also that at the time of the modification the ICC Court of Arbitration chose the site of arbitration in a substantial number of cases where the parties had not made a choice. (The absence of choice by the parties is less prevalent nowadays.) The new provision permitted the ICC Court to choose sites for geographical convenience and general acceptability of the exercise of the control function by the court at the seat of arbitration without having adopted as such local rules of procedure.

76. *See* discussion *supra* text accompanying notes 42–43.

77. Klaus Lionnet, *Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified? The Answer of the UNCITRAL Model Law,* J. INT'L Arb., Sept 1991, at 5.

78. The requirement for the arbitrations to follow any mandatory rules in effect at the seat of arbitration in ICC arbitrations is required, amongst other reasons, by the terms of article 26, the "General Rule," which provides: "In all matters not expressly provided for in these Rules, the Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law." ICC RULES, *supra* note 72, art.26.

79. Eisemann, *supra* note 75, at 398: "[A]rticle 11 of these Rules contains what appears to be a revolutionary innovation: The power of the arbitrators to deal with the proceedings outside any specific national law. But the respect of public policy rules of the *lex fori* narrows the scope of the provision."

80. The rules were adopted by the United Nations Commission on International Trade Law (UNCITRAL) on April 28, 1976. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL Arbitration Rules, U.N. Doc. A/311/17, U.N. Sales No. E.77.V.6 (1976) [hereinafter UNCITRAL RULES].

81. *Id.* art. 15.1.

law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."[82]

The drafters of the UNCITRAL Rules were of the opinion that few procedures in the Rules or agreed to by the arbitral tribunal would in fact conflict with any mandatory provisions of local law, or with other procedural law applicable by agreement of the parties.[83] Moreover, where such procedures might conflict with local laws, they believed that national courts reviewing arbitral awards would increasingly find that the award need comply only with the narrower, and less constraining, standard of international public policy rather than the broader test of domestic public policy.[84] To the extent that local courts do not already take this view, it is hoped that the enactment of modem legislation will improve the situation in many prospective arbitral fora.

The motive of the principal actors in the international arbitral community, such as the ICC and the drafters of the UNCITRAL Rules, was to reach a transnational arbitration procedure not by force but by persuasion. They wished to create a clear arbitral procedure, through agreement and well-drafted rules, that arbitrators would then apply unless confronted with a mandatory rule of national law that made this impossible.[85]

Numerous other institutions have prepared rules specifically designed for international arbitrations. Typical are the Rules of the London Court of International Arbitration and the International Arbitration Rules of the American Arbitration Association.[86] Another venture in the same direction, which provides procedures for the taking of evidence in international arbitration proceedings, is the Supplementary Rules governing the Presentation and Reception of Evidence in International Commercial Arbitration prepared by the International Bar Association.[87] These rules are designed to create a regime acceptable to parties from both common law and civil law systems, and represent a compromise between the methods for taking evidence in the two systems.[88]

B. Background to Legislative Reform: Denationalization or Relaxation?

The effect of international arbitration rules was to delocalize the way in which arbitrators would conduct their proceedings. These rules stressed that, except in the rare case where the parties so agreed, the arbitral proceedings were not intended to be a replica of court proceedings as conducted at the seat of arbitration.[89] The rules left wide freedom to the parties to provide for the conduct of the proceedings in a business like way, and when they made no specific provision the same powers were delegated

82. *Id.* art. 1.2.

83. See Pieter Sanders, Commentary on UNCITRAL *Arbitration Rules* 2 Y.B. COM. ARB. 172 (1977).

84. *Id.* at 179–80.

85. *Id.* at 179.

86. *See* Carl F. Salans, *The1985 Rules of the London Court of International Arbitration*, 2 ARB. INT'L 40 (1986); Paul D. Friedland, Arbitration Under the AAA's International Rules, 6 ARB. INT'L 301 (1990).

87. INTERNATIONAL BAR ASS'N, SUPPLEMENTARY RULES GOVERNING THE PRESENTATION AND RECEPTION OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION, REPRINTED IN 10 Y.B. COM. ARB. 152 (1985).

88. *See* David W. Shenton, *Explanatory Note*, 10 Y.B. COM. ARB. 145 (1985).

89. *See*, e.g., CRAIG, PARK & PAULSON, *supra* note 27, at 169–70.

to the arbitrators. Where parties came from countries having different systems of law, the rules permitted arbitral proceedings to be conducted according to procedures which could be a compromise between the different systems.[90] The rules were motivated by the pragmatic desire to improve the international arbitral process and were designed to act in the interstices of state power. They were based on the assumption that mandatory state provisions would prevail over inconsistent arbitration rules but that in many arbitration sites—the best arbitration sites—the parties would be allowed broad freedom to agree how arbitral procedures would be conducted. While the rules provided that awards were intended to be final and binding on the parties,[91] they did not define the nationality of awards rendered thereunder, nor the relationship between arbitral and state courts, both subjects being a matter of national law,[92] they did not define the nationality of awards rendered thereunder, nor the relationship between arbitral and state courts, both subjects being a matter of national law. Arbitration rules do not cover the right to recognition and enforcement of arbitral awards abroad; this is a matter defined by the state law of the recognition country, although the grounds upon which a foreign award may be denied recognition are largely limited by treaty.

From the 1960s onward, it became apparent that many arbitrations which were conducted under international arbitration rules were not as closely linked to the place of arbitration as domestic arbitrations, either because of the nationality of the parties or the nature of the transaction. Many states, as will be seen, wished to encourage these arbitrations,[93] but there was some question as to what legislative provisions should be enacted to provide for the arbitrations. Three basic models emerged. The first of these, the transnationalist model, assumed that the arbitration could largely be unlinked from procedural laws at the place of arbitration and take effect according only to the contractually agreed rules and procedures. International arbitration would be subject to judicial control, and accordingly to national procedural laws, only when the assistance of a court was requested to ensure the recognition and enforcement of the award, whether at the seat of arbitration or elsewhere.[94] The second model envisioned that national arbitration law at the seat of arbitration would distinguish between international arbitrations and domestic arbitrations and provide fewer procedural constraints and fewer grounds for judicial review for the former.[95] Because international disputes have fewer contacts with the forum state than domestic disputes, the forum state could afford to loosen its judicial control over such arbitrations. The treatment reserved for international arbitration under this regime could be termed one of relaxation. The third model assumed that there would be one arbitration law at the seat of arbitration for both domestic arbitrations and international arbitrations, but

90. *Id.*

91. *See, e.g.,* UNCITRAL Rules, art. 32.2.

92. CRAIG, PARK & PAULSON, *supra* note, 27, at 10–12. *See* UNCITRAL RULES art. 32.2.

93. *See* D. ALAN REDFERN & J. MARTIN HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 59 (2d ed. 1991).

94. Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 375 (1981) [hereinafter Paulsson, *Arbitration Unbound*]; *See also* REDFERN & HUNTER, *supra* note 93, at 82–83.

95. The arbitration law of France provides a leasing example. *See* W. Laurence Craig, William W. Park & Jan Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration*, 7 Y.B. Com. ARB. 407 (1982).

this would not prevent modernization of arbitration legislation to the benefit of both.[96] Within this third regime, special provisions could nevertheless be made for particular relationships-for instance, consumer contracts, which might be subject to stricter conditions-and in some limited fashion for international arbitrations, which might benefit from some special exceptions, particularly regarding limitations on the right to judicial recourse. Ultimately, however, international arbitration would continue to be governed by the general law.

The concept of a transnational arbitration regime has been widely criticized as leading to a stateless or anational award unauthorized by any positive law.[97] As one critic has said:

> [Transnational procedural law] is founded on the premise that it is contrary to the interests of the trading community to tolerate a regime in which international arbitrations have to be submitted to the differing arbitration laws of different countries, according to where the arbitrations happen to be conducted. This premise, which is certainly defensible, is seen as leading to the conclusion, which to the present author at least seems altogether more open to debate, that the local arbitration laws are by definition inapplicable to international arbitrations, which are visualised as occupying a juristic universe of their own, detached altogether from the mundane preoccupations of any single national system of arbitration law.[98]

To the extent that the concept of transnational arbitral procedure attempts to give some independent legal status to an award rendered in compliance with an agreed regime of international arbitration rules, it corresponds to the effective reality of how the parties intend the arbitral process to work. However, this intent can only be realized through the contractual agreement of the parties, the performance of which may be subject to mandatory provisions of law. Accordingly, the intended regime could be displaced if mandatory provisions of arbitration law at the place of arbitration so required.

The transnational model is attractive when the arbitration is one which will not eventually be integrated into a national legal order. To this extent the model owes something to arbitrations between states and private investors such as the *Ararnco*[99]

---

96. The Netherlands Arbitration Act of July 2, 1986 is an example. *See* PIETER SANDERS & ALBERT J. VAN DEN BERG, THE NETHERLANDS ARBITRATION ACT 1986 (1987) [hereinafter SANDERS & VAN DEN BERG, THE NETHERLANDS ACT]. The new Egyptian Arbitration Law (Law No. 27 of 21 Apr. 1994), which is based on but substantially modifies the UNCITRAL Model Law, also applies to international and domestic arbitration alike. See Bernard Fillion-Dufouleur & Philippe Leboulanger, *Le Nouveau droit égyptien de l'arbitrage*, 1994 REV. ARB. 665. A French translation of the Egyptian law is reproduced in 1994 REV. ARB. 763.

97. Mustill, *supra* note 4, at 51; Otto Sandrock, *How Much Freedom Should an International Arbitrator Enjoy?—The Desire for Freedom from Law v. The Promotion of International Arbitration*, 3, AM. REV. INT'L ARB. 30, 45–46 (1992).

98. Mustill, *supra* note 4, at 51.

99. The arbitration involved the interpretation of the terms of a concession agreement between Saudi Arabia and the Arabian American Oil Company (Aramco). In arbitration proceedings held in Geneva, a distinguished arbitral tribunal composed of Professor Georges Sauser-Hall as Chairman, H.E. Mahmoud Hassan, and Sir Saba Habachy found that while the substantive law applicable to the agreement was Saudi law, the state party to the arbitration could not be considered to have accepted submission to the procedural law and hence the sovereignty of another state. It found that the arbitration as such could only be governed

and *Topco*[100] arbitrations, where the arbitral tribunals found that the state party to the arbitration had not intended to subject itself to the procedural law of another sovereign state—namely, the arbitration site—and accordingly found that the arbitral procedure must be governed by international law.

It may be dangerous to infer any general lessons from arbitrations between government entities and private parties, such as the *Aramco* and Topco cases. The issues of sovereignty, and the conflicts between public and private law, loom so large in these idiosyncratic cases that they may lead to the delocalization of arbitral procedures by necessity, and without regard to the eventual fate of the award in subsequent recognition and enforcement proceedings.[101] Indeed, the special category of state contracts, and arbitrations concerning them, has become the subject of an abundant literature.[102] Nevertheless, some of these state arbitration cases provide examples of arbitrations which were held by arbitrators not to be subject to local arbitration laws, and yet were declared to be final and binding under the contractual arbitration clause agreed to by the parties.[103] What would be the status of these public law awards in subsequent private law proceedings? The "nationality" of such an award would not be dear. The reasoning of the arbitrators in Aramco and Topco leads to the conclusion that the awards, although they took place in Switzerland, were not Swiss awards.[104] Would that be any impediment to the recognition and enforcement of such a "stateless" award in a jurisdiction outside of the place of arbitration?[105] Doesn't the

---

by international law. Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117, 159–83 (1963) (Sauser-Hall, Hassan & Habachy, Arbs.).

100. Texaco Overseas Petroleum Co. (Topco) v. Government of the Libyan Arab Republic (1977) (Dupuy, Arb.), *reprinted in* 17 I.L.M. 8.

101. A similar situation presented itself in the *Topco* arbitration where the claimant sought from the arbitrators only a declaration of its rights under the contract and the law stipulated therein. According to the choice-of-law clause in the contract, in the event of a conflict between Libyan law and international law, "general principles of law" were to be applied. *Topco,* 17 I.L.M. at 11. The claimant requested in particular that the declarations be made without regard to the enforceability of the award. Such a declaration might have been used as a bargaining chip in negotiations or, as was speculated by commentators at the time, as a declaration of title to the oil lifted from the concession area and a basis for bringing "hot oil" suits in national courts of states to which the oil might be shipped. *See* Evrett W. Benton, Comment, *The Libyan Expropriations: Further Developments on the Remedy of Invalidation of Title,* 11 HOUS. L. REV. 924 (1974); Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases,* 75 AM. J. INT'L. I. 476, 490 (1981) ("an award of *restitutio in integrum* was viewed as being very helpful in prosecution of 'hot oil' cases against Libyan oil exports") (citation omitted); *id.* at 494–95, 536–37.

102. *See generally*, Jean-Flavien Lalive, *Contrats entre etats ou entreprises étatiques et personnes privées, in* 181 RECUEIL DES COURS 21 (Hague Academy of Int'l Law ed., 1983); BOCKSTEIGEL, *supra* note 33; Bernard Audit, *Transnational Arbitration and State Contracts: Findings and Prospects*, in TRANSNATIONAL ARBITRATION AND STATE CONTRACTS 77 (Hague Academy of Int'l Law ed., 1987).

103. *See*, e.g., *Topco*, 17 I.L.M. at 8–9.

104. Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117, 159–83 (1963) (Sauser-Hall, Hassan & Habachy, Arbs.).

105. The answer is not an easy one, as shown by the *S.E.E.E. v. Yugoslavia* arbitration of 1948. In that proceeding, an arbitration rendered in Lausanne was not considered to be a Swiss arbitration award because it was rendered by a panel of only two arbitrators, and was thus not capable of being registered with the Cantonal authorities in Lausanne as an award. Judgment of May 12, 1954 (Société Européenne d'Études et d'Enterprises (S.E.E.E.) v. Yugoslavia), Trib. Féd. Cant. Vaud (Switz.), 1958 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVÉ. [R.C.D.I.P.] 359, 364, *aff'd* Judgment of Sept. 18, 1957, Trib. féd. (Switz.), 1958 R.C.D.I.P. 366, 367. Like the ghost ship the Flying Dutchman, the award circulated throughout Europe for more than forty years before a final decision of recognition and enforcement was rendered in France in 1984. Judgment of Nov. 13, 1984 (S.E.E.E. v. Yugoslavia), Cour d'appel de Rouen, 1985, REV. AM. 115

New York Convention grant the parties to arbitration wide discretion in determining the law to govern arbitral procedure and the recognition of arbitral awards?[106]

These questions came up in private law arbitrations in the 1980s in a context which was most favorable to the denationalized or anational award; that is, a context where there was no conflict with the procedural law at the seat of arbitration which encouraged or permitted such proceedings.[107] This was the context of international awards rendered in France.

In *General Maritime Transport Co. v. Société Götaverken Arendel*,[108] a dispute arose concerning the sale of ships by a Swedish shipyard to a Libyan state enterprise; neither the parties nor the transaction had any connection with France other than the choice of Paris as the seat of ICC arbitration.[109] The arbitration took place under the 1975 version of the ICC Rules, article 11 of which provided, as set out above, that the proceedings would be conducted according to ICC Rules and any rules agreed to by the parties—or, failing such agreement, then such rules as agreed to by the arbitrators—without the requirement of applying any local procedural law to the arbitration.[110] No national procedural law was agreed or referred to by the parties or the arbitrators.[111] After an award in favor of the Swedish shipyard, the Libyan party sought to have the award set aside by a direct appeal to the Paris Court of Appeal.[112] The court found that, since the arbitration was not subject to French procedural law, the award rendered was not French, and direct appeal to the court was not available. The only judicial recourse, the court concluded, was that relating to foreign awards: The right to defend, on limited grounds, against an attempt to obtain recognition and enforcement of the award in France. As long as no suit was brought to enforce the award, French courts had no jurisdiction.[113]

Subsequent to this ruling, the Swedish shipyard applied for and obtained recognition and enforcement of the award in Sweden.[114] The Swedish courts had no difficulty in finding that the award had a status apart from that given by the law in the

---

(note Delvolvé) (a decision which does not imply, however, successful execution against the assets of the no longer existing Yugoslav Republic); *See* George R. Delaume, *S.E.E.E. v. Yugoslavia: Epitaph or Interlude?*, J. INT'L ARB., Sept. 1987, at 25. On the other hand, a more recent Unites States decision found no difficulty in enforcing an award under the New York Convention which was rendered by the Iran-U.S. Claims Tribunal. This was arguably a stateless award rendered by a tribunal subject only to the terms of an international agreement between Iran and the Unites States. Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc. F. 2d 764 (9th Cir. 1992).

106. For a commentary on the enforcement of a national or stateless awards under the New York Convention, *see* VAN DEN BERG, *supra* note 43, at 40–43; *see generally* Aida B. Avanessian, *The New York Convention and De nationalized Arbitral Award,* J. INT'L ARB., Mar. 1991, at 5.

107. VAN DEN BERG, *supra* note 43, at 29–43

108. Judgment of Feb. 21, 1980 (General Maritime Transp. Co. v. Société Götaverken Arendel A.B.), Cour d'appel de Paris, 1980 D.S. JUR. 568, *discussed in* CRAIG, PARK & PAULSSON, *supra* note 27, at 486.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* unpublished Judgment of Dec. 13, 1978, Court of Appeals of Sweden, *aff'd*, Judgment of Aug. 13, 1979, Supreme Court of Sweden, *published in* 1980 REV. ARB. 555 (French translation of the Swedish). For discussion, see Jan Paulsson, *Arbitre et juge en Suéde: Exposé general et réflexions sur la délocalisation des sentences arbitrales*, 1980 REV. ARB. 441, 473–84.

place where rendered and were prepared to recognize and enforce it despite the fact that it could be characterized as a stateless, or anational, award.[115]

The significance of these decisions and of the concept of the anational award did not escape commentators. As Jan Paulsson put it, the issue illustrated by the decisions was whether an international award could be recognized in an enforcement jurisdiction without being anchored in the legal system of the country where it was rendered.

> If detachment of the transnational arbitral process were denied, the choice of the place of arbitration has great significance. The transnational efficacy of the award would depend on its validity in the eyes of the courts of the country where it happens to be rendered. Parties seeking to rely on the award in other countries may be delayed or hindered by challenges to it before those courts. On the other hand, if detachment were accepted, the choice of the place of arbitration is of marginal importance; the award once rendered, would be cast adrift, its effects to be controlled by no other authority than its (unvarying) contractual foundations and the (varying) requirements of the particular jurisdiction in which it may be sought to be relied on.[116]

In light of the reform of national arbitration legislation beginning in the 1980s, it does not appear that the legal theory of denationalized arbitral procedure and the anational award has gained wide acceptance, except perhaps where a state itself is a party to the proceeding.[117] States have been unwilling to accept the idea that there is no link whatsoever between arbitral proceedings in their territory and the state's legal regime, and the idea that arbitral awards rendered in their territory should be

---

115. *Id.*

116. Paulsson, *Arbitration Unbound*, *supra* note 94, at 358. For subsequent development of the theory, see Jan Paulsson, *Delocalization of International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 53 (1983); Jan Paulsson, *The Extent of Independence of International Arbitration from the Law of the Situs*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 141 (Julian D.M. Lew ed., 1986) [hereinafter CONTEMPORARY PROBLEMS]. For criticism of the theory, see William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); Park, *National Law and Commercial Justice*, *supra* note 52, at 664–65, 686–89. The classic defense of the jurisdictional and territorial view of the relationship between arbitration and national legal systems is found in Fritz A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: *LIBER AMICORUM* FOR MARTIN DOMKE 157 (Pieter Sanders ed., 1967) *reprinted in* 2 ARB. INT'L 241 (1986). On the subject of delocalization, see generally REDFERN & HUNTER, *supra* note 93, at 81–88.

117. The special status of the state, which had been one of the factors leading arbitrators in certain circumstances to construct a delocalized arbitration procedure, is recognized in the Washington, or ICSID, Convention of 1965. The Convention provides for the resolution by arbitration of disputes between states and investors from other contracting states according to the ICSID rules. ICSID, *supra* note 32, § 1(2). ICSID arbitrations are subject only to the transnational procedures provided by the Convention and ICSID Arbitration Rules; no national court may intervene in any way concerning such procedures. *See id.* § 26; An ICSID award is not subject to a national *lex arbitri*, *id.* § 42, and, because it is a treaty, creates public international law obligations for signatory states. *Id.* § 53. *See* W. Laurence Craig, *ICSID Arbitration: The Foreign Investor's Point of View*, *in* 1993 PRIVATE INVESTMENTS ABROAD: PROBLEMS AND SOLUTIONS ch. 14. Except in the special circumstances of ICSID arbitration, where a state has agreed to international arbitration with a private party, it will ordinarily be subject to the general arbitration regime in effect at the seat of arbitration. For recent compilation of arbitral awards involving states and state enterprises in a variety of circumstances, see generally STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION (1990).

considered anational awards.[118] No reform legislation has proposed to recognize without qualification the transnational model of arbitration, a model which would assume that an arbitration was above, or at least untouched by, provisions of national laws of procedure at the place of arbitration.[119] However, some of the goals which the transnationalist theory seeks to promote—the parties' right to agree contractually on arbitral procedure and the entitlement of an award so obtained to enforcement—have been widely shared and have influenced arbitration reform. The means to achieve these goals may take different legislative forms. Some provisions of national reform legislation may have, within their limited scope, consequences similar to those sought after by a delocalized procedural regime or an anational award theory.[120]

It is important to avoid overgeneralization about the arbitration procedures which are currently being enacted by different states concerning international commercial arbitration, since each country's reforms may be grafted onto preexisting law and practices which have their own history and peculiarities. However, there is a definite trend towards the emphasis of party autonomy in the choice of arbitral procedures and towards the relaxation of judicial controls over arbitral awards.[121] These two forms of legislative reform may be used either singly or together. They constitute two different but complementary approaches toward legislative reform which may be employed in either the second model of legislative reform (special

118. There are conflicting definitions as to what constitutes an anational award. Where the law at the place of arbitration ignores or rejects any status for an international arbitration within the jurisdiction, an award rendered therein constitutes an anational award. Awards rendered under the ICSID Convention are certainly anational. Awards by permanent tribunals such as the Iran-U.S. Claims Tribunal are problematic. It has been suggested that where an award is not subject to judicial review under any national law except that of the place where it is ultimately presented for enforcement, or, where it is refused registration in the place rendered, it should be considered anatational, although this may be a minority view. Park, *National Law and Commercial Justice*, *supra* note 52, at 664.

119. In its absolute form, a delocalized procedure for arbitration represents considerably more than confirmation of the contractual approach to arbitration pursuant to which parties should be given the power by law to agree to the rules of procedure they wish to follow. It carries with it implications for the jurisdictional dimension of the issue and implies that the arbitrator is not considered as a substitute for a judge of a particular state; rather, he is regarded as a judge administering justice in the name of the international community of merchants. In such a hypothesis, less emphasis is placed on the will of the individual parties to agree to procedures, and more emphasis is placed on "the role of the great arbitral institutions, which create sets of arbitration rules, and which are deemed to be the source of the rules of that so-called legal order." Pierre Mayer, *The Trend Towards Delocalization in the Last Hundred Years*, *in* THE INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE (forthcoming Mar. 1995).

120. For instance, express legislative provision for the exclusion of international arbitrations from judicial review at the seat of arbitration, either by agreement (Switzerland), or altogether (Belgium), has the effect of shifting judicial control of the award to the place of recognition and enforcement of the award; a situation similar to that observed in the pre-reform *Götaverken* case. *See supra* text accompanying notes 108–15. Nevertheless, the arbitration would still be subject to Belgian or Swiss arbitration law whose mandatory provisions would have to be respected if the award were to be recognized and enforced in Belgium or Switzerland. Articles 1501–1505 of the *Nouveau Code de Procédure Civile*, added by the French decree on international arbitration, provide that French courts will apply the same criteria for the recognition and enforcement of foreign awards that they do when judicial review is sought from an award rendered in France in an international arbitration. The new articles have the effect that French courts may ignore a setting aside by the award abroad if made on other grounds. CODE DE PROCÉDURE CIVILE [C. PR. CIV.] arts. 1501–1505 (Fr.); *see infra* text accompanying notes 163–75. This has the same consequences as if the foreign award were considered an anational award. From this example it can be seen that the concept of the anational award may have a relative, as well as an absolute, application. This can lead to a questioning of the utility of characterization. *See* Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 633 (1989).

121. *See generally* Lalive, *Enforcing Awards*, *supra* note 28, at 337–38; Berger, *supra* note 1, at 1–6.

international regime) or the third model (reform relating to international arbitration within a general arbitration statute).

The first approach consists in delocalization of the arbitral procedure. This approach, termed "delocalization in the arbitral process,"[122] is based on the principle that the parties may agree that their arbitration shall be conducted not in accordance with the procedures provided by law in effect at the seat of arbitration, but by procedures found in some other national arbitration law, or by institutional or other arbitration rules to the exclusion of local rules.[123] Authorizing this choice does not, as we shall see, remove the arbitration from the orbit of local law and control; rather, it permits parties to agree to incorporate foreign rules as the procedure for the conduct of the arbitration.

The second approach attempts to lighten or remove the judicial control mechanism at the seat of arbitration over international commercial arbitrations.[124] This may be accompanied by limiting the grounds on which recourse to the courts may be had from an arbitral award, or even by excluding judicial recourse by means of an exclusion agreement between the parties where authorized by the laws of the seat of arbitration. This has the effect of providing a measure of delocalization of the award. While the law governing the arbitration may remain that of the seat, the absence or relaxation of the control mechanism has the effect of liberalizing the conduct of the arbitration itself since in the absence of a remedy the obligation of compliance with local procedures is diminished or removed, while the award rendered becomes final and binding.[125]

C. Arbitration Legislation: Modernization and Harmonization

The 1980s brought forth unique legislative developments throughout the world to better serve the needs of the users of international commercial arbitration and to respond to criticisms concerning arbitration laws that were either out of date or unsuited to modern international practice. It is useful to review the choices made by various states in adopting reform legislation.

A principal initiative in the movement to carve out a separate regime for international arbitrations came from the United Nations. In 1985, the General Assembly recommended to its members a model law on international commercial arbitration drafted by the UNCITRAL.[126] The Commission's draft benefited from contributions from many sources. The working group included not only the Commission's thirty-six member states, but also observers from other states, intergovernmental organizations, and international organizations with specific arbitration expertise, such as the International Chamber of Commerce, the International Council for Commercial Arbitration (ICCA) and the Chartered Institute

122. *See generally* Mayer, *supra* note 119.

123. CRAIG, PARK & PAULSSON, *supra* note 27, at 273–74; REDFERN & HUNTER, *supra* note 93, at 91–93; KLAUS P. BERGER, INTERNATIONAL ECONOMIC ARBITRATION 480–85 (1993).

124. Craig, *Uses and Abuses*, *supra* note 52, § 14.08, 4 ARB. INT'L at 195–98.

125. *See* Lalive, *Enforcing Awards*, *supra* note 28, at 331.

126. G.A. Res 40/78, U.N. GAOR, 40th Sess., 112th plen. mtg., Supp. No. 53, at 308, U.N. Doc. No. A/40/53 (1985). For the text of the UNCITRAL Model Law, see U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON INT'L COMMERCIAL ARBITRATION, U.N. GAOR, 40th Sess., Supp. No. 17, at 81–93, U.N. Doc. A/40/17 (1985), *reprinted in* 24 I.L.M. 1302 [hereinafter THE MODEL LAW].

of Arbitrators.[127] The drafters of the UNCITRAL Model Law recognized that national laws on arbitration were generally unsatisfactory for the resolution of international disputes.[128] Many of these laws were outdated and explicitly or implicitly submitted arbitration to procedures better-suited for court litigation. Even modern statutes were drafted primarily to meet the requirements of domestic arbitration, which naturally made up the bulk of cases; consequently, the needs of modern international arbitration practice were frequently not met.

While it is possible for a state adopting the Model Law to modify it so as to cover both domestic and international arbitration, the Model Law is specifically designed for the latter; article 1(1) explicitly provides that "this law applies to international commercial arbitration . . . ."[129] An arbitration is international if, as provided in article 1(3)(a), "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States . . . ."[130] Arbitration is also considered international if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country,[131] or if the place of arbitration, as determined in or pursuant to the arbitration agreement, is outside the state in which the parties have their place of business.[132]

The approach of the Model Law is to clarify and reduce the role of local court supervision over international arbitrations. Its aim is comparable to the reduction of court supervision over the recognition and enforcement of foreign awards provided by the New York Convention. In fact, the Model Law adopts the New York Convention as a statutory norm for the recognition and enforcement of international arbitral awards, wherever they may be rendered.[133] A recent explanatory note from the UNCITRAL Secretariat stated that:

> As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.[134]

---

127. HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1230–32 (1989).

128. United Nations, UNCITRAL: THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 30, U.N. Sales No. E.86.V.8 (1986).

129. THE MODEL LAW, *supra* note 126, art. 1(1).

130. *Id.* art. 1(3)(a).

131. *Id.* art. 1(3)(c).

132. *Id.* art. 1(3)(b)(i).

133. *Id.* arts. 34–35. These articles apply to awards whether rendered in the recognition state which has adopted the Model Law (the sole requirement being that it be international, as defined in article 1) or rendered abroad.

134. *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, UNCITRAL MODEL ARBITRATION LAW 18, para. 14 (United Nations ed., 1994) [hereinafter *Explanatory Note*].

The Model Law limits the judicial powers of supervision over, and assistance to, the arbitral process. It provides quite clearly in article 5 that "in matters governed by this Law, no court shall intervene except where so provided in this Law."[135]

The principal provisions relating to the conduct of arbitral proceedings are articles 18 and 19. Article 18 provides that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[136]

Article 19 provides:

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of the law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of the evidence.[137]

Other articles deal with specific procedural issues, mostly of a due process nature.[138]

The intent of these provisions is spelled out in the explanatory note from the UNCITRAL Secretariat:

> Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the Model Law.[139]

Article 34 of the Model Law specifies only a single mode of judicial recourse, before a court to be specified in article 6 thereof at the time of its adoption.[140] This recourse must be taken within three months of the rendering of the award, and the grounds are limited to those spelled out in the New York Convention for refusal of recognition and enforcement of foreign awards.[141] For those countries adopting it, the

---

135. THE MODEL LAW, *supra* note 126, art. 5.

136. *Id.* art. 18.

137. *Id.* art. 19.

138. These include articles 24(1) (rights of party to require oral hearing), 24(2) (requirement of adequate notice of hearings), 24(3) (communication to party of all documents received by tribunal), and 26(2) (procedures regarding reports of experts). THE MODEL LAW, *supra* note 126, arts. 24(1)-(3), 26(2).

139. *Explanatory Note*, *supra* note 134, at 21, para. 31; *see also* HOLTZMANN & NEUHAUS, supra note 127, at 564.

140. THE MODEL LAW, *supra* note 126, art. 34.

141. *Id.* art. 34(3).

Model Law will harmonize standards for judicial review of awards rendered in those states—a process hitherto free of international norms—with the international standards established by the New York Convention.[142] This automatic limitation of the grounds for judicial recourse eliminates the need for allowing parties to enter exclusion agreements which limit the grounds for judicial recourse or exclude it altogether. The Commission thought it was better to provide a simple, obligatory, and limited standard for review.[143]

The UNCITRAL proposed a model law rather than a convention or a uniform law because it knew that obtaining multilateral agreement on a precise text would be difficult due to wide variations in existing national laws. The hope was to encourage progress towards a recognized norm rather than to insist on uniformity. The Commission nevertheless recommended that states adopting the Model Law make as few changes as possible.

The Model Law occupies an interesting place in the chronology of the recent international commercial arbitration law reforms. Issued in 1985, it could take into consideration the previous amendments to arbitration laws in England (1979) and France (1980 and 1981). On the other hand, its provisions have been able to serve either as a model, or at least as points of comparison, for the many states which have embarked on arbitration law reform since 1985.

It was never expected that the Model Law would be enacted in all the principal arbitration centers in the world. Where states have long-established arbitration laws and practices, the tendency has been to modify those laws while remaining within the original statutory framework. States with less developed arbitration laws have tended to adopt entirely new legislation based on the UNCITRAL Model Law, usually with relatively few modifications. A characteristic common to most of these legislative efforts—whether based on the Model Law or not—was that international arbitrations were to enjoy a different regime from domestic arbitrations. This distinction followed from the recognition that the state's interest in the arbitral process, and in the ability of its courts to intervene in the process or review the results, was greater in domestic disputes where only its citizens or residents were involved. For international arbitrations, a much looser degree of judicial control—modeled on the powers given to an enforcement court under the New York Convention—was desirable.

The development of specialized control standards for the conduct of international arbitrations in the principal arbitration fora is a great advance in the practice of international commercial arbitration. This advance responds to the same needs which fueled the intellectual interest in the concept of anational arbitral awards-awards not specifically authorized or controlled by the law of the seat of arbitration. The approach of reform legislation is different, however, since the national regimes created for international arbitrations give very broad powers to the parties to agree to arbitral procedure; accordingly, their agreement to conduct the arbitration by procedures unfamiliar or unknown in local law is simply the application of the power specifically given to them by national law.

These arbitration law reforms indicate that, to a large extent, the transnational procedural law movement has been overtaken by legislative events. This development can be compared to the ICC's 1953 initiative proposing an international award to be

142. HOLTZMANN & NEUHAUS, *supra* note 127, at 912–13.

143. *Id.* at 911–12.

recognized by Convention countries. While the ICC's internationalist effort failed, the resulting agreement for the recognition and enforcement of foreign awards has become a keystone of the success of international commercial arbitration. While the proponents of the stateless or floating arbitration award have largely failed in their original goal, their efforts have led to an understanding that national arbitration laws must be revised to take into account the needs of the international business community.

The effect of these modem arbitration statutes is generally to provide a specialized legal regime at the place of arbitration applicable to international arbitration and to provide limits on intervention by local courts. As these laws specifically provide the requirements for awards in international arbitration, it would seem that the intent of the legislation is to anchor the award to the legal system of the place of arbitration and not to let it drift. The award is not a stateless award; however, the anchor chain provided by national legislation at the seat of arbitration is so long and so flexible that the parties have great liberty to conduct the arbitration in any reasonable way they may agree.

While the trend toward separate treatment of international arbitrations is unmistakable, the degree of freedom from local procedure varies from jurisdiction to jurisdiction, and the law of each relevant jurisdiction must be examined. It can be expected that the diversity in laws of the traditional arbitral centers will remain; the common thread will be the favor with which these jurisdictions view international arbitration and their willingness to adapt to its needs. This is because it is now quite clear that states wish to encourage the holding of arbitration within their jurisdiction; they become alarmed at the thought that international arbitrations taking place in their country will flee to more favorable jurisdictions, thereby creating an "invisible export."[144]

This is not the place to review in any detail the recent developments in arbitral legislative reform, but it is useful to note the dates of reforms in the traditional arbitral centers.[145] Of particular interest are the reforms in England and France, which preceded the Model Law and which illustrate entirely different approaches to legislative reform.

Reform in England was prompted by widespread dissatisfaction among foreign parties with the "case stated" method of judicial review.[146] This method permitted parties to certify questions of English law and have them decided by English courts, either during the arbitral process or after an award. Parliament eliminated this substantially unrestricted right of appeal on questions of law with the Arbitration Act of 1979.[147] The Arbitration Act abolished the "case stated" procedure,[148] replacing appeal to the High Court for error of law on the face of the record with a more limited right of appeal, and permitting parties to an international agreement to agree to

144. In the parliamentary reports leading up to the 1975 modifications to the English Arbitration Act it was estimated (on what basis was not revealed) that arbitrations escaping England could amount to an invisible export of £500 million annually. 392 Parl. Deb., H.L (5th Ser) 99 (1978), quoted in CRAIG, PARK & PAULSSON *supra* note 27, at 467–68.

145. For a good general review, *see* Adam Samuel, *Arbitration in Western Europe—A Generation of Reform*, 7 ARB. INT'L 319 (1991).

146. Arbitration Act 1950 § 21, 14 Geo. 6, ch. 27 (Eng.).

147. Arbitration Act 1979 ch. 42 (Eng.).

148. *Id.* § 1.

exclude any right of appeal, except the right to appeal based on the arbitrator misconduct and some kinds of procedural error.[149] England's arbitration laws—the Arbitration Acts of 1950 and 1979, as modified—are of general applicability; they are presumed to apply equally to all arbitrations based in England, whether domestic or international.

Unlike the French statute, no provision of the English Arbitration Acts specifically permits parties to international arbitrations to choose to have the arbitration governed by any law other than the law of England, or to derogate from the procedures provided by English law for domestic arbitrations.[150] As a result, there was a historic tendency for international arbitrations conducted in England to be supervised by members of the English legal profession and conducted very much like domestic arbitrations, which in turn were very similar to court litigation practices. More recently, in an effort to make London a more attractive venue for international arbitration, arbitration organizations have pointed out that even in domestic arbitrations, the parties have substantial freedom to agree to specific rules for the conduct of proceedings, and that such agreements will ordinarily be sufficient to preempt court-based procedures.[151] The London Court of International Arbitration in particular has promulgated rules which are specifically designed to empower arbitrators to conduct proceedings with maximum flexibility.[152]

None of this provides for true delocalization of procedure, however, since England's arbitration laws apply equally and without exception to domestic and international arbitration. What is achieved, on the other hand, by section 3 of the Arbitration Act of 1979, is a relaxation of the judicial control system. Now parties to international arbitration agreements may agree to exclude the rights of ordinary

149. *Id.* §§ 3–4. It is provided in the statute that even in the case of an international agreement the parties cannot agree in a future disputes clause to exclude appeals in "special categories" disputes arising under agreements relating to shipping, insurance and commodities and governed by English law. *Id.* § 4. It has been held that the general waiver of appeals provision in the ICC Rules constitutes a valid exclusion agreement. Arab African Energy Corp. v. Olieprodukten Nederland B.V., [1983] 2 Lloyd's Rep. 419 (Q.B.); *see* W. Laurence Craig, *International Ambition and National Restraints in ICC Arbitration*, 1 ARB. INT'L 419, 73–74 (1985).

150. English conflict of laws principles admit the theoretical possibility of party agreement as to a procedural law to govern the arbitration other than that of the English seat of arbitration. ALBERT V. DICEY & JOHN H.C. MORRIS, THE CONFLICT OF LAWS RULE 58, at 586–87 (Lawrence A. Collins ed., 12th ed. 1993). However, the possibility has not been favored by the courts or encountered in practice. *See infra* text accompanying notes 208–21. The case law concerning English conflict of law principles is usefully summarized in Lawrence A. Collins, *The Law Governing the Agreement and Procedure in International Arbitration in England, in* CONTEMPORARY PROBLEMS, *supra* note 116, at 126.

151. The limits on the parties' autonomy to set procedures and standards to be followed by the arbitrators are determined by the courts as a matter of public policy. At the present time, for instance, it is not permitted under English law for parties to agree that the arbitrators will determine the issues "in fairness and equity" and without resort to the strict provisions of law. *See* Michael R.E. Kerr, *'Equity' Arbitration in England*, 2 AM. REV. INT'L L. 377 (1991). Among legislative modifications currently under consideration is a proposal that equity clauses be authorized by statute. It remains a question of debate whether the parties can agree that English rules of evidence shall not be applied. *See* SIR MICHAEL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION 352–54 (2d ed. 1989) (stating that if an arbitrator deliberately admits evidence which he knows would be inadmissible in court proceedings, he commits procedural misconduct).

152. The London Court of International Arbitration (LCIA) Rules provide in article 5.1 that "[t]he parties may agree on the arbitral procedure, and are encouraged to do so." RULES OF THE LONDON COURT OF INT'L ARBITRATION art. 5.1 (1985) [hereinafter LCIA Rules]. Where the parties have no agreed, the arbitrators, under article 5.2 "shall have the widest discretion allowed under such law as shall be applicable to ensure the just, expeditious, economical, and final determination of the dispute." *Id.* art. 5.2.

appeal to the High Court and thus delocalize the award.[153] While the procedure remains local, the inability of English courts to review the award on the merits may sometimes achieve effects similar to that of delocalizing the procedure. The processes, however, are distinct; if an arbitral panel deliberately failed to follow fundamental procedures required by English law, its award would be subject to judicial recourse.[154]

English arbitration law reform, while retaining a uniform approach to domestic and international arbitration, has drastically reduced judicial intervention in arbitration, both by way of exclusion agreements and through restricted exercise of discretion by English courts, even in "special category" international arbitrations. As the 1989 Departmental Advisory Committee Report put it: "the 1979 legislation has marked a profound psychological change in English attitudes to arbitration, and has shown that the English legal and arbitration institutions have the willingness to listen to proposals for change and act upon them."[155]

Modest further changes may be expected. In 1989, the Departmental Advisory Committee recommended against the adoption of the Model Law,[156] noting that the Model Law was influenced by civil law concepts, and that historically there has been a closer relationship between the arbitral process and the courts in common law jurisdictions. The Committee was not in favor of having separate regimes for international and domestic arbitration, with the exception of the existing possibility of exclusion of judicial review. However, further legislation is presently contemplated which will codify existing statutory and case law principles in a form and language which is intended to borrow from the Model Law in style if not in substance.[157]

In France, arbitration law was completely revised by the modification of the *Code de Procédure Civile* (N.C.P.C.) in 1980; in addition, a special chapter for international arbitration was added by decree in 1981.[158] Under the new law, an international arbitration taking place in France is not subject to the detailed procedural provisions relating to domestic arbitration unless the parties so agree. The new provisions give the parties almost unlimited freedom to provide for their own arbitration procedure,

---

153. Section 3(1) provides:

(1) Subject to the following provisions of this section and section 4 below -

the High Court shall not, under section 1(3)(b) above, grant leave to appeal with respect to a question of law arising out of an award, and

the High Court shall not, under section 1(5)(b) above, grant leave to make an application with respect to an award, and

no application maybe made under section 2(1)(a) above with respect to a question of law,

if the parties to the reference in question have entered into an agreement in writing (in this section referred to as an 'exclusion agreement') which excludes the right of appeal under section 1 above in relation to that award or, in a case falling within paragraph (c) above, in relation to an award to which the determination of the question of law is material.

Arbitration Act 1979 § 3(1) (Eng.).

154. MUSTILL & BOYD, *supra* note 151, at 639–43.

155. U.K. DEP'T OF TRADE & INDUS., A NEW ARBITRATION ACT? THE RESPONSE OF THE DEPARTMENTAL ADVISORY COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION para. 25 (1989).

156. *Id.* at paras. 17, 88, 89.

157. English Draft Arbitration Bill, *in* U.K. DEP'T OF TRADE & INDUS., CONSULTATION DOCUMENT ON PROPOSED CLAUSES AND SCHEDULES FOR AN ARBITRATION BILL, *reprinted in* 10 ARB. INT'L 189 (1994).

158. Decree No. 80-345, 1980 JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] 1238–40; Decree No.81-500, 1981 J.O. 1398–1406. Craig, Park & Paulsson, *French Codification, supra* note 95, at 407.

either by specific agreement or by incorporating a set of rules, without requiring them to refer to a national law of procedure. Where they have not done so, such powers are given to the arbitrator. N.C.P.C. article 1494 provides:

> The arbitration agreement may, directly or by reference to a set of arbitration rules, define the procedure to be followed in the arbitral proceedings; it may also subject them to a given procedural law.
>
> If the agreement is silent, the arbitrator, either directly or by reference to a set of arbitration rules, shall establish such rules as may be necessary.[159]

Article 1494 was designed to provide the greatest possible freedom for the exercise of party autonomy. Subject only to the few mandatory rules of procedure at the French seat, the parties are to be free to choose arbitral procedures from institutional rules, transnational concepts, procedures of French domestic arbitration law, or foreign arbitration law. Selection of foreign law, however, is arguably not so much a choice of law as the contractual selection of procedures.[160]

International arbitrations in France, the 1981 decree provides a limited right of recourse from an award, directly to the Court of Appeal, on grounds similar to those for which the New York Convention permits refusal of recognition of a foreign award. No appeal on the merits of an award—for errors of fact or law—is permitted.

Aside from its practical significance in increasing France's attractiveness as an international arbitration site, the decree legislatively overruled the *Götaverken*[161] case, the basis of much of the writing about stateless awards and floating arbitrations. The *Götaverken* court held that where the parties to an international arbitration had not specifically agreed to use French procedural law, the resulting arbitral award was not a French award, and thus was not subject to recourse in French courts. Under the decree, an international arbitration in France is not subject to the detailed procedural provisions relating to domestic arbitration, unless the parties so agree, but the proceedings are nonetheless subject to due process, jurisdictional, and public policy requirements. Disregard of an award which violated these requirements could be sanctioned by the Court of Appeal. Thus, the award would be French, not stateless.

Judicial review of international arbitration awards by French courts, on the limited grounds provided by law, cannot be excluded by agreement. The right of judicial recourse on statutory grounds is a question of *ordre public,* or international public policy, and cannot be waived.[162] France's legislative approach to the reform of arbitration law is arguably totally different from England's. In France, the parties may contractually select their arbitral procedure, to the complete exclusion of French domestic arbitration law, but they cannot exclude judicial recourse. In England, the opposite is true-the parties may exclude judicial recourse, but not English arbitral procedures.

---

159. C. PR. CIV. art. 1494 (Fr.).

160. *See* Pierre Bellet & Ernst Mezger, *L'arbitrage international dans le nouveau code de procedure civile,* 70 R.C.D.I.P. 611, 624–25 (1981).

161. Judgment of Feb. 21, 1980 (General Maritime Transp. Co. v. Société Götaverken Arendel A.B.), Cour d'appel de Paris, 1980 D.S. JUR. 568. *See* discussion *supra* text accompanying notes 108–15.

162. MATTHIEU DE BOISSÉSON, LA DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL No. 437 (1990).

The 1981 French decree makes clear that the same standards apply to the recognition and enforcement of foreign awards as to awards rendered in France in international arbitral proceedings.[163] This creates less restrictive standards of review for foreign awards than those authorized by the New York Convention. France may recognize a foreign award which the New York Convention would not require to be recognized, since the French statute does not permit nonenforcement on the ground that the award has been set aside by the courts of the country where the arbitration took place. Instead of automatic nonenforcement, the French court will independently examine any reasons for nonrecognition, including the reasons which led to its annulment abroad, in the exercise of its control function. Very recently, in the case of *Hilmarton v. OTV,* France's highest court went out of its way to stress its independent right to apply its own recognition principles, without regard to court action in the country where the award was rendered, at least where questions of public policy were involved.[164] *Hilmarton* involved a claim by an English company against a French company for fees for services rendered as a "representative" or "intermediary" regarding a public works contract in Algeria.[165] Algerian law prohibited the performance of services as an intermediary in connection with a public works project. The representation agreement, which set the English company's fee at 4% of the amount of the contract finally awarded to the French company, was subject to Swiss law and provided that disputes would be settled by arbitration in Switzerland. The Swiss arbitral tribunal found that while illicit payments in connection with the agreement had not been proven, the representative had not performed substantial legal and tax consulting services, the alleged subject of the contract. Under all the circumstances, the tribunal concluded that a contract for services which were illegal in the place where they were to be performed was *contraire aux bonnes moeurs* and unenforceable under Swiss law. Under the Swiss Intercantonal Concordat in effect at the time, the claimant successfully obtained judicial recourse concerning the award through the cantonal court. The cantonal court annulled the award, and the

---

163. N.C.P.C. articles 1502 and 1504 provide five grounds upon which a French court may set aside an international award rendered in France or refuse to recognize or enforce a foreign award:

> 1) if the arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired
> agreement;
> 2) if the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;
> 3) if the arbitrator decided in a manner incompatible with the mission conferred upon him;
> 4) if due process [literally, the principle of an adversarial process] was not respected; or
> 5) if recognition or enforcement would be contrary to international policy *(ordre public international).*

C. PR. CIV. arts. 1502, 1504 (Fr.).

164. Judgment of Mar. 23, 1994 (Hilmarton v. Omnium de Traitment et de Valorization), Cass. civ. 1re, 1994 REV. ARB. 327 (note Jarrosson). The High Court's holding, that an award set aside at the place of arbitration might nevertheless be enforced in France if French criteria for annulment had not been met had already been anticipated in the *Norsolor* case, Judgement of Oct. 9, 1984 (Pabalk Ticaret Sirketi v. Norsolor), 1985 REV. ARB.431. The European Convention, applicable to arbitrations between parties from its nineteen signatory states, provides, in somewhat analogous fashion, that an award rendered in a contracting state and annulled there, must nevertheless be enforced in other contracting states unless the annulment was for one of the specific grounds allowed under the Convention. European Convention, *supra* note 53, arts. I(1)(a), IX.

165. Vincent Heuzé, *La morale, l'arbitre et le juge,* 1993 REV. ARB. 179 (commenting on the decision of the Court of Appeal of Paris in *Hilmarton* confirming the recognition in France of the annulled award).

annulment was affirmed by the Federal Tribunal, the Swiss high court.[166] The Swiss courts found that representation agreements were valid under Swiss law and that, absent proof of bribery, the award's determination that the contract was null and void was "arbitrary." Consequently, the award had to be overruled under article 36(f) of the Concordat.

In an attempt to prevent enforcement of the representation agreement in France, the French company obtained recognition *(exequatur)* in a French court of the Swiss arbitration award nonsuiting the claimant. Recognition was affirmed by the Paris Court of Appeal and subsequently by the Cour de Cassation, despite the intervening annulment of the award in Switzerland.

Under the French statute, the reason for Swiss courts' decision to set aside the award arbitrariness- is not a proper ground for refusing to recognize the award in France. The new Swiss arbitration legislation does not include this arbitrariness criterion, which led to excessive intervention by Swiss courts in the arbitral process. Accordingly, it would seem that French courts were justified in applying the more liberal criteria for recognizing foreign awards found in French legislation[167] and in finding that, under the circumstances, recognizing the award despite its annulment by Swiss courts was not a violation of "international public policy," which would have been grounds for nonrecognition under French arbitration statutes.

The Hilmarton case is a rare instance of the enforcement abroad of an award set aside in its country of origin.[168] The widely criticized annulment by the Swiss courts was based on an excessively broad standard of review, arbitrariness, which has since been eliminated. The French Cour de Cassation's action in recognizing the award may have been based to some degree on distaste for the Swiss court's action. However, it did nothing to suggest that it considered its action exceptional, remarking that, "finally the award rendered in Switzerland was an international award that was not integrated into the judicial order of the state, so that its existence remained established despite its annulment, and its recognition in France was not contrary to international public order."[169] This language implies that in France, at least, there is some lingering validity to the concept of the floating award, in the sense that arbitral awards rendered outside of France will be evaluated according to the French courts' own independent standards.[170] French courts, however, would not consider arbitral awards rendered in

166. Judgment of Apr. 17, 1990 (O.T.V. v. Hilmarton), Trib. féd. (Switz.), 1993 REV. ARB. 315, 322.

167. This is also a consequence of applying article VII(1) of the New York Convention which provides:

> The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

New York Convention, *supra* note 6, art. VII(1).

168. In addition to the *Norsalor* and *Hilmarton* cases in France, a Belgian court recognized an award rendered in Algeria against the Algerian state enterprise for oil and gas, Sonatrach, which had been set aside by the Algerian courts. Judgment of Jan. 9, 1990 (Sonatrach v. Ford, Bacon & Davis), Cour d'appel de Brussels (8e chambre) (Belg.) (cited by William W. Park, *Illusion and Reality, in International Forum Selection,* 30 Tex. Int'l L.J. 135, 177 n.249 (1995) [hereinafter Park, *Illusion and Reality*]).

169. Judgment of Mar. 23, 1994 (Hilmarton v. Omnium de Traitment et de Valorization), Cass. civ. 1re, 1994 REV. ARB. 327, 328 (translated from the French).

170. This is a result of the 1981 N.C.P.C. decree which provides that the recognition of foreign awards is determined by French standards of review, which provide even fewer grounds for denial of award recognition than does the New York Convention. Decree No. 81-500, 1981 J.O. 1398–1406. When the

France to be delocalized or anational, since they are subject to the (liberal) procedural safeguards provided by French law and to French judicial controls.[171]

In Switzerland, the Private International Law Act, which entered into effect on January 1, 1989, completely revised the law applicable to international arbitrations.[172] Chapter 12 of the Act provides a modem framework for international arbitration, allowing the possibility of judicial assistance to the arbitral proceedings—for instance, evidence taking and interim measures—but provides only limited grounds for judicial recourse from awards.[173] Where no party has a domicile, residence, or business establishment in Switzerland, the parties can, by special agreement, exclude all judicial recourse whatsoever.[174] One of the Act's innovative provisions, article 177, responds to dilatory tactics sometimes encountered in arbitrations involving government entities. The article provides that, once a government entity agrees to arbitrate, it may not subsequently rely on provisions of its own constitution or laws to contest its capacity to enter into an arbitration agreement.[175]

Other European countries, including Belgium,[176] Italy,[177] Austria,[178] and the Netherlands,[179] have followed this modernizing trend to varying degrees. Sweden is

---

decree entered into effect, some foreign critics characterized this phenomenon, which could lead to recognition in France of an award set aside where it was rendered, as "imperialistic liberalism." *Débats;* 1981 REV. ARB. 490, 493 (statement of Philippe Fouchard). *See also* Frederic E. Klein, *La nouvelle réglementation française de l'arbitrage international et les lois suisses; in* SWISS ESSAYS, *supra* note 55, at 57.

171. One might argue that, while French courts consider international arbitration awards rendered in France to be French, they consider awards rendered in Switzerland or other countries in similar circumstances to be anational. This relativism in attributing nationality to awards calls into question whether this characterization is necessary and whether the notion of the anational award is useful.

171. One might argue that, while French courts consider international arbitration awards rendered in France to be French, they consider awards rendered in Switzerland or other countries in similar circumstances to be anational. This relativism in attributing nationality to awards calls into question whether this characterization is necessary and whether the notion of the anational award is useful.

172. *See generally* SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE 1987, *supra* note 37. For commentary, see Marc Blessing, *The New International Arbitration L aw in Switzerland,* J. INT'L ARB., June 1988, at 9.

173. Judicial recourse, when permitted, is made directly to Switzerland's highest court, the Federal Supreme Court. Swiss Arbitration Statute art. 191.

174. *Id.* art. 192.

175. *Id.* art. 177.

176. CODES BELGES, TOME PREMIER, Law of Mar. 27, 1985 (54th supp. 1993) (modifying art. 1717 of the Judicial Code). This amendment excludes *all* recourse to Belgian courts from an arbitral award if neither party has a residence, domicile, or place of operation in Belgium.

177. CODES BELGES, TOME PREMIER, Law of Mar. 27, 1985 (54th supp. 1993) (modifying art. 1717 of the Judicial Code). This amendment excludes *all* recourse to Belgian courts from an arbitral award if neither party has a residence, domicile, or place of operation in Belgium.

178. A 1983 law makes clear the Austrian courts' jurisdiction over arbitrations which have no link to Austria other than being located there and the submission of such arbitrations to mandatory provisions of Austrian law. 4 ZIVILPROZESSORDNUNG [CIVIL PROCEDURE STATUTE] arts. 582, 595 (as amended by Federal Law of Feb. 2, 1983), *reprinted in* 9 Y.B. COM. ARB. 301 (1984).

179. The Netherlands adopted an entirely new arbitration law, applicable to both domestic and international arbitration in 1986. The new law was inspired by both French law and the UNCITRAL Model Law. Netherlands Arbitration Act, July2, 1986, entering into effect on Dec. 1, 1986, 4 WETBOEK VAN BURGERLIKJE RECHTSVORDERING [CODE OF CIVIL PROCEDURE] arts. I-VI [hereinafter The Netherlands Arbitration Act], *translated text and commentary in* SANDERS & VAN DEN BERG, THE NETHERLANDS ACT, *supra* note 96.

considering adopting an extensive new arbitration law, applicable to both domestic and international arbitration, which may enter into force on January 1, 1996.[180]

In the United States, there has been some debate as to whether the Model Law should be adopted by Congress.[181] The issue has not been resolved, but it does not appear that there is widespread support for its adoption.[182] International arbitration is still governed by the Federal Arbitration Act of 1925, which was amended in 1970 to implement the New York Convention and in 1990 to implement the Inter-American Convention.[183] The Federal Arbitration Act does not permit an ordinary appeal on issues of fact and law, and permits an award to be vacated only on grounds of fraud, partiality or corruption of the arbitrators, arbitrator misconduct, or excess of power (e.g., lack of jurisdiction).[184] To ensure that exceptional judicial review cannot be used as a substitute for the appeal mechanism, federal courts—consistent with state practice—have, even in domestic cases, refused to set aside or annul arbitral awards on the grounds of misconduct or excess of power unless an award's provisions are in "manifest disregard" of the law, a standard the courts have interpreted very restrictively.[185] Recent legislative initiatives in international arbitration have come, rather unexpectedly, not from Congress but from the states, a number of which have adopted the UNCITRAL Model Law or variations thereon.[186] However, such laws are generally only beneficial in those rare cases where the parties have specifically agreed that international arbitration in the United States shall be governed by a particular state's arbitration law. Where the parties have not made such an agreement, the effect of state laws may be limited by conflict-of-law and preemption principles.[187]

---

180. SWEDISH MINISTRY OF JUSTICE, THE DRAFT NEW SWEDISH ARBITRATION ACT: A PRESENTATION (1994) (in English).

181. *See* Daniel M. Kolkey, *Reflections on the U.S. Statutory Framework for International Commercial Arbitrations: Its Scope, Its Shortcoming and the Advantages of U.S. Adoption of the UNCITRAL Model Law,* 1 AM. REV. INT'L ARB. 491 (1990) (supporting adoption of the UNCITRAL Model Law); David W. Rivkin & Frances L. Kelner, *In Support of the F.A.A.: An Argument Against U.S. Adoption of the UNCITRAL Model Law,* 1AM. REV. INT'L ARB. 535 (1990) (opposing adoption of the UNCITRAL Model Law).

182. *See generally* Rivkin & Kellner, *supra* note 181.

183. 9 U.S.C. §§ 1–14, 201–08, 301–07 (1988 & Supp. V 1993).

184. 9 U.S.C. §§ 10, 207 (1988 & Supp. V 1993); *see also* INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 136–37, 142–47 U. Stewart McClendon & Rosabel E. Goodman eds., 1986).

185. Wilko v. Swan, 346 U.S. 427, 436–37 & n.22 (1953); Merrill Lynch v. Bobker, 808 F.2d 930, 933–37 (2d Cir. 1986). It is the better view that even "manifest disregard" of the law would not permit refusal to recognize a foreign award covered by the New York Convention. It does not constitute an independent ground for nonrecognition under the Convention and has been said not to rise to the level of a contravention of public policy. *See* Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160, 163–68 (S.D.N.Y. 1987); International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 181–82 (S.D.N.Y. 1990). In theory, the "manifest disregard" motive should not be available as a ground for resisting enforcement of, or for vacating, a nondomestic award rendered in the United States between foreign parties, which is considered covered by the Convention. However, it is not clear whether U.S. courts always follow this reasoning. *Compare* Avraham v. Shigur Express Co., No. 91 Cir., 1238 (SWK) 1991 U.S. Dist. LEXIS 12267, at 9–10 (S.D.N.Y. Sept. 4, 1991) (manifest disregard not available) *with* Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989) (manifest disregard considered, but no manifest disregard found). *See* Park, *Illusion and Reality, supra* note 168, at 181 n.275, 182 n.280, 186 n.302.

186. *See, e.g.*, CAL. CIV. PROC. CODE § 1280 (West 1983); CONN. GEN. STAT. ANN. § 52-408 (1987); OR. REV. STAT. § 36.300 (1993); and TEX. REV. CIV. STAT. ANN. art. 224 (West 1973).

187. *See* J. Stewart McClendon, *State International Arbitration Laws: Are They Needed or Desirable?* 1AM. REV. INT'L ARB. 245, 248–49 (1990).

While the English and French laws are important examples of different approaches to the treatment of international arbitration under domestic law, the Model Law will likely have a greater impact on the future of international arbitration throughout the world. Legislation based on the Model Law has, as of spring 1994, been enacted in thirteen countries.[188] Some of these, such as Mexico and Russia, are countries where significant growth in international trade and investment is expected in the coming years. Others, such as Canada, Hong Kong, and Bermuda, are seeking to become neutral arbitration sites as well as commercial centers. In general, jurisdictions that are already attractive as arbitration sites can make themselves still more attractive through adoption of the Model Law. The fact that the Model Law is easily understandable, was developed within the framework of the United Nations, and was drafted by international experts whose extensive *travaux préparatoires* are easily available, are all positive considerations. The UNCITRAL Secretariat has announced a project for the collection and dissemination of court cases interpreting the provisions of the Model Law, and this will no doubt improve the harmonization of arbitral practice. The influence of the Model Law will no doubt improve the harmonization of arbitral practice. The influence of the Model Law will no doubt also be felt in countries which have not adopted it. If the participants in international trade become accustomed to general arbitral practices developed under the Model Law, any state which does not adapt its own procedures to offer similar advantages risks losing its place as a preferred site for arbitration.

D. Emphasis of New Arbitration Laws on the Territoriality Principle

Advocates of the transnational concept of arbitration have repeatedly emphasized the fortuitous nature of the choice of an arbitration site and the weakness of contacts between that location and the parties and the international dispute referred to arbitration. This has been used as an argument against applying the local procedural law to the arbitration. Instead, it is argued, international arbitration should be subject only to the agreement of the parties, possibly limited by generally accepted transnational principles of procedure.

The drafters of the Model Law also recognized the lack of strong connections between the arbitration site and the arbitral proceedings. Accordingly, the Model Law provides for a different, relaxed regime of procedures and judicial recourse at the place of arbitration for international arbitrations as compared to domestic arbitrations. But, as for the applicability of the procedural law of the place of arbitration, the Model Law proponents take the transnationalist's argument and stand it on its head. It is just because the Model Law specifically provides a relaxed regime for international arbitrations that its provisions are mandatorily applicable to such arbitrations taking place in a Model Law country, just as domestic arbitrations are subject to domestic arbitration law. While the territoriality of arbitration law is implicit in general arbitration legislation (which like all legislation is assumed to be applicable within the

188. These countries are: Australia, Bermuda, Bulgaria, Canada (by the Federal Parliament and by the legislatures in all provinces and territories), Cyprus, Egypt, Hong Kong, Mexico, Nigeria, Peru, the Russian Federation, Scotland, and Tunisia. The Model Law has also been enacted in the United States in California, Connecticut, Oregon, and Texas. *See supra* note 186. For a discussion of the enactment process in various jurisdictions, see Bette E. Shifman, *Developments in Adoption of the 1985 UNCITRAL Model Law on International Commercial Arbitration,* 1AM. REV. INT'L ARB. 281 (1990).

state of enactment), the Model Law makes it explicit. Ironically, therefore, the Model Law drafters, where elsewhere opining on the unimportance of the place of arbitration, adopt exclusively the criteria of territoriality and make the place of arbitration the legal touchstone for international arbitration procedure and judicial recourse.[189]

The Model Law deals forthrightly with an issue which has bedeviled arbitration theorists for a long time: Whether the law governing the procedure of the arbitration, including any recourse from the award—the *lex arbitri*[190]—is governed by the national law of the arbitration site, or whether the parties, exercising party autonomy, could agree to submit to another national law.[191]

The classical theory has assumed that parties should be free to choose the law governing the arbitration, and conventions for the recognition and enforcement of awards have accorded equal status to the law of arbitration procedure chosen by the parties and the law of the seat of arbitration in setting the standards of procedure against which foreign awards should be measured to determine their suitability for recognition and enforcement.[192] The possibility of choosing as the *lex arbitri* a national law other than that of the seat of arbitration is highly impractical. However, the possibility does exist, and the consequences of making such a choice must be taken

---

189. As the commentators on the Model Law's *travaux préparatoires* put it:

> The Commission adopted the principle that the Model Law would apply if the place of arbitration was in the enacting State-known as the "territorial criterion" for applicability-only after extensive debate. . . .
>
> The Commission decided not to adopt the autonomy criterion. It was noted that the territorial criterion was widely accepted by existing national laws, and that where the autonomy criterion was available it was rarely used. Moreover, the Model Law allowed the parties wide freedom in shaping the rules of arbitral proceedings including the power to agree on the procedural provisions of a foreign law as long as they did not conflict with the mandatory provisions of the Model Law. This freedom, it was felt, reduced the need for providing the parties with the choice of a foreign law in lieu of the Model Law.

HOLYZMANN & NEUHAS, *supra* note 127, at 35–36.

190. This law has also been referred to more recently, in England, as the curial law.

191. *See, e.g.*, DICEY & MORRIS *supra* note 150, Rule 58 at 539–42; REDFERN & HUNTER *supra* note 93, at 7780. PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 319–53 (1965); Klein, *supra* note 170, at 57–59.

192. Article 2(1) of the Geneva Protocol, *supra* note 39, provide that "[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."

Article 1(c) of the Geneva Convention provides for enforcement of awards where "the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure." Geneva Convention, *supra* note 41, art. 1(c).

Article V(1)(d) of the New York Convention permits nonrecognition of an award where "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." New York Convention, *supra* note 6, art. V(1)(d). Article V(1)(e) also permits nonrecognition where "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made," thus contemplating the possibility of the exercise of judicial supervision the courts of a country other than the place of arbitration and applying a law other than the arbitration law of the seat. *Id.* art. V(1)(e).

Article IX of the European Convention also permits nonrecognition of an award which has been set aside (on grounds described by the Convention) "in a State in which, or under the law of which, the award has been made." European Convention, *supra* note 53, art. IX.

into consideration.[193] It is recognized that courts at the seat of arbitration must, as a matter of public policy and state sovereignty, be conceded some power of judicial supervision and recourse concerning the arbitral proceeding.[194] It is also recognized that the prospect of a court applying domestic procedural laws on some questions and federal procedural laws on others presents considerable difficulties. In practice, parties to international arbitration have rarely chosen to incorporate foreign procedural rules into their arbitration agreement. The provisions of the Model Law, while giving the parties broad freedom regarding arbitral procedures, represent the commencement, or perhaps the continuation, of a trend in favor of the territorial application of arbitration law, rather than the importation of a foreign *lex arbitri.*

Article 1 of the Model Law provides:

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except Article 8, 9, 35 and 36, apply on if the place of arbitration is in the territory of this State.[195]

These are two exceptions to the territoriality principle, designed to assist a Model Law state in performing its duties under the New York Convention. First, articles 8 and 9 permit a court in a Model Law state to refer parties to arbitration in another state, or to take interim measures in respect to arbitration in another state.[196] Second, articles 35 and 36 provide for recognition and enforcement of international awards, including those rendered abroad.[197]

The Model Law does not provide for application of its procedures to arbitrations outside of a Model Law jurisdiction,[198] nor does it provide for judicial recourse from an award rendered in another state.

---

193. A number of national arbitration laws (e.g., France, Germany) specifically contemplate the application of their provisions to arbitrations taking place in other jurisdictions. German law provides for direct judicial recourse to German courts from an award rendered abroad where the parties had chosen German law as the curial law of the arbitration. French law makes no such provision. The consequences of the choice of a curial law other than that of the seat of arbitration must be considered both in relation to the place of arbitration and to the state whose arbitration laws are being applied extraterritorially. For a discussion of these matters in respect to a statute specifically permitting such a choice, see Carlos E. Loumiet, *United States Florida International Arbitration Act*, 26 L.L.M. 949, 952 (1987).

194. While this jurisdiction would ordinarily be exclusive, this is not the case where the parties have adopted a procedural law other than that of the seat of arbitration and that procedural law provides for judicial review on the extraterritorial arbitral proceedings. German law, for instance, provides for such extraterritorial judicial review. Law of Mar. 15, 1961, ∫ 2, Bundesgesetzblatt II 121, Mar. 22, 1961 (implementing the New York Convention). In such a case there would be concurrent and potentially duplicative judicial review.

195. THE MODEL LAW, *supra* note 126, art. 1(1)-(2).

196. *Id.* arts. 8–9.

197. *Id.* arts. 35–36. It is true that article 36(1)(a)(iii) regarding recognition and enforcement repeats the language of the New York Convention, providing that an award may be refused recognition if the "arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement was not in accordance with the law of the country where the arbitration took place." *Id.* art. 36(1)(a)(iii). This was included to remain in harmony with the Convention but does not diminish the principle of territoriality found throughout the rest of the law. *See* HOLTZMANN & NEUHAUS, *supra* 127, at 1060–61.

198. Parties to an arbitration agreement providing for arbitration in a country not having adopted the Model Law could agree to follow the procedures of the Model Law, as adopted by another country, but this could take effect only as a contractual stipulation, incorporating procedures by reference, and not as a choice

The Model Law seeks to resolve simply and clearly the difficult issues raised by the extraterritorial application of one state's procedural law to an arbitration taking place in another state. Whether this approach will succeed will only be known when it is tested in the various situations in which conflicts can arise. However, that approach seems sensible and reflects the practice of the vast majority of states, particularly concerning the control function of the court at the seat of arbitration. While, as noted earlier, article 19 of the Model Law gives the parties wide freedom to choose arbitral procedures, it does not specifically refer to the choice of a foreign procedural law.[199] This is a simpler approach than that taken by some other modern laws which refer to the possibility that the parties may adopt provisions of foreign law. Even under this latter approach, the better view is that such a choice acts only as a *contractual* adoption of specific procedures; under the territoriality principle, the *lex arbitri* remains that of the place of arbitration, whose mandatory procedural provisions may not be avoided by party agreement. In any event, where the law is based on the territoriality principle, the courts at the seat of arbitration will be competent for judicial review. The parties to an arbitration agreement should not be able to use their freedom to choose arbitral procedures to exclude judicial review by the court at the seat. The parties may exclude judicial review only pursuant to the law of the arbitration site, which may empower the parties to agree to exclude judicial review or may automatically exclude such review for certain international matters.[200]

The new Swiss law offers a good example of the territoriality of the judicial control mechanism, together with specific options for exclusion. Article 176 of the Swiss Private International Law Act provides that:

> (1) The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is situated in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.
>
> (2) The provisions of this chapter shall not apply where the parties have agreed in writing that the provisions of this chapter are excluded and that the cantonal provisions on arbitration should apply exclusively
>
> (3) The seat of the arbitral tribunal shall be determined by the parties, or the arbitral institution designated by them, or, failing both, by the arbitrators.[201]

All international arbitrations in Switzerland are subject to judicial recourse to the federal Supreme Court, with two exceptions specifically provided for by the law. Article 191 permits the parties to agree that the cantonal court at the seat of

---

of law.

199. THE MODEL LAW, *supra* note 126, art. 19.

200. The theoretical underpinnings for this statement are found in such classical defenses of the territoriality principle as espoused by Frederick A. Mann, *Private Arbitration and Public Policy*, 4 CIV. JUST. W. 257, 267 (1985), and *Lex Facit Arbitrum*, *supra* note 116.

The issue is not closed and doctrinal defenses of theory of the parties; autonomy to choose the procedural law, or non-law, applicable to their arbitration, without regard to the place of arbitration, are still made. The trend of current legislation, however, would tend to confirm Mann's thesis that such liberty exists only to the extent provided for, or permitted, by the law at the place of arbitration.

201. Swiss Arbitration Statute art. 176.

arbitration, designated by cantonal law for this purpose, shall serve as the sole court of judicial review.[202] Article 192 provides that where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may agree that there shall be no judicial recourse in Switzerland whatsoever from the award, or may limit the grounds of recourse to one or several of the grounds otherwise permitted by the Act.[203] The effect of these provisions is to confirm the jurisdiction of Swiss courts over recourse from awards rendered in Switzerland, but to allow the parties, under certain specific conditions, to limit or exclude judicial review.

Like Article 1494 of the French NCPC, article 182 of the Swiss law gives the parties freedom to determine the procedural rules to be followed in the arbitration, including those contained in foreign law. The law provides that "[t]he parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice."[204]

The most authoritative commentators take the clear position that the latter choice would not result in applying a foreign law as the *lex arbitri*, but rather would only constitute a contractual incorporation of agreed rules:

> The parties are free in particular to agree on an ad hoc procedure, or to adopt arbitration rules, whether institutional (ICC, LCIA, AAA, Chamber of Commerce of Zurich, of Geneva, etc.) or not (UNICITRAL) or to submit the arbitral procedure to a procedural law of their choice, which can be either a law of arbitration procedure (e.g., the Belgian law, the Netherlands law, the dispositions of the UNCITRAL Model Law on Arbitration) or a domestic civil procedure law. In each case, it will consist of a procedure chosen by contract. *That is to say that the choice of law of procedure by agreement does not change that status of the arbitration in regard to chapter 12; nor does such choice submit the arbitration to the law of the country which has enacted such a statute.*[205]

France, in the chapter of its arbitration law applicable to international arbitration, adopts the territoriality principle for judicial recourse. Article 1504 states as follows: "An arbitral award rendered in France in international arbitral proceedings is subject to an action to set aside on the grounds set forth in articles 1502 [providing grounds on which a foreign award may be refused recognition and enforcement]."[206]

While the French law, unlike the Model Law, contemplates the possibility of French arbitration—that is, arbitration subject, by agreement of the parties, to the

---

202. *Id.* art. 191. The provision of article 191 that the parties may agree that a cantonal court shall serve to review awards under the Private International Law Act was added during parliamentary debates and reflects federalism considerations, as well as the fact that cantonal courts at some commercial centers are well-considered due to their long experience of reviewing arbitral awards under the Concordat. *See* Blessing, *supra* note 172, at 74.

203. Swiss Arbitration Statute art. 192.

204. *Id.* art. 182.

205. PIERRE LALIVE ET AL., LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 350 (1989) (commenting on art. 182(1) of the Act) (translated from the French) (citations omitted) (emphasis added).

206. C. PR. CIV. art. 1504 (Fr.).

French code of civil procedure—taking place abroad,[207] it is quite clear that French courts will not review an award that was rendered abroad.[208]

The Netherlands Arbitration Act of 1986, a general arbitration act covering both domestic and international arbitration, is also based on the principle of territoriality.[209] The Act is divided into two titles. The first, entitled "Arbitration In the Netherlands" governs proceedings where the place of arbitration, in the legal sense of the word, is within the territory of the state.[210] The second, entitled "Arbitration Outside the Netherlands," is brief and deals principally with recognition and enforcement of awards rendered in a foreign state; the conditions of recognition vary depending on whether there is an applicable treaty of recognition and enforcement in force with the country in question.[211] The second title also provides that a Netherlands court may grant interim measures of protection with respect to foreign arbitral proceedings, and that a Netherlands court shall decline jurisdiction over a dispute which is subject to arbitration outside the Netherlands pursuant to an agreement, unless the agreement is invalid under the law applicable to it.[212] These provisions are similar to the comparable provisions of the Model Law.[213]

While parties can agree to the rules of procedure that will apply to their arbitration, including rules provided by the procedural laws of a jurisdiction other than the place of arbitration, they cannot derogate from the control function of the courts at the seat of arbitration, except to the extent that the law of the arbitration site permits them to do so. This limitation results from the application of mandatory laws of the state having territorial power over the arbitration.

The trend of current arbitration legislation indicates that it will be very difficult to rebut the presumption that the procedural law governing the arbitration is that of the place of arbitration. If this presumption holds, the courts in the place of arbitration will exercise judicial control over the arbitral process according to the arbitration site's own laws. This control function is presumed to be exclusive with respect to review of the award. However, courts in foreign jurisdictions have the power to take interlocutory measures, and to recognize and enforce arbitral awards.

---

207. *See* C. PR. CIV. art. 1493 (Fr.) which provides that where the arbitration takes place abroad, if the parties have agreed that French procedural law shall apply, then either party may apply to the President of the Tribunal de Grande Instance in Paris if a difficulty arises regarding the appointment of the tribunal.

208.. C. PR. CIV. art. 1504 (Fr.) (providing for recourse only from international arbitration awards rendered in France). *See* Judgment of Feb. 18, 1986 (Aita v. Ojjeh), Cour d'appel de Paris, 1986 Rev. Arb. 583 (note G. Flécheux) (attempt to take judicial recourse from an award rendered in England dismissed, and costs for abusive procedure were rendered against the petitioner, the legality of a foreign award can be tested in the French courts only if the winning party seeks recognition and enforcement of the award in France).

209. SANDERS & VAN DEN BERG, THE NETHERLANDS ACT, *supra* note 96, at 11 n.1. The 1986 Act was influenced by the Model Law and by French arbitration law. F. Korthals Altes, *Preface* to SANDERS & VAN DEN BERG, THE NETHERLANDS ACT, *supra*, at 3.

210. The Netherlands Arbitration Act, tit. 1.

211. *Id.* tit. 2.

212. *Id.* art. 1074(1).

213. THE MODEL LAW, *supra* note 126, art. 16.

III. DEVELOPMENTS IN ARBITRATION PRACTICE

A. The Territoriality Principle: Applications and Conflicts

It is, of course, easy to take the broad view that the trend of modern arbitration laws is in favor of the territoriality principle. It is another thing to see how this principle is applied to varying fact situations in view of specific statutory language or binding case law. Even if it accepted that the laws of the place of arbitration should govern arbitration procedures, and that local courts should control and assist the arbitration, there remain a number of issues, including that of defining and determining the place of arbitration.

These issues were discussed recently by the London Court of Appeal in *Naviera Amazonica Pruana, S.A. v. Compania International de Seguros del Peru.*[214] That case concerned the liability of a Peruvian insurance company to a Peruvian ship-owning company under a policy whose printed general conditions stated that "in the event of judicial dispute . . . the jurisdiction and competence of the City of Lima [shall apply], without any reservation of any nature."[215] However, the typed endorsement to the policy provided, with supervening effect, for "Arbitration under the Laws and Conditions of London."[216] The shipowners commenced suit in the High Court in London for declarations that the dispute was to be referred to arbitration in London and for the appointment of an arbitrator.[217] The court determined that the parties had agreed that the agreement to arbitrate should be governed by English law, and that procedural law of the arbitration should be English law. However, the court denied the assistance of the English courts, on the ground that although the arbitration was to be governed by English law, the place of arbitration was to be in Peru.[218]

These findings were reversed on appeal. The Court of Appeal found that the disputes clause was a London arbitration agreement and that judge below had erred in failing to distinguish between the legal place of arbitration—the "seat" of arbitration—and the place, in Lima, where the arbitration hearings might be conducted for convenience, but which was not the agreed-upon place of arbitration:

> [I]t is clear that the Judge's conclusion in the present case is unlikely to be right, because it produces a highly complex and possibly unworkable result which the parties could hardly have intended. Or, to put it another way, his conclusion can only be right if this indeed is an apparently unprecedented instance of parties having expressly and clearly agreed to arbitrate in X (Lima) subject to the curial law of Y (London).[219]

---

214. Naviera Amazonica Persuna S.A. v. Compania Internacional de Seguros Del Peru, [1988] 1 Lloyd's Rep. 116 (C.A.).

215. *Id.* at 118.

216. *Id.*

217. *Id.* at 116.

218. *Id.*

219. *Id.* at 121. In his opinion, Lord Justice Kerr developed the view that the "seat" (or *siège* to use a continental term) of the arbitration is the official place of arbitration (the *locus arbitri*), and from this official link flows the application of the procedural law of the seat to the arbitration. *Id.* The use of a legal term such as seat or *locus arbitri* emphasizes that, in fact, arbitral hearings may be held from time to time in

The Court of Appeal rejected this interpretation of the arbitration agreement, and then went on to make a succinct summary of the choice-of-law issue:

> All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same.[220] But (1) will often be different from (2) and (3). And occasionally, but rarely (2) may also differ from (3).[221]

The court conceded that the transaction had the greatest number of contacts with Peru, whose law was undoubtedly the proper law of the contract[222] The law governing the agreement to arbitrate was, by its terms, English law.[223] What was at issue in *Amazonica* was the procedural or curial law governing the arbitration.[224] The court found that English law rejected the idea of a floating or delocalized arbitration and found that "every arbitration must have a 'seat' or *locus arbitri* or forum which subjects its procedural rules to the municipal law which is there in force."[225] The court conceded the theoretical possibility that parties might agree that the seat of arbitration would be in country X, but that the arbitration would be subject to English procedural law. However, the court conceded, such an agreement would cause such complexity and inconvenience that it should not be easily inferred. Nor could such an agreement be fully effective, since English courts, whose jurisdiction is territorially limited under English law, could not exercise control and supervision over an arbitration whose seat was abroad.[226] Having found (1) that the courts at the seat of arbitration had jurisdiction both to supervise and control arbitrations taking place there and to apply the mandatory provisions of their arbitration law, and (2) that, based on the language

---

another place or places without changing the official place of arbitration. *Id.* (quoting Redfern & Hunter [1st ed.] at 69). All legal systems permit parties by contract freely to choose the seat of arbitration, with the procedural consequences therefore flowing from the law of that place. It is immaterial that the seat has no contact with the transaction or the parties, as indeed will frequently be the case in the choice of neutral sites. *Id.* There is no parallel for arbitration of the concept of the fraudulent or fictitious seat or *siège* of incorporation in continental law which permits a court, because of the fraud, to ignore the normally applicable law of the seat to determine the status of the corporation.

220. This may reflect a particularly English attitude where the greatest number of international arbitrations attracted to London are in contracts subject to English law, even though the transaction may have no economic connection with England. A similar statement could not be made at a great number of neutral arbitral sites (such as Switzerland) where it is most likely that the proper law of the contract will not be that of the arbitral forum.

221. *Id.* at 119.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *See* Miller (James) & Partners Ltd. v. Whitworth St. Estates, Ltd., 1970 App. Cas. 583 (appeal taken from Eng.) (although the proper law of the contract was English and the arbitrator had been appointed to a submission in arbitration within the meaning of the English Arbitration Act 1950, the arbitrator could not be ordered to state a case to the English court since the locus of the arbitration was Scotland and the arbitration was governed by Scottish procedural law); Black Clawson Int'l Ltd. v. Papierwerke Waldhof, Aschaffenburg A.G. [1981] 2 Lloyd's Rep. 446, 447 (Q.B.) (holding that common sense suggested that a provision of the Arbitration Act of 1950 could not have been intended to apply the whole of the 1950 Act to an arbitration which had been from the outset designed to take place abroad).

of the contract, the parties intended for English arbitration procedure to apply, the court deduced that the parties intended for the arbitration to be governed by English curial law, and that London therefore was the intended seat—the legal place—of arbitration.[227] The court rightly based its decision on the desired unity between the place of the arbitration and the curial law governing the arbitration.

The London Court of Appeal was surely correct in its view that, when determining a court's powers of supervision and control over arbitral proceedings, nothing turns on the substantive or proper law of the parties' contract. A similar view was taken by a New York Federal District Court in *International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial.*[228] *Bridas* involved a shareholder agreement between an American company and an Argentine company.[229] The agreement provided that it would be governed by the laws of the State of New York, but that disputes connected to the agreement would be resolved by ICC-supervised arbitration.[230] The agreement did not provide for the place of arbitration, and the ICC Court of Arbitration designated Mexico City. When the Argentine company obtained an arbitral award against the American company, the American company petitioned a U.S. federal court to vacate the award.[231] Under the New York Convention, an application to set aside an arbitral award can only be made to a court "of the country in which, or under the law of which, that award was made."[232] The American company took the position that a U. S. court had jurisdiction to vacate the award as a competent authority of the country "under the laws of which [the] award was made."[233] This phrase, it argued, referred to the substantive law of the contract—the law of New York—rather than the procedural law applied by the arbitrators. The court rejected this argument, finding that:

> [T]he phrase in the [New York] Convention "[the country] under the laws of which that award was made" undoubtedly referenced the complex thicket of the procedural law of arbitration obtaining in the numerous and diverse jurisdictions of the dozens of nations in attendance at the time the Convention was being debated. Even today, over three decades after these debates were conducted, there are broad variations in the international community on how arbitrations are to be conducted and under what customs, rules, statutes or court decisions, that is, under what "competent authority." Indeed, some signatory nations have highly specialized arbitration procedures, as is the case with the United States, while many others have nothing beyond generalized civil practice to govern arbitration.[234]

While it may be argued that recent developments in arbitration legislation in popular arbitration centers have led to increasing conformity in the relatively few mandatory rules of arbitral procedure, and that the court's observations as to the

227. *Amazonica*, [1988] 1 Lloyd's Rep. at 120.
228. 745 F. Supp. 172 (S.D.N.Y. 1990).
229. *Id.* at 174.
230. *Id.*
231. *Id.* at 175.
232. *Id.* at 176.
233. *Id.* (quoting New York Convention art. 1(e)).
234. *Id.* at 177.

diversity of arbitration procedures maybe somewhat exaggerated, the court's conclusion that judicial review should be conducted by the court whose law governs the arbitration procedure is surely right. The court specifically mentioned the inconveniences of review by the courts of a country whose only tie to the arbitration was that its substantive law was applicable to the contract.

> [A]ny suggestion that a court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration defies the logic both of the Convention debates and of the final text, and ignores the nature of the international arbitral system. . . .
>
> . . . .
>
> . . . The whole point of arbitration is that the merits of the dispute will *not* be reviewed in the courts, wherever they be located. Indeed, this principle is so deeply imbedded in American, and specifically federal, jurisprudence that no further elaboration of the case law is necessary. That this was the animating principle of the Convention, that the courts should review arbitrations for procedural regularity but resist inquiry into the substantive merits of awards, is clear from the notes on this subject by the Secretary-General of the United Nations.[235]

The court explained that the competent authority under article V(1)(e) to vacate or set aside an award was "virtually always" the court of the country in which the award was made.[236] As to the additional phrase of that article referring to courts of a country "under the law of which" the award was made, the court stated: "The phrase 'or under the law of which' . . . refers to the theoretical case that on the basis of an agreement of the parties *the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.*"[237]

The court then found that by submitting to arbitration in Mexico, the parties had subjected themselves to Mexican procedural law, and only the courts of Mexico had jurisdiction to vacate the award.[238]

There is no doubt that both recent legislation and case law tend to emphasize the application of the procedural or curial law of the place of arbitration, and to confirm that the courts of that place are competent with respect to recourse from an award. Nevertheless, the laws of some jurisdictions permit a claim that such jurisdiction is not exclusive, and the courts of at least one jurisdiction, India, have been quick to exploit and widen possible alternative claims to judicial supervision. Indian courts have

---

235. *Id.* at 177–78 (citation omitted). The court cited in support thereof the *travaux préparatoires* of the Convention.

236. *Id.* at 177 (quoting ALBERT J. VAN DEN BERG, THE NEW YORK CONVENTION OF 1958, at 350 (1981)).

237. *Id.*

238. *Id.* at 178. In an interesting article, one of the counsel for Bridas takes the position that the parties' agreement to be bound by mandatory provisions of Mexican procedural law, incorporated in terms of reference established after the arbitration had begun, and not the place of arbitration as such is the determinative factor in identifying the court that has supervisory powers and from which judicial recourse could be sought. This approach denies the applicability, or at least the conclusiveness, of the territoriality principle. Sergio Le Pera, *Where to Vacate and How to Resist Enforcement of Foreign Arbitral Awards*: International Standard Electric Corporation v. Bridas Sociedad Anónima Petrolera, Industrial y Comercial, 2 AM. REV. INT'L ARB. 48, 55–56 (1991).

asserted the right to extensive judicial supervision of arbitrations outside India where the arbitration clause authorizing the arbitration is in a contract governed by Indian law. These claims of jurisdiction are based on three grounds: (1) the fact that the agreement to arbitrate is governed by Indian law; (2) contractual language which includes an express or implied agreement to grant Indian courts a supervisory role; and (3) specific provisions of Indian legislation which can be construed to deny the benefits of the New York Convention to arbitral awards rendered abroad but under agreements which are subject to Indian law.

The legislation in question is article 9 of the Indian Foreign Awards Act 1961, enacted following India's ratification of the New York Convention, which provides: "Nothing in the Act shall . . . apply to any award made on an arbitration agreement governed by the law of India."[239]

Indian courts have interpreted this article to remove any Convention obligations on Indian courts with respect to the recognition and enforcement of awards rendered in other Convention states where the agreement in which an arbitration clause is found is subject to Indian law.[240] Under this interpretation, such awards are not foreign awards, and hence are subject to all the procedures and remedies available to domestic awards in India. Indian courts have thus felt free to take jurisdiction to vacate an award rendered abroad and to take any of the extensive steps open to Indian courts with respect to domestic arbitration awards under the Indian Arbitration Act 1940.[241]

A first step in this direction was taken in *Oil & Natural Gas Commission v. Western Co. of North America*,[242] where a dispute between an Indian state company and a U.S. company had been settled by arbitration in London. The American company sought recognition and enforcement of the award in the United States under the New York Convention, but the Indian party sought to vacate the award before the Bombay Court, where it also sought other ancillary relief. The Supreme Court of India found that the award was not yet final and binding under the Indian Arbitration Act, which requires that a domestic arbitral award be made subject to a judgment and decree before it is enforceable, and that it would be oppressive for the Indian party to have to defend against enforcement in the United States while simultaneously prosecuting judicial recourse in India. The court then entered an injunction restraining the American company from so proceeding.[243]

To further justify its action, the court opined that under the New York Convention (which the Indian court declined to follow pursuant to article 9 of the Foreign Awards Act cited above, but which did apply to the enforcement action in the United States) enforcement may be refused where the arbitral award "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[244] Further, the court reasoned, it was Indian law that determined whether this award was

239. Foreign Awards (Recognition and Enforcement) Act, INDIA A.I.R. MANUAL § 9(b) (1961).

240. *See* Justice V.S. Deshpande, *Jurisdiction Over 'Foreign' and 'Domestic' Awards in the New York Convention*, 1958, 7 ARB. INT'L 123, 127–30 (1991).

241. *Id.*

242. 1987 A.I.R. (S.C.) 674 (India), *excerpts reprinted in* 13 Y.B. COM. ARB. 473 (1988). For critical comment on the decision, see M. Tupman, *Staying Enforcement of Arbitral Awards Under the New York Convention*, 3 ARB. INT'L 209 (1987), and the response of Justice Deshpande, *supra* note 240.

243. *Oil & Natural Gas Comm'n*, 1987 A.I.R. (S.C.) at 676.

244. *Id.* at 683–84 (quoting the New York Convention art. V(1)(e)).

not yet binding on the parties, or had been properly set aside or suspended.[245] The Indian court took no notice of the fact that the award had presumably become final in England where it had been rendered, or that the U. S. court handling the enforcement action clearly had discretion under article VI of the Convention to determine whether to enforce the award in view of pending proceedings.[246]

In the *Oil & Natural Gas Commission* case, the Indian court's exercise of extraterritorial jurisdiction may have been justified, to some extent, by a provision in the arbitration clause which could be interpreted as a rare choice by the parties to have an arbitration governed by a procedural law other than that of the seat of arbitration.[247] However, in *National Thermal Power Corp. v. Singer Corp.*, the Supreme Court of India showed itself ready to extend extraterritorial jurisdiction aggressively to vacate awards rendered abroad based only on a contractual choice of Indian law as the law governing the agreement under which the dispute arose.[248] In that case, an Indian state corporation brought proceedings in India under the Indian Arbitration Act of 1940 to vacate an interim award rendered in favor of a foreign corporation by an ICC arbitral tribunal in London. Unlike in *Oil &Natural Gas Commission*, there was no allegation that the parties had agreed to the application of Indian procedural law.[249] The Supreme Court found that the law governing the agreement to arbitrate was presumed to be the same as that governing the agreement in which the arbitration clause was found. This is an unremarkable presumption. However, the court then claimed a very wide scope of application for the Indian law governing the arbitration agreement, and used this scope to justify broad jurisdiction to review foreign arbitral awards. In contrast, the court claimed that courts at the seat of arbitration have only a limited scope of review, particularly where, as in the case considered, the parties had agreed to the ICC rules of procedure. The court explained:

> To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive law govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreements, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters

245. *Id.* at 683.

246. *See* New York Convention, *supra* note 6, art. VI.

247. The contract's applicable law clause provided that "[t]he validity and interpretation [of this Agreement] shall be 'governed by the Laws of India'. . . ." *Oil and Natural Gas Comm'n*, 1987 A.I.R. (S.C.) at 679. In addition, the lengthy ad hoc arbitration clause provided that the appointing authority, to name arbitrators in the event of default by the parties or the arbitrators, was to be the Chief Justice of the Supreme Court of India. The clause also stated: "The arbitration proceedings shall be held in accordance with the provisions of the Indian Arbitration Act, 1940 and the rules made thereunder as amended from time to time." The full text of the arbitration clause is reprinted at 13 Y.B. COM. ARB. 473, 474 (1988).

248. 18 Y.B. COM. ARB. 403 (1993).

249. The section entitled "General Conditions of Contract" provided for the application of the Indian Arbitration Act for disputes with *domestic* contractors but this provision was excluded for disputes with foreign contractors and in its place was a provision for ICC arbitration at a place to be determined by the arbitrators. *Id.* at 407.

> in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement.[250]

As in the *Oil & Natural Gas Commission* case, the court found that, pursuant to section 9(b) of the Foreign Awards Act, an award rendered abroad pursuant to a contract subject to Indian law would not be considered a foreign award protected by the Convention.[251] This permitted the court to find that the award rendered in London should be considered a domestic award. To justify its taking jurisdiction to vacate the award, the court effectively found that the specific choice of Indian law as the substantive law governing the agreement not only implied that Indian law governed the agreement to arbitrate, but also that the Indian Arbitration Act of 1940, a procedural law, was included as part of the governing law.[252]

The *Singer* decision, and its excessive exercise of extraterritorial jurisdiction, has been rightly criticized.[253] There is some evidence from very recent cases, at least with respect to the recognition of arbitral awards rendered abroad under agreements subject to *foreign* law, that the Indian judiciary would like to retreat from some of its extreme, and hostile, earlier positions.[254] To the extent that broad intervention by Indian courts in foreign arbitrations is justified or required by article 9 of the Foreign Awards Act, this retreat may require some sort of amendatory legislation.[255] Legislation may also be required to effect India's full compliance with the New York Convention.

The Indian experience is an exception to the trend toward harmonization of arbitration laws on the issues of the law applicable to the arbitration procedure and the courts competent to annul or vacate an award. In this sense, Indian law may be considered anachronistic. The possibility of concurrent exercise of jurisdiction by Indian courts where the contract in dispute is governed by Indian law has not prevented arbitrations abroad from proceeding, or courts at the place of arbitration from acting with respect thereto. It has, however, occasioned extensive delays and duplication of expenditures, and called into question the enforceability in India of any award ultimately obtained. Courts at the place of arbitration have been uniformly reluctant to give effect to Indian courts' attempts to apply Indian arbitration law extraterritorially.

For instance, in *Sumitomo Heavy Industries, Ltd. v. Oil &Natural Gas Commission,* the Indian defendant petitioned the English courts to restrain a London arbitration from proceeding.[256] The Indian party argued that before the arbitration could proceed, an Indian court must decide the issues of the extent of arbitral jurisdiction and possible frustration of the arbitration agreement, because the contract in question, and the arbitration clause in the contract, were governed by Indian law.

---

250. *Id.*

251. *Id.* at 409.

252. *Id.* at 410.

253. Jan Paulsson, *The New York Convention's Misadventures in India,* MEALEY'S INT'L ARB. REP., June 1992, at 18.

254. Renusager Power Co. v. General Elec. Co., Civ. App. No. 71 G 71 A of 1990 (S.C.R. India, October 7, 1993) (recognition and enforcement in India of ICC arbitration award rendered in Paris under agreement subject to New York law). *See* Lawrence F. Ebb, *Reflections on the Indian Enforcement of the GE/Renusager Award,* 10 ARB. INT'L 141 (1994).

255. Foreign Awards (Recognition and Enforcement) Act, INDIA A.I.R. MANUAL § 9 (1961).

256. [1994] 1 Lloyd's Rep. 45 (Q.B. 1993).

The English court found that the choice of London as the seat of arbitration carried with it the choice of English procedural law; consequently, English courts retained jurisdiction to supervise and assist the arbitration.[257]

The reluctance of courts at the seat of arbitration to relinquish supervisory jurisdiction is further illustrated by the case of *Union of India v. McDonnell Douglas Corp.*, in which the agreement between a United States airplane manufacturer and an Indian state corporation was governed by Indian law.[258] The arbitration clause specifically provided that "the seat of the arbitration proceedings shall be London, United Kingdom," but also provided that "the arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof."[259] The parties agreed to submit to the English court the issue of whether the law governing the arbitration proceedings was English or Indian law. Despite the unusual language of the contract specifying Indian procedural law, the English court found: (1) that the law governing the agreement to arbitrate was Indian law; (2) that the parties could not exclude the jurisdiction of the English courts over arbitration proceedings taking place in England, except to the extent permitted under English law; (3) that by their choice of England as the "seat" of arbitration the parties had intended the arbitration to be governed by English procedural, or curial, law; and (4) that the parties had chosen the provisions of the Indian Arbitration Act to govern the arbitral proceeding, but had not intended the Act to govern the external court supervision of the arbitration.[260] Although somewhat strained, this interpretation enabled the court to maintain intact the English system of assistance and judicial control over an arbitration whose seat was in London.

Wherever legal systems permit the parties to choose a *lex arbitri* other than the arbitration law applicable at the seat of arbitration, there exists potential for a conflict of curial laws, which could in turn lead to conflicting procedural obligations and multiple judicial review and annulment actions.[261] However, this has rarely happened, in part because the parties very seldom see any advantage to, and recognize the complications of, choosing to have the arbitral proceedings governed by a national arbitration law other than that of the seat of arbitration. Conflict has also been avoided by judicial interpretations which favor the application of the arbitration law at the seat of arbitration and interpret references to a foreign arbitration law as merely a contractual incorporation of rules of procedure. The trend of arbitration law reform, as marked by the provisions of the Model Law, is to reinforce this interpretation by emphasizing the territorial application of arbitration law. The problems caused by the extraterritorial application of procedural law in the Indian cases demonstrate the advantages that could be obtained by arbitration law reform aimed toward the harmonization of this basic procedural issue.

257. *Id.*

258. Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48 (Q.B. 1992).

259. *Id.* at 48.

260. *Id.* at 48–49.

261. *See* Park, *National Law and Commercial Justice*, *supra* note 52, at 655–56.

B. Judicial Assistance to the Arbitral Process

There are two major points of contact between arbitration and the courts. The first is judicial *supervision* of the arbitral process; that is, the intervention of the courts to control the jurisdiction of arbitral tribunals and to insure the efficacy of arbitral awards. This includes such judicial actions as staying court proceedings in favor of arbitration, referring parties to arbitration, enjoining or compelling arbitration, reviewing awards, and recognizing and enforcing awards. The second major point of contact is judicial *assistance* to the arbitral process itself.[262] With respect to the first point, we have seen trends (1) to protect the arbitral process from any premature intervention by courts, and (2) to presume the validity of arbitral awards by limiting the grounds upon which judicial recourse may be had, or recognition and enforcement denied. With respect to the second point, judicial assistance to the arbitral process itself, it is not possible to discern any uniform trend.

The drafters of the Model Law recognized that it was too soon to try to impose any uniformity in the field. The Model Law specifically provides for court involvement in only two groups of functions. The first group relates to the constitution of the arbitral tribunal,[263] the determination of the jurisdiction of the arbitral tribunal,[264] and the setting aside of the award.[265] All these matters are to be dealt with in a court or other competent authority designated in article 6.[266] The second group of functions includes court assistance in the taking of evidence[267] and the referral of parties to arbitration when a court action is brought in breach of an arbitration agreement.[268] The Model Law also provides for the recognition and enforcement of awards.[269] The Model Law states that requests for interim measures are not incompatible with arbitration,[270] but does not specify the kinds of interim measures available; these are defined by general provisions of law. Accordingly, the Model Law leaves it up to each state to determine what other measures of assistance or interim measures in support of arbitration it wishes to permit. However, articles 5 and 6 require that any additional court powers with respect to arbitration be specified in modifications made to the Model Law, and that all judicial powers regarding arbitration be vested in a single court whose identity is dearly specified in the law, so as to ensure centralization and specialization.

An informational note from the UNCITRAL Secretariat state:

> Beyond the instances in these two groups, "no court shall intervene in matters governed by this Law." This is stated in the innovative Article 5,

---

262. Goldman, *supra* note 36, at 257; J. Martin Hunter, *Judicial Assistance for the Arbitrator, in* CONTEMPORARY PROBLEMS, *supra* note 116, at 195; Joseph D. Becker, *The Supervisory and Adjunctive Jurisdiction of American Courts in Arbitration Cases, in id.* at 207.

263. The constitution of the arbitral tribunal would include the appointment of, and challenges to, arbitrators, and the termination of the arbitrator's mandate, as provided in articles 11, 13, and 14 of the Model Law. THE MODEL LAW, *supra* note 126, arts. 11, 13–14.

264. *Id.* art. 16.

265. *Id.* art. 34.

266. *Id.* art. 6.

267. *Id.* art. 27.

268. *Id.* art. 8.

269. *Id.* arts. 35–36.

270. *Id* art. 9.

> *which by itself does not take a stand on what is the appropriate role of the courts* but guarantees the reader and user will find all instances of possible intervention in this Law.[271]

Article 5 of the Model law provides that "[i]n matters governed by this Law, no court shall intervene except where so provided by this Law."

One type of judicial assistance, the taking of provisional measures in aid of arbitration, is related to enforcement powers over which the courts have a monopoly. If courts are responsible for the enforcement of arbitration awards, then it follows that they may intervene prior to the rendering of an award in order to assure the award's future enforceability. A court may do this by attachment, by preserving the subject matter of the dispute, or by enjoining conduct which might frustrate the arbitration agreement. Provisional measures such as attachment or injunction, however, are not defined by arbitration law, but rather by each country's civil procedure. These procedural laws vary tremendously, and there is currently no common factor, as there is for the conduct of the international arbitral proceedings, which can serve as a basis for harmonization.[272] Nevertheless, the time is ripe to consider the avoidance of conflict between national courts in granting provisional measures.

One important conflict concerns the issue of which courts should exercise jurisdiction over interim measures associated with arbitration.[273] One aspect of this conflict is explored by Alan Redfern in an article in this Symposium, entitled *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About To Turn?*, discussing the recent Channel Tunnel litigation in England.[274] Mr. Redfern argues that requests to courts for protective measures should not be considered violations of agreements to arbitrate. He goes on to note a growing recognition that judicial assistance of this nature should constitute an exception to the general disapproval of court intervention in modem international commercial arbitration practice. He also suggests, with a practical demonstration, that it is unrealistic to expect that such interim measures can be taken only by courts at the seat of arbitration. But if the right of courts to grant interim measures in connection with arbitration is generally recognized, the conditions under which such measures may be granted are not currently uniform, and neither the Model Law nor the relevant conventions provide standardized limitations on the scope of interim and provisional measures, or other means of avoiding conflict.

An examination of the difficult policy questions involved in whether a court should intervene and grant injunctive relief in respect of the arbitral process itself is found in Michael Collins' article in this Symposium, *Privacy and Confidentiality in*

---

271. *Explanatory Note, supra* note 134, at 18, para. 16 (emphasis added); *see also* HOLTZMANN & NEUHAUS, *supra* note 127, at 216–19 (pointing out the difficulty in determining general powers which may be exercised by courts in connection with international commercial arbitration but which are not governed by the Model Law and hence not restricted by it, and citing a list of such powers extracted from the *travaux préparatoires*).

272. For a summary of the varied laws for provisional remedies in support of arbitration in sixteen countries, see International Bar Ass'n, Interim Court Remedies in Support of Arbitration (David W. Shenton & Wolfgang Kuhn eds., 1987).

273. *See generally* CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION 118, 119 (ICC Int'l Court of Arbitration ed., 1993) [hereinafter CONSERVATORY MEASURES].

274. D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About To Turn?* 30 TEX. INT'L L.J. 71 (1995).

Arbitration Proceedings. Mr. Collins addresses the issue of whether a court should enjoin a party from using evidence or documents filed or disclosed by the opposing party for any purpose other than the arbitration itself. He concludes that the result will depend on the system of law governing the arbitration. Undoubtedly, such intervention will be more likely in countries such as England, where the courts have a close relation to the arbitral process and feel a duty to supervise and assist it.

Courts in such a country will be more likely to consider a breach of confidentiality in arbitration to have some equivalence to a breach of confidentiality in court proceedings and will feel justified in using exceptional injunctive relief on public policy grounds. In other states, courts may be content to leave the parties where they lie, limited to the remedies, or lack thereof, of the contractual arbitral process.

There is also a divergence of views on the underlying issue of the scope of arbitral confidentiality itself. Some legal systems are willing to imply broad obligations of secrecy and nondisclosure. Others are more laissez-faire and believe that whatever is not specifically forbidden is permitted. What are involved are not mere differences in law, but differences in culture and society, and different appreciations of the interest of secrecy and confidentiality. In these circumstances, a uniform approach to ancillary judicial measures protecting arbitral confidentiality cannot be expected.

Other judicial powers are directed toward assisting arbitrators and parties in the conduct of the arbitral proceedings themselves. Here there is a certain conflict between considerations which favor international commercial arbitration and would lead national courts to assist and encourage it, and considerations which have led to a certain delocalization of international arbitration from national legal systems and hence from the exercise of national judicial powers. If the international commercial arbitration movement generally seeks a loosening of judicial control over the arbitral process, and an emphasis on parties' contractual freedom to determine their own private arbitral procedure, then there is some inconsistency in demanding court assistance in gathering evidence, subpoenaing witnesses, or compelling the performance of other steps in the arbitration.

The hesitancy of courts to intervene in the arbitral proceedings themselves led one U.S. court, in refusing to intervene and order discovery in an arbitration, to make the classic remark that parties who agree to arbitration "relinquish rights to certain procedures and niceties which are normally associated with formal trial, including pretrial discovery."[275]

In the United States, courts retain the power to order discovery in connection with a pending arbitration. Historically, however, they have generally refrained from exercising that power except in the most exceptional and urgent circumstances.[276] That

275. Burton v. Bush, 614 F.2d 389, 389 (4th Cir. 1980). To the same effect, Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 361 (S.D.N.Y. 1957) states: "By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations."

276. *See* Charles Brower, *Discovery and Production of Evidence in the United States: Theory and Practice, in* TAKING OF EVIDENCE IN INTERNATIONAL ARBITRAL PROCEEDINGS 9 (ICC Inst. Of Int'l Business Law and Practice ed., 1990); Monica P. McCabe, *Arbitral Discovery and the Iran—United States Claims Tribunal Experience*, 20 A.B.A. INT'L L. 499, 503 (1986); Louis H. Willenken, *The Often Overlooked Use of Discovery in Aid of Arbitration and the Spread of the New York Rule to Federal Common Law*, 35 BUS. LAW. 173 (1979–80).

having been said, however, a contrary trend may be evidenced in the exercise of judicial power to compel and assist the taking of testimony for use in arbitration whose situs is abroad under 28 U.S.C. § 1782.[277] This statute, which provides for the assistance by U.S. courts to legal proceedings abroad, has been interpreted to include assistance to arbitral proceedings, and may be employed by a party to an arbitration without obtaining a prior order from the arbitral tribunal itself.[278] The rather unexpected result may be that U.S. courts provide more judicial assistance in taking evidence to foreign arbitral proceedings than to domestic arbitrations.

In other countries, the situation is mixed as well, and the judicial assistance available will depend upon the specific statutory provisions of the state involved. Modern arbitration statutes are not consistent in this area. Switzerland has gone far in offering judicial assistance to arbitral proceedings, but makes clear that most provisional measures, and orders concerning the taking of evidence, are within the jurisdiction of the arbitral tribunal.[279] Ordinarily the arbitral tribunal will make initial orders concerning the production of documents or the taking of testimony, and then seek judicial assistance if its orders are not complied with.[280]

The Netherlands Arbitration Act of 1986, a very comprehensive act containing some fifty-six sections, provides for general assistance by the courts to the arbitration process, including the power to grant interim measures and the novel power of consolidation or arbitral proceedings.[281] The main thrust of Act, however, is to grant broad procedural powers to the arbitrators, including the power to order parties to produce documents, and to draw appropriate inferences from any failure to do so. In some instances an arbitral tribunal may seek the assistance of the courts.

In France, on the other hand, the law relating to international arbitrations taking place in that country contains no provisions specifically authorizing the courts to intervene and order the production of documents in the arbitral process.[282]

In England, where there has traditionally been a close link between courts and the arbitral process, article 12(6) of the Arbitration Act of 1950 specifies eight areas where the courts are given the same powers that they enjoy in the conduct of

277. The provisions of this statute are based on an 1855 statute enabling a foreign state to seek judicial assistance in the United States to compel witnesses and gather information for proceedings abroad. Amendments to the act, and liberal interpretation by the courts, now permit not only arbitral tribunals, but parties to an arbitration taking place abroad, to obtain the assistance of U.S. courts in compelling discovery in the United States. *See* International Lit. Comm., Commercial & Fed. Litig. Section, *The Federal Assistance Statute: 28 U.S.C. Section 1782 and its Application to International Arbitrations*, 1994, N.Y. STATE B. ASS'N REP.

278. Application of Malev Hungarian Airlines, 964 F.2d 97 (2d Cir. 1992).

279. *See* Swiss Arbitration Statute art. 183.

280. *Id.* arts. 183–184. Swiss courts are not deprived of jurisdiction to order preliminary measures at the instance of a party, however. In some cases (attachment of assets, for instance), only courts have the requisite power to do it.

281. *See* Netherlands Arbitration Act art. 1046.

282. DE BOISSÉSON, *supra* note 162, Nos. 290–304, 741–754. Article 1460 of the NCPC, applicable to domestic arbitrations, and to international arbitrations where the parties have specifically so agreed, sets out the general rule that the arbitrator may order a party to produce evidence in its possession. The general powers of the court in summary proceedings (*en référé*) which is resorted to for provisional measures such as attachments and injunctions may sometimes also be used for the protection or gathering of evidence, most particularly by naming a court appointed expert to render a report or expertise. For a detailed report, see Gérard Pluyette, *The Role of the Courts and Problems Related to the Execution of Conservatory and Provisional Measures: The French Perspective, in* CONSERVATORY MEASURES, *supra* note 273, at 72–91.

proceedings in the High Court for the supervision and assistance of arbitral proceedings.[283] These powers include such common procedural devices as security for costs, discovery of documents, examination of witnesses on oath, preservation of goods, interim injunctions, and the appointment of a receiver.[284]

A recent House of Lords case illustrates the wide powers of the court over ancillary matters related to arbitral proceedings, and how court action in these matters may effectively preempt the agreed arbitral procedures. In *Coppée-Lavalin S.A./N.V. v. Ken-Ren Chemicals & Fertilizers Ltd.* (the *Ken-Ren* case),[285] the court had to consider whether it was appropriate to order the claimant in arbitration to post security for costs as a condition to the continuation of an ICC arbitration whose seat was in England. Under English law, the losing party may be required to pay the legal costs, including lawyers' fees, of the winners, and in some circumstances a claimant may be required to post security for such costs as a condition to proceeding with the litigation. Section 12(6) of the 1950 Arbitration Act provided that the High Court has the same power to order security for costs in arbitration as it does in court proceedings.[286] In a 1983 Court of Appeal case, *Bank Mellat v. Helliniki Techniki, S.A.*,[287] the court held that in determining the appropriateness of making an order for security for costs in connection with an international arbitration, the court would be guided by the degree of connection between the parties or to the arbitration on the one hand, and England and its legal system on the other. In *Bank Mellat*, the court concluded that, in view of the lack of connection between the parties and England, and the fact that they had agreed to the specific procedural regime of ICC international arbitration, it would be inappropriate to order security for costs, a measure which was considered somewhat exceptional under most systems of law. Under this reasoning, the outcome might have been different if the case had involved an arbitration closely connected with the English jurisdiction—for instance, commercial arbitration of a type regularly held in London, such as arbitration under the Maritime Arbitration Association Rules, or arbitration pursuant to an arbitration clause in a standard English form contract governed by English law.

Ken-Ren, which also involved an ICC arbitration, presented the court with a claim by an insolvent Kenyan corporation whose arbitration expenses were being funded by the state of Kenya. The court pointed out that if the claimant were not successful, the private corporate defendant would be entitled to costs, but there would be no means of recuperating them from the Kenyan party.[288] On the other hand, if a bond were ordered as a condition for going forward, the silent governmental party would be able to advance the necessary funds. A bare majority (3–2) of the Judicial Committee of the House of Lords decided that the mere fact that the arbitration was supervised by the ICC did not automatically mean that the court should not in its discretion order security, although it should rarely do so.[289] The court considered the

283. Arbitration Act 1950 § 12(6) (Eng.).

284. See MUSTILL & BOYD, *supra* note 151, at 296, 323–43, for a description of the wide powers of the court under article 1(b).

285. Coppée-Lavalin S.A./N.V. v. Ken-Ren Chems. & Fertilizers Ltd., [1994] 2 All E.R. 449 (appeal taken from Eng.).

286. Arbitration Act 1950 § 12(6) (Eng.).

287. Bank Mellat v. Helliniki Techniki, 1984 Q.B. 291 (C.A.).

288. *Ken-Ren*, [1994] 2 All E.R. at 477.

289. *Id.*

presence of the third party—who was funding the arbitration, but not effectively assuming all risk of loss—to be an exceptional circumstance which required an English court to exercise its discretion to order security for costs. The House of Lords, having reversed the decision of the court of appeal on this point, remanded the matter for the determination of adequate security for costs.[290]

The *Ken-Ren* decision illustrates the lack of generally accepted principles regarding the permitted, or desired, extent of judicial assistance in international arbitration. The possibility that an unsuccessful party may, in a final decision on the merits of the case, be required to contribute to the costs of his adversary is recognized in a number of legal systems, and indeed the ICC Rules permit arbitrators to make such an award.[291] The posting of security for costs according to court rules, however, remains a peculiarly English procedure, and is based on English statutes relating to judicial proceedings and the recovery of costs, including attorneys' fees, and the methods for determining such costs.[292] It is more than surprising that an English court—which under its legislation has the power to order the same ancillary relief in arbitration as it may in court proceedings—should be persuaded to order this measure in an arbitration that is governed by the rules of an international arbitral institution and has few contacts with the English legal system or other than the choice of London as the arbitration site.

The House of Lords decision recognized that if the claimant was unable to post security the arbitration would come to a halt, but stated that this was the ordinary result when a court order under section 12(6) of the 1950 Arbitration Act was not complied with.[293] The House of Lords failed to appreciate that its decision had the result of imposing on the claimant the worst aspects of both arbitration and litigation. Under ICC Rules, the claimant had to pay in advance one-half of all expected arbitration costs, including administrative costs of the supervising institution and the fees and expenses of the arbitrators.[294] Then, when the defendant failed to pay any part of its one-half share, the claimant had to pay the *defendant's* advance as well in order to unblock the arbitral proceeding.[295] From the perspective of a claimant who had agreed to settle all disputes by arbitration, this decision of the House of Lords to require the claimant to advance still more costs to continue arbitration added insult to injury. It also required the claimant, who had agreed with his opposing party to arbitration as the exclusive remedy for all disputes, to litigate in England's High Court, Court of Appeal, and the House of Lords before it could be determined under what conditions arbitral proceedings in England would be permitted to proceed. The *Ken-Ren* decision has been heavily criticized by the international arbitration bar, and it has been predicted that confirmation of judicial intervention to fix security for costs in these circumstances would have a deleterious effect on the attractiveness of England as a site for international arbitration.[296]

---

290. *Id.* at 452.

291. ICC RULES, *supra* note 72, art. 20(2).

292. Arbitration Act 1950 § 12(6)(e) (Eng.).

293. *Ken-Ren*, [1994] 2 All E.R. at 477.

294. ICC RULES, *supra* note 72, art. 9(2).

295. *Id.* art. 9.

296. Julian D.M. Lew, *Business and the Law: A Question of Costs*, FIN. TIMES (London), June 28, 1994, at 14: "This decision was based, primarily, on a belief that, if arbitration occurs in England, it must be subject not only to the supervision and control of English courts, but ultimately also to English procedural rules. . . . [B]y their approach the Law Lords have placed a disincentive to parties to come to arbitration in England."

The *Ken-Ren* case demonstrates the wide diversity in the area of ancillary measures in support of arbitration permitted under national laws. It also shows that with respect to measures of judicial assistance, national courts are very far from achieving an approach which is delocalized in outlook in the same manner as has been achieved with respect to the interaction of national law and the conduct of arbitral proceedings, and ultimately the recognition and enforcement of international arbitral awards.

C. Directions of Growth

This survey of legislative developments shows that through a combination of reform of existing legislation in most traditional arbitration centers, and the adoption of the UNCITRAL Model Law, or variations thereof, by a number of other states, a wide variety of jurisdictions have become acceptable seats for international arbitration. There is also a growing consensus at the traditional arbitration sites as to the amount of freedom to be given to the parties to agree to rules for the conduct of arbitral proceedings, and as to the scope of review to be undertaken by courts at the seat of arbitration. These advances are very significant and can only complement the already existing standards for recognition and enforcement of foreign awards established by convention.

At the same time, changes in patterns of trade and investment suggest that there may be a maturing of demands for arbitration at traditionally neutral arbitration sites in Europe. These sites developed to meet demonstrated needs based on trade flows between the United States, Europe, the Middle East, and Africa, and on what used to be called East-West trade. These needs will continue, including the need for dispute resolution facilities for parties in Eastern Europe and the C.I.S. states. It is worth noting, however, that while the traditional arbitration institutions and arbitration sites will continue to get their share of arbitration, more dramatic areas of growth can be seen in those regions of the world where arbitration has a shorter history: The Pacific Rim, Southeast Asia, and China. The growth of arbitration will be fueled, as always, by the needs of international business, but the direction it will take, and particularly the choice of arbitration sites, will also be a function of geography. These circumstances favor the selection and development of neutral arbitration centers in Asia, to the disadvantage of the traditional European locales.[297] Indeed, distances are so great in the Pacific that in many cases the fixing of an arbitration at a neutral site, rather than at the domicile of one of the parties, may be a luxury that the parties cannot afford except in very large cases.

At the present time, Hong Kong, having adopted the UNCITRAL Model Law and having a well-developed arbitration center and a skilled judiciary, ranks as the leading arbitration site in the region.[298] While the political neutrality of the site after Hong Kong's reversion to Chinese sovereignty in 1997 is questionable, it is possible

297. This is of course relative. Where important state interests are concerned, or where considerable amounts are at stake, a private investor may wish to continue to insist on the security of arbitration sites like Stockholm, Zurich, Paris, or Geneva which have been acceptable to Asian parties in the past.

298. *See* KAPLAN ET AL., *supra* note 17, at xxviii-xxxii; Neil Kaplan, *The Hong Kong Arbitration Ordinance: Some Features and Recent Amendments*, 1 AM. REV. INT'L ARB. 25 (1990); H. Edwin Anderson III, *Applicable Arbitration Rules for Maritime Disputes in Australia and Hong Kong*, 6 U.S.F. MAR. L.J. 387, 389–402 (1994); Howard S. Miller, *Hong Kong*, 14 TUL. MAR. L.J. 281, 281–82 (1990).

that the clarity of its law and the record its arbitral institutions and supervising courts will have established will be sufficiently positive factors to outweigh any disadvantage of its attachment to China, except perhaps in contracts directly touching upon Chinese sovereign interests.

China itself is making a major attempt to have foreign enterprises agree to arbitration in China under the procedures of the China International Economic and Trade Arbitration Association (CIETAC).[299] To this end it is in the process of modifying its arbitration law, and CIETAC, which went into effect on June 1, 1994, has revised and modernized its arbitration rules.[300] These rules reflect the influence of modern arbitration rules such as the ICC Rules and the UNCITRAL Rules.[301] Among other novel provisions, CIETAC rules permit the parties to agree on the use of a language other than Chinese.[302] CIETAC has also modified its panel of arbitrators to include a substantial number of well-known foreign arbitrators.[303]

Aside from Hong Kong, leading candidates for neutral arbitration sites in the Asia- Pacific region include Singapore, Kuala Lumpur, and, in Australia, which has adopted the UNCITRAL Model Law, Sydney and Melbourne.[304] The arbitration facilities in Singapore are excellent, and a newly enacted legislative provision has eliminated the effect of a judicial decision preventing foreign counsel from acting in arbitrations in Singapore, which would have dissuaded parties to international agreements from arbitrating there.[305] Kuala Lumpur is the home of the Regional Centre for Arbitration, set up by the Asian-African Consultative Committee with the cooperation of the Malaysian government, which provides for administration of international arbitration under the UNCITRAL Rules.[306] Under an interesting provision of the applicable Malaysian law, an award rendered under the provisions of those Rules becomes final and binding without possibility of any judicial recourse to Malaysian courts.[307]

---

299. *See* Stanley B. Lubman & Gregory C. Wajnowski, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 AM. REV. INT'L ARB. 107 (1993); Marcine A. Seid, *The Future of Chinese Arbitration in Dealing with Technology Transfer Investments in China*, 9 SANTA CLARA COMPUTER & HIGH TECH. L.J. 551, 567 (1993).

300. *See* Huang Yanming, *Some Remarks About the 1994 Rules of CIETAC and 'China's New International Arbitration Rules,'* J. INT'L ARB., Dec. 1994, at 105; Michael J. Moser, *China's New International Arbitration Rules*, J. INT'L ARB. Sept. 1994, at 5; Kent Chen, *New Rules to Improve and Speed Up Corporate Arbitration Process*, S. CHINA MORNING POST, Apr. 7, 1994, Business News sec., at 5.

301. *Id.*

302. *Id.*

303. *See* Seid, *supra* note 299, at 568.

304. International Arbitration Amendment Act 1989, No. 25 of 1989 (Australia), *reprinted in* MEALEY'S INT'L ARB. REP., June 1989, at G-1.

305. *Singapore to Remove Barriers to Foreign Lawyers*, MEALEY'S INT'L ARB. REP., Aug. 1991, at 7. Where Singapore law is applicable to the dispute, however, representations by a Singapore counsel is still required, although foreign counsel may assist. For the origins of the problem involving foreign counsel, see Andreas Lowenfeld, *Singapore and the Local Bar: Aberration or Ill Omen?*, 5 J. INT'L ARB., Sept. 1988, at 71.

306. *See* Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48, 85 n. 21 (1991); Terence P. Stewart & Margaret L.H. Png, *The Growth Triangle of Singapore, Malaysia, and Indonesia*, 23 GA. J. INT'L & COMP. L. 1, 41 (1993).

307. Malaysian Arbitration Act 1952 § 34 (as renewed 1972 and amended 1980); *see* Pieter Sanders, *Commentary*, 6 Y.B. COM. ARB. 194 (1981); Jan Paulsson, *Contracts en Asie: Kuala Lumpur comme lieu d'arbitrage*, 1994 R.D. AFF. INT'L 248 (noting that the barring of judicial review provisions of the law applies

Canada has also staked out a claim to participation in international arbitration affairs. By 1988, all of its provinces had adopted the UNCITRAL Model Law.[308] The Vancouver Arbitration Centre has been involved in Pacific Rim arbitrations and was recently the supervisory authority in an adaptation-of-contract dispute involving hundreds of millions of dollars between Japanese purchasers and Canadian timber interests. This dispute gave rise to an award which was challenged, and ultimately upheld, by the Canadian courts.[309] Canada can also rely on its reputation as a neutral country to attract arbitrations from the Pacific Rim.

Finally, American and European parties who contract with Asian parties may find that in certain cases the United States is more likely to be an acceptable arbitration site than in the past. In addition to the fact that there has been a recognition of the receptivity of U.S. courts to international arbitration practice, the very substantial Asian investment and immigration in the United States in recent years has made it a more familiar place to Asians.[310]

The interest of these geographical developments is that, in view of the great potential for growth, and the relative underdevelopment of international arbitration laws and institutions in the region, we may expect a continuation of initiatives, already underway through legislative reform and otherwise, to make various jurisdictions attractive venues for arbitration. There is strong evidence that the Model Law will play an important part in these developments, and that, even where a version of the law is not adopted, many of its values, endorsed by international arbitration experts from around the world, will be accepted. In this way, harmonization may come about even more rapidly in the Asia-Pacific region than in other regions of the world where arbitration practice, and the relationship between arbitration and the courts, is the product of long history and precedent.

D. Concluding Points: Diversity or Convergence?

1. Despite all the developments in arbitration laws and practice, most international arbitrations will proceed as a self-contained process. The parties will conduct their proceedings according to rules that they have agreed to by contract. These actions will not be substantially impacted by the contents of national procedural law at the seat of arbitration or elsewhere. This will be particularly the case where the counsel who assisted in drafting the arbitration clause took care to choose as the seat of arbitration a jurisdiction whose arbitration law gives wide freedom to the parties, or to the arbitrators, to determine how arbitral proceedings shall be conducted. International arbitrations can in this respect be compared to an iceberg: Above the surface is a small visible mass representing those cases where arbitrations intersect with national courts through ancillary proceedings, judicial recourse, enforcement actions, and disputed issues of applicable procedural law. Below the surface is the

---

only to arbitrations under the supervision of the Regional Centre that apply the UNCITRAL Rules, and not to other ad hoc or institutional arbitrations).

308. Shifman, *supra* note 188, at 296–300; Kevin C. Kennedy, *The Model on International Commercial Arbitration: It's Time for Michigan to Adopt It*, 72 MICH. BAR J. 192 (1993).

309. Quinette Coal Ltd. v. Nippon Steel Corp., 50 B.C.L.R.2d 207 (B.C. C.A. 1990) (Can.).

310. *See* Symposium, *Arbitration of Commercial Disputes in Mexico and the United States: A Panel Discussion*, 2 U.S.-MEX. L.J. 111, 116 (1994) (statement by Sergio Garcia-Rodriguez).

great preponderance of cases which proceed in a self-contained private system of justice, as they were intended to do.

2. This very partial survey shows substantial convergence in modern arbitration laws with respect to the procedures to be followed in arbitration and the standards for judicial recourse therefrom. The common denominator is the specific recognition, by the law of the place of arbitration, of a wide degree of party autonomy to agree to rules of arbitral procedure. This degree of convergence may be explained by the fact that the laws have been designed to accommodate themselves to international arbitral practices, and not vice versa. These arbitral practices have been developed under both institutional rules, such as the ICC Rules, and noninstitutional rules, such as the UNCITRAL Rules, and have been designed to accommodate the specific needs of international business. This is not only true of the Model Law but also of a number of the recently modified arbitration laws in countries such as France, Switzerland, and the Netherlands.

3. One of the surprising effects of the legislative reform movement has been to reinforce the concept of the territorial application of arbitration law and the importance of the law of the seat of arbitration. The insistence on the application of the arbitration law of the place of arbitration has not, however, been deleterious to international arbitration, because the contents of the law have been designed to attract international arbitration, to be user-friendly, and to specifically empower the parties to contractually specify arbitral procedures. The effect of the insistence on the territoriality of a country's arbitration law is to ensure that mandatory provisions of that law are applicable to arbitrations whose seat is in that country, even though the parties might seek to exclude them or adopt another procedural law. It would appear the better view that when the law of the place of arbitration permits a party to refer to another state's arbitration law for the establishment of arbitration procedures, this reference should be interpreted as a contractual incorporation of procedural rules, and not as the adoption of another *lex arbitri.*

4. The possibility of the recognition in an enforcement state of an award annulled where it was rendered has remained for the most part an academic construct. Recent French cases, which stress the autonomy of the arbitral process, demonstrate that the possibility for recognition exists where the grounds for refusal of enforcement under the enforcement country's legislation are narrower than those allowed by the New York Convention and narrower than the grounds for annulment in the rendering jurisdiction. This effect can only work one way, however; that is, in a manner more favorable to the arbitral award. A more dangerous possibility arising from non-recognition of the primacy of the procedural law of the place of arbitration is that of interference in the arbitral process by the courts whose law is applicable to the agreement in dispute, or to the agreement to arbitrate. As the Indian cases demonstrate, where courts other than those of the seat of arbitration intervene in pending arbitration, they risk derailing a process that is perfectly valid where it is taking place. Further, they claim to have standing to annul an award valid where it is rendered and eligible for recognition under the New York Convention. Such interventions are harmful to the arbitral process and create the risk of duplicative and conflicting judicial proceedings.

5. It is possible to imagine that there is such a phenomenon as "international arbitration practice," despite the existence of countless international arbitral institutions and a myriad of arrangements for ad hoc arbitrations in different fields, in

which there is a growing agreement as to the procedures to be followed and goals to be accomplished by this dispute resolution process. However, there is no international commercial arbitration law—there are only national arbitration laws. It is only through developments in national laws that the approaches to international arbitration have begun to converge. The Model Law will be a factor contributing to this harmonization and convergence.

6. When one moves away from the conduct of the arbitration itself, and the recognition of the award obtained thereby, to the field of judicial assistance to arbitration and interim measures of protection, one moves directly into the national laws of civil procedure. In this area, the natural diversity of national legal processes remains untouched by the unifying measures of a common arbitral process. As indicated by the very recent *Ken-Ren* case in the House of Lords, we can expect this diversity in the law of civil procedure, even that relating to international arbitration, to be with us for a long time.

APPENDIX

United Nations A/HRC/28/59

General Assembly

Distr.: General
22 December 2014
Original: English

Human Rights Council

Twenty-eighth session

Agenda item 3

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Financial complicity: Lending to States engaged in gross human rights violations

Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky*

Summary

The present report, submitted in accordance with Human Rights Council resolution 25/16, focuses on the question of lending to States engaged in gross human rights violations. It is intended to contribute to a better understanding of when financial support may contribute to, or sustain the commission of, large-scale gross human rights violations by sketching a rational choice framework premised on the incentives of authoritarian Governments and private and official lenders. In the report, the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, reviews the existing empirical evidence of the relationship between sovereign financing, human rights practices and the consolidation of Governments engaged in gross violations of human rights. In the report, the Independent Expert presents some interim conclusions and invites stakeholders to discuss them. The legal and policy implications of financial complicity will be discussed in a future study.

* Note by the Author: I would like to thank the *Texas International Law Journal* for reprinting in this Special Issue my report on financial complicity that was submitted to the twenty-eighth session of the United Nations Human Rights Council in March 2015. The report, dated 22 December 2014, has been published as UN Doc. No. A/HRC/28/59 and is also available in electronic format in Arabic, Chinese, French, Spanish, and Russian at www.undocs.org/A/HRC/28/59.

TABLE OF CONTENTS

I. INTRODUCTION

1. In his report to the General Assembly (A/69/273), the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, identified the question of lending to States that are responsible for gross human rights violations as one of his six thematic priorities. The holders of the mandate have repeatedly advocated that lending by international financial institutions, private actors and States should respect international human rights standards, in particular in the context of development cooperation and export credit insurance (see A/66/271 and A/68/542) calling for human rights safeguards in project financing or promoting a human rights-based approach to development cooperation (see A/HRC/25/50/Add.2 and A/HRC/17/37/Add.1). The main focus of the mandate has been to study the human rights impacts of foreign debt, debt relief, structural adjustment policies and austerity measures adopted in response to the debt crisis (see A/HRC/23/37 and Add. 1, A/HRC/25/50/Add.1 and Add. 3 and A/HRC/20/23/Add.1 and Add.2).

2. Previous mandate holders have not, however, addressed in detail the issue of what States, international financial institutions and private financial actors should do when they are confronted with the question of whether they should provide financial support to Governments or State institutions that are allegedly responsible for gross violations of human rights. In cases where States or other actors provide financial support in such contexts, how should they ensure that such support does not facilitate the commission of further gross human rights violations? The Human Rights Council has explicitly requested the Independent Expert to consider the effects of foreign debt and related financial obligations on the enjoyment of "all human rights", it is therefore more than appropriate to fill that gap, considering that the issue of financial complicity has, apart from some exceptions (see, for example, E/CN.4/Sub.2/412, Vols. I-IV and Corr. 1),[1] not been studied in a systematic manner by independent experts appointed by the United Nations.

3. The focus of the present report is on authoritarian regimes involved in gross human rights violations, but the Independent Expert also argues that there is a link to the protection of economic, social and cultural rights. Withdrawing financial support to States may negatively impact the enjoyment of economic, social and cultural rights for the affected populations, a problem that has been recognized, for example, in the context of comprehensive economic sanctions imposed by the Security Council. In addition, autocratic regimes have frequently perpetrated gross violations of human rights to suppress public dissent, violating core social, economic and cultural rights. Human rights defenders working on social rights, trade union representatives and land rights defenders are often the first to be targeted.

1. See also the report of the Special Rapporteur appointed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Assistance to Racist Regimes in Southern Africa. Impact on the Enjoyment of Human Rights* (United Nations publication, sales No. E.79.XIV.3). From 1981 to 1992, the Special Rapporteur continued to submit regular reports to the Commission on Human Rights and the General Assembly under the title "Adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to the racist and colonialist regime of South Africa", which also covered the issue of lending by States and commercial banks to the apartheid regime in South Africa.

4. There have been difficulties in understanding the causal link between sovereign financing and gross human rights violations by States. However, there is a rational explanation for why human rights violations committed by officials of authoritarian regimes may be influenced by the external financial support they receive.

5. Suitable legal and policy concepts are critical to recognizing better the connection between finance and gross human rights violations, taking into consideration the fungibility of the money and the complexity of the administrative and economic structures and the dynamics of authoritarian regimes. The purpose of the present report is to contribute to a better understanding of those links and provide a framework for a future report that will address some legal considerations pertinent to preventing financial complicity and holding lenders accountable for assisting in the empowerment of abusive regimes.

6. The Independent Expert follows the definition of complicity provided by the International Commission of Jurists: "enabling," "facilitating," or "exacerbating" human rights abuses through financing.[2] In order to address the notion of complicity and to grasp its implications in the financial field, the Independent Expert proposes a macro and holistic approach, interpreting the various connections to sovereign financing. In the present report, sovereign financing refers to every financial loan or provision of assistance to States which includes financing by private, bilateral or multilateral lenders, based on commercial, development or concessional objectives.

7. For the purpose of the present report, the Independent Expert understands "gross human rights violations" to mean severe and systematic violations of international human rights, which may amount to an international crime, as codified by the Rome Statute of the International Criminal Court, or any other systematic, widespread and severe violation of internationally recognized physical integrity rights, such as torture, enforced disappearances, extralegal, arbitrary or summary executions, or arbitrary detention.[3]

II. WHY DOES FINANCIAL COMPLICITY MATTER AND WHAT HAS THE UNITED NATIONS DONE IN THAT FIELD?

8. Political institutions influence sovereign borrowing, but lending to States also shapes the political institutions of the recipient, including those which are used to perpetrate crimes. That is the fundamental reason why it is important to reflect, from a human rights perspective, whether and under what conditions States engaging in gross human rights violations should receive financial assistance.

9. During the founding years of the United Nations, the issue of financial complicity came up during the 12 subsequent war crimes trials held by the United States of America in Nuremberg after the Second World War. The Military Tribunal of Nuremberg, when judging whether certain German industrialists who had donated

2. See International Commission of Jurists, *Corporate Complicity and Legal Accountability* (Geneva, International Commission of Jurists, 2008), vol. 1.

3. This definition is set out only to clarify the meaning of gross violations of human rights for the purpose of the present report, in order to emphasize that the Independent Expert has in mind multiple and large-scale violations of such rights. That should not be interpreted as an attempt to come up with an official definition of the term for the United Nations, or limit the scope of application of the term to civil integrity rights only.

money to the Schutzstaffel (SS) were responsible for criminal acts, reasoned that "it remains clear from the evidence that each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas."[4] To hold them criminally liable, the Military Tribunal found it sufficient to prove that two of the defendants, Flick and Steinbrinck, regularly provided substantial funds to a State organization responsible for the mass extermination of Jews, brutalities and killings in concentration camps, and other crimes under international law. The Nuremberg Trials were not held under the auspices of the United Nations and the crimes against humanity adjudicated in Nuremberg were of an unprecedented nature, but the ruling was nevertheless a landmark judgement, emphasizing that individuals may incur liability under international criminal law for financially contributing to a State organization responsible for mass extermination, war crimes and other gross violations of human rights.

10. At the United Nations, the question of whether States, international financial institutions or private finance should refrain from lending to States involved in gross human rights violations has mainly been discussed in the context of sanctions. Several sets of economic sanctions, or lending bans, have been called for by the General Assembly or imposed by the Security Council, with the aim of curtailing or minimizing gross human rights violations. In the 1960s, the General Assembly requested the World Bank and other international institutions to refrain from lending to South Africa and Portugal because of their poor human rights records. While the request was initially fruitless, the World Bank did stop approving further loans to the apartheid regime after 1966;[5] the International Monetary Fund (IMF), however, continued lending to South Africa until 1983. Human rights concerns were at the core of the first comprehensive sanctions regime of the United Nations, imposed on the white minority regime in Southern Rhodesia by the Security Council in resolution 253 (1968), which included a prohibition on making investment funds or any other financial or economic resources available to the illegal regime.

11. In 1977, Antonio Cassese was appointed as Special Rapporteur by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities with the specific mandate of assessing the link between the financial aid then being allocated to the Pinochet military regime and the human rights violations suffered by the Chilean population. His report analysed the political, institutional, economic, budgetary, fiscal and financial conditions then prevailing in Chile and considered how financial aid contributed in this context to the commission of the crimes of the regime, and several countries decided to not lend to the Pinochet regime because of its human rights record (see E/CN.4/Sub.2/412, vols. I–IV).

12. The pros and cons of more comprehensive economic sanctions against the apartheid regime in South Africa were feverishly debated for more than two decades. While mandatory sanctions imposed on the regime by the Security Council in resolutions 181 (1963) and 418 (1977) were limited to an arms embargo and to a

4. *United States* v. *Flick*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. VI (Washington, D.C., United States Government Printing Office, 1952).

5. See Samuel A. Bleicher, "UN v. IBRD: a dilemma of functionalism" *International Organization*, vol. 4, No.1 (winter 1970) and E/CN.4/Sub.2/1987/8/Rev.1, para. 54.

prohibition of military and nuclear cooperation, the General Assembly repeatedly urged the Security Council to consider comprehensive mandatory sanctions against the racist regime in South Africa, condemned transnational corporations and financial institutions that continued to collaborate with South Africa and repeatedly called upon the IMF "to terminate credit and other assistance to the racist regime of South Africa".[6] In 1987, in resolution 42/23B, the General Assembly urged all States to induce transnational corporations, banks and financial institutions to withdraw effectively from South Africa and prevent them from investing in the country and granting loans and credits to South Africa, and to hold them accountable for any transgressions.[7]

13. After the end of the cold war, the Security Council applied comprehensive sanctions, including financial sanctions, to Iraq (1990–2003), Libya, the former Yugoslavia (during the 1991–96 break-up) and Haiti (1993–94).[8] In the case of Yugoslavia, the Security Council decided in resolution 757 (1992) that no State should make any funds available to the authorities or any commercial, industrial or public utility in the Federal Republic of Yugoslavia and should prevent any person within their own territories from making those funds available (except payments exclusively for medical or humanitarian purposes and foodstuffs). The sanctions were justified by ceasefire violations, forcible expulsions and attempts to change the ethnic composition of the populations in Bosnia and Herzegovina and Croatia.

14. The sanctions regime imposed on Iraq and Haiti raised serious concerns about their adverse impact on the enjoyment of economic, social and cultural rights by the affected population,[9] prompting the Committee on Economic, Social and Cultural Rights to adopt its general comment No. 8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights.

15. To avoid such negative effects on the enjoyment of human rights, Security Council sanctions have become more targeted and have included arms embargoes, travel bans, financial sanctions and comprehensive asset freezes on specified individuals and entities. The majority of current sanctions regimes of the United Nations include, as part of their justification, violations of international human rights or humanitarian law, or make explicit reference to particular violations, such as recruiting child soldiers, committing rape and gender-based violence, targeting civilians and other similar offences.[10] Sanctions have been imposed on individuals in decision-making positions and on non-State actors, such as rebel and terrorist groups, and private sector actors. As of November 2013, there were 575 individuals and 414

6. See, for example, General Assembly resolutions 40/64A and 41/35B.

7. The General Assembly had earlier requested all States, pending Security Council action, to adopt legislative and/or other measures to ensure, inter alia, the prohibition of financial loans and investments and the withdrawal of investments from South Africa. See, for example, resolution 40/64.

8. See Security Council resolutions 661 (1990), 748 (1992), 757 (1992), 820 (1993) and 841 (1993).

9. See, for example, Center for Economic and Social Rights, "UN-sanctioned suffering: a human rights assessment of United Nations Sanctions on Iraq" (New York, May 1996), available from http://cesr.org/downloads/Unsanctioned%20Suffering%201996.pdf; George. A. Lopez and David Cortright, "Economic sanctions and human rights: part of the problem or part of the solution?" *International Journal of Human Rights*, vol. 1, No. 2 (1997); E. Gibbons and R. Garfield, "The impact of economic sanctions on health and human rights in Haiti, 1991 to 1994", *American Journal of Public Health*, vol. 89, No. 10 (October 1999); and E/CN.4/Sub.2/2000/33.

10. See, for example, Security Council resolutions 1533 (2004), 1572 (2004), 1591 (2005), 1970 (2011) and 2127 (2013).

entities designated for asset freezes by the Security Council.[11] While targeted sanctions avoid a number of negative human rights impacts associated with comprehensive economic or financial sanctions, they have raised concerns about due process and unintended negative impacts on economic, social and cultural rights, such as blocking legitimate humanitarian work or preventing the transmission of remittances to family members abroad (see, for example, A/HRC/16/50, paras. 1–27, A/65/258 and A/HRC/6/17 paras. 42–50).

16. In the case of terrorism, money received by a suspect terrorist group may not have been used to actually commit an act of terrorism.[12] However, that does not mean that the funding did not sustain a terror group and its terrorist acts. The issue may be more complex in relation to funding provided to States perpetrating gross violations of human rights, but the same argument can be made.

17. One would of course have to differentiate between whether funding provided to States directly finances the commission of gross violations of human rights, or maintains the general functioning and sustainability of a regime that violates human rights, and to what extent funds provided to such regimes might still be used for the realization of human rights, including social and economic rights.[13] Sometimes funds facilitate the commission of gross human rights violations in a more direct way, for example when they are used to equip intelligence services, police or other security forces with tools or weapons of repression. In many cases, financial support may rather have an indirect effect through enabling a regime that violates human rights to last longer by, for example, allowing it to fund patronage. We need to better understand when, whether and how official and private lending may contribute to gross human rights violations, in order to design and implement effective laws and policies at the national and international level aimed at minimizing the risk that financial support enables Governments or non-State actors to commit such violations.

18. With the present report, the Independent Expert intends to contribute to a better understanding of when financial support may contribute to or sustain the commission of large-scale gross human rights violations by sketching a rational choice framework premised on the incentives of authoritarian Governments and private and official lenders. As developed further below, authoritarian regimes make rational policy choices when they try to stay in power, using available funds to foster loyalty or repress opponents. Lenders also make rational calculations when deciding on loans, for which the likelihood that they will be paid back is key. Complementing the qualitative explanation, the Independent Expert will discuss the existing empirical evidence of the relationship that exists between sovereign financing, human rights practices and the consolidation of non-democratic Governments engaged in gross violations of human rights. Finally, the Independent Expert will present some interim conclusions and

11. Security Council special research report, "UN sanctions", 25 November 2013, available from www.securitycouncilreport.org.

12. See the discussion in *Holder* v. *Humanitarian Law Project*, US, 130 S .Ct. 2705 (S.C., 2010); *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008); *Almog et al.* v. *Arab Bank plc*, 471F.Supp.2d 257 (E.D.N.Y. 2007); *Weiss et al.* v. *National Westminster Bank plc*, 453 F.Supp.2d 609 (E.D.N.Y. 2006); *In re Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765 (S.D.N.Y. 2005); *Linde v. Arab Bank plc*, 384 F.Supp.2d 571 (E.D.N.Y. 2005).

13. Those ideas have been developed by the Independent Expert in "Tracking down the missing financial link in transitional justice", *International Human Rights Law Review*, vol. 1, No. 1 (2012).

invite stakeholders to discuss them. The legal and policy implications of financial complicity will be discussed in a future study.

III. HOW ADDITIONAL FUNDS CONSOLIDATE AUTHORITARIAN REGIMES IN MOST SITUATIONS

19. Authoritarian regimes committing gross human rights violations are politically vulnerable because of their problems of legitimation. Such regimes endeavour to retain power and do so by securing privileges for part of the population, the elites, the military or the security apparatus, by allocating economic benefits and/or political concessions in exchange for support. To remain in power, a regime must address economic constraints in ways that secure a minimum of political support, or enable the bureaucratic or repressive machinery to function efficiently, control society or repress the population. There is a mutually sustaining interaction between loyalty and repression, but there are also trade-offs, depending on the target of the strategies.[14] Both tactics require that Governments possess sufficient economic resources. The national economy, and more specifically the State budget, must support an effective system to buy loyalty or ensure repression.

20. Loyalties can be acquired through (targeted) economic benefits that can consist of resource transfers, subsidies, tariff protections and regulations that guarantee profits, employment and consumption. At the same time, public finance and repressive expenditures should be considered: the budget allocation and bureaucratic apparatus will reflect, to some extent, the repressive capacity and policy of the regime. The loyalty of the military, police or secret services in controlling or repressing opponents are imperative priorities for autocratic regimes that rule mainly through violence. Consequently, global data confirm that autocratic regimes frequently increase military budgets and often overcompensate the military police and other officials who control instruments of violence and coercion.[15] Indeed, military expenditures used to strengthen the coercive capacity of the regime and its stability,[16] have been found to contribute strongly to a country's external debt burden.[17]

21. It is true that Governments can frequently sustain themselves by taxes, income generated by investments, trade in commodities and other internal revenue, allowing

---

14. See Daron Acemoglu and James A. Robinson, *Economic Origins of Dictatorship and Democracy* (New York, Cambridge University Press, 2005); Bruce Bueno de Mesquita and others, *The Logic of Political Survival* (Massachusetts Institute of Technology Press, 2003); Ronald Wintrobe, *The Political Economy of Dictatorship* (Cambridge University Press, 1998).

15. See Justin Conrad, "Narrow interests and military resource allocation in autocratic regimes", *Journal of Peace Research*, vol. 50, No. 6 (November 2013). Specifically for military expenditures by Latin American dictatorships, see Thomas Scheetz, "The evolution of public sector expenditures: changing political priorities in Argentina, Chile, Paraguay and Peru", *Journal of Peace Research*, vol. 29, No. 2 (May 1992).

16. See Michael Albertus and Victor Menaldo, "Coercive capacity and the prospects for democratization", *Comparative Politics*, vol. 44, No. 2 (January 2012).

17. See, among others Robert E. Looney, "The influence of arms imports on Third World debt", *Journal of Developing Areas*, vol. 3, No. 2 (January 1989); John Dunne, Samuel Perlo-Freeman and Aylin Soydan, "Military expenditure and debt in small industrialised economies: a panel analysis", *Defence and Peace Economics*, vol. 15, No. 2 (2004); Russell Smyth and Paresh Kumar Narayan, "A panel data analysis of the military expenditure-external debt nexus: evidence from six Middle Eastern Countries", *Journal of Peace Research*, vol. 46, No. 2 (March 2009).

them to buy key loyalties and fund agencies of repression, but sovereign financing may frequently be crucial for maintaining autocratic rule and overcoming critical periods of dissent or economic downturns. With a longer time horizon in mind, it is reasonable to expect that external actors who contribute financially to the regular functioning of a regime that violates human rights are helping to consolidate it. Sovereign financing may assist it in attaining its principal feature: retaining power, either through the acquisition and maintenance of key loyalties, or the use of coercion to minimize and marginalize dissident voices. In many authoritarian regimes, the majority of the population remain in a situation of exclusion or dependency, unable to improve their condition or the way they are ruled, fearful that dissent may result in discrimination, torture or death. Freedom of association and assembly are limited, so that dissident voices cannot organize collectively or call for changes. Sovereign financing may serve to further uphold that status quo.

22. As money is fungible, funds lent or granted to a regime committing gross human rights violations might of course also be spent in a beneficial way. However, there are several reasons why such economic support may not be in the long-term interest of the population.

23. Firstly, even if it is proven that loans are employed for a beneficial use, such spending could also release other funds that can then be spent for harmful purposes. If lending is used to build roads, construct homes or other public infrastructure, there is little doubt that external financing was not directly allocated for repressive use. However, such projects may also be critical to quelling discontent or buying loyalty. Even funds allocated directly to social programmes or projects aimed at realizing economic, social and cultural rights can reduce social and political protest and resistance, thus prolonging the survival of the regime. Furthermore, government revenue that would otherwise have been spent on social or economic development can be distributed to strengthen clientelistic relations and fortify the national security system.

24. External funds may temporarily provide more fiscal space for regimes so that they can rely more on buying loyalties and depend less on repression. In fact, when Governments take into consideration the preferences of outside (non-supportive) groups that have their own financial and budgetary priorities, they will probably garner some social and political support, while at the same time contributing to their primary goal which, in the case of authoritarian regimes, may imply surviving in power and carrying out their political and economic plans.[18]

25. Secondly, while the domestic population may perceive that there has been a short-term improvement in well-being, as a result of additional public spending, that is directly at odds with the positive conditions that normally surround the enjoyment of human rights. Multilateral loans might not really benefit the enjoyment of human, social and economic rights, but may have a propagandistic purpose in making a regime look more benign externally than it actually is. The docile nature of the population can potentially be misinterpreted as acceptance of, or support for, a regime, confusing public compliance with expediency. In his report of 1977, the Special Rapporteur of

18. See Sabine Michalowski and Juan Pablo Bohoslavsky, "Ius cogens, transitional justice and other trends of the debate on odious debts: a response to the World Bank discussion paper on odious debts", *Columbia Journal of Transnational Law*, vol. 48, No. 1 (2010).

the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities demonstrated that sentiment in the case of the Pinochet regime. Authoritarian regimes have sometimes been able to withstand international pressure from other countries, or the United Nations, to improve their human rights record, because multilateral banks not only provide direct financial assistance to repressive Governments but also facilitate access to more sizeable amounts of private capital.

26. Finally, Governments with access to foreign income usually rely much less on the taxes levied from their citizens to obtain revenues.[19] That gives political elites little or no incentive to grant democratic representation, or the right to effective political participation, to citizens in exchange for their economic compliance as taxpayers. Economic elites and other relevant groups may be rewarded without the need for political bargaining, voter control or democratic decision-making on the use of funds. As has been explained, "in developing countries, tax bases are typically narrow and the state's ability to extract taxes is notoriously limited. Therefore, governments utilize their ability to sell loans internationally to generate revenue needed to fund domestic spending projects."[20] However, under authoritarian Governments, those public spending projects have clear and specific political objectives, including rewarding the loyalty of regime insiders, self-enrichment and financing the coercive apparatus.[21]

27. Increases and decreases in external financing can impact human rights in various ways. There are obviously cases in which foreign (including financial) investments can actually benefit the enjoyment of social and economic rights or promote the virtuous circle of growth and democratization, fostering greater respect for civil and political rights, but additional financing can also have the reverse effect. Debates on the effectiveness of international sanctions reflect the existing uncertainty as to whether reduced lending or economic support will lead to the desired policy outcomes, including better respect for human rights.[22] There are several examples in which sanctions limiting foreign investments contributed to a reduction in repression, but sanctions have also sometimes pushed regimes into intensified repression. The matrix below provides a framework highlighting the potential effects loans provided to an authoritarian regime may have on human rights. Frequently those effects will be mixed.

Interlinks between finance and human rights, possible scenarios

19. On oil revenues, see Kevin Morrison, "Oil, nontax revenue, and the redistributional foundations of regime stability", *International Organization*, vol. 63, No. 1 (January 2009). See also Michael L. Ross, "Does taxation lead to representation?" *British Journal of Political Science*, vol. 34, No. 2 (April 2004).

20. Irfan Nooruddin, "The political economy of national debt burdens, 1970-2000", *International Interactions*, vol. 34, No. 2 (June 2008).

21. William Easterly, "How did heavily indebted poor countries become heavily indebted? Reviewing two decades of debt relief", *World Development*, vol. 30, No. 10 (2002).

22. See Joy Gordon, "Smart sanctions revisited", *Ethics & International Affairs*, vol. 25, No. 3 (Fall 2011); David Lektzian and Mark Souva, "An institutional theory of sanctions onset and success", *Journal of Conflict Resolution*, vol. 51, No. 6 (December 2007); William H. Kaempfer, Anton D. Lowenberg and William Mertens, "International economic sanctions against a dictator", *Economics and Politics*, vol. 16, No. 1 (March 2004); and Dursun Peksen, "Better or worse? The effect of economic sanctions on human rights", *Journal of Peace Research*, vol. 46, No. 1 (January 2009).

	More human rights violations	*Fewer human rights violations*
More funds	Strengthen the regime, free up funds for criminal purposes	Promote the circle of growth and democratization or directly benefit the people
Fewer funds	Provoke instability and subsequently more repression	Weaken the regime and open up a democratic transition

28. Cutting off loans can destabilize authoritarian regimes, but whether increased repression will ensue is a more complex question. Two different outcomes are possible: when a regime faces financial constraints and cuts the resources for its population, dissent may occur and the regime may retaliate with elevated repression in the short term. Social and economic instability can beget escalation effects, radicalization of opposition groups and even defections from the security forces. The alternative scenario is that financial difficulties actually reduce repression, because the State has less financial capacity to operate its repressive apparatus, thus reducing the medium- and long-term sustainability of the regime, and ultimately shortening its political life. In sum, refraining from lending to a regime may have negative or positive outcomes depending on those different chains of causality. There are trade-offs between buying loyalty and repression and the regime may be unable to find a sustainable equilibrium between those two options.

29. It should be noted that gross human rights violations are increasingly committed in failed States or in the context of weak government structures. A further withdrawal of lending to weak or failing States could therefore cause further harm, as in such contexts the loss of administrative capacity and the lack of effectiveness of law enforcement by the State is a fertile ground for human rights abuses by private individuals or rogue agents of the State.[23] Weakening a State and its law enforcement institutions may sometimes increase the probability of gross human rights violations by further decreasing State capacity. However, just providing funding to a weak or failed State, or its law enforcement authorities, is unlikely to ensure the building-up of State institutions based on the rule of law and respect for human rights. The risk is that resources will rather be invested in repressive, State structures that disrespect human rights, or allocated to sustaining patronage networks.

30. As every situation needs to be separately assessed, lenders should respect fundamental due diligence standards, in order to understand the likely consequences of their own behaviour. Risk analysis should not only be focused on the likelihood of whether the loan will be serviced in the future, but needs to assess the impact lending will have on the population and their enjoyment of human rights. That includes not only considering whether the funds will consolidate an authoritarian regime, but also whether the debt obligations imposed on future generations of the country are just. To make informed decisions about their lending, States, the international community, multinational financial institutions and private lenders need to understand how the regime finances itself; to what extent it is dependent on external financing; which State

23. For an empirical study providing evidence for this trend, see, for example, Neil A. Englehart, "State capacity, State failure, and human rights", *Journal of Peace Research*, vol. 46, No. 2 (March 2009).

agencies or other actors are mainly responsible for gross human rights violations; what the intentions of the regime are; and whether there are opportunities for a transition to democracy. When financial assistance would predictably contribute to strengthening a regime perpetrating gross human rights abuses, lenders should refrain from allocating funding that will sustain it. Curbing lending under that scenario would ceteris paribus presumably lead to lower levels of human rights abuses in the country.

31. The Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities explained that point in his report on the financial contributions received by the Pinochet regime: depending on the circumstances, financial assistance can have a positive or negative impact on the human rights situation of any given country. Loans with the precise objective of building houses for the poorest and funds that are earmarked to alleviate suffering will be less likely to have a negative impact than loans granted for general spending needs.

32. To some extent, State behaviour has already become sensitive to such human rights arguments. A recent study analysing how States responded to physical integrity violations in developing countries in their bilateral development assistance between 1981 and 2004, revealed that, overall, donor States reduced their infrastructure, general budget and programme support for countries in which physical integrity violations had increased. On average, however, in such countries they maintained their development spending for the social sector, including health, education and water supply, or the promotion of human rights and democratization.[24] However, bilateral development financing is only a small part of all financial support or lending and the Independent Expert is not aware of studies that have analysed in a similar way non-concessional lending by States or private lenders.

33. Experience with past lending and recent developments should be analysed by lenders to enable them to recognize changing trends. A due diligence analysis should take into consideration at least the following information and factors: the amount, type, objective and timing of the proposed loans; information from post-disbursement monitoring of earlier loans; the growth of debt and the sustainability of public funds to service further debt; the type and character of gross human rights violations and potential changes in the human rights record of the country in question; information from civil society; the nature of the authoritarian regime; and the actions taken by international organizations and other Governments. Hence, a due diligence analysis to assess the impact of loans or additional loans on human rights should be viewed as a continuous process.

34. At the time lending decisions are made, a micro- and macroanalysis of the situation of the borrowing country should include the following questions:

(a) Whether the money would directly serve, or be easily diverted, to finance human rights violations (for example, funding for death squads, death camps, weapons or other tools to repress or control the population);

(b) Whether financial resources provided to the Government would make the regime politically stronger or extend its life;

(c) Whether the loan would improve the enjoyment of economic and social rights of marginalized people, or would more likely be used to sustain

24. Richard A. Nielsen, "Rewarding human rights? Selective aid sanctions against repressive States", *International Studies Quarterly*, vol. 57, No. 4 (December 2013).

clientelistic relations, or whether funding spent in the social sector would rather free government funds for repressive investments than improve the overall human rights situation.

35. Lenders should ask themselves those questions before granting any loan. Failing to exercise due diligence may not only come with considerable reputational risk. As legal standards and customs in the area of business and human rights are evolving, it cannot be ruled out that courts may start reviewing such lending decisions, even if many years later.[25]

IV. DO FUNDS CONSOLIDATE REGIMES ENGAGED IN GROSS VIOLATIONS OF HUMAN RIGHTS?

36. As explained in the previous section, in theory, net lending may have a profound influence on regimes engaged in gross violations of human rights. Funds can influence regime structure and stability, as well as the choices for survival and domination of the elite of a country. However, to what extent is the theoretical, rational choice explanation of the abusive behaviour of a regime confirmed by reality?

37. It should be noted that there has been some research analysing whether lending by international financial institutions or structural adjustment programmes imposed by them have had an impact on physical integrity rights. Those studies found that World Bank and IMF adjustment programmes lowered the overall level of government respect for human rights, including physical integrity rights.[26] While some scholars have found that net World Bank and IMF lending has improved respect for human rights, their data confirms that physical integrity rights increase when payback of loans exceeds new loans, suggesting that it is not the painful payment process which triggers such violations, but rather an indicator of a domestic crisis fuelling repression.[27]

38. Other studies have assessed whether development assistance or conditionalities attached to such lending have been able to reduce human rights violations, showing disparate results.[28] While some scholars find that European Union development assistance has had overall a positive impact on certain human rights, such as the right to freedom of movement, freedom of religion and workers' rights, other experts have

---

25. In recent civil lawsuits in Argentina, based on responsibility for financing criminal regimes, victims have sued the banks that financed the military junta between 1976 and 1983. Those cases include *Ibañez Manuel Leandro y otros casos/Diligencia Preliminar*, Juzgado Nacional de 1° Instancia en lo Civil 34, Buenos Aires, No. 95.019/2009; and *Garramone, Andrés* c. *Citibank NA y otros*, 2010, Juzgado Nacional en lo Contencioso Administrativo Federal N° 8, Buenos Aires, N° 47736/10. See also Juan Pablo Bohoslavsky and Veerle Opgenhaffen, "The past and present of corporate complicity: financing the Argentinian dictatorship", *Harvard Human Rights Journal*, vol. 23, No. 1 (October 2010).

26. See for example M. Rodwan Abouharb and David L. Cingranelli, "The human rights effects of World Bank structural adjustment, 1981–2000," *International Studies Quarterly*, vol. 50, No. 2 (June 2006) and by the same authors, "IMF programs and human rights, 1981–2003", *Review of International Organizations*, vol. 4, No. 1 (March 2009).

27. Silja Eriksen and Indra de Soysa "A fate worse than debt? International financial institutions and human rights, 1981–2003", *Journal of Peace Research*, vol. 46, No. 4 (July 2009).

28. For a reflection on and discussion of the link between foreign aid and political liberalization in the recipient country, see Abel Escribà Folch and Joseph Wright "*Foreign Pressure and the Politics of Autocratic Survival*", ch. 4 (forthcoming from Oxford University Press).

concluded that United States foreign aid, despite human rights conditionalities, is associated with increased physical integrity violations.[29]

39. Studies have also been carried out on the impact of economic sanctions on different autocratic regimes and their human rights record, finding that the likelihood of repression depends on the type of autocratic system.[30] They have, however, not investigated the impact of net lending on human rights. The Independent Expert is therefore not aware of any empirical research tackling the specific question of the link between foreign debt and regime survival in a systematic way. It is crucial to explore that issue, as the question he is raising has obvious policy and legal implications.

40. In the following paragraphs, the Independent Expert will discuss some preliminary evidence of the relationship between foreign financing and the likelihood that an authoritarian regime transitions to democratic rule.[31] He is using democratic governance as a proxy indicator for a low likelihood that gross human rights violations are being committed. Ideally, reliable data on gross human rights violations would need to be compiled as well, to assess whether there is a direct correlation between lending and gross human rights violations, but there are several methodological challenges. For example, there is no data set available which tracks over a long period and a large number of countries to what extent States have or have not been engaged in gross violations of human rights. While several data sets exist, which measure on a country basis violations of physical integrity, they usually fail to include in a systematic way information produced by the human rights mechanisms of the United Nations. The Independent Expert was therefore hesitant about using them for this report.

41. Using democratic governance as a proxy indicator for a low likelihood of gross human rights violations can nevertheless be justified. Empirical studies have found a close and consistent correlation between democratic governance and respect for human rights, including physical integrity rights, using different data sets.[32] In other words, widespread and systematic gross human rights violations are rather seldom found in countries that show certain fundamental features of democratic governance.

---

29. See, for example, Allison Sovey Carnegie, Peter M. Aronow, and Nikolay Marinov, "The effects of aid on rights and governance. Evidence from a natural experiment", unpublished working paper, 6 August 2012, available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2124994. See also Hyun Ju Lee, "The impact of U.S. foreign aid on human rights conditions in post-Cold War era", Iowa State University graduate theses and dissertations, available from http://lib.dr.iastate.edu/etd/12068.

30. See, for example, Abel Escribà-Folch, "Authoritarian responses to foreign pressure, spending, repression, and sanctions", *Comparative Political Studies*, vol. 45, No. 6 (June 2012) and Christian Davenport "State repression and the tyrannical peace", *Journal of Peace Research*, vol. 44, No. 4 (July 2007). It is argued that single party systems, especially those that involve more people and organizations, are less likely to engage in repression than other types of autocratic regimes, such as dictators or military regimes.

31. This section is based on research undertaken by the Independent Expert, together with Abel Escribà-Folch. See Juan Pablo Bohoslavsky and Abel Escribà-Folch, "Rational choice and financial complicity with human rights abuses: policy and legal implications" in *Making Sovereign Financing and Human Rights Work*, Juan Pablo Bohoslavsky and Jernej Letnar Cernic, eds. (Oxford, Hart Publishing, 2014).

32. See, for example, Christian Davenport, "The promise of democratic pacification: an empirical assessment", *International Studies Quarterly*, vol. 48, No. 3 (September 2004); Christian Davenport and David A. Armstrong, "Democracy and the violation of human rights: a statistical analysis from 1976 to 1996", *American Journal of Political Science*, vol. 48, No. 3 (July 2004); Steven C. Poe, and C. Neal Tate, Repression of human rights to personal integrity in the 1980s: a global analysis", *American Political Science Review*, vol. 88, No. 4 (December 1994); and Steven C. Poe, C. Neal Tate and Linda Camp Keith "Repression of the human right to personal integrity revisited: a global cross-national study covering the years 1976–1993", *International Studies Quarterly*, vol. 43, No. 2 (June 1999).

The close link between human rights and democratic governance is not only well tested by empirical research, but has also been stressed in resolutions of the General Assembly (55/96), the Commission on Human Rights (2000/47 and 2002/46) and the Human Rights Council (19/36).

42. Of course there some caveats: authoritarian or non-democratic regimes are not tantamount to systematic and gross violators of human rights. There is, however, robust empirical evidence that such violations have been more prominently committed by authoritarian regimes. Vice versa, gross violations of human rights may happen as well under democratic governance. The empirical research has only established that democratic regimes and their agents have a significantly lower predisposition to engage in gross violations of human rights, in particular against people living within their own territory.

43. It should be acknowledged that distinctions between democratic and autocratic regimes are not always very clear. Democratic governance can be organized in many different ways and the diverse nature of democracies reflects the rich social and cultural traditions of the world. The General Assembly has recognized that there is not one universal model of democracy, but that all democracies share common features (see resolution 55/96).

44. One such common feature is described in article 21, paragraph 3, of the Universal Declaration of Human Rights, which states that "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Similar provisions are included in article 25 of the International Covenant on Civil and Political Rights. For his research, the Independent Expert has relied on those human rights provisions to distinguish between autocratic and democratic types of governance, reflecting also the current state of the art in political science, which stresses the importance of periodic, free and competitive elections as a key feature of democratic governance.[33]

45. The Independent Expert would also like to acknowledge that there may be a time lag between the allocation of funding and its potential impact on gross violations of human rights. According to the explanations provided in the previous section, a regime may either invest funds to buy loyalty or strengthen the repressive apparatus. The life of the regime may thus be prolonged without necessarily seeing an immediate human rights impact in the form of more or less gross human rights violations. However, as long as an autocratic regime remains in power, there remains a greater risk that such a regime will engage in systematic suppression.

46. Preliminary empirical evidence shows that foreign financial sources might have an important impact on the durability of authoritarian regimes in power.[34] The authors of the study in question consider whether net transfers of public and publicly guaranteed external debt have an impact on the likelihood that an authoritarian regime transitions to democracy during the same year, using data covering the period

33. For the data presented further below, the Independent Expert has relied on the classification made by Barbara Geddes, Joseph Wright and Erica Frantz in "Autocratic breakdown and regimes transitions: a new data set", *Perspectives on Politics*, vol. 12, No. 2 (June 2014).

34. See Bohoslavsky and Escribà-Folch, "Rational choice and financial complicity with human rights abuses: policy and legal implications" in *Making Sovereign Financing and Human Rights Work.*

1970–2006.[35] The analysis is based on a data set capturing 158 different episodes of authoritarian rule in 91 countries.

47. The results show the negative impact over a period of 36 years that foreign debt has had on the likelihood of a transition to democracy.[36] While more research is needed and the preliminary results should be interpreted with caution, the effects are statistically significant at conventional levels. They suggest that foreign loans contribute to the perpetuation of authoritarian regimes. While the gross probability of a transition to democracy (within one year) in the sample is 2.2 per cent, moving from the minimum to the maximum value of the debt variable brings about a 1.65 per cent (per year) decrease in the probability of democratization (then reaching 0.3–0.4 per cent).[37] Over a 10-year period, for example, the effect would obviously be higher. The data set would predict that, on average, 22 per cent of all authoritarian regimes not benefitting from public or private lending would transition to democratic governance. However of those regimes regularly receiving net public or private lending, only 3.35 per cent would become democratically ruled. Some additional tests also reveal that foreign borrowing might be of special relevance in times of economic downturn, which usually lead to severe shrinkages in State revenues.

48. Rerunning the regime survival model detailed above, but distinguishing between net transfers on external debt (public and publicly guaranteed external debt) from official creditors and those from private lenders, it is possible to observe the impact of foreign debt provided by private and official creditors on the likelihood of democratization.[38]

49. The results suggest that, although both sources of funds have helped authoritarian regimes endure, loans from private creditors have actually been more likely to stabilize authoritarian regimes than official lending and thus are probably also more harmful to human rights.[39] Additional research is needed to establish whether funds provided to authoritarian regimes are used to buy loyalties through patronage (thus prolonging the life of the regime), or are used to boost the repressive apparatus of the regime.

50. The different impact of official and private lending might partially be explained by the fact that official creditors, in particular bilateral lenders, may be subject to some (although frequently limited) political accountability. As most of the world's large bilateral lenders enjoy some form of democratic governance, voters and civil society might resent their Governments using taxpayers' money to support States violating fundamental human rights. Similarly, albeit frequently criticized for their lack of transparency and democratic control, international financial institutions are subject to the scrutiny of public opinion, transnational groups, civil society and member States.[40]

---

35. Measured in constant (2000) dollars per capita. Data compiled from the World Bank *World Development Indicators*.

36. To estimate those probabilities, the other variables have been held constant at their means.

37. The results remain largely unaltered if one controls for trade (imports plus exports as a percentage of GDP).

38. See Bohoslavsky and Escribà-Folch "Rational choice and financial complicity with human rights abuses: policy and legal implications" in *Making Sovereign Financing and Human Rights Work*.

39. Ibid.

40. James H. Lebovic and Erik Voeten in "The costs of shame: international organizations and foreign aid in the punishing of human rights violators, *Journal of Peace Research*, vol. 46, No. 1 (January 2009), found that multilateral development cooperation commitments showed greater sensitivity to criticism of

51. In contrast, while civil society is increasingly monitoring corporations, voters exert less control over private lenders operating in international financial markets and States have so far prohibited private lenders only in exceptional circumstances by legal regulation from providing funds to States or State institutions with a bad human rights record.[41] Market discipline alone provides insufficient incentives for lending that is sensitive to human rights. It looks mainly at debt sustainability and the likelihood that the loan will be repaid, not at the democratic character of a regime, nor its predisposition for human rights abuse. The market does not prevent loans to dictators. On the contrary, once loans are provided to autocratic regimes, the market rather provides incentives to grant additional funds to such a regime, in order to stabilize it and ensure its repayment capacity. Market logic thus becomes a self-fulfilling prophecy.

V. NEXT STEPS

52. **Lending to regimes that commit gross human rights violations may contribute to regime consolidation, prolong disrespect for human rights and increase the likelihood of gross violations of human rights. Those conclusions can stand for both official and private financial assistance to Governments. Nevertheless, private lending seems to be more damaging, as it might enjoy lower public accountability compared to lending between States and to loans allocated by international financial institutions.**

53. **The statistical analysis presented above, which is based on 158 different episodes of authoritarian rule in 91 countries, suggests that net fund transfers may prolong autocratic rule and thus increase the risk of gross violations of human rights. However, each country situation must be assessed individually. The rational choice model presented by the Independent Expert, suggesting the likely causalities and the quantitative data presented, must be checked by case studies that serve to illustrate the causal linkages between the financial aid received and gross violations of human rights perpetrated by authoritarian regimes.**

54. **According to the argumentation developed in the previous sections, unless lending decisions are subjected to human rights impact assessments, appropriately targeted or mitigated by contractual measures, financial lending can have a persistent impact on authoritarian regimes, making it possible for them to consolidate autocratic rule and perpetuate political exclusion and human rights violations, and reducing the need for political concessions. However, it may sometimes be best not to lend on any condition, as financial inflows could impair the human rights situation, either immediately or over the longer term.**

55. **States engaged in gross human rights violations not only torture and kill people, but may also impose economic models that violate fundamental social, economic and cultural rights. As Antonio Cassese explained in a paper he wrote in 1979, the ways in which different rights violations are interlinked is often part of the survival strategy of**

---

human rights records by the United Nations Commission on Human Rights compared to bilateral commitments.

41. On how Latin American dictatorships received funds from private lenders see Robert Bejesky and Juan Pablo Bohoslavsky, "Contemporary lessons from Carter's incorporation of human rights into the financing of Southern Cone dictatorships" in *Making Sovereign Financing and Human Rights Work.*

a regime.[42] Foreign investors may benefit from the failure of a regime to respect human rights, such as the right to freedom of association and to form trade unions, or from countries with weak social, safety and health standards. If foreign actors make decisions based on profitability, and profitability is more likely to be higher when human rights are restrained, then economic assistance can contribute to the perpetuation of human rights abuses and such abuses, in turn, might potentially bring about the necessary conditions to attract and obtain additional economic assistance or investment. Moreover, a set of practices that have pernicious consequences for development may be part of the legacy of an authoritarian regime in the transition to democracy and the economic structures created under authoritarianism will influence the prospects for consolidating democracy.[43]

56. **The present report has not dealt with the legal aspects of financial complicity in human rights, or international or national law. The purpose of the report is to provoke discussion and to obtain feedback from stakeholders, to be able to assess the robustness of the framework and data provided, stimulate further data collection and determine how measurement methods and theoretical arguments could be improved accordingly. The Independent Expert intends to present a future report with a legal analysis of financial complicity and policy guidance as to how States and private financial actors should deal with the issue. He hopes that in a future report, he will also be able to present a revised analysis incorporating a direct statistical check between net lending and gross violations of human rights, although there are certain methodological challenges that need to be addressed in that respect.**

57. **The aim of the Independent Expert is to increase political and institutional interest in developing adequate guidance and policies that should assist States, multilateral institutions and private actors to make better and more informed decisions as to whether or not they should lend to Governments suspected of committing gross violations of human rights. Should decisions be made to lend to States or State institutions with questionable human rights records, such guidance should also specify how lending could be implemented to minimize the risk that it will contribute to gross violations of human rights or international crimes. The Independent Expert also intends to discuss in a future report whether the development of additional legal standards is required to address the issue. That includes clarifying to what extent lenders might be held responsible for financial complicity and how victims might enjoy access to remedies.**

---

42. Antonio Cassese, "Foreign economic assistance and respect for civil and political rights: Chile – a case study," *Texas International Law Journal*, vol. 14, No. 2 (1979).

43. See Tony Addison, "The political economy of the transition from authoritarianism," in *Transitional Justice and Development: Making Connections*, Pablo de Greiff and Roger Duthie, eds. (New York, Social Science Research Council, 2009); and, generally, *Justice and Economic Violence in Transition*, Dustin Sharp, ed. (New York, Springer Publications, 2014).


T
I
L
J