NINTH REGIONAL MEETING OF
THE AMERICAN SOCIETY OF INTERNATIONAL LAW

TENTH ANNUAL FULBRIGHT SYMPOSIUM
ON INTERNATIONAL LEGAL PROBLEMS

Globalizing the Rule of International Law at the
Pre-Dawn of a New Millennium

March 17, 2000
Golden Gate University
San Francisco, California
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AT THE PRE-DAWN OF A NEW MILLENNIUM

FRIDAY, MARCH 17, 2000
Golden Gate University School of Law
536 Mission Street, San Francisco
Auditorium B, Second Floor

OPENING CEREMONY 9:30 a.m. - 9:45 a.m.
Opening Remarks - PETER KEANE, Dean, Golden Gate University School of Law
Welcoming Remarks - DR. PHIL FRIEDMAN, President, Golden Gate University

Globalizing the Rule of International Law at the Pre-Dawn of a New Millennium
DR. SOMPONG SUCHARITKUL, Conference Director; Associate Dean; Director, S.J.D. and LL.M.
International Programs; and Distinguished Professor of International and Comparative Law,
Golden Gate University

MORNING SESSION Moderator: JOEL E. MARSH, Professor of Law, Golden Gate University
9:45 a.m. – 12:45 p.m.
- The Contribution of International Law to the
  Resolution of Self-Determination Conflicts
  MICHAEL VAN WALT VAN PRAAG, Professor of Law,
  Golden Gate University, San Francisco

- Alternative Dispute Resolution in the USA and Russia:
  A Comparative Evaluation
  ELENA NOSYREVA, Fulbright Scholar; Associate Professor of Law,
  Voronezh State University, Russia

- The 'Incorporation' of the European Convention on Human Rights into
  United Kingdom Law
  DOMINIC MCGOLDRICK, Fulbright Scholar; Professor of Law,
  University of Liverpool School of Law, Liverpool, UK

- Incorporation of Treaty and International Law in the United States:
  A Focus on the Juvenile Death Penalty
  CONNIE DE LA VEGA, Professor of Law, University of San Francisco

Rapporteur: BARTON S. SELDEN, Professor of Law, Golden Gate University
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LUNCH
12:45 p.m. – 2:15 a.m.

AFTEENNOON SESSION
Moderator: HELEN E. HARTNELL, Professor of Law, Golden Gate University
2:15 p.m. – 5:15 p.m.
- International Enforcement of Family Maintenance and Support Obligations
  RICHARD M. BUXBAUM, Jackson H. Ralston Professor of Law, University of California at Berkeley, Boalt Hall

- Unfair Competition on the Internet
  MARIKE VERMEER, Fulbright Scholar; Researcher, Molengraaf Institute for Private Law, Utrecht University, The Netherlands

- The Paradox of Free Market Democracy in the Developing World
  AMY L. CHUA, Visiting Professor of Law, Stanford University

- Cultural Exceptions to International Legal Norms: Women's Rights, Trade and the Environment
  JOEL R. PAUL, Visiting Professor of Law, University of California Hastings College of the Law, San Francisco

Rapporteur: CHRISTIAN N. OKEKE, Professor of Law, Golden Gate University

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Golden Gate Association of International Lawyers;
International Law Society; ABA, Law Students Division;
GLOBALIZING THE RULE OF INTERNATIONAL LAW
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by

SOMPONG SUCHARITKUL*

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Ambassador of Thailand; Former Member and Special Rapporteur of the International Law
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North Carolina at Charlotte); Former Visiting Professor of International Business Law
(National University of Singapore); Former Robert Short Professor of International Law and
Human Rights (University of Notre Dame School of Law); Former Cleveringa Professor of
International Law and International Relations (Leiden University, The Netherlands)
GLOBALIZING THE RULE OF INTERNATIONAL LAW
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I. INTRODUCTION

This is the Ninth Regional Meeting of the American Society of International Law for the West, Northwest and Southwest regions which Golden Gate University School of Law has the honor to host this year, prior to the regular Annual Meeting of the American Society in Washington D.C. in April 2000.

It is at the same time the Tenth Annual Fulbright Symposium hosted by Golden Gate University School of Law with the cooperation and cosponsorship of the Council of International Exchange of Scholars (CIES) also with headquarters in Washington D.C.

The combined sessions of the Regional Meeting of the ASIL and the Fulbright Symposium have now become the traditional forum for international lawyers, including publicists, privatists, comparatists and practitioners in the Bay Area and beyond and the Fulbright scholars of various legal disciplines from all comers of the world currently in residence in the United States. The ninth combined session will afford ample opportunities for international legal scholars to meet and exchange their views as well as share their experiences in this critical year of epoch-making transition from nationalization or Americanization to regionalization and eventual globalization.

II. UN21 AND THE PRE-DAWN OF A NEW MILLENNIUM

Following the close of the United Nations Decade of International Law on December 31, 1999, a new era has dawned within the American Society of International Law. The Group or Section involved in the United Nations Decade of International Law has renewed its continuing interests in international legal developments under the newly acquired title of UN21 or United Nations Legal Developments in the Twenty-First Century.

Setting aside the precise date at which the twenty-first century and the Third Millennium may be truly considered to start running, i.e., on January 1st, 2000 Y2K or 2001 Y2K + 1, it is clear that the coming of the twenty-first century and the Third Millennium is imminent and for the overwhelming majority of the international community in the Christian world not only inevitable but has already come to pass. Whatever the method of calculating the calendar year or the almanac, a new world appears to be in the offing. A new dawn can be felt which seems irresistible. One is almost led to believe that a NEW DEAL is somewhere, somehow brewing in the air in this year of the Golden Dragon.

For one thing, the opening of the New Year has augured well for the prospect of China, People's Republic of, to gain entry into the community of the trading nations of the world. The historic handshake between the President of China and the Trade Representative of the United States on November 15, 1999 marked the beginning of an end to considerable misgivings bordering on hostilities against the formal entry of China into the family of nations engaging in transnational trade, the long sought-after membership of the World Trade Organization.

Whatever the implications of China's admission to the WTO for the United States, or for Europe and the Western World, for Asia or East Asia and for Africa and Latin America, the reflection China casts on the World Trade Organization itself must also be taken into consideration.
To exclude a country with a sustained national economy and the world’s largest population of over 1.2 billion consumers and work force, is admittedly an anomaly which precludes any assertion of the universal character of the World Trade Organization.

From the perspective of the WTO, China’s entry symbolizes the never-ending process of globalization in the regulation of international trade. The mission of the WTO itself has acquired a new meaning and a new force.

III. GLOBALIZATION OF THE RULE OF LAW FOR THE UNITED STATES

The "Rule of Law" is an expression coined and known in the Western World as a standard of justice above which national legal systems should endeavor to achieve, maintain and sustain. In the "free world" during the "cold war", the "Rule of Law" was much used as a tool to enhance the prestige of the Western World in its respect for democracy and the "Rule of Law" as opposed to the "dictatorship of the proletariat" or autocrats and "socialist legality".

In the "free world" of the sixties, whether a jurist belonged to the common law system as the United States, the United Kingdom and members of the Commonwealth of Nations or to the civil law traditions such as France, Germany, Japan, Tunisia and Thailand, the phrase the "Rule of Law" had acquired a certain technically well-defined meaning, implying the existence of democratic institutions, independence of the judiciary and the legal profession, due process of law, equality before the law, human rights protection and the existence of a constitutional system of checks and balances of power as between the various organs of the State, the Legislative or Congress, the Bench or Court of Law, and the Executive or Administration of the nation.

The concept has been digested and formulated at the New Delhi Congress of Jurists in 1958 and further elaborated at Lagos, Nigeria, in a subsequent Declaration. Other non-governmental legal organizations such as the American Bar Association have also tried their hands, e.g., in the Athens Congress of World Peace Through World Law shortly after.

President Bush of the United States gave it a little twist following the outbreak of hostilities in the Iraq-Kuwait armed conflict and the Security Council Resolution to adopt all means necessary in 1991. On that occasion the "Rule of Law" came to include the ability of States to resort to the use of force to strengthen the "Rule of Law"

Thus, the "Rule of Law" in the domestic sense has been extended to apply to States in their inter-governmental relations. By analogy, the "Rule of Law" in the sense of the "Rule of International Law" has emerged, requiring States to observe and abide by the international obligations they have undertaken under the Charter of the United Nations and in accordance with international law.

Consistently with international endeavors to induce respect for the "Rule of Law" among States, UN21 recently sent an alarm signal to the effect that as of February 1, 2000, 45 nations lost their right to vote in the General Assembly of the United Nations for failure to pay their assessed dues which have fallen in arrears for two years. Most of these nations are expected to pay some of their dues before the next General Assembly Regular Session in September 2000. The majority of one hundred and ninety members do not pay all their dues in time. Only forty-three have paid in full. Seven were permitted to retain their votes by reasons of extenuating financial circumstances. The United States owes it dues which are past due for an amount in excess of US$ 1 billion and has consistently avoided a voting suspension by a partial payment among other reasons.
The Rule of Law for the World Organization also needs to be observed and respected and not to be used or misused as a means to threaten or undermine the proper functioning of the United Nations. Respect for the Rule of Law by the United States in this particular connection could serve to enhance the morale of the World Organization and other right-thinking members of the international community.

If the nation is weak in its respect for the "Rule of International Law" by refusing to pay up its dues in time, it should not be heard to invoke the "Rule of Law", let alone to seek its enforcement against another nation for failure to implement the "Rule of Law" in the absence of an effective collective international sanction.

Much worse, a State should not be allowed to hide behind the coat-tail of its Congress or Supreme Court for failure to fulfil an international obligation under the Charter of the United Nations or under international law. No nation can impose its domestic concept of the "Rule of Law" on other nations. Much less can any State pose as a "Rule of International Law," its own domestic law or international law as understood, accepted, adopted or interpreted by one of its organs, be it by a Presidential Decree, Act of Congress or a judicial decision of its highest instance, these national organs would otherwise only be acting as a judex in sua causa.

Globalization of the "Rule of International Law" is clearly not to be identified with globalization of the "Rule of National Law" of any State. It is diametrically opposite to the process of Americanization of any rule of international law to regulate any area of international relations, whether in trade, finance, criminal justice or crime suppression, political integration or disintegration.

IV. HUMAN RIGHTS PROTECTION IN THE GLOBAL CONTEXT

While human rights activists appear to grow from strength to strength in various academic institutions within the United States reflecting increasing violations which remain unthwarted, the trends favoring further infringements have not been pre-empted by recent judicial pronouncements from the United States Supreme Court. Procedural due process continues to be breached by the administrative authorities at various levels, from police brutality to false imprisonment with judicial sanctions based on falsely obtained information and involuntary confessions. A comparative study can be made of the recent practice in Turkey, the United Kingdom and Los Angeles where extorted confessions have resulted in unlawful detention requiring remedial measures, including compensation for illegal detention and false imprisonment.

International protection of human rights is everybody's business but in practice it is still nobody's business. Civil rights activists have not been unmindful of their uphill tasks against violations within their national communities where little or no relief seems readily available. Frustrated by an apparent lack of judicial or administrative measures to remedy human rights violations or to improve the lot of minorities and ethnic groups against prevalent racial discrimination, activists have been more vocal against violations of human rights beyond their national borders, believing with a sense of sincere moral duty that the expression of frustration could culminate in constructive measures or affirmative actions to be taken in the global context if not at national or local level.

While the rights of a human being qua homo sapiens deserve to be respected and observed everywhere, enforcement measures at the global level can only be invoked with the consent of the territorial State within whose borders the alleged violations of human rights have occurred. The only other alternative may rest with the collective wisdom of the international community. A country which has not ratified or truly accepted obligations under any of the Human Rights Conventions does not incur a record of its own infringements of human rights, because the State remains eminently outside the application of any reproach, criticism or even
international moral sanctions. It is ironical when, in the absence of informed national public opinion, such a country has permitted strong protestations against violations of human rights perpetrated beyond its national boundary in the belief that by thus diverting world attention from its own imperfections, it could still contribute to the respect and observance of human rights elsewhere, anywhere except in its own backyard.

If the name Martin Luther King, Jr., has been placed on record as a constant reminder of the continuing fight for civil liberties and the untold plight of the less fortunate Americans who continue to suffer as victims of racial discrimination, so are place names of equal significance such as "Little Rock" and "Wounded Knees." In this Hall of Fame, "Tiananmen Square" should also occupy a distinctive place to serve as a monumental living testimony of the dedications and sacrifices made by the freedom-fighters in China in a way not dissimilar from native Americans, African Americans and other freedom-loving minorities in this country.

The extent of implementation of international human rights very much depends on the measure of the willingness, readiness and ability of each nation to give effect to the respect and observance of human rights within its own territory. Like charity, human rights to obtain the dimension of global protection must begin at home. There are no short cuts, no deviations, no distortions nor delusions.

For instance, diversionary tactics such as staging demonstration against the World Trade Organization during its session in Seattle in November 1999 not on any trade issues but on human rights or workers' rights and environmental protection could not possibly improve human rights protection or the human environment, but merely serve to undermine world trade or to obstruct the progress and cooperation expected of the deliberation process.

On a more modest scale, a demonstration was organized in Bangkok on February 12, 2000, at the opening of the Tenth United Nations Conference on Trade and Development (UNCTAD X) attended by 190 members of the United Nations. Present were several Heads of States, the Secretary General of the United Nations, the Director General of the World Trade Organization and the Director General of UNCTAD. However, the protest was against IMF, the World Bank and WTO. The demonstration was staged by a group of workers from the Labor Union. The Bangkok workers, like the demonstrators in Seattle earlier, were barking up the wrong tree. One significant fact remains: the Thai public appeared less uninformed than its Seattle counterpart, with less resulting damage to spoil the image of the WTO, IMF or the World Bank. From each of these specialized agencies of the United Nations, both Thailand and the United States stand to benefit from their work. Little did the Bangkok demonstrators realize that thanks to the IMF and the World Bank as well as the WTO, Thailand is expected to start repaying nearly half a billion US dollars of its US$ 17 billion loan later this year and US$ 4.5 billion next year, and its GNP growth rate for 2000 will be nearly 5 % and close to 6 % in 2001.

"Freedom of Information" is as such an important component of human rights. In the United States, the strength of public opinion lies in freedom of opinion, as guaranteed by the First Amendment. This is further reflected in the well protected Freedom of the Press. In contradistinction to dictatorial regimes, where the press is controlled by the State or the Central Political Party, the American press is free, completely free and independent of any control by the Administration. But "Free Press" may result in absence of freedom of information. In a country of market economy, nothing is really free. Certainly, information is less free. It may have a price or it may be priceless. A strong press may control and even suppress or distort information.

How well-informed is the American public on matters of international concern is a matter of conjecture. How many American people are aware that the United States, as strong supporter of workers' rights, at one point withdrew from the International Labor Organization? How many are aware that, in spite of a well-protected
freedom of opinion, the lack of "Freedom of Information" may obscure the formation of public opinion? How many of us are familiar with the dispute between the United States and the UNESCO on freedom of information which led to United States withdrawal from that Specialized Agency of the United Nations in the field of education, science and culture.

In another context of global protection of international human rights, the judgement of the House of Lords of March 24, 1999, ex parte Pinochet, on appeal from a divisional court of the Queen's Bench Division, especially the opinion of Lord Browne-Wilkinson, confirming an earlier three to two decision of another Committee of the Lords of Appeal in the same House of Lords, leaves no room for any doubt that a former head of State of a foreign nation is not entitled to immunity from extradition proceedings in respect of torture or conspiracy to torture committed during his office as Head of State.

On the global scale, there will be fewer and fewer sanctuaries on earth to harbor former heads of State or officials of foreign governments for violations of human rights anywhere, anytime, by whomssoever committed. This landmark decision of the House of Lords should be hailed as a victory for the international protection of fundamental human rights and the dignity of the humankind.

V. INTERNATIONAL PROTECTION OF THE HUMAN ENVIRONMENT

The environment which human beings share with other earthly creatures deserves to be protected not only for the contemporary period but also for future generations.

It has been noted that in this particular connection the Supreme Court of the Philippines has been the first to recognize and give effect to the concept of " inter-generational equity" in the protection of the environment.

The "polluter pays principle" adopted in Europe is also accepted in the United States. However, care should be taken and the Precautionary Principle upheld lest the "polluter pays principle" turns into a license to commit pollution, at a price to be paid to the State which in turn will provide remedial measures that are far from adequate in the quest for the equitable assessment of appropriate compensation for the victims who suffer the injurious consequences of the pollution.

The United States has been more energetic in the extension of its domestic protection in the form of trade sanctions against violations of conservation measures to protect the marine mammals such as the dolphins in the catch of tuna and the endangered species such as sea turtles in the fishing of shrimp by banning tuna and shrimp or shrimp product derived from unprotected fishing.

It is encouraging to note from the global conservationist perspective that the Appellate Body of the WTO (WT/DS58/AB/R, October 12, 1998) has not declared to be illegal the legislation adopted by the United States empowering the United States authorities to prescribe means to protect sea turtles as long as it is not arbitrary or discriminatory.

With this timely ruling, it has been possible for the United States and the fishing nations involved to find a satisfactory solution to minimize if not eliminate unnecessary casualties for sea turtles in shrimp fishing, thereby enhancing possible conservation measures as long as international trade is not thereby impaired or restrained. It is clearly understood that the World Trade Organization is primarily established to promote and regulate international commercial activities and only incidentally to help other international agencies such as the United Nations Environmental Program (UNEP) in the attainment of their respective goals.
On the other hand, no nation is fully equipped to provide necessary measures in all fields of human endeavor to protect the global environment. Thus, in Mayaguezanos Por La Salud y El Ambiente v. U.S.A. (1st Cir. No.99-1412, December 20, 1999), a federal appeal court decided that a British-flag freighter, carrying nuclear waste passed between Puerto Rico and Hispaniola en route to Japan from France did not result in the United States being legally required to regulate shipment of nuclear waste through its exclusive economic zone (EEZ) under international law. The decision might have been different if complaints were brought before an ASEAN nation, having ratified the Nuclear Weapons-Free Zone for Southeast Asia and if the passage were in Southeast Asian waters. The problem remains one of implementation or the means to implement national legislation for ASEAN countries in the field in which even the United States does not feel bound to regulate the passage of nuclear waste, absent a Treaty obligation requiring regulation.

VI. GLOBAL REGULATION OF INTERNATIONAL TRADE

The regulation of international trade has hitherto been conducted simultaneously on different footings by various governmental and non-governmental bodies of national, regional, sub-regional and universal or global stature.

Trade negotiations continue unabated on the bilateral basis, both at different governmental levels, i.e., summit, ministerial, senior officials and official as well as non-governmental level of private sectors, chambers of commerce, national and international and through the process of merger and acquisition of multinationals or transnational corporations. Trade talks are also conducted through a series of Multilateral Trade Negotiations (MTN) as in the Kennedy Round, the Tokyo Round and the Uruguay Round, culminating in the formation of the World Trade Organization with all its organs and constituent components, including a Dispute Settlement Body.

As always, bilateral trade relations continue invariably to be regulated by mutual arrangements in the form of trade agreements with elaborate Treaty provisions for closer economic cooperation, while several groups of States within a sub-region or a region have formed for themselves a number of regional associations for economic and trade cooperation designed to achieve varying degrees of economic, social and monetary integration, such as the creation of a common market, a free trade area or an association tending to promote eventual integration such as the European Union, NAFTA, MERCOSUR and ASEAN or tighter interregional cooperation such as the Asia Pacific Economic Cooperation (APEC) and the AsiaEurope Meeting (ASEM).

To strive to attain uniformity in the application of rules regulating international trade, bilateral negotiations need to be more streamlined and brought into further harmony if not completely assimilated for all practical purposes. Side by side with bilateral endeavors and regional undertakings to comply with common principles and sets of rules, a unifying force can be generated thorough global efforts by means of a global approach to trade promotion, trade facilitation and trade dispute resolution.

The world is still divided. The gap has further widened between the "haves" and the "have-nots". As has recently been observed at UNCTAD X in Bangkok, the rich have become richer and the poor still poorer, thereby sinking below the social safety nets in the planning and implementation of national development plans for failure to raise the floor of poverty-stricken populace of the world who fell through the social security safety nets.
Regional organizations such ASEAN, NAFTA, SAARC, OAS, OAU, MERCOSUR, the Andean, the Amazon, West Africa, APEC and ASEM should be permitted to carry on their existing missions without interruption, while collective endeavors on a global scale should be further encouraged and facilitated. Regulations of international trade should be unified, so as to achieve harmony between bilateral and multilateral resolutions and between public and private or governmental and non-governmental regulation of transnational trade. The ultimate unification of rules of international trade can be achieved largely through mutual understanding, tolerance and acknowledgement of the need for mutual reconciliation and sympathy as part and parcel of the globalization of transnational trade. In this important stage of world trade, the evolution of the General Agreement on Tariffs and Trade (GATT) into a wider and more comprehensive World Trade Organization (WTO) in 1995 following the close of the Uruguay Round has inspired international confidence at this juncture of globalization of international trade based on the rule of international trade.

VII. DISPUTE SETTLEMENT AND ENFORCEMENT MEASURES

Globalization of international dispute settlement procedure has followed a slow process, requiring patience and perseverance on the part of those responsible for the wider appreciation and dissemination of international law in the field of peaceful resolution of transnational conflicts, whether in trade disputes, environmental protection or the global protection of human rights.

It is worthy of notice that several new international judicial instances have come into existence proliferating the global horizon. As at present advised, apart from the International Court of Justice which is servicing a full load of international claims, mention must be made of the availability of the International Law of the Sea Tribunal at Hamburg for adjudication of maritime disputes, the International Criminal Tribunal at The Hague for former Yugoslavia and at Arusha for Rwanda for prosecution and trial of alleged offenders for offences against the peace and security of mankind.

In addition, other claims commissions have been operational in specific fields of dispute resolution, such as Investment Disputes (ICSID), claims for compensation under Security Council Resolution 687 (UNCC), some with additional facilities and availabilities of actual payment or implementation. The case law generated by these international instances whether judicial, arbitral, mediational or conciliational deserves further attention.

What is still singularly lacking in the judicial method of dispute resolution at the highest instance has to a limited extent found some measure of relief with the assistance of Security Council Resolutions, designed to place sufficient pressure on alleged offenders to comply with the collective wish of the international community expressed in Security Council Resolutions to back up judicial pronouncements in contentious claims as well as in advisory opinions.

A solution appears to have resulted from the efforts of the Security Council to initiate the delivery of alleged offenders in the Lockerbie incident to be prosecuted and tried by a special neutral court set up on neutral ground and tried by competent neutral judges applying the *lex loci delicti commissi*, i.e., Scottish law as the law of the place where the offenses were committed.

Without the backing of the Security Council, the International Court of Justice appears to remain without power to enforce its order even if only as provisional measures to prevent further deterioration of the existing situation.

The attitude of the United States as party to the proceedings before the International Court of Justice brought by the Federal Republic of Germany, requesting provisional measures for suspension of the execution of Walter
Lagrand as reflected in the disposition of the Supreme Court in the Federal Republic of Germany v. U.S.A. (119 S. Ct. 1016, 1996) has served to harden its disregard for the binding character of provisional measures ordered by the World Court. To confuse the Court's lack of means to enforce its order with the binding nature of the order would tend to undermine the integrity of the highest international judicial instance as observed by President Sir Humphrey Waldock in regard to the rescue party undertaken by the United States under President Carter in the face of the Court order of provisional measures in December 1979.

An order of the World Court indicating provisional measures is not any less binding on the part of the parties to the proceedings, because one nation consistently ignores it when it does not serve its interest to observe although it has not hesitated to request such provisional measures when it is essentially for its benefits so to do. Consistency of attitude appears conducive to the credibility of a nation as a law-abiding member of the world community, especially if that nation often claims to respect and requires others strictly to respect and comply with the "Rule of Law" regardless of the absence of a collective sanction.

VIII. CONCLUDING OBSERVATIONS

The foregoing survey of legal developments in the period of twelve months partially preceding and ensuing the beginning of the Year of the Golden Dragon contains a mixed bag of encouraging signs of progressive international legal developments as well as disappointing retrogression in national judicial decisions and dicta.

While positive signs are visible in the globalization of international trade regulations except for the unhealthy start of the WTO Conference in Seattle last November, the impending irresistible entry of China into the World Trade Community is a milestone in the individual and collective endeavor to globalize the regulation of transnational trade in all its forms and manifestations and at all levels. Problems facing the WTO are still infinite and much is left to be desired.

The progress to be expected in the protection of human rights on a global scale is not any brighter than in the trade relations. Developments in the international protection of human rights cannot prosper without the national will to promote their protection within the confines of national boundaries. Respect for human rights cannot begin anywhere else but at home. No progress towards globalization of human rights protection can be achieved without the conscientious commitment of each and every nation to uphold the respect for human rights and the dignity of man within its respective borders. Payment of lip-services will not suffice to globalize international respect and implementation of international human rights.

Emphasis must be squarely placed on the willingness, readiness and ability of each State, especially the United States as leader of the world community, to submit controversial questions of human rights to the scrutiny of international supervision and determination. No further progress in this field could be expected for the United States if the matter continues to be adjudged by a judex in sua causa even at the highest federal instance. It would not be fair for a national bench to determine how much and how far the national court or its government has failed to comply with its international obligation to give effect to human rights under international law in conformity with an international as opposed to national minimum standard of treatment of the individual.

The protection of the international environment continues to interest developed nations in the sense and to the extent that developing countries should be required to refrain from adding further injury to the damage already heavily inflicted by the industrially advanced countries in the remote and recent past as is also continuously the case today.
It is difficult to reconcile this conflict of interests in terms of reaching a suitable compromise to mitigate further damage without denying developing countries and the least developed economies equal opportunities to achieve national economic development, even at the expense of utilizing some of their own natural resources such as the rain forests.

In this world of progressive economic development, globalization of international restraints presupposes suspension of wasteful use of energy and further global warming by industrialized countries using coals without in any way impairing the need on the part of the least developed economies to pursue their goals of national economic development to ensure their survival above and beyond the social safety nets.

Sompong Suchatitkul
San Francisco, March 17, 2000
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Michael van Walt van Praag is an Advisor on International Law and Conflict Management and Resolution and Adjunct Professor of Law, Golden Gate University School of Law. He is a Member of the Netherlands Development Assistance Research Council and Legal Advisor to the Office of His Holiness The Dalai Lama and to the Tibetan Government in Exile, and Special Counsel for United Nations Affairs. He holds a Doctorate in the Science of Jurisprudence and a Meester in de Rechten (J.D. and LL.M. equivalent) from Rijksuniversiteit Utrecht (Utrecht State University) and an LL.M. from Wayne State University School of Law in Michigan. Professor van Walt van Praag served as General secretary of the Unrepresented Nations and Peoples Organization (UNPO) and Consultant for the United Nations Development Program (UNDP). He was advisor to the Chechen Government Delegation in negotiations between the Chechen Republic and the Russian Federation as well as an Associate at Wilmer, Cutler & Pickering in Washington D.C. and London. He is a member of the New York Bar and has published extensively in English, German Dutch and French, including “Self-Determination in a World of Conflict – A Source of Instability or Instrument of Peace?” (in Festschrift: L. Bouchez, Kluwer Law); “Commentary to ‘The Bell Curve of Ethnic Politics: Rise and Decline of Self-Determination Movements in India (by Atul Kohli)”’ (in Self Determination and Self Administration: A Sourcebook, Lynne Reiner); “The Right to Self-Determination and the De-Colonisation Process” (in Tibetan People’s Right of Self-Determination, TPPRC and Friedrich-Naumann Foundation); and “A Concept of Nation in International Law” (book review, LEIDEN JOURNAL OF INTERNATIONAL LAW, Vol. 6 No. 1).
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Alternative Dispute Resolution in the USA and Russia: A Comparative Evaluation

Elena Nosyreva

Synopsis

The United States of America and the Russian Federation, two great countries, belong to the different type of jurisdictions: accordingly to the common law and the civil law. In spite of this important historic fact there are some common trends that are not limited by the legal, territorial or ideological boundaries. It is fair to be said the sphere of Alternative Dispute Resolution is among them.

It is the purpose of this paper to compare existing American ADR system and the various kinds of alternatives with their development in Russia.

The United States was one of the first countries established the additional ways for resolving legal disputes. They have been used as alternatives to traditional expensive, time-consuming, formal, complex, and stressful litigation. So they have got their name Alternative Dispute Resolution (ADR).

The development of the ADR in the United States has been primarily as an adjunct to American legal system and become its integral part.

In general, Alternative Dispute Resolution is the term, which identifies a group of processes through which disputes are resolved out side of official court system. At present many kinds of ADR exist in the USA. There are three primary well-known processes – negotiation, mediation, and arbitration. Elements of these processes have been combined in a number of ways in a rich variety of so called “hybrid” dispute resolution techniques such as mini-trial, early neutral evaluation, med-arb, rent-a-judge, ombudsman, etc. These methods might be described as non-court or private ADR practices.

In addition to private sector, ADR programs have been implemented into the public justice system. The Civil Justice Reform Act of 1990 required to develop cost and delay reduction plan in the federal district courts as a pilot program. Now the federal Alternative Dispute Resolution Act of 1998 requires every federal district court to implement a dispute resolution program. As a result different kinds of pre-trial alternatives are available in the American courts: court – annexed arbitration, mediation, summary jury trial, early neutral evaluation.

One of the hall marks of the ADR movement and success in the USA consists in the strong support not only from the federal or state legislative power
but from the non-profit professional organization such as well known all over the world American Bar Association, American Arbitration Association, Society of Professional in Dispute Resolution and others. They provide the legal communities with education, researches, and practices in the sphere of ADR. They also play very important role in the creation of the standards of ethics and professional responsibility for neutral persons who are charged in resolving disputes.

The last relevant ADR point, which should be underlined, is the specific of the American legal education. Many law schools included the disciplines deal with the Alternative Dispute Resolution in their curriculums. The courses of ADR, Arbitration, Mediation, Negotiation allow to orient students from the inevitable of traditional litigation toward the compromising dispute resolution.

All things considered it is might be said that the ADR in the United States has become the real integral part of its society, legal system and legal education.

Russia has also been revealing a growing interest to out-of-court methods of dispute resolution. However unlike the USA with its long, great ADR experience institute of the Alternative Dispute Resolution in Russia is in its infancy. There are a few kinds of non-court processes, which could be used for resolving dispute instead or before trial (they will be described below). Russian people (including lawyers), corporations, government agencies broadly use them. But at the same time it is worthy to note they do not realize that they use alternatives to litigation. Another words it means that there is no developed concept of ADR in Russian legal practice and our legislation does not recognize the term itself.

For the sake of fairness it must be noted that the questions on Alternative Dispute Resolution frequently find their discussion in the modern law publications in Russia. It is also notable one of the major directions in the work of Russian Foundation of Legal Reforms is the project “Development of Alternative Methods of Dispute Resolution” and arrangement of the All-Russian ADR movement within the frames of this project. This positive efforts give the hope that the doctrine of Alternative Dispute Resolution gradually will take the adequate place in Russian legal system.

Looking at the possible opportunity in using alternatives in Russia first of all arbitration should be named. This is the best known alternative process in Russia. Like the USA and many others countries our system includes two type of arbitration – domestic and international. However unlike the United States the separate statutes govern them.

Domestic arbitration or so-called “treteyskiy” court depending on its jurisdiction varies in two kinds. First is “treteyskiy” court for resolving civil disputes only between citizens. It has been regulated by the Rules on Treteyskiy Court of 1964. Because this law was adopted in the period of the Soviet Union it
is absolutely inappropriate for present social and economic situation in Russia. So it is practically does not use. Second kind of domestic arbitration also called “treteyskiy” court is intended for resolving commercial disputes between Russian corporations and businessmen. It is acting under the Provision Rules on Treteyskiy court for economic disputes of 1993. This type of arbitration has become more and more popular since new economic politics of free trade market was begun in Russia.

Current Russian law on domestic arbitration is the subject of strong critics from academics and practice lawyers because of its contradiction and unclear that restrains the entire arbitration development and efficiency. As a result new draft of Uniform Law on Domestic Arbitration was elaborated and expects to be adopted in the nearest future.

In respect to international arbitration there is the special Law of the Russian Federation on International Commercial Arbitration of 1993. It based on the UNSITRAL Model Rules. This fact is very important and means that Russian legislative regulation in the sphere of international arbitration follows the same way as well as many other countries including the USA which have resembling law based on the above mentioned uniform Rules. It is worthy to be emphasized. Both international arbitration system American and Russian have two similar fundamental elements: equal treatments of the parties and the right and opportunity to be heard before the tribunal. So there is no reason for foreign investors to be afraid to make an arbitration agreement with Russian businessmen. Besides Russian Federation as the successor of the former Soviet Union has become the member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958.

Alongside with arbitration there is forming a certain practice of applying mediation in Russia. So far it is used to resolve a few type of disputes on a small scale and it is largely occurring within legal vacuum. There is no legislator regulation and there is no guarantees any confidentiality of this process. Until Russia adopt its legislation to embrace the mediation process it is challenged that it will be get its more widely evolution.

Negotiation takes a very significant place among the Alternative Dispute Resolution due to it is might be both as an independent method of resolving disputes and as the essential part of any other alternative process. Unfortunately it is must be admitted that Russia historically had no experience in the using negotiation as the mean of the dispute resolution. As a result of centuries of strict government market regulation, most Russians have not developed any significant negotiating spirit. Russians have traditionally considered open compromise as a sign of weakness. But the time has changed. Now negotiation is the part of the legislator regulation in some kind of disputes in the commercial area. However it might be watching the lack of negotiation experience. Our society needs to be educated and trained in this process, how it works, what
types of negotiating strategies exist, how they can better used, etc. Another words the negotiation theory must be elaborated like in the USA.

There is a positive tendency also in Russian court system toward a wider use pre-trial settlement in order to reach agreement between disputing parties. The main cause of reviving interest to use alternatives inside court proceedings before trial is the unsatisfactory condition of entire Russian court system, which is explained insufficient budget financing, our courts being overloaded by civil cases. In addition, ordinary litigation is too expensive for the majority of Russian people particularly at the present time when our economic and social life are not stabilized. Federal constitutional Law on the Court System of Russian Federation of 1995 established new types of local courts – Court of peace or judge of peace. To some extent they have a certain resemblance with American Small Claims Court and they would be the best place for implementing court – related ADR program.

All above mentioned circumstances considered we may conclude that the contemporary position of Russian legal framework and research work, very strict needs in improving the court system, willingness to find new informal, inexpensive, speedy, less stressful ways for resolving conflicts create fit grounds for incorporating the concept of Alternative Dispute Resolution in our legal system.

USA’s experience demonstrates that alternatives processes are beneficial not only for conflicting parties but for public as well. They free the overloaded court system from a large number of civil cases. As a result courts can concentrate their efforts on complicated civil, criminal, constitutional cases. Moreover Alternative Dispute Resolution is not only legal concept. This is a certain type of psychology, which leads to reaching compromise and peace. In this respect ADR has no legal, territorial or ideological boundaries and may be adopted from one country or culture to another.
THE 'INCORPORATION' OF THE
EUROPEAN CONVENTION ON
HUMAN RIGHTS ACT INTO
UNITED KINGDOM LAW

by
Professor Dominic McGoldrick, University of Liverpool,
Fulbright Distinguished Scholar,
Human Rights Fellow, Harvard Law School

ASIL REGIONAL MEETING/ 10th ANNUAL
FULBRIGHT SYMPOSIUM
GOLDEN GATE UNIVERSITY
SCHOOL OF LAW SCHOOL

Friday 17 March 2000
HUMAN RIGHTS ACT 1998


2. Entry into force -

- sections 18, 19, 20 and 21(5) are in force.
- S.19: 'Statements of Compatibility'
- Substance of HRA: 2 October 2000
- following coming into force, an individual may rely on Convention rights in any legal proceedings, including appeals; and
- any proceedings brought by or at the instigation of a public authority whenever the act in question took place (sections 7, 22(4)): cf. *R v DPP ex parte Kebilone and Others*, The Times, 31 March 1999.

3. How does the Act work? Main principles-

A. "Incorporation"?

The "incorporated" Convention rights "... are to have effect for the purposes of this Act..."

Section 1(2)

- in fact this is not full incorporation. The rights only have the effect which the Act gives them

- they are not entrenched and the doctrine of implied repeal does not apply
B. Interpretative obligation: Imposes an interpretative obligation in respect of all legislation:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Section 3(1)

- Obligation applies to all courts [and beyond?]
- No need to find ambiguity; cf Brind.
- What does “possible” mean?
- A court or tribunal determining a question which has arisen in connection with a convention right must take into account any’ Convention jurisprudence of Court, Commission, Committee of Ministers.
- Statements of compatibility: s.19
- Subordinate legislation can be declared ultra vires, e.g. bye-laws.

C. Empowers higher courts to make ‘Declaration of Incompatibility’: section 4.

May be made:

By a higher court i.e. High Court and above - including Courts-Martial Appeal Court [note: NOT MAGISTRATES OR CROWN COURT]

In respect of provisions of
- primary legislation (including Orders in Council made under the Royal Prerogative)

- secondary legislation (but see also the *ultra vires* rule)

**Declaration of Incompatibility**

*where the court is satisfied*

- that it is incompatible with a Convention right;

- and (for secondary legislation) that the primary legislation concerned prevents removal of the incompatibility

*The Crown* has a right to be joined: section 5

**Effects of a Declaration of Incompatibility: section 4(6)**

- does not affect the validity, continuing operation or enforcement of the provision(s) [Cf. EC law]

is not binding on the parties to the proceedings in which it is made (Cf. Consider *R v DPP ex parte Kebiline and Others*, The Times, 31 March 1999). How does a criminal court deal with incompatibility arguments?

- but triggers the remedial power under section 10: [Sch. 2, para. 1(1)(b): retrospection]

**D. Statutory Duty**
Act creates an enforceable duty on ‘public authorities’ to act in a manner which is compatible with convention rights:

1. Unlawful acts - the duty

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right”

Section 6(1)

2. Unlawful acts – the parties

“Public authorities”

- core public authorities

- courts and tribunals

- “any person certain of whose functions are of a public nature”

(but not in relation to their private acts)

3. Unlawful acts – parties

“Victims”

- only a person who claims to be a “victim” of the unlawful act may make a claim in respect of an unlawful act.

“if the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.”

Section 7(3)
“Victims”

includes natural or legal persons, non-governmental organisations or groups of individuals who:

* - are directly affected by the unlawful act;

* - belong to a class or people who are potentially affected by the act in question.

* - are members of the family of the person directly affected.

4. Limitation Period: section 7(5): ONE YEAR from date on which act took place OR such longer period as the court or tribunal considers equitable having regard to all the circumstances. May be stricter periods imposed by particular procedures, e.g. judicial review.

5. Unlawful acts - remedies

“In relation to any act (or proposed act) of a public authority which a court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”

Section 8(1)

6. Unlawful acts - damages

Limits on awards of damages
• may only be awarded by a court which has power to award damages or compensation in civil proceedings

• may not be awarded in respect of judicial acts done in good faith, except to the extent required by Article 5(5) of the Convention [unlawful detention]

• may not be awarded unless the court is satisfied that it is necessary to afford “just satisfaction” to victim

• the court must take account of all the circumstances of the case, including:

  - any other relief, remedy or order made (by that or any other court);
  - the consequences of any decision (by that or any other court) in respect of the unlawful Act

The two big questions:

1. Any possibility of horizontal effect?

2. Will the UK courts use the ‘margin of appreciation’ doctrine?
Margin of appreciation doctrine used in reference to interpretation of rights and their limitations.

1. **Limitations** on rights: approach is relatively formulaic:

   - Is there an interference with the right?
   - Is the limitation ‘prescribed by law’ or ‘authorised by law’? = accessible, foreseeable
   - Is the interference based on one of the grounds of limitation set out in the convention, e.g. public morals?
   - Is the limitation ‘necessary in a democratic society’? – ‘pressing social need’, justification ‘relevant and sufficient’, ‘proportionality’

**The famous 'margin of appreciation'** –

Essence of it is this: *(Handyside v UK (1976), European Court of Human Rights:)*

'By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the ... 'necessity' of a 'restriction' or 'penalty' ... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10(2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws if force Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation'

**Points to note:**
European Court ultimately judges

Relevance of consideration by the national courts

Margin is different for each of the grounds of limitation: consider Brown v UK (morality)

Look to European legislation and practice to assess the standards: any 'European consensus?'

Margin can change over time – effect on s.2

Will the UK courts use the 'margin of appreciation' doctrine?

The three logics:

**MARGIN OF APPRECIATION: FIG.1**

<table>
<thead>
<tr>
<th>Z</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Y</td>
<td>VIOLATION BUT JUSTIFIED</td>
</tr>
<tr>
<td>X</td>
<td>VIOLATION</td>
</tr>
</tbody>
</table>

**MARGIN OF APPRECIATION: FIG.2**

<table>
<thead>
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<th>NO INTERFERENCE</th>
</tr>
</thead>
</table>
NO MARGIN OF APPRECIATION: FIG.3

<table>
<thead>
<tr>
<th>Y</th>
<th>NO VIOLATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>X</td>
<td>VIOLATION</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Z</th>
<th>NO INTERFERENCE</th>
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<tr>
<td>Y</td>
<td>NO VIOLATION</td>
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</tbody>
</table>

| X   | VIOLATION |

HOW BIG A DIFFERENCE WILL THE HUMAN RIGHTS ACT MAKE?

1. Cf *de facto* incorporation?

2. Only higher courts can make declaration of incompatibility – rare anyway.

3. Key will be the interpretative obligations and the duty on public authorities and those exercising public functions.
4. Public/private divide

5. In criminal cases – from discretion to duty?

6. Any possibility of horizontal effect?

7. Will "margin of appreciation" continue to apply?

8. Test cases; Human Rights Commission; Legal Aid?


Life of its own!
Professor de la Vega will address the prohibition against the death penalty for juvenile offenders and its recent application in United States courts. She will include a discussion of the application of the International Covenant on Civil and Political Rights in the U.S. and the effect and validity of reservations and declarations attached to the instrument of ratification. She will also cover the operation of customary international law and *jus cogens* norms.
Professor Connie de la Vega teaches International Human Rights at the University of San Francisco. She has also taught the course in U.S.F’s summer abroad program at Trinity College in Dublin, Ireland and will be teaching it this summer at Charles University in Prague, Czech Republic. She is also Director of the International Human Rights and Civil Litigation Clinics at U.S.F. The students in the International Human Right Clinic prepare written and oral statements on various human rights topics and participate in U.N. meetings in Geneva and New York. They also work on amicus curiae briefs in U.S. courts where international law is applicable. Professor de la Vega has written numerous articles on international human rights law including its application in the U.S. The articles and book reviews have appeared in Human Rights Quarterly and law journals at Harvard, University of Cincinnati, Whittier, and U.S.F.

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Barton S. SELDEN
RAPPORTEUR

Barton Selden is an Adjunct Professor of Law at Golden Gate University School of Law. He earned his J.D. at Boalt Hall and LL.M., International and Comparative Law, at the Vrije Universiteit, Brussels. He is the author of "Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look," published in the ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW, Volume II, and a frequent lecturer on European and International Business Topics in the U.S. and Italy. He is a private practitioner specializing in international business transactions.
Helen E. HARTNELL
M O D E R A T O R

Professor Hartnell is Associate Professor of Law at Golden Gate University School of Law. She received her B.S. (cum laude) and her J.D. (magna cum laude) from the University of Illinois. She practiced law for five years in Germany and in Wisconsin, and specialized in international business transactions and EC law. She has taught at the Free University of Berlin, Tulane Law School, ELTE Law School and Central European University (both in Budapest, Hungary), SMU School of Law, and Harvard Law School. She is actively involved with the American Society of International Law (Private International Law Interest Group) and the International Law Association, and is working on a Ph.D. in Jurisprudence and Social Policy at the University of California, Berkeley. Professor Hartnell has published articles on international commercial law, European law, and comparative constitutional law.
Richard BUXBAUM

INTERNATIONAL ENFORCEMENT OF FAMILY MAINTENANCE AND SUPPORT OBLIGATIONS

Dr. Buxbaum is the Jackson H. Ralston Professor of Law at the University of California Berkeley School of Law, where from 1993-1999 he served as Dean of International and Area Studies. He received his A.B. and LL.B. from Cornell; the LL.M. from the University of California at Berkeley; the Dr.iur.h.c. from the University of Osnabrück and Eötvös Lorand University, Budapest; and was appointed Honorary Professor of Law by Peking University in 1998. He practiced law in Rochester, New York and the U.S. Army before joining the Boalt faculty in 1961. He has published a casebook on corporation law and co-authored two books on federalism in corporation law. He is editor-in-chief of the American Journal of Comparative Law. Professor Buxbaum has been a visiting professor at the Universities of Michigan, Cologne, Frankfurt, and Sydney, and was awarded a 1992-93 Humboldt Research Prize for Humanities and Arts by the Alexander von Humboldt Foundation in Germany.
FAMILY LAW AND THE FEDERAL SYSTEM

Richard M. Buxbaum

Alexander Lüderitz worked with distinction at the intersection of Private International Law and Family Law, and enriched his work through a profound understanding of Comparative Law. It is both in friendship and in recognition of his achievements in this important sector that this tribute to his memory is presented. In substance, the following is a report on the recent refinement and implementation of methods developed in the United States to transcend, in family law, the impasse created by our well-known aversion to accepting international conventional obligations in fields that domestically are the province of the several states.

The original American scholarship about this subject, from which I borrow, is largely the creation of other US friends and colleagues of Alexander Lüderitz; thus, this is in a way also a family tribute to him.

Introduction

The title of this paper reflects the broad reach of the work of Alexander Lüderitz. The subject covered, however, is of necessity a more narrow one, one that the classic conflict-of-laws literature tends to relegate to the basement of practical implementation. Maintenance/child support was chosen because it best embodies the second component of the title, the special problem of the federal state.

The decision of the Hague Conference on Private International Law to revisit the issue of child support (maintenance) in order to improve both the substance and the implementation of the four relevant

- My deep thanks to Professor Carol Bruch, University of California, Davis School of Law, for her careful and critical review of this paper; the remaining shortcomings are mine alone.


2. Carol Bruch, “International Family Law as the Century Turns,” 33 Family Law Quarterly 607 (1999): “For many years the federal government was reluctant to enter into treaty obligations that would preempt state laws because family law was viewed as the proper subject of state rather than national law.” For an important critical voice against this position/attitude from a leading US conflict-of-laws authority, see Cavers, “International Enforcement of Family Support.” 81 Columbia Law Review 999 (1981), especially at 1005ff.

3. See, e.g., the relatively short shrift given the Hague Conventions’ implementation problems in the most recent substantial treatment of the field, in Martiny, “Maintenance Obligations in the Conflict of Laws.” in Vol. 247 Recueil des Cours 131 (1994-III). A noteworthy exception, however, is the mentioned contribution of Müller-Freienfels, supra n. 1, especially at 412ff.

4. It also reflects another family connection. It was our common mentor, colleague, and friend, Albert A. Ehrenzweig who used his mastery of Private International Law to point out to his American colleagues the interstate problems of excessive judicialization of child support that had not been resolved by the first effort at uniform legislation embodied in the Uniform Reciprocal Enforcement of Support Act (URESA) of 1950 and variously amended thereafter. See his “The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings,” 64 Michigan Law Review 1 (1965); see already also the description of this problem, among others, in Brockelbank, Interstate Enforcement of Family Support (The Runaway Pappy Act) (1960; 2d ed., with Infausto, 1971).

Conventions -- Hague 1956, 6 New York [UN] 1956, 7 Hague 1958, 8 and Hague 1973, 9 will provide an interesting test for United States participation in this form of international cooperation. The influence of the United States can be discerned in the formulation of the 1956 UN Maintenance Convention, 10 especially in its treatment of jurisdictional issues and of the special ratification problems of the federal state, and the substantive approach of the Hague Conventions (in their recognition of the need for administrative as well as judicial remedies) parallels even if it does not simply borrow from contemporaneous US debates on the subject. Nevertheless, the UN Convention was more an invitation to the US to reconsider its historic posture than a signal of the latter's willingness to do so. 11 That turn to more direct involvement originally was signalled with the US decision to join the Hague Conference (and UNIDROIT) in 1964, and has been confirmed with its participation not only in the negotiation of the one Convention (on international child abduction) the US has ratified but also in its work on more recent ones that the Hague Conference has produced on related subjects and that are in various stages of consideration and implementation.

The involvement of the United States in the important subsector of Family Maintenance/Child Support international cooperation, however, at least to date has moved in a different direction. The support problem unique to the United States comes from its federal not its international relations. The adoption by the majority of states of the original Uniform Reciprocal Enforcement of Support Act [URES A] 12 already some decades ago reflected the reality that the overwhelming majority of support problems was the result of the interstate mobility of the non-custodial spouse, compared with which the problems of international mobility faded into the background. While recognition of the latter problem, and efforts to enforce its consequences at the intra-US level, have been on the agenda for half a century by now, 13 and while indeed


10 Supra n. 7.


12 9A Uniform Laws Annotated (1968), vol. pt 1 B p 235 1999 9B master ed

13 The original Act [URES A] was adopted by the National Conference of Commissioners on Uniform State Laws in 1950, was variously amended thereafter, and was the subject of a major revision in 1968 [URES A]. See the review of this period (Editorial Text), 9 Part IB. Uniform Laws Annotated 235
the 1968 revision of the Uniform Law did turn out to be useful in the international context, it is a more recent legislative reform that has re-energized the effort to consider international enforcement as well.

That reform comprises both federal and (uniform) state law. It touches on procedural, substantive, and choice-of-law issues that may have an impact on future efforts at international cooperation. That cooperation by the US with its foreign counterparts in the past was based on what might be called an extra-Conventional regime; the US, however, probably will participate in the negotiations for a new Conventional regime now being planned. As a result, the recent US federal and state reforms not only will need to be reviewed by the foreign partners in both types of regimes, but may bear on the choice of regime in the future. The purpose of the present paper is, first, to recall the origin, constraints, and function of the extra-Conventional, “bottom-up” forms of transnational cooperation that the individual US States had devised over the past several decades; second, to introduce the possible impacts on these forms of transnational cooperation that the welfare-reform legislation of the 1990s has created; and, third, to speculate on the possible future forms of that cooperation that might develop within the same channels or be diverted into the mainstream of a revised Hague Convention on Maintenance enjoying US participation.

II. Context

1. The Reciprocity Issue: Phase One

While the original Uniform Act dates back to 1950, its major 1968 revision, that produced RURESA, provides the best starting point for this discussion. As DeHart, on whose article most of the following history is based, has explained, that Act encouraged bilateral efforts that would work for both outbound and inbound support-order enforcement requests. Because the Act defined the responding state (the state in which the non-supporting spouse resided) to include a foreign nation, a US state agency at least could ask the foreign state to accept and under its domestic civil procedure enforce the initiating jurisdiction's support order. In practice, given immigration and migration trends, this turned out to be of benefit primarily in the reverse situation, providing that, in RURESA’s terms, the foreign state was a jurisdiction “in which...a substantially similar reciprocal law is in effect.” Given this rather informal situation, and given the precedent of an earlier arrangement entered into in 1960 between the State of Michigan and the Province of Ontario, Canada under the original URESA, an official unit of the NCCUSL, the National Conference on Uniform Reciprocal Enforcement of Support, began the negotiation of international arrangement by individual States. The first such arrangement was concluded between California and the United Kingdom in 1972 (the latter’s ability to consider such arrangements having been established in that year thanks to the passage of the Maintenance Orders (Reciprocal Enforcement) Act of 1972). Although this official intergovernmental format could no longer be maintained once the NCCUSL ended its sponsorship of the Support Conference, an unofficial format was developed in the form of a non-

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14 As, according to Cavers, supra n. 2, did the 1975 revisions contained in the Social Services Amendments of 1974, 42 U.S.C. Secs. 651-662.

15 Id. at 93f.

16 I do not discuss the separate problem of the modification of a support order by either the initiating or responding state.

17 RURESA, Section 2(m).
profit entity now known as the National Child Support Enforcement Association (NCSEA). That entity, which of course was primarily involved in the implementation of interstate support orders, became the forum through and within which a number of States - led not surprisingly by California - adopted these arrangements with foreign countries. That process was significantly accelerated thanks to a 1979 British Order in Council that extended the California-style arrangement to all other States of the Union that had enacted the appropriate RURESA definition.

Among these, that with the Federal Republic of Germany may be of most interest to readers of this volume although for reasons given below it may not be the most efficient arrangement. It began with discussions between California state officials and the Heidelberg Institut für Vormundschaftswesen, soon joined by state officials from Illinois and Washington, all of whom, it should be recognized, participated in these preliminary negotiations on their own time and at their own expense. That institute, also technically an NGO (though with some Jugendamt support) was the catalyst leading to the first German involvement in this bilateral system, specifically with California. As is well-known in Germany, the practical awkwardness of fitting German civil procedure to the opportunity afforded by the RURESA structure and its single-State implementation led the Federal Ministry of Justice to draft and the Federal Parliament to adopt a statute mirroring these elements of RURESA, and in fact drafted to be available also to other

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18 See DeHart, supra n. 13, at 95. DeHart, then Deputy Attorney General of California, was instrumental in this initiative, and has been centrally engaged in both the state-by-state and federal efforts discussed below. Her engagement has been formally noted and commended by the then-Deputy Legal Adviser of the State Department for Private International Law, Peter Pfund: see same. “The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement.” 30 U.C. Davis Law Review 647, 658f (1997).

19 DeHart, supra n.13 at 95.

20 Not that this would be their first meeting of the topic; see in particular the meticulous discussion by Müller-Freienfels, supra n. 1.

21 DeHart, supra n. 13 at 96 n. 31. Gloria Folger DeHart, who as mentioned is credited with initiation of this process, also organized her colleagues from other States to participate, and pushed the essential concept of frequent meetings of the international community of working-level participants. As she has pointed out, DeHart, id. at 101:

“The State/NCSEA/ABA Family Law Section ‘team’ returns to many of these countries for follow up. In addition, and very useful for both the states and the foreign countries involved, is the attendance of foreign child support officials at the annual NCSEA training conference where they can meet enforcement officials and attorneys involved in support enforcement from most of the states.”


23 In particular, according to one commentator, German applicants could not count on a German court to play the “initiating-request” role without first going through the process of obtaining a judgment ordering payment of a support obligations. See thereto Runzi, supra n. 22 at 424f.
federal regimes, primarily those of Canada.\textsuperscript{24} The "inefficiency," if it is one, was that German law apparently required individual certification of each interested US State as one meeting the appropriate standards of reciprocal cooperation,\textsuperscript{25} which meant recourse to a variety of more or less formal assurances from State agencies, understandably a time-consuming process. The well-known "Alphonse and Gaston" dance of demonstrating mutual reciprocity to each putative dance partner obviously is made all the more complex when individual federal US States, with little experience in the conduct of foreign relations, come onto the dance floor with varying notions of the steps -- not to mention the differing understanding of their prospective partners of those different notions.

2. The Reciprocity Issue: Phase Two

It is, therefore, not surprising that efforts at more centralized approaches to the crossing of this first threshold barrier to consideration of foreign maintenance obligations have been proposed or adopted both in the United States and in other countries. To start with the latter, some countries, for example Austria and Sweden, simply included all US States that had enacted the Uniform Law in the program at once, and extended their own reciprocity to that group as a whole, either by special legislative action or by executive orders.\textsuperscript{26} France also adopted this approach, but only after receiving the assurance of the US Department of State that the conclusion of recognition arrangements by the several States of the Union with a foreign country was within the competence of these States under US constitutional norms.\textsuperscript{27} This involvement of the federal authorities (which occurred in 1980, of course with the acquiescence of the state representatives who had been negotiating the French arrangement) may have had an influence on the next stage of the reciprocity dance.

That next step was the direct involvement of the US Department of State, on behalf of the several states, in converting the existing State-foreign country arrangements into federal ones -- still, it should be noted, outside of the framework of the Convention. While this involvement had begun earlier, a strong new impulse for this centralized approach was a provision of the politically high-profile Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [sic], the principal purpose of which is "to get people off the welfare rolls."\textsuperscript{28} Section 371 thereof authorizes the Secretary of State, acting in consultation with the Secretary of Health and Human Services, "to designate as reciprocating countries those countries that are substantially able to meet the ... mandatory requirements for such designation."\textsuperscript{29}


\textsuperscript{25} This derives from Section 1(3) of the AUG, which characterizes federal states as "states" in the sense of nations; Section 1(2) requires the Federal Minister of Justice to certify and announce by official act the existence in the other "nation" of a law ensuring reciprocity, a condition of application of the AUG's procedures under Section 1(1).

\textsuperscript{26} Again, the details may be found in \textit{DeHart, supra} n. 13 at 98.

\textsuperscript{27} \textit{Id.} at 97


\textsuperscript{29} Pfund, "The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement." 30 \textit{U. C. Davis Law Review} 647, 659 (1997). The statute permits these declarations to be made "in the form of an international agreement, in connection with an international agreement or
These substantive requirements will be discussed below; what is of interest here is the effort to centralize, though on a supplemental rather than an alternative basis, the adoption of bilateral agreements: to move from a cat's-cradle to a hub-and-spoke system of relationships. Whether this is in fact an improvement or a bureaucratization of the first-described system, and whether it will in turn be supplanted by the possible US ratification of a possible total revision of the Hague Convention structure, is not yet clear. 30

What is clear is that so far, as of late 1999, the Department of State had concluded only four of these new arrangements.31 with Ireland, the Slovak Republic, Poland, and the Canadian Province of Nova Scotia. A few other negotiations have reached an advanced state, in particular those with The Netherlands and Norway, both of which, it should be noted, had already negotiated earlier bilateral arrangements with at least some States.

II The New Substantive Requirements

A more substantive issue arose with the enactment of the mentioned “Welfare Reform” legislation. The use of the irresistible lure of federal funding of missions that are traditionally and in a sense constitutionally the province of the several States as a mechanism for imposing federal (usually minimum) requirements on the latter that could not be imposed by direct mandate is a well-known if often controversial feature of the United States administrative system.33 The new welfare regime is no exception: indeed, its “command” could not be blunter, though its choice to rest in part on criteria developed not by Congress but in a sense by the State is unique: “In order to satisfy...[funding-eligibility criteria], each State must have in effect the Uniform Interstate Family Support Act, as approved by the American Bar Association....” 34 This raises the question, whether the criteria developed for purposes of interstate cooperation fit or can be adapted to the different field of international cooperation; in particular, the way and the degree to which these criteria have become the conditions of international reciprocity.

corresponding foreign declaration, or on a unilateral basis.” Section 659A, supra n. 28. According to a delegation of authority noted in the Notice cited infra n. 32, either the Legal Adviser of the Department or the Assistant Secretary for Consular Affairs is authorized to make the declaration after consultation with the other (and, presumably, after obtaining the concurrence of the Secretary of Health and Human Services).

30 Bruch, supra n. 2 at 614:

“Because the new approach provides benefits to every state each time the United States enters into a bilateral agreement with a foreign country, it is far more efficient than previous negotiations on behalf of individual states. But country-by-country negotiations nevertheless require far more time and effort than ratifying a multinational treaty.”


32 See xxxx Federal Register xxx (2000). Negotiations with the Netherlands and with Norway are well-advanced and may be completed during 2000. One procedural problem, apart from the substantive one next discussed, may be that the practice of “domesticating” even bilateral quasi-treaties may be more formal when implemented at this “high” a level as compared with the bottom-up practice that the earlier system had developed. On the other hand, even then it took the enactment of a statute (in Germany), whereas the Irish and Slovak arrangements have been based on declarations of satisfaction with the reciprocity standard by the Ministry of Justice and the Ministry of Foreign Affairs respectively.


34 42 U.S.C. Section 666(f).
1. The Problem

The reason why these criteria need to be discussed lies in one of the definitional subsections of that Uniform Act, which indirectly may have reintroduced and even sharpened a requirement of reciprocity. In order for its support orders to be honored by another State in the relatively automatic and expeditious way the UIFSA sets out, a State has to have "enacted a law or established procedures that are substantially similar to the [UIFSA] procedures...."35 "State" is defined specifically to include foreign nation.36 Taken alone, that "substantially similar" provision does not seem to differ substantially from the original (1992) UIFSA requirement that the foreign state's procedures should be substantially similar to and honor the Act's principles.37 The problem lies buried in the technical phrasing of the mentioned definition:

UIFSA Section 101(19). 1992 Version:38 "State" means a state of the United States.... The term "state" includes an Indian tribe and includes a foreign jurisdiction that has established procedures for issuance and enforcements of support orders which are substantially similar to the procedures under this Act.

[Commissioners'] Comment:39 "Subsection (19) withdraws the requirement of reciprocity demanded by RURESA and URESA. A state need not enact UIFSA in order for support orders issued by its tribunal to be enforced by other states. Public policy favoring such enforcement is sufficiently strong to warrant waiving any quid pro quo among the states. This policy extends to foreign jurisdictions, as well, which is intended to facilitate establishment and enforcement of orders from those jurisdictions. Specifically, if a support order from a Canadian province or Mexican state conforms to the principles of UIFSA, that order should be honored when it crosses the border in a spirit of comity."

UIFSA Section 101(19). 1996 Version:40 "State" means a state of the United States.... The term includes:

(i) an Indian Tribe; and
(ii) a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

[Commissioners'] Comment:41 "Subsection (19) withdraws the requirement of reciprocity between the several states...formerly demanded by RURESA and URESA. [42]...In the original promulgation of UIFSA, the language of Subsection (19) was somewhat ambiguous regarding the necessity of extending reciprocity to...foreign jurisdictions. By reorganizing the statutory language, the 1996 amendment clarifies that reciprocity is not required between the several states.... Further, the additional language and reorganization in Subsection (19)(ii) makes clear that in this UIFSA follows the pattern of RURESA to require that a foreign nation must have substantially similar law or procedures to either UIFSA, RURESA, or URESA

35 UIFSA Section 101(19)(B).
37 The reference to "procedures" is in the statute itself. UIFSA [1992] Section 101(19); the reference to "principles" is in the semi-official "Commissioners' Comment" thereto.
39 Id. at 411.
41 Id. at 259f.
42 The Comment points out that the issue will be moot as soon as all States enact UIFSA. "as mandated [sic] by Congress in its 1996 welfare reform." Id. at 259.]
(that is, reciprocity) in order for its support orders to be treated as if they had been issued by a sister state. This is sharply different from the rule for states: amended UIFSA 1996 recognizes that in international relations the concept of reciprocity is crucial to the acceptance of child support orders by other nations."

Because one may expect this understanding of the law to influence future efforts to achieve a larger network of mutual unilateral arrangements—i.e., achieve a network of reciprocal declarations of reciprocity—it becomes necessary to explore the substantive, jurisdictional, and choice-of-laws elements of the new US regime. In particular, it becomes relevant to assure foreign jurisdictions that the new regime should not inhibit their willingness to continue on this path of mutual assurance of equal treatment any more than it should deter a State of the US from doing so. That assurance will be the more convincing the more it is based on the unavoidable details of this new statutory arrangement; that, I trust, will justify the following lengthy review.

2. The Merits

The policies underlying the child-support provisions of the new legislation are above all those of practicality, and only to a minor (though important) degree those of jurisdiction. As a leading participant in the reform process has phrased them:

"The vision for child support enforcement . . . is that the payment of child support should be automatic and inescapable—'like death or taxes.' This vision is reflected in three key elements: (1) Access to Information—the ability to locate individuals and assets; (2) Mass Case Processing—the capacity to work cases in volume using computers, automation, and information Technology; and (3) Pro-Active Enforcement—the ability to take enforcement action automatically, preferably administratively, without reliance on a complaint-driven process."  

Particularly important implementing elements supporting these policies, at least those important in the international context, are the methods for assuring access to location of debtors, methods that indeed resemble their analogues in the field of taxation: mechanics for the centralization of the location and also the collection functions; steps to simplify rules of civil procedure concerning the conversion of contractual or court-ordered obligations into automatic liens rather than into separately recognized judgments in the state of the debtor's location; mandated response times and deadlines; and availability of professional assistance to the spouse seeking enforcement on a non-fee basis.

3. Their Implications for Transnational Cooperation

Taken by themselves, these criteria are not in principle new. The RURESA policies already reflect them, at least to the extent that the technology of that day permitted that reflection, and of course even the 1956 New York Convention already had introduced the basic concept of administrative (rather than judicial) leadership and public financing of the costs of the process. What is new, and important for present purposes, is the "raising of the stakes" in terms of the modern identification and collection procedures and the division of these specific mandates between the federal legislation (and its implementing regulations) and the cross-referenced new Uniform Act as enacted in the several States (UIFSA). Those domestic improvements in the process have international implications.

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43 Whether the statute should have been so understood is another matter. For cogent criticism of this understanding, see Caswell, "International Child Support—1999." 32 Family Law Quarterly 525, 537 (1999). One might add that the last sentence of the 1996 Comment reveals a confusion between unilateral and universal rules occasionally found in the treatment of conflict-of-laws regimes.

This may best be demonstrated by reviewing briefly the new elements of the interstate procedures that States expecting federal funding of their child-support enforcement offices, the so-called IV-D Agencies, are expected to implement. The location of the non-custodial spousal debtor of course is the beginning of the process, but for purposes of international cooperation the least remarkable. That, of course, is because it is the United States, not other countries, that lacked a national Identification-Card system, and that thus lacked an easy and effective way to help foreign applicants locate the US-resident obligor. The new US interstate location procedures now will give the foreign nation’s incoming request a free ride on the new interstate highway. Whatever the frustrations these applicants still may experience with locating the US resident, they will be less than those experienced in the past. The US outgoing applications, on the other hand, pose no new challenges to foreign location procedures in this locational regard and, thus, no new challenges in the context of reciprocity.

More interesting from that perspective is the change in asset seizure. To take one example: If the new domestic requirement that a private financial institution shall use an account-holder’s Social Security number as one searchable item permits the State collection agency to kill two birds with one stone — to identify available assets at the same time as it locates the debtor — a reciprocity requirement going this far would create a significant problem under the laws of many foreign jurisdictions. For the receiving jurisdiction to locate the foreign debtor by means of its own standard national identification system is one thing; to require disclosure of financial records, whether as pendant to that process or (as would be the case) as a separate process quite another. Fortunately, that domestic requirement is based on the one critical distinction between interstate and international cooperation, the difference in volume.

Current California statistics suggest that incoming foreign applications might reach 500 per year, of which approximately one-half come from Mexico; European ones typically do not, even in California, exceed 100, with no one country accounting for more than 20 or so. On the perhaps questionable assumption that the outgoing requests are of the same order of magnitude, it would seem that possible exorbitant asset-disclosure requests would not be serious enough to lead the US agency to deny foreign

45 Legler, supra n. 44 at 542f:

“...[T]he PR WORA...significantly expands access to information...[, providing] that the state child support agency must have access to two important categories of records. The first category is records of state and local government agencies, including vital statistics; state and local tax and revenue records; records concerning real and titled personal property; records of occupational and professional licenses: records concerning the ownership and control of corporations, partnerships, and other business entities;...records of motor vehicle departments; and corrections records....The second category...is certain records held by private entities, including customer records of public utilities and cable television companies and information (including assets and liabilities)...held by financial institutions.”

While some of this information may be useful in the search for assets, its primary purpose is to locate the debtor. Of course, it then serves both purposes.

46 Obviously German (and other) rules on data protection and privacy would bar this kind of search were it necessary in order to locate the debtor; but assuming that this is not a significant problem in countries other than the US, the exorbitant nature of such a search, in those terms, should be an academic issue only.

47 Section 317.


49 “Questionable” because it is generally reported that the outflow of requests from California to Mexico exceeds the reverse: but statistics to bear this out, especially as to the magnitude of the difference, do not seem to be available.
applications on the ground that in this one subset the foreign state's inability to provide that disclosure destroys the general assurance of reciprocity that remains (at least at the level of principles) a requirement. In the context of small-number searches, the location of the debtor should suffice to permit an efficient collection procedure to be initiated. Asset location is an offshoot of debtor location: only where there is a massive caseload should it be considered an important benefit to the collection process in its own right.

The third issue raised by the new procedures, that of automatic implementation of collection procedures, raises some different issues but fits this analysis as well, and permits the same policy conclusion. The single most important change here is the requirement that state law permit the automatic imposition of a lien on various types of assets, on the analogy of the typical tax lien. This kind of short-cut procedure has raised questions of procedural due process even in the United States, though the consensus seems to be that the debtor does not have a right to a pre-seizure hearing; I assume it would raise some questions in foreign jurisdictions as well, depending on its automaticity and on the rights of other claimants against the support debtor. More to the point, it might well require legislative changes in the rules of civil procedure in foreign jurisdictions. The basic point, however, remains the same. Since it is the problem of a massive case volume, and its partial resolution by means of collection efficiencies such as these, that led to the adoption of this procedure, it is not one which the US reasonably needs to insist on in the international context. Thus, its possible absence there again should not lead to a rejection of the assurance of reciprocity by the foreign state.

The underlying social problem of inadequate flow of support obligations, with its attendant burden on the state's social-welfare norms and budgets, makes it instrumentally appropriate—putting aside questions of fairness—that the state take over from the complainant the burden of pursuing the defaulter. The resolution of this remaining domestic problem now has been expedited by PRWORA, which "externalizes" the initiative required to pursue the defaulting spouse by placing it on the state. That alone has not posed problems in the reciprocity context in the past (other jurisdictions generally also provide this support) and should not do so in the future. It is not only the costs of the process that is at issue in the interstate context, however, but also the power of the governmental complainant to obtain short-cut procedures from its sister-State's agencies. The new, so-called "expedited" procedures the US States now are obliged to adopt in order to handle the routine situations as a condition of obtaining federal financial support are intended to avoid the need for involvement of the judiciary at any stage of the typical process, while permitting more complicated judicial proceedings for the occasional more complicated situations. In this new procedural sense, they do go fairly deeply into new territory and indeed "revolutionize the collection process." The following paraphrase thereof makes the point:

"...[O]rdering a genetic test: subpoenaing information...: changing payees in cases of assignment:

Legler, supra. n. 44 at 547:

"Under current law, unpaid support payments become a judgment by operation of law. The PRWORA builds upon this existing law through two crucial changes. It provides that liens on the unpaid child support obligations must additionally arise by operation of law, and that the liens must be able to be imposed administratively."


Indeed, even the question of interstate cross-border cooperation in this procedural context remains somewhat problematical. The adoption of a federal legislative mandate that each State was obliged to give full faith and credit to such automatic liens though unregistered in the state of the debtor's assets' location, contained in PRWORA Section 368, suggests this concern.

Legler, supra n. 44 at 551ff.

ld. at 553.
...intercepting or seizing periodic or lump-sum payments:...attaching and seizing assets of the obligor held in financial institutions; attaching public and private retirement funds; imposing liens; and increasing the amount of the monthly payment to cover...arrearages." 

55 Of all of the issues discussed so far, this seems to be the only one that could give foreign jurisdictions pause, and by doing so raise the issue of reciprocity against their own applications to US State authorities. To the extent that US States can recharacterize even this set of powers as relevant to and thus limited to the mass-volume situations, that danger can be avoided. 

56 Finally, the financially induced incentive for States to adopt the newest Uniform Support Law (specifically, the 1992 version of the Uniform Interstate Family Support Act with all amendments adopted through 1997) brings another major change into the system; namely, the expansion of personal jurisdiction achieved through the long-arm provisions of UIFSA, coupled with a uniform choice-of-law standard. That is sufficiently different from the substantive provisions to warrant separate discussion.

4. New Jurisdictional Issues

The jurisdictional issues raised by the new Uniform Act of course are not novel, and should be placed in the context of more general arguments about in-personam jurisdiction. As is well-known, the principal expansion of the forum court's personal jurisdiction over a foreign child-support obligor rests on some specifically identified earlier relations of that obligor to the obligee in their earlier joint domicile; otherwise, in the interstate context, it (unfortunately) remains debatable whether a foreign obligor can without more be haled into a forum court. Extension of the grounds of personal jurisdiction by statute or treaty may alleviate a constitutional objection, but that depends significantly on the details and the context.

Older debates about jurisdictional incongruities between US and other, especially Civilian regimes focus on the exorbitance of "tag" jurisdiction as permitted by the former and on the exorbitance of

55 Id. at 552. As Legler goes on to point out (id. at 556), each State also is obliged to permit revocation of drivers', professional, occupational, and recreational licenses.

56 One interesting indicator of the degree of federal micromanagement of the procedures, worth at least a footnote: One minor condition of obtain IVD funding by the states is their creation of a case-closure system that does not close unresolved cases except under limited conditions. Part 45, Code of Federal Regulations, Section 303.11 provides that a case may not be closed unless one of a set of criteria exist which, as to international cases, includes:

"(6) The noncustodial parent is a citizen of, and lives in, a foreign country, does not work for...a company with headquarters or offices in the United States, and has no reachable domestic income or assets; and the State has been unable to establish reciprocity with the country."

57 PRWORA Section 321.

58 UIFSA Section 201. 9 U.L.A. Section 501 (1992).


jurisdiction based on the domicile of the spousal/child claimant as permitted by the latter. Those distinctions remain active and bedevil any effort at international harmonization, as the early negotiations of a possible new Hague Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters well demonstrate.

In that sense, UIFSA brings no significant qualitative change to the older debates and, I would argue, presents few no problems. What is, as a matter of specifics, new is contained in Section 201, characterized by the Conference’s Official Comment thereto as containing “a broad provision for asserting long-arm jurisdiction to give the tribunals in the home state of the supported family the maximum possible opportunity to secure personal jurisdiction over an absent respondent.” Reasonably assuming, as Bruch does, that the quoted provision would pass that constitutional muster, it remains to ask whether its use in the international maintenance regime — a matter still to be reviewed — would seem exorbitant to the jurisdiction responding to a US submission of a maintenance order. That question is relevant (only) to the extent that denial of a major ground of personal jurisdiction by that jurisdiction would in turn raise the specter of non-reciprocity.

So far as Germany is concerned, that question might be answered by analogical recourse to the jurisprudence interpreting Article 1(2)(1) of the Brussels Convention, which has permitted recognition of even lump-sum judgments for child or spousal maintenance as falling without the Article’s exclusion of suits concerning “rights in property arising out of a matrimonial relationship” from the Convention’s reach. Extrapolating from that opening, it might be possible then to rely on the bases for personal jurisdiction as follows:

62 Earlier PUDRs were not held up by this difference between bases of personal jurisdiction: thus, one should expect that only those bases that indeed are new and qualitatively different could cause any problems.

63 Comment to Section 201, 9 Part IB U.L.A. 270 (1999). In fact, with perhaps one exception, the text of the statute will sound less revolutionary to a Civilian audience:

“In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this State may exercise personal jurisdiction over a nonresident individual...if:

1) the individual is personally served...within this State;
2) ....;
3) the individual resided with a child in this State;
4) the individual resided in this State and provided prenatal expenses or support for the child;
5) ....;
6) the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse;
7) ....;
8) there is any other basis consistent with the constitution of...the United States for the exercise of personal jurisdiction.”

64 Supra n.2 at 613.

65 See the discussion at p. infra.


jurisdiction that, within the circle of the Convention Member States, are acceptable in this recognition-and-

enforcement context. There are, however, some problems with that syllogism. The principal problem lies in

the well-known asymmetry of the Convention when it comes to non-Member States. The acceptance of

personal jurisdiction based on the fact that the plaintiff is a "weak party" and should not be required to seek

relief abroad is limited to the circle of Member States of the Brussels/Lugano Conventions. It probably

would not be available for the benefit of a third-country judgment brought to a Convention state for

recognition and enforcement. If, on the other hand, the previously discussed German statute were

construed as permitting recognition of, say, California support orders that were based on jurisdictional

grounds no broader than those of Brussels/Lugano, a matter of German law I am not competent to discuss,

the analogy would fit, and the problem would evaporate.

Substantively speaking, however, it has to be noted that the jurisdictional bases found in the new

US regime include some that may be difficult to sell if the sales argument were to be grounded on the

jurisdictional bases indirectly accepted in that Convention alone. Especially those bases that relate to the

establishment of paternity and conflate this with the support issue may be troublesome, given the fact that

the earlier reciprocal arrangements seem to have kept these matters separate. In the end, however, I

remain of the opinion that these jurisdictional issues would not, standing alone, create significant

roadblocks for the drive towards a larger net of bilateral enforcement arrangements. In the context of the

prior statutes and, especially, of the corpus of prior Conventions, they are not a radical breakout towards a

limitless reach of the US courts and agencies. Thus they should not trigger reciprocity concerns.

Nor is the choice-of-law provision of the new Uniform Act significantly different, or more

homeward-bound, than its predecessors. The basic rule calls for the responding tribunal to apply "the

procedural and substantive law, including the rules on choice of law, generally applicable to similar [local]

proceedings... and... to determine the duty of support and the amount payable in accordance with the

[local] law..." That general provision, however, is subordinate to the specific section providing for the

choice of law; specifically, that "[t]he law of the issuing state governs the nature, extent, amount, and
duration of current payments and other obligations of support and the payment of arrearages under the

order." In addition, the longer Statute of Limitations is to be applied, whether of the issuing or responding

189/02 (July 28, 1990) on this point. This is the position in Bruch, "The 1989 Inter-American Convention

on Support Obligations," 40 American Journal of Comparative Law 817, 826f (1992). Indeed the drafters' expectation that the new personal-jurisdiction provision of UIFSA would not hinder international

enforcement was based on this "weaker-party forum" concept; see Bruch, supra n. 60 at 1055f. As she

recognizes, the analogous provisions of the Hague Enforcement Conventions of 1958 and 1973 are only partly applicable, since they bear on the recognition and enforcement of such "weaker-party" forum orders,

but do not create that type of jurisdiction directly. Bruch, "The 1989 Inter-American Convention on

Support Obligations." supra at 827f.

There is an interesting parallel here to the judicially created doctrine that family-law issues,

though raised in litigation between persons who are citizens of different States, are outside the realm of

diversity jurisdiction, most recently confirmed and limited in Ankenbrandt v. Richards. 504 U.S. 689


68 It would also be possible, of course, to base this line of reasoning on the 1973 Convention on the

Recognition and Enforcement of Decisions Relating to Maintenance Obligations. supra n. . See the
decision of the ECJ in Van den Boogaard v. Laumen. supra n. 66, on this point.


for a recent analysis and critique of this situation.

70 Weintraub, supra n. 65 at 376f, also points to this basis as a novum even in the interstate context.


72 UIFSA Section 604(a). id. at 357.
It seems to me that only this latter mandate, possibly conflicting with the hoary distinctions between procedure and substance that have grown up around the prescription problem, could create a tension for the development of further non-Conventional bilateral arrangements. This, too, is not significant enough to shake the conclusion that, on balance, none of these issues rise to the level of calling the existence of reciprocity into question.

5. The Adequacy of Partial Reciprocity

The principal reason for this hopeful conclusion lies in the limited role these extensions of substance and procedure actually play in the current system of creating bilateral arrangements, either by each State or by the US, with one country at a time, especially if the arrangements are based on the PUDRs - the parallel unilateral declarations of reciprocity and thus of automatic enforcement. The question is not whether Germany would accept that the described extensions fall within its previous reciprocal arrangements with various US States, but whether, if it does not, these States then would deny reciprocity to German requests for enforcement on the basis that Germany no longer was granting reciprocity to their requests. That question is for each State to answer, and a State would, I submit, be shooting itself and its clients in the foot were it to throw out the baby with the bathwater and scuttle a satisfactory working arrangement because it is not as perfect as the new interstate regime, based, as it is, on the quite different problems of high-volume caseloads. It is true that the new jurisdictional and choice-of-laws extensions (if the latter are such) are less driven by the mass-case phenomenon than are the substantive ones, but that alone should not lead to a different outcome.

This argument, however, assumes a certain flexibility or discretion on the part of the competent State authority to make such a judgment. That assumption has not been controversial in the past, when general congruence of "principles" rather than close congruence of "laws and practices" sufficed to secure mutual assurances of reciprocity. The uncertainty, such as it is, has been introduced by the puzzling retrograde view of the Uniform Law Commissioners that suggests a qualitative difference between interstate and international respect. In that situation, I would argue that both the assumption, and the consequences of its inaccuracy, are the less problematic the more this is a matter for each individual State to decide. Both the assumption and the consequences are different in the case of the federal takeover of the bilateral arrangements, discussed earlier. It is conceivable that the federal authorities will become mired in the problem of securing a difficult and unnecessary unanimity among their client States as a condition precedent to continuing with what already is a slow process: although to be fair the more recent of the new arrangements were made after both PROWRA and UIFSA II were on the books.

73 UIFSA Section 604(b), ibid.
74 See, e.g., Ehrenzweig, Conflict of Laws
75 Another useful approach is that of Spector. "Toward an Accommodation of Divergent Jurisdictional Standards for the Determination of Maintenance Obligations in Private International Law." (unpublished, 1999). By analogy to the practice under the Child Custody and Abduction Conventions, he proposes that the receiving jurisdiction should not look at the basis for personal jurisdiction claimed by the sending jurisdiction when it issued its order, but at whether on the facts of the underlying documentation the former could have asserted personal jurisdiction, in the reverse situation, on a ground available under its law. This would be especially useful in reducing foreign objections to the US exercise of "tag" jurisdiction. Thus, if the jurisdictional bases of Section 201 (3), (4), and perhaps even (6), would have been specifically available to the receiving jurisdiction, the fact that jurisdiction in fact was based on subsection (1) should be irrelevant.
76 As the referenced Federal Register Notice, supra n. 32, indicates, the Ireland, Slovak Republic, Nova Scotia and Poland Declarations of Reciprocit) were made after September 10, 1997. By the same token, however, it should be noted that the Notice provides that:
The interesting question, of course, is whether moving these issues and discussions to a new diplomatic conference that seeks to create a revised Maintenance Convention is a way to cut the federal knot, or is a way of rejecting an adequate solution in favor of a better but unreachable one. The Congressional adoption -- in part directly in PROWRA, in part by reference through UIFSA -- of the described substantive, procedural, and jurisdictional extensions as conditions to be met in future reciprocal arrangements does not augur well for the first conclusion. It is not a constitutional issue: that is, a treaty would override the prior federal as well as state statutory regimes. It is, however, a significant issue of political authority, nerve, and credibility; an issue that, in particular, pits two rival views of states' rights against each other. It has been close to impossible in the past, and remains difficult to this day, for the US Executive Branch to find support from the Legislative Branch for treaty "intrusion" into subjects historically left to the States, constitutional as that "intrusion" may be.

If the Executive Branch is fated to strive for the full international implementation of the new and therefore by definition more perfect version of the interstate arrangement, it may well be trapped in the paradoxical situation of denying some States their freedom to opt for the less perfect but more feasible arrangement. Since for US States it is Mexico and to a lesser extent Canada that provide the substantial plurality (in some cases the majority) of international issues, and since implementation procedures are frequently revisited and improved by their authorities at the working level, the lessons learned from those experiences may be more effective as heuristic tools for more general improvement than a decade of diplomatic discussions focused on more formal issues. Treaties are a blunt tool for this kind of work.

"...these procedures must be in substantial conformity with mandatory elements set out in the statute: procedures for the establishment of paternity and support orders for children and custodial parents; a system for the enforcement of orders, including procedures for the collection and distribution of payments under such orders; providing administrative and legal services without cost to the U.S. applicant, and the designation of an agency to serve as a central authority...."
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The Internet offers companies a wide range of opportunities to makes themselves and their products and services better known. Companies may, for example, send advertisements by e-mail, either solicited or unsolicited (spamming). They can advertise on the web sites of themselves or on the web sites of others. They may make use of hyperlinks to use information of other web sites or they may make use of metatags in order to be found more easily by the search engines.

Online advertising and -marketing can raise questions with respect to unfair competition. The traditional forms of unfair competition, such as misleading advertising, disparagement and causing confusion may also occur on or through the Internet. How such acts may constitute an act of unfair competition, should be answered under the national rules of unfair competition as there are no international rules on this issue. A recent European initiative intends to harmonise certain rules with respect to electronic commerce, including rules on online advertising and -marketing (commercial communication). In December 1998 the European Commission made a proposal for a Directive on certain legal aspects of electronic commerce in the Internal Market. Very recently, on February 28th, a common position has been adopted by the European Council. The draft Directive includes rules on commercial communication in general, including the unsolicited sending of advertisements through e-mail (spamming), and rules on the liability of Internet intermediaries and electronic contracts.

However, that leaves unsolved the question which national law applies in an international dispute resulting from the use of the Internet. Current conflict rules, like the *lex loci delicti* and the market rule are no longer efficient as the Internet (often) offers no geographical connections. An alternative conflict rule for Internet unfair competition matters needs therefore to be sought. Much discussed is the country-of-origin principle, meaning in an Internet context; the place where the information originates. The country-of-origin principle is also included in the draft European Directive, but there it is not intended as a conflict rule. However, opinions differ as it comes to the question whether the country-of-origin rule in the draft Directive has the effect of a conflict rule. Still, research is needed for an efficient alternative conflict rule in international unfair competition disputes resulting from the use of the Internet.
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The Paradox of Free Market Democracy: Rethinking Development Policy

Amy L. Chua

Markets and democracy are “the twin pillars” of prevailing development orthodoxy.1 Many have explored the ways — “theoretical, historical, and empirical” — in which these two pillars are said to reinforce each other.2 By contrast, this Article will focus on an inherent instability in free market democracy.

For a long time, leading political philosophers and economists held that market capitalism and democracy could coexist, if at all, only in fundamental tension with one another.3 Markets would produce enormous concentrations of wealth in the hands of a few, while democracy, by empowering the poor majority, would inevitably lead to convulsive acts of expropriation and confiscation. In Adam Smith’s words, “For one very rich man, there must be at least five hundred poor . . . . The affluence of the rich excites the indignation of the poor, who

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1 Professor of Law, Duke University. For their helpful comments, I would like to thank Bruce Ackerman, Owen Fiss, Gerry Gunther, Henry Hansmann, Tom Heller, Donald Horowitz, Mark Kelman, Gerald Neuman, Jed Rubenfeld and the participants in workshops at the University of Chicago and Columbia University.


3 Larry Diamond, Democracy and Economic Reform: Tensions, Compatibilities, and Strategies for Reconciliation, in Economic Transition in Eastern Europe and Russia: Realities of Reform 107, 108 (Edward P. Lazear ed. 1995); see, e.g., Peter Berger, The Capitalist Revolution 73 (1986) (describing the contemporaneous rise of capitalism and democracy in Europe and the United States); Robert Dahl, On Democracy 168 (1998) (suggesting that market-capitalism “creates a large middling stratum of property owners” who “are the natural allies of democratic ideas and institutions’’); Diamond, supra, at 108 (observing that both capitalism and democracy rest on “fundamental principles of competition and choice” and are threatened by “excessive concentration of power in the state’’); Owen M. Fiss, Capitalism and Democracy 13 Mich. Int’l L. 908, 911(1992) (“Both notions are rooted in assumption of human rationality and self-interest, and thus rely on individual freedom and autonomy as the means for achieving their ends’’).

are often both driven by want, and prompted by envy, to invade his possessions. Maddison warned against the “danger” to the rights of property posed by “an equality & universality of suffrage, vesting compleat power over property in hands without a share in it.” David Ricardo was willing to extend suffrage only “to that part of [the people] which cannot be supposed to have an interest in overturning the right of property.” Thomas Babington Macaulay went further, portraying universal suffrage as “incompatible with property” and “consequently incompatible with civilization.” From this point of view, free market democracy is a paradox, a contradiction in terms.

But as it turned out, the Paradox of Free Market Democracy did not prove insuperable. On the contrary, while “[d]emocracy and market-capitalism are locked in a persistent conflict,”

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7 The Works and Correspondence of David Ricardo, supra note __, at 369-70.

8 Macaulay, supra note __, at 268.

I am far from wishing to throw any blame on the ignorant crowds . . . We ourselves, with all the advantages of education, are often very credulous, very impatient, very short-sighted, when we are tried by pecuniary distress or bodily pain . . . Imagine a well-meaning laborious mechanic fondly attached to his wife and children. Bad times come. He sees his wife whom he loves grow thinner and paler every day. His little ones cry for bread; and he has none to give them. Then come the professional agitators, the tempters, and tell him that there is enough for everybody, and that he has too little only because landed gentlemen, fundholders, bankers, manufacturers, railway proprietors, shopkeepers, have too much? Is it strange that the poor man should be deluded, and should eagerly sign such a petition as this? The inequality with which wealth is distributed forces itself on everybody’s notice. It is at once perceived by the eye. The reasons which irrefragably prove this inequality to be necessary to the well-being of all classes are not equally obvious. . . .

. . . And do you believe that as soon as you give the workingmen absolute and irresistible power they will forget all this? . . . In every constituent body capital will be placed at the feet of labor; knowledge will be borne down by ignorance; and is it possible to doubt what the result must be? . . . What could follow but one vast spoliation? One vast spoliation!

Id. at 271-72, 274.

9 Dahl, supra note 2, at 173. As Dahl has noted, this conflict “can be understood in two ways: Democracy may be seen as a danger to property rights; or property rights may be seen as a danger to
this conflict has been more or less successfully negotiated throughout the developed world. Defining the terms broadly, markets and democracy have coexisted quite healthily in the United States for two hundred years, and at least a dozen other developed countries "have remained continuously capitalist and democratic for the past half-century." That democratic politics proved compatible with capitalism in the First World -- that the electoral "power of numbers" did not overwhelm the "economic power of property" -- is one of the great surprises of modern history. 10

Will the Paradox of Free Market Democracy be similarly negotiable in developing societies? Through what institutions? What face will the Paradox assume in the developing world? Law and development, booming anew today, 13 has systematically ignored this set of questions -- a remarkable omission, given the confidence with which democracy and markets are being exported all over the Third and postcommunist worlds. 14


12 For a particularly interesting discussion of the "peaceful" but "precarious" "coexistence between democracy and capitalism" in industrialized Western societies, see JÜRGEN HABERMAS, The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies, in THE NEW CONSERVATISM 55-56 (1985); see also DAHL, supra note __, at 166-79 (describing the "antagonistic symbiosis" between democracy and market-capitalism); CHARLES E. LINDBLOM, POLITICS AND MARKETS 159, 161 (exploring "the close but uneasy relationship between private enterprise and democracy"). For economic models exploring the same phenomenon, see JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 147-65 (1975); DOWNS, supra note __, at 198; Allan H. Meltzer & Scott F. Richard, A Rational Theory of the Size of Government, 89 J. POL. ECON. 914, 916 (1981); Sam Peltzman, The Growth of Government, 23 J. L. & ECON. 209, 222-23 (1980).


14 The self-confidence characteristic of today's law reform efforts in the developing world contrasts jarringly with the self-questioning (and in some cases self-flagellation) that accompanied the decline of the earlier law and development movement, the basic thrust of which was also to export democratic capitalism to the developing world. See, e.g., David M. Trubek & Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 Wis. L. REV. 1062, 1070, 1080. As a number of commentators have suggested, the angst about "cultural imperialism" in the 1960s and 1970s was in significant part a product of the Vietnam War. See, e.g., Richard Bilder & Brian Z. Tamanaha, The Lessons of Law-and-Development Studies, 89 AM. J. INT'L L. 470 (1995). Similarly, the absence of self-doubt today probably reflects the collapse of the former Soviet Union and the sense (at least in the West) that there is no acceptable alternative to the Western developmental paradigm.
This Article makes four points. The first, in the nature of a hypothesis that I will try to make plausible but will not be able to prove, is that the Paradox of Free Market Democracy in the developed world is and always has been mediated by a host of devices substantially de-escalating the conflict between market-generated wealth disparities and majoritarian politics. These devices, while varying widely across nations, generally fall into three categories: material, political, and ideological.

Materially, in all the developed nations, the less well-off have essentially been "bought out," in part through market-generated material prosperity, but also in significant part through strong networks of redistributive institutions. Politically, in addition to a long history of massive exclusions from the suffrage, Western nations have a variety of institutions that restrain majoritarian confiscatory impulses, including separation of powers and constitutional property protections. Finally, these "buy-outs" and political restraints have been supplemented, perhaps crucially, by the existence of various market-compatible ideologies - belief-systems that make the less well-off majority more inclined to accept or at least not to rebel against the extreme income disparities produced in a market economy. Probably the most prominent of these ideologies in the United States is that of upward mobility.

(To avoid misunderstanding, I am not concerned with the origins of these mediating institutions and ideologies. For example, I am not making the functionalist claim that market-compatible ideologies emerged in the developed nations because the Paradox of Free Market Democracy "demanded" them. My concern, rather, is with effects - in particular, with the neutralizing impact that these institutions and ideologies have had on the conflict between markets and majoritarian politics.)

Second, these developed-world mediating devices are largely absent from the developing world, and there is no reason to assume that they will be spontaneously generated by market and democratic reforms. On the other hand, many developing countries do have one highly effective restraint on democracy: systemic political corruption. In recent years, anti-corruption initiatives have become a major thrust of international development policy. These initiatives are long overdue and of the utmost importance, but to the extent that they succeed, they will sharpen the conflict between markets and democracy.

Third, in critical respects, the Paradox of Free Market Democracy is much more dangerous and potentially explosive in the developing world. To begin with, in terms of sheer numbers, the poor are vastly more numerous, and poverty far more entrenched, in the developing world today than in the developed world, either today or at analogous historical periods.

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15 See infra TAN __.
16 See infra TAN __.
17 See infra TAN __.
18 See infra TAN __.
19 See infra TAN __.
addition, universal suffrage is generally being implemented in the developing world on a rapid, large-scale basis that contrasts sharply with the very gradual and incremental enfranchisement characteristic of the history of Western democratization. Moreover, perhaps most fundamentally, in stark contrast to both the Western nations and all the East Asian “Tigers,” many developing countries have one or more ethnic minorities who, along with foreign investors, will tend under market conditions to economically dominate the “indigenous” majorities around them, at least in the near to midterm future. The existence of such market-dominant minorities, together with other conditions prevalent throughout the developing world, converts the Paradox of Free Market Democracy into an engine of potentially catastrophic ethnonationalism. In these circumstances, democracy will often mobilize majoritarian ethnoeconomic resentment into powerful nationalist movements potentially subversive of both markets and democracy themselves.

Thus, the Paradox of Free Market Democracy often has an entirely different face in the developing world. The ethnic and racialist structures of the developed world typically help defuse the conflict between markets and democracy, essentially by fracturing the poor majority. In the United States, for example, racism (together with a thriving ideology of upward mobility) arguably makes poor and lower middle class whites feel more “kinship” with wealthy whites than with African-Americans or Hispanic-Americans of comparable economic status. As a result, racism in the United States creates no particular threat to a market economy. On the contrary, to the extent that racism helps reconcile a great number of poor and working class whites to the prevailing economic hierarchy (because there is a group still lower than they) and impedes political coalitions among the poor, racism helps to mediate the Paradox of Free Market Democracy.

By contrast, the distinctive overlapping of class and ethnicity characteristic of many developing countries-- in which the “very rich” are (or are perceived as) ethnically distinct -- tends to catalyze the Paradox of Free Market Democracy, with democracy pitting an “indigenous” majority against an economically dominant “outsider” minority. This dynamic is not a mere theoretical possibility in the developing world. It is a persistent, lethal reality, as recent events in Indonesia have once again illustrated.

Finally, for all these reasons, it is irresponsible to promote markets and democracy in the developing world in the absence of institutions capable of mediating the conflict between them. To be sure, today’s prevailing policy approach to law and development does include proposals

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20 See infra TAN __.
21 See infra TAN __.
22 See infra TAN __.
23 See infra TAN __.
24 See infra TAN __.
25 See infra TAN __.
that, if successful, would replicate some of the devices that have helped mediate the Paradox of Free Market Democracy in the developed world -- for example, "social safety nets" and constitutional property protections. But these policies do not grapple with the distinctive and most dangerous aspects of the Paradox of Free Market Democracy as it presents itself in the developing world, such as the much more massive extent of poverty, the rapidity of democratization, and the problem of market dominant minorities.

Part I of this Article will explore the material, political, and ideological devices that have helped mediate the conflict between markets and democracy in the developed world. While some of these devices will also be desirable in the developing world, others surely will not be. One of the most important challenges facing developing world policymakers is to think much more carefully about how the developed world "solved" the Paradox of Free Market Democracy and whether these "solutions" could -- or should -- exist in the developing world.

Part II will show how certain conditions characteristic of developing societies make the Paradox of Free Market Democracy especially problematic and combustible. Contemporary Indonesia is offered as a paradigmatic example. Weimar Germany is also discussed here, as a rare instance in which a Western nation pursued -- with catastrophic ethnonationalist consequences -- free market democracy under conditions in many respects analogous to those characteristic of many developing countries today.

Part III will explore policies that might be capable of grappling with the Paradox of Free Market Democracy as it presents itself in the developing world. The policies I propose will focus on the problems of market dominant minorities and ethnonationalism just described -- problems that the latest law-and-development panaceas (rule of law, state-building, judicial independence, civil society) do not address and in certain circumstances may even aggravate. If markets and genuine democracy are to coexist in the developing world, it will be crucial to find ways to give large numbers of the impoverished majority a stake in the market economy, and in particular, an interethnic market economy.

While the Paradox of Free Market Democracy will not be ethnicized everywhere in the developing world, the proposed policies will, with some adjustment, have bearing for all developing and post-communist countries. This is so not only because all developing countries pursuing market and democratic reforms will have to find ways to mediate the basic conflict between market-generated wealth disparities and majoritarian politics. More important, in virtually all developing and post-communist countries, foreign investors -- who tend to prosper disproportionately under economic liberalization, often provoking nationalist, anti-market sentiment -- occupy a role analogous to that of economically dominant minorities.
Cultural Exceptions to International Legal Norms: Gender, Trade and the Environment

Joel R. Paul

States invoke cultural exceptions as justifications for derogating from international legal obligations. For example, some developing countries claim cultural exceptions against the international legal norm of gender equality for women and sexual minorities. International legal scholars have debated the universality of human rights, but most implicitly assume that the norm of gender equality, unlike other human rights norms, is bounded by culture. These scholars have ignored the disparate treatment of culture in other areas of international law.

My article maps out the international legal discourse of cultural exceptions. It is not another argument for, or against, cultural exceptions. Rather, it explores the reason for the apparently inconsistent treatment of culture. To this end I examine the legal discourse deployed in two other cultural controversies: The European Union and Canada assert cultural exceptions against the W.T.O. rules that prohibit import barriers to U.S. publications, films and videos. Japan and Norway argue for a cultural exception to justify their rejection of the International Whaling Commission’s ban on whale hunting. In both cases, the international community rejects cultural exceptions to international legal norms.

I conclude that cultural exceptions to international legal norms are tolerated only when they facilitate globalization. Globalization causes popular anxieties, which threaten the political consensus for market liberalization. In my view, restrictions on women and sexual minorities represent displaced cultural anxieties. The international legal system permits this derogation from the norm in order to maintain domestic support for globalization.