

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

2008

From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine

Christiana Ochoa

Indiana University Maurer School of Law, cochoa@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Finance and Financial Management Commons](#), [International Business Commons](#), and the [International Law Commons](#)

Recommended Citation

Ochoa, Christiana, "From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine" (2008). *Articles by Maurer Faculty*. Paper 10.
<http://www.repository.law.indiana.edu/facpub/10>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine

Christiana Ochoa*

The odious debt doctrine, which holds that in some cases, successor governments should not be responsible for the debts incurred by previous despotic rule, has limped along in the legal imagination for over a hundred years. Recently, however, legal theorists and practitioners have attempted to define the contours of this controversial concept. This article investigates the contents of the odious debt doctrine to query what characteristics make debt odious rather than simply onerous. It then argues that there may be little distinction between those characteristics as they apply to debt and as they apply to other types of transnational financial obligations and financing arrangements that despots may adopt. Finally, the article posits that if there is, in fact, little distinction, there may be valuable lessons to be learned from the odious debt doctrine for application to other types of transnational financing arrangements, and proposes that a broader "odious finance" doctrine is the better approach.

I. INTRODUCTION

A vibrant discourse over sovereign debt forgiveness and cancellation has emerged in recent years as nongovernmental, governmental, and international entities assess the justice of onerous debt levels. Among the facets of this discussion is a newly emerging elucidation of what has been termed the odious debt doctrine.

The odious debt doctrine follows from the normative principle that the debt despots incur should not form a continuing obligation for states emerging from the grips of a despotic government, at least to the extent that the

* Associate Professor of Law, Indiana University School of Law – Bloomington. J.D., Harvard Law School, B.A., University of Michigan. The author would like to thank Timothy Lynch, Mitu Gulati, Hannah Buxbaum, Larry Catá Backer, Patrick Keenan, Paul Stancil, Ken Dau-Schmidt, Timothy Waters, Luis Fuentes-Rowher, and Brian Shoup for their insightful comments on earlier drafts of this article and the ideas contained herein. In addition, this article has benefited from the generous suggestions of the participants in the Duke Law School Law & Contemporary Problems 2007 Annual Conference, the University of Illinois School of Law Conference on the intersection of human rights and international criminal law, and Indiana University School of Law's Aspiring Scholars Conference, who have heard and commented on the ideas contained herein. The generous assistance provided by Christiana Zilke and the editors of the Harvard International Law Journal, especially Nan Lou and Priya Bindra, was also instrumental to the completion of this article. Please send correspondence to the author at cochoa@indiana.edu. The author's work, including this article, can be found at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=439960.

debt did not benefit the population that existed under the prior regime.¹ This article does not take issue with this normative position.

Rather, this article identifies a key problem with the application of the odious debt doctrine. In particular, it argues that the odious debt doctrine, if implemented alone, would result in unintended consequences because it would create incentives for dictators to search for funds from sources that may harm the economic resources, natural environment, and population at least as much as debt would. Given the odious debt doctrine's moral imperatives and normative goals, it seems unreasonable to develop a functional odious debt doctrine that will give despots cognizable incentives to make yet more use of these (potentially more harmful) methods of financing their regimes.

A more comprehensive view must be taken of the financing mechanisms utilized by despotic governments, such that odious debt is not viewed as so unique as to create doctrines around itself that lead to unanticipated results that might be more detrimental than a world without the odious debt doctrine. This article proposes an odious finance doctrine that considers a variety of financing mechanisms in use by despotic governments and captures other transactions despots use to finance their regimes.

Both the odious debt doctrine and the proposed odious finance doctrine contribute significantly to the burgeoning efforts toward, and popular sensibility regarding, corporate social responsibility and, more broadly, regarding the externalized social and environmental costs of our global economic system. This article argues that the odious finance doctrine will be significantly more beneficial than the odious debt doctrine to close the legal and regulatory gaps with respect to human rights violations, corruption, and environmental harms that are perpetrated or perpetuated in connection with despots.

In establishing an argument for expanding the scope of the odious debt doctrine, the article will proceed as follows: In Part II, the odious debt doctrine—including its historical origins, recent and current wellsprings, and contemporary academic literature on the subject—will be discussed at some length. This Part demonstrates that current academic debates have focused too exclusively on despotic government debt. Part III discusses two international norms governing government succession: the doctrine on the continuation of commercial obligations and the doctrine regarding compensation for expropriation. Under these doctrines the obligations incurred by one regime are binding on its successor. Odious debt—a doctrine of forgiveness—operates as an exception to this general rule, as would the odious finance doctrine proposed herein.

Part IV presents two detailed examples of alternative sources of financing that despotic governments may utilize. Rather than providing an exhaustive

1. For a fuller discussion of the contours of the odious debt doctrine, see *infra* Part V.

catalogue of the various means by which dictators may raise funds, this Part aims to provoke the reader into thinking about the availability of other sources of funding. Part IV then argues that, in some cases, these alternative sources of financing may be seen as more harmful than loans to the long-term interests of the emerging state. The point of this argument is not to diminish the significant harms that may be bestowed on a successor government and its population by high debt levels. Rather, the goal is to explore the likelihood that some harms wrought by non-debt financing may be worse than those created by debt. Primarily, the article attempts to achieve this goal by way of an exposition of real cases that illustrate this proposition. This exposition does not undermine the utility of the conceptual tools offered by the odious debt doctrine. Rather, it probes whether the concept of odiousness can be applied to transactions other than loans.

Part V provides the contours of an odious finance doctrine, primarily by examining the characteristics of the odious debt doctrine. Central to the application of the doctrine is the categorization of certain debts as “odious” and therefore subject to cancellation. It then asks whether other types of despotic financing might be remedied or deterred by expanding application of the odious debt doctrine to include other transactions despots employ to finance their regimes, thereby giving rise to an odious finance doctrine.

Part VI contextualizes the odious finance doctrine by assessing the limitations on the application of the doctrine and suggesting some practical applications of odious finance that transcend the bounds of odious debt.

II. THE ODIIOUS DEBT DOCTRINE

A. *Historical Origins and Development*

The odious debt doctrine has received a heightened level of attention in recent years, the most recent wave of which started with the U.S. government’s search for mechanisms for handling and disposing of some portions of Iraq’s outstanding debt.² The debates surrounding third-world debt forgiveness have also contributed to the increased attention scholars have recently paid to this doctrine.³ Before turning to these new contributions, however, it is useful to explore the historical development of this relatively unknown doctrine.

The idea that a population should not to be burdened by the debts of a despot has been in circulation for over two millennia.⁴ Aristotle wrote that in the event that “a democracy tak[es] the place of an oligarchy or despotism

2. For further discussion of the role that Iraq’s debt played in reviving the odious debt doctrine, see *infra* Part II.B.1–2.

3. For a discussion of the role of the odious debt doctrine in the wider debt forgiveness discourse, see *infra* Part II.

4. Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 71 L. & CONTEMP. PROBS. (forthcoming 2007) [hereinafter Cheng, *Odious Debt Doctrine*].

. . . persons refuse either to meet the contracts in hand on the ground that it was not the State, but the despot who entered upon them, or to perform any similar obligation”⁵

The contemporary norm that the debts of states and governments pass to their successors evolved from early developments in international law.⁶ The present rule does not typically recognize that debts can be broken into a number of categories.⁷ Buchheit, Gulati, and Thompson have offered the terminology of “virtuous” and “profligate” debts,⁸ or debts that will “benefit the people expected to repay the debt” (virtuous debts) and those that will not (profligate debts).⁹

Virtuous debts include loans used for the purpose of building necessary and sustainable infrastructure projects, loans used to finance military activities that are supported by the state’s populace or which protect the state against aggression, or loans that facilitate the creation of new economic sectors or the re-invigoration of the entire economy through government-sponsored spending programs.¹⁰

Profligate debts, on the other hand, are more questionable on economic or moral grounds, and, as Buchheit, Gulati, and Thompson have defined them, they “convey little or no benefit to the people expected to repay those debts.”¹¹ Exceptions to the rule that sovereign debts are passed to successors are appropriately located under the category of profligate debts.

5. ARISTOTLE’S POLITICS 162 (W.E. Bolland trans., Longmans, Green & Co. 1877).

6. See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 221–22, 229–30 (J. Morrice trans., London 1715), cited in TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS 13–14 (2006) [hereinafter CHENG, STATE SUCCESSION]; ARTHUR KEITH, THE THEORY OF STATE SUCCESSION 2–3 (1907).

7. For a more complete description of this taxonomy, see, for example, Lee C. Buchheit et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1208–20 (2007).

8. *Id.* at 1210–20. The categorization of debts into “virtuous” and “profligate” is helpful in analyzing the various types of debt that might be undesirable and perhaps avoidable under a variety of legal theories. Odious debt is just one type of profligate debt.

9. *Id.* at 1211–12.

10. *Id.* at 1210–11. Readers should note that in many cases, it will be difficult to distinguish between virtuous and profligate purposes. For example, while some might demand that an infrastructure project be *both* necessary and sustainable, others might only be willing to deem defensive military activity a virtuous use of debt financing. These debates fall outside the scope of this article, as the odious debt doctrine will only correctly address those cases that fall clearly into the non-virtuous category.

11. *Id.* at 1212. Buchheit, Gulati, and Thompson have focused their attention on the intergenerational tension of sovereign debt, which, under current legal doctrine, survives governments (and often states) and passes to their successors and the future generations thereof. The text of the Buchheit article is at times unclear about the definition the authors are attaching to “intergenerational tension.” At times, they appear concerned about the populations of “successor governments and states,” as they should rightly be. *Id.* at 1210. At other times, they seem concerned only with “a later generation of citizens.” *Id.* at 1212. It should be made clear that even the population living at the time the debt was incurred and spent may not have benefited in any way from the sovereign’s borrowing. In this way, the use of the concept of intergenerational tension as the pivot between profligate and virtuous debts can at times be confusing. Their simpler definition of profligate debts is the better one and applies to borrowings that “convey little or no benefit to the people expected to repay those debts.” *Id.*

Various authors have set forth three possible exceptions to the standard rule that the debts of a government pass to its successor.¹² Those exceptions include (1) war debts, (2) regime debts or hostile debt, and (3) odious debt.¹³ Others have consolidated these exceptions, classifying war debts and hostile debts as two subcategories of odious debt.¹⁴ A brief look at the doctrines of war debts and regime debts—each an important predecessor to the odious debt doctrine—will thus help to explain the origins of the modern understanding of odious debt.

Commentators typically trace the hostile debt exception to the standard rule that debts must be repaid to the end of the Spanish-American War.¹⁵ At the end of the war, the Spanish government argued that in accordance with international law the United States, as the holder of Cuba's sovereignty, should repay Cuba's debts.¹⁶ The United States, on the other hand, took the position that Cuba's debts would not be repaid. The United States contended that Cuba incurred the majority of its debts (1) for purposes that were hostile to Cuba's ultimate independence, (2) without consent of the Cuban people, and (3) in order to finance programs intended to help ensure that Cuba would remain a Spanish territory.¹⁷ The loans, for example, were used to quell Cuban insurrection against Spain.¹⁸ The United States further argued that the lenders knew their funds would be used for this purpose and must have known the inherent risks of non-repayment when lending for such purposes.¹⁹

12. For a discussion of this doctrine, often referred to as the continuity doctrine or the universal succession doctrine, see *infra* Part III.

13. Buchheit, *supra* note 7, at 1212–20.

14. See Cheng, *Odious Debt Doctrine*, *supra* note 4, at 13–16. This is consistent with O'Connell's view of the composition of the odious debt doctrine. See D.P. O'CONNELL, *THE LAW OF STATE SUCCESSION* 187–91 (1956) [hereinafter O'CONNELL, *LAW OF STATE SUCCESSION*].

15. Buchheit, *supra* note 7, at 1214–15.

16. PATRICIA ADAMS, *ODIOUS DEBTS: LOOSE LENDING, CORRUPTION AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY* 163 (1991) [hereinafter ADAMS, *ODIOUS DEBTS*].

17. O'CONNELL, *LAW OF STATE SUCCESSION*, *supra* note 14, at 188–89.

18. *Id.* at 188.

19. *Id.* Readers should note that the doctrine of hostile debts, like the doctrine of odious debt, has a spotty history. As O'Connell notes, the arguments made by the United States after the Spanish-American War were thereafter attempted in the course of drafting the treaties of Versailles and St.-Germain in 1919. The arguments were successful in excusing Poland from its debts but not ultimately successful in excusing Czechoslovakia from the wartime and pre-war debts incurred by the Austro-Hungarian Empire. See also Memorandum of American Peace Commission, Paris, Oct. 14, 1889, S. Doc. No. 62-55, pt. 2 at 48–50 (1899), reprinted in JOHN BASSETT MOORE, *MOORE'S DIGEST OF INTERNATIONAL LAW* § 97, 358–59 (John Bassett Moore ed., 1906), stating:

From the moral point of view, the proposal to impose [these debts] upon Cuba is . . . untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hopes and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence would be even more unjust.

War debts act as another potential exception to the standard rule. The war debt exception asserts that “creditors who lend money for the purpose of carrying on a war, or when a war is ‘notoriously imminent,’ are investing in a doubtful security.”²⁰ The test for war debts is slightly different than that for hostile debts but, as in the hostile debt context, turns in part on the lenders’ implied or actual knowledge that they may not be repaid for the loans they have extended. O’Connell states that two instances were foundational in shaping this doctrine: the annexation of the Boer Republics in 1900 during the course of the Boer War and the World War I peace treaties (the Treaty of Versailles and the Treaty of Saint-Germain) of 1919.²¹ In both instances, parties argued that the debt incurred by the vanquished enemy government in fighting against the ultimate victor would not be assumed by the victor or successor government.²²

In addition, Buchheit, Gulati, and Thompson have accurately reminded us that the Fourteenth Amendment to the U.S. Constitution also includes a war debt exception with respect to the debts the Confederate States incurred to finance their rebellion.²³ The Fourteenth Amendment voided these debts by stating that:

[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.²⁴

Finally, the origins of the odious debt doctrine are often traced to an arbitration in 1923 between Costa Rica and Great Britain, typically referred to as the Tinoco Arbitration, over which William Howard Taft presided as sole arbitrator.²⁵ Costa Rica had been ruled by a dictator, Federico Tinoco, who entered into a number of agreements with private entities.²⁶ A number of those contracts served to benefit Tinoco or his family members personally. After Tinoco retired and left office, a Costa Rican domestic law called the Law of Nullities No. 41 repudiated all of these contracts.²⁷ Examples of such

ALEXANDER N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* [THE EFFECTS OF STATE TRANSFORMATIONS ON THEIR PUBLIC DEBTS AND OTHER FINANCIAL OBLIGATIONS] 159 (1927).

20. O’CONNELL, *LAW OF STATE SUCCESSION*, *supra* note 14, at 189.

21. *Id.* at 190–91.

22. *Id.*

23. Buchheit, *supra* note 7, at 1213 n.29.

24. U.S. CONST. amend. XIV, § 4.

25. William Howard Taft was serving at the time as the tenth Chief Justice of the U.S. Supreme Court.

26. *Gr. Brit. v. Costa Rica*, 1 R.I.A.A. 369 (1923), *reprinted in* 18 AM. J. INT’L L. 147 (1924) [hereinafter Tinoco]. An electronic synopsis of this arbitration is also available. *See* Kurt Taylor Gaubatz and Kathleen Kane, *Abridgment and Notes, The Tinoco Arbitration: Arbitration Between Great Britain and Costa Rica*, <http://www.gwu.edu/~jaysmith/Tinoco.html> (last visited Nov. 10, 2007).

27. Tinoco, *supra* note 26, at 148.

contracts notably included a concession contract made with the Central Costa Rica Petroleum Company, a British firm, pursuant to which the company was granted the right to “explore for and exploit oil deposits in Costa Rica”²⁸ and loans provided directly to Tinoco by the Royal Bank of Canada, purportedly for government expenses, but with full knowledge by the Bank that these loans were destined for Tinoco’s personal use upon his departure from Costa Rica.²⁹ Loans were also made directly to Tinoco’s brother for payment of his future salary.³⁰ Taft stopped short of contravening the standard rule of government succession to sovereign debts.³¹ However, he also upheld the Costa Rican Law of Nullities, writing:

The whole transaction here was full of irregularities It must make out its case of actual furnishing of money for [the government’s] legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government [responsible] for the money paid to him for this purpose. The case of the money paid to the brother . . . is much the same.³²

Taft employed a different test to uphold the Law of Nullities in the Tinoco Arbitration than what had been used previously in the hostile debt or war debt context. Here, there was no colonial power imposing a debt on a newly liberated state as in the hostile debt context, nor were there victors or vanquished parties as one would find in the war debt scenario. However, there were similarities. The people of Costa Rica did not benefit from the loans; rather, the loans were “so closely connected with this payment for obviously personal and unlawful uses of the Tinoco brothers”³³ that the bank could not make a rightful claim that the loans were made “for any legitimate governmental uses of the Tinoco government.”³⁴ For Taft, it was also significant that the lenders knew that the loans would not be used to benefit Costa Rica or its people.³⁵

28. *Id.* at 149. Notable for the central thesis of this article, the Law of Nullities cancelled all of these contracts, and the arbitration addressed both the loans and the concession agreement. Discussions regarding the odious debt doctrine largely ignore the concession portions of this arbitration and focus exclusively on the loans.

29. *Id.* at 168.

30. *Id.*

31. ADAMS, ODIIOUS DEBTS, *supra* note 16, at 167–68; Tinoco, *supra* note 26, at 375–99.

32. Tinoco, *supra* note 26, at 394.

33. *Id.*

34. *Id.* Robert Howse has compiled a concise history of the odious debt doctrine that includes additional instances where the doctrine was at issue. See U.N. Conf. on Trade & Dev. [UNCTAD], *The Concept of Odious Debt in Public International Law*, UNCTAD/OSG/DP/2007/4 (July 2007) (prepared by Robert Howse) [hereinafter Howse], available at http://www.unctad.org/en/docs/osgdp185_en.pdf.

35. Howse, *supra* note 34.

Thus, when Alexander Sack identified the contours of an emergent odious debt doctrine in 1927, he by no means did so out of whole cloth.³⁶ Still, Sack coined the term “dettes odieuses.”³⁷ He wrote:

If a despotic power incurs a debt not for the needs or in the interests of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is odious for the population of all the State.

This debt is not an obligation for the nation; it is a regime’s debt, a personal debt of the power that has incurred it, consequently it falls with the fall of this power.

The reason these “odious” debts cannot be considered to encumber the territory of the State, is that such debts do not fulfill one of the conditions that determine the legality of the debts of the State, that is: the debts of the State must be incurred and the funds from it employed for the needs and in the interests of the State.

“Odious” debts, incurred and used for ends which, to the knowledge of the creditors, are contrary to the interests of the nation, do not comprise the latter—in the case that the nation succeeds in getting rid of the government which incurs them—except to the extent that real advantages were obtained from these debts. The creditors have committed a hostile act with regards to the people; they can’t therefore expect that a nation freed from a despotic power assume the “odious” debts, which are personal debts of that power.³⁸

Thus, in order for a debt to be classified as “odious” under Sack’s formulation, the debt must be (1) incurred by a despotic power;³⁹ (2) used for

36. In fact, as Buchheit et al. have noted, commentators prior to Sack had taken note of the perils of lending to countries in which a regime change could result in the loans being “portrayed as hostile to the citizens of that country, personal to a departing dictator, or otherwise lacking the consent of the people ultimately bound to repay the loans.” Buchheit, *supra* note 7, at 1217–18 (citing Charles H. Hyde, *The Negotiation of External Loans with Foreign Governments*, 16 AM. J. INT’L L. 523, 531 (1922) and John Fischer Williams, *International Law and International Financial Obligation Arising from Contract*, in 2 BIBLIOTHECA VISSERIANA DISSERTATIONVM IVS INTERNATIONALE ILLUSTRANTIVM, vol. II, at 54–55 (1924)).

37. SACK, *supra* note 19, at 157–84.

38. ADAMS, ODIUS DEBTS, *supra* note 16, at 165 (citing SACK, *supra* note 19, at 157).

39. SACK, *supra* note 19, at 157–58. Despotism usually refers to a form of government where a single authority exercises absolute power. This article mirrors the majority of the literature on odious debt, however, in that it is not strict in its use of the term “despot” and, like the odious debt literature, uses other, largely synonymous terms such as “tyrant” and “totalitarian,” or “dictator” and “dictatorship.” See, e.g., Buchheit, *supra* note 7, at 24 (noting that “the most important thing is to be able to spot the despot, the dictator, the tyrant—in other words the odious regime” but offering no definition of these terms). This is perhaps as it should be, given the mutable and unique nature of each such government. This may well be a case where providing a precise definition may be difficult or impossible and not beneficial. Some authors have argued that a regime should be labeled “odious” if it systematically represses its population or loots the nation’s resources and wealth. This article identifies a variety of regimes that could be classified as despotic. A precise determination of whether they would fit the definition of “despotic regimes” by some normative standard is beyond the scope of this article. Nonetheless, the fact that a regime possesses certain despotic characteristics may not render it despotic. For

purposes that do not further the needs or interests of the state;⁴⁰ and (3) the creditor must have known that the loans would be used for purposes contrary to the interests of the nation.⁴¹

It has been argued that, in addition to the three elements Sack sets out, there is or should be a fourth: that the debt must have been incurred without the consent of the state's people.⁴² Sack was aware of the possibility of this fourth element and included it in his exposition of odious debt. In reference to the Cuban debt discussed previously herein, Sack noted that John Bassett Moore had written, "The burden of the so called 'Cuban debt,' imposed upon the people of Cuba without their consent and by force of arms, was one of the principal wrongs for the termination of which the struggles for Cuban independence were undertaken."⁴³

Regardless of whether a three-prong or four-prong test is employed, it would be a mistake to state that the odious debt doctrine is accepted under international law. States have not explicitly bound themselves to the principles of the odious debt doctrine and there is no odious debt treaty or convention encapsulating this doctrine. Similarly, there is not at this time a plausible argument that sufficient state practice accompanied by *opinio juris* has made the odious debt doctrine a matter of international custom.⁴⁴

example, a despotic regime is likely to be corrupt, but it is not the case that all corrupt regimes are despotic.

40. ADAMS, ODIIOUS DEBTS, *supra* note 16, at 165 (citing SACK, *supra* note 19, at 157).

41. *Id.*

42. There is some controversy over this fourth criterion. Buchheit, Gulati, and Thompson, for example, fold the fourth criterion into the requirement that a despot incur the debt. For them, this implies that the people did not approve the incurrence of the debt. Buchheit, *supra* note 7, at 1218 n.52. Cheng, on the other hand, has unearthed at least four scholars who have set out this fourth requirement: John Bassett Moore in 1906, D.P. O'Connell in 1956, Ashfaq Khalfan in 2003, and Anupam Chander in 2004. See Cheng, *Odious Debt Doctrine*, *supra* note 4, at 13–14 (citing MOORE, *supra* note 19, at 359); O'CONNELL, *supra* note 14, at 188; Christopher G. Paulus, "Odious Debts" vs. Debt Trap: A Realistic Help?, 31 BROOKLYN J. INT'L L. 83, 85 (2005); Anupam Chander, *Odious Securitization*, 53 EMORY L.J. 923, 924 (2004).

43. SACK, *supra* note 19, at 159 (citing MOORE, *supra* note 19, at 359).

44. Article 38 of the Statute of the International Court of Justice sets out the sources of international law as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38 [hereinafter ICJ Statute]. The Restatement (Third) of the Foreign Relations Law of the United States defines customary international law slightly differently from article 38(1)(b) of the ICJ Statute as the law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). It should be noted that this doctrine might be an example of the type of customary law that may be affected by the inclusion of individuals in the forma-

B. Recent Revival of the Odious Debt Doctrine

The doctrine currently stands as a useful theory and argument in particular instances of debt reduction or forgiveness. Recently, the theory has assisted lawyers and policymakers in considering two pressing goals: eliminating third-world debt⁴⁵ and reducing the overwhelming debt of Iraq.⁴⁶ The doctrine has proved to be a useful conceptual tool in these contexts, and as a result, the idea of odious debt has resurfaced and has been the subject of recent scholarship, especially during 2007.⁴⁷ This subpart provides a brief overview of a sampling of this scholarly attention.

The purpose of this overview is twofold. First, it outlines some of the questions and approaches surrounding the theory of odious debts. The second is more important to the ultimate objectives of this article: illustrating and challenging two widespread assumptions about debt. In recent scholarship devoted to the idea of odious debts and the implications of a functional odious debt doctrine, there appears to be a common assumption that debt is not only the first and best financing option for states but also that, in the face of rising costs of lending, borrowers will either pay more for loans or will be forced to live without whatever finances they were hoping to attain through borrowing. A second shared assumption appears to be that loans are the only type of commercial obligation or means of financing a despotic government that might burden successor governments, successor states, and

tion of customary international law, a proposal by the present author. See Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007).

45. See, e.g., JOHN SMITH, *THIRD WORLD DEBT: RELIEF OR CREDIT CRUNCH?* (2000), <http://www.cseweb.org.uk/downloads/smith.pdf>. In connection with the debates on third-world debt cancellation, the odious debt doctrine is just one of many tools. The applicability in some countries would be obvious, as the leaders of many developing countries have been despots and have borrowed for purposes that would meet the criteria to be termed odious.

46. See, e.g., Patricia Adams, *Iraq's Odious Debts*, Policy Analysis No. 526, Sept. 28, 2004, available at <http://www.cato.org/pubs/pas/pa526.pdf> [hereinafter Adams, *Iraq's Odious Debts*]; G8 RESEARCH GROUP, *DEBT RELIEF: IRAQ, INTERIM COMPLIANCE REPORT*, Feb. 9, 2006, http://www.g7.utoronto.ca/evaluations/2005compliance_interim/2005-13_g8-i-comp_iraq.pdf. As of 2004, Iraq's debt was estimated to be approximately \$120 billion. A significant portion of this debt would be characterized as "odious" by application of the odious debt doctrine. As a result, the United States has led an effort to see Iraq's debts reduced. *Id.* The obvious applicability of the odious debt doctrine to this situation and its potential utility led to a good deal of discussion on the topic. See also Jubilee Iraq, *Odious Debt*, <http://www.jubileeiraq.org/odiousdebt.htm> (last visited Nov. 10, 2007); William F. Buckley, Jr., *Odious Activities: Should Iraqi Debt Be Repaid To Russia and France?*, NAT'L REV. ONLINE, Oct. 7, 2003, <http://www.nationalreview.com/buckley/buckley200310071228.asp>.

47. In January 2007, Duke Law School and its Journal of Law and Contemporary Problems hosted a conference titled *Odious Debts and State Corruption*. In February 2007, the University of North Carolina School of Law and the North Carolina Journal of International Law and Commercial Regulation hosted *Odious Debt: Exploring the Outer Limits of Sovereign Debt*. The Duke conference was called the "first-ever conference on odious debt, law and economics," and the pair of conferences are seen in the community of advocates for an odious debt doctrine as "an unprecedented run of public debate on the issue of odious debts" *Odious Debts Online, Legal Scholars Hold Another Public Debate on Odious Debt*, Feb. 7, 2007, http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=odo_news&NewsID=2837.

their people and impede their ability to form and fund a fully functioning government.⁴⁸

1. *The Iraq Context*

When the United States first occupied Iraq, the Iraqi national debt was estimated to be approximately \$120 billion.⁴⁹ This debt stood as a tremendous obstacle to the reconstruction and redevelopment of Iraq.⁵⁰ As a result, a number of scholars and debt-reduction advocates looked to the odious debt doctrine as a tool for reducing the country's debt. However, the literature on odious debt and immediately related topics was sparse at that time.⁵¹

Starting in late 2003, soon after President Bush appointed former Secretary of State James Baker as his emissary regarding the Iraqi debt, this changed significantly. Commentators published a number of articles and reports on Iraq's debt situation and many proposed potential solutions or ameliorants. Patricia Adams, for example, published a policy paper that described the odious debt doctrine and recommended that the Iraqi people not allow their debt to be restructured through the channels and efforts put forth by the United States, which favored a debt reduction and rescheduling by the Paris Club⁵² and rejected debt forgiveness on the basis of any moral or quasi-legal imperatives.⁵³ She proposed that the Iraqi people should take

48. The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983, defines state debt as "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law." Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, U.N. Doc. A/CONF.117.14 (Apr. 8, 1983).

49. MARTIN A. WEISS, CONG. RESEARCH SERV., IRAQ: PARIS CLUB DEBT RELIEF, CRS REPORT FOR CONGRESS (2005), <http://fpc.state.gov/documents/organization/44019.pdf> (noting that of the \$120 billion national debt, approximately \$40 billion was owed to Paris Club members (\$21 billion in principal and \$19 billion interest), \$60–\$65 billion was owed to non-Paris Club governments (mainly in the Persian Gulf), and \$15 billion was owed to commercial creditors).

50. See Martin Crutsinger, *World Bank Calls on Rich Countries to Forgive Two-Thirds of Iraq's Debt*, ASSOCIATED PRESS, Oct. 29, 2003.

51. ADAMS, ODIUS DEBTS, *supra* note 16; Michael Kremer & Seema Jayachandran, *Odious Debt*, Brookings Institution Policy Brief No. 103 (July 2002), <http://www.brookings.edu/comm/policybriefs/pb103.htm> (providing two of the very few examples of academic treatment of the issue). For a fairly comprehensive bibliography of this work, see generally the Odious Debts webpage at <http://www.odiousdebts.org>, which includes a section on *Key Reports on Odious Debts*, housing a number of the reports produced by civil society and academics, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=titles&SubID=519> (last visited Nov. 10, 2007). The majority of other work existing at the time came out of the debt-reduction movement and has provided a very good foundation for later scholarly work in the field. For example, Jubilee Iraq, a nongovernmental organization dedicated to the reduction of Iraqi debt and of its odious debt in particular, was formed in March 2003 and operates as a clearing-house for information about the status of financial claims against Iraq. Jubilee Iraq was inspired, at least partially, by the larger Jubilee movement, which seeks reduction and forgiveness of sovereign debt of less developed countries. Their web addresses are, respectively, <http://www.jubileeiraq.org> and <http://www.jubileeiresearch.org> (last visited Nov. 10, 2007).

52. The Paris Club is an informal group of the world's nineteen major creditor countries. This group works together on occasion to reduce or reschedule developing country debts. The Paris Club, <http://www.clubdeparis.org> (last visited Nov. 10, 2007).

53. See generally Adams, *Iraq's Odious Debts*, *supra* note 46.

advantage of the odious debt doctrine and require lenders to prove the legitimacy of their loans and their resultant claims. Under her proposal, claims could be processed through an arbitral tribunal that would investigate the legitimacy of each contested loan.⁵⁴

During this period, the Council on Foreign Relations also published a report on Iraq's debt. The report included a brief but fairly complete overview of the debt, the U.S. plan for reducing the debt, and the applicability of the odious debt doctrine to the situation.⁵⁵ Soon after this report was published, the Congressional Research Service (CRS)⁵⁶ focused its attention on the subject of Iraqi debt.⁵⁷ The CRS reports, however, did not address odious debt, even as they focused on the debt relief measures pursued by the United States and the inconsistencies such measures would create, given that countries such as "Nigeria, Indonesia, Kenya and Georgia have also recently emerged from decades of authoritarian and autocratic rule, and are saddled with extensive government debt, yet receive nowhere near the level of international exposure that has been given the Iraq situation."⁵⁸

Finally, a small handful of legal academic articles and student notes were published around this time.⁵⁹

2. *The Broader Debt Forgiveness Context*

While the United States was wringing its hands over how to reduce Iraq's debt, the discussion about third-world debt forgiveness was becoming live-

54. *Id.* at 13–14.

55. ESTHER PAN, COUNCIL ON FOREIGN REL., IRAQ: THE REGIME'S DEBT (2003), <http://www.cfr.org/publication/7796>.

56. The Congressional Research Service is a research group that provides Congress with reports on a wide variety of politically relevant issues.

57. CRS reports are only occasionally available to the public. As a result, this article does not claim to provide a comprehensive list of CRS reports on this topic. One such report, however, is MARTIN A. WEISS, CONG. RESEARCH SERV., IRAQ: PARIS CLUB DEBT RELIEF, CRS REPORT FOR CONGRESS (2005), <http://fpc.state.gov/documents/organization/44019.pdf>.

58. *Id.* at CRS-5 to CRS-6. Detlev Vagts has compared Iraq's situation to that of Germany's under Hitler. He reminds his readers that in the case of Germany, odious debt was not at issue because Germany had not incurred any contractual indebtedness under Hitler's rule. He states, seemingly casually, that this is one of the differences between the German and Iraqi debt problems, but otherwise does not and has not addressed the question of odious debt. Detlev F. Vagts, *Sovereign Bankruptcy: In Re Germany (1953)*, In *Re Iraq (2004)*, 98 AM. J. INT'L L. 302, 303 (2004).

59. See Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?* 2005 UTAH L. REV. 401 (2005) (raising the possibility that Iraq could be a good location in which to exercise the odious debt doctrine); Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391 (2005) (arguing that the Argentine debt restructuring could prove that even massive and potentially odious debt may be more efficiently reduced through methods other than the application of the odious debt doctrine); Darius Adam Marzec, *The New Iraq: Resolving Public and Private Obligations Incurred Under Saddam Hussein's Rule in the Context of International Arbitration*, 7 CARDOZO J. CONFLICT RESOL. 163 (2005) (arguing for the creation of an arbitration tribunal in Iraq regarding Hussein-era debt and contractual obligations); Paulus, *supra* note 42 (providing an overview of the odious debt doctrine); Volinka Reina, *Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide for Better Resolution of Successor State Responsibility?*, 22 BERKELEY J. INT'L L. 583, 584 (2004) (arguing that politics is more apt than law to address Iraq's liabilities).

lier.⁶⁰ Much of this discussion took place in the context of two debt-reduction initiatives created by the World Bank and IMF: the Heavily Indebted Poor Countries (“HIPC”) Initiative, which was introduced in 1996 to act as a comprehensive framework for debt relief, and the Multilateral Debt Relief Initiative (“MDRI”), which “allows for 100 percent relief on eligible debts by three multilateral institutions—the IMF, the International Development Association (“IDA”) of the World Bank, and the African Development Fund (“AfDF”)—for countries completing the HIPC Initiative process.”⁶¹

In many cases, the countries that stood to benefit from debt forgiveness were new democracies that had only recently emerged from dictatorships⁶² and were fraught with corruption and graft.⁶³ Some commentators have accordingly begun to favor the inclusion of the odious debt doctrine in the broader debt forgiveness debate.⁶⁴

There are essentially two approaches in this literature. The first argues that the HIPC is not inclusive enough and that a comprehensive consideration of countries with meritorious claims for debt relief would include not only the most indebted and poorest countries of the world but also those countries servicing debt that was incurred by means satisfying the elements of the odious debt doctrine. Michael Kremer and Seema Jayachandran have noted that several other countries should have been granted debt relief in connection with the HIPC. Additionally, several countries that are not on the HIPC list of debt relief candidates have “a plausible claim that their debts are illegitimate”⁶⁵

The second approach notes the attention the odious debt doctrine received in the Iraq context and argues that the conceptualization of illegitimate debt in Iraq is similarly applicable to many other countries and situations.⁶⁶

60. Jeffrey Sachs has done much to make this topic more accessible to the public. See, e.g., Jeffrey Sachs, *The Development Challenge*, 84 FOREIGN AFF. 78 (2005).

61. International Monetary Fund, Factsheet: Debt Relief under the Heavily Indebted Poor Country (HIPC) Initiative, <http://www.imf.org/external/np/exr/facts/hipc.htm> (last visited Nov. 10, 2007).

62. Examples include Nigeria, Indonesia, and Kenya.

63. The Transparency International Corruption Perception Index 2007 ranks Nigeria, Kenya, and Indonesia among the most corrupt countries in the world. TRANSPARENCY INT’L, CORRUPTION PERCEPTION INDEX 2007, http://www.transparency.org/policy_research/surveys_indices/cpi/2007.

64. The most direct treatment of this suggestion appeared in a 2004 student note. See Emily F. Mancina, Note, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT’L L. REV. 1239 (2004); see also Nsongurua Udombana, *The Summer Has Ended and We are Not Saved! Towards a Transformative Agenda for Africa’s Development*, 7 SAN DIEGO INT’L L.J. 5 (2005).

65. Kremer & Jayachandran, *supra* note 51; see, e.g., Charles Mutasa, *Politics of the Millennium Development Goals in Africa: Is Global Partnership Really Working*, 6 SUST. DEV. L. & POL’Y 25 (2005–06); see also CENTRO DE DERECHOS ECONÓMICOS Y SOCIALES, UPHEAVAL IN THE BACK YARD: ILLEGITIMATE DEBTS AND HUMAN RIGHTS: THE CASE OF ECUADOR-NORWAY (2002), available at http://www.oid-ido.org/IMG/pdf/Illegitimate_Debts_and_Human_Rights.pdf.

66. See, e.g., Africa Action, *Africa’s Debt & Iraq’s Debt—Washington’s Double Standard*, TALKING POINTS, Apr. 21, 2004, <http://www.africaaction.org/newsroom/index.php?op=read&documentid=493&type=14>.

3. *Sovereign Debt, Burdensome Debt, and the Odious Debt Doctrine*

The burgeoning odious debt literature has received a good deal of attention from experts in sovereign debt and lending. Valuable analyses have been recently written by Anna Gelpern⁶⁷ and Lee Buchheit,⁶⁸ both of whom have significant experience in these areas, and Mechele Dickerson, a bankruptcy expert.⁶⁹

Tom Ginsburg, Thomas S. Ulen, and Larry Backer have also made valuable contributions to this literature by exploring the problem of the odious creditor—the creditor who will lend to the worst of regimes for any number of reasons.⁷⁰ Omri Ben-Shahar and Mitu Gulati have taken a more nuanced view of the “odious creditor” concept. They argue that the party best positioned to prevent accumulation of odious debt is the party who ought to bear the cost of such debt. At the same time, Ben-Shahar and Gulati make the important point that populations often do benefit from at least some portion of debt incurred by despotic regimes. To the extent that this is so, populations and creditors should share liability on the debt, reflecting the relative blameworthiness and benefits of each.⁷¹

The contributions of these scholars have been invaluable to the development of the odious debt doctrine. Nonetheless, they have focused their attention solely on debt to the exclusion of other types of financing and contracts, perpetuating a blind spot in the odious debt doctrine and its attendant literature and in the wider effort to close the legal and regulatory gaps with respect to the relationship between economic activity and social and environmental harms.

67. Gelpern, *supra* note 59; Anna Gelpern, *Odious, Not Debt*, 71 LAW & CONTEMP. PROBS. (forthcoming 2007).

68. Buchheit, *supra* note 7.

69. Mechele Dickerson, *Insolvency Principles and the Doctrine of Odious Debts: The Missing Link in the International Human Rights Debate*, 71 LAW & CONTEMP. PROBS. (forthcoming 2007) (evaluating the odious debt doctrine through the framework provided by the U.S. Bankruptcy Code); see also Charles Seavey, *The Anomalous Lack of an International Bankruptcy Court*, 24 BERKELEY J. INT'L L. 499 (2006) (arguing that there is no international bankruptcy court because the world's economic powers prefer ad hoc and political resolution of debt crises); Kunibert Raffer, *Odious, Illegitimate, Illegal or Legal Debts—What Difference Does it Make for International Chapter 9 Debt Arbitration?*, 71 LAW & CONTEMP. PROBS. (forthcoming 2007) (discussing duties of creditors and when and how creditor misbehavior would trigger damages).

70. Tom Ginsburg & Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development and Democratization* (Univ. of Ill. Law & Econ. Research Paper No. LE07-014, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981627 (focusing some attention on the odious creditor and proposing that international financial institutions establish and fund an insurance scheme to which both nations and creditors seeking to repudiate debt on the basis of odiousness can appeal); Larry Catá Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, 71 LAW & CONTEMP. PROBS. (forthcoming 2007) (examining the illegitimacy of the credit, rather than the debt side of odious debt, looking specifically at the arguments of Fidel Castro about the “systemic odiousness” of the world's lending institutions as a basis for repudiation).

71. Omri Ben-Shahar & Mitu Gulati, *Partially Odious Debts?: A Framework for an Optimal Liability Regime*, 71 LAW & CONTEMP. PROBS. (forthcoming 2007).

4. *The Moral Imperatives of the Odious Debt Doctrine*

Finally, the odious debt doctrine has gained the attention of a number of commentators focused primarily on the moral imperatives and human rights aspects of the doctrine. The doctrine holds a compelling promise for cancelling the crippling debt burdens of countries recently freed from dictatorial, corrupt, and odious regimes.⁷²

In addition, some commentators have noted that the doctrine holds the possibility of acting as a private enforcement mechanism for international anti-corruption law.⁷³ One example includes a proposal that countries emerging from corrupt regimes may be excused from the repayment of debt on “traditional” odious debt principles and, further, that those emerging from truly abusive regimes would have to be paid restitution by businesses, banks, and nations that actively and knowingly invested in such a regime.⁷⁴

There are, of course, other important contributions to the burgeoning literature on odious debt. One notable example includes Adam Feibleman’s recent article arguing that sovereigns and creditors could undertake contractual provisions for the prevention and repudiation of odious debt.⁷⁵

Despite a strong tendency toward optimism on the part of commentators regarding the odious debt doctrine, the doctrine and its attendant literature also has critics. Tai-Heng Cheng argues that the odious debt doctrine fails to take into account the fact that successions are so fundamentally political that legal rules have failed to gain any foothold.⁷⁶ He argues that the only viable strategy for influencing outcomes is not through tools like the odious debt doctrine, but rather through a savvy understanding of the international decision-making process. A similar critique might be applicable to the odious finance doctrine proposed herein. However, this article acknowledges that debt forgiveness and considerations about requisite compensation for expropriation in the case of succession are highly political processes. It follows, therefore, that the article does not make the ambitious suggestion that an odious finance doctrine would or should be law, much as this might be an ideal objective. The odious debt doctrine is not currently a legal doctrine. Nonetheless, it may operate as a persuasive conceptual tool and argument for debt forgiveness. Odious finance would similarly operate in the political, rather than the legal, context, providing regularized, recognized, and legiti-

72. See, e.g., Joseph Hanlon, *Defining Illegitimate Debt and Linking Its Cancellation to Economic Justice*, Norwegian Church Aid (2002), available at <http://www.odiousdebts.org/odiousdebts/publications/DefiningIllegitimateDebt.pdf>.

73. Anita Ramasastry, *Odious Debt or Odious Payments? Using Anti-Corruption Measures to Prevent Odious Debt*, 32 N.C. J. INT’L L. & COM. REG. 819 (2007).

74. David Gray, *Devilry, Complicity and Greed: Transitional Justice and Odious Debt*, 71 LAW & CONTEMP. PROBS. (forthcoming 2007).

75. Adam Feibleman, *Contract, Priority and Odious Debt*, 85 N.C. L. REV. 727 (2007); see also Cheng, *Odious Debt Doctrine*, *supra* note 4.

76. See CHENG, STATE SUCCESSION, *supra* note 6.

mate arguments for both debt forgiveness and leniency in compensation for expropriation cases.

Albert Choi and Eric Posner offer criticisms of the odious debt doctrine on more substantive than procedural grounds. They argue that there is reason for skepticism about a number of the empirical premises made by the human rights-focused odious debt doctrine optimists.⁷⁷ Despite the fact that this article fundamentally disagrees with the ultimate skepticism expressed by Choi and Posner, it concurs with their observation that “[i]f a dictatorial regime cannot borrow because of the odious debt doctrine, the regime might attempt to extract and sell inefficiently large quantities of nonrenewable natural resources”⁷⁸ In addition, Choi and Posner point to the current problem faced by Western countries in locations such as Sudan and Myanmar, where China and Russia have undermined Western economic leverage over those governments by continuing to trade with and invest in those countries.⁷⁹ However, unlike the Choi and Posner critique, which ends its contribution to the odious debt doctrine discourse in skepticism and criticism, this article attempts to create a framework to avert a particular problem nestled within the odious debt doctrine.⁸⁰

Given the relatively recent swell of this literature and the discrete character of this doctrine, a large portion of the literature shares several assumptions. Among the most important of these shared assumptions for the purpose of this article is that the only significant financing mechanism for states is debt and the only kind of contract that can be odious is a lending contract. These assumptions present inherent perils, all of which arise from their failure to acknowledge the various other mechanisms states may employ to raise funds and, in particular, the financing tools corrupt or despotic leaders may utilize to increase their private coffers. Before turning to a discussion of these mechanisms in Part IV, Part III will provide a brief overview of the existing international law governing successor governments and states with respect to their financial obligations and transactions.

77. See Albert Choi and Eric Posner, *A Critique of the Odious Debt Doctrine* (U. Chi. L. & Econ., Olin Working Paper No. 323, 2007), available at http://papers.ssrn.com/sol3/paper.cfm?abstract_id=957346. In particular, Choi and Posner argue that “because the dictator controls the government, the doctrine necessarily harms the public if it is to affect the incentives of the dictator.” *Id.*

78. See *id.* at 15.

79. See *id.* at 17.

80. For further discussion, see *infra* Part VI. It should be noted that Choi and Posner offer additional criticisms of the odious debt doctrine, such as the possibility that the public will actually be harmed by the absence of quasi-public investments, *id.* at 14, and the possibility that isolating dictators is not always a viable strategy, *id.* at 16. They would likely find similar flaws in an odious finance doctrine, despite the ability of the odious finance doctrine to capture other concerns they express, such as the likelihood that dictators would turn more heavily to natural resource exploitation. In addition, Choi and Posner take issue with Jayachandran and Kremer’s focus on loan sanctions to the exclusion of trade sanctions. This article does not take the position that one type of sanction is preferable to another. Rather, given the political nature of successions and the treatment successors receive regarding loan forgiveness and requisite compensation for expropriation, it seems the best approach to regularize and legitimize various economic methods for discouraging despotism.

III. UNDERLYING LEGAL DOCTRINES

The odious debt doctrine and the odious finance doctrine proposed herein may enable governments emerging from a dictatorship to avoid unfair obligations traditionally imposed by international law, namely the international law doctrines governing the continuing commercial obligations of successor states and the responsibilities of sovereigns to provide compensation for expropriations of property.⁸¹

A. *Continuity of Commercial Obligations*

History contains a plentiful catalog of state and government successions, each of them particular and peculiar in their own ways: peaceable or forceful; anticipated or not; welcomed or dreaded. These, of course, are not legal classifications. Under international law, the two main operative categories in succession doctrine are state succession and government succession.⁸² This distinction has been criticized as failing to meet the policy needs of a global economy.⁸³

National governments founder or run their terms on a regular basis. When they do, they are normally followed by successor governments, either friendly or antagonistic to their predecessors. In states where succession is regularized by constitutional mandate,⁸⁴ statute,⁸⁵ or custom,⁸⁶ government succession may be largely predictable or at least follow predictable patterns. Unstable regimes, on the other hand, may be toppled unpredictably. In either scenario, classical doctrine on government succession holds that the commercial obligations of the predecessor government will be passed along to the successor.

81. Readers should also note that there is legal doctrine relating succession to state contracts. For a discussion of the contract question, see *infra* Part VI. Unlike in the areas of continuity of commercial obligations and compensation for expropriation, the odious finance doctrine would be largely consistent with the doctrine on succession to contracts and would therefore not act as an exception to that doctrine.

82. This distinction has been criticized as irrelevant in the modern context of globalization. See, e.g., CHENG, *STATE SUCCESSION*, *supra* note 6, at 2–4.

83. *Id.* at 4. This article adopts this view. References to state or government succession alone should be read to include both state and government successions.

84. The Constitution of the United States of America serves as a fine example. See, e.g., U.S. CONST. art. I, § 4 (addressing the election of Senators and Representatives); U.S. CONST. art. II, § 1 (addressing succession to the presidency); U.S. CONST. amend. XX, § 3 (addressing succession in the event the President-elect or Vice President-elect is ineligible or unable to serve); U.S. CONST. amend. XXV (addressing voluntary and involuntary succession to the presidency and vice-presidency).

85. See, e.g., 3 U.S.C. § 19 (2000) (designating a long line of succession to the presidency).

86. The United Arab Emirates serves as a good example of a hybrid between constitutional provisions and custom regarding succession. Although its constitution contains detailed provisions regarding succession to the presidency, when the only president in the history of that country died, the successor was determined according to familial and political considerations reminiscent of more customary societies. See PROVISIONAL CONST. OF THE U.A.E. art. 51–53 (containing the rules of presidential election and succession); see also Strategic Forecasting, Inc., United Arab Emirates: The Question of Succession (Oct. 17, 2004), http://www.tunezine.com/breve.php?id_breve=682 (discussing the likely successors to the then-president, who was rumored to be living his final days).

The rules regarding state and government succession, the legal significance of succession and the obligations of successors to fulfill the obligations of their predecessors, are noted for their complexity, inaccuracies and lack of clarity⁸⁷ and, especially in the case of state succession, may be so full with examples in which the doctrine was supplemented with other considerations and case-by-case treatment that they look more like a slate of potential political considerations than legal doctrines.⁸⁸ Nonetheless, this Part will briefly discuss two relevant doctrines for successor governments, both of which have a well-developed history and literature.

State and government succession to commercial obligations is typically governed by the rules of universal succession,⁸⁹ which state that successor states and governments succeed not only to the responsibilities of governance and assets of a territory, but also to their debts and other commercial obligations.

The odious debt doctrine exists as a potential exception to the universal succession doctrine since it holds out the possibility that successors would not bear the debt burdens incurred by their predecessors in the event that the previous regime was sufficiently repressive and that the benefits of the debt did not benefit the population, together with other potential requirements.⁹⁰ The odious finance doctrine proposed herein would expand the concept of odiousness and would continue to provide an exception to this doctrine.

B. *Compensation for Expropriation*

The odious finance doctrine proposed in this article rests on the idea that parties that invest in a despotic regime may be benefiting the despotic regime rather than the people of that state. To the extent that investors have reason to know this would be the case, the benefits of the standard compensation for expropriation doctrine ought not to provide them with cover for the political risks they take on in a given foreign investment venture.

87. See W. Michael Reisman, *Foreword* to TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS* (2006); CHENG, *STATE SUCCESSION*, *supra* note 6, at 26, 37.

88. For further discussion of the political nature of the odious debt doctrine and the odious finance doctrine, see *supra* notes 76–77 and accompanying text.

89. The universal succession theory, or the theory of continuity of obligations, has its roots in Roman law. However, its position as the prevailing doctrine has not been constant. In fact, a wide range of theories of commercial obligation upon succession has existed and has spanned the extremes from the *tabula rasa* (clean slate) theory, which held that no obligations pass to a successor, to the universal succession theory, which holds that all obligations pass to successors. As Cheng notes, neither of these absolutist theories is appropriate at this time. CHENG, *STATE SUCCESSION*, *supra* note 6, at 13–25. This variance of theories is evidenced by the differing approaches of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983, which sets forth a slightly qualified universal succession theory in its Article 34, and the Restatement (Third) of the Foreign Relations Law of the United States § 209(2), which sets out a qualified *tabula rasa* theory. Because international law is by no means settled on this issue, legal justification for the equitable mitigation of the universal succession theory is necessary.

90. See *supra* Part II.

As in the area of continuation of commercial obligations, the doctrine on compensation for expropriation is not stable or settled.⁹¹ Two major schools of thought exist regarding compensation for expropriation. The first, known as the “Hull Formula,” requires states to pay “prompt, adequate and effective” compensation for lawful takings of a foreigner’s property.⁹² This position is the one favored by the United States and other capital-exporting countries, especially during the negotiation of bilateral investment treaties.⁹³ Developing countries, on the other hand, have tended to subscribe to a compensation theory that provides that a host state should afford foreigners essentially the same treatment as it gives its nationals and that compensation therefore should be determined by reference to the domestic laws of the host state.⁹⁴

Additional controversy exists with respect to the appropriate compensation measure.⁹⁵ This debate centers on whether compensation must be made at market or full value, or if instead there are equity and justice considerations that one “must take into account in arriving at what he may consider as just or fair compensation.”⁹⁶ Essentially, this is a conflict between the Hull Formula, which has been interpreted as requiring full or market value compensation, and sources that reject the Hull Formula in favor of language that opens the possibility of equitable principles to be included in a calculation of the compensation to be paid. Examples of such sources include the

91. In fact, some have claimed that besides the law regarding the use of force, no question in international law has given rise to as much debate. See, e.g., Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT’L L. 553 (1981).

92. Press Release, S.T.E.T., Mexico: Expropriation of American Properties (Aug. 26, 1938), in DEP’T ST. PRESS RELEASES, vol. XIX, at 139 (1939) (written by then-Secretary of State Cordell Hull about Mexico’s expropriation of U.S. farms and agricultural properties); accord Press Release, S.T.E.T., Mexico: Expropriation of American Properties (July 22, 1938), in DEP’T ST. PRESS RELEASES, vol. XIX, at 50 (1939); see also Dolzer, *supra* note 91; Oscar Schachter, *Editorial Comment: Compensation for Expropriation*, 78 AM. J. INT’L L. 121 (1984).

93. RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 108 (1995).

94. This doctrine is encompassed by the U.N. Charter of Economic Rights and Duties of States, which affirms:

[Each State has the right to] nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.

G.A. Res. 3281, art. 2, § 2(c), U.N. Doc. A/RES/3281 (Dec. 12, 1974).

95. See, e.g., Schachter, *supra* note 92; M.H. Mendelson, *Compensation for Expropriation: The Case Law*, 79 AM. J. INT’L L. 414 (1985).

96. Bin Cheng, The Grotius Society, *The Rationale of Compensation for Expropriation*, 44 PROBS. OF PUB. & PRIV. INT’L L., TRANSACTIONS FOR THE YEAR 1958–1959, at 267, 309–10 (1958). Professor Cheng’s article is a useful source for bibliographic as well as substantive coverage of the debate concerning expropriation prior to the time of its publication. In particular, he makes a strong case regarding payment of just, equitable, and fair compensation.

Restatement (Third) of Foreign Relations Law of the United States, which calls for payment of just compensation,⁹⁷ the oft-cited Permanent Court of International Justice's 1928 *Chorzów* case, which refers to a requirement of a "payment of fair compensation,"⁹⁸ and the 1922 *Norwegian Shipowners Claims* arbitration, in which the arbitral tribunal called for "just compensation" and stated that just compensation should be determined by fair actual value at the time and place in view of all surrounding circumstances.⁹⁹

The rationale for full compensation for expropriation "consists in the fact that certain individuals in a community . . . *without their being in any way at fault*, are . . . asked to make a sacrifice of their private property for the general welfare of the community."¹⁰⁰ Thus, the rationale for full compensation rests on a presumption that the private property owner and the investment itself are without fault. In expropriation cases in which the odious finance doctrine would be relevant, the innocence of the property owner and the investment would inherently be in question, given that the doctrine would apply only in situations where the investor knew or should have known that the investment would be used for purposes contrary to the purposes of the nation and the investment was, in fact, used in such a way.¹⁰¹ Where it is established that such investors and investments do carry some degree of fault resulting from their decision to invest despite having had constructive or actual knowledge of the profligate purposes of their investment, considerations of equity and justice are appropriate. An odious finance doctrine would provide a mechanism for making such considerations. In some cases, where the benefits of the investment have accrued to the despot and to the people, an odious finance doctrine might dictate partial, rather than full or market value compensation.¹⁰² In the rare case where the investor is unable to show any benefit bestowed on the people by way of its investment, expropriation with no compensation would arguably be warranted.

97. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987), stating:

A state is responsible under international law for injury resulting from:

- (1) a taking by the state of the property of a national of another state that
 - (a) is not for a public purpose, or
 - (b) is discriminatory, or
 - (c) is not accompanied by provision for *just compensation* (emphasis added).

98. *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 46 (Sept. 13).

99. *Norwegian Shipowners Claims* (Nor. v. U.S.), 1 R. Int'l Arb. Awards 307, 339–41 (Perm. Ct. Arb. 1922).

100. Cheng, *supra* note 96, at 297 (emphasis added).

101. For further discussion of this requirement, see *infra* Part V.B.3.

102. For a similar proposal in the area of debt, see Ben-Shahar & Gulati, *supra* note 71.

C. Contract Law—Avoidance Doctrines

The odious finance doctrine would entail the possibility of cancelling the contracts that establish and govern the relationship between the investor and the state. Succession to state contracts is treated as distinct from succession to public debt.¹⁰³ The comments to § 209 of the Restatement (Third) of Foreign Relations Law of the United States state that “[w]hile terminating an obligation to repay a debt would unjustly enrich the state, terminating an executory contract does not necessarily have the same effect.”¹⁰⁴ The comments go on to state that the rule “corresponding to *rebus sic stantibus*”¹⁰⁵ or to “voidability for impossibility or frustration in private contract law, might be fairly applied here.”¹⁰⁶

In addition to the doctrines of impossibility and frustration, the contract doctrines of illegality and unenforceability on the grounds of public policy may be applicable as legal bases upon which parties arguing for application of the odious finance doctrine may rely. In this vein, readers should be reminded that, while many of the contracts that would come under scrutiny under the odious finance doctrine may contain significant questions regarding their legality,¹⁰⁷ illegality is not required in order to render an agreement unenforceable. Rather, a contract can be rendered unenforceable when it is likely that refusal of enforcement will prevent the violation of sufficiently important public policy. Cases regarding unenforceability for public policy require a balancing of the interests involved, but courts have long recognized that:

The power to contract is not unlimited. While as a general rule there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of the law or public policy.¹⁰⁸

103. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209(2) (1987).

104. *Id.* at cmt. f. Comment (f) also addresses development contract and concession agreements directly and states that it would be “unfair” to the investor to “repudiate an obligation which the private party concluded in good faith” The odious finance doctrine does not contravene this comment, as it would only apply when the investor knew or had reason to know of the odious character of the investment, challenging any argument that the contract was made in good faith.

105. The concept of *rebus sic stantibus* is stated in Restatement § 336 and comment (a) thereto and essentially provides for the voidability of international agreements in the event of unforeseen fundamental change of circumstances.

106. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209(2) cmt. f (1987).

107. Violations of international human rights law and domestic civil rights law, domestic constitutional law, international or municipal environmental law, and international or municipal corruption law would be examples, if the party contesting the legality of the contract could show that the contract was premised on illegal behavior (a difficult task, surely).

108. *Sternamen v. Metropolitan Life Ins. Co.*, 62 N.E. 763, 764 (N.Y. 1902). Readers should note that, absent explicit provisions in the contract to the contrary, cancellation of contracts will, typically, be treated under host-country law. The discussion regarding contract law avoidance doctrine has been based

From a normative perspective, this article is in agreement with the position that in addition to the validly desirable policies of predictability and stability, “international law should manage state successions to . . . facilitate . . . and support the legitimate aspirations of territories that undergo succession.”¹⁰⁹ Exceptions to the continuity doctrine and the inclusion of the concept of odious financing in expropriation cases that align with already existing contract avoidance doctrines may help to accomplish this policy objective.

IV. ALTERNATIVES TO HIGH-COST DEBT

Some commentators writing about odious debt have observed that the question of whether the lender is a private firm or a public entity should not be relevant to the consideration of what can be covered by the doctrine.¹¹⁰ This article accepts this proposition and adds to it the observation that sovereigns seeking to raise capital have alternatives to borrowing funds. Indeed, despots do not necessarily care about the origin of their funds—public, private, debt, grant, contractual profit-sharing payments, taxation, or fees—so long as they can be used to fund their corrupt, abusive, or rent-seeking activities.¹¹¹

Any number of finance methods can be used to fund undesirable activity on the part of the despotic government. Recently, a good deal of attention has focused on the consequences of high debt burdens for developing countries as the crushing effects of those burdens have come to be known by the international community.¹¹² This knowledge has resulted in the policy initiatives discussed in Part II above. To no small extent, the concern for Iraq’s ability to emerge from the Saddam Hussein regime and the enormous debts incurred by that regime has in part led to the recent reemergence of interest

entirely on U.S. understandings of contract law. The applicability of these avoidance doctrines would depend on the internal law of each country asserting these bases as legal justifications for the applicability of the odious finance doctrine.

109. CHENG, *STATE SUCCESSION*, *supra* note 6; *see also* O’CONNELL, *STATE SUCCESSION*, *supra* note 14, at 345–52, discussing expropriation of concessions and the principles of compensation and stating:

[t]he arguments in favor of the inherent revocability of concession agreements tend to be a fortiori in the case of successor States, which cannot be compelled to carry on with arrangements made by their predecessors which are either contrary to their public interests or obstructive of the realization of their own ideas of social development.

Id. at 347–48.

110. Gelpert, *Odious, Not Debt*, *supra* note 67.

111. Bertrand Gros Lambert & Michel-Henry Bouchet, *Do Corrupt Countries Receive Less Foreign Capital After All?* 2 (CERAM, Working Paper No.1, 2006), available at <http://ssrn.com/abstract=904620>.

112. Debt can be extremely burdensome for developing countries and can prevent them from achieving economic growth or from pursuing economic policies and social programs that benefit their populations. *See, e.g.*, Gerardo Esquivel, Felipe Larrain & Jeffrey D. Sachs, *The External Debt Problem in Central America: Honduras, Nicaragua, and the HIPC Initiative* 1–5 (Harv. Inst. for Int’l Dev., Working Paper No. 645, 1998), available at <http://ssrn.com/abstract=168173> (discussing the Nicaraguan and Honduran debt levels and their inhibiting effect on growth).

in the odious debt doctrine.¹¹³ Again, it is not the objective of this article to diminish or question the deleterious effects of high levels of sovereign debt. Rather, this article aims to expand the scope of the odious debt doctrine to other types of sovereign finance.

In part, the rationale for this expanded focus rests on the recognition of two rationales. First, many kinds of sovereign finance ultimately rest on contractual relationships. This rationale recognizes that the odious debt doctrine addresses instances of lending to despots but does not address lending to private parties (as in the case of project finance transactions or asset-backed loan transactions) whose activities are contracted with despots and do not redound to the benefit of the people. The odious finance doctrine captures avenues of despotic finance that rely on contracts in the form of loan agreements and attendant documents for memorializing terms and conditions, just as it captures concession, production sharing, or project finance¹¹⁴ contracts for the extraction of natural resources, and contracts establishing FDI. Second, at least some forms of sovereign finance may be at least as harmful—or more so—to the short-term and long-term interests of the population as debt may be. This Part will first examine two of these sovereign finance alternatives—natural resource extraction contracts and other FDI.¹¹⁵ To the extent possible, it will also seek to provide specific examples in which despotic regimes utilized these methods to benefit the politically connected few rather than the population generally or, worse, harmed the population. This Part will then suggest three types of harms not found directly in the context of debt loads but often found in natural resource exploration and exploitation arrangements as well as in other types of FDI. To the extent possible, the three categories of harms explored herein—those arising from (1) depletion of natural resources and environmental degradation, (2) corruption, and (3) human rights violations—will be kept conceptually separate, despite the fact that they are often intricately interconnected in the actual circumstances in which they arise.

Readers should be alerted that it has been nearly impossible to uncover forensic information about how despotic regimes actually finance themselves. As a result, this article, and particularly this Part, must on many occasions make recourse to the information that is available about (1) corruption, (2) how natural resources contracts and other foreign investment agreements are created and allocated, (3) protests to their creation, and (4)

113. For more on the connection between the odious debt doctrine and Iraq, see *supra* Part II.

114. With respect to project finance transactions, readers will note that the Equator Principles are a voluntary code to which lenders representing a large portion of the capital for project finance transactions have signed on. While much has been written about the Equator Principles, it is not clear how effective they will be. It is possible that, like many voluntary codes, they will fail to be adequately monitored, resulting in irregular compliance.

115. A notable third alternative financing source is the outright sale of land or other valuable state assets. Sales of such property would be a natural source of funds for governments if an odious finance doctrine failed to encompass such transactions. This section does not treat property sales at length due to space and resource constraints. It is a subject for future research.

the doubtful nature of their public benefit and the possibility that the public is actually harmed by such contracts. The result is that many of the examples provided in this article arise in countries that would likely not be deemed despotic. The examples are meant to provide the reader with insights about what occurs or is likely to occur inside despotic regimes.

A. *Alternative Finance Methods*

1. *Natural Resource Extraction*¹¹⁶

Concession and production-sharing contracts,¹¹⁷ often in conjunction with project finance arrangements,¹¹⁸ can be used to arrange the financing and extraction of a wide variety of natural resources, including oil and gas, timber, minerals, and gems. It is often by way of these mechanisms that land is surveyed for economically profitable natural resource caches. Once the extraction process has begun, these arrangements also act as the mechanisms through which extracted, mined, or felled resources are allocated among the

116. The question of what is meant by natural resources has been a subject of some scholarly debate and has given rise to a typology that differentiates between, for example, (1) natural resources that require human intervention to be obtained and those that do not, (2) resources that are localized and those that are dispersed throughout a country, and (3) those that are renewable and those that are not. For a summary of this literature, see Matthias Basedau, *Context Matters—Rethinking the Resource Curse in Sub-Saharan Africa* 7–8 (Global & Area Studies, Working Paper No. 1, 2005), available at <http://ssrn.com/abstract=906983>.

117. Concession contracts are generally understood to be contracts where private ownership of the goods to be extracted is permitted. In such a scenario, the state transfers title to these goods to the extracting company, the company extracts the goods, and then pays a royalty and a tax on profits. This contract system for petroleum extraction was very common until 1950. At one time, up to 122 countries around the world were using concession contracts. Concession contracts are known for granting nearly unrestricted and unfettered rights over long periods of time to explore and extract resources. See generally TENGKU NATHAN MACHMUD, *THE INDONESIAN PRODUCTION SHARING CONTRACT: AN INVESTOR'S PERSPECTIVE* 24 (2000). Under a production sharing contract, the government owns the goods. The extracting company and the government each have the right to sell some set percentage of the extracted goods in accordance with the contract terms. In addition, the extracting company may be required to pay taxes and/or royalties on their profits from the sale of the goods. For a useful roadmap of various types of contractual arrangements for exploration and extraction of petroleum, see *id.* at 25; see also Wendy Duong, *Partnerships With Monarchs—Two Case Studies: Case One Partnerships With Monarchs in the Search for Oil: Unveiling and Re-Examining the Patterns of “Third World” Economic Development in the Petroleum Sector*, 25 U. PA. J. INT'L ECON. L. 1171, 1211–17 (2004). For an overview of a variety of petroleum contracts, see ZHIGUO GAO, *INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS* (1994).

118. Project finance refers, in simple terms, to the means by which particular projects are funded and characteristically refers to non-recourse financing which will derive its repayments from the profits of the project itself, rather than from any particular contract party.

The term “project finance” . . . is generally used to refer to the arrangement of debt, equity, and credit enhancement for the construction or refinancing of a particular facility in a capital-intensive industry, in which lenders base their credit appraisals on the projected revenues from the operation of the facility, rather than on the general assets or the corporate credit of the promoter of the facility, and in which they rely on the assets of the facility, including the revenue-producing contracts and cash flow, as collateral

Scott L. Hoffman, *A Practical Guide to Transactional Project Finance: Basic Concepts, Risk Identification and Contractual Considerations*, 45 BUS. LAW 181, 181 n.1 (1989).

various parties to the contract—typically the state-owner of the resources and a private, usually foreign, corporation. Consequently, natural resource concessions contracts or production-sharing contracts and project finance transactions play vital roles in financing state activities.

Wendy Duong has written in great detail about a petroleum production-sharing contract in Vietnam.¹¹⁹ In her study regarding the tendencies of such arrangements to produce both monopolistic and monarchical outcomes, she describes one Vietnamese production-sharing contract negotiated in the early 1990s under which the extracted oil was to be shared between an international oil company and a state entity, PetroVietnam. PetroVietnam was to receive the people's share of the oil from the extraction activities of the oil company.¹²⁰ Under the Vietnamese Constitution, however, the people of Vietnam were the collective owners of all of that country's natural resources.¹²¹ Thus, the sale of the oil was to be made for the good of the people.¹²² Yet at the time the contract was drafted and finalized, there were numerous activist groups documenting and denouncing the government's human rights track record and high levels of neglect and abuse of its own people.¹²³ The powerful point Duong makes is that despite such alerts and denunciations, the production-sharing arrangement was finalized and, despite grave concern

119. Duong, *supra* note 117. This article does not take the position that Vietnam is ruled by a despotic government. On the contrary, Vietnam is an example of a country that, despite documented problems, would be unlikely to be deemed a despotic regime such that the odious finance doctrine would apply. Still, Duong's work provides valuable insights into the abilities of production-sharing contracts to consolidate power in the hands of the investor and the state. The fact that the benefits from such contracts may not be passed on to the people in a country like Vietnam can be analogized to situations in which governmental power is more consolidated and malevolent than it is in Vietnam.

120. *Id.* at 1195–96.

121. *Id.* (citing VIETNAM CONST. pmbll., art. 17). Article 17 states:

The land, forests, rivers and lakes, water supplies, wealth lying underground or coming from the sea, the continental shelf and the air, the funds and property invested by the State in enterprises and works in all branches and fields—the economy, culture, society, science, technology, external relations, national defence, security—and all other property determined by law as belonging to the State, come under ownership by the entire people.

This is not an atypical arrangement. Although a survey of constitutional allocation of natural resource ownership was not undertaken in connection with this article, similar provisions are not uncommon in national constitutions. The Indonesian Constitution is one such example and will be discussed herein. For the argument that the right of permanent sovereignty over natural resources has been accepted as a principle under international law and that this is a right that rests with the people, see Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 34 (2006). See also East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30) (adopting the principle of permanent sovereignty over natural resources). See also Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1193 (1996) (stating that there is a literature supporting the contention that permanent sovereignty over natural resources has attained *jus cogens* status while others disagree).

122. Duong, *supra* note 117, at 1196.

123. *Id.* at 1196–97 (citing the reports of various human rights organizations).

that the benefit of the arrangement would not accrue to the people of Vietnam, there was no inquiry into the legitimacy of the deal.¹²⁴

Among Duong's hypotheses is that even contracts that are profitable for the government may not pass any benefit on to the citizens of a country.¹²⁵ This phenomenon is commonly called the resource curse¹²⁶ or the paradox of plenty¹²⁷ and refers to the negative correlation between natural resource wealth in many developing countries and their economic growth.¹²⁸ This observation has been made repeatedly and has been applied not only to economic growth but also to the tendency of natural resource wealth to contribute to violent conflict, high levels of corruption, and other failures in government.¹²⁹

In the time since the concept of the resource curse was first identified, other scholars have noted that a country's governmental institutional framework and the degree of corruption within a country are highly relevant factors in predicting whether natural resource extraction and production will ultimately generate economic growth and redound to the benefit of the country's people.¹³⁰ The claim here is not that extraction and production of natural resources can never benefit the people of a country but that contracts granting rights for the exploration, extraction, and sale of natural resources in practice hold only a tenuous possibility of providing such benefits. In the many countries in which natural resources are believed to belong, or are legally stated to belong, collectively to the people,¹³¹ this may seem particu-

124. *Id.* at 1197; see also GLOBAL WITNESS, OIL AND MINING IN VIOLENT PLACES: WHY VOLUNTARY CODES FOR COMPANIES DON'T GUARANTEE HUMAN RIGHTS (2007), available at http://www.globalwitness.org/media_library_detail.php/580/en/oil_and_mining_in_violent_places.pdf.

125. Duong, *supra* note 117, at 1242.

126. See RICK AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS (1993); Jeffrey Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, (Harvard Inst. for Int'l Dev., Discussion Paper No. 517a, 1995). Sachs and Warner's findings have been challenged by a number of authors from a variety of perspectives. See, e.g., Matthias Basedau, *supra* note 116 (arguing that many factors can complicate the resource curse, such as the country's type and degree of resource abundance and dependence, its resource revenue management, and the types of involved companies); Daniel Lederman & William Maloney, *Open Questions About the Link Between Natural Resources and Economic Growth: Sachs and Warner Revisited* (Banco Central de Chile, Working Paper No. 141, 2002) (challenging Sachs and Warner's analysis on other counts such as their study's chosen time period and omitted variables that could have changed their results); Osmel Manzano & Roberto Rigobon, *Resource Curse or Debt Overhang?* (Nat'l Bureau of Econ. Research, Working Paper No. 8390, 2001) (suggesting that the resource curse might be better explained by focusing instead on a country's debt burden).

127. TERRY LYNN KARL, *THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES* (1997).

128. The higher a country's dependence on mineral extraction, as opposed to other economic activity, the lower its standard of living will be. The relationship between dependence on oil extraction and poverty is somewhat more ambiguous. Twelve of the world's twenty-five most mineral-dependent states are classified by the World Bank as "highly-indebted poor countries." For oil-dependent states, this number is six of twenty-five. MICHAEL ROSS, OXFAM AMERICA, *EXTRACTIVE SECTORS AND THE POOR* 7 (2001), available at http://www.oxfamamerica.org/newsandpublications/publications/research_reports/art2635.html/OA-Extractive_Sectors_and_the_Poor.pdf.

129. See, e.g., Basedau, *supra* note 116.

130. See, e.g., *id.*

131. Many countries grant ownership of their natural resources to the sovereign or to the people. This is known as the domanial system. See Andrew B. Derman, *International Oil and Gas Joint Ventures: A*

larly problematic. But even in countries following a domanian system, in which natural resources are believed to belong to the state, questions must at least be raised about the legitimacy of arrangements under which natural resources—often the greatest source of wealth for a given country—are promised to foreign companies, sold for profits that will benefit government officials and foreign companies, and will not significantly benefit, or will even harm, the people of the host country.¹³² Questions regarding the legitimacy of these contracts are especially pressing given that the natural resource contracts can have durations of twenty, thirty,¹³³ or even ninety-nine years¹³⁴ and can thus result in long-term detrimental consequences to the financial and political stability of a country¹³⁵ and significantly restrict the available sources of funds for government programs going forward.

This article proposes an odious finance doctrine that would only operate in the event where an investment contract was incurred by a despot, did not benefit the people, and where the investor had reason to know that the people would not be benefited by the contract. Wendy Duong's Vietnamese example of what might be conceived of as a profligate investment may raise questions about its validity and morality but it would not be treated by the odious finance doctrine because it would fail to meet at least some of these criteria. Nonetheless, it serves as a valuable example from which lessons can be drawn of the connections between natural resource contracts, state power, and wealth accumulation, and as an illustrative case of investment that has failed to redound to the benefit of the people. Similarly, it is not the contention of this article that all situations in which the resource curse appears to be asserting itself would give rise to the odious finance doctrine. Rather the appearance of a resource curse within a country that is seen as despotic might raise a rebuttable presumption that the odious finance doctrine should apply to extraction contracts.

2. *Foreign Direct Investment and Other Transactions*

Contractual arrangements made between despotic governments and private investors, public entities and/or international organizations facilitating the exploration and exploitation of natural resources are not the only type of

Discussion with Associated Form Agreements, 16 A.B.A. SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW 62 (1992).

132. Within the odious debt doctrine discourse, an argument has been made that debt might only be reduced to the extent it did not benefit the people of a country. See Ben-Shahar & Gulati, *supra* note 71.

133. MACHMUD, *supra* note 117.

134. For example, Liberia granted Firestone a ninety-nine year concession to vast tracts of land for the purposes of latex harvesting in 1926. For more on this arrangement, see *infra* Part IV.B.3.c.ii.

135. A recent example arises in Guatemala where a concession granted by a military dictatorship to a mining company in the 1960s continues to be the source of land conflict and potential human rights violations. To the current knowledge of this author, the facts of this situation have not been the subject of scholarly exposition or coverage by the mainstream media. They have thus not yet been verified but have been the source of activist alerts. See, e.g., RightsAction, Skye Evictions (Aug. 1, 2007), http://www.rightsaction.org/urgent_com/Skye_evictions_080107.html.

potentially odious non-debt obligation a new government may face. FDI in other economic sectors serves as one category of example, as may outright sales of valuable government property.¹³⁶

FDI has been defined as an “investment made to acquire lasting interest in enterprises operating outside of the economy of the investor” and includes gaining an effective managerial voice for the investor as among its objectives.¹³⁷ This is almost always accomplished by way of an equity investment in a given enterprise.¹³⁸ Three main FDI strategies are greenfield investments, mergers and acquisitions, and joint ventures¹³⁹ and the distinguishing characteristic of FDI is often stated to be “control over the assets of a foreign enterprise.”¹⁴⁰ As of 1995, FDI was the “largest single source of external finance for developing countries.”¹⁴¹

Countries eager to attract FDI must make decisions regarding two types of legal rules. First, they must address questions regarding registration requirements and restrictions on FDI. For example, a country must determine if it intends to restrict investment active in particular sectors or engaged in particular activities, such as investments that might invoke national security concerns.¹⁴² In addition, national policymakers must make decisions regarding a wide range of regulations with respect to labor, environmental, corporate, tax, and intellectual property law, and regarding how foreign companies will be treated with regard to ownership requirements, licenses, export and transfer of profits, and investment incentive programs.¹⁴³ While countries are increasingly settling these issues by way of bilateral investment treaties (BITs),¹⁴⁴ the ability of each country to make decisions regarding those aspects of its regulation that can attract foreign investment ought not

136. See *supra* note 115.

137. UNCTAD, Foreign Direct Investment, <http://www.unctad.org/Templates/Page.asp?intItemID=3146&lang> (last visited Nov. 10, 2007). There are many valid definitions for FDI. The WTO Secretariat, for example, states that FDI “occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) *with the intent to manage that asset*. The management dimension is what distinguishes FDI from portfolio investment in foreign stocks, bonds and other financial assets.” WTO Secretariat, Trade and Foreign Investment, PRESS/57 (Oct. 9, 1996), *reprinted in* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 3 (Daniel D. Bradlow & Alfred Escher eds., 1999).

138. LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 137.

139. *Id.* at 20.

140. *Id.* at 20–21. See also MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 4–8 (1994).

141. RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES xi (1995).

142. Countries are given wide prerogative to make determinations of this sort, as they “have the right to freely regulate the entry of foreigners into their economies unless they have provided otherwise in an international agreement.” LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 137, at 29.

143. *Id.* at 29.

144. Bilateral investment treaties (BITs) are:

[A]greements between two countries for the reciprocal encouragement, promotion and protection of investments in each other’s territories by companies based in either country. Treaties typically cover the following areas: scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, and dispute settlement mechanisms, both state-state and investor-state.

to be underestimated. For example, BITs do not typically address specific labor practices or environmental laws and licenses, which may be of great importance to investors in particular business sectors.

FDI scholars have noted that the most attractive quality of any host country in attracting FDI is a “clear, transparent, stable and enforceable legal framework.”¹⁴⁵ This article by definition addresses itself to those situations in which the legal environment does not meet these criteria, but to which FDI is nonetheless attracted. In these environments, other qualities must be used to attract FDI. It may be worth conjecturing whether these are the locations in which light environmental standards, low wages, minimal labor protections, and tax holidays are most prevalent.

Indeed, if stable, clear, and transparent legal frameworks are not available, or if political stability and security are not present, arrangements may be made (contractually or less formally) to provide the foreign investor with the security it requires.¹⁴⁶ These arrangements can and have come at great cost to the populations surrounding FDI enterprises. The recent lawsuit against Chiquita Brands International, in which Chiquita pled guilty to charges of paying bribes to the Colombian paramilitary group, AUC, and the recently discovered connections between the Colombian government and the AUC serves as an insight into these types of arrangements.¹⁴⁷

The Chiquita example, like other examples of corporate misbehavior, offers insight into these potential long-term, contractually imposed harms to the public good and to the welfare of a population. Again, it is not the claim of this article that Colombia should be viewed as a despotic regime. Rather, Colombia is an open enough country that we are able to obtain current information regarding profligate practices on Chiquita’s part. The Chiquita/Colombia example is offered not as an instance in which the odious finance doctrine would operate, but rather as an example of the type of arrange-

UNCTAD, Investment Instruments Online: What are BITs?, http://www.unctadxi.org/templates/Page___1006.aspx (last visited Nov. 10, 2007). There are now over 2000 BITs, involving more than 175 countries. UNCTAD, Investment Instruments Online: UNCTAD Analysis of BITs, http://www.unctadxi.org/templates/Page___1007.aspx (last visited Nov. 10, 2007).

145. LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 137, at 28.

146. The recent report by Global Witness cites to a number of such arrangements. See GLOBAL WITNESS, *supra* note 124. The report also discusses the Voluntary Principles on Security and Human Rights which aim to address this issue through a voluntary code of conduct with only opaque enforcement mechanisms. See *id.* at 9–15.

147. See Press Release, Department of Justice, Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine (Mar. 19, 2007), available at http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html; see also The National Security Archive, Documents Implicate Colombian Government in Chiquita Terror Scandal: Company’s Military Payoffs Made Through Military’s ‘Convivir’ (Mar. 29, 2007), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB217/index.htm>; Michael Evans, ‘Para-Politics’ Goes Bananas, NATION, Apr. 16, 2007, <http://www.thenation.com/doc/20070416/evans>. The AUC has a long history as a documented violator of human rights. See The National Security Archive, Paramilitaries as Proxies: Declassified Evidence on the Colombian Army’s Anti-Guerilla “Allies” (Oct. 16, 2007), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB166/index.htm>.

ments that one would find if it were possible to unveil all arrangements made between investors and despotic regimes.

In addition, as in the discussion of natural resource extraction arrangements, it is clear that FDI itself should not be seen as odious, nor should all FDI within despotic regimes be characterized in this light; these strokes would obviously be grossly over-broad. Rather, arrangements for the establishment of a foreign direct investment within a particular country should not enjoy protection from scrutiny simply because the obligations they create on the part of the government are contractual obligations to do something other than pay interest and principal on a loan.

B. Instances in Which the Alternatives Have Been More Harmful than Debt Alone

1. *Depletion of Natural Resources and Environmental Degradation—The Indonesian Example*

Examples of massive environmental degradation facilitated or performed by foreign companies may result in short-term, medium-term, and/or long-term harms. For the purposes of this article, short-term harms may be thought of as those harms that have negatively affected the population during the time the despotic regime was in power. Medium-term harms are both those harms that will impinge on the abilities of the successor government to attract new investors in its early years as well as those harms that will thus prevent the successor government and population from making use of existing environmental and natural resources for their own benefit. Long-term harms are those that prevent successor governments and populations from ever recovering the value of depleted environmental and natural resources. Each will be discussed in turn.

Short-term environmental harms are essentially those harms that were incurred and experienced by the population during the time the despot was in power. Harmful air and water pollution are good examples.¹⁴⁸ As a general matter, nondemocratic governments and dictatorships have been found to provide public goods, including safe water and pollution control, at significantly lower levels than democratic governments.¹⁴⁹ Specific historical in-

148. Some categories of environmental harms may last long into the future. In this event, it will be useful to think of these as short-term as well as medium- or long-term harms.

149. Robert Deacon, *Dictatorship, Democracy, and the Provision of Public Goods* 28, 39–44 (Dep't of Econ., U.C. Santa Barbara, Departmental Working Papers, Paper 20-03, 2003), available at <http://repositories.cdlib.org/ucsbecon/dwp/20-03>; Roger D. Congleton, *Political Institutions and Pollution Control*, 74 *REV. ECON. & STAT.* 412 (1992) (arguing that political arrangements (i.e. democratic vs. authoritarian) have more impact on environmental regulation than other factors); see also Eric Neumayer, *Do Democracies Exhibit Stronger International Environmental Commitment? A Cross-Country Analysis*, 39 *J. PEACE RES.* 139, 140, 144 (2002) (establishing a "positive impact of democracy on international environmental commitment" but also challenging the proposition that democracy and poor environmental outcomes are strongly correlated, except where there is little time lapse between policy adoption mirroring commitment and environmental outcome). For an empirical analysis that suggests a multidimensional relation-

stances of harmful air and water pollution are also available.¹⁵⁰ At the end of the Cold War, the environmental abuses of Eastern Europe's totalitarian societies created a set of data points confirming the proposition that such regimes are less prone to provide necessary environmental regulation.¹⁵¹ And today in China, for example, over 750,000 people are believed to die prematurely each year from exposure to pollutants, including approximately 350,000 to 400,000 premature deaths annually due to poor air quality in Chinese cities.¹⁵²

Some commentators have argued that the assumption that totalitarian regimes will always be less protective of the environment than democratic governments does not withstand empirical analysis.¹⁵³ Whether totalitarian regimes provide more or less environmental protections than democratic ones, however, is not the only issue in relation to odious investment; in fact, it is not particularly relevant. More germane is whether the population in question derived enough benefit from the pollution-generating investment activity. This article assumes that industrial activity will produce pollution and environmental harm.¹⁵⁴ This pollution may be thought of as the negative consequence of economic growth.¹⁵⁵ However, in democratic societies, the assumption is that the people will benefit from the economic upsides of the industrial activity. A common problem in totalitarian regimes, on the other hand, is the highly stratified distribution of wealth, which restricts the distribution of benefits beyond elite sectors of society. To the extent that the population incurred the cost of industrial activity and was harmed by its pollution and did not benefit from that activity, the investment should be thought of as contrary to the interests of the population.

Among the medium-term consequences emerging governments will face is the inability to attract new income-producing investors to locations that are significantly polluted, unhealthy, and afford only a low quality of life.¹⁵⁶ Added to this medium-term consequence is the inability of successor governments to make new and more equitable arrangements for the exploration and extraction of the country's natural resources. Until semi-renewable resources have been restored, they cannot be used responsibly by future gov-

ship between democracy and environmental outcomes, see Manus I. Midlarsky, *Democracy and the Environment: An Empirical Assessment*, 35 J. PEACE RES. 341 (1998).

150. It is not always easy to obtain information regarding air and water quality of a location ruled by a despot. For this reason, it is of course worth noting that historical experience may not be relevant to modern-day or future dictatorships. However, given the findings discussed above regarding the tendency of dictatorships to provide lower levels of pollution control, historical instances may be useful in thinking through the potential for environmental harms in current and future dictatorships.

151. Midlarsky, *supra* note 149.

152. Richard McGregor, *750,000 a Year Killed by Chinese Pollution*, FIN. TIMES, July 2, 2007, available at <http://www.ft.com/cms/s/8f40e248-28c7-11dc-af78-000b5df10621.html>.

153. Midlarsky, *supra* note 149.

154. Congleton, *supra* note 149.

155. *Id.*

156. In addition to making a location unappealing to potential investors, whole economic sectors, such as tourism, may be unavailable until air and water pollution are alleviated.

ernments hoping to pass the benefits of such use on to the countries' populations.¹⁵⁷

The long-term environmental and resource depletion harms that can be caused by foreign direct investment are not necessarily particular to despotic regimes. In every instance in which resources are used at a rate faster than they can be restored, natural resources are depleted, often forever. All styles of government, democratic and not, participate in this type of long-term natural resource depletion.¹⁵⁸ Some may argue that extraction of natural resources is not necessarily a public harm. It can have beneficial economic effects without consequentially harming the environment, and there are ample examples of this type of sustainable extraction.¹⁵⁹

The likelihood of extraction being sustainable, however, is far more likely when the enterprise is controlled by an entity whose interests include looking after the long-term welfare of its people and the environmental well-being of the territory it controls. Particular to despotic regimes, for example, are the uses of those resources and the income stream they produce. Deforestation in Indonesia during the years of Suharto's rule serves as one telling example.¹⁶⁰

Article 33 of the 1945 Indonesian Constitution states in paragraph 3 that "[t]he land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people."¹⁶¹ Nonetheless, during Suharto's rule, Indonesia witnessed far-reaching deforestation and forest degradation that operated in the context of wide-scale corruption and violated the constitutional mandate of providing maximum benefit for the people.¹⁶²

Deforestation in Indonesia is largely the result of a corrupt political and economic system that regarded natural resources, especially forests, as a source of revenue to be exploited for political ends and personal

157. An elaboration of renewable, semi-renewable, and nonrenewable resources is beyond the scope of this article. For the sake of simplicity, it adopts a framework in which renewable resources are those that can be replaced at the same rate as human consumption of that resource (such as wind or solar power); semi-renewable resources are those that, with proper management, can be used in perpetuity (such as sustainable deforestation or other types of soil-intensive farming or well-planned use of aquifers); and nonrenewable resources are those that cannot be replaced at the rate of human consumption (such as oil and gas, but would also include excessive use of otherwise semi-renewable resources that have been depleted beyond their ability to self-renew).

158. Midlarsky, *supra* note 149, at 351–53.

159. ADAMS, ODIUS DEBTS, *supra* note 16.

160. Suharto was Indonesia's second president. Under his rule from 1967–98, Suharto's "New Order" authoritarian government was militaristic, violent toward dissident sectors of his own population, and corrupt. *See, e.g.,* AUDREY R. KAHIN & GEORGE MCT. KAHIN, SUBVERSION AS FOREIGN POLICY: THE SECRET EISENHOWER AND DULLES DEBACLE IN INDONESIA (1995); *Army in Jakarta Imposes a Ban on Communists*, N.Y. TIMES, Oct. 19, 1965, at 1.

161. 1945 Constitution of the Republic of Indonesia, art. 33.

162. *See generally* THE STATE OF THE FOREST: INDONESIA (Emily Matthews ed., 2002).

gain . . . and their profitability was used by the Suharto regime as a means to reward and control friends, family, and potential allies.¹⁶³

In 1967, Indonesia's Forestry Act created the option for the granting of timber harvesting rights and logging concessions. As a result, exports of Indonesian timber rose rapidly in the 1970s.¹⁶⁴ Nearing the end of Suharto's rule, "some 585 concessions covered 63 million [hectares], approximately one-third of the nation's total land area."¹⁶⁵ Logging concessions in Indonesia were for terms of up to twenty years¹⁶⁶ and initially named private entities as the concession holders.¹⁶⁷ As a result of these contracts, the long-term well-being of the forests suffered significantly.

The close connection between the Suharto regime and most of the major timber groups resulted in a lack of oversight and transparency, which is one reason for ongoing poor forestry management.¹⁶⁸ In early 2000, the Ministry of Forestry reported that "most" of the forests under logging concessions were in a "damaged condition."¹⁶⁹ Restrictions and rules on logging, which make up part of the concession contracts, were regularly violated by timber companies.¹⁷⁰ Despite the large-scale depletion of one of Indonesia's key natural resources in a manner that did not benefit the people, Suharto and the private enterprises benefited significantly. During his rule, Suharto is believed to have stolen between \$400 million¹⁷¹ and \$35 billion.¹⁷²

The example of Indonesia during Suharto's rule is one example of two combined phenomena. The first, called the "pollution haven" hypothesis, theorizes that firms will flock to areas with lower environmental protections.¹⁷³ This hypothesis is shown to be particularly strong in the case of firms engaged in pollution-intensive activities.¹⁷⁴ The second theory, also supported by empirical data, is that the ability of FDI to influence govern-

163. *Id.* at 23.

164. *Id.* at 24.

165. *Id.* at 26.

166. *Id.* at 24.

167. After initial concession periods ended, a large number of concessions "either transferred to five state-owned corporations . . . or reconstituted as joint ventures between private firms and one of the state firms." *Id.* at 26. Others directly benefited Indonesia's military who became concession holders of 1.8 million hectares. However, private corporations continued to benefit significantly. Even after "this major shake-up in the industry, the top 10 timber companies were virtually unscathed; their ranking and control over concession area changed little." *Id.* at 27.

168. *Id.*

169. *Id.*

170. WORLD BANK, INDONESIA: ENVIRONMENTAL AND NATURAL RESOURCE MANAGEMENT IN A TIME OF TRANSITION 19 (2001), available at [http://wbln0018.worldbank.org/eap/eap.nsf/Attachments/Indonesia+Environmental+Report/\\$File/Indonesia+ENVNRM+Transition-entire.pdf](http://wbln0018.worldbank.org/eap/eap.nsf/Attachments/Indonesia+Environmental+Report/$File/Indonesia+ENVNRM+Transition-entire.pdf).

171. Peter Gelling, *Indonesia: Subarto Is Sued Over State Money*, N.Y. TIMES, July 10, 2007; see also Peter Gelling, *Indonesia: Charges Dropped Against Ailing Subarto*, N.Y. TIMES, May 13, 2006.

172. *Subarto Tops List of Embezzling Leaders*, N.Y. TIMES, Mar. 26, 2004.

173. Beata Smarzynska Javorcik & Shang-Jin Wei, *Pollution Havens and Foreign Direct Investment: Dirty Secret or Popular Myth?*, 12 (World Bank, Policy Research Working Paper No. 2673, 2001), available at <http://ssrn.com/abstract=328240>.

174. *Id.*

mental policy makers to ease environmental restrictions is conditional on the local government's degree of corruptibility.¹⁷⁵ The evidence supporting this theory, combined with the pollution haven hypothesis, suggests that FDI pursued in the context of a corrupt government may lower local environmental standards which in turn may have the effect of attracting pollution-intensive industry. Adding to this already bleak situation, corrupt governments are far less likely to pass the benefits of FDI to their populations, and the means by which benefits are retained in the hands of the elite may not be explicit or transparent, since corruption and non-contractual arrangements benefiting the government or the investor in illicit ways will likely always be obscured. As a result, the long-term obligations under contracts with foreign investors for natural resource extraction or other FDI activity may rely on assumed or implicit terms that are highly undesirable to the new government and not beneficial to the populations thereof.

2. *Widespread Corruption*¹⁷⁶

Corruption is not explicitly stated as a requirement for loan forgiveness under the odious debt doctrine. However, the doctrine assumes at least some level of corruption, as it requires that loans forgiven thereunder have been extended to a government but have not been used for the benefit of the population.¹⁷⁷

Three theoretical relationships between FDI and corruption are identified here. The first has already been mentioned above and lies in the capacity of foreign firms to influence corrupt governments to adopt regulatory policies that are beneficial to their operations.¹⁷⁸ The second relationship has been referred to as the "helping hand" of corruption.¹⁷⁹ In this relationship, corruption greases the wheels of investment, production, and commerce.¹⁸⁰ The third relationship has been identified as the "grabbing hand" of corruption

175. Matthew A. Cole, Robert J.R. Elliott & Per G. Fredriksson, *Endogenous Pollution Havens: Does FDI Influence Environmental Regulations?* (Univ. of Nottingham, Research Paper No. 20, 2004), available at <http://ssrn.com/abstract=764124>.

176. This article adopts the definition of corruption employed by Transparency International, a leading anti-corruption organization: "Corruption is operationally defined as the misuse of entrusted power for private gain." Transparency International Website, Frequently Asked Questions, http://www.transparency.org/news_room/faq/corruption_faq (last visited Nov. 10, 2007).

177. See Gray, *supra* note 74.

178. See Cole et al., *supra* note 175.

179. See Peter Egger & Hannes Winner, *How Corruption Influences Foreign Direct Investment: A Panel Data Study*, 54 *ECON. DEV. & CULTURAL CHANGE* 459 (2006). The "helping hand" view of corruption is similar to the "efficient grease" hypothesis, which supposes that corruption can help to attract foreign direct investment by minimizing tax burdens. See Shang-Jin Wei, *Does Corruption Relieve Foreign Investors of the Burden of Taxes and Capital Controls?* (World Bank, Policy Research Working Paper No. 2209, 1999), available at <http://ssrn.com/abstract=623966>; Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?* (World Bank, Policy Research Working Paper No. 2048, 1999), available at <http://ssrn.com/abstract=604923>.

180. See Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 *Q. J. OF ECON.* 599, 600 (1993); see generally Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *The Allocation of Talent: Implications for Growth*, 106 *Q. J. OF ECON.* 503, 503-30 (1991).

and suggests that corruption is costly for investors.¹⁸¹ While one or more of these relationships might be beneficial to the income stream of a corrupt government, none are beneficial to the population. For this reason, this article contemplates short- and long-term effects of FDI under corrupt and despotic governments.

This article maintains that the “helping hand” of corruption, while it may exist, is not beneficial enough to provide economic progress. Rather, it accepts the conclusion that “the benefits of corruption are not apparent even where they are most confidently expected. . . . [C]orruption appears not to be beneficial for economic development, nor is it indispensable as a tool of political integration.”¹⁸²

As in the discussion of environmental harms and natural resource degradation, short-term, medium-term, and long-term harms result from FDI under corrupt governments. The short-term harms are those that occur while a despotic government remains in power. In the context of corruption, short-term harms would essentially fall into two categories. The first would consist mainly of the lost economic benefit the population would have derived from natural resource exploitation and other forms of FDI had the despotic government officials not taken the proceeds for their own personal use. The second cost consists of the difference between the value of natural resource extraction or concession contracts entered into at market price and those entered into because the winning bidder paid the most bribes or kickbacks. This cost also includes the cost associated with the possible inefficiency, environmental degradation and labor abuses in which the winning bidder may engage. Presumably, under a non-corrupt regime, factors such as the value of the bids and the quality of the bidder’s environmental and labor practices would enter into the decision of which firm should be awarded the contract. In an environment of corruption, these considerations are much less important.¹⁸³ To the extent that this occurs and prohibits more efficient and beneficial activity, the population will have incurred harm.

An excellent example of this type of harm is the Kenyan Anglo-Leasing Scandal, in which a French firm originally bid on a government contract for a new passport printing system at a rate of €6 million. The contract was awarded to a British firm, Anglo-Leasing and Finance, at a rate of over €30 million. Anglo-Leasing then arranged to subcontract the work to the same

181. See Egger & Winner, *supra* note 179, at 459–60.

182. M. Shahid Alam, *Anatomy of Corruption*, 48 AM. J. ECON. & SOC. 441, 453 (1989). But see David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q., 719, 732 (1966) (stating that corruption may be vital to development in that “corruption may play a useful role which is sufficiently important that if it was not played by this device must be played by another or the consequences might severely undermine the pace, but more importantly the character, of the development effort”).

183. Augustine Ruzindana, *The Importance of Leadership in Fighting Corruption in Uganda*, in INST. FOR INT’L ECON., CORRUPTION AND THE GLOBAL ECONOMY 133, 137 (Kimberly Ann Elliot ed., 1997) (stating that corruption often results in abandoned or incomplete roads, buildings and other projects that are the physical manifestation of corruption opportunities).

French firm.¹⁸⁴ This scandal was just one of many of its sort, which has led to a strong perception that Kenya is among the most corrupt countries in the world.¹⁸⁵

The longer-term detrimental effects of corruption come over time and, again, are of two sorts.¹⁸⁶ The first is “the fact that when corruption becomes endemic, it can threaten the basic rule of law, property rights, and enforcement of contracts.”¹⁸⁷

Data from a number of developing countries shows that endemic corruption of this sort is particularly damaging to the poor because of pervasive corruption in basic services.¹⁸⁸ Indicative of this phenomenon is Save the Children’s work promoting revenue transparency in the extractive oil and gas sector. Their work highlights the negative impacts of corruption and a lack of transparency on the provision of public services such as healthcare and education, which disproportionately affect children, and especially poor children.¹⁸⁹

In addition, the degradation of the legitimacy of a government and its legal system can have long-term effects on the level of investment a country is able to attract over time.¹⁹⁰ This reputational harm is difficult to measure but also difficult to repair.¹⁹¹

Illustrative of the potential magnitude of these harms, a study addressing the effects of bureaucratic inefficiency (a milder problem) on yearly GDP concluded that:

[I]f Bangladesh were to improve the integrity and efficiency of its bureaucracy to the level of that of Uruguay (corresponding to a one-standard deviation increase in the bureaucratic efficiency index), its

184. See Jeevan Vasegar, *Kenyan President Faces Rebellion on Sleeze*, GUARDIAN, Feb. 24, 2005; see also Report from John Githongo, Permanent Secretary for Governance and Ethics at the time of the scandal, to Mwai Kibaki, Kenyan President (summary of report) (Nov. 22, 2005), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf.

185. See TRANSPARENCY INT’L, *supra* note 63 (ranking Kenya 150 out of 180 countries for its high level of corruption).

186. Experts on corruption have identified four types of harm: political, economic, social, and environmental. For a discussion of each of these, see Transparency International Website, *supra* note 176.

187. Omar Azfar, Young Lee & Anand Swamy, *The Causes and Consequences of Corruption*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 46 (2001).

188. See *id.* at 48.

189. See SAVE THE CHILDREN, BEYOND THE RHETORIC: MEASURING REVENUE TRANSPARENCY: COMPANY PERFORMANCE IN THE OIL AND GAS INDUSTRIES i (2005), available at <http://info.worldbank.org/etools/docs/library/238453/Comp.pdf> (stating that “[c]hildren are the most vulnerable to the devastating impact of conflict and chronic under-investment in health and education.”); see also *id.* at 1 (providing more detailed information regarding the impact of a lack of transparency on children).

190. See Azfar et al., *supra* note 187 at 53; see also Alam, *supra* note 182, at 453; Egger & Winner, *supra* note 179, at 460.

191. In this way, the harm to a country’s reputation with respect to its level of corruption is similar to a company’s goodwill, which refers to the intangible assets of a corporation, including customer relations, brand name, and good employee relations. For more on valuing goodwill and on the legal history of the concept of goodwill, see generally Gabriel A. D. Preinreich, *The Law of Goodwill*, 11 ACCT. REV. 317, 317–29 (1936).

investment rate would rise by almost five percentage points, and its yearly GDP growth rate would rise by over half a percentage point.¹⁹²

The view that a country's perceived levels of corruption—or its reputation with respect to corruption—is detrimental to its future ability to attract FDI is reinforced by the above quotation and is adopted and perhaps perpetuated by Transparency International, a leading anti-corruption NGO. Because corruption operates for the most part in secret, actual levels of corruption are difficult to determine. For this reason, Transparency International publishes annual Corruption Perception Indexes which are composite indexes that draw on multiple expert opinion surveys polling perceptions of public sector corruption in 163 countries around the world. The Corruption Perception Index “scores countries on a scale from zero to ten, with zero indicating high levels of perceived corruption and ten indicating low levels of perceived corruption.”¹⁹³ Because information regarding secretive transactions is inherently imperfect, there is likely to be a significant time lag between efforts to expunge corrupt activity from the private and public sector and improvements in the perceived level of corruption within a given country.¹⁹⁴

3. *Human Rights Abuses*

The moral imperatives of the odious debt doctrine are strengthened by the possibility that the loans provided to a despotic leader not only failed to benefit the population but were in fact used to finance the harms inflicted by the despot upon the population. This article agrees that the notion of

192. Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681, 705 (1995).

193. Press Release, Transparency International, Persistent Corruption in Low-Income Countries Requires Global Action (Sept. 26, 2007), http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_09_26_cpi_2007_en; see also TRANSPARENCY INT'L, Corruption Perceptions Index 2006 (Sept. 24, 2007), http://www.transparency.org/policy_research/surveys_indices/cpi/2007. Transparency International has also recently begun publishing a Bribe Payers Index, looks at supply-side corruption in terms of the perceived propensity of companies from thirty leading exporting countries to pay bribes overseas. TRANSPARENCY INTERNATIONAL, BRIBE PAYERS INDEX (May 8, 2007), http://www.transparency.org/policy_research/surveys_indices/bpi.

194. There are currently strong proposals on the table for improving transparency and reducing corruption, especially in resource-rich nations. See, e.g., Publish What you Pay, <http://www.publishwhatyoupay.org> (last visited Nov. 10, 2007); The Extractive Industries Transparency Initiative, <http://www.eitransparency.org> (last visited Nov. 10, 2007); U.S. Dep't of State, Bureau of International Information Programs, G8 Summit Advances Anti-Corruption Efforts Worldwide (June 10, 2004), <http://usinfo.state.gov/ei/Archive/2004/Jun/10-83709.html> (discussing the 2002 G-8 Evian Declaration); Transparency International, Business Principles for Combating Bribery, http://www.transparency.org/global_priorities/private_sector/business_principles (last visited Nov. 10, 2007); Transparency International, Promoting Revenue Transparency Project (June 11, 2006), http://www.transparency.org/publications/newsletter/2006/july_2006/anti_corruption_work/revenue_transparency; OECD, Convention on Combating Bribery of Foreign Officials in International Business Transactions (Nov. 21, 1997), http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html. The OECD Convention was inspired by the U.S. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1-3 (2006) and the International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 78dd-3 (2006), which implemented the OECD convention in U.S. law.

holding the population of a newly democratized state responsible for the repayment of loans that were used to abuse them is abhorrent. In addition, other types of investments, such as extractive industry investments and other types of FDI, sometimes play direct, facilitative, or complicit roles in human rights violations.¹⁹⁵ To the extent that this can be shown to have occurred, such FDI should not enjoy the benefits of the standard continuity of commercial obligations doctrine or of full or market value compensation for expropriation.

In recent years, the connections between transnational corporations and human rights violations have received significant attention,¹⁹⁶ and examples of human rights violations caused by corporations or in which they were complicit are relatively numerous.¹⁹⁷ Each instance in which a particular investor has directly or indirectly engaged in human rights violations will have particular facts that will have to be established before any doctrine negating the continuity of the investment could be of use. For this reason, it is beyond the scope of this article to detail all the various types of human rights abuses that might create a basis for negation of the continuity doctrine and/or the doctrine regarding compensation for expropriation. What follows are just a handful of a large number of cases in which FDI caused harms that might have been avoided or mitigated had an odious finance doctrine been included in the risk calculations of the investing firms.

a. Angola: Diamond and Oil Extraction and Human Rights

The diamond extraction industry has received much attention over the past decade, as larger and larger portions of the diamond-demanding population have come to learn of the importance of diamonds in financing internal wars in locations such as Angola and Sierra Leone and of the brutal labor practices surrounding their extraction in such situations.¹⁹⁸

In Angola, the rebel group UNITA had a long-standing strategy of occupying the areas with the highest concentration of diamond mines and used diamonds to finance the purchase of weaponry.¹⁹⁹ During, and as a result of,

195. See, e.g., GLOBAL WITNESS, *supra* note 124.

196. For a broad overview of the many industries, countries, international interventions, legal frameworks, and possible violations, see Business and Human Rights Resource Center, <http://www.business-humanrights.org/Search/Sitemap> (last visited Nov. 10, 2007). For a somewhat dated, though excellent overview of the human rights obligations of corporations, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 466–67 (2001).

197. To date, there are no agreed standards for establishing complicity by corporations in human rights violations. See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES, SUMMARY (2002), available at http://www.ichrp.org/paper_files/107_p_02.pdf (examples of complicity include situations in which corporations benefit from human rights abuses and/or situations in which corporations are silent in the face of human rights abuses committed by others).

198. See G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Jan. 29, 2001).

199. Massimo Guidolin & Eliana La Ferrara, *Diamonds Are Forever, Wars Are Not. Is Conflict Bad for Private Firms?* 3 (Fed. Res. Bank of St. Louis, Research Div., Working Paper Series, Paper No. 2005-004C, 2006), available at <http://research.stlouisfed.org/wp/2005/2005-004.pdf>. From the time Angola

Angola's civil war, thousands of civilians were killed, hundreds of thousands were maimed and millions were displaced.²⁰⁰ UNITA's attacks against civilians, including mass murders of civilians, have been documented.²⁰¹

Beginning in 1994, as part of a peace agreement, UNITA was formally permitted to mine diamonds and was also permitted to form partnerships with foreign companies.²⁰² The importance of diamonds to UNITA and of UNITA-controlled diamonds to the diamond market as a whole was significant. It is estimated that from 1992 to 1997, "the rebel movement supplied between eight and ten percent by value of the rough diamonds on the world market."²⁰³ The connections between UNITA and foreign diamond companies during this period have been established elsewhere and include recorded connections between twelve transnational diamond buying companies and UNITA.²⁰⁴

A possibly related fact lies in the days immediately after the death of UNITA leader Jonas Savimbi. Savimbi's death led to the precipitous end of Angola's civil war. Rather than resulting in a gain in stock prices for "Angolan" diamond stocks, Savimbi's death caused an immediate, abnormal decline of four percent in the stock price of companies holding diamond concessions in Angola.²⁰⁵ The cease-fire process that resulted from Savimbi's death led to further declines of up to nine percent, leading commentators to conclude that the "*unambiguous* end of the war was still bad news for diamond mining companies working in Angola."²⁰⁶ In other words, "investors perceived Savimbi's death as 'bad news' for the companies holding mining concessions in Angola, and as 'no news' or 'good news' for otherwise similar companies not operating in the country."²⁰⁷

UNITA was not the only party engaging in human rights abuses during Angola's internal war, nor were diamonds the only source of funds for the rebels or the government.²⁰⁸ In addition to receiving income from diamond operations, the government of Angola and its military were also financed by

gained independence until 2002, UNITA (União Nacional para a Independência Total de Angola) fought the MPLA (Movimento Popular de Libertação de Angola). On February 22, 2002, UNITA leader Jonas Savimbi was killed and within two months of his death a ceasefire agreement was signed. *Id.*

200. Chairman of the Monitoring Mechanism on Sanctions Against UNITA, *Supplementary Report of the Monitoring Mechanism on Sanctions against UNITA*, ¶ 5, delivered to the Security Council and the General Assembly, U.N. Doc. S/2001/966 (Oct. 12, 2001) (prepared by Richard Ryan), available at <http://www.un.org/Docs/sc/committees/Angola/966e.pdf> [hereinafter *Report of the Monitoring Mechanism*].

201. *Id.* at 6.

202. Guidolin & La Ferrara, *supra* note 199, at 3.

203. *Id.* (citing TONY HODGES, *ANGOLA: ANATOMY OF AN OIL STATE*, 174–77 (2000)).

204. *Report of the Monitoring Mechanism*, *supra* note 200, ¶ 205.

205. Guidolin & La Ferrara, *supra* note 199, at 5.

206. *Id.* at 13.

207. *Id.* at 8.

208. See Phillippe Le Billon, *Angola's Political Economy of War: The Role of Oil and Diamonds*, 100 AFR. AFF. 55, 55–80 (2001) (stating that international corporations were intricately connected to both the military strategy of the government and the strategy of rebellion).

oil extraction²⁰⁹ and human rights reports document abuses perpetrated by government entities against civilian populations, primarily in oil rich regions of the country.²¹⁰ In addition, it is estimated that from 1997 to 2002, more than \$4 billion of oil revenue was embezzled from the government coffers, contributing to wide-scale childhood malnutrition, and undermining the civil, political, social, economic, and cultural rights of Angola's citizens.²¹¹

b. *Myanmar: “[N]otorious for using violence and coercion to secure areas slated for major investment projects”*²¹²

The ruling government of Myanmar (formerly Burma), like Angola, is highly dependent on oil and natural gas extraction to sustain its military rule. It is estimated that Myanmar's gas industry accounted for at least thirty percent of the country's exports.²¹³ The connection between human rights abuses and investments in this sector of the Burmese economy has received much attention, in part due to a lawsuit based on the U.S. Alien Tort Statute (“ATS”).²¹⁴

The *Doe v. Unocal* lawsuit involved the construction of a natural gas pipeline in Myanmar. The plaintiffs, Burmese villagers, sued Unocal, alleging its complicity in violations committed by the Burmese military, intelligence, and police forces. These violations included violence and intimidation to relocate whole villages, enslave villagers living in the pipeline area, steal property, require forced labor, and commit assault, rape, torture, and murder.²¹⁵ The lawsuit was ultimately settled out of court,²¹⁶ but not before media attention was drawn to the regular violations of human rights within Myanmar in connection with large scale investments such as the Unocal pipeline.

As new deposits of natural gas are discovered in western Myanmar, firms from India, South Korea, Russia, and China have been undeterred by the expense and public embarrassment Unocal experienced as a result of its connections with the Burmese military.²¹⁷ For example, the Shwe gas field is being developed by a group of South Korean and Indian firms in partnership

209. Guidolin & La Ferrara *supra* note 199, at 5.

210. Press Release, Human Rights Watch, Angola: In Oil Rich Cabinda, Army Abuses Civilians (Dec. 23, 2004), available at <http://hrw.org/english/docs/2004/12/23/angola9922.htm>.

211. *Id.*

212. Press Release, Human Rights Watch, Burma: Natural Gas Project Threatens Human Rights: South Korean, Indian Investments May Lead to Complicity in Abuses, (March 24, 2007) [hereinafter, Human Rights Watch, Burma], available at http://hrw.org/english/docs/2007/03/24/burma15557_txt.htm.

213. *Id.*

214. Alien Tort Statute, 28 U.S.C. § 1350 (2006).

215. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997).

216. EarthRights International was the representative for the plaintiffs in the case. See EarthRights International, *Doe v. Unocal*, <http://www.earthrights.org/legal/unocal> (last visited Nov. 10, 2007).

217. For a valuable probe into the issue of Chinese investment and its effects on human rights observance by private actors, see Patrick Keenan, *Financial Globalization and Human Rights*, 45 COLUM. J.

with the government.²¹⁸ Analysts estimate that the Shwe field could result in revenues of \$580–\$824 million per year for twenty years, for a total of \$12–\$17 billion.²¹⁹ These investments are being made in the face of high levels of well-known human rights abuses by the Burmese military,²²⁰ and in the face of knowledge that the Burmese government “spends the bulk of Myanmar’s resources to maintain its enormous army, and has some of the lowest social spending of any country in the world.”²²¹

It is important to note that while the practices in Myanmar may be particularly egregious, connections between natural resource extraction by foreign corporations and human rights abuses have been drawn in many other areas of the world.²²² Lawsuits against Shell for its activities in Nigeria²²³ and against Texaco for its activities in Ecuador²²⁴ provide just two examples.

c. Historical Labor Abuses on Banana Plantations and Child Labor in Liberia

i. Latin American Banana Plantations

Historical accounts and analysis of the relationship between the United Fruit Company and dictatorships in Latin America during the twentieth century provide another example of what has been termed the potential “Triple Alliance” that may be formed between investors engaged in FDI, repressive governments, and the elite of the investor’s host country.²²⁵ During the early part of the twentieth century, United Fruit received a number of land grants and railway concessions from dictatorial governments.²²⁶ During this same time period, dictatorial governments were often willing to

TRANSNAT’L L. (forthcoming 2008) (manuscript at 3–5, on file with author); *see also* Human Rights Watch, Burma, *supra* note 212.

218. *Id.* Human Rights Watch also reports that:

The Shwe gas project is led by the South Korean company Daewoo International. The company’s former president and chief executive, Lee Tae-yong, went on trial in Seoul this month on charges that he and executives of six other companies illegally exported weapons equipment and technology that was used to build an arms factory in central Burma.

Id.

219. *Id.*

220. *See* BBC News, *Red Cross Condemns Burma ‘Abuses’*, June 29, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6252024.stm>. The International Committee of the Red Cross closed some of its offices in Myanmar in October 2006, and in June 2007, in a rare departure from its usually neutral stance on conflicts and human rights abuses, denounced the excessive human rights abuses by the Burmese military.

221. Human Rights Watch, Burma, *supra* note 212.

222. *See, e.g.*, GLOBAL WITNESS, *supra* note 124.

223. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104–05 (2d Cir. 2000) (alleging complicity in human rights abuses against the Ogoni People and Wiwa in particular).

224. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (alleging violations of human rights due to significant environmental harm caused by Texaco’s negligence in its operations in Ecuador).

225. Marcelo Bucheli, *Good Dictator, Bad Dictator: United Fruit Company and Economic Nationalism in Central America in the Twentieth Century* 7 (Univ. of Ill. at Urbana-Champaign, C. of Bus. Working Papers Series, Paper No. 06-0122, 2006), available at http://www.business.uiuc.edu/Working_Papers/papers/06-0115.pdf.

226. *Id.* at 12, 14, 16.

violently suppress labor unrest for the benefit of United Fruit.²²⁷ In addition, it has been argued that the relationship between United Fruit (and other foreign investors) and repressive governments is, by necessity, a rather close one.²²⁸ The relationship allows the firm and the government to benefit each other while the people gain little and may actually be harmed as a result of the arrangement.²²⁹

ii. Firestone in Liberia

A second example comes from Liberia, spanning 1926 to the present. The recent *Roe v. Bridgestone*²³⁰ ATS case provides a concise history of how the labor abuses and slave-like conditions in Liberia worsened significantly after the establishment of Bridgestone Firestone's rubber-tapping operations there in 1926.²³¹

At that time, then Liberian president Charles D. B. King's government granted Firestone a ninety-nine year concession for the right to lease one million acres of land suitable for latex harvesting. In 1927, King's government was accused of recruiting and selling forced labor for various infrastructure projects and selling people into slavery.²³² The resulting inquiry into Liberian labor conditions included, among other negative findings, the conclusion that high government officials

have given their sanction for compulsory recruitment of labor for road construction, for shipment abroad and other work, by the aid and assistance of the Liberian Frontier Force; and have condoned the utilization of this force for purposes of physical compulsion on road construction for the intimidation of villagers, for the humiliation and degradation of chiefs, of captured natives to the coast, there guarding them till the time of shipment.²³³

The lead investigator for the League of Nations into the labor situation in Liberia concluded that human beings were being pawned by the government.²³⁴ Firestone, however, did not leave the country, nor did it ensure that

227. *Id.* at 3, 5.

228. *Id.* at 8.

229. For example, when banana prices fell in Honduras in 1932, United Fruit lowered wages of workers and local planters. As a result, workers went on strike. The Honduran dictator of the moment, Gen. Tiburcio Carías, allowed the wage reduction and reacted to the worker strikes by banning the communist party, prosecuting the opposition and creating an even closer bond with United Fruit. *Id.* at 13.

230. *Roe v. Bridgestone*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

231. See also Phillip James Johnson, *Seasons in Hell: Charles S. Johnson and the 1930 Liberian Labor Crisis* (Mar. 31, 2004) (unpublished Ph.D. dissertation, Louisiana State University) (on file with the university library), available at <http://etd.lsu.edu/docs/available/etd-04152004-123145>.

232. See U.S. GOV'T PRINTING OFFICE, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY INTO THE EXISTENCE OF SLAVERY AND FORCED LABOR IN THE REPUBLIC OF LIBERIA (1931).

233. *Id.*

234. Cuthbert Christy, *Pawning of Human Beings in Liberia*, 30 J. ROYAL AFR. SOC'Y 113, 169-74 (1931).

Firestone would forego all benefits from this type of human exploitation. Indeed, the plaintiff's complaint in the *Firestone* case alleges that soon after Bridgestone Firestone was granted its concession,

indigenous people were forced from their land and were then conscripted to provide forced labor, first planting and cultivating rubber trees and then harvesting latex from the mature trees. The Complaint alleges that Firestone agreed to pay local chiefs to deliver able-bodied workers to the Plantation, and that the local chiefs conscripted workers at gunpoint. According to the Complaint, plaintiffs and most other current workers on the Plantation are third or fourth generation descendants of those original workers, and these plaintiffs have rarely if ever left the Plantation.²³⁵

The complaint in this case also alleges that conditions for adults and children continue to be excessively exploitative.²³⁶ It is significant, however, that the plaintiffs feel themselves at liberty to sue Firestone under the ATS.²³⁷ This is an encouraging sign that the emerging democracy in that country may be creating an atmosphere for redressing and correcting the exploitative practices of previous Liberian regimes.

Considering the grim nature of available information regarding labor abuses in relatively open societies,²³⁸ there is real cause for concern regarding the labor practices of firms operating within closed societies in the control of despotic governments.

To the extent that firms are benefiting from the ability of a regime to offer its labor force at excessively low rates and/or with little or no regulatory protections, firms may be engaging in investment activity that benefits the repressive regime but may not benefit the people of their host country. Indications of this sort of activity would be most obvious when governments supply armed security forces, military forces, or police to ensure through violent means that labor unrest is suppressed.

235. Entry on Defendant's Motion to Dismiss at 11, *Roe v. Bridgestone*, 492 F.Supp. 2d 988 (S.D. Ind. 2007) (No. 06-0627).

236. *See id.* at 12–13 (noting that the complaint alleges that the Firestone plant was created in close collaboration with the Charles Taylor regime to allow human exploitation and has continued in this vein. It also notes that the complaint alleges that during the Taylor regime, Firestone "used its shipping facilities to import arms and ammunition" for the military).

237. *See id.* (refusing to dismiss the plaintiff's claims regarding the exploitation of child labor by Firestone).

238. Examples include India, Ecuador, Mexico, Guatemala, Thailand, Saudi Arabia, and the United Arab Emirates.

V. AN ODIIOUS FINANCE DOCTRINE

A. *Characteristics That Make Debt Odious and Not Just Onerous*

The odious debt doctrine discourse often arises in the context of countries with extremely high levels of debt. Many countries have high levels of debt, and some of that debt may be forgiven under various efforts already discussed herein. It is important to recall, however, that the odious debt doctrine is not primarily a tool for the reduction of debt that could appropriately be thought of “merely” as excessive, burdensome, and difficult or impossible to service. Rather, the odious debt doctrine targets a more narrowly defined and particular type of debt. The task now at hand is to examine what makes a particular debt odious as distinguished from debt that is “only” onerous. By exploring these elements, a clearer perspective should be obtained on the applicability of the concept of odiousness to other types of despotic finance.

As stated previously, the agreed-upon characteristics making debt odious under the odious debt doctrine are (1) that it was incurred by a despotic power,²³⁹ (2) that it was used for purposes that do not further the interests of the state, and (3) that the creditor must have known that the loans would be used for purposes that were contrary to the interests of the nation.²⁴⁰

Finally, some have argued that, in addition, the debt must have been incurred without the consent of the people. Clearly, then, not all burdensome debt can be called odious as most debt will not fit even the three standard criteria of the odious debt doctrine.

B. *Can Only Debt Be Odious?*

The essential question for the purposes of this article is whether there is any underlying reason why the concept of odiousness has thus far been restricted to the realm of credit financing and has not yet made the leap to other sources of financing.

In considering the types of investments discussed herein—investments involving outright sales and purchases and FDI in various sectors—the aim has been to provide information about the potential negative outcomes of such methods of despotic financing. The goal has not been to give a balanced account of the outcomes of *all* instances of such sales and FDI. Rather, the article by necessity has focused on the most egregious type of such activities, operating in locations that have the worst governments. When these investments finance despotic governments, they might justify exceptions to the doctrine of continuity of commercial obligations, and argue in favor of

239. SACK, *supra* note 19, at 157–84.

240. *Id.*

equity concerns in the context of compensation for expropriation in the event of government succession.

Before reaching the conclusion that they would, in fact, justify mitigating these doctrines, however, it is worthwhile to elaborate on the analogies between the loans that would be treated under the odious debt doctrine and the investments that have been discussed herein. What follows is a rephrasing of the characteristics of odious debt to encompass other types of despotic financing explored in this article.

1. *Incurred by a Despotic Power*

Despots regularly create national obligations. In the case of outright sales of state property, the government will have created an obligation either explicitly or implicitly to not retake the property in the future without compensation.²⁴¹ In many cases, the government will have entered into bilateral investment treaties, which bind it to provide favorable investment terms and operating environments for foreign investors. In the case of oil, gas, gem and timber extraction, land concessions, production-sharing agreements, and project finance, the underlying contract will likely create an additional set of obligations on the part of the government, including the granting of property, the provision of security, and the promise of tax holidays. Many of these obligations may be long-term, and are likely to outlive the reign of the despots who create them.

2. *Used for Purposes That Do Not Further the Need or Interests of the State*

As has been demonstrated herein, there is significant debate regarding the extent to which direct investors benefit from associations with despotic regimes. Some argue that democratic regimes are more beneficial environments for transnational firms. It must be said that much FDI may benefit the interests of the state (meaning the people of the state), whether through the payment of taxes, the provision of employment opportunities, or the transfer of technology to host country enterprises. But, as has been shown herein, there are also instances in which the overwhelming effect of an investor's operations does not further the interests of the state, but rather primarily benefits the personal interests of those comprising the despotic incumbent government.²⁴²

In many cases, the investor's operations will diminish the natural resource wealth of a country such that the people and successive governments will have far fewer available sources of funds, especially if their obligations are

241. In some cases, the government may have signed a bilateral treaty stating explicitly that it employs a compensation standard that mirrors the Hull formula (discussed previously in Part III). This article takes the position that such provisions to bilateral treaties should be cancelled in cases where the elements of an odious finance doctrine are satisfied.

242. See discussion of Angolan diamond operations and discussion of corruption, *supra* Part IV.B.3.a.

continued.²⁴³ In some cases, high levels of corruption result in very little or no revenues from an investment being used for the provision of even essential public services.²⁴⁴ It is difficult to contemplate how it could be argued that such investments redound to the benefit of the people.

Further, in some cases, the presence of an investor will destabilize a region, and in order to aid an investor's activities, a government may displace whole villages, enslave people, and engage in arbitrary detention, killings, and other human rights violations. Such government activity may be financed directly or indirectly through government payments, or by the firm itself.²⁴⁵ In other cases, an investor's allegiance with the government results in labor regulations and policies that violate basic labor rights principles.²⁴⁶ In such cases, again, convincing arguments that an investor's presence benefits the people would be difficult to construct in earnest.

3. *The Investor Must Know That the Investment Would Be Used for Purposes Contrary to the Interests of the Nation*

The increasing flow and availability of information regarding corruption perceptions, human rights abuses, and political conditions make accurate risk assessments in relation to these factors easier for investors than they previously have been. Nonetheless, any requirement of "knowledge" on the part of the investor gives rise to a number of questions that have arisen in the context of the odious debt discussion²⁴⁷ as well as in the context of anti-corruption efforts.²⁴⁸

Robert Howse has provided a discussion of the proper knowledge standard within the odious debt doctrine literature.²⁴⁹ A complete analysis and recommendation of the standard of knowledge²⁵⁰ in the context of investments of the sort described by this article must be reserved for another day or another author. However, since outright sales and FDI (especially FDI in

243. See discussion of environmental degradation and natural resource exploration and extraction, *supra* Part IV.B.3.

244. See discussion of Myanmar, *supra* Part IV.B.3.b.

245. See discussion of Myanmar and gas exploration, *supra* Part IV.B.3.b.

246. See discussion of the United Fruit Company in Latin America and latex in Liberia, *supra* Part IV.B.3.c.

247. See Chander, *supra* note 42.

248. See, e.g., Julia Christine Bliss & Gregory J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 LAW & POL'Y INT'L BUS. 441 (1989) (discussing the 1988 amendments to the FCPA, which included a more stringent knowledge requirement by deleting a controversial "reason to know" standard).

249. Howse, *supra* note 34, at 20–21.

250. The definition of and required standard of knowledge is a source of controversy both in the odious debt doctrine and Foreign Corrupt Practices Act contexts. Knowledge might mean actual knowledge (i.e., the firm *actually* knew that its investment in a host state would be detrimental to the interests of the nation) or it might mean constructive knowledge (i.e., the firm *knew, had reason to know, or should have known* that its investment would be detrimental to the interests of the nation). Because actual knowledge is much more difficult to establish than constructive knowledge, the standard chosen is quite important.

the extractive and agricultural sectors) are significantly more vulnerable to internal political conditions and volatility²⁵¹ than other credit-only investments, the standard required to trigger the odious finance doctrine need be no stricter than the knowledge standard required to trigger the odious debt doctrine.

4. *Incurred Without the Consent of the People*

As was stated in the earlier discussion of the characteristics of the odious debt doctrine, there is some controversy over this criterion.²⁵² This author adopts the view expressed by Buchheit, Gulati, and Thompson regarding this criterion because she finds it redundant with other characteristics of odious debt.²⁵³ If the obligations were incurred by a despot, they were likely incurred without the consent of the people.

The analysis contained in this Part leads to the conclusion that the characteristics that make debt odious under the odious debt doctrine can be rather easily applied conceptually to the obligations taken on by despots in connection with other types of financing. These obligations can also be deemed odious and, as a result, under the doctrine of odious finance, such obligations should be forgiven, cancelled, or deemed void. The moral imperatives of the odious debt doctrine presumably would also transplant onto non-debt obligations. This being the case, a significant concern arises. This concern is the impetus of this article and is discussed in subpart five below.

5. *Why an Odious Finance Doctrine?*

Loans are not the only sources of funds for despots. In many instances, loans may not even be the most lucrative source of funds. A functional odious debt doctrine would only deter potential creditors from lending to despots but would leave other sources of financing available. Some of those sources, as has been shown herein, may be more detrimental to the population than onerous debt levels. Indeed, a functional odious debt doctrine, without more, might create incentives to further pursue these more damaging alternative methods of raising funds. The blind spots of the odious debt doctrine and its attendant literature lie in the unintended consequences that will arise if debt remains the only method of despotic financing treated by the concept of odiousness.

This possibility requires broader thinking about odiousness, such that the concept might attach itself to a much larger set of obligations incurred by a despotic power that are not used to further the interests of the population of the state and that the investor must have known would be used for purposes

251. See, e.g., Le Billon, *supra* note 208, at 561.

252. See *supra* note 42 ("Buchheit, Gulati, and Thompson, for example, fold the fourth criterion into the requirement that a despot incur the debt. For them, this implies that the people did not approve the incurrence of the debt."); Buchheit, *supra* note 7, at 1213 n.29.

253. Buchheit, *supra* note 7, at 1213 n.29.

contrary to the interests of the nation. Under an odious finance doctrine, any such obligation would be treated as an exception or a mitigating factor to standard law dictating continuity of obligations in government successions and requiring compensation for expropriations and would be subject to full or partial cancellation.

VI. PRACTICAL ASPECTS OF AN ODIUS FINANCE DOCTRINE

A. *Natural Limits*

Among the primary justifications for the doctrine of continuity of commercial obligations in international law is that any alternate rule would create instability and would lead to significantly less business activity due to the unpredictability of outcomes in the event of government succession. The viability of the world economic system simply depends on this sort of predictability and stability. Similar theories underlie arguments for full compensation for expropriation.

As has been shown above, however, some economic activity may not be beneficial, benevolent, or even neutral in relation to the welfare of the people in the countries in which they operate. Investors who have engaged in investments creating obligations that satisfy the criterion of an odious finance doctrine have engaged in activity that *ought not to be protected*. Rather, they have engaged in activity (corruption, human rights abuses, etc.) that ought to be deterred. A doctrine that would create additional risk and instability for this type of investment is likely to result in at least two likely outcomes. In some cases, investors may decide that the risk and instability created by the doctrine deters their investment altogether. The reaction of some readers to the possibility of complete divestment may initially be negative. However, readers should bear in mind that any investor making an assessment that its activities may someday fall under the ambit of the odious finance doctrine is likely engaging in highly undesirable activity. Divestment may be a good outcome in these cases.²⁵⁴

Another likely outcome is that investors will be more scrupulous about their own actions and more scrutinizing and demanding about the actions of their governmental contracting partners. In the context of the odious debt doctrine, commentators have noted that the detailed terms and conditions of some loans regarding the uses of the loan proceeds and reporting requirements of the debtor may come to be more explicit and demanding so that

254. Fidelity Investments provides a recent example of this type of divestment; as a result of pressure created by a divestment campaign, the company has reduced its holdings in oil companies with ties to Sudan. Indiana University Human Resource Services, The Informed Employee, *Fidelity Reduces Its Holding in Companies with Ties to Sudan*, No. 41 at 3 (August 2007), available at <http://www.indiana.edu/~uhrs/benefits/bulletin/2007/Aug/3.html#sudan>. Similarly, Warren Buffett has recently sold \$100 million worth of shares in PetroChina. See *Divesting PetroChina*, FIN. TIMES, October 10, 2007, at 14, available at <http://www.ft.com/cms/s/1/1aef9f02-7646-11dc-ad83-0000779fd2ac.html>.

the lender is able to ensure that their loans are not used for abhorrent ends and will thus not become subject to the odious debt doctrine. Bilateral treaties and contracts could contain similar terms and conditions.

In addition, when this occurs as a result of arrangements agreed upon with a despotic government and only the despotic government has benefited, upholding such obligations after the government has been succeeded may contribute to continued corruption, environmental harm, human rights abuses, and political and economic instability within the state of the newly formed government. This seems contrary to the policy objectives of predictability and stability over the long term.

Other authors have noted that in some cases, countries have made the informed decision to service debt obligations that might have been classifiable as odious. The primary reason for an emerging government to continue servicing all loans is to demonstrate its goodwill and sense of responsibility toward the international community and to gain the respect and goodwill of the international community and potential future investors.²⁵⁵

In the case of FDI, successor governments may have additional reasons not to upset particular investors as well as the international community. To the extent that the terms and conditions contained within the four corners of the contracts between the despotic government and the investor are not themselves objectionable (and indeed they may not be, as the undesirable activity of such investors and governments may not be set out in a legal document), the emerging government may find it beneficial to their ongoing need for investment and state financing to maintain the investment within their territory. However, in the instances where this is not the case, the odious finance doctrine would function to provide emerging governments with a tool to terminate or modify those obligations created by the despot that were not in the ongoing interest of the state and the people to maintain. The odious finance doctrine would reset the presumption of continuity of commercial obligations, and it would factor into determinations of just or equitable compensation for expropriation upon succession. It would provide this function in relation to the very worst investment activities operating in countries that had the very worst governments.

*B. Obligation Cancellation*²⁵⁶

There are at least three possible scenarios for obligation cancellation under an odious finance doctrine. The first would only require an assessment of the odiousness of the particular regime; the second would require consideration of the beneficence of each contract as a whole made under a despotic regime and a determination; and the third would require consideration of each term

255. Robert Howse has made note of this phenomenon. See Howse, *supra* note 34, at 23.

256. This would include the cancellation of the legal obligation to compensate for expropriations and the cancellation of state contracts.

of each contract that has come to be questioned under the odious finance doctrine.

The first possibility would not determine whether particular contracts are odious, but rather whether particular regimes are odious. Proposals have been made in the context of discussions of the odious debt doctrine that an efficient (though highly political) method of providing creditors with information about whether loans to a particular government may be cancelled under the odious debt doctrine is to establish an institutional body charged with the task of declaring governments odious.²⁵⁷ Such declarations would provide creditors with somewhat reliable knowledge, information and predictability *ex ante* that any loans made to that government may not be repaid if a new government should topple the incumbent despot.²⁵⁸ With that information, creditors could both determine whether or not to extend loans to a despotic regime at all and, if they were tentatively willing to extend the loan, calculate what interest rate would be high enough to compensate itself for the added attendant risk.

The second possibility assumes that even despotic regimes may make contracts that are good for their populations and attempts not to deter that activity. Under this possibility, no official *ex ante* determination of the odiousness of a given regime would be made. Rather, each investor would be on notice that the odious finance doctrine may operate to cancel particular contracts that a succeeding government claims meet the requirements of the odious finance doctrine. Such determinations would be made on an investment-by-investment or contract-by-contract basis, and only those contracts fitting the odious finance doctrine would be cancelled, voided, or declared unenforceable.

The third possibility appreciates that emerging governments may want to maintain economic programs that include active FDI in many sectors and may wish to continue many of the contracts and concessions made under the despotic government. It is possible, nonetheless, that the successor government may determine that some of the terms of established contracts or concessions go to the heart of the contract's odiousness. This approach would maintain whole contracts, which would be enforceable if "odious terms" in the contract were renegotiated or removed such that the whole contract would be beneficial to the population.

Each of the possibilities detailed above would have its particular administrative costs. One can imagine that a system that entailed wholesale proclamations of regimes as odious would carry with it front-end costs of political negotiations and confrontations in the time leading up to such a proclamation, given that odiousness would, in many cases, result in broad divestment from countries with odious governments. On the other hand, the last two

257. This possibility has been discussed by Howse and others. *See, e.g.*, Howse, *supra* note 34, at 23.

258. Some readers may consider such a body to be analogous to commercial rating agencies.

possibilities would carry with them back-end costs as any disputes over the odiousness of a contract would likely be litigated or arbitrated in lengthy proceedings. Investors whose contracts were named as wholly or partially odious (as well as their home governments) would engage in long-term litigation and arbitration to defend their interests, much as investors and their governments have done in the past when contracts and investments have fallen into dispute.

Currently, such litigation and arbitration includes as its legal backdrop doctrines that favor continuity of commercial obligations and full compensation for expropriation. An odious finance doctrine would provide emerging governments saddled with “odious obligations”²⁵⁹ with tools for resetting the presumption of continuity and full compensation by providing exceptions and mitigating factors to these doctrines when justice so requires. The arbitration setting may be particularly well suited to this type of equity consideration, given the variety of legal and non-legal sources and considerations an arbitral tribunal may employ in arriving at its decisions.

VII. CONCLUSION: THE AMBITS OF ODIOSNESS

As has been stated previously, the aim of this article has not been to dilute or derail the potential utility or impact of the odious debt doctrine. That doctrine is founded on strong legal and moral principles that should be given full consideration. This article has addressed the potential implications of a functional odious debt doctrine acting in isolation from larger considerations of the various funding sources for despots. In the event that lenders believe their loans may not be repaid due to the odious debt doctrine, they will chose either to only extend loans with very high interest rates and stringent repayment terms or will decide that even high interest rates cannot cover their risk and will not provide loans at all. Despots faced with little or no possibility of accessing low cost loans or any loans at all to fund their personal operations are not likely to throw up their hands and give up power. Rather, they will turn to other possible sources to finance their regime. As this article has demonstrated, these alternative sources may often result in more long-term damage to the people and the territory of a country than debt.

This article, therefore, urges broad thinking about the ambits of odiousness such that all sources of funds for despotic governments are subject to review and, where justice requires, are subject to cancellation due to their odious nature. Any other approach will create incentives that may result in broader, more prolonged and more unfortunate harms than debt alone can inflict.

259. O’Connell used the term “odious obligations.” See O’CONNELL, *LAW OF STATE SUCCESSION*, *supra* note 14, at 421.