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## Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'

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# CONTEMPORARY INTERNATIONAL LAW: AN 'EMPIRE OF LAW' OR THE 'LAW OF EMPIRE'?

JOSÉ E. ALVAREZ\*

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## INTRODUCTION

All too often the options facing the United States (as well as other nations) when it comes to foreign affairs are portrayed as a binary choice between unilateralism and multilateralism, between “bowling alone” and playing with others.<sup>1</sup> Framing the choice this way packs a

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1. *See generally* UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES (David M. Malone & Yuen Foong Khong eds., 2003) (exploring the effects of the Bush Administration foreign policy of unilateralism); cf. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN

rhetorically powerful punch—as when former President Bill Clinton suggested at the 2008 Democratic Convention that the might of the United States rests not on its demonstrable military power but on the power of its example (including presumably its adherence to the international rule of law).<sup>2</sup> The suggestion that committing to international law requires ceding the deployment of one's unilateral power in deference to others—that it requires ceding to multilateral consent and involves a choice between relying on brute force and relying on the rule of law—also haunts international law scholarship. Today's legal academy, particularly in the United States, reflects a divide between traditional defenders of international legalism and revisionist upstarts who question the efficacy, or at the very least the democratic legitimacy, of both global treaties negotiated within multilateral institutions and the rules of custom that are backed by the international community.<sup>3</sup> It is easy to see this academic chasm, which has obviously been reflected in the policies adopted by the outgoing Bush Administration, as a schism between those who believe in international law and those who do not. At the extreme end one finds John Bolton, former U.S. ambassador to the United Nations, who famously contended that international law does not really exist. Bolton stated that while nations might be said to be “politically” or “morally” bound to adhere to those international agreements to which they have given their consent, they cannot be said to be “legally” bound by them because the only real law is national law sanctioned by a national constitution such as the United States' Constitution.<sup>4</sup> For Bolton, who removed the United States' signature from the International Criminal Court's Statute in the early

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COMMUNITY (2000) (exploring evidence of declining community participation and social interactions by Americans and its impact on the country).

2. See *Transcript: Bill Clinton's Convention Speech*, NEW YORK TIMES, Aug. 27, 2008, <http://www.nytimes.com/2008/08/27/us/politics/27text-clinton.html> (“People the world over have always been more impressed by the power of our example than by the example of our power.”).

3. For a survey of scholarly views, see José E. Alvarez, *The Closing of the American Mind*, in RECONCILING LAW, JUSTICE, AND POLITICS IN THE INTERNATIONAL ARENA: PROCEEDINGS OF THE 32ND ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW, OTTAWA, OCTOBER 16-18, 2003 74, 85-86 (John McManus ed., 2004); see also James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121, 122 (2000) (criticizing the United States' tendency to act unilaterally).

4. John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000).

days of the current Bush Administration,<sup>5</sup> the battle against international legalization is about nothing less than protecting the United States' rule of law from encroachment by ersatz multilateral rules.

The view that commitment to international law reflects a binary on/off switch is not limited to this side of the Atlantic. Particularly since the United States' invasion of Iraq in 2003, European legal scholars have sometimes portrayed the United States as a renegade nation bent on defying global norms and threatening to create a "lawless world," whether with respect to the environment, international criminal law, humanitarian law, or human rights.<sup>6</sup> To European critics such as British international lawyer Philippe Sands, adherence to international law requires a commitment to multilateral action over unilateral action.<sup>7</sup> At a conference on unilateralism held just prior to the terrorist attacks of September 11th, 2001, the fundamental divide between the academics present was becoming evident. The Europeans (but very few of the Americans) identified the legal "obligation to cooperate" as the basis for the post-world war international legal order.<sup>8</sup> For Europeans like Pierre-Marie Dupuy, the presumption deployed in the Lotus Case—the right of a state to act alone—has come to be severely conditioned; it has been displaced by a "law of coexistence" that, in general, requires states to exhaust multilateral remedies before they can legitimately turn to unilateral action.<sup>9</sup>

This dichotomous perspective has considerable evidence to support it. Particularly in recent years, the United States has often tried to "go it alone," at the expense of a sincere or credible

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5. JOHN BOLTON, SURRENDER IS NOT AN OPTION: DEFENDING AMERICA AT THE UNITED NATIONS AND ABROAD 85 (2007) (calling his "unsigning" of the Rome Statute on behalf of the Bush Administration his "happiest moment at State").

6. See, e.g., PHILIPPE SANDS, LAWLESS WORLD: AMERICAN AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR (2005) (discussing U.S. unilateral policies in violation of international law).

7. Cf. *id.* at 174-80 (Criticizing unilateral "anticipatory self-defense").

8. See, e.g., Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19 (2000) (describing the divergent views of the United States on the role of unilateralism in foreign policy).

9. *Id.* at 23-24.

commitment to engage in multilateral negotiations.<sup>10</sup> The most famous example of U.S. unilateralism or exceptionalism is the “Bush Doctrine,” that former Vice Presidential candidate Sarah Palin had some trouble identifying in some of her televised interviews.<sup>11</sup> The Bush Doctrine is the proposition, proclaimed in the U.S. National Security Strategy, that the United States can deploy the “pre-emptive” use of force in response to *potential* threats to its security, even if these threats are uncertain in scope and would not have otherwise triggered anticipatory self-defense under customary international law.<sup>12</sup> This strained effort to re-interpret the terms of the U.N. Charter’s ban on the use of military force is not the only recent black mark on the United States’ international law record.<sup>13</sup> The United States has also pointedly rejected participation in multilateral treaty negotiations on a number of fronts over recent years. We have frequently pursued a strategy of acting alone and refused to join prominent multilateral treaty regimes—including arms control agreements (such as the Comprehensive Test Ban), the Kyoto protocol, the Statute of the International Criminal Court (ICC), the Convention on the Law of the Sea, the Convention on Biological Diversity, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, numerous International Labor Organizations agreements, and global human rights treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the Convention on the Rights of the Child, the International Covenant on Economic, Social, and Cultural Rights, and protocol one of the International Covenant on Civil and Political Rights.<sup>14</sup> Many international lawyers, including non-European

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10. See David D. Caron, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment*, 21 BERKELEY J. INT'L L. 395 (2003) (describing the U.S. trend towards unilateralism during the administration of George W. Bush).

11. *Excerpts: Charlie Gibson Interviews Sarah Palin*, ABC NEWS, Sept. 11, 2008, <http://abcnews.go.com/politics/vote2008/story?id=5782924&page=1>. See also Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1497-1501 (2003) (discussing the Bush Doctrine).

12. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15-16 (2002), <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf> (delineating the Bush Administration’s security policies, including preemptive action against emerging threats to the United States).

13. U.N. Charter art. 2, para. 4.

14. See generally UNILATERALISM AND U.S. FOREIGN POLICY, *supra* note 1.

lawyers, have echoed the critiques of scholars like Philippe Sands.<sup>15</sup> Many of us have also pointed out that the United States' war on international law has also taken the form of lawless interpretations of some of the treaty regimes to which we belong, including the 1949 Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>16</sup> Even our own Supreme Court has suggested that we have severely mangled international law, particularly in the course of waging our "war" against terror.<sup>17</sup> But this view of the plight of contemporary international law—and the challenges it faces from states such as the United States—over-simplifies the choices countries such as the United States face.

We need to be careful about overstating the case against United States unilateralism, not only because of the risk of partisan political backlash, but more importantly because the next president cannot afford to take such a simple view of the choices this nation and the world face. The next administration will necessarily have to engage far more than the Bush Administration ever did with international law and its institutions. As it does so, it will increasingly find legal regimes that are too complex to be reduced to a simple choice between unilateralism and multilateralism or the deployment of power versus subservience to law. Contemporary international legal regimes are not principally about choosing between acting as lawless empire or pre-committing oneself to multilateral cooperation.

## I. THE IDEAL OF LAW

What we increasingly find—in regimes as distinct as those seeking to prevent terrorist acts and those governing foreign investment—is a turn to what I would call an *empire* of law. This is not the same as either the ideal of the rule of law as portrayed by idealistic

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15. See, e.g., CLYDE PRESTOWITZ, *ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS* (2003) (criticizing U.S. unilateralism and advocating multilateral approaches to confront terrorism and other world problems).

16. See, e.g., José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006) (critiquing Bush Administration lawyers' memoranda justifying "enhanced interrogation techniques").

17. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-33 (2006) (holding that trials before specially designed military commission violate both U.S. and international law).

international lawyers or the exercise of hegemonic rule by one particular national empire, that is, what some might call the law of *empire*. Nor is it the case that today's empires of law involve only multilateral institutions such as the United Nations.

#### A. THE UNITED STATES AND THE UNITED NATIONS

For all the attention and proper criticism of the United States' defiance of the international community and the strictures of the U.N. Charter in choosing to invade Iraq, it is important to recognize just how much even the Bush Administration continued to rely on international law and the United Nations in waging its "war" on terror and weapons of mass destruction. Indeed, even with respect to the invasion of Iraq, the lawyers of the U.S. State Department have preferred not to rely on the controversial notion of the pre-emptive use of force.<sup>18</sup> Their case for the legality of that invasion has not relied primarily on the Bush Doctrine. The government lawyers charged with justifying that invasion have emphasized instead that U.S. actions were justified because U.N. Security Council authorized the collective use of force against Iraq twelve years earlier in Resolution 687. Furthermore, they have noted that Security Council members had acquiesced in later U.S. and U.K. military actions to enforce the U.N.-authorized "no fly" zones over Iraq.<sup>19</sup> Whether or not one accepts the contention that the invasion of Iraq was merely another step in enforcing the U.N. Security Council's own terms for continuing to deal with a threat to the international peace, these arguments by Bush Administration lawyers highlight the fact that even after 9/11, Philippe Sands' "lawless" nation has repeatedly turned to the U.N. Security Council and its Chapter VII enforcement powers with respect to issues regarding the international law of self-defense, counter-terrorism and weapons of mass destruction, and the occupation of Iraq.<sup>20</sup>

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18. See, e.g., William H. Taft IV & Todd F. Buchwald, *Agora: Future Implications of the Iraq Conflict, Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003) (supporting the United States' use of military force in Iraq largely on the basis of prior Security Council resolutions).

19. *Id.* at 559.

20. See, e.g., José E. Alvarez, Editorial Comment, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003) (surveying the normative effects of Security Council actions concerning counterterrorism, postconflict Iraq, and self-defense against the Taliban).

Though today few international lawyers accept the unilateralist doctrine of the pre-emptive use of force, far more are willing to accept the proposition that the rules governing self defense have been subtly changed by the preambles of Security Council Resolutions 1368 and 1373 and states' acquiescence in U.S. actions in Afghanistan after 9/11.<sup>21</sup> These resolutions imply that:

- (1) Terrorist violence, at least when of the scale of the events of September 11, 2001, and even when undertaken by a nonstate actor, may constitute an "armed attack" for purposes of U.N. Charter Article 51.
- (2) A state's assistance to, harboring of, or post hoc ratification of violent acts undertaken by individuals within its territory, or perhaps even mere negligence in controlling such individuals, may make that state responsible for those acts and justify military action against it. In other words, such state action (or inaction) may constitute a breach of the state's own duty not to violate U.N. Charter Article 2(4).
- (3) The right to respond with military force against both terrorist individuals and harboring states does not become impermissible retaliation or illegal anticipatory self-defense, or exceed the rules of proportionality, merely because the threat of continued terrorist attack remains clandestine and unpredictable (as it has been since 9/11).<sup>22</sup>

The United States, in short, has turned to the United Nations just like critics such as Sands would recommend—at least to secure multilateral acceptance of its numerous military actions apart from those in Iraq.<sup>23</sup> It has used international law to justify, and to modify, the rules permitting force.

Further, as its legalist critics have urged, the United States has turned to the U.N. Security Council to legalize its efforts to criminalize terrorist acts around the world. The U.N. Security Council's law-enforcement efforts to counter terrorism have accompanied the United States' military "war" on terror.<sup>24</sup> The

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21. S.C. Res 1368, pmb., U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, pmb., U.N. Doc. S/RES/1373 (Sept. 28, 2001).

22. Alvarez, *supra* note 20, at 879.

23. See Richard N. Gardner, *Agora: Future Implication of the Iraq Conflict, Neither Bush Nor the "Jurisprudes"*, 97 AM. J. INT'L L. 585, 589 (2003).

24. See Alvarez, *supra* note 20, at 874-78 (describing the Security Council's efforts).

United States has spearheaded these efforts, but they have been pursued under the flag of the United Nations. After 9/11 the U.N. Security Council has expanded its efforts to impose “smart sanctions” against named terrorists and terrorist organizations.<sup>25</sup> The Council’s resolutions, subsequent to its original Resolution 1267 that first imposed sanctions on persons identified by the Council as members of or contributors to Al Qaeda, created procedures by which hundreds of individuals or organizations believed to be associated with Al Qaeda or the Taliban anywhere in the world have been denied access to their bank accounts or the right to travel overseas.<sup>26</sup> Today, a Security Council Sanctions Committee implements sanctions similar to those imposed by the U.S. Office of Foreign Assets Control, except that the authority for these is not U.S. law but the law of the U.N. Charter, specifically the power of Council under Chapter VII to undertake enforcement action and to do so even if such action would otherwise violate international law.<sup>27</sup>

Under resolution 1373 the Council has effectively legislated portions of the International Convention for the Suppression of the Financing of Terrorism.<sup>28</sup> In that resolution, the Security Council mandated, among other things, that all states must criminalize provision of funding to be used for terrorist acts, freeze assets of parties who use those assets to commit acts of terrorism, and prohibit transfer of terrorist funding. Further, it decided that states must not harbor terrorists or those who finance terrorists. must implement border controls to prevent migration of terrorist groups, and cooperate with one another during investigations of terrorist activity.<sup>29</sup> Resolution 1373 and its progeny, which established the U.N. counter-terrorism committee (“CTC”) to oversee these efforts

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25. *See id.*

26. *See* Eric Rosand, Current Developments, *The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT’L L. 745 (2004) (examining the implementation of sanctions against suspected Al Qaeda and Taliban members).

27. *See Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the Comm. on Finance*, 107th Cong., S. Hrg. 107-880, at 42-47 (2002), available at <http://www.senate.gov/~finance/hearings/84922.pdf> (prepared statement of Alan Larson, Under Secretary of State for Economic, Business and Agricultural Affairs) (presenting an overview of the U.S. sanctions and listing procedures targeted at terrorist finance).

28. *See* Alvarez, *supra* note 20, at 875.

29. S.C. Res. 1373, *supra* note 21, ¶1-2.

and provide states with assistance in implementing the Council's legislative demands, is an attempt to establish a fairly comprehensive counter-terrorism regime.<sup>30</sup> The United States' role in driving these actions was quite evident. As some U.S. officials suggested, the Security Council's efforts appeared to be an attempt to make effective at the global level the strictures imposed under the USA PATRIOT Act and related U.S. counterterrorism legislation.<sup>31</sup>

The United States has also turned to the U.N. Security Council for help in stemming the threats posed to the world by weapons of mass destruction. Under Resolution 1540, the Council established a regime comparable to that established under 1373 for counter-terrorism.<sup>32</sup> Under that resolution, the Council, again acting under Chapter VII of the U.N. Charter, prohibited all states from providing any support to non-state actors that attempt to develop, acquire or transport nuclear, chemical, or biological weapons.<sup>33</sup> The Council also required states to adopt and enforce appropriate laws to advance this aim and to enforce measures to establish domestic controls over such weapons.<sup>34</sup> The Council also established, as it with respect to counter-terrorism, a separate committee to provide States with assistance in complying with these edicts and to receive state reports indicating how states are complying.<sup>35</sup>

It would also be inaccurate to portray the United States' occupation of Iraq since the war as a unilateral throwback to the days of unfettered imperialism. The occupation of Iraq was not untethered from international law but was, on the contrary, a product of its application. Although the Security Council has avoided suggesting that the United States' 2003 invasion of Iraq was legal, the Council has affirmed the responsibilities of Iraq's occupiers through resolutions 1483 and its progeny.<sup>36</sup> The United Nations, through the Council, has continued to bless the agreements between Iraqi

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30. See Eric Rosand, Current Developments, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 334-35 (2003) (describing the creation of the CTC and how it functions).

31. See Alvarez, *supra* note 20, at 875.

32. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

33. *Id.* ¶ 1.

34. *Id.* ¶¶ 2-3.

35. *Id.* ¶ 4.

36. See, e.g., Alvarez, *supra* note 20, at 882-86.

authorities and the United States authorizing continued occupation by the latter.<sup>37</sup> It has also legitimated joint U.S.-Iraqi efforts to impose criminal liability on Iraq's former leaders.<sup>38</sup> While the convictions and subsequent executions of Iraqi leaders such as Saddam Hussein, undertaken without the involvement of the International Criminal Court, have drawn their share of critics, it would not be accurate to display such efforts as entirely unauthorized by the United Nations.<sup>39</sup> In addition, while U.S. efforts to impose "democracy" on Iraq have also invoked comparisons to an "imperial" age long since passed, even these can be connected to Council authority. At least during the period prior to installation of an Iraqi government, the Security Council also gave the United States and the United Kingdom, as occupying powers, implicit permission to reform Iraqi institutions to the extent necessary to bring about democratic institutions.<sup>40</sup> As some commentators have suggested, in doing these things the Council may have subtly changed the underlying rules of occupation law, under which occupiers have been required to be mere caretakers not authorized to engage in comprehensive or permanent reforms of the occupied country's institutions.<sup>41</sup>

It would be relatively easy to praise all of the Council's efforts as the counterpoint to the Bush Administration's unilateral "war" on terror. One could portray all of these as antidotes to the Bush Administration's "lawless" attempts to threaten force preemptively, to detain "enemy combatants" without notifying the Red Cross, or to question detainees through unlawful "enhanced interrogation techniques."<sup>42</sup> It is not hard to describe these Council resolutions as

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37. S.C. Res. 1483, ¶ 4, U.N. Doc. S/RES/1483 (May 22, 2003); *see also* David J. Scheffer, *Agora (Continued): Future Implications of the Iraq Conflict, Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003) (describing the U.N. Security Council's actions allowing the U.S. and U.K. to occupy and govern Iraq).

38. S.C. Res. 1483, *supra* note 37, pmb., ¶ 3.

39. *Cf.* José E. Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319 (2004) (surveying criticisms of the Iraqi Criminal Tribunal established in the wake of U.S. occupation).

40. S.C. Res. 1483, *supra* note 37, pmb., ¶ 4 and ¶ 8.

41. *See, e.g.*, Scheffer, *supra* note 37, at 844-45.

42. *See* Scott Shane, David Johnston, & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (reporting that U.S. Attorney General Alberto Gonzalez approved the harsh interrogation techniques despite criticism).

attempts to use the U.N. Charter's collective security arm as intended, no less so than the Council resolutions leading to the first invasion of Iraq, namely the first President Bush's Gulf War.<sup>43</sup> That earlier Council effort has been widely praised in the scholarly literature as an exemplar of the U.N. Charter working as the collective security mechanism that it was intended to be.<sup>44</sup> Like Resolution 678, which authorized the use of force by those acting to defend Kuwait, the Council's efforts in Resolutions 1373, 1540, 1267, and 1428 are no less products of the rule of law. They too are Chapter VII actions duly authorized by the Charter. They too are the products of the Council's ability to proclaim a "threat to the peace" as it sees fit (pursuant to article 39 of the U.N. Charter) and the authority under the Charter enabling the Council to take any and all measures (including actions that impact directly on individuals) under articles 41 and 42 of the U.N. Charter.<sup>45</sup> Further, the Council is specifically authorized under article 103 of the Charter to override members' existing treaty obligations as necessary to implement its collective enforcement sanctions.<sup>46</sup> Thus, the Council's actions seem to be the embodiment of the international rule of law and the United Nations working as intended: an explicit abdication by the "hyper-power" of the temptation to exert its considerable powers extralegally.

## B. INTERNATIONAL INVESTMENT TREATIES

The United States' turn to international investment treaties is another progressive example of the United States' turn to legalism over the sheer deployment of power. In the days of formal empire, the United States, like other colonial powers, sometimes threatened "gunboat diplomacy" to defend the rights of its private foreign

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43. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

44. See generally Thomas M. Franck & Faiza Patel, *Agora: The Gulf Crisis in International and Foreign Relations Law, U.N. Police Action in Lieu of War: "The Old Order Changeth"*, 85 AM. J. INT'L L. 63, 63 (1991).

45. See U.N. Charter arts. 39, 41, 42; see generally Paul C. Szasz, Notes and Comments, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901 (2002).

46. See, e.g., S.C. Res. 748, ¶ 17-8, U.N. Doc. S/RES/748 (Mar. 31, 1992) (imposing aviation sanctions on Libya notwithstanding pre-existing treaties guaranteeing Libya landing rights).

investors overseas.<sup>47</sup> Today, U.S. foreign investors are more likely to be protected by international investment treaties and not by lawless threats, nor even by the United States threatening to apply unilateral economic sanctions against an expropriating state (as under the United States' Hickenlooper Amendment).<sup>48</sup> U.S. and other foreign investors today are protected by an intricate web of nearly 3,000 bilateral or regional investment protection treaties.<sup>49</sup> These treaties generally contain assurances that once admitted, foreign investors: (1) will receive trade treatment equal to that which the host state gives to any other foreign investor ("most favored nation" status) or the treatment it accords its own investors (national treatment); (2) will receive "fair and equitable treatment" and "full protection and security" in accordance with international law; (3) will be able to transfer profits and other capital out of the country without unreasonable currency restrictions; and 4) will receive prompt, adequate and fair compensation if expropriated directly or indirectly.<sup>50</sup> Many investment agreements also provide that foreign investors from either state party will be able to forego local courts and have direct access to international binding arbitration to resolve alleged treaty violations by host states.<sup>51</sup> This means that unlike most international legal regimes, the investment regime grants its non-

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47. See Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 529-31 (2002).

48. See 22 U.S.C.A. § 2370 (West 2004). The Hickenlooper Amendment cuts off U.S. foreign assistance to countries that expropriate the property of U.S. citizens. See generally ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 473 (2002) (marking the explosion of U.S. bilateral investment treaties over recent years).

49. See, e.g., Lisa Sachs & Karl Sauvant, *BITs, DITs and FDI Flows: An Overview*, in *THE IMPACT OF BILATERAL INVESTMENT TREATIES AND DOUBLE TAXATION TREATIES ON FOREIGN DIRECT INVESTMENT FLOWS* (Jeffrey Sachs ed., 2009); José E. Alvarez, *The Evolving Foreign Investment Regime*, IL.POST, Feb. 29, 2008, <http://www.asil.org/ilpost/president/pres080229.html> (stating that nearly every member of these treaties has some obligation to give foreign investors most favored nation treatment and to protect investors from harms caused by investment contract breaches or customary international law).

50. R. DOAK BISHOP, JAMES CRAWFORD, & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 1007-1169 (2005) (considering arbitral caselaw interpreting these rights).

51. See *id.* at 1009 (noting that some arbitration agreements require, however, that the case first be submitted to the host's local courts, but that if the case is not resolved after 18 months then the investor has recourse in international arbitration).

state beneficiaries directly enforceable rights at the international level. The investment regime is enforced by the thousands of foreign investors, principally multinational enterprises with the wherewithal to invest overseas and to protect their financial interests when these are threatened through international arbitration. Foreign investors themselves serve as the private attorneys general to enforce and enable ongoing interpretation of international investment law.<sup>52</sup> The growing body of arbitral international investment case law is therefore as much their creation as it is of the states that enter into investment treaties.

The United States exerted considerable leadership in the creation of this international investment regime.<sup>53</sup> While the United States was not the first Western country to establish bilateral investment treaties (“BITs”), its first BITs were among the most investor-protective ever devised, as was the investment chapter of the North American Free Trade Agreement (“NAFTA”).<sup>54</sup> The investor-state claims brought pursuant to the NAFTA by North American law firms have encouraged foreign investors around the world to seek recourse through International Centre for Settlement of Investment Disputes (“ICSID”) arbitration and have helped to spur the growing movement to investor-state arbitration under other mechanisms, such as ICSID’s Additional Facility and the United Nations Commission on International Trade Law (“UNCITRAL”).<sup>55</sup> The United States, the country that has been for a considerable period of time the home to the leading foreign investors of the world, has led in establishing the contemporary international investment regime. The United States also has been highly influential with respect to many other actions by international organizations that complement the investment regime, such as efforts by the International Monetary Fund (“IMF”), the World Bank, and regional development banks to impose “good

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52. See LOWENFELD, *supra* note 48, at 485, 493 (explaining the important contribution investors play in arbitration and dispute resolution which contributes to the corpus of international law).

53. See generally KENNETH J. VANDELDELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 20-1 (1992).

54. See generally, José E. Alvarez, *Critical Theory and the North American Free Trade Agreement’s Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303 (1996-97).

55. See, e.g., Sachs & Sauviant, *supra* note 49, at xxxviii-xli.

governance” standards on states that complement the rights granted foreign investors in investment agreements.<sup>56</sup>

### III. COUNTER-NARRATIVE: LAW OF EMPIRE

Not all international lawyers have accepted the binary description of law/non-law, unilateral/multilateral actions discussed earlier. Others, especially those who consider themselves members of critical legal studies movements, argue that these regimes merely legalize rule by the powerful, and especially by the United States and its closest Western allies. “Crits,” especially those who consider themselves part of the Third World Approaches to International Law (“TWAIL”) academic genre, argue that the legal regimes discussed *infra* constitute contemporary forms of neocolonialism.<sup>57</sup> For current critics of international law—such as Makua Matua, Ugo Mattei, or B.S. Chimni—these U.S.-backed international law regimes do not represent the neutral law among sovereign equals favored by international idealists, but law imposed by and at the service of the world’s hegemon or hegemons.<sup>58</sup> Orders by the Security Council, the dictates of the IMF, or the rules of investment treaties are, from the critical perspective, nothing more than U.S. imperial ambitions “laundered” by law—whether “blue-washed” through the (mis)use of the United Nations or international financial institutions or imposed on the unwilling through unequal bilateral treaties.<sup>59</sup> American University’s Washington College of Law has helped to popularize

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56. See generally Daniel Kalderimis, *IMF Confidentiality as Investment Regulation: A Theoretical Analysis*, 13 SOC. & LEG. STUD. 103 (2004); David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 TEX. INT'L L.J. 387 (2000).

57. See Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171 (2005) (surveying TWAIL literature).

58. See, e.g., Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003) (describing the new forms of “imperial” international law dominated by a few hegemonic players); B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004) (semble); Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841 (2000) (arguing that current international law is a reflection of Eurocentric preoccupations).

59. See generally LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000).

the view that much of contemporary international law seeks to implement the “Washington consensus”<sup>60</sup> on how all states are supposed to behave—whether with respect to the threat of terrorism or foreign investors. The Grotius lectures that the Washington College of Law has generously sponsored in recent annual meetings of the American Society of International Law have provocatively raised the profile of such views.<sup>61</sup>

#### A. THE SECURITY COUNCIL: LEGISLATING HEGEMONY

As my own work depicting recent Security Council actions as manifestations of “hegemonic international law” suggests,<sup>62</sup> this rival description of contemporary international law has considerable merit. Although, as noted above, it is easy to portray the Council resolutions surveyed above as examples of the U.N. Charter working as intended, it is also easy to suggest the opposite. Security Council resolutions like 1373 and 1540, which purport to bind all states subject to no geographic or temporal limitation, can be seen as constituting an unprecedented and unwarranted “legislative” or even “constitutional” turn for an organ originally intended to serve only as collective enforcer of the peace, not global lawmaker.<sup>63</sup> By using its political leverage on the Council, the United States has managed on these occasions to circumvent the “vehicle *par excellence* of community interest,” namely the *negotiation* of a multilateral treaty, and has opted instead to use an unaccountable global law-maker subject to its veto power.<sup>64</sup>

Security Council law-making also has peculiar characteristics not shared by much of international law. In Resolution 1373, for example, the Council selected only some provisions of a recently

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60. See John Williamson, *What Washington Means by Policy Reforms*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7, 7-8 (John Williamson ed., 1990) (including in the “Washington consensus” political branches, international financial institutions, economic agencies, and think tanks).

61. See, e.g., B.S. Chimni, *A Just World Under Law: A View from the South*, 22 *AM. U. INT’L L. REV.* 199 (2007) (The Eighth Annual Grotius Lecture presented at the 100th annual meeting of the American Society of International Law).

62. Alvarez, *supra* note 20.

63. See generally Jena L. Cohen, *A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach*, 15 *CONSTELLATIONS* 456 (2008).

64. Alvarez, *supra* note 20, at 875 (quoting Bruno Simma).

concluded (and therefore not widely ratified) Convention for the Suppression of the Financing of Terrorism, added provisions that do not appear in that treaty (because they did not win favor at the multilateral level), and omitted those provisions which it did not like, including the Convention's explicit deference to other requirements of international law. These include the due process rights of persons charged with terrorism-related offences, the rights of extradited persons, and the treaty's provisions envisioning judicial review.<sup>65</sup> Further, unlike most efforts to implement global rules within the United Nations, the Council's 1373 and 1540 regimes rely on groups of experts not chosen on the basis of geographic representation but dominated by experts from the United States and United Kingdom.<sup>66</sup> This effort at "imperial" law relies less on an "independent international civil service" than do most efforts by international organizations. And the fact that the Security Council's efforts under its resolution 1267, which imposes direct sanctions on individuals, are no less respectful of due process rights than is U.S. national law with respect to "enemy combatants" captured in the United States' war on terror does not reflect positively on the Council.<sup>67</sup>

These critiques are valuable insofar as they remind us that the turn to multilateralism, or at least to those multilateral institutions established after the second World War, is no guarantee that the ideal of the rule of law will be satisfied. As Lloyd Gruber reminds us, the IMF's harsh conditionality policies are no less unfair or inequitable merely because they come from a multilateral institution.<sup>68</sup>

## B. INTERNATIONAL INVESTMENT

It is even easier to brand the international investment regime, largely built on BITs, as tools of empire. BITs are comparable to the capitulation agreements that Western powers once extracted from the periphery in the nineteenth century.<sup>69</sup> Under such agreements,

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65. *Id.* at 876.

66. *See id.* (noting that other members do not have the power and resources to object to the U.S. and U.K. dominance).

67. *See, e.g.,* Joined Cases C-402 & 415/05 P, *Kadi v. Council*, 2008 E.C.R. 00 (critically examining the legality of European legislation implementing the Security Council's counterterrorism sanctions).

68. *See* GRUBER, *supra* note 59, at 55 (noting government leaders' attempts to blame the IMF for hardships imposed under IMF conditionality).

69. *See generally* Fidler, *supra* note 56.

Western colonial powers gained extraterritorial jurisdiction in the territories of non-Western countries by exempting Western nationals (including Western merchants and investors) from local law. These capitulation agreements imposed the “standard of civilization” on the “uncivilized” by granting jurisdiction over Western nationals and their property to consular officials of the Western states in lieu of local courts.<sup>70</sup> Western states justified these treaties on the premise that poor host states of foreign traders and investors were incapable of satisfying the standard of justice granted by “civilized nations.”<sup>71</sup> Like old capitulation agreements, present day BITs also exempt foreign investors from having to go to local courts. They merely substitute international arbitral mechanisms for the former’s recourse to consular officials. Further, while investment agreements are formally the product of mutual state consent, the consent by LDCs to terms that are extremely favorable to foreign investors largely from the West has been heavily constrained by the dictates of the market as well as the privatization and other demands extracted by institutions like the World Bank and the IMF.<sup>72</sup>

#### IV. THE COMPLEXITY OF CONTEMPORARY INTERNATIONAL REGIMES

This alternative critical description of international legal regimes, however, is something of a caricature despite its merits. Efforts to characterize contemporary legal regimes in the Security Council or under BITs as manifestations of either the ideal of law or the “law of empire” are unduly simplistic. Closer attention to the actual operation of such regimes reveals that these regimes are subject to counter-veiling forces that make them both hegemonic *and* lawful. They are more accurately seen not as the *law of empire* but as *empires of law*.

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70. *See id.* at 391-92.

71. *See id.* at 392.

72. *Cf. id.* at 404 (explaining that while international law is still an exercise in hegemonic power, the global economic and political fallout from the Cold War enabled policy and legal reform in developing countries by the IMF and World Bank).

### A. THE BACKLASH AGAINST THE SECURITY COUNCIL

Consider what has happened even in the brief time since 9/11 under the Security Council regimes surveyed above. The United States' resort to the Security Council to legitimate its use of force in the wake of 9/11 resulted in consequences for the United States, as well as for others and for the resulting law. The U.S. officials who opted to turn to the Council had not anticipated all of these consequences. While the Security Council's acquiescence in military action in Afghanistan has gone some way towards modifying the underlying rules governing self defense, the law has not moved towards accepting the preemptive use of force. As Ian Hurd has argued, the justificatory legal discourse required of any state going to the Council initially forced the United States to try to justify its invasion of Iraq by asserting the existence of weapons of mass destruction. The subsequent absence of such weapons imposed a substantial cost on the United States in terms of lost allies.<sup>73</sup> The Council's failure to approve the U.S. invasion has arguably held the line on the United States' most far-reaching attempts to deviate from the traditional rules governing the use of force. Similarly, the United States' recourse to the Council to justify its occupation has imposed constraints on U.S. actions, among them, the fact that a continued U.S. presence in Iraq remains contingent on Iraqi acquiescence and subsequent approval by the Security Council.<sup>74</sup>

Considerable push-back by states and NGOs objecting to "legislative" efforts by the Council has also accompanied the Council's efforts on counterterrorism and weapons of mass destruction.<sup>75</sup> As Ian Johnstone and others have noted, supporters of

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73. IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* (2007); see also Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the U.N. Sanctions, 1992-2003*, 59 INT'L ORG. 501 (2005) (explaining how legitimacy may be lost if the hegemon is too often seen as itself violating the rules of the game).

74. See, e.g., Council on Foreign Relations, *Backgrounder: U.S. Security Agreements and Iraq*, Dec. 23, 2008 (examining the agreements that have determined the legality of the continued U.S. presence in Iraq as supervised by the Security Council), available at <http://www.cf.org/publication/16448/>.

75. See, e.g., Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002), *Second Report of the Monitoring Group Established Pursuant to Security Council Resolution*

resolution 1373 over time have had to devote much greater efforts to securing implementation with counter-terrorism measures through deliberative discourse less reliant on top-down Council fiat.<sup>76</sup> There have been greater efforts to justify the merits of the underlying measures, greater efforts to make the operation of relevant Council committees more transparent, and a shift to more accountable forms of implementation.<sup>77</sup> In 2005, for example, the CTC was made subject to the direction of a larger body, the Counter-terrorism Directorate (“CTED”).<sup>78</sup> Although U.S. officials sought to have the CTED report solely to the CTC, resistance by other states led to a compromise whereby the U.N. Secretary-General would appoint its executive director.<sup>79</sup> Suggestions that the goal of resolution 1373 was to secure global dissemination of the USA PATRIOT Act have been quietly shelved amidst growing agreement that the best way to secure effective counter-terrorism cooperation involves persuading, not forcing, states to comply. In addition, there has been a more serious complementary effort within the General Assembly to come up with a multilateral convention which, unlike the Council’s more hegemonic efforts, actually defines what “terrorism” is.<sup>80</sup> Even the United States deems this necessary to stem the opportunism that counterterrorism Security Council ‘legislation’ without benefit of definition engenders.<sup>81</sup>

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*1363 (2001) and Extended by Resolution 1390 (2002)*, U.N. Doc. S/2002/1050 (Sept. 20, 2002) (noting that some states have failed to take measure because of the lack of legislative authority to do so); Per Cramér, *Recent Swedish Experience with Targeted U.N. Sanctions: The Erosion of Trust in the Security Council*, in *REVIEW OF THE SECURITY COUNCIL MEMBER STATES* 85, 105 (Erika de Wet et al. eds., 2003) (examining the difficulties Sweden encountered in implementing Security Council issued sanctions that were in apparent contradiction of individuals’ fundamental rights).

76. See Ian Johnstone, *Legislation and Adjudication in the U.N. Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L. 275, 276 (2008) (contending that public policy decisions are best made when accompanied by reasoned argumentation).

77. *Id.* at 288-89.

78. See *id.* at 285 (noting that the CTED comprised 20 experts in charge of helping the CTC make policy and strategic decisions).

79. *Id.*

80. See *id.* at 288-89; ERIC ROSAND, ALISTAIR MILLAR & JASON IPE, *THE UN SECURITY COUNCIL’S COUNTERTERRORISM PROGRAM: WHAT LIES AHEAD?* (Oct. 2007).

81. Cf. Human Rights Watch, *Current Events, Opportunism in the Face of Tragedy: Repression in the Name of Anti-Terrorism*, <http://www.hrw.org/legacy/>

There has been even greater member push-back with respect to the smart counterterrorism sanctions imposed under 1267 and subsequent resolutions. Members quickly objected to how this regime operated and challenges soon emerged in national courts, the European Court of Human Rights, and the European Court of Justice.<sup>82</sup> Political pressures from states objecting to the listing of their nationals have forced changes in the way the Sanctions Committee operates. While initially individuals were listed (largely at the behest of intelligence experts from the United States and the United Kingdom) based on political trust, there were no procedures for removing persons from the sanctions list once listed and there were no exceptions identified for enabling targeted individuals to have access to some money to meet their daily needs for shelter and food. The U.N. sanctions committee was forced to change its procedures.<sup>83</sup> Under European pressure, that committee was compelled to identify formal guidelines or evidentiary standards for states to follow in proposing names, and to incorporate humanitarian exceptions and a de-listing procedure.<sup>84</sup>

But these positive steps to enhance the counterterrorism regime's transparency and legitimacy were insufficient to prevent the culmination of challenges before international dispute settlers. After a number of predictable judicial determinations in both national courts and the European Court of Human Rights that binding Council actions could not be judicially reviewed or challenged, in 2008 a grand chamber of the European Court of Justice finally held in *Kadi v. Council of the European Union* that the council's targeted sanctions as implemented under European community law could not be sustained.<sup>85</sup> The Court refused to find that it was unable to engage in judicial review of the legality of the sanctions as applied to individuals living within the European Union and refused to find that

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campaigns/september11/opportunismwatch.htm (last visited Mar. 3, 2009); William Orme, *Response to Terror: U.N. Fears Abuses of Terror Mandate*, L.A. TIMES, Jan. 2, 2002, at A1 (presenting examples of governments restricting freedoms under the pretense of fighting terrorism).

82. See, e.g., *Kadi v. Council*, *supra* note 67; *Bosphorus v. Ireland*, 2005-VI Eur. Ct. H.R. 109; Case T-253/02, *Ayadi v. Council*, 2006 E.C.R. II-2139; Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3533.

83. See, e.g., S.C. Res. 1730, ¶¶ 1-7, U.N. Doc. S/RES/1730 (Dec. 19, 2006) (outlining the new de-listing procedure).

84. *Id.*

85. *Kadi*, 2008 E.C.R. at ¶ 61.

the primacy of Security Council actions could prevent an inquiry into whether the underlying sanctions were consistent with the fundamental rights granted to individuals under European law.<sup>86</sup> The court went on to find the de-listing procedures provided by the U.N. Security Council fell short of respecting the rights of European nationals to assert their own rights during a relevant proceeding because the de-listing procedures were only “diplomatic and intergovernmental.” The Court noted that the procedures also failed to provide access to the reasons and evidence justifying one’s appearance on the list of sanctioned individuals, and therefore prevented the opportunity for that individual to present a defense and receive an effective legal remedy.<sup>87</sup> Despite the fact that the U.N. sanctions were stated to be “temporary,” the Court found that the European regulation implementing them was a disproportionate and intolerable interference with the individual’s property right under European law and the European Convention on Human Rights.<sup>88</sup> Accordingly, the Court annulled the regulation as applied to the applicants before it but permitted it to be maintained for three months to allow the European Council to remedy the flaws that it found with respect to procedures.<sup>89</sup>

Whatever is the final outcome of that particular case, the question of how to adjust the U.N. Security Council’s counterterrorism sanctions regime to make it more compatible with international human rights is an issue that both the European Council and the U.N. Security Council will eventually need to resolve. Otherwise the legitimacy and possibly the legality of the counterterrorism sanctions regime of the United Nations will continue to be in doubt.

These examples suggest how contemporary international law sets limits when powerful states try to use the rule of law or multilateral institutions, even in institutions in which the powerful states hold a veto, to advance the law of empire. The Security Council’s efforts are not quite the same as actions taken by the United States on its own. Even the Council must comport its legislative actions with the expectations of the international community and with the rest of international law. As the Kadi decision suggests, these limits arise

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86. *Id.* ¶¶ 283-299.

87. *Id.* ¶¶ 323-326.

88. *Id.* ¶¶ 369-371.

89. *Id.* ¶¶ 372-376.

because the U.N. Security Council's actions now exist within an inescapable larger web of international law and institutions, including a myriad of international courts.

#### B. CONSTRAINT OF EMPIRE IN INTERNATIONAL INVESTMENT

But as the example of the international investment regime addressed *infra* suggests, the law of empire is necessarily constrained as well even when multilateral institutions are not as involved in their elaboration or enforcement. In other cases, constraints re-emerge to the extent that law—even hegemonic law—remains grounded in reciprocal application.

The contention that the international investment regime is comparable to nineteenth century capitulation agreements ignores the fact that today's flows of investment are not merely in one direction, from north to south. At the moment, the United States is both the world's leading exporter of capital flows and its leading *recipient* of foreign investment capital.<sup>90</sup> We share this duality with others, such as Brazil, Russia, India and China (abbreviated to "BRICs"), all of which are also leading recipients and exporters of capital.<sup>91</sup> Of the net stock of foreign direct investment capital, approximately seventeen percent of it consists of outward FDI flows from emerging markets.<sup>92</sup> It is no longer accurate to portray the international legal regime governing foreign regime as strictly concerned with protecting capital from the West as it goes to the rest.

What this means is that the United States has developed, particularly over recent years, the same love-hate relationship when it comes to foreign investment as have many other countries. The United States, along with virtually all countries (including communist holdovers such as Cuba) are now firm converts to David Ricardo's theory of comparative advantage.<sup>93</sup> This is clearly

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90. See ECONOMIC INTELLIGENCE UNIT, WORLD INVESTMENT PROSPECTS TO 2011: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF POLITICAL RISK (2007), available at <http://vcc.columbia.edu/pubs/documents/WorldInvestmentProspectsto2011.pdf>.

91. See Sachs & Sauvant, *supra* note 49, at xxxii.

92. *Id.*

93. DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (Everyman's Library No. 590, Ernest Rhys ed., 1911). See generally Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998) (providing an introduction to and

evidenced by the fact that over the course of recent years, nearly all countries around the world have modified their national laws to make it easier for foreign investors to enter and operate in their territories.<sup>94</sup> Virtually all nations now regard free capital flows as indispensable for economic growth. At the same time, the United States shares fears with most countries, including LDCs, about whether granting reciprocal rights to all investors will interfere with sovereign prerogatives or result in challenges to national law.<sup>95</sup> Foreign takeovers of U.S. companies, including former public utilities, remain a flash point of debate over the power of sovereigns to influence employment, control national security, preserve local jobs and prevent outsourcing, encourage technological innovation, and protect intellectual property or national security.<sup>96</sup>

Comparing provisions of the 1984 Model U.S. BIT with the provisions that appear in the latest U.S. Model text suggests what the United States' twenty years of experience with investment treaties, including over ten as a defendant under NAFTA in cases brought by Canadian investors in the United States challenging U.S. federal and state laws under the vague open ended guarantees under the 1984 treaty, has wrought.<sup>97</sup> Over time, the U.S. government has become more reticent about protecting the rights of foreign investors at the expense of the sovereign prerogatives of the United States. Today's U.S. Model BIT is more than twice as long as it once was.<sup>98</sup> It has become a longer document in order to better protect the sovereign or regulatory rights that the United States once ridiculed when it was fighting the proposed "New International Economic Order" once advocated by LDCs.<sup>99</sup> The text of its most recent Model BIT reflects

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overview of comparative advantage).

94. Economist Intelligence Unit, *supra* note 90, at 67 (noting that out of 2,394 changes in national FDI laws between 1991 and 2005, 92% were in the direction of creating a more favorable climate for foreign investors).

95. *Cf. id.* at 11, 12-13 (arguing that a rise in protectionism among states is hampering foreign direct investment, namely mergers and acquisitions).

96. *See* Sachs & Sauvart, *supra* note 49, at tbd.

97. For a table comparing the respective texts of the U.S. Model BITs of 1984 and 2004, *see* José E. Alvarez, *The Evolving BIT* (forthcoming Transnational Dispute Management 2009).

98. For the text of the 2004 U.S. Model BIT, *see* [http://www.ustr.gov/Trade\\_Sectors/Investment/Model\\_BIT/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html).

99. *See, e.g.*, G.A. Res. 3281 (XXIX), pmbi., ¶ 3, art. 18, U.N. Doc. A/9631 (Dec. 12, 1974) (promoting an economic order "based on equity, sovereign

a U.S. government that has faced investor claims under the NAFTA challenging California's rights to protect its ground water as a violation of the overly broad guarantees of fair and equitable treatment<sup>100</sup> and asserting that a Mississippi jury award of punitive damages against a Canadian investor constituted an illegal taking of property.<sup>101</sup> The newly hedged BIT language also reflects awareness of ICSID decisions interpreting the U.S.-Argentina BIT that have found Argentina liable for millions of dollars in damages resulting from harms inflicted on foreign investors as a result of general measures that Argentina took in response to a serious economic and political crisis.<sup>102</sup>

The new language of U.S. BITs recalibrates the balance between the rights accorded investors and a nation's right to regulate in the public interest in a number of ways. Under the new Model BIT, the United States has restricted the definition of the fair and equitable guarantee, suggesting that it only embraces traditional protections under customary international law.<sup>103</sup> While that guarantee still covers incidents of maltreatment by national courts, it limits investor protections to egregious acts involving basic violations of due process.<sup>104</sup> The new U.S. language on expropriation restricts the meaning of "indirect" takings to violations that would be recognized by the U.S. Supreme Court in the classic takings case, *Penn Central*.<sup>105</sup> Takings jurisprudence should recognize the elements

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equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems").

100. *Methanex Corp. v. U.S.*, (Can. v. U.S.), pt. II, ch. D, 8-9, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005), available at [http://naftaclaims.com/Disputes/USA/Methanex/Methanex\\_Final\\_Award.pdf](http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf) (finding that the court had no jurisdiction over a suit by Methanex against the United States alleging violation of NAFTA's Chapter 11).

101. *The Loewen Group, Inc. et al. v. U.S.*, ICSID Case No. ARB(AF)/98/3, ¶¶92-95, 42 I.L.M. 811 (2003) (rejecting a NAFTA chapter 11 action alleging violation by the United States after an allegedly unfair trial).

102. See generally José E. Alvarez, and Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, Yrbk International Investment Law & Policy 379 (2008-09).

103. See U.S. Model BIT of 2004, *supra* note 98, at Art. 5 and annex A.

104. See, e.g., Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 5, ¶¶ 1-3, annex A, Apr. 4, 2006, S. Treaty Doc. No. 109-9 [hereinafter U.S.-Uruguay Treaty].

105. See *Penn Cent. Transp. Co., et al. v. New York City, et al.*, 438 U.S. 104 (1978), U.S-Uruguay Treaty, *supra* note 104, annex B (using the analysis of

contained in annex B(4) in the U.S.-Uruguay BIT as the balancing factors identified by the U.S. Supreme Court in that *Penn Central*.<sup>106</sup> Moreover, the new U.S. language with respect to the measures that “it considers necessary” for the protection of its essential security suggests an attempt to make that clause essentially self-judging. Thus, international arbitrators cannot second-guess a state’s determination that a measure that harms a foreign investor is needed to protect that state’s own determination of the state’s “essential security.”<sup>107</sup> The changes that the U.S. has made to its investment treaty bring the property protections granted in those agreements closer to the way property rights are recognized and protected in the European Convention on Human Rights.<sup>108</sup>

The changes to the U.S. BIT program over the course of twenty years demonstrate that the investment regime can no longer be caricatured as law designed only to protect the capital interests of the metropole. They show that today’s investment agreements, or at least those concluded by the erstwhile leader of the investment regime, are not quite like colonial era capitulation treaties. Today’s BITs bite the metropole back. As the U.S. changes to its most recent BITs suggest, the metropole is occasionally chafing under the regime’s reciprocal constraints. And yet the fact that both rich states like the United States and LDCs continue to accept the general premises of the investment regime and tinker only around the edges of its investor protections suggests the extent to which states still consider that

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takings found in the Supreme Court’s decision of *Penn Central*, to limit the definition of indirect expropriation).

106. *Penn Cent. Transp.*, 438 U.S. at 124.

107. See U.S.-Uruguay Treaty, *supra* note 104, art. 18, ¶ 2 (“Nothing in this treaty shall be construed . . . to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”). For consideration of the significance of this change, see generally Alvarez & Khamsi, *supra* note 102.

108. See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”).

regime to be in their interests. States' continued reliance on international investment treaties indicates the degree to which all states have now bought into the premise that liberal capital flows provide mutual benefit. Most states do not see their investment agreements as a zero-sum game like a capitulation agreement. Most states continue to believe that the mutual flow of capital raises all boats. Today, when 27 percent of the BITs are between developing countries<sup>109</sup> and a considerable portion of capital flows are *going to* the West as well as *coming from* the East, it is less plausible to describe investment agreements as one-sided tools of the West. Nor are the countries such as China and Egypt who are signing such agreements to protect their foreign investors easily characterized as agents of *Anglo-American* empire.<sup>110</sup> Today's global regime for investment is not simply a product of treaties imposed through *bilateral* assertions of power by the rich West against the rest.

#### V. A CONTEMPORARY APPROACH TO UNDERSTANDING "EMPIRE"

Describing the essence of complex regimes, whether they are led by the U.N. Security Council or formed by bilateral investment treaties, is a challenge. We need a description that recognizes that what we now have is different from prior empires that were territorially based or were essentially the product of one state's power writ large. While these regimes remain tools of empire, we need to recognize that the meaning of "empire" is now distinct from what it was in the colonial age. These contemporary legal regimes exist in a realm beyond statehood, a place where the categories of imperialized periphery and exploitative metropole blur.

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109. See Sachs & Sauvant, *supra* note 49, at xxxiv.

110. See *id.* fig. 8, at xxv (indicating that China (119 BITs) and Egypt (100) are among the ten countries with the largest number of BITs as of June 2007; the United States is not among the top ten BIT signatories). Cf. WALTER RUSSELL MEAD, *GOD AND GOLD: BRITAIN, AMERICA, AND THE MAKING OF THE MODERN WORLD* (2007) (describing how the English speaking powers have shaped the modern world).

## A. ANCIENT EMPIRE

In ancient usage, an imperium was universal by definition.<sup>111</sup> Ancient empires saw themselves as all-encompassing. An empire was a harmonious and autonomous cosmos confronted otherwise only by chaos.<sup>112</sup> Those who stayed outside its domain were uncivilized savages. In ancient times, true “empires” aspired to universality.

The Athenian Empire which began roughly in 478 BC and collapsed in 405 B.C. is particularly interesting. That empire emerged from an alliance among Hellenic states against the Persians.<sup>113</sup> In 454 B.C. Athens reorganized the alliance, the Delian League, and established a joint treasury at Delos which collected contributions from the allies.<sup>114</sup> Under Athenian leadership, the independent states sent representatives to a temple at Delos where decisions were taken in a general congress. The Delian League came to include captured cities (whose populations were enslaved and the land colonized by Athenians) and members of the League who had once rebelled and were compelled back into it and forced to give tribute. As Michael Doyle has described it, “the Delian League thus became an empire in which Athens exercised imperial control largely by informal means.”<sup>115</sup>

This regime was sustained by “allies of the tribute-paying class,” each of which had a “.legally independent, formally sovereign government, including a democratic assembly.”<sup>116</sup> The Delian League was also sustained by periodic military interventions and by the voluntary acquiescence of the populations and elites of the periphery—who sometimes feared, hated, or revered Athens but which were generally aware that integration into the League conferred concrete economic benefits, including access to the

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111. STEPHEN HOWE, *EMPIRE: A VERY SHORT INTRODUCTION* 13-14 (2002) (explaining that imperium, the predecessor of the word “empire,” meant rule over wide territories to which no other monarch could claim title).

112. *Id.* at 14 (asserting that the Greeks created, and the Romans espoused, the idea that groups outside the empire were barbarians).

113. MICHAEL W. DOYLE, *EMPIRES* 54-81 (1986).

114. *Id.* at 55.

115. *Id.* at 56.

116. *Id.*

Athenian market, the protection of Athens from piracy, and other imperially provided “collective goods.”<sup>117</sup> Unlike Sparta’s hegemonic alliance, the Peloponnesian League (which only controlled the foreign relations of its allies), Athens was more ambitious. It collected tribute, imposed the jurisdiction of its courts, regulated the commerce of its subject allies, and sought to impose a “democratic” form of government over indigenous traditions of government.<sup>118</sup> As Doyle tells the story, the brief Athenian empire was driven by concerns for security, material self interest (including the need to maintain open sea lanes and trade), and self-confidence in spreading the Athenian way of life.<sup>119</sup>

#### B. THE MODERN EMPIRE OF LAW

There are obvious parallels between the Athenian League, today’s United States, and today’s regimes for collective security and the regulation of foreign investment. The Athenian example suggests that empire can be built by a “adventurous”<sup>120</sup> and proud democratic society intent on spreading its democratic way of life to others; that empire can be grounded on conceptions of the market, private property, liberalized free trade among what we would today call nation states, and it that can spread through the rule of law applied extraterritorially. But it also suggests that an empire built on trade can still have an impact on the periphery’s foreign *and* domestic affairs. At the same time, as the previous discussion of the U.N. Security Council and investment regimes demonstrate, it is not entirely right to describe these regimes as mere passive conduits for imposing U.S. views on others. Such an interpretation fails to acknowledge a principal source of the legitimacy and power of these regimes.

As the example of ancient empires illustrates, some “empires” can be based on universalistic ideals, including universal rules of law. The Delian League example demonstrates that there can be such a thing as an “empire of legal rules” that is distinguishable from or at

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117. *Id.* at 56-57.

118. *Id.* at 59.

119. *Id.* at 61-63.

120. *Id.* at 65 (defining the adventurous spirit of Athens as “an attitude of mind and a repertory of actions which together create a distinctive way of life”).

least not identical to rule by imperialist territorial colonial empire.<sup>121</sup> Modern regimes for counter-terrorism and for the regulation of investment, like much else in contemporary international law, share a number of characteristics with Athenian empire. Today's legalistic methods enable the exercise of indirect hegemonic power. Powerful states such as the United States can still get their way but may sometimes achieve their goals through the legitimation processes provided by multilateral institutions or through recourse to the "traditional" pedigreed sources of international law, such as treaties. Still, the effects of indirect empire can be, like those of Athens, pervasive. Possibly because their hegemonic impact is indirect, today's international legal regimes can penetrate more deeply into the foreign and domestic policies of states than could the direct top-down rules of colonial empire, which were more likely to generate resentment and resistance. The contemporary Security Council and investment regimes, like the Athenian empire, rely on common interests genuinely shared among states. Their legitimacy and efficacy largely depend on voluntary acquiescence, even if the U.N. counterterrorism regime relies, as did Athens, on the threat of military intervention.

Today, most states, like the United States, want to deter terrorists and their access to WMDs. Most also want incoming foreign investment and want to protect their own investors going abroad, because many states, and not only the United States, have within them the modern equivalent of a "tribute-paying" class, namely entrepreneurs who benefit from the investment regime. The desire most states have for foreign capital is, in short, not merely one that is dictated by international bureaucrats at the IMF. At the same time, as the changes to the U.S. Model BIT suggest, states still want to protect their sovereign rights to regulate in the public interest, while still protecting the rights of foreign investors.

There are potential connections between the modern international regimes described here, democratic self-governance and inter-state security; indeed, these connections existed in ancient Athens. As

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121. Cf. Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 738 (1993) ("... the idea of international law as an ordering mechanism that draws its categories from an essential culture and yet stands apart from its cultural context continues to command considerable rhetorical power.").

with the Athenian League, the investment regime highlights the importance and protection of private entrepreneurs; like that ancient League, it relies on foreign trade for both security and commerce. Like it, the investment regime also reproduces an international division of labor. To some the investment regime, along with the WTO's trade regime, is an essential component of the "liberal" peace.<sup>122</sup> The Security Council's counter-terrorism regime is also premised on the need to protect globalization from threats posed by non-state actors intent on destroying or disrupting not only global commerce but democratic institutions.<sup>123</sup>

The global regimes for counter-terrorism and international investment resemble ancient empires in a more fundamental way. These regimes also aspire to universality. They also rely on sacrosanct truths that in our secular age approach the divine revelation that justified some ancient empires.<sup>124</sup> In lieu of universal agreement on a single god or set of gods, we have placed our collective faith in the power of the United Nations' collective security scheme and, with respect to investment, in David Ricardo's theory of comparative advantage.<sup>125</sup> Participation and compliance with these regimes are, increasingly, the only options states have. Neither the United Nations' collective security scheme nor the investment regime has a clear rival. Those few states outside their

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122. See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 239 (2000) (suggesting that no two countries with a McDonald's franchise have gone to war).

123. See, e.g., S.C. Res. 1624, pmb., U.N. Doc. S/RES/1624 (Sept. 14, 2005) ("Deeply concerned that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, undermines global stability and prosperity, and must be addressed urgently and proactively by the United Nations and all States, and emphasizing the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life . . .").

124. Cf. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 160-82 (2000) (maintaining that U.S. empire is motivated by "the extension of the internal U.S. constitutional project" and the promotion of independence and democracy); DOYLE, *supra* note 114, at 62-63 (including among the Athenian empire's motivations for expansion a desire to spread its democracy and "way of life").

125. See *supra* note 96 and accompanying text (introducing Ricardo's theory of comparative advantage). Cf. United Nations Member States, List of Member States, <http://www.un.org/members/list.shtml> (last visited Mar. 3, 2009) (listing the 196 countries that have ratified the U.N. Charter and are members of the United Nations).

domain, like those outside the Athenian empire, may as well be barbarians. Not participating in these regimes is tantamount to political or financial suicide.<sup>126</sup> To be brought under the these regimes—to be allowed to participate in them—is to be allowed to enjoy the newly defined forms of “sovereignty” left to nation states, as it was with Athens.<sup>127</sup> For much of the world, these regimes (irrespective of their origins) are perceived as requirements of contemporary civilization, morally and politically justified.

## CONCLUSION

The empires of law described here are perhaps only an application of Martti Koskenneimi’s insight that international law oscillates between utopia and state apology.<sup>128</sup> But the empires of law described here are probably closest to the universalist empire based on the globalization of economic and cultural exchanges described by Michael Hardt and Antonio Negri in their book, *Empire*.<sup>129</sup> Theirs is a conception of empire premised on a “global market and global circuits of production;” a new “global order, a new logic and structure of rule—in short a new form of sovereignty.”<sup>130</sup> “Empire,” they write, “is the political subject that effectively regulates these global exchanges, the sovereign power that governs the world.”<sup>131</sup> Hardt and Negri write of a post-sovereign world that “encompasses the spatial totality” and knows no territorial boundaries.<sup>132</sup> Their version of empire joins societies across spatial political boundaries and makes such boundaries less relevant.

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126. Cf. FRIEDMAN, *supra* note 122, at 248 (observing that states that have the resources or ideology to except themselves from globalization, such as North Korea, Afghanistan, Sudan, and Iran, are the exception).

127. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995) (defining contemporary sovereignty as “status,” including the ability to participate in international institutions).

128. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

129. See HARDT & NEGRI, *supra* note 124, at xiv-xv (arguing that “the rule of Empire operates on all registers of the social order extending down to the depths of the social world”); see also Susan Marks, *Empire’s Law*, 10 *IND. J. GLOBAL LEGAL STUD.* 449, 461 (2003) (asserting that globalization reconfigures political authority to create a new system of sovereignty).

130. HARDT & NEGRI, *supra* note 124, at xi.

131. *Id.*

132. *Id.* at xiv.

As Hardt and Negri indicate, empires of law reflect the fact that old notions of sovereignty and the exercise of sovereign power are no longer sufficient to describe contemporary international law.<sup>133</sup> These regimes have outgrown their origins. They are no longer the product of territorially demarcated empire—even as they enable the pursuit of the ideologies favored by the powerful.<sup>134</sup> Nor are these regimes mere fig leaves for old-fashioned imperialist power. Even the United States is discovering that the shift to using legal tools and institutions has consequences. Some of these include unanticipated checks and balances on the exercise of hegemonic power, such as the international courts that are proliferating to check the power of the U.N. Security Council.<sup>135</sup> Others, such as the new forms of “balancing” emerging within BITs, result from the fact that any law worthy of the name needs to be reciprocally applied. Whether the new empires of law of today will prove to be as short-lived as the Athenian empire remains to be seen.

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133. *Id.* at xii (arguing that empire is not an extension of imperialism which worked to enrich European colonizers, but a decentralizing and deterritorializing force). *Cf.* Marks, *supra* note 129, at 461 (asserting that globalization creates a new form of sovereignty).

134. *See* Marks, *supra* note 129, at 461-64 (drawing comparisons between international lawyers' perspectives and those by Hardt and Negri).

135. For a chart of international courts and tribunals, *see* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 404-05 (2005).