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PUBLIC POWER AND PRIVATE PURPOSE: ODIOUS DEBT AND THE POLITICAL ECONOMY OF HEGEMONY

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Article

***699 PUBLIC POWER AND PRIVATE PURPOSE: ODIIOUS DEBT AND THE POLITICAL
ECONOMY OF HEGEMONY**

Louis A. Pérez, Jr., Deborah M. Weissman [\[FNd1\]](#)

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I spent thirty-three years and four months in active military service as a member of this country's most agile military force, the Marine Corps. I served in all commissioned ranks from Second Lieutenant to Major-General. And during that period, I spent most of my time being a high class muscle-man for Big Business, for Wall Street and for the Bankers. In short, I was a racketeer, a gangster for capitalism. I suspected I was just part of a racket at the time. Now I am sure of it. Like all the members of the military profession, I never had a thought of my own until I left the service. My mental faculties remained in suspended animation while I obeyed the orders of higher-ups. This is typical with everyone in the military service. I helped make Mexico, especially Tampico, safe for American oil interests in 1914. I helped make Haiti and Cuba a decent place for the National City Bank boys to collect revenues in. I helped in the raping of half a dozen Central American republics for the benefits of Wall Street. The record of racketeering is long. I helped purify Nicaragua for the international banking house of Brown Brothers in 1909-1912 (where have I heard that name before?). I brought light to the Dominican Republic for American sugar interests in 1916. In China I helped to see to it that Standard Oil went its way unmolested. -- Major General Smedley Butler (1933) [\[FN1\]](#)

***700** The large money center banks are the true foreign aid policymakers of the United States. -- Representative Jim Leach, R- Iowa. [\[FN2\]](#)

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I. Introduction

The purpose of this article is to rethink the Odious Debt discourse by drawing attention to the relationship between finance capital in service of national interests and as an instrument of U.S. foreign policy. The current debates have attempted to arrive at a ***701** usable definition of Odious Debt. In historical terms, Odious Debt has referred to sovereign indebtedness that may be repudiated under circumstances that imply a debt incurred by a despotic ruler with the full knowledge of the lender that the transaction was without the consent of or the benefit for the citizenry. [\[FN3\]](#)

The comments that follow are driven by the argument that the United States has used bank loans in the world system as a dominant facet of imperialism. Attention to this issue necessarily deepens the complexity in arriving at any workable legal theory to address the issue of Odious Debt.

The concerns addressed on the pages that follow explore the inter-relationship between the use of finance capital and national interests. We use historical narratives not as means to document the origins of the Odious Debt doctrine as has been commonly done, but rather to demonstrate the complexity attending efforts to create an Odious Debt doctrine that might function in law. [\[FN4\]](#) That the practice of loans-both private and public-and the protocols of repayment have experienced dramatic changes in recent decades does not alter the historic character, and function, of loans in aid of national and foreign policy interests. Simply stated, issues that we confront in our times are themselves a product of the structural and historical convergence of private economic power and political strategies.

This article is predicated on the understanding that attention to Odious Debt is distinguished from other sovereign debt issues by concern for the ways that the use and/or misuse of foreign capital enables human rights violations. Scholars writing about Odious Debt invoke such concerns by calling for the development of mechanisms that will “cut off malignant regimes’ access to weapons or other goods.” [\[FN5\]](#) Commentators who address the burden of repayment of debts originally incurred for the purpose of repression have characterized the need to create an Odious Debt doctrine as a “moral imperative” to avoid “morally repugnant ***702** consequences” attending the enforcement of repayment. [\[FN6\]](#) Indeed, human rights organizations have encouraged the development of an Odious Debt doctrine. [\[FN7\]](#) The orderly and regular payment of debts is, of course, a matter of concern in these discussions. What appears to be the determining factor distinguishing Odious Debt from other sovereign debt restructuring issues is, hence, not simply the proposals for their resolution. Rather, it is the notion that a mechanism, whether ex ante or ex poste, must be created to avoid loans from becoming instruments of repression and harm.

There has been renewed interest in the doctrine of Odious Debt since the war in Iraq. Shortly after the invasion, the United States campaigned for the reduction of Iraq's debt, a significant portion of which could be considered odious. [\[FN8\]](#) Presumably, the elimination of Iraq's debt would enhance Iraqi resources for the benefit of U.S. interests. [\[FN9\]](#) Given the primary purpose of the revitalization of the Odious Debt doctrine, this article suggests that the relationships between finance capital and national interests must be factored in as an element of Odious Debt. The circumstances of the loan, the use of funds by the sovereign debtor state, the nature of the regime, state succession, and, finally, the structures and processes to determine whether such debts should ***703** be repudiated or repaid are all factors which should be considered. This article suggests that the convergence of creditor banking interests with political concerns often contributes to the harmful circumstances sought to be remedied by the doctrine of Odious Debt.

Our paper examines Odious Debt as a matter of banking and U.S. foreign policy. Part II examines the convergence of private and government interests that serve to influence the conditions and purposes of sovereign loans. [\[FN10\]](#) Part II also examines historical narratives as a way to set in relief the complex relations relevant to the creation of Odious Debts. It suggests that the unity of interests between financial elites and U.S. political actors may create the very concerns at issue in the Odious Debt discourse. Part III reviews the manner in which laws, regulations, legal policy, and legal doctrine have been shaped by the convergence of market and policy interests in ways that further complicate the rationales for legal approaches to Odious Debts. [\[FN11\]](#) It examines the suitability of private law functioning “as a coherent set of rules for the centralized adjudication of contracts, torts, and property disputes” as a legal framework for Odious Debt. [\[FN12\]](#) It also reviews existing case law regarding sovereign debt, specifically the Allied Bank-Costa Rica trilogy, with regard to the court's deference to U.S. interests that prevail over other legal considerations in litigating these issues. In the realm of law, the combination of factors that affect laws and legal policy demonstrates the complexity, if not impossibility, of developing a workable legal theory to address Odious Debt. In Part IV, we conclude by suggesting that the templates for resolving Odious Debt must be structured in a manner that transcends the power inherent in developing nations debtor-first world creditor relationships. [\[FN13\]](#)

***704** II. Interlocking Interests: Private Loans to Sovereign States and Foreign Policy

Banking and financial investments, trade and commerce, manufacturing and industry, matters of supply and demand, among other facets of the free enterprise system, do not function in a vacuum. They operate in a real--world context; they act upon--and in turn are acted upon--by a host of factors that often determine survival, many of which have little relationship to market mechanisms. Matters related to public policy and government regulation, graft, corruption, malfeasance, national interests, and foreign policy, among others factors, are conditions that have decisive effects on the workings of market mechanisms. [\[FN14\]](#) Nowhere perhaps do these forces operate with greater effect than in the realm of banking and finance, especially as they relate to international credit transactions.

A. The Convergence of Private Interests and Government Interests.

In designing a legal framework for analyzing Odious Debt, scholars are obliged to acknowledge the realpolitik of global power relationships as the context within which loans to

sovereign states are made. Banks are subject to the constraints of policy imperatives and the national interests of the states in which they operate. In fact, the relationship is dialectical. Bankers wield private economic power and political influence over policymakers with whom they share larger ideological assumptions. Indeed, often policy makers and bankers are the same people, frequently moving between public office and private boardrooms. [\[FN15\]](#) Hence, not infrequently, the lines of interests intersect and converge. These circumstances raise questions about whether these debts are “pure” financial transactions or political intervention in the affairs *705 of other states by other means on behalf of U.S. economic and strategic interests. [\[FN16\]](#) To begin to consider these questions, it is helpful to examine relationships between bankers and government.

1. Bankers and Government

A historical perspective on the relationships between bankers and government offers a useful way to review these relationships and appreciate the ways in which the interaction between private and public actors has influenced economic decisions and political outcomes. The movement of elite actors between the private realm of banking and the public sphere of government is an established facet of American history. Social registries, family genealogies, newspaper society pages, memoirs, business records, and government reports document the social, economic, and political connections between bankers and public officials. [\[FN17\]](#) These relationships have been forged at elite universities, and in private clubs, cemented through professional ties, and replicated in marriages and family affiliations. [\[FN18\]](#)

There exists a vast amount of literature on the topic of influential banking families including regional, national, and international elites. [\[FN19\]](#) The history of J. P. Morgan is emblematic of *706 these overlapping relationships and demonstrates the influence of banks on foreign policy and the reciprocal sway of government interests in market matters. [\[FN20\]](#) The personnel exchanges that have taken place at the highest echelons of policy-making and market transactions have been detailed in a number of accounts. [\[FN21\]](#) Morgan's interests were not the only financial power brokers to play this role. The history of the Rockefeller family, among others, for example, features nearly as prominently in the realm of influential moneyed elite who moved continuously between the private and the public spheres of power. [\[FN22\]](#) But it is Morgan's close and constant personal connections with public officials and the role of Morgan's associates in government that establishes the Morgan family as emblematic of those banking interests that have ready access to political power.

The administration of Theodore Roosevelt (1901-1909) is illustrative of the convergence of finance, commerce, and public policy. [\[FN23\]](#) Roosevelt's Secretaries of State John Hay, Elihu Root, and Robert Bacon all had close ties with banking interests, including Morgan. [\[FN24\]](#) Secretary of Navy Paul Morton served *707 previously as vice-president of the Atchison, Topeka and Santa Fe Railroad in which Morgan had a substantial interest. [\[FN25\]](#) Assistant Secretary of Navy Herbert L. Satterlee was married to Morgan's eldest daughter and had served as Morgan's business associate and advisor. [\[FN26\]](#) This combination of interests shaped a foreign policy in which the lines between national interests and private concerns were always blurred and increasingly merged. Nowhere did these issues reveal themselves with greater clarity than in Latin America.

Historian Gabriel Kolko borrows Max Weber's term "political capitalism" to describe this era as a time when financiers and government officials mixed politics and law "to secure those conditions of stability and predictability so vital to a rationalized capitalist economy." [\[FN27\]](#) Financial loan transactions were the primary means for securing U.S. financial and political leverage throughout Latin America. [\[FN28\]](#) External debts may have been transacted by private banks but the terms of these "controlled" loans were negotiated with the participation of government officials who obtained concessions in the form of control over the *708 borrowing state's economy. [\[FN29\]](#) Debtor states were often obliged to modify elements of public administration and political institutions. They had to agree to transform their economies and accept the advice and direction of financial experts whose judgments would take precedence over the sovereign debtor state and whose power and influence served to interfere with groups who opposed U.S. foreign control. [\[FN30\]](#) Loan transactions thus served as more than "private financial transactions, but as one of the instruments through which national destiny was achieved." [\[FN31\]](#) Credit was a means of political control, often to the detriment of the internal interests of other countries, and often producing the very harm associated with Odious Debt.

2. The Business of Diplomacy, the Diplomacy of Business, and Loans and Hemispheric Hegemony

It was this convergence of interests that also shaped a foreign policy characterized by intervention and interference throughout Latin America, a policy that exemplifies Max Weber's use of the term "political capitalism," an imperial capitalism that uses the force of one state to seize profits from another. [\[FN32\]](#) In this period, armed intervention and military occupation throughout the Caribbean and Pacific were a dominant means of expanding American influence. Financial transactions between banks and *709 states featured prominently in these efforts. [\[FN33\]](#)

This convergence of interests assumed full policy form in 1904 with the pronouncement of the Roosevelt Corollary to the Monroe Doctrine. The pronouncement outlined the imperative by which the United States assumed the role of regional arbitrator of the legitimacy of governments to be measured by payment of debts and obligations. [\[FN34\]](#) Roosevelt's pronouncement was preceded by the actions of European powers who had earlier intervened militarily to force the issue of Venezuela's debt repayment and then sought enforcement of their debt contracts through the Hague Tribunal. [\[FN35\]](#) U.S. politicians and bankers were wary of the exercise of European influence in the hemisphere as well as the subordination of American debts. [\[FN36\]](#) These circumstances encroached on U.S. military and political interests in the region and impaired the interests of U.S. foreign investment bankers as well. Roosevelt sought to rectify this situation in his diplomatic pronouncement:

All that this country desires is to see the neighboring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our hearty friendship. If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere,

ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power. [\[FN37\]](#) *710 U.S. policies were largely successful. As a result of the Roosevelt Corollary, sovereign debt prices in Latin America significantly increased in value. [\[FN38\]](#) But Roosevelt's pronouncement did not by itself comprise the whole of a new policy toward sovereign debt. The United States increasingly resorted to military and political intervention to force the repayment of foreign debt. a. The Santo Domingo Investment Company

The history of the Santo Domingo Investment Company offers an exemplary case study. The U.S. intervention provides a compelling illustration of a web of political and economic concerns for the purpose of reshaping power relations in Latin America.

In the late nineteenth century, Santo Domingo's foreign debt was purchased by the Santo Domingo Improvement Company (SDIC), a New York-based company with ties to officials in the U.S. government. [\[FN39\]](#) Much of the Santo Domingo foreign debt was incurred by a profligate and corrupt dictator, Ulises Heureaux (in and out of power between 1882 and 1899), a long-time ally of the United States who continued to borrow for nefarious purposes while working closely with SDIC. [\[FN40\]](#) At the time of the debt purchase, atrocities committed by Heureaux were known both to SDIC and to the U.S. government. [\[FN41\]](#) These facts were deemed irrelevant to the SDIC and to U.S. politicians. [\[FN42\]](#) Control over Dominican finances served each set of interests: the SDIC seeking to increase its profit, and the U.S. government wishing to increase *711 its dominion in the Western Hemisphere. [\[FN43\]](#) "From Washington's point of view, the project of the SDIC was essentially geopolitical." [\[FN44\]](#)

Historian Cyrus Veaser details the financial transactions and policies of SDIC and Hereaux that resulted in the country's economic collapse and ultimately, in a civil insurrection. [\[FN45\]](#) Heureaux was overthrown and assassinated, while SDIC "became a full-fledged pariah, universally reviled by the Dominican people." [\[FN46\]](#) Successive governments sought to diminish American control and influence over internal affairs and to eliminate foreign financial control, including the SDIC. [\[FN47\]](#) However, as a result of U.S. pressure and threats, subsequent governments were ultimately unsuccessful in their efforts to set their own courts of relations with SDIC and unable to reclaim control of Dominican finances without American interference. [\[FN48\]](#)

Despite arguments in favor of efforts to resolve the debt in the Hague Court or by bringing the dispute to a special international commission for arbitration, the United States insisted that the matter be arbitrated before two Americans and one Dominican. [\[FN49\]](#) The arbitration took place in the United States, notwithstanding the fact that the Dominican Republic generally adhered to the Calva Doctrine which disfavored arbitration in the home state of a foreign investors as a form of meddling in sovereign affairs. [\[FN50\]](#) The *712 attorney for SDIC also represented the interests of the United States. [\[FN51\]](#) Veaser, who examined the arbitration archival records, described the bias in favor of the SDIC and the United States and wrote: "while presenting itself as an appeal to a higher standard of justice, the arbitration in fact resembled the victory of one set of local interests over another." [\[FN52\]](#)

Not surprisingly, the outcome favored SDIC and established not only that the sovereign debt would have to be repaid, but awarded to the United States the exercise of power over all matters of debt repayment and control of Dominican finances. [\[FN53\]](#) The terms of repayment left the Dominican government in a disastrous position, unable to pay other foreign debtors. [\[FN54\]](#) Dominicans were dispossessed of all forms of sovereignty and the resentment and ill-will toward the United States was a source of such instability as to have bearing on the decision by the United States to militarily occupy the country. [\[FN55\]](#)

Although the United States eventually abandoned SDIC for fear that its excesses and “venality” impaired the orderly and controlled operations of capitalism, it did not abandon its geopolitical strategy to act in concert with private financial interests. In the Dominican Republic, as in many other Latin American states, dollar diplomacy functioned in concert with gunboat diplomacy and military occupation. U.S. marines waged ***713** war against Dominican insurrectionists, torturing guerrilla fighters and civilians. [\[FN56\]](#) The centralization of military power by the United States and the disruption of self-governance are credited as having created the Rafael Trujillo regime, described as “the most repressive regime the Dominicans had ever known.” [\[FN57\]](#)

The account of Santo Domingo's sovereign debt during the late nineteenth and early twentieth century illuminates the complicated structural roots of foreign credit transactions. These structural roots are relevant to the development of criteria for determining Odious Debt as a “workable legal theory,” [\[FN58\]](#) including factors of corrupt or suspicious loans, [\[FN59\]](#) odious regime, [\[FN60\]](#) interests of the people, consent of the people, and knowledge of the creditor. [\[FN61\]](#) Proposals that deal with principles of law to be applied, [\[FN62\]](#) and which institutions should adjudicate, [\[FN63\]](#) can be tested by this historical case. The story of SDIC suggests the necessity of including in this analysis the real world relationships between banking and foreign policy and the inexorable entanglement of private financial interests with geopolitical strategic interests.

***714 b.** Cuba, Gerardo Machado, and Chase Bank

The relationship between policymakers and bankers has its antecedents early in the twentieth century, to be sure. But SDIC is not the only instance that sets in relief the matter of Odious Debt as a function of the relationship between, on the one hand, national interests and public policy and, on the other, corporate influence and private gain. In fact, it was not until the post-World War I years, during which time the United States emerged as the most powerful creditor nation in the world, that the efficacy of collaboration between the State Department and banks revealed itself. [\[FN64\]](#) The State Department and banks entered into communications, if not negotiations, and developed the basis for what both parties soon came to appreciate as mutually beneficial and reciprocally useful relationships. In fact, as early as June 1921, J.P. Morgan pledged that all future loans to foreign governments would be undertaken with the full knowledge of the State Department. [\[FN65\]](#)

It was in U.S. relations with Latin America that this collaboration was perfected. U.S. loans to Latin America not only served to advance North American strategic interests but also acted to

promote U.S. economic expansion so vital for national well being. “We now have surplus billions to lend and to invest abroad,” proclaimed Walter Parker of Fenner and Beanne (now Merrill Lynch). [\[FN66\]](#) The U.S. had acquired “the status of world banker” and, as Parker declared, “[m]ore and more we will need the raw materials of other countries. More and more we will need favorable markets in other countries for our manufacturers.” [\[FN67\]](#) The *715 Division of Latin American Affairs predicted that loans for Latin American development, “whether [they] be for materials made in the United States, or for public works, or improvements in lands or industries in Latin America will mean an additional bond of material and mutual interest between North and South America.” [\[FN68\]](#)

The collaboration between banks and the State Department can be seen most vividly in the case of Cuba during the 1920s. Cuban access to U.S. loans, the prerequisite of which was State Department approval, was one of the principal methods by which the U.S. government controlled political outcomes in Cuba. The State Department collaborated closely with J.P. Morgan in developing the conditions for a loan to the government of Alfredo Zayas (1921-1935). [\[FN69\]](#) For its part, the J.P. Morgan interests insisted to the State Department that General Enoch Crowder be retained as U.S. ambassador to Cuba. Crowder, the bankers insisted, was a man in whom they all had confidence to supervise financial transactions. [\[FN70\]](#)

The matter of collaboration between bankers and policymakers vis-à-vis Cuba and in relation to the issue of Odious Debt perhaps is most egregious in the case of the administration of Gerardo Machado (1925-1933). Elected president in 1924, Machado completed his full four-year term of office, whereupon he retained power illegally by extra-constitutional means, and eventually by *716 force and violence. [\[FN71\]](#) All through the late 1920s and early 1930s, as opposition to Machado expanded, Cuba plunged into catastrophic economic conditions. [\[FN72\]](#) Political repression and economic depression combined to edge the island toward social upheaval. [\[FN73\]](#) But it was also true that Machado had created auspicious conditions for U.S. capital. He repressed the communist party and he crushed labor unions. All in all, Machado served as the prototype of “Our Man in Havana.”

It was thus with deepening misgivings that the State Department followed developments in Cuba. Machado, U.S. officials clearly understood with regret, governed Cuba as a dictator, illegally, and through terror and torture. [\[FN74\]](#) But, he had also served U.S. interests well. Thus, the goal of the U.S. government during the late 1920s and early 1930s was to sustain Machado's power until some satisfactory peaceful solution to the Cuban crisis presented itself. To further this end, the State Department used U.S. loans. “The Government cannot afford to cut down expenditures,” warned C.B. Curtis, the U.S. Chargé in Havana to the Secretary of State. [\[FN75\]](#) Curtis stated,

[t]he Government of Cuba is today a dictatorship . . . but his support is none too secure and must be maintained . . . by employment and desired public works given to the people at large . . . The people must be kept satisfied by a proper expenditure of money for Government purposes and the money must be found.” [\[FN76\]](#) And to the point: “[e]conomically, all kinds of expenses must be reduced but, politically, this is almost impossible. A loan must be sought at no very distant date and the United States will probably *717 have to approve the loan because of political considerations.” [\[FN77\]](#) Banks

were thus asked to aid a beleaguered regime out of “political considerations,” as a matter of U.S. policy needs. Indeed, Chase Bank worked closely with the State Department to support Machado while at the same time imposing conditions upon him for the purpose of protecting American interests. [\[FN78\]](#) c. Re-examining the Historical Premise of Odious Debt

There is one final concern regarding the discussion of Odious Debt in a historical context. History is a matter of perspective and, as contested terrain, it accommodates divergent viewpoints and conflicting interpretation. The Odious Debt discourse takes as a point of reference the Cuban debt of 1898. Spain, upon ceding Cuba to the United States, demanded that the U.S. assume responsibility for debt incurred by Spain, repayment for which was to be made with Cuban revenues. [\[FN79\]](#) Scholars often characterize the grounds upon which the U.S. refused to assume the debt as an illustration of the operation of the doctrine of Odious Debt. [\[FN80\]](#) A number of articles that discuss Odious Debt begin with the premise that the Cuban debt owed to Spain could be repudiated because loan proceeds were used to suppress Cubans. [\[FN81\]](#) In fact, it is neither incomprehensible nor unreasonable that the United States sought to avoid assumption of the Cuban debt. What is at issue, however, is the reason given by the United States which must be viewed as an improvised argument raised to the level of “principle” as the basis to reject the Cuban debt.

The American repudiation of the Cuban debt at the end of the U.S. war with Spain (1898) is a complex matter, principally because it is a case very much contingent on the exercise of power. For the Americans to have suggested that the debt had ^{*718}been “imposed upon the people of Cuba without their consent” is not, of course, entirely without merit. Within the context of the Spanish Constitution of 1876, however, Cuba was in fact deemed part of the Spanish nation with the juridical status of an ultramarine province. [\[FN82\]](#) It is not likely that any other Spanish province, Galicia, for example, or Catalonia, would have had the ability to render “consent” to the decision by the State to incur a national debt.

Similarly, the U.S. suggestion at the time--and later propounded by scholars-- that the debt had not been “incurred for the benefit of the Cuban people” is a problematic proposition. The insurrection in Cuba was an internal challenge to Spanish rule by a minority of the population, characterized principally by a war against property and production: that is, the destruction of agriculture, ranching, mining, commerce, transportation, and communication. [\[FN83\]](#) It is certainly a plausible proposition for the Spanish government to have argued it had incurred a debt precisely for the “benefit of the Cuban people”; that is, the debt was incurred in defense of the interests of that vast portion of the population that was not implicated in the insurrection and toward whom the State had fundamental legal responsibilities to act to protect their life and property. Within the framework of the Spanish Constitution, Cuba represented a secessionist challenge. [\[FN84\]](#) Spain was no more disposed to acquiesce to Cuban secession than was the United States inclined to accept the secession of the Confederacy.

Moreover, the settlement between the United States and Spain at the Treaty of Paris in 1899, must be understood to be the result of negotiations between two countries vastly unequal in power. In fact, the United States was determined to reject the Cuban debt. [\[FN85\]](#) ^{*719} The defeat of Spain enabled the United States to impose on Spain a peace settlement on the terms

entirely favorable to American interests. The U.S. repudiation of the Cuban debt has less to do with the circumstances of the Cuban insurrection (1895-1898) than with the logic of the victor imposing the terms of peace on the vanquished. That is, the pronouncement of principles as reason to reject the debt was an *ex post facto* morale rationale to explain a political decision. Considered in this light, the proposition that the U.S. repudiation of the Cuban debt serves as an example of a state practice of refusing to repay an odious debt is doubtful. [\[FN86\]](#)

One only has to consider the long legacy of merged economic interests and political concerns that fostered U.S. sponsored successive regime changes and coups in such countries as Nicaragua, [\[FN87\]](#) Guatemala, [\[FN88\]](#) and Chile, [\[FN89\]](#) as well as the use of loans as an instrumentality of Cold War positioning for the West. [\[FN90\]](#) In *720 these states, invasions, occupations, and regime changes were accomplished in part by a unity of interest in the United States between financial agents and U.S. political actors. [\[FN91\]](#) Agreement as to whether an odious regime was created or defeated by the pursuit of these interests is unlikely, but the awareness of these relationships must inform any approach to these issues. A theory of Odious Debt must include more than the nature of the debt or the parties bound to it; it must also address the geopolitical interests that transcend any particular transaction.

These considerations further complicate the efforts to resolve the problem of Odious Debt. Debt policies may serve as either reward or punishment in foreign policy terms. [\[FN92\]](#) How should scholars, activists, or jurists factor in on this convergence of power? Is the determination of odiousness of a regime affected by American involvement in the support or creation of such regime? Should the claim that financial transactions serve national interests and are sanctioned at the highest level of political authority be a consideration in the resolution of sovereign debt? Is the evaluation of the odiousness of the debt affected by the creation and management of the debt in part as a function of foreign policy? The cases of the SDIC and the Machado loans illustrate that whether through dollar or gunboat diplomacy, bankers and politicians have resolved the issue of sovereign debt repayment in a manner aptly described as functioning as “an alternative to colonialism” to assure the realization of their mutual interests. [\[FN93\]](#)

The relationship between profits and policy is not a condition of the distant past, as illustrated in the following excerpt of a New York Times article on Paul Volcker's transition as Chairman of the Federal Reserve Board to investment banking: “Asked whether he felt prepared for the deal-making side of Wall Street, [Mr. Volcker] said, referring to the negotiations on third-world debt that took place while he was at the Fed, ‘I don't know who you thought was making all those deals; I was.’” [\[FN94\]](#) Debt crises during the 1970s *721 and 1980s elicited a unified response from private financial concerns and government, even when private banks were treated preferentially as compared with official creditors. [\[FN95\]](#) Bankers exert powerful influence on the government and benefit from lobbying, channels of communication, networks, and a range of personal connections where interests are peddled. [\[FN96\]](#) Just as American economic interests depended on the exercise of diplomatic and military power during the twentieth century, so too have such current interests operated at the beginning of the twenty-first century. If, indeed, as many scholars note, [\[FN97\]](#) it is the post-Saddam Iraq debt that has given new life to the Odious Debt debates, we might do well to consider the role of U.S. private financial and political interests in relationship to the Iraqi debt, dictatorship, regime change, and debt forgiveness.

III. Legal Theories

The relationship between finance capital and geopolitical interests is, of course, directly relevant to the consideration of the very circumstances by which Odious Debts may be created. But it is also an essential concern in determining the legal approach to the resolution of debt enforcement. The considerations that influence the making of loans must also inform legal strategies adopted to regulate Odious Debt. If bankers are primary actors in the shaping and implementation of foreign policy and government intervenes in the development of market transactions, how then, *722 does the law reflect this interlocking relationship in the resolution of debt repayment disputes?

This Part reviews the way in which laws, regulations, legal policy, and legal doctrine have been shaped by the convergence of market and policy interests in ways that complicate the rationales for legal approaches to Odious Debts. It questions the efficacy of private law concepts applied in U.S. courts as a framework for a workable legal theory. This part also reviews the trilogy of decisions in *Allied Bank International v. Banco Crédito Agrícola de Cartago* (Allied III) [FN98] as another instance that demonstrates that issues of national interests and foreign policy are at least as relevant in determining outcomes in sovereign debt issues as are principles of law.

A. Foreign Policy and Banking Laws

The regulation of financial institutions serves a number of critical functions related to the soundness and stability of the economy and the competitiveness of financial markets. Although commentators have analyzed the nature of regulations that act to limit lending to foreign borrowers for purposes of minimizing risk exposure, the functions that such regulations may fulfill in regard to implementing foreign policy strategies are often overlooked. [FN99] In this regard, several laws and regulations are worth examining to illustrate the reciprocal relationship between private banking interests and political power relevant to the development of an Odious Debt doctrine.

1. The International Lending Supervision Act

As the 1980s debt crises in developing countries created concerns about the absence of supervision of international lending practices, Congress established oversight procedures to minimize risks to the stability of banking systems. [FN100] During this period, *723 foreign lending to less-developed countries (LDCs) increased significantly, particularly by American commercial banks that were less concerned with how foreign loans might be used than were official lenders. [FN101] Banks often preferred sovereign debtors to private debtors because the former yielded higher profits and offered enormous administrative fees for loans. [FN102]

As a result of the increased activity in the foreign market, Congress passed the International Lending Supervision Act of 1983 (ILSA) to assure that banks properly assessed the risks posed by lending to foreign states and that they maintained adequate reserves in the event of default. [FN103] ILSA, however, did not regulate the nature of foreign loans or the amount of lending abroad. [FN104] And although the statute authorized agencies to rate countries as a means to discourage lending to those states considered “value-impaired,” commentators have noted that

the administrative mechanisms for discouraging loans were based less on measures of market indicators than on political judgments. [\[FN105\]](#) Indeed, the act of declaring that a state lacked creditworthiness could have been politically and economically destabilizing not just to the debtor state and to banks themselves, which could not risk the consequences of declaring the loans non-performing, but also to the ability of the United States to maintain spheres of ***724** influence. [\[FN106\]](#)

In fact, the U.S. government relied on a strategy of making uninterrupted private bank loans to foreign debtors not only as a way of insuring that countries could continue debt repayments and maintain the stability of the banking system, but to maintain its political interests in borrowing countries and support those governments deemed vital to U.S. interests. [\[FN107\]](#) Without the flow of debt dollars, the development and expansion of market economies would have been limited. Just as importantly, it would have been difficult to pursue Cold War policies designed to curry favor with states that could have otherwise been drawn to the Soviet orbit. [\[FN108\]](#) The amount and volume of loans increased with little effective regulatory intervention despite the decreased ability of the LDCs to repay debts. [\[FN109\]](#)

U.S. interests depended on sustained loans to developing countries, notwithstanding the growing debt crisis and the threat of sovereign state defaults. In this regard, ILSA might be described as “soft law” with regard to its stated goals of assuring prudent and responsible banking practices. ILSA provisions were inadequate to regulate banking practices. GAO reports indicate that many banks neither maintained proper scrutiny with regard to risky lending practices nor maintained adequate loan reserves. [\[FN110\]](#) But more had to be done to facilitate loans, even when such transactions may have been contrary to the good management and, perhaps ultimately, the profitability of banks. Sound banking ***725** practices were considered secondary to instrumental banking practices and the need to encourage loans to LDCs. [\[FN111\]](#) Indeed, the banks that experienced the pressure of regulatory agencies were those that were reluctant to extend financing to countries of strategic importance to the United States. [\[FN112\]](#)

2. Baker Plan and Brady Initiative

Two initiatives were designed to deal with the problem of heavy LDC indebtedness where the current or imminent inability to repay debts threatened domestic economic interests and U.S. interests. The first, known as the Baker Plan, encouraged commercial banks to maintain flows of funds to countries of strategic importance to the United States. [\[FN113\]](#) The second, called the Brady Initiative, encouraged loan forgiveness at the same time it encouraged new loans. [\[FN114\]](#) Although neither initiative was statutorily enacted, various federal regulatory schemes that facilitated the plans actually functioned with the force of law. [\[FN115\]](#) Both plans required banks to increase loans to developing countries, even when such loans might conflict with prudent banking practices, and even when such loans would jeopardize the ***726** economic stability of the borrowing countries. [\[FN116\]](#)

a. The Baker Plan [\[FN117\]](#)

The Baker Plan was an initiative set forth by the U.S. Secretary of the Treasury James A. Baker in October 1985 for the purpose of managing the debt crisis. [\[FN118\]](#) The plan was

designed to encourage new loans by American commercial and multilateral lenders to a number of highly indebted countries. [\[FN119\]](#) The loans would be conditioned on the willingness of the borrowing country to implement “market-oriented” reform policies such as deregulation, privatization, and liberalization of trade.” [\[FN120\]](#) Supporters of the plan touted it as a benefit to banking interests as well as foreign policy interests. [\[FN121\]](#)

The plan, considered by most commentators to be a failure, increased the debts of sovereigns already burdened with debt payments they could not make. [\[FN122\]](#) Nonetheless, Baker loans were encouraged by Federal Reserve rules which accorded them favorable treatment. [\[FN123\]](#) Tax regulations provided incentives for Baker Plan loan transactions. [\[FN124\]](#) Banking regulations also eased ^{*727} the restrictions on U.S. bank ownership of foreign companies as part of the Baker Plan transactions so long as the countries involved agreed to liberalize the restrictions on foreign investment. [\[FN125\]](#) As financial experts noted, these new bank rulings promised to facilitate the expansion of banking interests in other sectors such as manufacturing and service. [\[FN126\]](#)

In sum, the Baker Plan allowed U.S. officials to exhort banks to maintain, if not increase, their lending to heavily indebted countries in turmoil. On-going lending was crucial to American interests, particularly in Latin America where a backlash against U.S. foreign and economic policies was taking shape. Banks were encouraged to maintain their loans with Latin America for fear that cash-poor countries would no longer be able to import goods from the United States and would further result in price-cutting measures by nations who urgently needed access to cash. [\[FN127\]](#) However, greater incentives were necessary to obtain the volume of loans demanded by the United States. The Brady Initiative was designed to follow the Baker Plan and further induce banks to intervene in the growing debt crisis.

b. Brady Initiative [\[FN128\]](#)

The Brady Initiative sought to foster market-based solutions to the debt crises by encouraging private creditors to provide debt relief through the conversion of loans into securities bonds and the promotion of debt-equity schemes in addition to some debt reduction or forgiveness. [\[FN129\]](#) Debt forgiveness in this form worked ^{*728} to the benefit of banks because countries would be more likely to borrow again once cleared of old debts. [\[FN130\]](#) As one commentator noted, “[n]ew loans confirmed a country's creditworthiness and this perception generated even more loans. [\[FN131\]](#) Indeed, following the Brady Initiative, foreign capital poured into Latin America. [\[FN132\]](#)

Congress encouraged implementation of the Brady Initiative through a number of measures. [\[FN133\]](#) It extended support to the prescriptions of the Brady Plan in the International Debt Management Act, which directed federal banking regulatory agencies to provide “the widest possible latitude’ with respect to debt restructuring by commercial banks with high exposure to third-world debt.” [\[FN134\]](#) In addition, a series of administrative rulings were enacted that served as inducements to banks. [\[FN135\]](#) Revenue rulings along with favorable tax regulations supported creative means to facilitate and accomplish Brady goals. [\[FN136\]](#) The regulatory function of the Securities and Exchange Commission also aided banks who engaged in Brady-type transactions by issuing a ruling ^{*729} to allow banks to avoid having to recognize a loss

even when the Brady bond values were less than a loan's value despite a pre-existing general SEC interpretation to the contrary. [\[FN137\]](#) Although it was unsuccessful in passing a bill, the United States House of Representatives Committee on Banking and Financial Services encouraged banks to participate in the Brady Plan and sought to authorize favorable risk ratings to Brady-style loans. [\[FN138\]](#) Bank regulators also facilitated the implementation of the Brady Initiative through pressure on banks reluctant to engage in new loan restructuring. [\[FN139\]](#)

The Brady Initiative was considered one of the first efforts to address the debt crises in a coherent and systematic manner. [\[FN140\]](#) It was also considered more successful than the Baker Plan. [\[FN141\]](#) As with the Baker Plan, however, it is difficult to assess the benefits for LDCs. Debtor countries paid the price by having to sell off state ownership in their industries and firms, and privatize without regard to benefits or drawbacks of such economic restructuring. [\[FN142\]](#) The literature is filled with accounts of the difficulties caused by structural adjustment programs and other conditionalities associated to neoliberal reforms. [\[FN143\]](#) There is no evidence that the *730 Brady Initiative, while reaffirming debtor-creditor relations between private banks and sovereign states, improved the well-being of debtor nations. [\[FN144\]](#)

3. Other Statutes Governing Market Transactions with Foreign Governments.

The United States has long pursued geopolitical interests through statutory control of commercial activity and its ability to alter banking practices. [\[FN145\]](#) The Foreign Direct Investment Program (FDIP) was enacted in 1968 after calls for voluntary restraints on foreign direct investment failed to limit foreign direct investments. [\[FN146\]](#) As noted above, Regulation K restricts bank debt-for-equity investment to those countries that have restructured debt and privatized according to externally imposed conditionalities. [\[FN147\]](#) The International Emergency Powers Act that allows the executive *731 branch to regulate foreign loans when, for example, foreign policy or economic issues warranted has also been broadly interpreted in order to gain leverage against other debtor countries. [\[FN148\]](#)

Statutory prohibitions on commercial transactions with sovereigns perceived to be hostile to U.S. interests, even when outside the scope of banking matters, further illustrate the convergence of financial and political interests and are worth briefly mentioning. For example, embargos on trade with Cuba, including the Hickenlooper Amendment (1976), [\[FN149\]](#) the Torricelli Act (1992), [\[FN150\]](#) and the Helms-Burton Act (1996), [\[FN151\]](#) were promulgated due to the Cuban government's expropriation of American assets through nationalization and its refusal to allow American firms opportunities to extract profits from Cuba. More generally, the Trading with the Enemy Act (1917) and other economic sanction statutes impose a range of economic and trade restrictions for foreign policy purposes. [\[FN152\]](#) Similarly, the Foreign Assistance Act (1961) establishes political conditions for any economic aid to foreign countries. [\[FN153\]](#) The International Trade Administration of the Department of Commerce, authorized by the United States and Foreign Commercial Service Act (1980), mandates the Secretary of Commerce to regulate U.S. business activities in conformity with foreign policy interests. [\[FN154\]](#)

*732 The 1949 Export Control Act [\[FN155\]](#) and its successor, the Export Administration Act, [\[FN156\]](#) were used as instruments of the Cold War to weaken the Soviet Union. [\[FN157\]](#) The Foreign Corrupt Practices Act (1977) also placed restrictions on U.S. companies with regard

to foreign transactions. [\[FN158\]](#) Federal law made it a crime for any entity to lend to a sovereign that is in default in the payment of a debt to the United States. [\[FN159\]](#) The Taiwan Relations Act (1979) promoted free markets and commercial exchanges between the United States and Taiwan in function of a foreign policy designed to obstruct the reunification of Taiwan and China. [\[FN160\]](#)

These statutes demonstrate that government interests at times appear to overshadow and limit, if not conflict with, market transactions. [\[FN161\]](#) However, it is often not difficult to identify how market interests converge with trade and other market restriction statutes. The U.S. government encouraged banks to make loans even when growing debts of developing countries threatened their stability. [\[FN162\]](#) At the same time, banks were motivated to make loans because they believed there were significant profits to be made. [\[FN163\]](#) In the case of the Hickenlooper Amendment, which banned trade with Cuba and other sovereigns that expropriate U.S. property, the *733 statute was strongly supported by private economic interests. [\[FN164\]](#) On the other hand, when the legal force of statutes such as the Foreign Corrupt Practices Act do not favor this convergence, enforcement of the law may still be an unlikely scenario. [\[FN165\]](#) The foreign availability provision of the Export Control Act is also instructive here. The Act limits the imposition of controls for foreign policy or national security interests if the controlled goods or services are available “in sufficient quantities and comparable in quality to those produced in the United States so as to render the controls ineffective in achieving their purposes.” [\[FN166\]](#) Thus, national security interests may be tempered by the competitive interests of American business.

These statutes set in relief the difficulties attending efforts to develop strategies to resolve sovereign debt disputes. They suggest that the market rarely acts outside of the scope of national interests, and vice versa. Foreign banking is politicized and foreign policy is commercialized. The realpolitik of lending activity requires a debt resolution framework that addresses not only the circumstances of the sovereign debtor or the practices of creditor banks, but the circumstances of U.S. interests in which all such transactions are conceived and conducted.

B. Private Law Tools, Litigation, and the Resolution of Odious Debt

Writers have identified a broad range of issues which a legal doctrine of Odious Debt ought to address. Scholars have proposed to enumerate the elements by which a regime may be declared odious and they have offered ideas as to those institutions they *734 believe to be best suited for the task. [\[FN167\]](#) Some have suggested a debt-by-debt approach to determine whether certain transactions can be deemed odious. [\[FN168\]](#) Others have suggested the use of bankruptcy to resolve the problem. [\[FN169\]](#) Some commentators have sought to sort out the most appropriate adjudicatory bodies for hearing claims of Odious Debt. [\[FN170\]](#) Much of the discourse is framed around the question of whether Odious Debt is a matter best resolved within the realm of public law or whether private law addresses the issues more effectively. [\[FN171\]](#)

This section challenges the proposition that private law in U.S. domestic courts holds promise for the establishment of a workable legal theory to address Odious Debt. First, it questions the appropriateness of the application of laws that govern private relationships to public matters. Odious Debt, as demonstrated in this article, implies regime changes, coups, occupation, state succession, and the instrumental use of financial transactions for hegemonic

purposes--all facets of empire-building and global hegemonic shifts. [\[FN172\]](#) As a normative concern, these are matters *735 better suited for the application of public international law than private law concepts. Second, this section reviews case law development in the area of sovereign debt disputes to demonstrate that the outcome of such cases is likely to be a function of foreign policy concerns that eclipse other legal considerations. As a result, efforts to litigate Odious Debt will always be idiosyncratic and situational.

1. Private Law and Public Turmoil

Private law has become a dominant tool in the efforts to resolve legal disputes arising out of globalized market transactions. [\[FN173\]](#) Such is the case with sovereign debt matters. Private law has assumed a dominant role in the scheme of sovereign debt repayment generally, notwithstanding the fact that nation-states have long been considered as subjects of public law. [\[FN174\]](#) Predictability, stability, order, and harmonization, all properties associated with private law, are important factors in banking transactions and contract enforcement, and hence explain the appeal of private law arguments in fashioning an Odious Debt doctrine to private economic actors. [\[FN175\]](#)

The characteristic for which private law is credited, if not appreciated, is its perceived indifference to the political. Proponents argue that private law provides the basis for “utterly nonpolitical arguments” and “change[s] the nature of any dispute from hotly ideological to seemingly neutral and objective.” [\[FN176\]](#) *736 Private law concepts, it is suggested, offer the all-important quality of impartiality. [\[FN177\]](#) The apparent disregard for redistributive concerns and for distance from government regulation have been celebrated as properties likely to enhance private ordering of contractual rights and obligations. [\[FN178\]](#) Debts falling within this category of concerns may be well-suited by private law formulas.

As one scholar has noted, with other issues implicated in the Odious Debt discourse, debating the proper place of private law may “serve as proxy for a much more basic battle over much larger stakes.” [\[FN179\]](#) If we consider the human rights concerns that distinguish Odious Debt from other debt, we must decide whether the roles and functions of private law are consistent with the tasks at hand. Even private law principles such as illegality, unconscionability, duress, unclean hands, unjust enrichment, and other equitable claims and defenses are limited to the dealings of the parties to the transaction. The purpose of private law is to do justice between the parties to the dispute without influencing outside relationships. [\[FN180\]](#) When put to the purpose of resolving international disputes, private law purportedly does not determine or interfere with systemic changes. [\[FN181\]](#) According to these claims, private law is not suited to function as a set of normative rules with general applicability to discourage governments or lenders from entering into debts that may have morally repugnant consequences for the citizens of the debtor state. Private law functions thus limit what can and should be accomplished in regard to Odious Debt.

There is a paradox to be noted, however, which further confirms that private law is not suitable as a framework for a legal *737 theory to resolve Odious Debts. Private law, notwithstanding its designation as apolitical, often serves political interests as much as it responds to the logic of the market. Its political dimensions are of the order of the market, not the

order of human rights. Although its bias may be “rendered invisible by an ideology that defines the private sphere in apolitical terms,” private law often “functions ideologically and normatively to support the value and superiority of economic liberalism.” [\[FN182\]](#)

Historian Emily Rosenberg has demonstrated the way in which loans negotiated as private contracts between sovereign debtors and private creditors functioned in aid of U.S. capital interests. [\[FN183\]](#) She notes that the rhetoric of contract law, particularly in relationship to sovereign debtors and private creditors, may conceal relationships of power under the guise of contract principles such as mutuality. [\[FN184\]](#) Indeed, it was through the private contract provisions, with its emphasis on private law enforcement mechanisms, that the United States often exercised dollar diplomacy as marketplace transactions and thus gained control of developing countries, particularly in Latin America, for its own political and economic interests. [\[FN185\]](#)

In fact, Odious Debts cannot be treated as a nonpolitical matter. Such debts are not the exclusive business of private international actors. Consideration of Odious Debts requires a workable legal theory that acknowledges public international law, the normative character of which is more suited to systemic transformations and human rights concerns as opposed to private law “that empties or neutralizes the law of the land.” [\[FN186\]](#) Private ***738** law, its proponents admit, provides no readily useful solution to Odious Debt.

2. Litigating Odious Debts in U.S. Courts

In addition to considering proposals as to the type of law that should apply to Odious Debt disputes, there is also the matter of the location where such disputes might be resolved. Some scholars have proposed the courts of the United States. [\[FN187\]](#) There is no existing body of case law vis-à-vis Odious Debt that illustrates how such a doctrine would fare if these issues were to be litigated in the domestic courts of the United States. [\[FN188\]](#) There are, however, a number of cases related to sovereign debt repayment, and a review of these decisions offers some insight into the possible outcomes. We focus on *Allied Bank International v. Banco Crédito Agrícola de Cartago*, [\[FN189\]](#) a case that has been the subject of scholarly analysis elsewhere, particularly with regard to the act of state doctrine which “operates to confer presumptive validity on certain acts of foreign sovereigns by rendering non-justiciable claims that challenge such acts.” [\[FN190\]](#)

Allied is instructive for a number of reasons. The case was initially brought in 1982 by a syndicate of creditor banks after Costa Rica suspended payments on its external debts in response to a growing economic crisis (Allied I). [\[FN191\]](#) Costa Rica was the first country in Latin America to cease payments on external debts. [\[FN192\]](#) Costa Rica filed a motion to dismiss the action on grounds including sovereign immunity and the banks subsequently filed for summary judgment. [\[FN193\]](#) Costa Rica responded by raising the act of state doctrine. [\[FN194\]](#) In July 1983, the district court denied both ***739** motions, and noted a judgment in favor of Allied in this case would put the judicial branch of the United States at odds with policies of central importance as articulated by a foreign government and was not deemed to be in the interest of the U.S. government who might suffer in relations to Costa Rica. [\[FN195\]](#) Thereafter, an agreement was reached between thirty-eight of the thirty-nine creditor banks; Costa Rica

refinanced its debts, payments resumed, and the case was dismissed. [\[FN196\]](#) The one hold-out creditor, however, appealed, (Allied II) and the U.S. Court of Appeals for the Second Circuit heard the matter. [\[FN197\]](#)

In Allied II, argued and decided in the Spring of 1984, the Court of Appeals for the Second Circuit, while affirming the district court, did so under principles of comity, and did not determine the applicability of the act of state doctrine. [\[FN198\]](#) Instead, the court held that Costa Rica's actions in cancelling repayment of debt were consistent with the law and policy of the United States and that both the U.S. legislative and executive branches were fully supportive of Costa Rica's actions. [\[FN199\]](#) The court delved into the views of the U.S. government with some particularity, and excerpted passages from legislative hearings held around the time Costa Rica had issued its decrees prohibiting payment through late 1983:

President Reagan and the Congress reacted sympathetically to Costa Rica's financial crisis and its default on Foreign Assistance Act loans. The President advised that [continuation of] U.S. assistance to Costa Rica is consistent with the commitment of this Administration and in Congress to help Costa Rica regain economic viability. We therefore regard such assistance, which is designed to help the Government with financial and management reforms and with needed credit to the private sector, as vital and in the national interest. We are *740 hopeful that bilateral debt restructuring will be completed within the next several months. [\[FN200\]](#) The court noted additional evidence of the government's opinion on this issue, citing the Congressional resolution and history: the House of Representatives also expressed "full support for the Republic of Costa Rica and its democratic institutions as that country responds to the current economic crisis" (citations omitted). [\[FN201\]](#) And finally, the court noted, In January 1983, the United States joined several other nations in the signing of the Paris Club Agreed Minute which rescheduled the intergovernmental debt of Costa Rica. The Agreed Minute contained a provision recommending the rescheduling of Costa Rica's commercial obligations. [\[FN202\]](#) On this last point, the court cited the brief in support of Costa Rica as its source. [\[FN203\]](#) For the first time, in June 1984, the United States lent its support to the creditor banks that had requested rehearing. [\[FN204\]](#) In Allied III, the United States appeared as amicus curiae and enunciated a different position than two federal courts had previously interpreted. [\[FN205\]](#) The U.S. government sought to explain its apparent inconsistencies with its earlier statements upon which the court had relied. [\[FN206\]](#) It claimed that while it supported the principles of negotiated debt payment, it opposed Costa Rica's unilateral effort at restructuring as inconsistent with U.S. policy. [\[FN207\]](#) On the basis of this new elucidation of the government's position, the court reversed its previous decisions. [\[FN208\]](#)

The court subsequently analyzed the act of state doctrine as the next step in determining whether the Costa Rican decrees *741 repudiating debt were subject to judicial review by U.S. courts. [\[FN209\]](#) The court explained that the act of state doctrine was primarily concerned with foreign policy prerogatives within the province of the legislative and executive branches, and required a determination as to whether judicial consideration of Costa Rica's acts would prejudice U.S.-Costa Rica relations. [\[FN210\]](#) Notably, the court made reference to the Supreme Court's judicial preference to "avoid the creation of 'an inflexible and all-encompassing rule' to govern the applicability of the doctrine." [\[FN211\]](#) As we argue in this article, however, such

flexibility also allows strategic interests to prevail over principles and thwart the goals of those who seek to develop a workable legal theory to resolve Odious Debt. [\[FN212\]](#)

The court ultimately avoided a determination of the application of the act of state doctrine to Costa Rica's decrees. It held that the situs of the debt was the United States and not Costa Rica, and thus, the act of state doctrine did not apply. [\[FN213\]](#) Its final assessment, however, turned on the U.S. position that Costa Rica's unilateral effort to repudiate private debt was inconsistent with U.S. policy on debt obligation and contrary to U.S. interests. [\[FN214\]](#)

The case of Costa Rica invites a closer examination of the context within which the Allied claim was decided. Each decision turned on the position of the United States. It must be asked: Is it plausible to conclude that the government of the United States would not have made its position known in Allied I? Should we accept that the United States revealed to neither party nor the courts its position on Costa Rica's obligations when the case was first appealed in Allied II, particularly given that Costa Rica in its brief claimed to articulate the U.S. government's position? The district court dismissed Allied's claim explicitly on its understanding of the government's position. Would the United States not have been concerned about expressing its policy on such a critical case as sovereign debt knowing that court decisions would be premised on its very views of the matter?

The U.S. government remained silent when the case first came before the court of appeals. What changed? One might argue that Costa Rica's actions changed, but only to renegotiate and to recommence payment to the satisfaction of thirty-eight of the thirty-nine creditors, actions that were consistent with the articulated position of the United States in Allied III. Costa Rica's unilateral determination to repudiate debt, the basis upon which the United States explained its position in Allied III may have been the state of facts in Allied I and Allied II, and may have been the state of facts when the decision was made to continue U.S. aid and when U.S. support was expressed for Costa Rica's efforts to solve its economic crisis. Costa Rica, however, was not engaged in unilateral actions (if ever they were) when Allied III was decided.

Omitted from the discussions of the Allied decisions are other important dimensions of U.S.-Costa Rica relations. The reversal of the U.S. government is perplexing. Clearly something happened between October 1983 (Allied II) and June 1984 (Allied III) to cause the Reagan administration to reverse itself-- awkwardly and unexpectedly--on the matter of the Costa Rican debt. The circumstances surrounding this change serve to underscore the anomalous character of the Odious Debt discourse.

The explanation may have to do with the changing strategic interests of the United States. During the early 1980s, U.S. covert operations against the Sandinista government in Nicaragua were in the process of expanding and in need of larger regional legitimacy, for which Washington demanded support from Costa Rican President Luis Alberto Monge. Indeed, keeping Costa Rica financially sound and "as a counterweight to Nicaragua" was a key U.S. strategic interest. [\[FN215\]](#) However, in November 1983, only one month after Allied II, President Monge proclaimed Costa Rican neutrality and refused to cooperate with U.S. intervention efforts against the Sandinista government. [\[FN216\]](#)

In the months that followed, the United States increased its *743 pressure on the Monge government. Washington extended support to anti-Monge factions inside Costa Rica. The United States, only one month before intervening in Allied III as amicus, was seeking to exploit the “deepening existing conflicts within the Government of President Luis Alberto Monge, who is firmly committed to the nation's neutrality, and strengthen the hand of his opponents in the country who are more supportive of Washington's position.” [\[FN217\]](#) At the same time, U.S. Ambassador Curtin Winsor was reported to have threatened the Costa Rican government with a denial of foreign aid. [\[FN218\]](#) Subsequently, documents produced during the trial of Oliver North detailed the economic blackmail waged by the United States against Costa Rica in an effort to enlist its support for the “Nicaraguan resistance.” [\[FN219\]](#) It is in this context that the reversal of the Reagan administration against the Costa Rican government becomes intelligible, and in the process raises corollary issues of the degree to which matters of debt, and the impartiality of U.S. courts, can credibly be separated from the political interests of the United States.

U.S. strategic interests do not tell the entire story of Costa Rica's sovereign debt. In the early 1980s, Costa Rica was targeted to receive large amounts of U.S. funds tied to structural adjustments and policy changes emphasizing privatization. [\[FN220\]](#) U.S. officials insisted that Costa Rica privatize its banks, and much of U.S. aid was targeted for this purpose. [\[FN221\]](#) Indeed, the United States was keen on reforming Costa Rica's social welfare state and reshaping it to conform to the policies and programs of neoliberalism to the benefit of U.S. economic interests. [\[FN222\]](#) U.S. aid *744 and loans required shifts in agricultural policies that benefitted foreign-owned agribusinesses while small Costa Rican businesses were losing their footing. [\[FN223\]](#) As a result of these policy shifts, foreign debt soared. [\[FN224\]](#) For those concerned with Odious Debt, an additional concern to be examined is the extent to which U.S. interests and influence in Costa Rica contributed to its sovereign debt difficulties.

Allied is but one sovereign debt case whose outcome is tied to the expressed interests of the U.S. government. There may be little else at issue in these matters as the courts have not been susceptible to defenses that might otherwise be available to sovereign debtors. [\[FN225\]](#) Sovereign debt cases that follow the Allied decisions have corresponded to shifting U.S. interests. [\[FN226\]](#) Some may defend this process as duly deferential to the “institutional competence and . . . the distinctive position of the President in the domain of foreign affairs.” [\[FN227\]](#) But this hardly leads to a workable legal theory for resolving Odious Debts and defeats any likelihood *745 of achieving stability, predictability, or a common set of standards by which relief may be granted for citizens plagued with the burdens of these transactions.

IV. Conclusion

The examination of these relationships as a matter of the historical record serves to set in relief the complex-and indeed the inexorable-interaction between national interests and finance capital under optimum circumstances. We suggest these to be optimum conditions in the sense that the passage of time has afforded the researcher the opportunity to access private personal papers, corporate records, and government classified documents. In sum, these are materials that were previously closed but are vital to a fuller understanding of the workings of financial interests and political power in the real world. This array of research materials provides a rich

source of information that is unavailable for the study of recent developments. It is thus to the past that we turn in search of insight into the real workings of Odious Regimes and Odious Debt as a means to advance some tentative approaches to similar concerns in the present.

It is as a result of the insights gained from the past that we suggest that the development of a legal theory relative to Odious Debt must perforce address the complex web of interests implicated in transactions between private creditors, sovereign debtors, and national interests. In fact, we believe that the development of a usable legal theory to address Odious Debt is a highly problematic proposition. As a normative matter, we think that private legal tools are poorly disposed to accomplish these goals. [\[FN228\]](#) The mere invocation by the U.S. government of matters *746 of “national security,” for example, is often sufficient to affect the outcome, if not suspend judicial proceedings wherein such concerns are raised. [\[FN229\]](#)

We would thus prefer to think more about addressing the conditions that create Odious Debt in the first place. If indeed, as we suggest, there is little likelihood for the development of a usable Odious Debt legal theory, and notwithstanding the appeal of the intellectual challenge of the academic exercise that such an undertaking implies, it would be perhaps more fruitful to reflect on some of the larger implications of the real world context of the Odious Debt discourse if only to understand the nature of the international system, from which perhaps other kinds of useful knowledge may be obtained.

Most importantly, however, we think that lenders, whether official or private, ought to take a page from domestic lenders such as Self Help Credit Union [\[FN230\]](#) based in North Carolina, or Acción USA based in Boston. [\[FN231\]](#) Their principles of lending strengthen businesses and the communities where they operate, and who have identified comparative principles of Odious Debt in the form of predatory lending issues, and whose practices may provide the standards for creating wealth and creating markets, accomplished without exploitation or harm. As Robert Kuttner stated,

[t]he nations of the developing world are not just ‘emerging markets,’ as the phrase has it. They are human societies. It is high time to make markets our servant, not our master. We need to appreciate the power of the engine, but recognize that it needs to be steered; and to respect that human ingenuity and social consensus take as many diverse forms as there are diverse cultures. Commerce may be *747 global, but the paths to human development are substantially local. We have not reached the end of history, and those who think so should read some history with more humility. [\[FN232\]](#)

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[\[FN1\]](#). Tariq Ali, *The Clash of Fundamentalisms: Crusades, Jihads and Modernity* 286 (2003).

[FN2]. Jeff Gerth, Pressure on Bank Regulators, N.Y. Times, Nov. 11, 1982, at D3 (quoting U.S. Representative Jim Leach, (R-Iowa)).

[FN3]. Lee Buchheit et al., The Dilemma of Odious Debts, Duke L.J. (forthcoming 2007) (manuscript at 15-16, on file with authors).

[FN4]. See *infra* Part II.

[FN5]. Patrick Bolton & David Skeel, Odious Debt or Odious Regimes? 70 Law & Contemp. Probs. (forthcoming May 2007) (manuscript at 1, on file with authors).

[FN6]. Buchheit et al., *supra* note 3, at 22-24.

[FN7]. Probe International, Odious Debts, [http:// www.odiousdebts.org/odiousdebts/index.html](http://www.odiousdebts.org/odiousdebts/index.html) (last visited Apr. 11, 2007); Jubilee Iraq, <http://www.jubileeiraq.org/blog/> (last visited Apr. 11, 2007); Campaign for the Cancellation of Haiti's Debt, [http:// www.haitisupport.gn.apc.org/fea_camps_main.html#de](http://www.haitisupport.gn.apc.org/fea_camps_main.html#de) (last visited Apr. 11, 2007).

[FN8]. Testimony of John B. Taylor, Under-Sec'y of the Treasury for Int'l Affairs before the House Appropriations Subcommittee on Foreign Operations, (May 20, 2004), available at <http://www.treas.gov/press/releases/js1669.htm>.

[FN9]. Iraqi Debt: Double Speak (Sept., 2004) (Int'l Cooperation for Dev. & Solidarity unpublished manuscript, on file with author), available at [http:// www.cidse.org/docs/200409271712468293.pdf](http://www.cidse.org/docs/200409271712468293.pdf) (observing that U.S. economic interests wanted to avoid encumbering their investments with prior debt burdens: “[f]or the US, letting the debt contracted by Saddam Hussein burden Iraq's budget and mortgage future oil revenue is out of the question”). Esther Pan, Council on Foreign Relations, Iraq: The Regime's Debt (2003), [http:// www.cfr.org/publication/7796/](http://www.cfr.org/publication/7796/) (characterizing forgiveness of Iraqi foreign debt as a “real boom waiting to happen”). Tai-Heng Cheng, Renegotiating the Odious Debt Doctrine, 70 Law & Contemp. Probs. (forthcoming May, 2007) (noting that U.S. corporations would benefit by debt repudiation which would assure that Iraqi revenues would be available to them as opposed to pre-existing debts).

[FN10]. See *infra* Part II.

[FN11]. See *infra* Part III.

[FN12]. Daniela Caruso, [Private Law And State-Making In The Age Of Globalization](#), 39 N.Y.U. J. Int'l L. & Pol. 1, 5 (2006).

[FN13]. See *infra* Part IV.

[FN14]. See Albert H. Choi & Eric Posner, A Critique of the Odious Debt Doctrine 1-2 (Univ. of Va. Pub. Law and Legal Theory, Working Paper No. 58, 2007) (noting the various and complex reasons that support relationships, including trade, with dictatorial regimes) available at <http://www.villanova.edu/schools/law/papers/workingpapers/58.pdf>.

law.bepress.com/cgi/viewcontent.cgi?article=1098&context=uvalwps.

[FN15]. See *infra* notes 17-26 and accompanying text.

[FN16]. See Emily Rosenberg, *Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy, 1900-1930*, at 60 (1999) (describing the control of finances and debt repayment by the United States in the Dominican Republic as “an alternative to colonialism that would still institute the supervision ... deemed necessary for fiscal and social reform”). *Id.*

[FN17]. Godfrey Hodgson, *The Foreign Policy Establishment*, in *Ruling America, A History of Wealth and Power in a Democracy* 215, 220 (Steve Fraser & Gary Gerstle, eds., 2005) (describing establishment elites connected through class, culture, and dynasty).

[FN18]. See generally Murray N. Rothbard, *Wall Street, Banks, and American Foreign Policy* (1995), available at [http:// www.lewrockwell.com/rothbard/rothbard66.html](http://www.lewrockwell.com/rothbard/rothbard66.html) (providing a detailed account of the span of these relationships developed primarily through family and marriages ties, personal friendships, and close business partners).

[FN19]. See, e.g., Kevin Phillips, *American Dynasty, Aristocracy, Fortune, and the Politics of Deceit in the House of Bush* (2004); Cyrus Veaser, *A World Safe for Capitalism: Dollar Diplomacy and America's Rise To Global Power* 5, 16-19 (2002) (detailing the connections between the N.Y.-based investment company that controlled finances in the Dominican Republic with U.S. presidents, cabinet members, and diplomats). For other scholarly works on these relationships, see generally, Ron Chernow, *The House of Morgan* (2001); Jean Strous, *Morgan: American Financier* (2000); Kenneth Hafertepe, *Banking Houses in the United States: The First Generation*, 35 *Winterthur Portfolio* 1781 (2000); Charles R. Geisst, *Wall Street: A History* (1997); Kathleen Bark, *Morgan Grenfell, 1838-1988: The Biography of a Merchant Bank* (1990).

[FN20]. Rothbard, *supra* note 18, at 3 (demonstrating the influence of the Morgan family on administrations from the mid 1800s through the beginning of the 20th century).

[FN21]. Karen S. Hoffman, “‘Going Public’ in the Nineteenth Century: Grover Cleveland's Repeal of the Sherman Silver Purchase Act,” 57 *Rhetoric & Pub. Aff.* 62 n.21 (2002) (noting that Morgan served as financial advisor to Grover Cleveland); Richard H. Wiebe, *The House of Morgan and the Executive, 1905-1913*, 65 *Am. Hist. Rev.* 49, 51 (1959) (describing the close and controlling relations between J.P. Morgan and Senator Nelson W. Aldrich).

[FN22]. See generally Peter Collier & David Horowitz, *The Rockefeller: An American Dynasty* (1976); see also Rothbard, *supra* note 18, at 21-22 (describing the influence of Morgans and Rockefeller with regard to the establishment of the federal reserve system).

[FN23]. See Joseph G. Haubrich & João A. C. Santos, *Alternative Forms of Mixing Banking with Commerce: Evidence from American History*, 12 *Fin. Markets, Inst. & Instruments* 121 (2003) (providing an overview of the convergence of banking and commerce).

[FN24]. Bacon was a member of J.P. Morgan & Company from 1894-1903. Hall of the Secretaries of State, <http://dosfan.lib.uic.edu/ERC/secretaries/rbacon.htm> (last visited Apr. 11, 2007). See John Milton Cooper, Jr., *The Five Who Made Empire*, 79 Va. Q. Rev. 578, 581 (2003) (noting that Root gained a reputation as counsel for J.P. Morgan).

[FN25]. See History of the Randsburg Railway, <http://www.randsburg-railway.com/history.htm> (last visited Apr. 11, 2007); Carlos D. Ramirez, *Did J. P. Morgan's Men Add Liquidity? Corporate Investment, Cash Flow, and Financial Structure at the Turn of the Twentieth Century* 50 J. of Fin. 661, 667 (1995) (noting the affiliation and control of the railroad company by Morgan); Rothbard, *supra* note 18, at 11-12 (noting the relationship between Morton and the Morgan-controlled Atchison, Topeka, and Santa Fe).

[FN26]. Rothbard, *supra* note 18 at 12

[FN27]. Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916*, at 179 (1963). Using letters and correspondence between business and government, Kolko documents the ways in which antitrust legislation reflected the interests of big business, which recognized a need for order and control. *Id.* at 167. See Wiebe, *supra* note 21, at 51 (noting that Roosevelt's antitrust initiatives were no bane to Wall Street, whose influential members financed his candidacy for a second term as President); see also Steven A. Ramirez, [Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It](#), 61 Wash. & Lee L. Rev. 1583, 1613 (2004).

[FN28]. Rosenberg, *supra* note 16, at 65 (describing Morgan and other banking interests as focusing on Latin America). See Alberto Gonzalo Santos, [Beyond Baker and Brady: Deeper Debt Reduction for Latin American Sovereign Debtors](#), 66 N.Y.U. L. Rev. 66, 67 (1991) (describing the sizeable debt owed by Latin American countries to private banks).

[FN29]. Rosenberg, *supra* note 16, at 62. Rosenberg also describes how sovereignty of borrowing states was further impaired by the importation of economic experts who advised debtor governments about how to transform their economies in ways that benefited the United States. *Id.* at 195-96.

[FN30]. *Id.* at 92-93, 105 (noting that financial supervision of sovereign debtors by U.S. professional managers was at times buttressed by military control, although such supervision was designed to substitute for out and out colonialism).

[FN31]. *Id.* at 52 (describing the view of European lenders whose views were emulated in the United States).

[FN32]. The U.S. military seized territories and sponsored regime changes in the 1890's (Spanish American War, Brazil, Nicaragua, Santo Domingo, and Panama), making way for Morgan family banking interests to profit through purchase and control of the Panama Canal Company. Kris James Mitchener & Marc Weidenmier, *Empire, Public Goods, and the Roosevelt Corollary*, 65 J. of Econ. Hist. 658, 676 (2005); Max Weber, *Economy and Society* 917 (Guenther Roth and Claus Wittich eds. 1968); Peter Breiner, 'Unnatural Selection': Max Weber's Concept of Auslese

and His Criticism of the Reduction of Political Conflict to Economics, 18 Int'l [Rel. 289, 304 \(2004\)](#).

[\[FN33\]](#). Rosenberg, *supra* note 16, at 92-93.

[\[FN34\]](#). The Roosevelt Corollary to the Monroe Doctrine, H.R. Doc. No. 1-59, at xxxiii-xxxv (1904), available at <http://www.state.gov/r/pa/ho/time/gp/17660.htm>.

[\[FN35\]](#). Mitchener & Weidenmier, *supra* note 32, at 662.

[\[FN36\]](#). *Id.*

[\[FN37\]](#). The Roosevelt Corollary to the Monroe Doctrine, President Theodore Roosevelt's Annual Message to Congress, Dec. 6, 1904, in *The State of the Union Messages of the Presidents 1790-1966*, at 2134 (Fred L. Israel ed. 1966), available at <http://www.latinamericanstudies.org/us-relations/roosevelt-corollary.htm>.

[\[FN38\]](#). Mitchener & Weidenmier, *supra* note 32, at 664-66, 670 (quoting the Corporation of Foreign Bondholders who attributed rising bond prices to the Corollary: "the increase in values is largely due to the idea that the recent utterances of President Roosevelt with regard to the Monroe Doctrine were intended to indicate that the United States Government would not allow the Spanish-American Republics ... to evade the payment of their liabilities to their foreign creditors").

[\[FN39\]](#). Veaser, *supra* note 19 at 3, 11, 16-19 (noting that SDIC's president, Smith M. Weed, was a close friend of Grover Cleveland and had close consultation with President Benjamin Harrison about his intention to usurp control of Dominican finances from the Europeans).

[\[FN40\]](#). *Id.* at 3.

[\[FN41\]](#). *Id.* at 12.

[\[FN42\]](#). *Id.*

[\[FN43\]](#). *Id.* at 13, 23 (describing meetings between SDIC operatives and the U.S. Dep't of State in which the Secretary of State encouraged SDIC's venture in the hopes that U.S. strategic interests in the area would be improved as Europeans would be divested of their interests by SDIC's transactions).

[\[FN44\]](#). *Id.* at 43.

[\[FN45\]](#). Veaser, *supra* note 19 at 3, 75 (explaining that SDIC management was for the purpose of making profits from buying and selling Dominican debts; no profits would yield to the benefit of the state or the lives of its citizens).

[\[FN46\]](#). *Id.* at 3; Mitchener & Weidenmier, *supra* note 32, at 681.

[FN47]. Veese, *supra* note 19, at 99-100.

[FN48]. *Id.* at 100-09.

[FN49]. *Id.* at 110; Richard H. Collin, Theodore Roosevelt's Caribbean: the Panama Canal, the Monroe Doctrine, and the Latin American Context 402-03 (1992). See Charles Beard & Mary Beard, History of the United States: Progressive Democracy and the World War 503-36 (Macmillan 1921), available at <http://www.marxists.org/archive/beard/history-us/index.htm>.

[FN50]. Anoosha Boralessa, [Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles That Transnational Corporations May Face](#), 17 N.Y. Int'l L. Rev. 53, 58-59 (2004); Christina L. Whittinghill, [The Role and Regulation of International Commercial Arbitration in Argentina](#), 38 Tex. Int'l L.J. 795, 798 (2003) (explaining that the Calvo doctrine enunciated by an Argentine jurist in 1868, "stated that foreign investors should not be allowed to resort to their home governments to solve their disputes in Latin America"); D. H. N. Johnson, Review: The Calvo Clause. A Problem of Inter-American and International Law and Diplomacy by Donald R. Shea, 20 Mod. L. Rev. 428, 429 (1957); Cyrus Veese, Inventing Dollar Diplomacy: The Gilded Age Origins of the Roosevelt Corollary to the Monroe Doctrine, 27 Diplomatic Hist. 301, 305 (2003).

[FN51]. Veese, *supra* note 19, at 105, 110 (describing the role of John Bassett Moore, who served as counsel for SDIC and as the representative of the State Department in legal proceedings to enforce payment of SDIC's debt).

[FN52]. *Id.* at 118; see also Veese, *supra* note 50, at 305 n.14 (citing sources that connected the arbitrators with men influential with SDIC).

[FN53]. Veese, *supra* note 50 at 307.

[FN54]. Veese *supra* note 19 at 123.

[FN55]. Veese, *supra* note 50, at 311-12.

[FN56]. See Bruce J. Calder, The Impact of Intervention: The Dominican Republic During the U.S. Occupation of 1916-1924, at 115 (2006).

[FN57]. *Id.*; see also Veese, *supra* note 19, at 160 (noting Rafael Trujillo's brutal 31-year dictatorship was described as a "legacy" of the centralization of power by the U.S. marines during the occupation).

[FN58]. Buchheit et al, *supra* note 3, at 23.

[FN59]. *Id.* at 39-40.

[FN60]. Bolton & Skeel, *supra* note 5, at 1.

[FN61]. Ashfaq Khalfan et al., *Advancing the Odious Debt Doctrine* (Ctr. for Int'l Sustainable Dev. Law, Working Paper No. COM/RES/ESJ, 2003), available at <http://www.cisd.org/pdf/debtentire.pdf>.

[FN62]. Buchheit et al, *supra* note 3, at 36-55 (discussing the use of the law of agency as a defense to Odious Debt); Adam Feibelman, *Contract, Priority and Odious Debt*, 85 N.C. L. Rev. (forthcoming Mar. 2007) (suggesting that sovereign debtors and creditors should adopt a contractual approach).

[FN63]. Bolton & Skeel, *supra* note 5, at 3 (proposing that the United Nations Security Council and the International Monetary Fund should determine characteristics and resolution of Odious Debt); Michael Kremer & Seema Jayachandran, *Odious Debt*, (Nat'l Bureau of Econ. Research, Working Paper No. W8953, 2002), (proposing an odious debt tribunal) available at <http://www.nber.org/papers/w8953>.

[FN64]. Memorandum from W.W. Cumberland, Office of the Foreign Trade Advisor, (Sept. 27, 1921) (on file with the National Archives, Washington, DC, File 811.51/2981, DS/RG 59), (reflecting that this collaboration developed as a strategy whereby both parties came to understand their mutual interests). W.W. Cumberland of the State Department Office of Foreign Trade acknowledged that cooperation was necessary so that "both the government and business can obtain mutual advantages from being mutually informed regarding their respective operations and policies." *Id.*

[FN65]. Letter from J.P. Morgan to Warren Harding, (Jun. 6, 1921) (on file with the National Archives, Washington, D.C., File 811.51/2981, DS/RG 59).

[FN66]. Walter Parker, *The Trade Promise of the New World*, in *Official Report of the Fifteenth National Foreign Trade Convention* 142-43 (Nat'l Foreign Trade Council 1928).

[FN67]. *Id.*

[FN68]. Memorandum from the Division of Latin American Affairs to Sumner Welles, (Sept. 29, 1921) (on file with the National Archives, Washington, D.C., File 811.51/2981, DS/RG 59).

[FN69]. See Letter from Dwight W. Morrow, Partner of J.P. Morgan & Co., to Alfredo Zayas (Oct. 7, 1921) (on file with the National Archives, Washington, D.C., File 837.51/624, DS/RG 59), Letter from Charles Evan Hughes to J.P. Morgan (Oct. 20, 1921) (on file with the National Archives, Washington, D.C., File 837.51/624, DS/RG 59).

[FN70]. Letter from Dwight W. Morrow, Partner of J.P. Morgan & Co., to Charles Evans Hughes, (Dec. 27, 1922) (on file with Amherst College Archives and Special Collections under Cuba-Correspondence, 1921-1922, Dwight W. Morrow Papers) (documenting that that private loans in furtherance of U.S. interests were conditioned on the appointment of Crowder). "The bankers with whom I have talked," J.P. Morgan partner Dwight Morrow wrote privately to Secretary of State Charles Evans Hughes, "are satisfied that Cuba is fundamental[ly] sound, but

that her immediate problems are most intricate. They believe that the service of the loan and the general conduct of Cuban finances depend to a large extent upon the ability of the American representative, backed by the Department of State, to guide the Cuban administration to satisfactory performance.” Id.

[FN71]. Robert Whitney, *State and Revolution in Cuba: Mass Mobilization and Political Change, 1920-1940*, at 55-80 (2001).

[FN72]. Cuban Economic Research Project, *A Study on Cuba: the Colonial and Republican Periods, the Socialist Experiment, Economic Structure, Institutional Development, Socialism and Collectivization* 295-96 (1965).

[FN73]. Luis E. Aguilar, *Cuba 1933: Prologue to Revolution* 98-115 (1972).

[FN74]. Dispatch from C. B. Curtis to the Secretary of State, (July 8, 1929) (on file with the National Archives, Washington, D.C., File 837.51/1352, DS/RG 59).

[FN75]. Id.

[FN76]. Id.

[FN77]. Id.

[FN78]. Robert F. Smith, *The United States and Cuba: Business and Diplomacy, 1917-1960*, at 127-28 (1960).

[FN79]. Buchheit et al., *supra* note 3, at 12.

[FN80]. Id.

[FN81]. Id. at 11, 16. See Bolton & Skeel, *supra* note 5, at 1; Khalfan et al., *supra* note 61, at 15-16, 18; Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 *Am. Econ. Rev.* 82, 83 (2006).

[FN82]. Raymond Carr, *Spain 1808-1930*, at 379-83 (1966). See Ineés Roldán de Montaud, *La Unión Constitucional y la Política Colonial de España en Cuba (1868-1878)* 154, 156-57 (1991).

[FN83]. See John Lawrence Tone, *War and Genocide in Cuba 1895-1898*, at 57-68 (2006).

[FN84]. See generally Rafael Pérez Delgado, *1898, El Año del Desastre* (1976); José Barón Fernández, *La guerra hispano-norteamericana de 1898* (1993); Juan Eslava Galán & Diego Rojano Ortega, *La España del 98: El Fin de Una Era* (1997).

[FN85]. Walter, Millis, *The Martial Spirit* 378-80 (1931).

[FN86]. See Jeff King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. Int'l L. & Com. Reg. 101, 129-30 (2007) (suggesting that the U.S. repudiation of the Cuban debt is a “relevant

instance[] of state practice” that gives rise to a customary international legal standard that establishes when nations might repudiate odious debts).

[FN87]. Rosenberg, *supra* note 16, at 66-67 (describing U.S. opposition to President José Santos Zelaya, whose nationalistic program threatened U.S. financial and trade interests, and who was forced to flee as a result of U.S. intervention--including military intervention). A corporate secretary for a U.S. mining company was subsequently installed as president, who then agreed to award to the U.S. a customs receivership and control of Nicaraguan finances. *Id.* at 67.

[FN88]. See generally Max Holland, *Private Sources of U.S. Foreign Policy*, William Pawley and the 1954 Coup d'État, in *Guatemala, J. of Cold War Stud.*, 36 (2005) (describing covert and private forces at play in the U.S.-sponsored 1954 coup in Guatemala in furtherance of U.S. private economic interests and Cold War politics).

[FN89]. See Joseph Collins, *Tightening the Financial Knot*, in *The End of Chilean Democracy: An IDOC Dossier on the Coup and Its Aftermath* 178, 182 (Lawrence Birns ed., 1974) (reviewing government documents that detail the pressure from U.S. businesses and banks threatened by the Allende government's nationalization policies and their support for U.S. intervention in Chile); Lars Schoultz, *Beneath the United States: A History of U.S. Policy Toward Latin America* 361 (1998) (noting that “U.S. covert actions against Allende's Popular Unity government [has been] well-documented”).

[FN90]. Benjamin J. Cohen, *In Whose Interest? International Banking and American Foreign Policy* 61 (1986) (describing bank loans as instrument of foreign policy to effectuate Cold War strategies). But cf. Anna Gelpern, *Odious, Not Debt*, 70 *Law & Contemp. Probs.*, (forthcoming 2007) (commenting on official debt and noting how countries that had the resources to do so provided loans and other financial assistance to shore up “friendly governments”).

[FN91]. Cohen, *supra* note 90, at 61.

[FN92]. See *id.* at 190.

[FN93]. Rosenberg, *supra* note 16, at 60.

[FN94]. Walker F. Todd, *A Brief History of International Lending, from a Regional Banker's Perspective*, 11 *Geo. Mason L. Rev.* 1, 2 (1989) (quoting James Sterngold, *Volcker Gets Princeton Chair and Post at Investment Bank*, *N.Y. Times*, Mar. 3, 1988, at 1, 26).

[FN95]. James Thuo Gathii, *The Sanctity of Sovereign Loan Contracts and its Origins in Enforcement Litigation*, 38 *Geo. Wash. Int'l L. Rev.* 251, 257-59 (2006) (noting that commercial banks and the U.S. government agreed on approaches to the issue of sovereign debt repayment although commercial banks profited significantly compared with government creditors).

[FN96]. Cohen, *supra* note 90, at 66 (describing the way in which bankers have powers and channels of influence including congressional hearings, media, and public and private meetings).

[FN97]. See Feibelman, *supra* note 62 (noting that the fall of Saddam Hussein's regime “unleashed a wave of interest” in the topic of Odious Debt; see also Soren Ambrose, [Social Movements and The Politics Of Debt Cancellation](#), 6 *Chi. J. Int'l L.* 267, 278-79 (2005) (observing that the Odious Debt doctrine was recently revived with regard to Iraq's debt); Anna Gelpern, [What Iraq and Argentina Might Learn From Each Other](#), 6 *Chi. J. Int'l L.* 391, 393-94 (2005) (noting that the doctrine of Odious Debt has experienced a revival as a result of regime change in Iraq).

[FN98]. [757 F.2d 516 \(2d Cir. 1985\)](#). See *infra* Part III B 2.

[FN99]. See generally Note, The [Policies Behind Lending Limits: An Argument for a Uniform Country Exposure Ceiling](#), 99 *Harv. L. Rev.* 430 (1985) [hereinafter Policies Behind Lending Limits]. A Westlaw search using the terms “foreign policy” and “banking regulations” in the same sentence yielded only one journal article.

[FN100]. See Peter Dombrowski, Policy Responses to the Globalization of American Banking, 108 (1996).

[FN101]. See *id.* at 101 (noting that commercial banks were unconcerned with how loans were used so long as debts were repaid). Private creditors continue to control a large portion of sovereign debt. See Samuel E. Goldman, [Mavericks in the Market: The Emerging Problem of Hold-Outs in Sovereign Debt Restructuring](#), 5 *UCLA J. Int'l. L. & Foreign Aff.* 159, 163 n.12 (2000) (noting, for example, that the Dart family of Sarasota, Florida was Brazil's largest outside creditor). By the mid 1970s, almost half of LDC loans were with private banks. *Id.* at 165-66.

[FN102]. Dombrowski, *supra* note 100, at 101; see also Cohen, *supra* note 90, at 52-53 (noting that banks could generate substantial earnings from fees alone).

[FN103]. International Lending Supervision Act of 1983, [12 U.S.C. § 3901-3912 \(2006\)](#); Reporting and Disclosure of International Assets, [12 C.F.R. § 211.44 \(2006\)](#), see also 12 C.F.R. 214 (governing agreements with foreign banks).

[FN104]. See Policies Behind Lending Limits, *supra* note 99, at 439 n.39; Dombrowski, *supra* note 100, at 102 (noting that banks were left to lend huge sums without any formal requirement of analyzing the economic circumstances of the borrowing state).

[FN105]. Barry E. Carter, International Economic Sanctions: Improving the Haphazard U.S. Legal Regime, 75 *Cal. L. Rev.* 1162, 1217 n.224 (1987) (noting political pressure affecting the way in which the Interagency Country Evaluation Review Committee, established by ILSA, handled foreign debt issues).

[FN106]. Rory Macmillan, The [Next Sovereign Debt Crisis](#), 31 *Stan. J. Int'l L.* 305, 327 n.118 (2005) (noting that bank regulators were reluctant to identify credit-risk countries because, among other issues, it would have created a threat to the U.S banking system); Goldman, *supra* note 101, at 166-67; Dombrowski, *supra* note 100, at 113 (noting that such exposure could have set off a “foreign policy crisis”).

[FN107]. Dombrowski, *supra* note 100, at 100 (noting that the U.S. relied on private bank loans to avoid political instability in borrower states).

[FN108]. *Id.* at 105 (describing conflicts in the developing world that threatened U.S. economic and security interests); Cohen, *supra* note 90, at 76 (quoting the staff of the U.S. Senate Foreign Relations Committee that the United States “has important security interests in other debtor countries ... It can hardly afford to stand by and watch the economies of these countries collapse, or to have their governments undermined politically by financial difficulties”).

[FN109]. *Id.* at 99-100.

[FN110]. Dombrowski, *supra* note 100, at 123, 136.

[FN111]. Cohen, *supra* note 90, at 218-19 (describing pressures from Treasury and Federal Reserve officials to continue loans to Latin American countries in default and quoting Paul A. Volcker who directed that “new credits not be subject to supervisory criticism”).

[FN112]. *Id.* at 219.

[FN113]. See [James A. Baker III, U.S. Sec'y of Treasury, Address Before the Joint Annual Meeting of the International Monetary Fund and the World Bank, \(Oct. 8, 1985\), in 25 I.L.M. 412](#) [hereinafter Statement of James A. Baker].

[FN114]. Nicholas F. Brady, U.S. Sec'y of Treasury, Remarks Before the Third World Debt Conference sponsored by the Brookings Institution and the Bretton Woods Committee (Mar. 10, 1989), in Dep't. of St. Bull., (May 1989), at 53-56 [hereinafter Brady Initiative], available at [http:// www.findarticles.com/p/articles/mi_m1079/is_n2146_v89/ai_7654675](http://www.findarticles.com/p/articles/mi_m1079/is_n2146_v89/ai_7654675). See Enrique R. Carrasco, [The 1980s: The Debt Crisis and the Lost Decade of Development](#), 9 *Transnat'l L. & Contemp. Probs.* 119, 123 (1999); Alex Voegelin, *The Process of Rescheduling: Prospects After the Brady Initiative*, 10 *Ann. Rev. of Banking L.* 324, 325 (1991).

[FN115]. See Jill E. Fisch & Caroline M. Gentile, [Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring](#), 53 *Emory L.J.* 1043, 1060-61 (2004) (describing the way in which federal regulators put pressure on commercial banks to make new loans to sovereign debtors); Keith A. Palzer, [Relational Contract Theory and Sovereign Debt](#), 8 *Nw. J. Int'l L. & Bus.* 727, 742 (1988) (noting the impact of the federal regulatory system in sovereign loan transactions).

[FN116]. Dombrowski, *supra* note 100, at 123-24 (observing that the drive to loan more money to LDCs did not succeed in improving the state of their economies).

[FN117]. See Statement of James A. Baker, *supra* note 113.

[FN118]. *Id.*; see also Philip J. Power, [Sovereign Debt: the Rise of the Secondary Market and its Implications for Future Restructurings](#), 64 *Fordham L. Rev.* 2701, 2714 n.66 (1996); Christine

A. Bogdanowicz-Bindert, *World Debt: The United States Reconsiders*, 64 *Foreign Aff.* 259, 267, 273 (1985).

[FN119]. Power, *supra* note 118, at 2714.

[FN120]. Santos, *supra* note 28, at 76; see also Bradley K. Boyd, *The Development of a Global Market-based Debt Strategy to Regulate Private Lending to Developing Countries*, 18 *Ga. J. Int'l & Comp. L.* 461, 482 (1988) (noting requirements that the sovereign debtor be willing to open its markets to foreign investment).

[FN121]. Dombrowski, *supra* note 100, at 25 (stating that bank loans would help debtor nations economically and would thus be more likely to pay their loans).

[FN122]. Macmillan, *supra* note 106, at 326-37.

[FN123]. Nancy Knupfer, *Debt-for-Nature Swaps: Innovation or Intrusion?* 4 *N.Y. Int'l. L. Rev.* 86, 87 n.32 (1991) (citing, for example, 12 C.F.R. § 211.5(f)(2)(ii) which liberalized the amount that banks are allowed to hold as equity in foreign countries); see also Boyd, *supra* note 120, at 480 n.100 (noting revised Regulation K).

[FN124]. Allegra G. Biggs, *Nibbling Away at the Debt Crisis: Debt-for-Nature Swaps*, 10 *Ann. Rev. Banking L.* 429, 445-46 (1991) (describing a number of alternatives by which LDCs debts might be considered to be paid down).

[FN125]. Boyd, *supra* note 120, at 480 n.100; Mark H. Stumpf et al., *International Debt: Solutions to Insolvency or Illiquidity*, 80 *Am. Soc'y Int'l L. Proc.* 42, 46 (1986).

[FN126]. Boyd, *supra* note 120, at 480 (quoting industry experts in the *Wall Street Journal*).

[FN127]. Dombrowski, *supra* note 100, at 127.

[FN128]. See Brady Initiative, *supra* note 114.

[FN129]. See William M. Berenson, *Current Legal Issues Affecting Central Banking*, 29 *Geo. Wash. J. Int'l L. & Econ.* 337, 343 (1995) (describing a debt-equity swap as “a mechanism by which a bank exchanges foreign sovereign external debt of a debtor country for an equity stake in a company in that country through privatization, stock market investment, or direct investment”); Ross P. Buckley, *Why Some Developing Countries Are Better Placed Than the International Monetary Fund to Develop Policy Responses to the Challenges of Global Capital*, 5 *Tul. J. Int'l & Comp. L.* 121, 132 (2006); Power, *supra* note 118, at 2720. These bonds were collateralized through IMF and World Bank funds and assurances. See Macmillan, *supra* note 106, at 315.

[FN130]. Macmillan, *supra* note 106, at 314 n. 47.

[FN131]. Cohen, *supra* note 90, at 47 n.25 (quoting Banker's Trust official, Lawrence J.

Brainard).

[FN132]. Macmillan, *supra* note 106, at 314 n.47.

[FN133]. Mary Weiss, The [Enterprise for the Americas Initiative: An Instructive Model for International Funding for the Environment](#), 24 N.Y.U. J. Int'l L. & Pol. 921, 935 (1992) (noting that Congress required the Treasury to include collateral issues to debt repayment, such as natural resource management initiatives in the Brady Plan).

[FN134]. Power, *supra* note 118, at 2720, n.102. (citing [22 U.S.C. § § 5321-5333](#), specifically § 5322(8), which urges “debtors and commercial bank creditors to recognize that current approaches to the debt problem should focus on ‘a reduction in current debt service obligations’” Douglas L. Hymas & Robert P. Doane, III, The [International Debt Management Act of 1988: Has the Baker Plan Been Replaced?](#), 1989 B.Y.U. L. Rev. 593, 604 (1989)).

[FN135]. Dombrowski, *supra* note 100, at 153 (noting that accounting, tax, and other regulatory changes were enacted to obtain cooperation from banks).

[FN136]. Roseanne Model, [Debt-for-Nature Swaps: Environmental Investments Using Taxpayer Funds without Adequate Remedies for Expropriation](#), 45 U. Miami L. Rev. 1195, 1207, n.71, 72 (1991) (citing Revenue Rulings and Treasury Department pronouncements encouraging debt for nature swaps, and a Washington Post story quoting Treasury Secretary Nicholas Brady who encouraged creative approaches to implementing his plan to reduce foreign debt and make new loans at the same time). See Biggs, *supra* note 124 at 445-46.

[FN137]. Buckley, *supra* note 129 at 134 n.78; Gathii, *supra* note 95, at 262.

[FN138]. Power, *supra* note 118, at 2720 n.104. This would have benefited banks by allowing them to maintain a lower level of reserves. *Id.*

[FN139]. Ross P. Buckley, The [Facilitation of the Brady Plan: Emerging Markets Debt Trading from 1989 to 1993](#), 21 Fordham Int'l. L. J. 1802, 1809 (1998). See Goldman, *supra* note 101, at 167 (noting that private debts were virtually required to restructure their debts, although restructuring was technically voluntary).

[FN140]. Guillermo Emiliano Del Toro, [Foreign Direct Investment in Mexico and the 1994 Crisis: A Legal Perspective](#), 20 Hous. J. Int'l L. 1, 69-70 (1997) (describing the plan as “homogenous and effective”).

[FN141]. Richard Euliss, The [Feasibility of the IMF's Sovereign Debt Restructuring Mechanism: An Alternative Statutory Approach to Mollify American Reservations](#), 19 Am. U. Int'l L. Rev. 107, 110-11 (2003) (noting the successful reduction in LDCs' foreign debt).

[FN142]. Berenson, *supra* note 129, at 344 (“[s]elling off equities and privatization may be seen as an excessive sell off of the national patrimony to foreign investors and cause unwanted political problems for the debtor government”).

[FN143]. John W. Head, For [Richer Or For Poorer: Assessing The Criticisms Directed At The Multilateral Development Banks](#), 52 U. Kan. L. Rev. 241 (2004) (noting the criticism of international development banks that impose harmful conditions in exchange for loans); Jason Morgan-Foster, The [Relationship Of IMF Structural Adjustment Programs To Economic, Social, And Cultural Rights: The Argentine Case Revisited](#), 24 Mich. J. Int'l L. 577, 583 (2003) (noting the findings of a study indicating that structural adjustment conditions lead to poor economic results); Peter Uvin, 'Do As I Say, Not as I Do': The Limits of Political Conditionality 5 Euro. J. of Devel. Research 63, 74-74 (1993) (noting the lack of effective if not disastrous results produced by economic and political conditionalities attached to development funds); Saliwe M. Kawewe & Robert Dime, The Impact of Economic Structural Adjustment Programs [ESAPs] on Women and Children: Implications for Social Welfare in Zimbabwe, 27 J. of Soc. and Soc. Welfare 79, 79 (2000) (arguing that structural adjustment programs introduced by international financial institutions have been inappropriate for Zimbabwe); Fran Ansley, [Inclusive Boundaries And Other \(Im\)Possible Paths Toward Community Development In A Global World](#) 150 U. Pa. L. Rev. 353, 380-81 n. 50 (2001) (observing that structural adjustment policies have constrained national policies and have created additional debt burdens on poorer countries).

[FN144]. Dombrowski, *supra* note 100, at 163; Santos, *supra* note 28, at 70.

[FN145]. Dombrowski, *supra* note 100, at 37 (noting the efforts of the U.S. government, acting as principal, to influence and alter the course of banking practices).

[FN146]. [Exec. Order No. 11,387](#), 3 C.F.R. 90 (1968), reprinted in 12 U.S.C. app. § 95a (1976). This Executive Order was issued under authority granted to the President by the 1917 Trading With the Enemy Act, Ch. codified as amended at [50 U.S.C. app. § 5\(b\)](#) (1976). See Joseph A. Grundfest, The [Limited Future of Unlimited Liability: A Capital Markets Perspective](#) 102 Yale L.J. 387, 417 n.123 (1992); see also Dombrowski, *supra* note 100, at 16 (noting that the efforts to reduce foreign credit were part of a plan to align banking practices with foreign policy interests).

[FN147]. Manuel Monteagudo, The Debt Problem: The Baker Plan and the Brady Initiative: A Latin American Perspective, 8 Int'l. Law. 59, 70 n.57 and accompanying text (1994); Thomas M. Reiter, The [Feasibility of Debt-Equity Swaps in Russia](#), 15 Mich. J. Int'l L. 909, 915 n.27 (1994).

[FN148]. [50 U.S.C. § § 1701-1707 \(2000 & Supp. III 2003\)](#). See Mariano-Florentino Cuéllar, [Auditing Executive Discretion](#), 82 Notre Dame L. Rev. 227, 244 (2006) (observing the ease with which the government has been able to declare emergency conditions in order to exercise economic constraints under the statute).

[FN149]. [22 U.S.C. § 2370 \(2000 & Supp. IV 2004\)](#).

[FN150]. Cuban Democracy Act of 1992, [Pub. L. No. 102-484](#), 106 Stat. 2575 (codified as [22 U.S.C. § § 6001-6010 \(2004\)](#)).

[FN151]. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, [Pub. L. No. 104-114](#), 110 Stat. 785 (codified as [22 U.S.C. § § 6021-6091](#), [6061-6067 \(2004\)](#)).

[FN152]. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended in [50 App. U.S.C. § § 1-44](#)) See [Wendy N. Duong, Partnerships with Monarchs in the Development of Energy Resources - Case Two: Dissecting an Independent Power Project and Re-evaluating the Role of Multilateral and Project Financing in the International Energy Sector](#), 26 U. Pa. J. Int'l Econ. L. 69, 138 n. 460 (2005) (providing a list of various statutes prohibiting trade with Iran, Burma, Sudan, and Libya).

[FN153]. Scott Meisler, [Into The Impetuous Vortex: The Mansfield Amendment, Political Accountability, and the Separation of Powers](#), 93 Geo. L.J. 2097, 2108 (2005).

[FN154]. [15 U.S.C. § 4721](#) (2000).

[FN155]. [50 U.S.C. App § 5\(b\)](#) (2000).

[FN156]. [50 U.S.C. App § § 2402-20](#) (continued by [Exec. Order No. 13,222](#), [60 Fed. Reg. 44,025](#) (Aug. 17, 2001)).

[FN157]. See Andreas L. Lowenfeld, [Trade Controls for Political Ends: Four Perspectives](#), 4 Chi. J. Int'l L. 355, 358 (2003) (describing the Act as the principal means by which to sanction the Soviet Union); Kenneth J. Vandeveld, [Reassessing the Hickenlooper Amendment](#), 29 Va. J. Int'l L. 115, 139 (1988) (noting that a poll of the members of the Council of the Americas taken in August 1970 revealed that of the membership that owned ninety percent of U.S. investment in Latin America, seventy-six percent believed the Hickenlooper Amendment, which prohibited trade with Cuba, was harmful to their interests).

[FN158]. [15 U.S.C. § 78m\(b\)\(2\) \(3\)](#), [78dd-1](#) to [-3](#), [78ff](#) (2000 & Supp. IV 2004).

[FN159]. [18 U.S.C. § 955](#) (2000).

[FN160]. [22 U.S.C. § 3301](#) (2000). See Terry E. Chang, The [Gold Rush in the East: Recent Developments in Foreign Participation Within China's Securities Markets as Compared to the Taiwanese Mode](#), 44 Colum. J. Transnat'l L. 279, 312 (2005).

[FN161]. Lowenfeld, *supra* note 157, at 369 (observing that “[e]conomic sanctions for political ends are the opposite of mercantilism”).

[FN162]. Cohen, *supra* note 90, at 40.

[FN163]. *Id.*

[FN164]. See Vandeveld, *supra* note 157, at 156 (observing that the statute was in furtherance of private goals, strongly lobbied by such interests, and in opposition to foreign policy interests).

[FN165]. See Dimitri K. Simes, President, Nixon Center, & Paul J. Saunders, Director, Nixon Center, Tuesday, Testimony before the Committee on Banking and Financial Services, United

States House of Representatives, September 21, 1999, available at http://www.nixoncenter.org/publications/testimony/9_21_99Russia.htm.

[FN166]. [50 App. U.S.C. § 2403\(C\) \(2000\)](#) (but allowing for the President to nonetheless impose restrictions if “adequate evidence has been presented to him demonstrating that the absence of such controls would prove detrimental to the foreign policy or national security of the United States”).

[FN167]. Bolton & Skeel, *supra* note 5, at 2-3 (defining such a regime as one that engages in systematic suppression or systematic looting and suggesting that the UN Security Council make the determination as to which regime is odious); see also Khalfan et al., *supra* note 61, at 42; Jayachandran & Kremer, *supra* note 81, at 30 (describing various institutions as options for operationalizing the definitions of Odious Debt).

[FN168]. Buchheit, et al., *supra* note 3, at 21 (noting that the Sack definition of Odious Debt called for a debt-by-debt approach, that is, if a loan is used to benefit the people, it is repayable regardless of the nature of the regime, but if it is used for ill purposes or benefits only the ruler, it is odious and can be repudiated).

[FN169]. Mechele Dickerson, *Insolvency Principles and the Doctrine of Odious Debts: the Missing Link in the International Human Rights Debate*, 70 *Law & Contemp. Probs.* (forthcoming 2007) (discussing a bankruptcy mechanism); see also Power, *supra* note 118, at 2767.

[FN170]. Tom Ginsburg & Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development, and Democratization* 70 *Law & Contemp. Probs.* (forthcoming 2007) (examining proposals to establish international committees or international tribunals to determine Odious Debt).

[FN171]. See Buchheit et al., *supra* note 3, at 29; Feibelman, *supra* note 62, at 727; Anna Gelpern, [What Iraq and Argentina Might Learn From Each Other](#), 6 *Chi. J. Int'l L.* 391, 394 (2005) (noting the increase in the use of private law tools such as contracts between sovereign debtors and creditors).

[FN172]. Larry Catá Backer, [Ideologies of Globalization and Sovereign Debt: Cuba and the IMF](#), 24 *Penn St. Int'l L. Rev.* 497, 534 (2006) (quoting Fidel Castro querying whether it is possible “to separate the private concerns from issues requiring direction and control by the political community”).

[FN173]. Caruso, *supra* note 12, at 3 (2006) (noting that private law has helped to establish “new centers of authority” in the global arena); A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* 16, 180 (2003) (noting the increasing influence of private power in the global political economy). Cutler notes that even when private international law previously was used to determine controversies, national law as opposed to private law was the focus. *Id.* at 18. For a review of the debates about the dominance of European private law, see Ugo Mattei & Fernanda Nicola, [A ‘Social Dimension’ in European](#)

[Private Law? The Call for Setting a Progressive Agenda, 41 New Eng. L. Rev. 1 \(2006\).](#)

[FN174]. Cutler, *supra* note 173, at 24 (describing states as subjects of international law). See Buchheit et al., *supra* note 3, at 55 (noting that matters of sovereign debt were historically determined on the basis of diplomatic intervention).

[FN175]. Caruso, *supra* note 12, at 73-74.

[FN176]. *Id.* at 19 (reviewing the arguments in favor of private law as a tool of creating public structures). Cutler, *supra* note 173, at 62 (noting how merchant law as a form of private law was understood as “apolitical and neutral in operation and in effect”).

[FN177]. Caruso, *supra* note 12, at 34.

[FN178]. *Id.* at 22-23.

[FN179]. Backer, *supra* note 172, at 499.

[FN180]. Christoph U. Schmid, [Pattern of Legislative and Adjudicative Integration of Private Law, 8 Colum. J. Eur. L. 415, 484 \(2002\)](#) (noting that the purpose of private law is to obtain fairness and justice between the parties to the dispute without influencing circumstances or outside relationships). But see Robert Wai, [Transnational Private Law and Private Ordering in a Contested Global Society, 46 Harv. Int'l L.J. 471, 474 \(2005\)](#) (arguing that private international law may regulate social relations).

[FN181]. Wai, *supra* note 180, at 473 (noting that private international law deals with the disputes of parties not the dispute of systems).

[FN182]. Cutler, *supra* note 173, at 62, 69, 242. Mattei & Nicola, *supra* note 173, at 44, 48 (observing that private law serves to facilitate accumulation and exploitation and global capitalism); Richard Delgado, [About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties, 39 Harv. C.R.-C.L. L. Rev. 1, 9 \(2004\)](#) (stating that private law is premised in principles of the marketplace and capitalism); Cutler, *supra* note 173, at 34 (quoting Joel Paul; private law is not about public power).

[FN183]. Rosenberg, *supra* note 16, at 76 (describing the preference for private contracts as a means of regulating foreign economies, particularly so that no congressional approval would be required).

[FN184]. *Id.* at 72.

[FN185]. *Id.* at 71-72.

[FN186]. Cutler, *supra* note 173, at 24 (quoting Boaventura de Sosa Santos).

[FN187]. Buchheit et al., *supra* note 3, at 29, 56.

[FN188]. *Id.* at 29 (suggesting courts of the state of New York as an appropriate forum).

[FN189]. [757 F.2d 516 \(2d Cir. 1985\)](#).

[FN190]. *Id.* at 520. For a discussion on the act of state doctrine, see Gathii, *supra* note 95, at 286-305; see also Fisch & Gentile, *supra* note 115, at 1079-81.

[FN191]. *Allied Bank International v. Banco Crédito Agrícola de Cartago (Allied 1)*, 566 F. Supp. 1440 (S.D.N.Y. 1983); *Allied III*, 757 F.2d at 519.

[FN192]. Marc Edelman, *Back From the Brink*, NACLA Rep. on the Am. Nov.-Dec. 1985 at 37, 39.

[FN193]. *Allied III*, 757 F.2d at 519.

[FN194]. *Id.*

[FN195]. The court noted that a decision enforcing the debt could damage the relationship between the executive branch of the United States and the government of [Costa Rica](#). *Allied I*, 566 F. Supp. at 1444.

[FN196]. *Allied III*, 757 F. 2d at 519.

[FN197]. *Allied Bank Int'l v. Banco Crédito Agrícola de Cartago (Allied II)*, U.S. App. LEXIS 23237 (1984).

[FN198]. *Id.*

[FN199]. *Id.*; *Allied III*, 757 F. 2d at 519.

[FN200]. *Allied II*, 733 F.2d at 23.

[FN201]. *Id.*

[FN202]. *Id.*

[FN203]. *Id.*

[FN204]. S. Karene Witcher, *U.S. Backs Banks Against Costa Rica in Loan Squabble*, Wall St. J., June 12, 1984, at 1.

[FN205]. *Allied III*, 757 F.2d at 519.

[FN206]. *Id.*

[\[FN207\]](#). *Id.*

[\[FN208\]](#). *Id.* at 520.

[\[FN209\]](#). *Id.*

[\[FN210\]](#). *Id.* at 520-21.

[\[FN211\]](#). [Allied III, 757 F. 2d at 521.](#)

[\[FN212\]](#). See Gathii, *supra* note 95, at 304-05 (suggesting that Allied II contravenes the proper distribution of functions between the judicial and political branches by granting to the executive essentially unreviewable powers to determine sovereign debt controversies).

[\[FN213\]](#). [Allied III, 757 F. 2d at 521.](#)

[\[FN214\]](#). [Id. at 522.](#)

[\[FN215\]](#). Edelman, *supra* note 192, at 45.

[\[FN216\]](#). Costa Rica Proclaims Neutrality, N.Y. Times, Nov. 17, 1983, at A12 (“The neutrality of Costa Rica will be active,” proclaimed President Monge).

[\[FN217\]](#). Richard J. Meislin, U.S. Aid to Seek Costa Rica Shift, N.Y. Times, May 11, 1984, at D22.

[\[FN218\]](#). *Id.*

[\[FN219\]](#). Martha Honey, Hostile Acts: U.S. Policy in Costa Rica in the 1980s 63 (1994).

[\[FN220\]](#). *Id.* at 51, 53; Edelman, *supra* note 192, at 40-42 (noting an influx of U.S. aid tied to structural reforms and privatization).

[\[FN221\]](#). Honey, *supra* note 219, at 79-80 (describing less than transparent maneuvers orchestrated by US AID to force Costa Rica to denationalize its banks).

[\[FN222\]](#). *Id.* at 77-86. The U.S. also exerted influence on Costa Rica to reform its agricultural export policies in ways that tied it to the U.S. market. *Id.* at 168.

[\[FN223\]](#). *Id.* at 138.

[\[FN224\]](#). *Id.* at 139 (noting that the nontraditional agricultural export entities, dominated by foreign capital, were given duty and tax breaks).

[\[FN225\]](#). Gathii, *supra* note 95, at 308-09.

[FN226]. See Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina*, 21-31, (Wash. Legal Found., Critical Legal Issues, Working Paper No. 140, 2006), available at <http://www.law.harvard.edu/programs/pifs/pdfs/Washingtonlegal2006.pdf>. In 1995, the Clinton Administration, appeared as amicus in a case involving Brazil's sovereign debt brief but this time supported the defaulting Brazil. CIBC Bank and Trust Co. v. Banco Central do Brasil, 886 F. Supp. 1105 (S.D.N.Y. 1995). Ten years later, the court of appeals determined a sovereign debt case in favor of Brazil without U.S. intervention, but upon the basis that the decision was consistent with U.S. policy. Pravin Banker Associates v. Banco Popular del Peru, 109 F.3d 850 (2d Cir. 1997). Beginning in 2001, the United States again intervened on behalf of Argentina in a series of cases for reasons, as some speculate, to discourage Argentina's move away from neo liberal policies and the market. Scott, *supra* note 226, at 37. Most recently, the U.S. government filed as amicus on behalf of Argentina in support of Argentina's efforts to resist restraining notices and orders of attachment imposed on an Argentine bank account at the Federal Reserve Bank of New York on the ground that those assets were protected from attachment by the Foreign Sovereign Immunities Act of 1976. The court of appeals upheld the district court's decision and vacated such orders. EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007).

[FN227]. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 4 (Univ. of Chicago, Pub. Law Working Paper no. 128, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901999.

[FN228]. Of the proposals that have been offered, we come closest to agreeing with the general recommendations that international institutions would best be suited to make determinations about Odious Debt. See Balakrishnan Rajagopal, From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions, 41 Harv. Int'l L.J. 529, 529 (2000) (noting that "[i]nstitutions represent the concrete manifestations of the normative aspirations of law in the international system"). For example, Bolton and Skeel suggest the U.N. Security Council, whereas we would hesitatingly propose the U.N. General Assembly or other U.N. oversight body. Bolton & Skeel, *supra* note 5, at 3. Bolton and Skeel also suggest the IMF as a suitable institution to assess the nature and character of the debt transaction. Bolton & Skeel, *supra* note 5, at 9. On this point, we refer to the need for and proposals to restructure and reform the IMG with regard to governance issues as scholars in the field have urged. Daniel B. Bradlow, *The Governance of the IMF: The Need for Comprehensive Reform*, Meeting of the G24 Technical Committee (2006), available at <http://www.g24.org/brad0906.pdf>; Abbas Mirakhor & Iqbal Zaidi, *Rethinking the Governance of the International Monetary Fund*, (Int'l Monetary Fund, Working Paper No. 273, 2006), available at <http://www.imf.org/external/pubs/ft/wp/2006/wp06273.pdf>.

[FN229]. Michael J. O'Connell, A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, And the Courts, 24 B.C. Third World L.J. 223, 234-41 (2004) (reviewing cases where the courts have invited the State Department to comment on whether human rights-related law suits would interfere with U.S. foreign policy).

[FN230]. Self Help Credit Union, <http://www.self-help.org/> (last visited Apr. 10, 2007)

[\[FN231\]](#). Acción USA, available at <http://www.accionusa.org> (last visited Apr. 10, 2007)

[\[FN232\]](#). Robert Kuttner, Development, Globalization, and Law, 29 Mich J. Int'l L. 10, 38 (2004).

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