DEBT TO ODIOUS FINANCE: AVOIDING THE EXTERNALITIES OF A FUNCTIONAL ODIOUS DEBT DOCTRINE

Christiana Ochoa
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Dear Editors,

Please accept this submission of *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*. As you may be aware, the odious debt doctrine has received highly energized attention in recent months from academics and practitioners alike.

The odious debt doctrine operates as a potential justice-based exception to international laws stating that emerging states and governments must service the debt obligations of their predecessor. In essence, the odious debt doctrine holds that loans that were (i) incurred by a despotic government and (ii) were not used to benefit the population should be cancelled when the despotic government is toppled. The emerging state and population are thereby freed from the financial burden of servicing loans from which they received no benefit.

Rising from the context of Iraq’s debt reduction and the broader developing country debt forgiveness projects that are currently underway, the discussion over the odious debt doctrine has begun to appear in journals such as Duke Law School’s Law and Contemporary Problems, the North Carolina Law Review, the Chicago Journal of International Law and a handful of other prestigious outlets.

The shared assumption of the recent attention the odious debt doctrine has received, however, is that despotic governments that cannot access loans will see their coffers dry up and will then not be able to function. This is simply not the case. Despotic governments can and do resort to other sources for financing their activities that can be even more detrimental to the short and long term interests of an emerging government and its population than a burdensome debt load may be.

The attached article argues that a functional odious debt doctrine, without more, will create incentives for despotic governments to exploit the territory and people of their countries to raise funds. This unintended consequence is addressed by what the article terms the “odious finance doctrine,” which seeks to include a wider range of financing mechanisms within the ambit of odiousness such that a more comprehensive approach might be taken the problem of financing despotic governments.

This article is a continuation of my prior research on the intersections of transnational economic activity and human rights. My other scholarly research has, for example, studied the language employed in the discourse over the social responsibilities of businesses and trade and finance organizations and argued for the inclusion of individuals in the formation of customary international law.

I hope you will enjoy reading this piece. I believe it will fundamentally influence the content of the odious debt doctrine discussion.

Most sincerely,

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FROM ODIOUS DEBT TO ODIOUS FINANCE: AVOIDING THE EXTERNALITIES OF A FUNCTIONAL ODIOUS DEBT DOCTRINE

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Abstract

The Odious Debt Doctrine has limped along in the legal imagination for over 100 years and by some estimates even since Aristotle. In recent years, and particularly in recent months, legal theorists and practitioners have attempted to define the contours and details of this controversial and undeveloped doctrine.

This Article looks at the generally agreed upon characteristics of the odious debt doctrine and considers the spill-over effects and externalities that would ensue if this doctrine were ever made regularly operative. Many commentators have noted the increased costs of borrowing and lending that would result from the doctrine. Some view this increased cost as detrimental to borrowers and lenders alike. Others view both the doctrine and the increased costs associated with it as mechanisms to curtail the undesirable practices of brutal dictators and despots.

Both views, however, usually analyze the doctrine as if debt is the sole finance vehicle for despotic governments. This is simply not the case. Debt is not the sole finance vehicle; they are able to raise funds through a wide variety of other methods, including the pillaging of the nation’s natural resources, property, and other valuable assets. Despotic leaders, facing great difficulty in accessing private or public loans, may rely more heavily on these alternative sources of funds. Furthermore, although debt can be crippling for developing countries and merits the attention it has received, these alternative methods of despotic fund raising may in fact be yet more adverse than debt in both the short and long term.

Upon regime change or state succession, even assuming a functional odious debt doctrine, property and assets pillaged by the predecessor state or government will be difficult or impossible to recover given the current state of international law as it pertains to state succession, commercial obligations and compensation for expropriation.

This Article investigates the contents of the odious debt doctrine to query what characteristics make debt odious rather than simply onerous. It then seeks to establish that there may be little distinction between those characteristics as they apply to debt and as they apply to other types of transnational financial obligations and financing arrangements. Finally the Article posits that if there is, in fact, little distinction, there may be valuable lessons to be learned from the odious debt doctrine for application to other types of transnational financing arrangements, and proposes that an “odious finance” is the better approach. The contours of such an odious finance doctrine are presented herein.
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I. INTRODUCTION

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

In essence, the odious debt doctrine holds a normative position that the debt incurred by dictators should not form a continuing obligation for states emerging from the grips of a despotic government, at least to the extent that the debt did not benefit the population that existed under the prior regime. This Article does not take issue with this normative position.

Rather, this Article identifies a key problem in the odious debt doctrine. In particular, it argues that the odious debt doctrine, if implemented alone, will result in unintended consequences since it would create incentives for dictators to search for funds from sources that may harm the economic resources, natural environment and population at least as much as, if not more than, debt. This being the case, a more comprehensive view must be taken of the financing mechanisms utilized by despotic governments, such that odious debt is not viewed as so unique as to create doctrines around itself that lead to unanticipated results that might be more detrimental than a world without the odious debt doctrine. In short, this Article proposes a doctrine that considers the possible odiousness of all manner of financing mechanisms of despotic governments, or in other words, it proposes an odious finance doctrine instead of an odious debt doctrine.

In establishing an argument for an expanded scope of the doctrine of odiousness, the Article will proceed as follows: in Part II, the odious debt doctrine will be discussed at some length, including its historical origins, its recent and current well-springs and the recent academic literature that has arisen around the doctrine. This section attempts to

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demonstrate that the current academic discussion and the current literature have lost the proverbial forest for the trees of despotic government debt. Part III discusses the underlying international law doctrines to which the odious debt doctrine and an odious finance doctrine would act as exceptions, namely the doctrine on continuation of commercial obligations and the doctrine regarding compensation for expropriation, each in the context of state or government succession.

Part IV presents two detailed examples alternative finance sources which despotic governments may utilize. The aim of this section is not to provide an exhaustive catalogue of the various means by which dictators may raise funds. Rather, it is to provoke the reader into thinking about the availability of other funding sources. Part V argues that, in some cases, these alternative financing sources may be seen as more harmful to the long-term interests of the emerging state than loans. As the Article will state again in its body, the point of this argument is not to diminish the significant harms that may be bestowed on a successor government and its population by high debt levels. Rather, the goal is to elucidate the possibility, or likelihood, that some harms wrought by non-debt financing may be worse than those created by debt. Primarily, the Article attempts to achieve this goal by way of an exposition of real cases which illustrate this proposition.

Part VI of the Article provides the contours of an odious finance doctrine, primarily by interrogating the characteristics of the odious debt doctrine for the kernels that some debt be placed in a category called “odious” and therefore be subject to cancellation and then asking whether other types of despotic financing might be similarly categorized. Part VII places the odious finance doctrine into a larger context by reminding the reader of the limited nature of such a doctrine, suggesting some practical means by which an odious finance doctrine may be applied and the bounds which the concept of odiousness should transcend. Finally, the conclusion provides suggestions for future research.

II. THE ODIOUS DEBT DOCTRINE

A. Historical Origins and Development

The odious debt doctrine has received a heightened level of attention in recent years, starting with the United States government’s search for mechanisms for handling and disposing of some portions of Iraq’s outstanding debt. The debates surrounding third world debt forgiveness have also contributed to the increased attention scholars have recently

1 For further discussion of the role that Iraq’s debt played in reviving the Odious Debt Doctrine, see Part II herein.
paid to this doctrine. Before turning to this recent scholarly and political attention, however, it is useful to explore the historical development of this relatively unknown doctrine.

Two stories are typically told regarding the origins of the odious debt doctrine. One story notes that the idea that a population ought not be burdened by the debts of an oligarch has been in circulation for over two millennia. Aristotle wrote that in the event that:

[when] a democracy tak[es] the place of an oligarchy or despotism . . . persons refuse either to meet the contracts in hand on the ground that it was not the State, but the despot who entered upon them, or to perform any similar obligation...  

The early development of international law created the modern day standard rule that the debts of states and governments pass to their successors. Early international law also created a discernible set of debt categories. These might be said to include both virtuous and profligate debts.

Those readers experienced with the benefits of debt financing will be able to easily imagine those types of loans that would be classified as virtuous debts. Loans used for the purpose of building of necessary and/or sustainable infrastructure projects, loans used to finance military activities which are supported by the state’s populace or which protect the state against aggression, or loans that ac in the creation of new

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2 The role of the odious debt doctrine in the wider debt forgiveness discourse is discussed in Part II herein.
4 BEKKER, W.E. BOLLAND TRANS., LONGMANS, GREEN & CO., ARISTOTLE’S POLITICS 162 (1877) (text of).
7 id. (Buchheit, et.al.)
economic sectors or the re-invigoration of the entire economy through government sponsored spending programs.\footnote{8}

Profligate debts, on the other hand, are more questionable on economic or moral grounds, and, as Buchheit, Gulati and Thomson have defined them, “convey little or no benefit to the people expected to repay those debts.”\footnote{9} The exceptions to the rule that sovereign debts are passed to successors can appropriately be located under the category of profligate debts.

Some authors have set forth three possible exceptions to the standard rule that the debts of a government pass to its successor.\footnote{10} Those exceptions are (i) war debts, (ii) regime debt or hostile debt, and (iii) odious debt.\footnote{11} Others have condensed these exceptions, classifying war debts and hostile debts as two subcategories of odious debt.\footnote{12} A brief attention to the doctrines of war debts and regime debts, each an important predecessor to the odious debt doctrine, will thus help to explain the origins of the modern understanding of odious debt.

The hostile debt exception to the standard rule that debts must be repaid is typically traced to the end of the Spanish American War.\footnote{13 At the time of the Spanish American War, the terms of the Treaty of Paris, signed on December 10, 1898, transferred sovereignty over Puerto Rico, Guam, and the Philippines to the United States. The Spanish American War ran its course from start to finish in 1898.

\footnote{14} From Odious Debt to Odious Finance – Draft 8/24/2007

\footnote{8 id. (Buchheit, et.al.) It should be noted, of course, that exactly what are virtuous purposes and what are profligate purposes will in many cases not be terribly clear. For example, some might demand that an infrastructure project be both sustainable and necessary, others might only be willing to deem defensive military activity a virtuous use of debt financing. These debates are not necessary to address in this Article, as the odious debt doctrine will only correctly address itself to those cases that fall clearly into non-virtuous category.

\footnote{9} id. at 9. Buchheit, Gulati and Thomson have focused their attention on the intergenerational tension of sovereign debt which, under current legal doctrine, survives governments (and often states) and passes to their successors and the future generations thereof. The text of the Buchheit article is at times unclear about the definition the authors are attaching to “intergenerational tension.” At times, they appear concerned about the populations of successor governments and states, as they should rightly be. See id. At other times, they seem concerned only with “a later generation of citizens” See id. It should be made clear that even the population living at the time the debt was incurred and spent may not have benefited in any way from the sovereign borrowing. In this way, the use of the concept of intergenerational tension as the pivot between profligate and virtuous debts can at times be confusing. Their more simple definition of profligate debts is the better one and applies to borrowings that “convey little or no benefit to the people expected to repay those debts.”
end of the war, the Spanish government argued that in accordance with international law the United States, as the holder of Cuba’s sovereignty, should repay Cuba’s debts. The United States, on the other hand, took the position that Cuba’s debts would not be repaid. The primary arguments put forth by the United States were that the majority of Cuba’s debts were incurred for purposes that were hostile to Cuba’s ultimate independence, were incurred without consent of the Cuban people and were incurred in order to finance programs intended to help ensure that Cuba would remain a Spanish territory. The loans, for example, were used to quell Cuban insurrection against Spain. The United States further argued that the lenders knew that their funds would be used for this purpose and must have known the inherent risks of non-repayment when lending for such purposes.17

17 id. D.P. O’CONNELL, THE LAW OF STATE SUCCESSION 188-9 (1956). It must be noted that the doctrine of hostile debts, like the doctrine of odious debt, has a spotty history, at best. As O’Connell notes, the arguments made by the United States after the Spanish American war were thereafter attempted in the course of drafting the Treaty of Versailles and the Treaty of St.Germain in 1919. The arguments were successful in excusing Poland from its debts but not ultimately successful in excusing Czechoslovakia from the war and pre-war debts incurred by the Austro-Hungarian Empire. id. See also, JOHN BASSETT MOORE, ON PUBLIC DEBTS, in JOHN BASSETT MOORE, MOORE’S DIGEST OF INTERNATIONAL LAW, 97, 358-359 (1906), stating:

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

Quoted in ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRS. TRAITÉ JURIDIQUE ET
War debts act as another potential exception to the standard rule. The war debt exception asserts that “creditors who lend money for the purpose of carrying on a war, or when a war is ‘notoriously imminent’, are investing in a doubtful security.”18 The test for war debts is slightly different than that for hostile debts but, as in the hostile debt context, turns in part on the lenders’ implied or actual knowledge that they may not be repaid for the loans they have extended. O’Connell states that two instances were foundational to establishing this doctrine - the annexation of the Boer Republics in 1900 during the course of the Boer War and the World War I Peace Treaties (the Treaty of Versailles and the Treaty of St. Germain) of 1919.19 In both instances, the argument was made that the debt incurred by the vanquished enemy government in fighting against the ultimate victor would not be assumed by the victor and successor government.20

Buchheit, Gulati and Thompson have accurately reminded us that the Fourteenth Amendment to the United States Constitution also includes a war debt exception with respect to the debts the Confederate States incurred to finance their rebellion.21 The Fourteenth Amendment voided these debts by stating:

...neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.22

The modern history of the doctrine of odious debts is often traced to an arbitration in 1923 between Costa Rica and Great Britain, typically referred to as the Tinoco Arbitration, over which Howard Taft presided as sole arbitrator.23 Costa Rica had been ruled by Frederico Tinoco, a

FINANCIER 159 (1927) (The Effects of State Transformations on Their Public Debts and Other Financial Obligations).

22 U.S. Const., amend. XIV, Sect. 4.
23 Howard Taft was serving as the tenth Chief Justice of the United States Supreme Court at the time.
dictator, who entered into a number of agreements with private entities.24 A number of those contracts served to benefit Tinoco or his family members personally. After Tinoco retired and left office, a Costa Rican domestic law, called the Law of Nullities No. 41, repudiated all of these contracts.25 Examples of such contracts notably included a concession contract made with the Central Costa Rica Petroleum Company, a British firm, pursuant to which the Company was granted the right to “explore for and exploit oil deposits in Costa Rica”26 and loans provided directly to Tinoco from the Royal Bank of Canada, purportedly for government expenses, but with full knowledge by the bank that these loans were destined for Tinoco’s personal use upon his departure from Costa Rica.27 Loans were also made directly to Tinoco’s brother for payment of his future salary.28 Taft stopped short of contravening the standard rule of government succession to sovereign debts.29 However, he also upheld the Law of Nullities writing:

The whole transaction was full of irregularities...It must make out its case of actual furnishing of money for [the government’s] legitimate use...It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco for his personal support after he had taken refuge in a foreign coun-


26 Tinoco Arbitration between Great Britain v. Costa Rica (1923) 1 U.N. REP. INT’L ARB. AWARDS 369, reprinted in 18 AM. J. INT’L L. 149 (1924). Notable for the central thesis of this article, the arbitration addressed both the loans and the concession agreement. Discussions regarding the odious debt doctrine largely ignore the concession portions of this arbitration and focus exclusively on the loans.


try... It could not hold his own govern-
ment responsible for money paid to him
for this purpose...The case of the money
paid to the brother...is much the same.30

The test employed by Taft to uphold the Law of Nullities in the Ti-
noco Arbitration was different than that used previously in the hostile
debt or war debt context. Here, there was no colonial power imposing a
debt on a newly liberated state as in the hostile debt context, nor were
there victors or vanquished parties as one would find in the war debt
scenario. However, there were similarities. The people of Costa Rica did
not benefit from the loans, rather the loans were “so closely connected
with this payment for obviously personal and unlawful uses of the
Tinoco brothers”31 that the bank could not make a rightful claim that the
loans were made “for any legitimate governmental uses of the Tinoco
government.”32 For Taft, it was also significant that the lenders knew
that the loans would not be used to benefit Costa Rica or its people.33

Thus, in 1927 when Alexander Sack set out the contours of a new
odious debt doctrine, he by no means did so out of whole cloth.34 Still,
this Russian law professor and author on two important books regarding
the effects of state succession on public debts35 coined the term “dettes
odieuses.”

He wrote:

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

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

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

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

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37 ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES. TRAITÉ JURIDIQUE ET FINANCIER
Thus, in order for a debt to be classified as “odious” under Sack’s formulation, the debt must be:

- incurred by a despotic power;\(^{38}\)
- used for purposes that do not further the needs or interests of the state;\(^{39}\) and
- the creditor must have known that the loans would be used for purposes contrary to the interests of the nation.\(^{40}\)

It has been argued that, in addition to the three elements set out by Sack, that there is or should be a fourth one; that the debt must have been incurred without the consent of the state’s people.\(^{41}\) Sack was aware of the possibility of this fourth element and included it in his exposition of odious debt.\(^{42}\) In reference to the Cuban debt discussed previously herein, John Basset Moore had written, “The burden of the so-called <<Cuban debt>>, imposed upon the people of Cuba without their consent and by force of arms, was one of the principal wrongs for the termination of which the struggles for Cuban independence were undertaken.”\(^{43}\)

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\(^{38}\) id.

\(^{39}\) id.

\(^{40}\) Id.


\(^{42}\) ALExANDER N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES. TRAITÉ JURIDIQUE ET FINANCIER* 159 (1927). (The Effects of State Transformations on Their Public Debts and Other Financial Obligations).

\(^{43}\) John Bassett Moore, *MOORE’S DIGEST OF INTERNATIONAL LAW* 97, 359 (1906) cited in ALEXANDER N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS*
Regardless of whether a three prong or four prong test is employed, it would be a mistake to state that the odious debt doctrine is accepted under international law. States have not explicitly bound themselves to the principles stated by the odious debt doctrine and there is no odious debt treaty or convention encapsulating this doctrine. Similarly, state action in relation to the doctrine is certainly not of such a nature that a plausible argument could be made that the odious debt doctrine is law as a matter of international custom.  

B. Recent revival of the Odious Debt Doctrine

The doctrine currently stands as a useful theory or argument in particular debt reduction or forgiveness situations. Most recently, the theory has assisted lawyers and policy makers considering two recently pressing problems - third world debt elimination and reducing the

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

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

Statute of the International Court of Justice, Article 38. The Restatement (Third) Foreign Relations Law of the United States defines customary international law slightly differently from Article 38(1)(b) of the Statute of the ICJ as the law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” Restatement (Third) Foreign Relations Law of the United States §102(2) (1987). It should be noted that this doctrine might be an example of the type of customary law that may be affected by the inclusion of individuals in the formation of customary international law, a proposal that has been argued by a handful of scholars and the present author. See, e.g. Christiana Ochoa, The Individual and Customary International Law Formation, __VA. J. INT’L L. __ (forthcoming).

45 See, e.g., John Smith, Third World Debt: Relief or Credit Crunch (available at www.cseweb.org.uk/downloads/smith.pdf) (last visited June 8, 2007). In connection with the debates on third world debt cancellation, the odious debt doctrine is just one of many
overwhelming debt of Iraq. As a result of these two contexts in which the doctrine has served as a useful conceptual tool, the idea of odious debt has resurfaced and has been the subject of an impressive amount of recent scholarship, especially during 2007. This Section will provide a brief overview of this scholarly attention devoted to the odious debt doctrine.

The purpose of this overview is twofold. First, it aims to provide the reader with a sense of the questions and theories surrounding the theory of odious debts. The second is more important to the ultimate objectives of this Article. In recent scholarship devoted to the idea of odious debts and the implications of a functional odious debt doctrine, there appears to be a widespread assumption that debt is not only the first and best financing option for states but also that, in the face of rising costs of lending, borrowers will either pay more for loans or will be forced to live without whatever finances they were hoping to attain through borrowing. A second shared assumption appears to be that loans are the only type of commercial obligation or means of financing a despotic tools. The applicability here, in some countries, would be obvious, as the leaders of many developing countries have been despots and have borrowed for purposes that would meet the criteria to be termed odious.

46 See, e.g., Patricia Adams, *Iraq's Odious Debts*, Policy Analysis No. 526, September 28, 2004 (available at www.cato.org/pubs/pas/pa526.pdf) (last visited June 8, 2007); G8 Research Group, *Debt Relief: Iraq*, Interim Compliance Report, February 9, 2006. (available at http://www.g7.utoronto.ca/evaluations/2005compliance_interim/2005-13_g8-i-comp_iraq.pdf) (last visited June 8, 2007). As of 2004, Iraq’s debt was estimated to be approximately $120 billion, a good portion of which might well be classified as “odious” were it to be measured against the doctrine’s tests. As a result, the United States has led an effort to see Iraq’s debts reduced. *Id.* The obvious applicability of the odious debt doctrine to this situation and its potential utility led to a good deal of discussion on the topic. See also, e.g., Jubilee Iraq, *Odious Debt*, (available at www.jubileeiraq.org/odiousdebt.htm), (last visited June 8, 2007.); William F. Buckley, Jr., *Odious Activities: Should Iraqi Debt Be Repaid To Russia and France?*, National Review Online, October 7, 2003 (available at http://www.nationalreview.com/buckley/buckley200310071228.asp) (last visited June 8, 2007).

government that might burden successor governments, successor states and their people and impede their ability to form and fund a fully functioning government.48

It should be observed that while the literature on odious debt is by no means vast, it is not the objective of this Article to describe each existing contribution. Rather, what is hoped is that the reader can gain a sense of the strains of discourse currently in play in the context of this doctrine.

1. The Iraq Context

When the United States first occupied Iraq, that country’s national debt was estimated to be approximately $120 billion.49 This debt stood as a tremendous obstacle to the reconstruction and re-development of Iraq.50 As a result, a number of scholars and debt-reduction advocates looked to the odious debt doctrine as a tool for reducing the Iraqi debt. However, the literature on odious debt and immediately related topics was, at that time, was sparse.51 For example, Jubilee Iraq, a non-governmental organization dedicated to the reduction of Iraqi debt and of its odious debt in particular, was formed in March 2003 and operates

48 The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983, defines state debt as “any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law. U.N. Doc. A/CONF.117.14. This Convention and definition will be discussed further in Section IV herein.

49 Martin A. Weiss, Iraq: Paris Club Debt Relief, Congressional Research Service, Order Code RS21765, Updated January 19, 2005. (available at http://fpc.state.gov/documents/organization/44019.pdf, last visited June 20, 2007). Of the $120 billion national debt, approximately $40 billion was owed to Paris Club members ($21 billion in principal and $19 billion interest), $60-$65 billion was owed to non-Paris club governments (mainly in the Persian Gulf) and $15 billion was owed to commercial creditors.


51 Examples include, Patricia Adams, ODIOUS DEBTS: LOOSE LENDING, CORRUPTION AND THE THIRD WORLD’S ENVIRONMENTAL LEGACY (1991) and Michael Kremer & Seema Jayachandran, Odious Debt, Brookings Institution Policy Brief #103 (July 2002) (available at http://www.brookings.edu/comm/policybriefs/pb103.htm) provide two of the very few examples of academic treatment of treatment of the issue. The majority of other work existing at the time came out of the debt-reduction movement, some of which is excellent and has provided a very good foundation for later scholarly work in the field. For a fairly comprehensive bibliography of this work, see the Odious Debts webpage, which includes a section on Key Reports on Odious Debts, housing a number of the reports produced by civil society and academics. (available at http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=titles&SubID=519, last visited June 20, 2007).
as a clearinghouse for information about the status of financial claims against Iraq.52

Starting in late 2003, soon after the appointment of former Secretary of State James Baker as President Bush’s emissary regarding the Iraqi debt, this changed significantly, as a number of articles and reports on Iraq’s debt situation and potential solutions or ameliorants to the problem were proposed. Patricia Adams, employing her expertise on the subject, published a policy paper in September 2004 which described the odious debt doctrine and recommended in very strong terms that the Iraqi people should not allow their debt to be restructured through the channels and efforts put forth by the United States, which favored debt reduction and rescheduling by the Paris Club53 and rejected debt forgiveness on the basis of any moral or quasi-legal imperatives.54 She proposed that the Iraqi people should take advantage of the odious debt doctrine and require lenders to prove the legitimacy of their loans and their resultant claims. Under her proposal, claims would be processed through an arbitral tribunal which would investigate the legitimacy of each contested loan.55

During this time period the Council on Foreign Relations also published a report on Iraq’s debt which included a fairly complete, if brief, overview of that country’s debt, the U.S. plan for reducing the debt and the applicability of the odious debt doctrine to the situation.56 Soon after this report the Congressional Research Service (CSR)57 focused its attention on the subject of the Iraqi debt and published reports related to this topic.58 The CSR reports, however, did not address odious debt, even

52 Jubilee Iraq was inspired, at least partially, by the larger Jubilee movement, which seeks reduction and forgiveness of sovereign debt of less developed countries. Their web addresses, in turn, are http://www.jubileeiraq.org and http://www.jubileeresearch.org (last visited, June 20, 2007).

53 The Paris Club is an informal group of the world’s eighteen major creditor countries. This group works together on occasion to reduce or reschedule developing country debts. See The Paris Club, www.clubdeparis.org (last visited, June 20, 2007).


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

58 The CRS reports are not easily accessible to the public, though they are occasionally obtainable. As a result, this Article does not claim to provide a comprehensive list of CSR reports on this topic. Two versions of one such report, however, are Martin A. Weiss, Iraq: Paris Club Debt Relief, CRS Report for Congress, Order Code RS21765, updated January 19, 2005 (available at http://fpc.state.gov/documents/organization/44019.pdf, last visited June 20, 2007) and
as they focused on the debt relief measures pursued by the United States and the inconsistencies such measures would create given that countries such as “Nigeria, Indonesia, Kenya and Georgia also recently emerged from decades of authoritarian and autocratic rule, and are saddled with extensive government debt, yet receive nowhere near the level of international exposure that has been given the Iraq situation.”

Detlev Vagts published an editorial comment in the American Journal of International Law in 2004 which reviewed the “only extant example of a bankruptcy...under international law, the London Agreement on German External Debts (LDA) of 1953.” In comparing Germany and Iraq, he reminds us that in the case of Germany, odious debt was not at issue because Germany had not incurred any contractual indebtedness under Adolf Hitler’s rule. He states, seemingly casually, that this will be one of the differences between the German and Iraqi debt problems but otherwise does not address the question of odious debt.

Finally, a small handful of legal academic articles and student notes were published around this time. Each approach is slightly different. Some argue for arbitral tribunals for settling creditor claims on basis (which would include use of the odious debt doctrine where applicable).

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Others argue persuasively that a case-by-case process is inefficient (and thus point to the inefficiencies of the odious debt doctrine which would often require case by case considerations), and still others argue that in the Iraqi case of government succession to massive debt international law is unlikely to be more useful than politics.

2. The Broader Debt Forgiveness Context

At the same time as the United States was wringing its hands over how to reduce Iraq’s debt, the discussion about third world debt forgiveness was becoming more lively and more public. Much of this discussion took place in the context of the World Bank’s and the IMF’s Heavily Indebted Poor Countries (HIPC) Initiative, which was launched in 1996 to act as a comprehensive framework for debt relief and in the context of the Multilateral Debt Relief Initiative, which holds the possibility of “one hundred percent relief on eligible debts by three multilateral institutions—the IMF, the International Development Association (IDA) of the World Bank, and the African Development Fund (AfDF)—for countries completing the HIPC Initiative process.”

In many cases, the countries which stood to benefit from debt forgiveness were also countries that had recently democratized after being governed by a strong-handed dictator in regimes were identified as fraught with corruption and graft. Some commentators have thus emerged arguing for including the odious debt doctrine to the broader debt forgiveness debate.

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64 Jeffrey Sachs has done much to make this topic more accessible to the public. See, e.g., The Development Challenge, 84 FOREIGN AFF. 78 (2005).
67 Examples include Nigeria, Indonesia, Kenya.
68 The Transparency International Corruption Perception Index 2006 ranks Nigeria, Kenya and Indonesia among the most corrupt countries in the world. The index can be viewed through Transparency International’s web site, at http://www.transparency.org/policy_research/surveys_indices/cpi (last visited, June 21, 2007).
69 The most direct treatment of this suggestion appeared in a 2004 student note. See, Emily F. Mancina, Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law 36 GEO. WASH. INT’L L. REV. 1239 (2004). See also, Undombana Nsongurua, The Summer Has Ended and We are Not Saved – Towards a Transformative Agenda for Africa’s Development 7 SAN DIEGO INT’L L. J. 5 (2005-
There are essentially two approaches in this literature. The first argues that the HIPC is not inclusive enough and that a comprehensive consideration of countries with meritorious claims for debt relief would include not only the most indebted and most poor countries of the world but also those countries servicing debt that was incurred by means that might well satisfy the elements of the odious debt doctrine. Michael Kremer and Seema Jayachandran, two scholars intimately involved with the revival of the odious debt doctrine, have noted that several other countries have been granted debt relief in connection with the HIPC but that several countries that are not on the HIPC list of debt relief candidates have “a plausible claim that their debts are illegitimate...”

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

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

The burgeoning odious debt literature has received a good deal of attention from experts in sovereign debt and lending. This should not be surprising. Valuable analyses have been recently written by Anna 2006); Jonathan E. Sanford, Foreign Debts to the U.S. Government: Recent Rescheduling and Forgiveness 28. GEO.WASH. J. INT’L. L. & ECON. 345 (1995).


Gelpern\textsuperscript{72} and Lee Buchheit,\textsuperscript{73} both of whom have significant experience in these areas and Mechele Dickerson, a bankruptcy expert.\textsuperscript{74}

Tom Ginsburg and Thomas S. Ulen and also Larry Backer have also made valuable contributions to this literature by exploring the problem of the odious creditor – the creditor who will lend to the worst of regimes for any number of reasons.\textsuperscript{75} Omri Ben-Shahar and Mitu Gulati have taken a more nuanced stance on this suggestion. They argue that the party best positioned to prevent accumulation of odious debt is the party who ought to bear the cost of such debt. At the same time, Ben-Shahar and Gulati make the important point that populations often do benefit from at least some portion of debt incurred by despotic regimes. To the extent that this is so, populations and creditors should share liability on the debt reflecting the relative blameworthiness and benefits of each.\textsuperscript{76}

The contributions of these scholars have contributed have been invaluable to the development of the odious debt doctrine. However, it is the position of this Article that the attention to debt only, to the exclusion of other types of financing and contracts, has created a blind spot in the developing odious debt literature that stands to have unanticipated and unfortunate consequences which have heretofore gone un-discussed.


\textsuperscript{74} Mechele Dickerson, \textit{Insolvency Principles and the Doctrine of Odious Debts: The Missing Link in the International Human Rights Debate}, (draft on file with author), (evaluating the odious debt doctrine through the framework provided by the United States Bankruptcy Code). See also, Kunibert Raffer, \textit{Odious, Illegitimate, Illegal or Legal Debts – What Difference Does it Make for International Chapter 9 Debt Arbitration?} (draft on file with author) (discussing duties of creditors and when and how creditor misbehavior would trigger damages). See also, Charles Seavey, \textit{The Anomalous Lack of an International Bankruptcy Court}, 24 BERKELEY J. INT’L L. 499 (arguing that there is no international bankruptcy court because the world’s economic powers prefer ad hoc and political resolution of debt crises).

\textsuperscript{75} Tom Ginsburg and Thomas S. Ulen, \textit{Odious Debt, Odious Credit, Economic Development and Democratization} (draft on file with author) (focusing some attention on the odious creditor and proposing that international financial institutions establish and fund an insurance scheme to which both nations and creditors seeking to repudiate debt on the basis of odiousness can appeal); Larry Catá Backer, \textit{Odious Debt Wears Two Faces: Cuba, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes} (draft on file with author) (examining the illegitimacy of the credit, rather than the debt, side of odious debt, looking specifically at the arguments of Fidel Castro about the “systemic odiousness” of the world’s lending institutions as a basis for repudiation).

\textsuperscript{76} Omri Ben-Shahar & Mitu Gulati, \textit{Partially Odious Debts?: A Framework for an Optimal Liability Regime}, (on file with author)
4. The Moral Imperatives of the Odious Debt Doctrine

Finally, the odious debt doctrine has gained the attention of a good number of commentators focused primarily on the moral imperatives and human rights aspects of the doctrine. The promise the doctrine holds for cancelling crippling debt burdens of countries recently freed from dictatorial, corrupt and, indeed, odious, regimes is compelling.\(^77\) It should be noted that there are also skeptics of this position; they argue that there is no empirical proof that the odious debt doctrine will be helpful in these ways. Rather, they argue, there is reason for skepticism about a number of the empirical premises made by the human rights focused optimists.\(^78\)

In addition, some commentators have noted that the doctrine holds the possibility of acting as a private enforcement mechanism for international anti-corruption law. One example includes a proposal that countries emerging from corrupt regimes may be excused from the repayment of debt on “traditional” odious debt principles and, further, that those emerging from truly abusive regimes would have to be paid restitution by businesses, banks and nations that actively and knowingly invested in such a regime.\(^79\)

There are, of course, other important contributions to the burgeoning literature on odious debt. Notable examples include Adam Feibleman’s recent article arguing that sovereigns and creditors could undertake contractual provisions for the prevention and repudiation of odious debt.\(^80\) Also, Tai-Heng Cheng, an expert on the law of commercial obligations after state succession,\(^81\) argues that the odious debt doctrine fails to take into account the fact that successions are so fundamentally political that legal rules have failed to gain any foothold. He argues that the only mechanism for influencing outcomes is not through tools like


\(^78\) See, Albert Choi and Eric Posner, A Critique of the Odious Debt Doctrine, (draft on file with author) In particular, Choi and Posner argue that “because the dictator controls the government, the doctrine necessarily harms the public if it is to affect the incentives of the dictator.”

\(^79\) David Gray, Deviiry, Complicity and Greed: Transitional Justice and Odious Debt (draft on file with author)


the odious debt doctrine but rather through a savvy understanding of the international decision making process.82

Given the relatively recent swell of this literature and the discrete character of this doctrine, a large portion of the literature shares several assumptions. Among the most important of these shared assumptions for the purpose of this Article is the seeming assumption that the only significant financing mechanism for states is debt and the only kind of contract that can be odious is a lending contract. To the present author, these assumptions seem to present inherent perils, all of which arise from their failure to acknowledge the various other mechanisms states may employ to raise funds and, in particular, the financing tools corrupt or despotic leaders may utilize in increasing their own private coffers. The following Section will describe in some detail just two of these mechanisms - investments facilitating the extraction of natural resources and foreign direct investment (FDI) in areas other than natural resources. The following Section also mentions some other possible problematic sources of funds.

III. UNDERLYING INTERNATIONAL LAW DOCTRINES

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

A. Continuity of Commercial Obligations

History contains a plentiful catalog of state and government successions, each of them particular and peculiar in their own way: peaceable or forceful; anticipated or not; welcome or looked upon with dread. These, of course, are not legal classifications. As treated by international law, the two main operative categories in succession doctrine are state succession and government succession.83 This distinction has been criticized as failing to meet the policy needs of a global economy.84

82 Tai-Heng Cheng, Renegotiating the Odious Debt Doctrine (on file with the author).

83 This distinction has been criticized as irrelevant in the modern context of globalization. See, e.g. Tai-Heng Cheng, State Succession and Commercial Obligations, Transnational Publishers, at 2-4 (2006)

84 Tai-Heng Cheng, State Succession and Commercial Obligations, Transnational Publishers, at 4 (2006). This Article adopts this view. References to state or
National governments founder or run their terms on a regular basis. When they do, they are normally followed by successor governments, either friendly or antagonistic to their predecessors. In states where succession is regularized by constitutional mandate\(^{85}\) statute\(^{86}\) or custom\(^{87}\), government succession may be largely predictable or at least follow predictable patterns. Unstable regimes, on the other hand, may be toppled unpredictably. In either scenario, international law on government succession holds that the commercial obligations of the predecessor government will be passed along to the successor.\(^{88}\)

The rules regarding state and government succession, the legal significance of succession and the obligations of successors to fulfill the obligations of their predecessors are noted for their complexity\(^{89}\) and, especially in the case of state succession, may be regarded as so sated with examples in which the doctrine was supplemented with other considerations and case-by-case treatment as to look more like a slate of potential political considerations rather than legal doctrine. Nonetheless, this Article will briefly discuss two relevant doctrines for successor governments, each of which has a well developed history and attendant literature.

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\(^{85}\) The Constitution of the United States of America serves as a fine example. Succession by election is addressed in Article I, 4, addressing election of Senators and Representatives; Article 2, Section 1, addressing election, installation and removal of the President. Succession to the Presidency by other means is addressed in Article II, Section 1making the Vice President first in line to succeed the President and directing Congress to provide for situations in which neither the President nor the Vice President are able to serve; Amendment XX, Section 3 addressing rules of succession in the event that the President-elect and/or the Vice-President-elect are ineligible or unable to serve and Amendment XXV, addressing voluntary and involuntary succession to the Presidency and Vice-Presidency.


\(^{87}\) The United Arab Emirates serves as a good example of a hybrid between constitutional provisions and custom regarding succession. Its constitution contains detailed provisions regarding succession to the presidency. Nonetheless when the only President in the history of that country died, the successor was determined according to familial/political considerations very reminiscent of more customary societies. See, Const. of the U. A. E., Articles 51-53, containing the rules of presidential election and succession. See also, Strategic Forecasting, Inc., United Arab Emirates: A Question of Succession (Oct. 17, 2004), available at http://www.tunezine.com/breve.php3?id_breve=682 (last visited, May 30, 2007) (describing the likely successors to the then President, who was rumored to be living his final days).

\(^{88}\) For more on this doctrine, see Section III herein.

\(^{89}\) Forward by W. Michael Reisman, in TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS, TRANSNATIONAL PUBLISHERS, at x (2006)
State and government succession to commercial obligations is typically governed by the rules of universal succession, which state that successor states and successor governments succeed not only to the responsibilities of governance and assets of a territory but also to their debts and other commercial obligations.

The odious debt doctrine exists as a potential exception to universal succession since it holds out the possibility that successors would not bear the debt burdens incurred by their predecessors in the event that the regime which had made the financial undertaking was sufficiently repressive and that the benefits of the debt do not benefit the population, together with other potential requirements.

B. Compensation for Expropriation

Like in the area of continuation of commercial obligations, the doctrine on compensation for expropriation is not stable and settled. Two major schools of thought exist regarding compensation for expropriation exist. The first is known as the “Hull Formula” and requires states to pay “prompt, adequate and effective” compensation for lawful takings of foreigner’s property. This position is the one favored by the United Nations. The universal succession theory, or the theory of continuity of obligations, has its roots in Roman law. It’s position as the prevailing doctrine, however, has not been constant. In fact, a wide range of theories of commercial obligation upon succession has existed over time and has spanned the extremes from the tabula rasa (clean slate) theory, which held that no obligations pass to a successor, to the universal succession theory at the other, which holds that all obligations pass to successors. As Cheng notes, neither of these absolutist theories is appropriate at this time.  

The requirements of the doctrine as currently understood will be discussed at greater length in Section II herein. 

States and other capital exporting countries, especially during the nego-
tiation of bilateral investment treaties. Developing countries, on the
other hand, have tended to subscribe to a compensation theory which
provides that a host state should afford foreigners essentially the same
treatment as it gives its nationals and that therefore compensation should
be determined by reference to the domestic laws of the host state.

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

94 RUDOLF DOLZER AND MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES
95 This doctrine is encompassed by the Charter of Economic Rights and Duties of States,
Article 2(2)(c), G.A. Res. 3281 of 1974, stating that:
[A host state may] nationalize, expropriate or transfer
ownership of foreign property, in which case appropriate
compensation should be paid by the state adopting such
measures, taking into account its relevant laws and regula-
tions and all circumstances that the state considers
pertinent. In any case where the question of compensation
gives rise to a controversy, it shall be settled under the do-
mestic law of the nationalizing state and by its tribunals,
unless it is freely and mutually agreed by all states con-
cerned that other peaceful means be sought on the basis of
sovereign equality of states and in accordance with the
principle of free choice of means.
96 See e.g., Oscar Schachter, Compensation for Expropriation, 78 AM. J. INT’L L. 121 (1984); M.H. Mendelson, Compensation for Expropriation: The Case Law, 79 AM.
97 Bin Cheng, The Rationale of Compensation for Expropriation, Transactions of
the Grotius Society, Problems of Public and Private International Law, Transactions for
the Year 1958-59, 267, 310 (1958). Professor Chen’s article is a useful source for
bibliographic as well as substantive coverage of the debate concerning expropriation
prior to the time of its publication. In particular, he makes a strong case regarding
payment of just, equitable and/or fair compensation.
compensation, the often cited Permanent Court of International Justice’s 1928 Chorzów case, which refers to a requirement of a “payment of fair compensation,” and the 1922 Norwegian Shipowners Claims arbitration, in which the arbitral tribunal called for “just compensation” and stated that just compensation should be determined by “fair actual value at the time and place...in view of all surrounding circumstances.”

The deep rationale for full compensation for “consists in the fact that certain individuals in a community... without their being in any way at fault, are asked to make a sacrifice of their private property for the general welfare of the community. Thus the rationale for full compensation rests on a presumption that the private property owner and the investment itself is without fault. In expropriation cases in which the odious finance doctrine proposed by this article would be relevant, the innocence of the property owner and the investment would inherently be in question. Where it is established that such investors and investments are not, in fact, innocent, considerations of equity and justice are appropriate. An odious finance doctrine would provide a mechanism for making such considerations.

From a normative perspective, this Article is in agreement with the position that in addition to the validly desirable policies of predictability and stability, “international law should manage state successions to facilitate and support the legitimate aspirations of territories that undergo succession.” Exceptions to the continuity doctrine and the inclusion of

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98 Restatement Third Foreign Relations Law of the United States, § 712, stating:

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

1. a taking by the state of the property of a national of another state that
   a. is not for a public purpose, or
   b. is discriminatory, or
   c. is not accompanied by provision for just compensation;

99 Case Concerning the Factory at Chorzów (Merits), 1928 PCIJ, ser. A, No.17, at 46.


the concept of odious financing in expropriation cases may help to accomplish this policy objective.

IV. ALTERNATIVES TO HIGH COST DEBT

Some commentators writing about odious debt have observed that the question of whether the lender is a private firm or a public entity should not be relevant to the consideration of what can be covered by the doctrine.103 This Article accepts this proposition and adds to it the observation that sovereigns seeking to raise capital have alternatives to borrowing funds. Indeed has been noted that despotic regimes do not necessarily care what the origin of their funds may be – public, private, debt, grant, contractual profit sharing payments, taxation, fees, etc., so long as they can be used to fund their corrupt, abusive or rent-seeking activities.104

Any finance method can be used to finance undesirable activity on the part of the despotic government. In fact, there are many types of financing methods which may hurt populations significantly more than the short-term and long-term impediments to development associated with high debt loads. And this last statement in no way denies that debt burdens can be crushing.105

This Article highlights the fact that many of these alternative finance methods come at just as high, if not greater, cost to the populations of a given country than debt. This Section describes two of these alternatives

103 See, Anna Gelpern, Odious, Not Debt, 71 L. & CONTEMP. PROBS. [ ] (2007) (forthcoming)
105 Debt burdens can be extremely burdensome for developing countries and can prevent them from achieving economic growth or from pursuing economic policies and social programs that benefit their populations. See, e.g., Esquivel, Gerardo, Larrain, Felipe and Sachs, Jeffrey D., The External Debt Problem in Central America: Honduras, Nicaragua, and the HIPC Initiative, 1-5, (November 1998). Harvard Institute for International Development Working Paper No. 645. Available at SSRN: http://ssrn.com/abstract=168173 or DOI: 10.2139/ssrn.168173 (discussing the Nicaraguan and Honduran debt levels and their inhibiting effect on growth.) The purpose of this paper is in no way to minimize these deleterious effects of high debt levels nor is it to question the importance of the odious debt doctrine. Rather, the argument of this paper is that the underlying normative claims and moral imperatives that make the odious debt doctrine appealing are not and should not remain in the exclusive domain of debt. Esquivel, Gerardo, Larrain, Felipe and Sachs, Jeffrey D., The External Debt Problem in Central America: Honduras, Nicaragua, and the HIPC Initiative, 1-5, (November 1998). Harvard Institute for International Development Working Paper No. 645. Available at SSRN: http://ssrn.com/abstract=168173 or DOI: 10.2139/ssrn.168173
natural resource extraction contracts and other FDI. To the extent possible, it will also seek to provide specific examples in which despotic regimes utilized these methods to benefit the politically connected few rather than the population generally or, worse, harmed the population.

A. Natural Resource Extraction

Production sharing and concession contracts, often in conjunction with project finance arrangements, can be used to arrange the financ-

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

[107] The question of what is meant by natural resources has been a subject of some scholarly debate and has given rise to a typology which differentiates between, e.g., 1) natural resources that require human intervention to be obtained and those that do not; 2) resources that are localized and those that are to be found dispersed throughout a country; and 3) those that are renewable versus those that are not. For a summary of this literature, see, Matthias Basedau, Context Matters - Rethinking the Resource Curse in Sub-Saharan Africa at 7-8, Global and Area Studies Working Paper No. 1, (May 2005)Available at SSRN: http://ssrn.com/abstract=906983

[108] Concession contracts are generally understood to be contracts in which private ownership of the goods to be extracted is permissible. In such a scenario, the state transfers title to these goods to the extracting company, the company extracts the goods, and the company then pays a royalty on the goods as well as a tax on profits from their sale. This contract system for petroleum extraction was very common until 1950. At one time, up to 122 countries around the world were using concession contracts. Concession contracts are known for granting nearly unrestricted and unfettered rights over long periods of time to explore and extract resources. Tengku Nathan Machmud, The Indonesian Production Sharing Contract: An Investor's Perspective, at 24 (2000). Under a production sharing contract the government owns the goods. The extracting company and the government each have the right to sell some set percentage of the extracted goods in accordance with the contract terms. In addition, the extracting company may be required to pay taxes and/or royalties on their profits from the sale of the goods. A useful roadmap of various types of contractual arrangement for exploration and extraction of petroleum can be found in Tengku Nathan Machmud, The Indonesian Production Sharing Contract: An Investor's Perspective, at 25 (2000). See also, Wendy Duong, Partnerships With Monarchs - Two Case Studies: Case One Partnerships With Monarchs in the Search for Oil: Unveiling and Re-Examining the Patterns of “Third World” Economic Development in the Petroleum Sector. 25 U. PENN. J. OF INT'L ECON. L., 1171, 1217-1211 (2004). Available at SSRN: http://ssrn.com/abstract=969017. For an overview of a variety of petroleum contracts, see ZHIGUO GAO, INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS (1994).

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

The term “project finance”...is generally used to refer to the arrangement of debt, equity, and credit en-
ing and extraction of a wide variety of natural resources, including oil and gas, timber, minerals, gems, etc. It is often by way of these mechanisms that land is surveyed and explored for economically profitable natural resource caches. Once resources are being extracted, these arrangements also act as the mechanisms through which extracted, mined or felled resources are allocated among the various parties to the contract – typically the state-owner of the resources and a private, usually foreign, corporation. Consequently natural resource concessions contracts or production sharing contracts and project finance transactions play vital roles in the financing state activities.

Wendy Duong has written in great detail about one a petroleum production sharing contract in Vietnam. In her study regarding the tendencies of such arrangements to produce both monopolistic and monarchical outcomes, she describes one Vietnamese production sharing contract negotiated in the early 1990’s under which the extracted oil was to be shared between an international oil company and a state entity, PetroVietnam. PetroVietnam was to receive the people’s share of the oil from the extraction activities of the oil company. Under the Vietnamese constitution, however, the people of Vietnam were the collective owners of all of that country’s natural resources. Thus, the sale of the

hancement for the construction or refinancing of a particular facility in a capital-intensive industry, in which lenders base their credit appraisals on the projected revenues from the operation of the facility, rather than on the general assets or the corporate credit of the promoter of the facility, and in which they rely on the assets of the facility, including the revenue-producing contracts and cash flow, as collateral...


Wendy Duong, id., at 1195-6.


Article 17. (Ownership of the Entire People)

The land, forests, rivers and lakes, water supplies, wealth lying underground or coming from the sea, the continental shelf and the air, the funds and property invested by the State in enterprises and works in all branches and fields - the economy, culture, society, science, technology, external relations, national defense, security - and all other property
oil was to be sold for the good of the people. Yet, at the time the contract was drafted and finalized, there were numerous activist groups documenting and denouncing the government’s human rights track record and high levels of neglect and abuse of its own people. The powerful point she makes is that despite such alerts and denunciations, the production sharing arrangement was finalized and, despite grave concern that the benefit of the arrangement would not accrue to the people of Vietnam, there was no inquiry into the legitimacy of the deal.115

Among Duong’s hypotheses is that even contracts that are profitable for the government may not pass any benefit on to the citizens of a country. This phenomenon is commonly called the resource curse or

113 Wendy Duong, id. at 1196.
114 Wendy Duong, id. at 1196-7, citing the reports of various human rights organizations.
115 Wendy Duong, id., at 1197.
116 Wendy Duong, id., at 1242.
117 See, RICK AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS, (1993); JEFFREY SACHS AND A.M. WARNER, NATURAL RESOURCE ABUNDANCE AND ECONOMIC GROWTH, Center for International Development, Harvard University (1997). Sachs’ and Warner’s findings have been challenged by a number of authors from a variety of perspectives. See, e.g. O. Manzano, O. and R. Rigobon, Resource Curse or Debt Overhang? NBER Working Paper 8390, July 2001 (suggesting that the resource curse might be better explained by focusing instead on a country’s debt burden) and Lederman, Daniel Lederman and William Maloney, Open Questions about the link between Natural Resources and Economic Growth: Sachs and Warner Revisited, Banco Central De Chile Working Paper No 141, Feb 2002 (challenging Sachs and Warner’s analysis on other counts such as their study’s chosen time period and omitted variables that could have changed their results.) and Matthias Basedau, Contest Matters - Rethinking the Resource Curse in Sub-Saharan Africa Global and Area Studies Working
the paradox of plenty and refers, simply put, to the negative correlation between natural resource wealth in many developing countries and their economic growth. This observation has been made repeatedly and has been applied not only to economic growth but also to the tendency of natural resource wealth to contribute to violent conflict, to high levels of corruption and to other failures in government and governance, especially in the form of corruption.

In the time since the resource curse was identified and given a moniker, other scholars have noted that a country’s governmental institutional framework and the degree of corruption within a country are highly relevant factors in predicting whether natural resources extraction and production will ultimately generate economic growth and redound to the benefit of the country’s people. The claim here is not that extraction and production of natural resources can never be beneficial to the people of a country but that contracts granting rights for the exploration, extraction and sale of natural resources, in practice, hold only tenuous possibilities for benefiting a country’s people. In the many countries in which natural resources are believed or are legally stated to belong collectively to the people, this may seem particularly problematic. But even in countries following a domanial system, in which natural resources are believed to belong to the state, questions must at least be

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119 The higher a country’s dependence on mineral extraction, as opposed to other economic activity, the lower its standard of living will be. The relationship between dependence on oil extraction and poverty is somewhat more ambiguous. Twelve of the world’s twenty-five most mineral-dependent states are classified by the World Bank as “highly-indebted poor countries.” For oil-dependent states, this number is six of twenty-five. M. Ross, M. Extractive Industries and the Poor at 7, Oxfam America, (2001). (available at, http://www.polisci.ucla.edu/faculty/ross/oxfam.pdf, last visited, July 4, 2007).


122 Many countries grant ownership of their natural resources to the sovereign or to the people. See, Andrew B. Derman, International Oil and Gas Joint Ventures: A Discussion with Associated Form Agreements, Natural Resources, Energy and Environmental Law Section, Monograph Series No 16 (1992).
raised about the legitimacy of arrangements under which natural resources—often the greatest source of wealth for a given country—are promised to foreign companies, are sold for profits which will benefit government officials and foreign companies and harm, or do not benefit, or perhaps only minimally benefit, the people of the host country. Questions regarding the legitimacy of these contracts are especially pressing given that the natural resource contracts can have durations of twenty, thirty years or even nine-nine years and can thus result in long-term detrimental consequences on the financial and political stability of a country and can significantly restrict the available sources of funds for government programs going forward.

B. Foreign Direct Investment and other Transactions

Contractual arrangements made between despotic governments and private investors, public entities and/or international organizations facilitating the exploration and exploitation of natural resources are not the only type of potentially odious non-debt obligation a new government may face. FDI in other economic sectors serve as one category of example, as may outright sales of valuable government property.

FDI has been defined as an “investment made to acquire lasting interest in enterprises operating outside of the economy of the investor” and includes gaining an effective managerial voice for the investor as

123 Within the odious debt doctrine discourse, an argument has been made that debt might only be reduced to the extent it did not benefit the people of a country. See, Mitu Gulati, [full cite] (forthcoming)


125 For example, in 1926 Liberia granted Firestone Tires a ninety nine year concession to vast tracts of land for the purposes of latex harvesting. For more on this arrangement, see Section VI herein.

126 A recently emerging example arises in Guatemala where a concession granted to a mining company in the 1960s when Guatemala was governed by a military dictatorship continues to be the source of land conflict and potential human rights violations. To the current knowledge of this author the facts of this situation have not been the subject of scholarly exposition or even of the mainstream media. They have thus not yet been verified but have been the source of activist alerts. See, e.g., RightsAction, GUATEMALA: more forced evictions of indigenous peoples planned in benefit of Skye Resources - Urgent Action below . (August 1, 2007) available at http://www.rightsaction.org/urgent_com/Skye_evictions_080107.html (last visited, August 22, 2007).

127 See fn.106 infra. [“A notable third alternative financing source is the outright sale of land or other valuable state assets. Sales of such property would be a natural recourse for governments if an odious finance doctrine failed to encompass such transactions. This Section does not treat property sales at length due to space and source constraints. It is a subject for future research.”]
among its objectives. This is almost always accomplished by way of an equity investment in the enterprise. Three main strategies of or methods for FDI are greenfield investments, mergers and acquisitions and joint ventures and the distinguishing characteristic of FDI is often stated to be “control over the assets of a foreign enterprise.” As of 1995, FDI was the “largest single source of external finance for developing countries.”

Countries eager to attract FDI must make decisions regarding two types of legal rules. First, regulations addressing registration requirements and restrictions on FDI must be addressed. For example, a country must determine if it intends to restrict investment in particular sectors or engaged in particular activities, such as investments that might invoke national security concerns. In addition, national policy makers must make decisions regarding a wide range of regulations in respect to labor, environmental, corporate, tax, intellectual property law, etc. and regarding how foreign companies will be treated in regard to ownership requirements, licenses, export and transfer of profits, investment incentive programs, etc. While many of these decisions are increasingly being settled by way of bilateral investment treaties (BITs), the ability

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128 Foreign Direct Investment, United Nations Conference on Trade and Development, available at http://www.unctad.org/Templates/Page.asp?intItemID=3146&lang= (last visited July 4, 2007). There are many valid definitions for FDI. The WTO Secretariat, for example, states that FDI “occurs when an investor based in one country (the home country) an asset in another country (the host country) with the intent to manage that asset. The management dimension is what distinguishes FDI from portfolio investment in foreign stocks, bonds and other financial assets.” WTO Secretariat, Trade and Foreign Investment, PRESS/57 (October 9, 1996), cited in DANIEL D. BRADLOW AND ALFRED ESCHER (EDS.), LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, at 3 (1999).


133 Countries are given wide prerogative to make determinations of this sort, as they have the “right to freely regulate the entry of foreigners into their economies unless they have provided otherwise in an international agreement.” DANIEL D. BRADLOW AND ALFRED ESCHER (EDS.), LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT at 27.

134 DANIEL D. BRADLOW AND ALFRED ESCHER (EDS.), LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT at 29.

135 Id., DANIEL D. BRADLOW AND ALFRED ESCHER (EDS.), Bilateral investment treaties (BITs) are: agreements between two countries for the reciprocal encouragement, promotion and pro-

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of each country to make decisions regarding those aspects of its regulation that can attract foreign investment ought not be underestimated. For example, BITs do not typically address specific labor practices or environmental laws and licenses, which may be of great importance to investors in particular business sectors.

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

And indeed, if stable, clear, transparent legal frameworks are not available, or if political stability and security are not present, arrangements may be made (contractually or less formally) to provide the foreign investor with the security it might require. These arrangements can and have come at great cost to the populations surrounding FDI enterprises. The recent law suit against Chiquita Brands Int’l, to which Chiquita pled guilty to charges of paying bribes to the Colombian para-military group, AUC, and the recently discovered connections between protection of investments in each other's territories by companies based in either country. Treaties typically cover the following areas: scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, and dispute settlement mechanisms, both state-state and investor-state.


137 *Daniel D. Bradlow and Alfred Escher (eds.), Legal Aspects of Foreign Direct Investment* 28 (1999). This Article, almost by definition, addresses itself to those situations in which the legal environment does not meet these criteria but to which is nonetheless attracted.
the Colombian government and the AUC serves as an insight into these types of arrangements.138

The Chiquita example, like other examples of corporate misbehavior and misdeeds, offers some insights into these potential long-term contractually imposed harms to the public good and to the welfare of a population. As in the discussion of natural resource extraction arrangements, the author wishes to make clear that FDI itself should not be seen as odious, nor should all FDI within despotic regimes be characterized in this light. These strokes would obviously be grossly over-broad. Rather, the argument here is that arrangements for the establishment of a foreign direct investment within a particular country should not enjoy protection from scrutiny simply because the obligations they create on the part of the government are contractual obligations for the sale of property, use of territory for operations, the availability of a labor force, the provision of security, or for particular tax treatment, regulatory carve-outs, etc., rather than obligations for the repayment of interest and principal.

V. THE ALTERNATIVES MAY BE MORE DETRIMENTAL THAN DEBT

In recent years, the consequences high debt burdens for developing countries of have come to be known by the international community. This knowledge has resulted in the policy initiatives discussed in Section II herein. And, to no small extent, the concern for Iraq’s ability to emerge from the Saddam Hussein regime and the enormous debts incurred by that regime has in part led to the recent reemergence of interest

in the odious debt doctrine.\textsuperscript{139} As has been stated previously herein, it is not the objective of this Article to diminish or call into question the deleterious effects of high levels of sovereign debt.

Rather, this Article aims to expand the scope of the odious debt doctrine to other types of sovereign finance. In part, the rationale for this expanded focus rests on the recognition of two facts. The first is that any kind of sovereign finance is ultimately a contractual relationship. This is true for loans, which rely on contracts in the form of loan agreements and attendant documents for memorializing of terms and conditions, just as it is true for concession, production sharing or project finance contracts for the extraction of natural resources, just as it is true for the contracts between investors engaging in FDI and host countries. The second is that at least some forms of sovereign finance may be at least as harmful - or more so - to the short-term and long-term interests of the population as debt may be. This Section will suggest three types of harms not found directly in the context of debt loads but often found in natural resource exploration and exploitation arrangements as well as in other types of FDI. To the extent possible, the three categories of harms explored herein - those arising from (i) depletion of natural resources and environmental degradation, (ii) from corruption and (iii) from human rights violations - will be kept conceptually separate, despite the fact that they are often intricately interconnected in the actual circumstances in which they arise.

A. Indonesia: Depletion of Natural Resources and Environmental Degradation

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

\textsuperscript{139} The connection between the odious debt doctrine and Iraq is discussed herein in Section II.
Short-term environmental harms are essentially those harms that were incurred and experienced by the population during the time the depot was in power. Harmful air and water pollution may serve as good examples. As a general matter, non-democratic governments and dictatorships have been found to provide public goods, including safe water and pollution control at significantly lower levels than democratic governments. Specific historical instances of harmful air and water pollution are also available. At the end of the Cold War, the environmental abuses of Eastern Europe’s totalitarian societies created a set of data points confirming the proposition that such regimes are less prone to provide necessary environmental regulation. And today in China, for example, over 750,000 people are believed to die prematurely each year from exposure to pollutants, including approximately 350,000 to 400,000 premature deaths due to poor air quality in Chinese cities.

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


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


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

Among the medium-term consequences emerging governments will face is the inability to attract new income producing investors to locations that are significantly polluted, unhealthy and afford only a low quality of life. Another to this medium-term consequence is the inability of successor governments to make new, more equitable arrangements for the exploration and extraction of its natural resources. Until semi-renewable resources have been restored, they cannot responsibly be used by future governments hoping to pass the benefits of such use on to their populations.


Roger D. Congleton, Political Institutions and Political Control, 74 REV. OF ECON. & STATS 412 (Aug., 1992)

Id. Roger D. Political Institutions and Political Control, 74 REV. OF ECON. & STATS 412 (Aug., 1992)

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

An elaboration of renewable, semi-renewable and non-renewable resources is beyond the scope of this Article. For the sake of simplicity, it adopts a framework in which renewable resources are those that can be replaced at the same rate as human consumption of that resource (examples would be wind or solar power); semi-renewable resources are those that, with proper management, can be used in perpetuity (examples might be sustainable de-forestation or other types of soil-intensive farming or well-planned use of aquifers); and non-renewable resources are those that cannot be replaced at the rate of human consumption (examples include oil and gas, but would also include excessive use of otherwise semi-renewable resources that have been depleted beyond their ability to self-renew).
The long-term environmental harms and resource depletion harms that can be caused by foreign direct investment are not necessarily particular to despotic regimes. In every instance in which resources are used at a rate faster than they can be restored, natural resources are depleted, often forever. As in the case of environmental harm, all styles of government, democratic and not, participate in this type of long-term natural resource depletion.150 Particular to despotic regimes, however, are the uses of those resources and the income stream they produce. Deforestation in Indonesia during the years of Suharto’s151 rule serves as one telling example.

Article 33 of the 1949 Indonesian Constitution states, in paragraph 3 thereof, that “Land and water, and the natural resources found therein, shall be controlled by the state and shall be exploited for the maximum benefit of the people.”152 Nonetheless, during Suharto’s rule, Indonesia witnessed large scale deforestation and forest degradation that violated the constitutional mandate of providing maximum benefit for the people.153

Deforestation in Indonesia is largely the result of a corrupt political and economic system that regarded natural resources, especially forests, as a source of revenue to be exploited for political ends and personal gain...and their profitability was used by Suharto’s regime as a means to reward and control friends, family, and potential allies.154

In 1967, Indonesia’s Forestry Act created the opportunity for the granting of timber harvesting rights and logging concessions. As a result, exports of Indonesian timber rose rapidly in the 1970s.155 Nearing the

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end of Suharto’s rule, “some 585 concessions covered 63 million [hectares], approximately one third of the nation’s total land area.” \(^{156}\)

Logging concessions in Indonesia were for terms of up to twenty years\(^{157}\) and initially named private entities as the concession holders.\(^{158}\) As a result of these contracts, the long-term well-being of the forests suffered significantly.

The close connection between the Suharto regime and most of the major timber groups resulted in a lack of oversight and transparency, which is one reason for ongoing poor forestry management.\(^{159}\) In early 2000, the Ministry of Forestry reported that “most” of the forest under logging concessions was in “damaged condition.”\(^{160}\) It appears that the restrictions and rules on logging, which make up part of the concession contracts, were regularly violated by timber companies.\(^{161}\) Despite the large-scale depletion of one of Indonesia’s key natural resources in a manner that did not benefit the people, Suharto and the private enterprises that owned concessions benefited significantly.\(^{162}\) During his rule,

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\(^{158}\) After initial concession periods ended, a large number of concessions were reconstituted as joint ventures and one of Indonesia’s five state-owned forestry operations. Others directly benefited Indonesia’s military we became concession holders of 1.8 million hectares. However, private corporations continued to benefit significantly. “Even after this major shake-up in the industry, the top 10 timber companies were virtually unscathed; their ranking and control over concession area changed little.” Id., EMILY MATTHEWS (ED.), THE STATE OF THE FOREST: INDONESIA, at 27 (2002).

\(^{159}\) Id., EMILY MATTHEWS (ED.), THE STATE OF THE FOREST: INDONESIA, at 27 (2002).


\(^{162}\) For a discussion of Suharto’s wealth accumulation, see, John Colmey and David Liebhold, Suharto Inc.: The Family Firm, TIME MAGAZINE, May 24, 1999.
he is believed to have stolen between $400 million\textsuperscript{163} and $35 billion dollars\textsuperscript{164}.

The example of Indonesia during Suharto’s rule is perhaps one example of two combined phenomena. The first, called the “pollution haven” hypothesis, theorizes that firms will flock to areas with lower environmental protections.\textsuperscript{165} This hypothesis is shown to be particularly strong in the case of firms engaged in pollution-intensive activities.\textsuperscript{166} The second theory, also supported by empirical data, is that the ability of FDI to influence governmental policy makers to ease environmental restrictions is conditional on the local government's degree of corruptibility.\textsuperscript{167} The evidence supporting this theory, combined with the pollution-haven hypothesis, suggests that FDI pursued in the context of a corrupt government may lower local environmental standards which, in turn, may have the effect of attracting pollution-intensive industry. Adding to this already bleak situation, corrupt governments are far less likely to pass the benefits of FDI to their populations, and the means by which benefits are retained in the hands of the elite may not be explicit or transparent, since corruption and non-contractual arrangements benefiting the government or the FDI in illicit ways will likely always be obscured. As a result, the long-term obligations under contracts with foreign investors for natural resource extraction or other FDI activity may rely on assumed or implicit terms which are highly undesirable to the new government and not beneficial to the populations thereof.

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B. Corruption

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

Three theoretical relationships between FDI and corruption are identified here. The first has already been mentioned above and lies in the capacity of foreign firms to influence corrupt governments to adopt regulatory policies that are beneficial to their operations. The second relationship has been referred to as the “helping hand” of corruption. In this relationship, corruption greases the wheels of investment, production and commerce. The third relationship has been identified as the “grabbing hand” of corruption and suggests that corruption is costly for investors. While one or more of these relationships might be beneficial to the income stream of a corrupt government, none are beneficial to

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168 This Article adopts the definition of corruption employed by Transparency International, a leading anti-corruption organization. According to Transparency International, “[c]orruption is operationally defined as the misuse of entrusted power for private gain.” This definition is available at http://www.transparency.org/news_room/faq/corruption_faq (last visited, July 10, 2007).

169 Some commentators have focused expressly on this aspect of the odious debt doctrine. See, David Gray, Devilry, Complicity and Greed: Transitional Justice and Odious Debt (draft on file with author).


the population. For this reason, this Article contemplates short and long-term effects of FDI under corrupt and despotic governments.

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

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


corruption in developing countries plays a ‘role which is sufficiently important that if it was not played by this device must be played by another or the consequences might severely undermine the pace, but more importantly the character of the development effort.

175 Augustine Ruzindana, The Importance of Leadership in Fighting Corruption in Uganda, at 137, in KIMBERLY ANN ELLIOT (ED.), CORRUPTION AND THE GLOBAL ECONOMY, INSTITUTE FOR INTERNATIONAL ECONOMICS (1998) (stating that corruption
prohibits more efficient and beneficial activity, the population will have incurred harm.

An excellent example of this type of harm is the Kenyan Anglo-Leasing Scandal in which a French firm originally bid on a government contract for a new passport printing system at a rate of €6 million. The contract was awarded to a British firm, Anglo-Leasing Finance, at a rate of over €30 million. Anglo-Leasing subsequently arranged to subcontract the work to the same French firm. This scandal was just one of many of its sort. Corruption is estimated to cost Kenyans approximately $1 billion per year.

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

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

often results in abandoned or incomplete roads, buildings and other projects that are the physical manifestation of corruption opportunities.)

176 See, Jeevan Vasegar, Kenyan President Faces Rebellion on Sleaze, THE GUARDIAN, (Feb 24, 2005). See also the report of the John Githongo, the Permanent Secretary for Governance and Ethics at the time of the scandal, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_02/06_kenia_report.pdf (last visited, July 9, 2007).


178 Experts on corruption have identified four types of harm: political, economic, social, and environmental. For a discussion of each of these see, http://www.transparency.org/news_room/faq/corruption_faq (last visited, July 10, 2007).


181 Save the Children states that: “Children are the most vulnerable to the devastating impact of conflict and chronic under-investment in health and education. Transparency in the oil and gas industries is about economic justice: a citizen’s right to a fair share of the economic benefits derived from their country’s natural resources. This includes children.” Save the Children, Beyond Rhetoric: Measuring Revenue Transparency in the Oil and Gas Industries, at 1 (2005). This document also provides more detailed information regarding the impacts of lack of transparency on children. Id, at 2.
In addition, degradation to the legitimacy of a government and its legal system can have long-term effects on the level of investment a country is able to attract over time. This reputational harm is difficult to measure but also difficult to repair.

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

If Bangladesh were to improve the integrity and efficiency of its bureaucracy to the level of Uruguay (corresponding to a one-standard deviation increase in the bureaucratic efficiency index), its investment rate would rise by almost five percentage points, and its yearly GDP growth rate would rise by over half a percentage point.

The view that a country’s perceived levels of corruption – or its reputation in respect to corruption – is detrimental to its future ability to attract FDI is a view reinforced by the above quotation and also a view adopted and perhaps perpetuated by Transparency International, a leading anti-corruption NGO. Because corruption operates for the most part in the shadows and in secret, actual levels of corruption are difficult to determine. For this reason, Transparency International publishes annual Corruption Perception Indexes which are composite indexes that draw on multiple expert opinion surveys polling perceptions of public

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183 In this way, the harm to a country’s reputation in respect to its level of corruption might be thought of as similar to a company’s goodwill, which refers to the intangible assets of a corporation. These intangible assets might include customer relations, brand name, good employee relations, etc. For more on valuing goodwill and on the legal history of the concept of goodwill see, Gabriel A. D. Preinreich, *The Law of Goodwill*, 11 THE ACCOUNTING REVIEW 317-329 (1936), available at http://links.jstor.org/sici?sici=0001-4826(193612)11%3A4%3C317%3ATLOG%3E2.0.CO%3B2-C (last visited, July 10, 2007).

sector corruption in 163 countries around the world. The Corruption Perception Index “scores countries on a scale from zero to ten, with zero indicating high levels of perceived corruption and ten indicating low levels of perceived corruption.”\(^\text{185}\) Because information regarding secretive transactions is inherently not perfect information, there is likely to be a significant time lag between efforts to expunge corrupt activity from the private and public sector and improvements in the perceived level of corruption within a given country.\(^\text{186}\)

**C. Human Rights Abuses**

Among the factors that give strength to the moral imperatives of the odious debt doctrine is the possibility that the loans provided to a despotic leader not only failed to benefit the population but, in fact, were used to finance the harms inflicted by the despot upon the population. This Article concurs that the notion of holding the population of a newly democratized state responsible for the repayment of loans that were used to abuse them in previous times is abhorrent. In addition, other types of investments, such as extractive industry investments and other types of FDI sometimes plays direct, facilitative or complicit roles in violations of human rights. To the extent that this can be shown to have occurred, such FDI ought not enjoy the benefits of the standard continuity of


commercial obligations doctrine and of full or market value compensation for expropriation.

In recent years, the connections between transnational corporations and human rights violations have received significant attention\(^{187}\) and examples of human rights violations caused by corporations or in which corporations were complicit\(^{188}\) are relatively numerous. Each instance in which a particular investor has engaged in human rights violations, directly or indirectly, will have particular facts which will have to be established before any doctrine negating the continuity of the investment could be of use and, for this reason, it is beyond the scope of this Article to detail all the various types of human rights abuses that might create a basis for negation of the continuity doctrine. What follows are just a handful of a large number of cases in which FDI caused harms that might have been avoided or mitigated had an odious finance doctrine been included in the risk calculations of the investing firms.

### 1. Angola: Diamond and Oil Extraction and Human Rights

The diamond extraction industry has received much attention over the past decade, as larger and larger portions of the diamond-demanding population have come to learn of the brutal labor practices of rebel leaders using diamonds to finance their operations\(^{189}\) and, further, of the importance of diamonds in financing internal wars in locations such as Angola and Sierra Leone.\(^{190}\)


\(^{188}\) To date, there are no agreed standards for establishing complicity by corporations in human rights violations See, International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing Legal Obligations of Companies*, at 121 (2002). Examples of complicity include situations in which corporations benefit from human rights abuses and/or in which corporations are silent in the face of human rights abuses committed by others.


\(^{190}\) See United Nations, *The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts* General Assembly Resolution, A/RES/55/56 (Jan. 29, 2001).
In Angola, the rebel group UNITA, had a long standing strategy to occupy the areas with the highest concentration of diamond mines and used diamonds to finance their on-going need for weaponry.\(^{191}\) During and as a result of Angola’s civil war, thousands of civilians were killed, hundreds of thousands were maimed and millions were displaced.\(^{192}\) UNITA’s attacks against civilians, including mass murders of civilians, have been documented.\(^{193}\)

Beginning in 1994, as part of a peace agreement, UNITA was formally permitted to mine diamonds and was also permitted to form partnerships with foreign companies.\(^{194}\) The importance of diamonds to UNITA and of UNITA-controlled diamonds to the diamond market as a whole was significant. For example, it is estimated that from 1992-1997, “the rebel movement supplied between eight and ten percent by value of the rough diamonds on the world market.”\(^{195}\) The connections between UNITA and foreign diamond companies during this time period has been established elsewhere and include recorded connections between twelve transnational diamond buying companies and UNITA.\(^{196}\)

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

UNITA was not the only party guilty of human rights abuses during Angola’s internal war, nor were diamonds the only source of funds for the rebels or the government. In addition to receiving income from diamond operations, the government of Angola and its military were also financed by oil extraction and human rights reports document abuses perpetrated by government entities against civilian populations, primarily in oil rich regions of the country. In addition, it is estimated that from 1997-2002, more than $4 billion of oil revenue was embezzled from the government coffers, contributing to wide scale childhood malnutrition, and undermining the civil, political, social, economic and cultural rights of Angola’s citizens.

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2. Myanmar: “notorious for using violence and coercion to secure areas slated for major investment projects”204

The ruling government of Burma (or Myanmar), like Angola, is highly dependent on oil and natural gas extraction to sustain its military rule. It is estimated that Burma’s gas industry makes up at least thirty percent of the country’s exports.205 The connection between human rights abuses and investments in this sector of the Burmese economy has received much attention, in part due to a lawsuit based on the United States Alien Tort Claims Act.206

The lawsuit of Doe v. Unocal, involved the construction of a natural gas pipeline in Burma. The plaintiffs, Burmese villagers, sued Unocal, alleging its complicity in violations committed through the Burmese military, intelligence and/or police forces, which used violence and intimidation to relocate whole villages, enslave villagers living in the pipeline area, steal property, and commit assault, rape, torture, forced labor, and murder.207 This lawsuit was ultimately settled out of court208 but not before media attention was drawn to the regular violations of human rights within Burma in connection with large scale investments such as the Unocal pipeline.

As new deposits of natural gas are discovered in western Burma, firms from India, South Korea, Russia and China have been undeterred by the expense and public embarrassment Unocal experienced as a result of its connections with the Burmese military.209 For example, one gas

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206 Alien Tort Claims Act, 28 U.S.C § 1350.

207 Unocal I, 963 F. Supp. at 883. These are violations of the human rights set out in the UDHR and the ICCPR. See, UNDHR, Art. 3 and Art. 5; ICCPR, Art. 6, Art. 7 and Art. 9 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

208 EarthRights International was the representative for the plaintiffs in the case. Their announcement of the settlement can be viewed at http://www.earthrights.org/legal/unocal/ (last visited, July 12, 2007).


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

It is important to note that while the practices in Burma may be particularly egregious, connections between natural resource extraction by foreign corporations and human rights abuses have been drawn in many other areas of the world. Law suits against Shell in Nigeria and against Texaco in Ecuador provide just two examples.

3. Historical Labor Abuses on Banana Plantations, Child Labor in Liberia and Labor Abuses in Saudi Arabia

Latin American Banana Plantations:

Historical accounts and analysis of the relationship between the United Fruit Company (UFC) and dictatorships in Latin America during

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210 Id. Human Rights Watch also reports that:

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

Id.


the twentieth century provide another example of what has been termed the potential “Triple Alliance” that may be formed between investors engaged in FDI, repressive governments and the elite of the investor’s host country.\textsuperscript{214} During the early part of the twentieth century, United Fruit received a number of its land grants and railway concessions from dictatorial governments.\textsuperscript{215} During this same time period, dictatorial governments were often willing to violently suppress labor unrest to for the benefit of United Fruit.\textsuperscript{216} In addition, it has been argued elsewhere that the relationship between United Fruit (and other foreign investors) and repressive governments is, by necessity, a rather close one\textsuperscript{217} - one in which the firm and the government each benefit the other and the people stand to benefit either little, not at all, or may actually be harmed as a result of the arrangement.\textsuperscript{218}

Firestone in Liberia


\textsuperscript{218} One example of this is included in Marcelo Bucheli, \textit{Good Dictator, Bad Dictator: United Fruit Company and Economic Nationalism in Central America in the Twentieth Century}, at 13, Unpublished Manuscript, available at \url{http://www.business.uiuc.edu/Working_Papers/papers/06–0115.pdf} (last visited, July 13, 2007), describing events that transpired in Honduras in 1932 when banana prices fell. United Fruit lowered wages of workers and local planters. As a result workers struck. The Honduran dictator of the moment, General Tiburcio Carías, allowed the wage reduction and reacted to the worker strikes by banning the communist party, prosecuting the opposition and creating an even closer bond with United Fruit.
A second, more recent example arose in Liberia from 1926 to the present. The facts of the recent *Roe v. Bridgestone* Alien Tort Statute case provide a concise history of the significant labor abuses and slave-like conditions that have existed in Liberia since before Bridgestone Firestone established its rubber tapping operations there in 1926 and which became increasingly problematic as the labor conditions in Liberia were altered significantly as a result of Firestone’s large scale operations.

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

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

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220 *Id. Roe v Bridgestone*


The lead investigator for the League of Nations into the labor situation in Liberia concluded that human beings were being pawned by the government. Firestone, however, did not leave the country, nor did they ensure that their own labor practices in the country would not benefit from this type of human exploitation. Indeed, the plaintiff’s complaint in the Firestone case alleges that soon after Bridgestone Firestone was granted its concession:

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

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

Wide Spread Abuses in Saudi Arabia

Like many countries, Saudi Arabia actively promotes itself to potential businesses seeking to engage in FDI. Despite long running

\[225\] Cuthber Christy, Pawning Of Human Beings In Liberia, 30, no. 119 J. AFRICAN SOCIETY, 169-174 (April 1931)
\[226\] Roe v Bridgestone, at 9.
\[227\] See, Roe v Bridgestone, 9-13 (The complaint alleges among other facts that the Firestone plant was created to allow human exploitation and has continued in this vain, including close collaboration with the Charles Taylor government. It also argues that, during the Taylor regime, Firestone used its shipping facilities to import arms and ammunition" for the military. id. at 12.
\[228\] The court in this case has refused to dismiss the plaintiff’s claims regarding the exploitation of child labor by Firestone. See, Roe v Bridgestone.
\[229\] See the Saudi Arabia General Investment Authority website, located at http://www.sagia.gov.sa/en (last visited, July 12, 2007). The Kingdom of Saudi Arabia has identified 400 potential investments in eight business sectors, covering all of Saudi
concerns regarding the political openness and the human rights record of the Saudi government, the stock of FDI in Saudi Arabia for the United States alone in 2003 was $4.2 billion, up from $3.8 billion 2002.230

In that country, “foreigners account for 67 per cent of the workforce and hold 90 to 95 percent of private-sector jobs.”231 The natural conclusion to be drawn from this figure is that foreign firms operating in Saudi Arabia are likely to be employing foreign workers, the majority of whom are low-paid skilled and unskilled workers employed in a wide variety of business sectors.232

Recent reports have brought to light the wide spread labor abuses of the nearly nine million migrant workers living in Saudi Arabia.233 Abuses include, slavery-like work conditions, including workers being locked inside their workplaces and denied freedom of movement during their contract terms.234

The labor abuses within Saudi Arabia serve as an admittedly bare example, but also as a somewhat rare insight of the kinds of labor rights violations workers may suffer in the employ of foreign firms operating within and to the benefit of repressive governments.235 Considering the grim nature of available information regarding labor abuses in relatively open societies,236 there is real cause for concern and possibly even alarm regarding the labor practices of firms operating within closed societies in the control of despotic governments.


236 Examples might include India, Ecuador bananas, Mexico and Guatemala factories, Thailand and the UAE.
To the extent that firms are benefiting from the ability of a regime to offer its labor force at low rates and/or with little or no regulatory protections, firms may be engaging in investment activity that benefits the repressive regime but may not benefit the people of their host country. Indications of this sort of activity would be most obvious when governments supply armed security forces, military forces or police to violently ensure that labor unrest is suppressed.

VI. AN ODIOUS FINANCE DOCTRINE

A. Characteristics that make Debt Odious and not just Onerous

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

As stated previously, the agreed upon characteristics making debt odious under the odious debt doctrine are that it was (i) incurred by a despotic power237 (ii) used for purposes that do not further the interests of the state and (iii) that the creditor must also have known that the loans would be used for purposes that were contrary to the interests of the nation.238

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


238 Id.
B. Can only Debt be Odious?

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

In considering the types of investments discussed herein – investments involving outright sales and purchases and FDI in various sectors – the aim has been to provide information about the potential negative outcomes of such methods of despotic financing. The goal has not been to give a balanced account of the outcomes of all instances of such sales and FDI. Rather, the Article, by necessity has focused on the true gutter of such activities, operating in locations that have the worst of governments. When these investments finance despotic governments, they might justify exceptions to the doctrine of continuity of commercial obligations, and argue in favor of equity concerns in the context of compensation for expropriation in the event of government succession.

Before reaching the conclusion that they would, in fact, justify mitigating these doctrines, however, it is worthwhile to elaborate on the analogies that can be drawn between the loans that would be treated under the odious debt doctrine and the detriments and obligations created by the investments that have been discussed herein. What follows is a re-phrasing of the characteristics of odious debt to encompass other types of despotic financing of the sort explored in this Article.

1. Incurred by a Despotic Power

In all of the financing examples provided herein, despots created national obligations. In the case of outright sales of state property, the government will have created an obligation either explicitly or implicitly to not retake the property in the future without compensation. In many cases, the government will have entered into bilateral investment treaties, pursuant to which the government binds itself to provide favorable investment terms and operating environments for foreign investors. In the case of oil, gas, gem and timber extraction, land concessions, production sharing agreements, and project finance the underlying contract will likely create an additional set of obligations on the part of

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\(^{239}\) In some cases, the government may have signed a bilateral treaty stating explicitly that it employs a compensation standard that mirrors the Hull doctrine (discussed previously in Part III herein.) This Article takes the position that such provisions to bilateral treaties should be cancelled in cases where the elements of an odious finance doctrine are satisfied.
the government for the granting of property, the provision of security, the
promise of tax holidays, etc. Many of these obligations may be long-
term - lasting twenty, thirty, or even ninety-nine years and many of these
obligations will outlive the reign of the despots who create them.

2. Used for Purposes that do not Further the Need or Interests of
the State

As has been demonstrated herein, there is significant debate regard-
ing the extent to which direct investors benefit from associations with
despotic regimes. Some argue that democratic regimes are more benefi-
cial environments for transnational firms. And, of course, it must be said
that much FDI may benefit the interests of the state, whether through the
payment of taxes, the provision of employment opportunities, the trans-
fer of technology to host country enterprises, etc. But, as has been shown
herein, there are also instances in which the overwhelming effect of an
investor’s operations do not further the interests of the state, but rather
primarily benefits the personal interests of those comprising the despotic
incumbent government.240

In many cases, the investor’s operations will diminish the natural re-
source wealth of a country, such that the people and successive
governments will have far fewer available sources of funds, especially if
their obligations are continued.241 In some cases, high levels of corrup-
tion result in very little or no revenues from an investment being used
for the provision of even essential public services.242 It is difficult to
contemplate how it could be argued that such investors operate in fur-
therance of the interests of the state.

Further, in some cases, the presence of an investor will destabilize a
region and in order to aid an investor's activities, a government may
displace of whole villages, enslave people and engage in arbitrary
detention, killings and other human rights violations. Such government
activity may be financed directly or indirectly, though government
payments, by the firm itself.243 In other cases, an investor’s allegiance
with the government results in labor regulations and policies that violate
basic labor rights principles.244 In such cases, again, convincing argu-

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240 See, e.g., discussion of Angolan diamond operations in Section V herein. and
discussion of Corruption in Section V herein.
241 See, e.g., discussion of environmental degradation and natural resource explora-
tion and extraction at Section V herein.
242 See, e.g., discussion of Burma in Section V herein.
243 See, e.g., discussion of Burma and gas exploration in Section V herein.
244 See, e.g., discussion of the United Fruit Company in Latin America, Latex in
Liberia and labor in Saudi Arabia in Section V herein.
ments that an investor’s presence benefits the state would be difficult to construct in earnest.

3. **Investor Must Also Have known that the Investment would be Used for Purposes that were Contrary to the Interests of the Nation**

The increasing flow and availability of information regarding corruption perceptions, human rights abuses, and political conditions make risk assessments increasingly easier for investors to make accurately. Nonetheless, any requirement of “knowledge” on the part of the investor gives rise to a number of questions that have arisen in the context of the odious debt discussion as well as in the context of anti-corruption efforts.

A complete analysis and recommendation of the standard of knowledge in the context of investments of the sort described by this Article must be reserved for another day or another author. However, since outright sales and FDI (especially FDI in the extractive and agricultural sectors) is significantly more vulnerable to internal political conditions and volatility than other credit-only investments, the standard required to trigger the odious finance doctrine need be no more strict than the knowledge standard required to trigger the odious debt doctrine.

4. **Incurred without the Consent of the People**

As was stated in the earlier discussion of the characteristics of the odious debt doctrine, there is some controversy over this criterion.

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247 The required standard of knowledge is the source of controversy both in the odious debt doctrine context and in the context of the Foreign Corrupt Practices Act. The definition and standard of knowledge is an essential component of this and other doctrines. Knowledge might mean actual knowledge (i.e., the firm *actually* knew that its investment in a host state would be detrimental to the interests of the nation) or it might mean constructive knowledge (i.e., the firm *knew, had reason to know, should have known*, etc. that its investment would be detrimental to the interests of the nation.) Because actual knowledge is much more difficult to establish than constructive knowledge, the standard chosen is quite important.
249 See this footnote above: “Buchheit, Gulati and Thompson, for example fold the fourth criterion into the requirement that the debt be incurred by a despot. For them this
This author adopts the view expressed by Buchheit, Gulati and Thompson regarding this criterion because it finds it to be redundant with other characteristics of odious debt. If the obligations were incurred by a despot, they were likely incurred without the consent of the people.

The analysis contained in this Section leads this author to the conclusion that the characteristics that make debt odious under the odious debt doctrine can be rather easily applied to the obligations taken on by despots in connection with other types of financing. These obligations can also be deemed odious and, as a result, under the doctrine of odious finance, such obligations should be forgiven, cancelled or deemed void. The moral imperatives of the odious debt doctrine presumably would also transplant onto non-debt obligations. This being the case, a significant concern arises and is the impetus of this Article and is discussed in Subsection 5 below.

5. Why an Odious Finance Doctrine?

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

This possibility requires broader thinking about odiousness, such that the concept might attach itself to a much larger set obligations incurred by a despotic power that are not used to further the interests of the population of the state and which the investor must have known would be used for purposes that were contrary to the interests of the nation. Under an odious finance doctrine any such obligation would be treated as exceptions or mitigating factors to standard law dictating continuity of obligations in government successions and requiring
compensation for expropriations and would be subject to full or partial cancellation.

VII. CONCLUSION: PRACTICAL ASPECTS OF AN ODIOUS FINANCE DOCTRINE

A. Natural Limits

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

As has been shown above, however, some economic activity may not be beneficial, benevolent or even neutral in relation to the welfare of the people in the countries in which they operate. Investors that have engaged in investments creating obligations that satisfy the criterion of an odious finance doctrine have engaged in activity that ought not be protected. Rather, they have engaged in activity (corruption, human rights abuses, etc.) that ought to be deterred. A doctrine that would create additional risk and instability for this type of investment is likely to result in at least two likely outcomes. In some cases, investors may decide that the risk and instability created by the doctrine deters their investment altogether. The reaction of some readers to the possibility of complete divestment may initially be negative. However, it should be borne in mind that any investor making an assessment that its activities may some day fall under the ambit of the odious finance doctrine is likely engaging in highly undesirable activity. Divestment may be a good outcome in these cases.251

Another likely outcome is that investors will be more scrupulous about their own actions and more scrutinizing and demanding about the actions of their governmental contracting partners. In the context of the odious debt doctrine, commentators have noted that the detailed terms and conditions of some loans regarding the uses of the loan proceeds and reporting requirements of the debtor may come to be more explicit and demanding so that the lender is able to ensure that their loans are not used for abhorrent ends and will thus not become subject to the odious

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251 A recent example of this type of divestment comes from Fidelity Investments, which has come under pressure to divest its shares in oil companies with ties to Sudan.
debt doctrine. Bilateral treaties and contracts could contain similar terms and conditions.

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

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

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

B. Obligation Cancellation

There are at least three possible scenarios for obligation cancellation under an odious finance doctrine. The first would only require an assessment of the odiousness of the particular regime, the second would require consideration of the beneficence of each contract as a whole made under a despotic regime and a determination and the third would require consideration of each term of each contract that has come to be questioned under the odious finance doctrine.
The first possibility would determine, not whether particular contracts are odious but rather, whether particular regimes are odious. Proposals have been made in the context of discussions of the odious debt doctrine that an efficient (though highly political) method of providing creditors with information about whether loans to a particular government may be cancelled under the odious debt doctrine is to establish an institutional body charged with the task of declaring governments odious. Such declarations would provide creditors with somewhat reliable knowledge, information and predictability \textit{ex ante} that any loans made to that government may not be repaid if a new government should topple the incumbent despot.\textsuperscript{252} With that information creditors could both determine whether or not to extend loans to a despotic regime at all and, if they were tentatively willing to extend the loan, calculate what interest rate would be high enough to compensate itself for the added attendant risk.

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

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

Of course, each of these possibilities would have its particular administrative costs. One can imagine that a system which entailed wholesale proclamations of regimes as odious would carry with it front end costs of political negotiations and confrontations in the time leading up to such a proclamation, given that odiousness would, in many cases, result in broad divestment from countries with odious governments. On

\textsuperscript{252} Some readers may consider such a body to be analogous to commercial rating agencies.
the other hand, the last two possibilities would carry with them back end costs as any disputes over the odiousness of a contract would likely be litigated or arbitrated in lengthy proceedings. Investors whose contracts were named as wholly or partially odious (as well as their home governments) would engage in long-term litigation and arbitration to defend their interests, much as investors and their governments have done in the past when contracts and investments have fallen into dispute.

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

C. The Ambits of Odiousness

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

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