Federal Courts, International Tribunals, and the Continuum of Deference

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ROGER P. ALFORD*

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INTRODUCTION

The degree of deference that federal courts confer upon the decisions of international tribunals is a matter that has vexed the bar and the bench for well over a century.\(^1\) Courts remain perplexed by the problem, and their pronouncements reflect a limited understanding of the role of international law and international tribunal decisions in domestic courts.\(^2\) The Supreme Court has unhelpfully observed that “we should

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give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret it. However, such a formulation invites lower courts to misunderstand and misuse international tribunal decisions. The degree of "respectful consideration" will depend on numerous factors, many of which are never analyzed, or at least not analyzed systematically. Justice O'Connor was closer to the mark when she stated that,

[a]s...international tribunals gain strength both in numbers and in authority, their relationship with the domestic courts of member nations will be of critical importance.... [O]ur courts will have to interpret specific provisions of the different treaties and authorizing statutes to determine what effect to give to the judgment of various international tribunals. But the effect to be given to these decisions will turn on far more than simply instructions to courts in treaties and statutes, which often are inoperative, opaque, or omitted altogether. The effect to be given such decisions ultimately will depend on the approach—or model if you will—that courts use, knowingly or unknowingly, in conferring deference.

The deference issue has only been exacerbated in recent years by the sheer quantity of international tribunals now in existence. International adjudication is in ascendance. The international judiciary now includes a tribunal for the law of the sea, several mass reparation tribunals,

4. Id.
5. Sandra Day O'Connor, Federalism of Free Nations, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 14, 19 (Thomas M. Franck & Gregory H. Fox eds., 1996). More recently Justice O'Connor noted that "although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts." O'Connor, supra note 2, at 350.
international criminal tribunals, trade and investment tribunals, human rights tribunals, and several new regional economic integration tribunals. Scores of international tribunals are now in existence, and dozens of these have been established in the past twenty years.


rate of growth has been so furious that scholars are experiencing
tribunal fatigue; the dizzying pace of change is so rapid that they have
little time to compare and contrast these tribunals and reflect upon their
holistic importance for the development of international law. As a result
federal courts have no system for understanding these tribunals and no
methodology for conferring deference.

Further exacerbating the problem is the striking variety of
international adjudicative bodies and the absence of any canonical
definition of what constitutes an international tribunal. Depending on
the criteria one employs, the universe of international tribunals is
extremely broad or narrow. Broad definitions include within their ambit
almost any inter-governmental fact-finding proceeding performing a
quasi-adjudicatory function, and even private arbitral tribunals
established with or without governmental imprimatur.\footnote{13} By contrast,

\footnote{13. One broad definition includes an entity as falling within the international judiciary if it makes legal determinations based on international law, was established directly or indirectly by international agreement, and somehow represents an expression of the international rule of law. According to the PICT, these entities have certain commonalities that justify their presence within the international judiciary.

First, all of these entities make legal determinations, and this sets them apart from other bodies...which share the same aspiration towards a “just world” but are of a quintessentially political nature.... And this leads to a second commonality, which is the fact that in order to make their determinations they all resort to the same body of law: international law. Third, all of these international bodies have been established directly or indirectly (i.e., through a decision taken by a body established by treaty) by international agreements....Finally, and perhaps more importantly, collectively they are the expression of a widely shared need to abandon a world where only States count and the mighty rule, in favor of an order where certain fundamental common values are shared, protected and enforced by all members of a wide society, composed of States, International Organizations and individuals in all their legal incarnations. See http://www.pict-pcti.org/publications/PICT.Synoptic.Chart.2.0.pdf (last visited July 29, 2002). This definition leads to the classification of approximately 125 adjudicative entities as international tribunals. The PICT has developed a synoptic chart of all the possible international adjudicative bodies that could be included within a definition of an international tribunal, see the synoptic chart developed by PICT. See id. An even broader definition has been proposed by one noted scholar, Hans Smit. He has proposed a definition of international tribunal that is the “broadest possible construction,” encompassing “all bodies with adjudicatory functions,” including private arbitral tribunals. Hans Smit, \textit{American Judicial Assistance to International Arbitral Tribunals}, 8 AM. REV. INT'L ARB. 153, 157-58 (1997). Smit even goes so far as to sincerely argue that an international tribunal includes any private arbitration in the United States in which “any of the parties before it, or any of the arbitrators, is not a citizen or resident of the United States.” \textit{Id.} at 158. Smit derives this interpretation based on what he personally intended as the Reporter for the Commission with the principal responsibility for drafting 28 U.S.C. § 1782, making the startling assertion that his intent should be regarded as the intent of Congress. \textit{Id.} at 154-55. In so doing, he eschews the textualist approach to statutory interpretation, Oliver Wendell Holmes, Jr., \textit{The Theory of Legal Interpretation}, 12 HARV. L. REV. 417, 419 (1898-99) ("we do not inquire what the legislature meant; we ask only what the statute means"), and ignores traditional concepts of the intentionalist approach. See National Broad. Co. v. Bear Stearns & Co. 165 F.3d 184, 188 (2d Cir. 1999). See also \textit{In re Request for Int'l Judicial Assistance} (Letter


narrow definitions impose exacting criteria that exclude many tribunals established in the past fifty years, including several mass reparation tribunals, international criminal tribunals, and human rights tribunals. One organization has identified just over a dozen international tribunals using a narrow definition and over a hundred using a broad definition.

Fortunately, the definitional problem has been addressed in the United States. The term "international tribunal" is referenced in a number of United States statutes. From these statutory obligations, as

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Rogatory) for the Federative Republic of Brazil, 936 F.2d 702, 706 (2d Cir. 1991) ("we do not believe it appropriate in this case to accept [Professor Smit's] commentary as persuasive evidence of the meaning of the statute that the Congress ultimately enacted."). Not surprisingly, U.S. courts have rejected this approach, for there is nothing in the text or legislative history to support such a broad definition and it would require federal courts to provide greater assistance to foreign and international private arbitral tribunals than to wholly domestic arbitral tribunals. National Broad. Co., 165 F.3d at 188-91.

14. One European scholar has proposed a definition of an international tribunal as a judicial body that is a permanent entity established by an international legal instrument, utilizing rules of procedures that preexist the dispute, and rendering decisions that are based on international law and binding on the parties. See Christian Tomuschat, International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: INTERNATIONAL COURT OF JUSTICE, OTHER COURTS AND TRIBUNALS, ARBITRATION AND CONCILIATION: AN INTERNATIONAL SYMPOSIUM, 285, 290-313 (Max Planck Institute for Comparative Law and International Law 1974). See also Cesare P.R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 N.Y.U. J. INT'L L. & POL. 709, 713-15 (1999). Such a restrictive approach excludes many tribunals established in the past fifty years, including almost all mass reparation tribunals, two of the three international criminal tribunals, and most human rights tribunals. This narrow definition leads to the classification of just over a dozen adjudicative bodies as international tribunals. The PICT has essentially adopted this approach, resulting in the inclusion of approximately seventeen to nineteen tribunals and the exclusion of dozens of others. See PICT Research Matrix, http://www.pict-pcti.org/matrix/Matrix-main.html (last visited Feb. 28, 2003). Although PICT analyzes nineteen tribunals in detail, not all of them satisfy all of the core criteria. For example, the ad hoc criminal tribunals for Yugoslavia and Rwanda are not permanent entities.


(a) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to...(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing. (emphasis added)

Id.; 22 U.S.C. § 2710(d)(1) (2002) (authorizing establishment of International Litigation Fund to assist the Department of State in "preparing or prosecuting a proceeding before an international
interpreted, one can discern a workable definition for international tribunals as:

an objective and impartial adjudicative body established by or with the imprimatur of two or more governments with the power to make a binding decision as to law or facts.\textsuperscript{17}

\textit{tribunal}, or a claim by or against a foreign government or other foreign entity") (emphasis added); 22 U.S.C. § 6713(d)(2) (1998) Respecting the Chemical Weapons Convention,

[The Attorney General is authorized to seek any and all available redress in any \textit{international tribunal} for indemnification to the United States for any liability imposed on the United States by virtue of the actions of an inspector of the Technical Secretariat, and to seek such redress in the courts of the foreign nation from which the inspector is a national.

\textit{Id.} (emphasis added); 18 U.S.C. § 3181 (1996) Note (describing assistance to be provided by national courts to ad hoc Yugoslav and Rwandan international criminal tribunals); 18 U.S.C. § 3181 Note (same); 22 U.S.C. § 262-1 (a) & (d) (1998),

The United States shall not become a party to any \textit{new international criminal tribunal}, nor give legal effect to the jurisdiction of such a tribunal over any matter described in subsection (b), except pursuant to [an Article II treaty or statute enacted by Congress]... The term ‘new international criminal tribunal’ means any permanent international criminal tribunal established on or after October 21, 1998 and does not include [the ad hoc criminal tribunals established for Yugoslavia and Rwanda](emphasis added).


The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or \textit{international tribunal}. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

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\textit{Id.} (emphasis added); 28 U.S.C. § 1696(a) (1994).

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\textit{Id.} (emphasis added); 28 U.S.C. § 1782(a) (1996) ("The district court in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or \textit{international tribunal}"). Only one of these, 28 U.S.C. § 1782, has been subject to significant analysis by courts.

17. This definition is not found expressly in any statute or any single court decision. But a careful review of the relevant materials suggests such a derivative definition based on an analysis of the numerous court decisions interpreting 28 U.S.C. § 1782. See Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 667 (9th Cir. 2002) ("Our prior decisions also read the legislative history surrounding the adoption of Section 1782 broadly to include 'bodies of a quasi-judicial or administrative nature' as well as preliminary investigations leading to judicial proceedings."); Ishihara Chem. Co. v. Shipley Co., 251 F.3d 120, 124-125 (2d Cir. 2001) (proceeding must be
This definition falls between the two extremes, rejecting a litmus test that excludes many international adjudicative bodies that do not meet certain artificial categories, but is not so broad as to embrace the whole panoply of potential candidate institutions.

Given the difficulties in taming and naming this beast, it is not surprising that federal courts have haphazardly addressed the question of how much deference should be conferred on international tribunal decisions. What is needed is a methodology for deference. For the first time in scholarly literature, this article proposes such a methodology for all international tribunals based on seven models that have been applied to different international tribunals and should be applied to dozens more. These models are placed along a continuum according to the degree of deference to be conferred. The continuum is graphically illustrated as follows:

18. Such artificial categories include permanence, the use of predetermined procedures, and the application of international law. See supra note 14.

19. Adjudicative bodies that might elsewhere be defined as an international tribunal include entities that render non-binding decisions (human rights commissions), arbitrations that resolve private disputes without governmental input (private international commercial arbitration) or bodies representing purely domestic endeavors of international import (truth commissions). See supra note 13.
For each point along the continuum, the model is briefly presented and applied to a particular tribunal best illustrating the degree of deference to be conferred. The normative application of the model is then outlined to enable federal courts to apply the model in other contexts or to other tribunals. The presentation of these seven models will illuminate how federal courts are conferring, and should confer, varying degrees of deference on international tribunal decisions. It is hoped that such a presentation will make perspicuous the increasingly common but unexamined practice of federal court deference to international tribunal decisions.

The first point along the continuum is the full faith and credit model. Part I of this article addresses this model, which requires federal courts to treat decisions of international tribunals in the same manner as state court judgments. Located at one extreme end of this model's continuum, international tribunal decisions are recognized and enforced without substantive or procedural review. This model applies when there are specific, binding instructions in a treaty or statute requiring direct recognition. The decisions of at least one international tribunal—tribunals established under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)—clearly fall within this model.

Part II examines the arbitration model, which suggests that, under the Federal Arbitration Act, decisions of international tribunals sitting as arbitral bodies shall be recognized and enforced in federal courts absent

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20. See infra Part II.
significant procedural defects. Tribunal decisions incorporated under this model enjoy an extraordinarily high degree of deference, with no review of the merits of the decision. The Iran-United States Claims Tribunal is the best illustration of the arbitration model.

Part III examines the foreign judgment model, based on Hilton v. Guyot, which suggests that in the absence of binding instructions in a statute or treaty, federal courts as a matter of comity should directly recognize a decision of an international tribunal in the same manner as a foreign judgment. Falling in the middle of the continuum, this is far weaker than the previous direct enforcement models, but nonetheless often will lead to recognition of the judgment. Decisions of the European Court of Justice are ripe for recognition using this model.

Part IV considers the Charming Betsy model, which posits that if a statute is ambiguous and an international tribunal has declared the statute to be in violation of international law, a federal court shall seek to interpret the statute to be consistent with the international obligation as interpreted by the international tribunal. The decisions of the World Trade Organization are the premier example of the use of this model.

Part V presents the Paquete Habana model. This model does not directly recognize and enforce international tribunal decisions but rather acknowledges that international tribunals offer trustworthy evidence of international law, and federal courts should resort to their decisions when questions of legal rights depending on international law are presented for their determination. The decisions of the International Court of Justice are frequently cited as persuasive authority under this model.

Part VI presents the special master model, an approach in which an international tribunal becomes a special master to a federal court under Rule 53 of the Federal Rules of Civil Procedure in order to provide particularized relief to individual claimants. Although directly enforced, tribunal decisions incorporated under this model enjoy an extraordinarily low degree of deference, with the federal court exercising the power of full review of every aspect of the tribunal’s decisions. The Claims Resolution Tribunal established to resolve

22. See infra Part III.
23. 159 U.S. 113 (1895).
24. See infra Part IV.
26. See infra Part V.
27. The Paquete Habana, 175 U.S. 677 (1900).
28. See infra Part VI.
29. See infra Part VII.
Holocaust-era Swiss bank accounts is illustrative of an international tribunal that has been used in this manner.

Finally, Part VII concludes with the “no deference” model. At the other extreme end of the continuum, this model posits that in certain circumstances federal courts should confer no deference on decisions of international tribunals, finding the decisions irrelevant in resolving certain questions, such as the scope of constitutional guarantees. A prime example of the “no deference” model is the attempt in death penalty litigation to use decisions of human rights tribunals to influence the interpretation of the Eighth Amendment's proscription against “cruel and unusual punishment.” This model reflects unsuccessful efforts to interpret the Constitution to give expression to an international majoritarian impulse reflected in international tribunal decisions.

I. THE FULL FAITH AND CREDIT MODEL

The first model for understanding the degree of deference federal courts confer on international tribunal decisions is the full faith and credit model. This model begins with an understanding of the manner in which decisions of sister State judgments are recognized within the U.S. federal system and then posits that similar treatment has been accorded to international tribunal judgments. This model applies to scenarios where a statute or treaty imposes specific, binding instructions on federal courts, requiring direct recognition. Such an approach reflects the greatest degree of deference of the models presented. In its broadest application, it all but confers co-equal status to international tribunal decisions and domestic state court judgments.

30. See infra Part VIII.
A. The Constitutional Full Faith and Credit Obligation

Article IV of the U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress has extended that obligation to federal courts by statute, requiring them to grant full faith and credit to state court judgments:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.  

The Supreme Court has stated that the purpose of the Full Faith and Credit Clause was to

alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

As the Supreme Court has recently observed, regarding the recognition of judgments, the full faith and credit obligation is exacting:

[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.

As Supreme Court jurisprudence has developed, the Full Faith and Credit Clause generally has been interpreted to require every state to honor the judgments of every other state. "[A] judgment conclusive in one state is conclusive in all, regardless of the intrusion on state sovereignty."
Thus, the Constitution requires that States within the United States recognize and enforce judgments of another State in the same manner as they would a decision of their own. Congress has extended that recognition to the federal system by virtue of section 1738, requiring that federal courts treat decisions of state court judgments in the same manner as that state would treat such a judgment.

Can the same be said of international tribunal decisions? Do federal courts accord foreign or international judgments full faith and credit? At the beginning of the twentieth century the Supreme Court confidently stated that no right of full faith and credit "is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and [the Court is] referred to no treaty relative to such a right." But by the turn of the twenty-first century it is clear that the right of full faith and credit had been established by treaty with respect to decisions of at least one international tribunal.

B. The Full Faith and Credit Model and ICSID Tribunals

The 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) is one of the more significant international treaties addressing the
recognition and enforcement of international arbitral awards.\textsuperscript{38} With over 150 signatories, including the United States, the ICSID Convention is one of the principal mechanisms for foreign investors to protect their investments abroad. The ICSID Convention was revolutionary because it signaled a marked advancement in the international legal system. As Elihu Lauterpacht has observed,

\[\text{[for the first time a system was instituted under which non-State entities...could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal's awards would be directly enforceable within the territories of the State’s parties.}\textsuperscript{39}\]

The provisions of the ICSID Convention on the recognition of judgments are remarkable in that they accord to ICSID awards the same status as a final judgment of the courts of a constituent state. The two principal provisions are Articles 53 and 54 of the ICSID Convention. Article 53 of the ICSID Convention provides that:

\begin{quote}
The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.\textsuperscript{40}
\end{quote}

Article 54 provides in relevant part:

\begin{quote}
Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.\textsuperscript{41}
\end{quote}


\textsuperscript{40} ICSID Convention, supra note 38, at art. 53(1).

\textsuperscript{41} Id. at art. 54(1).
The implementing legislation in the United States, 22 U.S.C. § 1650a, leaves little doubt as to the status of such ICISD decisions, providing that

[a]n award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.42

Thus, pursuant to section 1650a, an ICISD award shall be accorded the same deference as a State court judgment.

The precise contours of section 1650a have been addressed in only one case in the United States: Liberian Eastern Timber Corp. v. Liberia (LETCO).43 In LETCO, a French-owned and controlled company sought to enforce an ICISD arbitration award in the United States. The District Court for the Southern District of New York directed entry of judgment against Liberia in 1986 finding that LETCO "is entitled to enforcement of the pecuniary obligation of the award in its favor, as rectified, in accordance with the provisions of 22 U.S.C. § 1650a," and ordered that

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42. 22 U.S.C. § 1650a(a) (1966). See also S. REP. NO. 89-137(1966), reprinted in 1966 U.S.C.C.A.N. 2617 (Statement of Fred B. Smith, Department of the Treasury, Before the Senate Foreign Relations Comm.) ("If an action is brought in a U.S. district court to enforce the final judgment of a State court, it is, of course, given full faith and credit in the Federal court. Section [1650a] would give the same status to an arbitral award."). It should be noted that ICISD also administers arbitrations that fall outside the ICSID Convention and therefore are not subject to enforcement in the United States under section 1650a. In particular, this includes arbitrations for the settlement of investment disputes between parties one of which is not an ICISD member country or a national of such a country. NAFTA arbitrations are the best example of such arbitration proceedings, as neither Canada nor Mexico are signatories to the ICSID Convention. ICISD may administer such arbitrations under the ICSID Additional Facility Rules or under another set of arbitration rules that appoints ICISD as the administering authority. Such awards are subject to enforcement under the New York Convention, not the ICSID Convention. See generally Ibrahim F.I. Shihata & Antonio R. Parra, The Experience of the International Centre for Settlement of Investment Disputes, 14 ICSID REVIEW - FOREIGN INV. L. J. 299, 344-55 (1999); see also Mar. Int'l Nominees Establishment v. Rep. of Guinea, 693 F.2d 1094, 1193, n.14 (D.C. Cir. 1982)

(At the enforcement stage, the ICISD treaty, see Convention art. 54, and a supporting United States statute, 22 U.S.C. § 1650a (1976), provide that ICISD arbitrations are to be enforced as judgments of sister states. We need not decide whether Guinea's signing of the ICISID treaty would thus waive its immunity from proceedings enforcing ICISD awards, for this is a proceeding to confirm an AAA arbitration.);

the "annexed arbitration award...be docketed and filed by the Clerk of this Court in the same manner and with the same force and effect as if it were a final judgment of this Court." Liberia subsequently sought to prevent execution of this judgment by arguing, *inter alia*, that as a sovereign, it was immune from the court's jurisdiction under the Foreign Sovereign Immunities Act. The federal district court rejected this argument, ruling that Liberia had waived its jurisdictional immunity by signing a concession contract subject to ICSID arbitration. Such action, the court concluded,

leaves little doubt that the signatories to the Convention intended the awards made pursuant to its provisions be given full faith and credit in their respective jurisdictions.... Liberia clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award.  

*LETCO* is a straightforward example of a federal court granting full faith and credit to an ICSID award in the same manner as a state court judgment. While the decision is unremarkable, the consequences of

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45. *LETCO*, 650 F. Supp. at 76. The Court separately ruled that Liberia's claim that it was immune from execution of the judgment under the Foreign Sovereign Immunities Act was rejected with respect to properties used for commercial activities falling under the commercial activity exception of the FSIA. *See id.* at 77-78. *See also ICSID Convention, supra note 38, at art. 54(3) ("Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."). Liberia E. Timber Corp. v. Liberia, 659 F. Supp. 606 (D.D.C. 1987).

There has been some commentary suggesting that the Court should not have analyzed its subject matter jurisdiction with reference to the FSIA. Such commentators have reasoned that Article 54 requires contracting states to automatically recognize an ICSID award, excluding the defense of sovereign immunity from jurisdiction. Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 185 (1996); Dorothy Black Franzoni, *International Law – Enforcement of International Centre for Settlement of Investment Disputes Arbitral Awards in the United States*, 18 GA. J. INT'L & COMP. L. 101, 113 (1988). However, Article 54 as implemented by 22 U.S.C. § 1650a, simply requires a federal court to treat an ICSID award in the same manner as it would "a judgment of a court of general jurisdiction of one of the several States." Had Liberia consented to the jurisdiction of a State or federal court by virtue of a choice of law clause or forum selection clause in a contract, and then subsequently argued before a federal court that it lacked jurisdiction to execute the default judgment rendered pursuant thereto, the court again would have considered its subject matter jurisdiction and found jurisdiction based on Liberia's waiver of immunity under the FSIA. *See Eckert Intern., Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 32 F.3d 77 (4th Cir. 1994). The immunity question would have raised in both contexts, and the waiver of immunity would be effective in either to defeat Liberia's challenge to the federal court's jurisdiction.
such an approach is not. With respect to pecuniary obligations, it puts a
decision of an international tribunal on the same plane as a domestic
judgment. This raises the question of why an ICSID tribunal should be
accorded such status. The objectives inherent in the Full Faith and
Credit Clause provide clues.

One objective of the Full Faith and Credit Clause is to promote
“unification, not centralization...leav[ing] each state with power over its
own courts but bind[ing] litigants...by prior orders of other courts with
jurisdiction.”46 Accordingly, under the constitutional system, the “faith
and credit given is not to be niggardly but generous, full...,” such that
“local policy must at times be required to give way.”47 One would be
hard-pressed to argue that the ICSID Convention has any such
grandiose objectives of the unification of judicial systems on the
international plane, binding ICSID tribunals with the judicial branches
of the signatory countries. But it does provide a unity of sorts. Article
54 requires courts to respect judgments of ICSID tribunals even if such
respect would require local policies to yield. The unity established is
thus functional; ICSID tribunals decide the case, and national courts
execute the judgment. Awards rendered by ICSID tribunals are
recognized and enforced by national courts, as these courts effectively
become a judicial adjunct executing an international award without
review.

A further goal of the Full Faith and Credit Clause is to promote the
finality of judgments. As the Supreme Court has put it,

[i]t is just as important that there should be a place to end as that
there should be a place to begin litigation. After a party has had
his day in court, with opportunity to present his evidence and his
view of the law, a collateral attack upon the decision... merely
retries the issue previously determined. There is no reason to
expect that the second decision will be more satisfactory than the
first.48

Thus, the finality is promoted in that “once the judgment is final
within a state, the Full Faith and Credit Clause generally requires that
the judgment be accorded the same effect in all states.”49 As applied to
ICSID decisions, the drafters of the ICSID Convention assumed that
host States would honor ICSID tribunal awards, but were particularly
concerned that foreign investors might not. Thus, the full faith and

47. Id. at 584.
48. Stoll v. Gottlieb, 305 U.S. 165, 172 (1938). For an elaboration on this objective, see Sterk,
supra note 35, at 60.
49. Sterk, supra note 35, at 61.
The full faith and credit obligation addresses this problem by promoting the finality of a tribunal award in all signatory states. The sovereign interests of the forum state where enforcement is sought are not a basis for re-litigating claims or collaterally attacking judgments rendered. Once an ICSID decision becomes final and binding, it becomes so not only for the parties, but also for the forum where enforcement is sought. As an ICSID tribunal put it, "the Convention excludes any attack on the award in national courts." 51

Article 54 was thus incorporated into the Convention to promote finality by directing national courts to recognize and enforce ICSID tribunal decisions without review. But the Convention also sought finality by means of certain instructions to the parties. Complementing Article 54 are the obligations of Article 53, which stipulate that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." 52 If Article 54 binds courts to recognize judgments of ICSID tribunals, Article 53 binds litigants to ICSID awards, obligating them to respect and honor the decision. As one noted commentator has put it, "Article 53 thus establishes a complete parallelism between the obligation to comply with the award and the possibility of enforcement of that obligation through domestic courts." 53 In fact, Article 53 goes further than Article 54 in that the former renders an award res judicata as to all its provisions, while the forcible execution in the latter is limited to the pecuniary obligations. 54 The focus of the binding nature of ICSID tribunal decisions is directly on the parties to the ICSID proceeding and indirectly on national courts where enforcement may be sought. By virtue of Article 53, parties commit to honor the award and waive the right to appeal the decision in national courts, and national courts shall respect such a commitment and enforce such a waiver. The requirement in Article 53 that the award is not "subject...to any remedy" further underscores that a "party to ICSID proceedings who is dissatisfied with the award may not turn to another forum for relief for

52. ICSID Convention, supra note 37, at art. 53.
54. Id. at 329.
the same claim.”

Article 53 thus establishes the doctrine of res judicata for ICSID tribunal awards. The binding nature of these awards on the parties is a component of the full faith and credit obligation. To paraphrase the Supreme Court, by the provision for full faith and credit, the local doctrine of res judicata becomes part of international jurisprudence. Taken together, Articles 53 and 54 require, at a minimum, that the parties and the enforcing national court give res judicata effect to the ICSID award. Having litigated and lost a question in one competent tribunal, the party cannot re-litigate the same question in another forum. The award is binding on the same parties, both in that international forum and any national signatory forum.

C. Normative Application

The full faith and credit model will rarely be appropriate for application by federal courts. The essential requirement under this model is a federal mandate to grant full faith and credit to decisions of international tribunals. This mandate may be embodied in implementing legislation or a self-executing international agreement.

The full faith and credit obligation as applied to ICSID tribunals reflects the obligations to treat judgments as final and binding and the same as constituent state court judgments. Can the same be said of other international tribunals? Yes and no. To the extent that prevailing parties may request a national court to grant full faith and credit in order to execute a judgment, no other treaty to which the United States is a signatory provides similar entitlements. But to the extent that the full faith and credit obligation embodies the concept of res judicata, preventing questions resolved in an international forum from being re-litigated in a national forum, one could argue that the decisions of other international tribunals may enjoy a similar status. Although the ICSID Convention is unique in expressly providing for full faith and credit—requiring States to “enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”—it is not unique in providing that parties must treat international tribunal decisions as final, binding, and not subject to appeal. The International Court of Justice is illustrative.

The U.N. Charter and the Statute of the International Court of Justice

55. Schreuer, supra note 50, at 1085.
56. Riley v. N.Y. Trust Co., 315 U.S. 343, 349 (1942) (“By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, became part of national jurisprudence.”).
57. ICSID Convention, supra note 38, at art. 54(1).
(ICJ) express similar language as Article 53 of the ICSID Convention. Article 94(1) of the U.N. Charter provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."58 Article 59 of the Statute of the International Court of Justice stipulates that, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case"59 and Article 60 provides that "[t]he judgment is final and without appeal."60 These provisions expressing the binding nature of ICJ decisions are not unique. The agreements establishing the World Trade Organization,61 the United Nations Compensation Commission,62 the Iran-United States Claims Tribunal,63 and the United States-Mexico Claims Commission64 contain similar provisions.

While these provisions are "binding" on the United States in the sense that the United States incurs international responsibility for failure to abide by them, the harder question is whether they are "binding" on U.S. federal courts. Scholars have vigorously debated the issue, with some arguing that these rules are not "self-executing" and therefore not binding on the courts,65 while others contending that such rules are an

58. U.N. CHARTER art. 94.
60. Id. at art. 60.
61. Agreement Establishing the World Trade Organization in Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, Art. XVI:4, 33 I.L.M. 1125, 1152 (1994) ("Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.").
63. Claims Settlement Declaration, art. IV, 20 I.L.M. 230 (1981) ("All decisions and awards of the Tribunal shall be final and binding.").
64. La Abra Silver Mining Co. v. United States, 175 U.S. 423 426-27 (1899), The contracting parties [Mexico and the United States] agreed to consider the result of the proceedings of the Commission as a full, perfect, and final settlement of every claim upon either Government, arising out of any transaction of a date prior to ratification of the Convention, and to give full effect to the decision of the Commission or the Umpire without objection, evasion, or delay; and they further engaged that every such claim...should from and after the conclusion of its proceedings be considered and treated as finally settled, barred, and thereafter inadmissible.
65. John H. Jackson, The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligations, 91 AM. J. INT'L L. 60, 61, 64 (1997) (WTO obligations not self-executing; "the WTO rules, and certainly therefore the results of a dispute settlement panel, do not ‘ipso facto’ become part of the domestic jurisprudence that courts are bound to follow as a
expression of U.S. foreign policy and a court's failure to treat them as final and conclusive would usurp the executive function. The better argument is that decisions of international tribunals must be recognized and enforced by federal courts under this model only if and to the extent there is a federal mandate embodied in legislation or a self-executing agreement requiring courts to treat the decisions as such. It is axiomatic that a "non-self-executing treaty" is a "treaty that may not be enforced in the courts without prior legislative 'implementation'" and to treat international agreements as conclusive expressions of executive will binding upon the courts absent self-execution would obviate the distinction inherent in the doctrine.

In some cases, Congress has clearly stated that an international tribunal decision shall not be recognized in the courts. In other cases Congress has concluded the international tribunal decisions shall be recognized in the courts. In still other instances, Congress has mandated that any adverse decision of an international tribunal is a matter for the political branches and creates no private right of action in

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66. Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 682 (1998) (In *Belmont, Pink, Ex parte Peru, and Hoffman*, the Supreme Court "spoke of the duty of the federal courts to give effect to the foreign policy of the United States as determined and expressed by the executive branch. There can be little doubt that the same principles should be binding on state courts.").
68. La Abra, 175 U.S. at 440-43, 460-61. Following judgment by United States-Mexico Claims Commission allegedly secured by claimant's fraud, Congress passed legislation requiring retri

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power to make the distribution of moneys in the hands of the Secretary of State [paid by Mexico pursuant to Commission judgment]...depend upon the result of a suit...brought in a court of the United States...for the purpose of determining whether the La Abra Company...had been guilty of fraud in the matter of the claim that it presented to the commission. The act of 1892 is to be taken as a recognition...of the legal right of the company to receive the moneys in question unless it appears upon judicial investigation that the United States was entitled by reason of fraud...to withhold such moneys from it.

Id.

69. 22 U.S.C. § 1650a:

An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.

Id.; see supra text accompanying notes 42-45.
federal courts.\textsuperscript{70} But absent implementing legislation, federal courts have never concluded that an international agreement establishing a tribunal is self-executing such that, as a matter of federal law, federal courts shall recognize and enforce their decisions as final and binding.\textsuperscript{71}

Moreover, with regard to the ICJ, federal courts have addressed whether the relevant provisions of the Charter and the Statute are self-executing, and have suggested in dicta that certain articles of the U.N. Charter are self-executing,\textsuperscript{72} while others are not.\textsuperscript{73} As for Article 94, no court has ever had occasion to address whether it is self-executing as between state parties,\textsuperscript{74} but one court has held it creates no enforceable

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\item \textsuperscript{70} 19 U.S.C. § 3533(f) (1994) (If the WTO panel report or Appellate Body report is adverse to the United States, USTR shall consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation); see also 19 U.S.C. § 3538(a) (1994) (If WTO Appellate Body finds that International Trade Commission action is not in conformity with certain WTO obligations, the Trade Representative may request agency to issue an advisory report on whether statute permits agency to take steps that would render its action not inconsistent); 19 U.S.C. § 3512(a) (1994) (No provision of WTO agreements, nor application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect); 19 U.S.C. § 3512(c) (1994) (No person other than the United States shall have a cause of action under any of the WTO agreements by virtue of congressional approval of WTO agreements or may challenge any action or inaction by any agency of the United States on the that ground that such action or inaction is inconsistent with the WTO agreements).
\item \textsuperscript{71} Breard v. Greene, 523 U.S. 371, 378 (1998); Iran Aircraft Indus. v. Avco, Corp., 980 F.2d 141, 144-46 (2d. Cir.). Of course, a federal court's refusal to act in accordance with an international tribunal's decision may subject the United States to international responsibility. See Iran v. United States, Award No. 586-A27-FT, ¶ 71 (June 5, 1998),[through the refusal by the United States Court of Appeals for the Second Circuit to enforce the \textit{Avco} award, the United States has violated its obligation under the Algiers Declarations to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the jurisdiction of the United States. It is a well-settled principle of international law that every international wrongful act of the judiciary of a state is attributable to that state."); Id.; see also infra text accompanying notes 123, 234-237.
\item \textsuperscript{73} Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373-75 (7th Cir. 1985) (citing cases).
\item \textsuperscript{74} The most likely context in which this may arise in the coming years will be in the pending death penalty case between Mexico and the United States. See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) available at http://www.icj-cij.org. (last visited February 10, 2000). Mexico likely will prove successful in its claim that the United States has violated the Vienna Convention on Consular Relations, given the factual similarities of its claim and that of similar litigation successfully brought by Germany against the United States in 2001. See LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 104, para. 128, 40 I.L.M. 1069 available at http://www.icj-cij.org. (last visited February 10, 2003). If so, then for the first time in history a prevailing state party may seek recognition of a final and binding I.C.J. decision against the United States in federal courts.
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private rights of action. Whether provisions operate by themselves without legislation is a matter of the drafter’s intent. The fundamental distinction drawn from the cases is that when a provision is clear, definite and uses mandatory language, it generally reflects the framers’ intent that it has operative effect without further implementation. Applying this approach, the relevant language is equivocal. The Charter uses promissory language—“[e]ach Member...undertakes to comply”—while the Statute uses mandatory language—the decision has “no binding force except between the parties and in respect to that particular case” and “[t]he judgment is final and without appeal.” Giving meaning to all these provisions, one might say there is a promise to comply with a decision, but an obligation as between the parties to treat it as final, binding and not subject to appeal. To that extent, and only that extent, these provisions appear to be self-executing.

Taken together, these provisions could provide the essential elements mandating res judicata effect to be given to International Court of Justice decisions in national courts. That is, it could be argued that the same parties who present a question before the International Court of Justice cannot re-litigate the issues resolved before national courts. If the International Court of Justice found that it had jurisdiction and concluded that an international obligation had been violated, as between those parties, that same question could not be re-litigated in their national courts. Articles 59 and 60 of the Statute would require that the decision of the ICJ preclude the same parties from re-litigating the same question.

Thus, to the extent that the full faith and credit obligation connotes

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76. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 312-14 (1829). A number of factors are cited as relevant in determining drafter’s intent. See Frolova, 761 F.2d at 373.
77. See, e.g., Frolova 761 F.2d at 374 (Article 56 is “not the kind of promissory language that will create a judicially enforceable right”); see Sei Fujii, 242 P.2d at 621-22,
78. U.N. CHARTER, art. 94, para. 1 (emphasis added).
79. Statute of the International Court of Justice, arts. 59, 60 (emphasis added).
the obligation to grant res judicata effect to decisions of the original forum, the ICJ Statute incorporates such an obligation. But one should not take from this the fullest obligations inherent in full faith and credit. Full faith and credit incorporates not only the defensive obligation preventing non-prevailing parties from re-litigating issues presented, but also the offensive obligation to execute and enforce judgments without regard to competing sovereign interests. Lacking any language requiring such confirmation, the decisions of the International Court of Justice do not enjoy this fuller version of faith and credit. In addition, even if decisions of the ICJ enjoy res judicata effect, the limits of a full faith and credit model should not be ignored. To say that ICJ decisions merit full faith and credit is not to suggest a private right of action, or third-party issue preclusion, with non-parties utilizing decisions of the ICJ against a state party or a state party using the ICJ decision against non-parties. Nor is it to suggest that decisions of the ICJ might in any way enjoy stare decisis in national courts. But in requiring that parties treat the decisions as final, binding and not subject to appeal, the Statute confers a finality on decisions that precludes parties from re-litigating decided issues at the national level.

More generally, it should be emphasized that simply because an international treaty requires the parties to treat an international tribunal decision as final, binding and not subject to appeal, one should presume this to be directed at the parties to the litigation, not the national courts enforcing the decision. The ICSID Convention stands alone in instructing national courts to treat tribunal decisions in the same manner as a judgment of a constituent state court. For this reason it is the only international tribunal that clearly falls within the full faith and credit model. As for other international tribunals, whether federal courts will give res judicata effect to their decisions will depend, among other things, on whether the United States is a signatory to the convention establishing the tribunal, and whether the United States was a party to the dispute. Assuming both, one may view the parties' obligation to treat the decision as final and binding to include an obligation on the judicial branch to hold the political branches to their obligation, i.e., to give the decision res judicata effect. But in the absence of both, one should not assume that federal courts would treat the decision of an international tribunal as having res judicata effect, without some review of the integrity of the process that led to that decision. As Michael

82. But see Reilley & Ordonez, supra note 80, at 456-65. See also Sterk, supra note 35, at 101-03 (discussing res judicata effect on non-parties).
Ramsey has argued, "integrity of the prior judgment is a precondition of effectuating the policies of res judicata" and, at least in the foreign judgment context, federal courts will investigate whether the judgment has the requisite integrity before enforcing the judgment. The same could be said of decisions of international tribunals. As discussed below, for those international tribunals upon which the United States has not placed its imprimatur of approval, another model—such as the foreign judgment model—may be more apropos.

In sum, the full faith and credit model falls at the extreme on the continuum of deference because national courts must accord international tribunal decisions co-equal status with a state court judgment. In implementing the ICSID Convention, Congress has mandated that the "pecuniary obligations" of an ICSID tribunal decision "shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." With respect to the monetary obligations, the decisions under this model stand alone in enjoying the same status as internal judgments. Thus, direct recognition and enforcement of the decision is guaranteed without reservation. No other model comes close to this degree of deference. Other models posit direct recognition and enforcement, but they are subject to significant reservations. The arbitration model provides an extremely effective mechanism for direction recognition and enforcement of international tribunal decisions. Attempts at recognition, however, will invariably be challenged on the grounds that significant procedural defects rendered the decisions fatally flawed. The foreign judgment model is even less deferential, anticipating that a federal court will scrutinize the decision-making process to guarantee the integrity of the decision. Only after its integrity has been confirmed will the court recognize the decision. In its broadest application, the full faith and credit model affords federal courts almost no discretion; the international tribunal decision shall be recognized and enforced.

84. 22 U.S.C. § 1650a(a).
II. THE ARBITRATION MODEL

The arbitration model is a modest retreat from the full faith and credit model. Its principal difference is that federal courts will recognize and enforce the decisions of an international tribunal unless one of the grounds for non-enforcement set forth in the applicable treaty has been satisfied. This review mechanism is the approach taken with respect to foreign arbitral awards and provides a limited but significant check on the enforceability of such decisions. In the absence of more specific instructions, the arbitration model recognizes that under the Federal Arbitration Act certain international tribunals are empowered to render arbitration awards and that federal courts will recognize and enforce those awards with a significant degree of deference.

A. Recognition and Enforcement Under the New York Convention

The principal vehicle for the recognition and enforcement of arbitral agreements and awards is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. With over 130 signatories, the New York Convention enjoys extraordinary application and is one of the hallmarks for the facilitation of international commerce. The purpose of the New York Convention is to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

According to the drafters of the New York Convention, two of its principal achievements were that it "gave a wider definition of the awards to which the Convention applied" and it "reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply." 87

Under the Federal Arbitration Act provisions implementing the New York Convention, a party to the arbitration may apply to a federal court for an order confirming the award against any other party to the arbitration and the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the New York Convention. 88 This approach, similar to the approach implemented in other countries, provides an extremely effective mechanism for enforcing foreign arbitral awards in any other state that is a party to the New York Convention.

In the United States context, determining whether a decision rendered by an international tribunal is subject to New York Convention enforcement depends on three factors: (1) the genesis of the tribunal—that it is constituted as a result of an agreement in writing between the parties; (2) the result of the tribunal—that it render an enforceable "arbitral award" that is binding on the parties; and (3) the relationship between the parties—that it be international and "commercial" in nature. 89

First, for an award to be enforceable under the New York Convention, the tribunal must have its origins in an arbitration agreement. The Convention defines an arbitration agreement broadly:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. 90

In the United States, courts have a liberal policy favoring the recognition and enforcement of foreign arbitral awards and

90. See supra note 85, New York Convention, at art. II.
agreements. In keeping with the liberal policy favoring arbitration, courts have taken a broad definition of what constitutes a written arbitration agreement.

The second requirement for New York Convention enforcement is that the international tribunal renders an “arbitral award.” The term “arbitral award” is broadly defined in the New York Convention to include ad hoc and permanent adjudicative bodies. Article I of the New York Convention provides in relevant part that:

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

If an arbitral tribunal has rendered an award, contracting states must recognize the award as binding and enforce it, subject to the limited grounds for non-enforcement set forth in Article V of the New York Convention.

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91. As the Supreme Court has put it, a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. The invalidation of such an agreement would not only allow the respondent to repudiate its solemn promise but would reflect a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Scherk, 417 U.S. at 516-19 (internal quotation and punctuation omitted).

92. For a useful illustration of this liberal policy as reflected in attempts to bind non-parties, see Thomson-CSF, S.A. v. Amer. Arb. Assoc., 64 F.3d 773, 776-80 (2d Cir. 1995).

93. See supra note 85, New York Convention, at art. I.

94. Id. at art. III.

95. The grounds for non-enforcement under Article V of the New York Convention are the following:

(1) Recognition and enforcement of the award may be refused...
The third requirement is not mandated by the New York Convention but is embodied in a reservation of the United States. Article I authorizes states upon accession to declare that the Convention will only apply to international awards and only to "commercial" relationships.\(^6\) The United States has taken a reservation, which as implemented by the Federal Arbitration Act, provides that:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement...falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.\(^7\)

The "international" obligation is liberally applied. For example, an arbitral award rendered in the United States between two foreign parties...
was deemed to satisfy the requirements of section 202. In the context of international tribunals it will be rare that this obligation is not satisfied. The "commercial" obligation likewise is liberally construed to be as broad as the reaches of the Interstate and Foreign Commerce Clauses of the U.S. Constitution. To the extent that an international tribunal has rendered an award arising out of a relationship between the parties that is commercial in nature, the obligation of this New York Convention reservation will be satisfied.

B. The Arbitration Model and the Iran-United States Claims Tribunal

Applying these requirements to international tribunals, raises questions as to the first requirement that the award have its genesis in an arbitration agreement. In the international tribunal context, this is a question of whether an arbitration agreement embodied in an international treaty granting jurisdiction to an international tribunal is effective and binding not only for the states that sign such a treaty but also their nationals who are arbitrating a particular dispute arising from such grant of jurisdiction. This issue is particularly relevant for those treaties that establish international tribunals that do not require the diplomatic espousal of claims but rather permit nationals of a contracting state to bring an action directly before the tribunal. The international agreements establishing the Iran-United States Claims Tribunal are illustrative.

Following the seizure of the United States embassy on November 4, 1979, the United States quickly seized millions in Iranian assets. On January 19, 1981, on the last day of the Carter Administration, the United States and Iran signed the Algiers Accords establishing the Iran-United States Claims Tribunal to resolve claims by American nationals against the government of Iran arising out of the Iranian revolution.

98. Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933 (2d Cir. 1983) ("Had Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so.").


As the Supreme Court described it, the purpose in "[t]he establishment of the Tribunal was to preclude litigation by Americans against Iran in American courts, so the United States undertook to terminate such legal proceedings, unblock Iranian assets in the United States, and nullify all attachments against those assets." Given that claims in federal courts were foreclosed, the tribunal took a novel approach to international adjudication by permitting private parties to directly pursue actions against the government of Iran, without the assistance of the United States. Any decisions rendered by the tribunal in favor of these claimants were subject to enforcement and execution from Iranian assets that had been frozen and transferred to an Algerian escrow account. However, any decisions concerning Iranian counterclaims had no direct enforcement method. Iran was required to seek enforcement in federal courts. It did so pursuant to the New York Convention.

Perhaps the most significant case illustrating the use of the New York Convention to enforce the decisions of the Iran-United States Claims Tribunal is *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.* In *Gould*, an American corporation, Hoffman Electric Corporation (Hoffman), entered into contracts with the Iranian Ministry of Defense in the 1970s. Following the Iranian revolution in 1979, Hoffman sued for breach of contract in the District Court in the Central District of California and obtained a writ of attachment on Iranian assets held in the United States. After Iran and the U.S. signed the Algiers Accords in January 1981, establishing the Iran-United States Claims Tribunal, and after President Reagan issued the Executive Order 12294, suspending all claims in federal courts, the district court vacated the attachment and dismissed the claim without prejudice. Hoffman then filed claims before the Iran-United States Claims Tribunal for breach of contract, and Iran counterclaimed. The Tribunal rendered an award in Iran's favor, ruling that Gould was to pay $3.6 million and return certain military equipment to Iran. Because the Algiers Accords provided no


102. 887 F.2d 1357 (9th Cir. 1989). The other oft-cited case involving recognition and enforcement of Tribunal decisions in the United States is *Iran Aircraft Indus., et. al. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992). In this case, the Second Circuit refused to enforce a Tribunal award based on one of the grounds for challenging the award in the New York Convention. However, *Avco* does not address whether the treaty adequate as an arbitration agreement or whether Tribunal decisions are arbitral awards within the meaning of the New York Convention. The Second Circuit presumes both to be true. *Id.* at 145-46.
enforcement mechanism for arbitration awards in Iran's favor,\textsuperscript{104} Iran successfully sought recognition and enforcement in the United States pursuant to the New York Convention in federal district court. On appeal, Gould argued that the New York Convention "applies...only as to those awards that derive from an arbitral agreement in writing to which the parties voluntarily submitted."\textsuperscript{105} The Ninth Circuit concurred with Gould's argument that an arbitral award must emanate from a written agreement, but construed the Algiers Accords as representing the required written agreement.

Because the President acted within his authority on behalf of United States citizens, the real question is not whether Gould entered into a written agreement to submit its claims against Iran to arbitration, but whether the President—acting on behalf of Gould—entered into such an agreement. The answer is clearly yes. Deputy Secretary of State Warren Christopher initialed the Accords in his role as an agent for the President; and thus, the requirements of Article II, 1 [of the New York Convention] are satisfied.\textsuperscript{106}

Alternatively, the Court argued that even if the United States government lacked authority to enter into the agreement in writing required under the Convention, Gould "ratified" the actions of United States by filing its claim and arbitrating it before the Iran-United States Claims Tribunal.\textsuperscript{107}

Applying this principle broadly, the implications are profound. Following the logic of the Ninth Circuit, if a state lawfully enters into an agreement that vests an international tribunal with jurisdiction to resolve claims of its nationals, it does so on behalf of its nationals and that, for purposes of enforcing an arbitral award against a national, such an agreement between states satisfies the jurisdictional requirement of the New York Convention that there be an agreement in writing.\textsuperscript{108}

\textsuperscript{104} See Gould, 887 F.2d at 1360-61.
\textsuperscript{105} Id. at 1363.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 1364.
\textsuperscript{108} Although the breadth of such authority is quite extensive, it flows naturally from the authority of states to regulate international relations and to settle international disputes. As the Supreme Court in \textit{Dames & Moore v. Regan}, put it, United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.... Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States
Moreover, by pursuing a claim before the international tribunal, the national ratifies the decision of the state to enter into the agreement, and such ratification occurs notwithstanding the fact that he or she has no alternative forum to pursue the action.

The second requirement for New York Convention enforcement is that the international tribunal render an "arbitral award." The key language in Article I is that the "term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted." A simple reading of this provision would lead one to conclude that an arbitral award may be rendered by any permanently-established adjudicative body.

With respect to the Iran-United States Claims Tribunal, the Ninth Circuit in *Gould* only discussed this particular requirement in passing. It simply noted that, as a permanent arbitral body that renders arbitral awards, the Iran-United States Claims Tribunal satisfies the requirements of Article I of the Convention. Such a superficial analysis is unfortunate, for the precise contours of the term "permanent arbitral bodies" are unclear and one should hesitate to include all international tribunals under this rubric. Many international tribunals are engaged in functions that intuitively one would exclude from the category of arbitration. Among these include tribunals responsible for prosecuting crimes, determining human rights violations, and resolving personnel and administrative disputes. Even if the tribunal is engaged in resolving commercial disputes, is *Gould*’s superficial analysis correct that international tribunals are sitting as "permanent arbitral bodies" and as such their decisions are "arbitral awards" within the meaning of the New York Convention?

The preparatory work of the New York Convention suggests claimants themselves, since a claimant’s only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf. But is also undisputed that the "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole."

*Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981) (citations omitted). Thus, if the United States has the broader authority to extinguish or settle claims of its nationals against foreign governments, it also has the lesser authority to provide its nationals with an alternative forum for redress of their grievance.


110. *Gould*, 887 F.2d at 1362 ("Article I discusses the scope of the Convention, stating that it 'shall apply to the recognition and enforcement of arbitral awards....' The Convention defines 'arbitral awards' to include those 'made by permanent arbitral bodies'. ... The Tribunal's award satisfies th[is] requirement[] as well.").
otherwise. One drafting committee report states that:

The expression "arbitral awards" was understood...to include awards made by arbitral bodies appointed for each case (whether selected by the parties or by an organization), as well as awards made by permanent arbitral bodies established in accordance with the law of a contracting State."\textsuperscript{111}

This may suggest a reference to international tribunals, but more likely it is a reference to standing municipal arbitral bodies, as existed in certain Communist countries.\textsuperscript{112} Elsewhere, this same report suggests that the Convention was not intended to cover arbitration between States. In explaining the title to be given to the treaty, the Committee noted that:

[T]he expression "international arbitral awards"...normally referred to arbitration between States. \textit{Since the draft Convention does not deal with arbitration between States}, but with the recognition and enforcement in one country of arbitral awards made in another country, the Committee adopted the title "Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards", which reflects more accurately the object of the Convention.\textsuperscript{113}

This is further supported by the text of the New York Convention, which requires that the award be "made in the territory of a State."\textsuperscript{114} The text and preparatory materials suggest that international tribunals established solely to resolve interstate disputes are not intended to be subject to traditional enforcement mechanisms under the New York Convention. But it does not follow that international tribunals, such as the Iran-United States Claims Tribunal, established by treaties to resolve interstate disputes and disputes involving a private party are never


\textsuperscript{112} That the USSR suggested including a reference to permanent arbitral bodies may suggest that permanent municipal arbitral bodies were intended, as the USSR was one of the countries that have such permanent arbitral bodies. \textit{See id.}; \textit{see also Gould}, 887 F.2d at 1363 n.9; Leonard V. Quigley, \textit{Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards}, 70 \textit{Yale L.J.}, 1049, 1061 (1961) (The Convention "also applies to awards made by permanent arbitral bodies, a provision which covers arbitration before trade tribunals of Communist countries.").

\textsuperscript{113} \textit{Supra} note 111, Draft Convention, at III.A.1.2 (emphasis added).

\textsuperscript{114} \textit{Supra} note 85, New York Convention, at art. 1; \textit{see also Stephen J. Toope, Mixed International Arbitration} 29 (1990).
subject to New York Convention enforcement. Rather, the Convention was intended to regulate the recognition and enforcement in one country of awards rendered in another country. Most international tribunals render “anational” awards governed by the international legal system and not subject to the control of a single national state. They therefore should not be viewed as arbitral awards subject to New York Convention enforcement. Absent evidence of intended subordination to the laws of the forum state, the tribunal’s decisions should be viewed as subject to the international legal system and not municipal supervision.

That said, if an international tribunal decision was rendered in another country and subject to the laws of that country as the *lex arbitri*, it should be treated as a foreign arbitral award. Finding intent to subordinate the tribunal’s decisions to national laws may be difficult to ascertain. One of the clearest signs of such subordination is if the tribunal’s proceedings reference the New York Convention, or are subject to international commercial arbitration rules that clearly contemplate New York Convention enforcement, such as the rules of the American Arbitration Association (AAA), International Chamber of Commerce (ICC), or the United Nations Commission on International Trade Law (UNCITRAL).

Applying this approach to the Iran-United States Claims Tribunal, classifying its decisions as “arbitral awards” within the meaning of Article I of the Convention seems appropriate. As one commentator has noted regarding the Iran-United States Claims Tribunal, the “choice of the UNCITRAL Rules... is very significant” in discerning the *lex arbitri* intended by the United States and Iran.

The UNCITRAL Rules chosen by the drafters of the [Algiers] Accords demonstrate... that it can be ‘taken for granted that there is an applicable national law’ (footnote omitted).... [T]he presumed intent of the parties adopting the UNCITRAL Rules calls for municipal review as clearly as if the choice instead had

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118. NAFTA, supra note 9, art. 1122(2).

119. Caron, supra note 117, at 138.
been the American Arbitration Association Rules or the ICC Rules.  

As to the third requirement that the arbitral award is “international” and arise out of a “commercial” relationship, the Ninth Circuit in Gould had little difficulty concluding that an award of the Iran-United States Claims Tribunal is “international” because “the Tribunal sits at The Hague, which is in the Netherlands, which is a contracting State” and because “the award is obviously not domestic in nature because Iran is one of the parties to the agreement.”  

As to the “commercial” requirement, the court noted the obligation and without discussion simply concluded that it was satisfied. Such a cursory conclusion is unfortunate but nonetheless correct. The dispute between the parties arose out of a contractual relationship between an American corporation and the Iranian Ministry of Defense regarding the provision of military equipment. It therefore fell squarely within traditional concepts of commercial activity. 

But the “commercial” obligation may render certain decisions of the Iran-United States Claims Tribunal unenforceable in the United States under the New York Convention. For example in one recent dispute between Iran and the United States, the Tribunal ordered the United States to pay Iran over $5 million as a result of a breach of the Algiers Accords. More specifically, this breach involved a U.S. federal court’s refusal to enforce a tribunal decision notwithstanding the Algiers Accord obligation of the United States to treat all awards as final and binding. Assuming Iran is unable to secure enforcement by other means, one would expect that if Iran sought enforcement in the United States pursuant to the New York Convention, a federal court would

120 Id. at 139.
122 Id.

Under the plain meaning of the statute then, three basic requirements exist for jurisdiction to be conferred upon the district court: the award (1) must arise out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope. These three conditions are clearly satisfied here.

Id.

123 Islamic Republic of Iran v. United States, Award No. 586-A27-FT (June 5, 1998) paras. 61-76. For a discussion of the case, see Anuj Desai, Case No. A27: The Iran-United States Claims Tribunal’s First Award of Damages for a Breach of the Algiers Declarations, 10 AM. REV. INT’L ARB. 229 (1999). The case arose out of the Second Circuit’s refusal to enforce a Tribunal decision on the grounds that the American claimant did not have an opportunity to present his case within the meaning of Article V of the Convention. See Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145-46 (2d Cir. 1992).
conclude that a dispute between the United States and Iran concerning a violation of an international agreement did not constitute a commercial relationship.

The Iran-United States Claims Tribunal represents a remarkable example of an international tribunal falling within the arbitration model. The two governments agreed to an adjudicative process to resolve interstate disputes as well as disputes between private parties and the respective governments. The “arbitration agreement” was entered into when the United States and Iran signed the Algiers Accords. This agreement was done on behalf of their respective nationals and is binding upon them to the extent they pursue an action before the tribunal. Decisions of the tribunal are resolved according to arbitration rules that contemplate supervision by Dutch courts. Finally, the awards rendered by the Tribunal are international in nature and generally involve commercial relationships between Iran and private parties. As such, the awards rendered by this tribunal are foreign arbitral awards subject to New York Convention enforcement. As the Iran-United States Claims Tribunal stated in a recent case, although the Tribunal is “clearly an international tribunal,” the “mechanism available in the United States for the enforcement of Tribunal awards is the . . . New York Convention.”

C. Normative Application

The arbitration model posits that federal courts will treat the decisions of certain international tribunals as foreign arbitral awards enforceable pursuant to the New York Convention. In applying this model, assuming the parties are seeking direct recognition and enforcement, federal courts must begin their analysis by first determining whether the international tribunal fits another model requiring greater deference. That is, federal courts must ask if there is any binding federal lex specialis applicable to the specific international tribunal that may trump the lex generalis of the New York Convention. For example, although an ICSID tribunal award likely would satisfy all the requirements of the New York Convention, the requirements of the ICSID Convention as implemented by 22 U.S.C. § 1650a obviate the need to apply this model to that tribunal.

In this regard it is noteworthy that the Ninth Circuit in Gould wholly failed to undertake this first step. Although the Algiers Accords requires that “[a]ll decisions and awards of the Tribunal shall be final and

The Gould court simply assumed without discussion that the New York Convention applied. Of course, credible arguments can be made that this obligation is not directly binding on federal courts, but it is nonetheless disturbing that the Gould court failed to address this *lex specialis*.

In the absence of a binding federal *lex specialis* requiring greater deference to the tribunal decision, federal courts should ascertain whether they should defer to tribunal decisions in the manner prescribed by Congress in the Federal Arbitration Act implementing the New York Convention. This legislation requires recognition and enforcement if (1) the tribunal had its *genesis* in a written arbitration agreement; (2) the tribunal rendered an enforceable "arbitral award;" and (3) the *relationship* between the parties was "international" and "commercial" in nature. For international tribunals, federal courts should examine whether the first requirement is satisfied, either by virtue of the treaty establishing the tribunal or some other legal instrument constituting an arbitration agreement. For the second requirement to be fulfilled federal courts should satisfy themselves that the states establishing the international tribunal intended for it to be subject to the *lex arbitri* of the forum state or otherwise subject to New York Convention enforcement.

That is to say, if an award is made in Geneva or The Hague by an international tribunal, is it subject to the supervision of the Swiss or Dutch courts, respectively? If not, such decisions are not arbitral awards enforceable under the New York Convention. For the third requirement, federal courts should confirm that the award is "international" (which rarely will be an issue) and that the relationship between them is "commercial." For many international tribunals (human rights tribunals, criminal tribunals) the relationship between the parties is decidedly not commercial in nature.

Of course, federal courts are regularly required to recognize and enforce foreign arbitral awards under the New York Convention. So frequent is this practice that they may fail to appreciate the unique features of arbitration before international tribunals and simply assume that the New York Convention applies. The celebrated case of *Iran Aircraft Indus. v. Avco* is a cautionary tale illustrating the simplicity of the act.

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with which federal courts address international tribunal decisions. In that case, the Second Circuit concluded that the obligations in the Algiers Accords that the United States treat Tribunal awards as final and binding only required treatment at least as favorable as that accorded to foreign arbitral awards. It then rather summarily concluded that the New York Convention a fortiori applied. Unlike Gould, no analysis was undertaken as to whether there was an arbitration agreement between the parties, whether the award was a "foreign arbitral award" of a "permanent arbitral body" or whether the relationship between Avco and Iran was "commercial" in nature. While each of these requirements no doubt could be found in that case applying reasoning similar to Gould, the failure to even address the issues is disturbing.

Federal courts can anticipate that in the future they will be asked to apply the arbitration model to the decisions of other international tribunals. Application of these norms should guide federal courts in ascertaining whether to utilize the arbitration model. The decisions of two other tribunals—the Claims Resolution Tribunal and the International Tribunal for the Law of the Sea—are illustrative.

The tribunal established to resolve claims to Holocaust-era dormant Swiss bank accounts, the Claims Resolution Tribunal, is a good example of an international tribunal that fits the arbitration model. Under the first phase of the Claims Resolution Tribunal proceedings—the CRT I proceedings—the claimant and defendant sign a Claims Resolution Agreement, thereby agreeing to submit the dispute to the Claims Resolution Tribunal for resolution. Consistent with Article 2 of the CRT I Rules, the tribunal will not arbitrate claims to dormant accounts until it has received a Claims Resolution Agreement signed by the parties, in which the claimant and the defendant "agree that the

128. Avco, 980 F.2d at 141.
129. Avco, 980 F.2d at 145-46.
130. The CRT was created by the Independent Claims Resolution Foundation chaired by former U.S. Federal Reserve Chairman Paul Volcker. The Foundation was established by the Swiss Federal Banking Commission, the public supervising entity of Swiss banks, and the Independent Committee of Eminent Persons ("ICEP"). ICEP was created pursuant to a Memorandum of Understanding between the World Jewish Restitution Organization, the World Jewish Congress, and the Swiss Bankers Association. See Alford, The Claims Resolution Tribunal, supra note 7, at 259-60.
131. For a discussion of the distinction between the first and second phases of the Claims Resolution Tribunal, see id at 260-67. The second phase of the CRT more aptly fits the "Special Master model discussion below. See infra text accompanying notes 334-349.
132. See Alford, The Claims Resolution Tribunal, supra note 7, at 276, n. 183.
Claimant's claim to the above dormant account shall be resolved by the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Under the CRT I Rules, the tribunal decisions are expressly subject to Swiss law and CRT decisions have been reviewed by Swiss courts. The relationship between the parties is commercial in nature arising out of a banking relationship between a Swiss bank and foreign clientele. As such the CRT I proceedings fall within the arbitration model and should be enforced as such.

By contrast, litigation under the Law of the Sea Convention is an example of an international adjudicative process that appears to be a likely candidate for the arbitration model, but upon analysis does not fit. Pursuant to Article 287 of the United Nations Convention on the Law of the Sea (LOS Convention), parties may choose among several options to resolve disputes concerning the interpretation or application of the LOS Convention, including the options of interstate arbitration or submitting the dispute to the International Tribunal for the Law of the Sea (ITLOS) sitting in Hamburg. Utilizing the above analysis, as Gould suggests, Article 287 arguably constitutes the arbitration agreement that would be binding as between the parties. However, the failure to include institutional rules such as the ICC or UNCITRAL or otherwise subordinate the adjudicative process to the municipal law of Germany is evidence that such a tribunal does not constitute arbitration subject to enforcement in national courts under the New York Convention. Moreover, the disputes arising before the ITLOS often will concern core disputes between countries that are not commercial in nature. As such, decisions of ITLOS should not be recognized under

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136. Decisions of the CRT have been subject to adjudication before the Swiss Federal Court pursuant to Article 176 of the Swiss Act on Private International Law (“SPILA”). PRIVATE INTERNATIONAL LAW AND ARBITRATION 40-41 (Andreas Bucher & Pierre-Yves Tschanz eds. 1996).
139. See, e.g., ITLOS Press Release 43, Case on Conservation of Swordfish Stocks Between
the arbitration model.

Assuming the decisions of an international tribunal fit the arbitration model, a federal court should grant significant deference. In implementing the New York Convention, Congress has mandated an arbitral award shall be confirmed against any other party to the arbitration and the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the New York Convention. While this does not mean that decisions of international tribunals are directly effective in the United States, it does mean that "[i]f an award has been rendered, that award must be enforced unless the party against whom enforcement is sought presents evidence that one of the limited defenses enumerated under Article V of the [New York] Convention is applicable."

III. THE FOREIGN JUDGMENT MODEL

A third model for federal court deference to decisions of international tribunals is the foreign judgment model. Under this approach, as a matter of comity, a judgment rendered in a foreign court will be given conclusive effect in federal courts without a review of the merits of the decisions, unless there are grounds to believe that the judgment should

Chile and the European Community in the South-Eastern Pacific Ocean, at http://www.itlos.org (last visited Dec. 21, 2000). (ITLOS “called upon to decide...whether the European Community has complied with its obligations under the United Nations Convention on the Law of the Sea to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its Member States in the high seas adjacent to Chile’s exclusive economic zone,...and whether the ‘Galapagos Agreement’ of 2000 was negotiated in keeping with the provisions of the UN Convention.”)

140. 9 U.S.C. §§ 201, 207.
be impeached. The foreign judgment model posits that decisions rendered by certain international tribunals are candidates for similar treatment. In particular, this model applies to those situations where direct recognition is sought, and courts have no binding federal mandate from a statute or self-executing treaty as to what effect to give to their judgments.

A. Recognition and Enforcement Under Hilton v. Guyot

The landmark case enunciating U.S. policy regarding recognition and enforcement of foreign judgments is found in *Hilton v. Guyot*. In *Hilton*, two Americans in Paris operating a firm under the name A.T. Stewart & Co. had contractual relations with a French firm, Charles Fortin & Co. Disputes arose regarding adjustment of certain accounts and French judgments were rendered in favor of Charles Fortin & Co. Unable to execute the judgment in France, Bertin Guyot, liquidator of the firm of Charles Fortin & Co. sought recognition and enforcement of the judgment in the United States. After an exhaustive review of the approaches of other countries regarding the enforcement of foreign judgments, the Supreme Court articulated the classic test for recognition of foreign judgments:

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.144

143. 159 U.S. 113 (1895).
144. Id. at 159-60. The Supreme Court went further than this and ultimately held that there was an independent ground upon which we are satisfied that the comity of our nation does
As applied over the past century, *Hilton* has become foundational for two reasons. First, the grounds it articulates for non-recognition of a foreign judgment—lack of due process, lack of personal or subject matter jurisdiction, insufficient notice, fraud, public policy, etc.—have become codified in decisions, statutes, and commentaries. Both the Restatement of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act adopt principles that find their genesis in the *Hilton* formula.\footnote{UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4; 13 Ptt. II U.L.A. 58-59 (2002); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).}

Second, *Hilton* is important because the basis for recognizing foreign judgments is founded on international comity. The extent to which the law of one nation, as put in force within its territory...by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." ... "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.\footnote{159 U.S. at 163-64.}

Thus, the basis for recognizing and enforcing foreign judgments rests on ill-defined notions of international comity. Although uncertain in its application, in practice federal courts are quite willing to recognize foreign money judgment creditors on this basis, provided the *Hilton* safeguards are satisfied.

While *Hilton* principles have become fundamental as the basis for recognizing foreign judgments, there is little evidence that federal courts have had occasion to utilize *Hilton* specifically, or international comity generally, as grounds for recognizing and enforcing international tribunal judgments. The most important example comes from the late

\textit{not require us to give conclusive effect to the judgments of the court of France; and that ground is the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.}

\textit{Id. at 210. However, this reciprocity requirement has not been followed in subsequent lower court cases, principally because, applying \textit{Erie Railroad v. Thompkins}, the recognition and enforcement of a foreign judgment is deemed to be governed by state common and statutory law. For an extensive commentary on this, see Richard H. M. Maloy & Desamparados M. Nisi, \textit{A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think it Needs Repairing}, 5 J. INT'L LEGAL STUD. 1 (1999).}
19th century *La Abra* trilogy of cases concerning the enforcement of United States-Mexico Claims Commission decisions. Following that Commission's decision in favor of the La Abra Silver Mining Co., among others, and payment by Mexico to the United States pursuant thereto, Mexico alleged that these claims were procured by fraud and should not be disbursed to the claimants. The Supreme Court agreed, and rested its argument on international comity.

International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. Every citizen who asks the intervention of his own government against another for the redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity. The Court then in the first case of the *La Abra* trilogy denied the claimants request for a writ of mandamus requiring disbursement of these funds, finding that it was within the President's discretion to negotiate again with Mexico to have these claims retried, and in the meantime it was appropriate for the President to withhold payment. Subsequently, the United States refused to have the claims resubmitted to the international tribunal, proposing instead to have them investigated and retried domestically. Congress subsequently authorized review of the claims in U.S. courts and denial of the claims in the event they were found to have been procured by fraud. The Supreme Court upheld the constitutionality of these congressional measures and declined to order disbursement of the funds paid by Mexico pursuant to the international tribunal decisions.

148. Key, 110 U.S. at 73-74; see also Boynton, 139 U.S. at 322; *La Abra Silver Mining Co.*, 175 U.S. at 434, 458, 463.
149. Key, 110 U.S. at 74.
151. *La Abra Silver Mining Co.*, 175 U.S. at 441-43.
152. Id. at 450-99.
Of course, the *La Abra* trilogy of cases does not fit the classic scenario of enforcement of an international tribunal judgment. The treaty between Mexico and the United States stipulated what effect to be given to the Commission’s decisions, Mexico had already made payment to the United States, and the principal question was whether the United States could refuse to make downstream disbursement to the claimants of the amounts paid by Mexico.\(^{153}\) Nonetheless, the basis for the denial of the claims is remarkably similar to *Hilton*. To use *Hilton* language, the judgment of the United States-Mexico Claims Commission “should be held conclusive upon the merits...unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud...or that...by the comity of our own country, it should not be given full credit and effect.”\(^{154}\) The third case of the *La Abra* trilogy contains virtually identical language:

We might well doubt the soundness of any conclusion that could be regarded as weakening...the force that should be attached to the finality of an award made by an international tribunal of arbitration. So far from the act of Congress having any result of that character, the effect of such legislation is to strengthen the principle that an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.\(^{155}\)

With the exception of the *La Abra* trilogy of cases, there are no reported instances of an attempt to use this model to refuse recognition in the United States of an international tribunal judgment. Of course, it is rare for an international tribunal to render a money judgment that is not at the same time a “foreign arbitral award” subject to enforcement under the arbitration model set forth above. It is also uncommon for an international judgment creditor to seek recognition of an international tribunal decision in federal courts. Therefore, it is perhaps not surprising that there are so few cases to support a foreign judgment model.

Having said this, there are logical reasons why the policies that support recognizing foreign judgments should apply with equal force to international decisions. As the Third Circuit has noted, at the root, comity concerns reflect a desire to promote predictability, stability, and respect for the rule of law.

The primary reason for giving effect to the rulings of foreign

\(^{153}\) *Id.* at 426-29.

\(^{154}\) *Hilton*, 159 U.S. at 159-60.

\(^{155}\) *La Abra Silver Mining Co.*, 175 U.S. at 463 (emphasis added).
tribunals is that such recognition factors international cooperation and encourages reciprocity. Thus, comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises. It also encourages the rule of law, which is especially important because as trade expands across international borders, the necessity for cooperation among nations increases as well.  

Such concerns are of equal weight in the international judgment and the foreign judgment context.

This is particularly so where the United States is not a party to the treaty establishing the international tribunal or has not otherwise consented to the tribunal’s jurisdiction. In such contexts, respect for foreign judgments will be based on common law notions of international comity, in the absence of express legislative or executive pronouncements regarding the degree of deference to be given such judgments. International tribunal decisions fit the foreign judgment model most clearly when they are truly alien, that is, they do not involve the imprimatur of the United States reflected in treaty accession or jurisdictional consent. Absent such consent, federal courts should undertake the Hilton analysis and respect judgments of international tribunals on the basis of international comity.

Finally, one should underscore that recognition and enforcement of foreign or international judgments could apply both offensively and defensively. Comments to the Restatement on Foreign Relations explain:

The judgment of a foreign state may not be enforced unless it is entitled to recognition. Whether a foreign judgment should be recognized, may be an issue, however, not only in enforcement...but in other contexts, for example where the defendants seeks to rely on a prior adjudication of a controversy (res judicata), or whether either side in a litigation seeks to rely on prior determination of an issue of fact or law.  

Thus, in any discussion regarding the recognition and enforcement of decisions of international tribunals, one should keep in mind that such recognition may come in the form of a defensive claim of res judicata or an offensive claim to have a judgment executed.

B. The Foreign Judgment Model and the European Court of Justice

As noted above, there are no reported instances in the past century in which decisions of an international tribunal have been subject to enforcement and recognition using a foreign judgment model. Nonetheless, there is nothing to prevent decisions of certain international tribunals from enjoying recognition and enforcement under the foreign judgment model. A brief examination of the possibility for recognition of decisions of the European Court of Justice is illustrative.

The European Court of Justice is an international tribunal established by the Treaty of Rome with the responsibility to ensure “that in the interpretation and application of this Treaty the law is observed.”

There is an extremely intricate and fluid relationship between Member State national courts and the European Court of Justice. Perhaps most significant, under the “preliminary reference” procedure of Article 234, formerly Article 177, a national court may request the European Court of Justice to give a preliminary ruling on the interpretation of the Treaty or the validity and interpretation of acts of Union institutions if such a preliminary ruling is necessary to enable the national court to give proper judgment in a case pending before it. Upon rendering any such decision, the national court is bound to apply the determination of the European Court of Justice to the case before it.

A U.S. federal court has not yet had occasion to recognize and enforce a decision of a Member State national court incorporating a decision of the European Court of Justice. Nonetheless, in at least two instances federal courts have dismissed actions to permit Member State national courts (and the European Court of Justice as appropriate) to determine whether violations of EU competition law have occurred. In a third case, a federal court was faced with a dispute that had previously been subject to decisions by a European national court and the European Court of Justice. These cases underscore the confidence that federal courts have in the decision-making process of European national courts and the likelihood that they would enforce a foreign judgment.

159. Id. at 234.
160. See, e.g., Case 52/76, Benedetti v. Munari, 1977 E.C.R. 163, ¶ 26, the Court of Justice has jurisdiction to ‘give (...) rulings’ concerning the interpretation ‘of this Treaty’ and that ‘of acts of the institutions of the Community’. It follows that the purpose of a preliminary ruling is to decide a question of law and that that ruling is binding on the national court as to the interpretation of the Community provisions and acts in question.

Id.
incorporating an ECJ decision.

In Information Resources, Inc. v. Dun & Bradstreet Corp., the federal district court declined to exercise jurisdiction over claims alleging that the A.C. Nielsen Company engaged in anticompetitive activity in Europe. The plaintiff sought to assert claims that the defendants had violated the competition rules of the Treaty of Rome, requesting the district to assert supplemental jurisdiction over these claims in addition to the Sherman Act claims. The court exercised its discretion to decline supplemental jurisdiction because such a claim raised novel and complex issues of State law. The court noted that, even if this claim were cognizable, normally it would be brought in a European national court:

which would apply its own substantive and procedural rules and remedies in giving effect to the Treaty [of Rome], and would have the option of seeking an opinion from the European Court of Justice on questions of European Community law. This court does not have that option; it would have to decide what European Community law would be, de novo.

In Capital Currency Exchange, N.V. v. National Westminster Bank PLC, the plaintiff, a Netherlands Antilles corporation, and its New York affiliate alleged that British banks and their officers engaged in antitrust violations by denying banking services to the plaintiffs and its affiliates. The district court dismissed the case on forum non conveniens grounds, finding that England is an adequate forum for plaintiffs’ claims. On appeal the Second Circuit affirmed the finding that plaintiffs could not bring Sherman Act claims before English courts but could challenge and secure monetary damages for defendants’ allegedly anti-competitive conduct under Article 85 and 86 of the Treaty of Rome.

Finally, in Eurim-Pharm GmbH v. Pfizer, Inc., a federal district court faced a claim that defendants engaged in a worldwide price-fixing and market allocation conspiracy that had the direct, substantial and reasonably foreseeable effect of artificially inflating the price of the product in the United States. Significantly, the case had previously been the subject of litigation in German court, with a preliminary determination to the European Court of Justice, which found that the

162. Id. at 417.
163. 155 F.3d 603 (2d Cir. 1998).
164. Id. at 609-10.
use of a national trademark to exclude competition from the sale of
goods acquired in another member state of the European Union violated
the Treaty of Rome. The federal court did not need to reach the
question of the preclusive effect of these decisions, finding that “even
assuming the truth of plaintiff’s allegations that the United States
price...has risen since the expiration of defendants’ patent, plaintiff has
failed to allege any facts demonstrating a causal connection between
defendants’ conduct in Europe and the price increase in the United
States.”

None of these cases involved requests to recognize and enforce a
decision of the European Court of Justice. But all of them clearly
express confidence in the ability of Member State national courts—and
the European Court of Justice—to adjudge questions and fashion
remedies to address anticompetitive behavior in violation of the Treaty
of Rome. Taking these cases to their logical conclusion, one may apply
the following heuristic. Assume that a Member State national court was
seized of a claim alleging violations of EU competition law and
referenced an Article 234 preliminary question to the European Court of
Justice. Assume further that the European Court of Justice made a
determination that there had been a violation of the Treaty of Rome,
leading the European national court to incorporate that determination
into its own decision and subsequently to award monetary damages.
 Having no alternative to enforce the judgment in Europe, the successful
claimant then sought enforcement of the monetary award in the United
States, while the defendant argued that the judgment should not be
recognized and enforced, in particular on the grounds that there had
been no violation of the EU competition law.

Assuming such a scenario, applying Hilton offensively for
enforcement purposes, there is every reason to think that a federal court
would utilize Hilton principles in assessing whether to recognize and
enforce a decision of a European national court incorporating the
decision of the European Court of Justice. The federal court would ask
the traditional Hilton questions, such as whether the parties before the
national court and the European Court of Justice had an “opportunity for
a full and fair trial...before a court of competent jurisdiction.”

Assuming that the federal court is satisfied these criteria were met, it
would enforce the judgment of the Member State court, which in turn
had incorporated the determination of the European Court of Justice. In
so doing, it would analyze the procedural fairness of the European Court

167. Id. at ¶ 13.
of Justice and assess whether comity considerations merit recognition of its decisions.

Applying another heuristic of defensive recognition of the judgment, assume that a federal court—unlike Information Resources—exercised supplemental jurisdiction under 28 U.S.C. § 1367 over competition claims alleging a violation of the Treaty of Rome. Assume further that the parties to the dispute had parallel litigation in a Member State national court, which found no violation of the Treaty of Rome. The European Court of Justice used an Article 234 reference determination to arrive at such a finding. In such a situation, the U.S. federal court arguably would not be forced to "decide what European Community law would be de novo," but could simply apply Hilton principles in assessing whether to give preclusive effect to the determination of the Member State decision incorporating the decision of the European Court of Justice.

In both hypothetical scenarios, a federal court would recognize and enforce the decision of a Member State national court incorporating a dispositive determination of the European Court of Justice. In both cases, the determination whether to recognize the Member State national court judgment incorporating the European Court of Justice decision would be made in the same manner as other foreign judgments are recognized. In both cases a federal court would be utilizing a foreign judgment model to recognize the decision of an international tribunal.

C. Normative Application

The foreign judgment model posits that federal courts will treat the decisions of certain international tribunals in the same manner as foreign judgments enforceable as a matter of international comity. In applying this model, assuming the parties are seeking direct recognition and enforcement, federal courts must begin their analysis by first determining whether or not the international tribunal fits one of the other two models previously discussed that require greater deference. If there is a federal mandate, such as 22 U.S.C. § 1650a or a self-executing treaty, specifically addressing recognition of that tribunal's judgments, federal court recognition should be pursued according therewith. In the absence of binding federal lex specialis, courts should ascertain whether the international tribunal decision satisfies the requirements of the arbitration model by applying the requirements of the New York Convention as implemented in the United States.

With respect to the European Court of Justice, for example, there is no federal legislation requiring recognition or enforcement of their decisions, and the fact that the United States is not a signatory to the Treaty of Rome and never otherwise agreed to be bound to their decisions precludes application of the first model. The decisions of the European Court of Justice also do not satisfy the arbitration model because, although sitting in Luxembourg, its decisions are not subject to their court's supervision. Nor do the ECJ decisions generally arise from a commercial relationship between the parties. Application of the arbitration model to that tribunal would therefore be inappropriate. But as suggested, a federal court may face a scenario in which a party seeks recognition and enforcement of an ECJ decision embedded in a Member State money judgment, in which case the foreign judgment model may be applicable.

In the event that neither the full faith and credit model nor the arbitration model are appropriate, upon request for direct recognition of an international tribunal decision a federal court should decide whether to recognize and enforce the decision based on international comity principles that animate from *Hilton v. Guyot*. Comity counsels that such decisions are not enforced as a rule of law, but rather out of "practice, convenience, and expediency," promoting the substantial value of "discouraging repeated litigation of the same question" in multiple fora.71 The fundamental question for this model of enforcement is the integrity of the process that gave rise to the judgment. When an international tribunal having jurisdiction inquires into the relevant facts and law, judicially, honestly, and with the intent to reach the right result, a federal court should not "sit as a court of appeal from that which gave the judgment."72 In most cases this should result in the recognition and enforcement of the decision of the international tribunal.

Federal courts can anticipate that in the future they will be requested to recognize and enforce—defensively or offensively—a decision of an international tribunal absent a binding federal mandate instructing them as to what deference to be given to their judgments. This model responds to that scenario. While the European Court of Justice may be one of the clearest examples of a decision of an international tribunal that could be recognized in the United States under a foreign judgment model, there are other international tribunals that are also likely candidates. International tribunals that involve interstate arbitrations involving money judgments are the most promising. Assuming the

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previous discussion is correct—that interstate arbitration generally is not subject to enforcement under the New York Convention—then it is likely that monetary judgments rendered by these international tribunals adjudicating claims between states fall within the foreign judgment model. As the Restatement on Foreign Relations has noted, “[f]oreign arbitral awards not falling under the [New York] Convention are generally enforceable in the United States in the same manner as foreign judgments..., whether or not they have been judicially confirmed in the state where made.” Two international tribunals, the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission, are illustrative.

The United Nations Compensation Commission (UNCC) was established by the United Nations Security Council to resolve claims arising out of the Gulf War brought against Iraq by countries espoused on the behalf of their nationals. The decisions of the UNCC are rendered by a panel of commissioners and subject to the approval of a governing council established by the United Nations Security Council. Such decisions do not fit the arbitration model outlined above because, among other things, there is nothing to indicate that the UNCC, located in Geneva, is subject to the supervision of the Swiss courts. It is truly an “anational” tribunal applying international law and under the supervision of the United Nations. It therefore does not render awards subject to enforcement under the New York Convention. Nor does the UNCC clearly fit the full faith and credit model, for although the United States is a party before the UNCC and agreed that UNCC decisions are “final and are not subject to appeal or review on

173. Restatement (Third) of the Foreign Relations Law of the United States § 487 cmt. h; see also id. at § 487 note 8 (Actions to enforce foreign arbitral awards not falling under the Convention must therefore must [sic] be brought in State courts, or in federal courts in exercise of diversity of citizenship jurisdiction. Most State arbitration statutes do not provide for enforcement of foreign awards; and there is no equivalent to the Uniform Foreign Country Money Judgments Act. Nevertheless, arbitral awards rendered in foreign states have been freely enforced in the United States, and recognition or enforcement has been refused only on grounds that would justify refusal to recognize or enforce foreign judgments.


procedural, substantive or other grounds," this obligation likely is not self-executing, i.e., is not a federal mandate binding on federal courts.\textsuperscript{176} The judgments of the UNCC are enforced through funds received by the United Nations from revenues generated from the sale of Iraqi oil.\textsuperscript{178} As a result, the current mechanism for payment to successful claimants gives them little incentive to satisfy judgments in other fora. This is less true for claims that were wholly or partially unsuccessful before the UNCC. In those situations, claimants may wish to pursue litigation in national courts, an option contemplated by the UNCC procedures.\textsuperscript{179} If a claimant pursues such a claim before national courts or in arbitration, Iraq may seek defensive recognition of the UNCC decision to preclude or limit the claim presented, as it has done in at least one context.\textsuperscript{180} A federal court faced with such an argument could apply Hilton principles to determine whether the UNCC decision should be recognized and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{176} Id. at art. 40(4).
\item \textsuperscript{177} This obligation is contained in "provisional rules" adopted by a decision of the Governing Council of the UNCC. See id. This entity was established by the U.N. Security Council as an organ of the UNCC and is responsible for establishing the criteria for the compensability of claims, the rules and procedures for processing the claims, and the guidelines for the administration and financing of the Compensation Fund. Its membership is composed of the same member states as the U.N. Security Council. The decisions of the Governing Council require majority approval for adoption. See The Governing Council, available at http://www.unog.ch/unc/germany.htm. (last visited February 10, 2003). Thus, the obligation was imposed by a decision of the Governing Council, an entity that is an organ of the UNCC, which itself was established by the Security Council, which in turn was established by the U.N. Charter. If the self-execution doctrine concerns a determination as to the framer's intent as to the operative effect of the agreement, this obligation was imposed by an entity and found in a document that is too attenuated to discern such intent.
\item \textsuperscript{178} See generally http://www.unog.ch/unc/introduc.htm (last visited February 10, 2003) (describing role of UNCC).
\item \textsuperscript{180} In 1973 Iraq and Turkey entered into an agreement to build a pipeline to transport crude oil from Kirkuk, Iraq to the Turkish port of Ceyhan. Iraq contended that the UNCC decision was res judicata, precluding Botas' claim in arbitration. On August 6, 1990 the U.N. ordered Turkey to shut down the pipeline, which it did, suffering extensive losses. Botas claimed damages in excess of $1 billion and on September 27, 2001, the UNCC awarded Botas Petroleum Pipeline Corp. $176,340,655, dismissing the remaining portions of the claim because the injury was not directly caused by the Gulf War. See Report and Recommendation Made by the Panel of Commissioners Concerning the Sixth Installment of "EI" Claims, U.N. Doc. S/AC.26/2001/18 (2001) at 29-40, paras. 97-152, available at http://www.unog.ch/unc/reports.htm. (last visited February 10, 2003). Botas subsequently sought to re-litigate some of the issues presented to the UNCC pursuant to an arbitration clause in the Iraq-Turkey agreement, to which Iraq responded by contending that the UNCC decision was res judicata as between the parties. No award has yet been rendered. Interview with James Loftis, former Senior Legal Officer, United Nations Compensation Commission (Aug. 9, 2002).
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enforced.

Another international tribunal that may fit the foreign judgment model is the Eritrea-Ethiopia Claims Commission (Claims Commission) located in The Hague. The Claims Commission was established as part of the Peace Agreement between Ethiopia and Eritrea on December 12, 2000. The Claims Commission decides, among other things, claims for loss, damage or injury by either nation or its nationals resulting from the Eritrean-Ethiopian war. This tribunal does not fit the full faith and credit model, as the United States is not a party and there is no federal mandate requiring U.S. court recognition of their decisions. Nor does the tribunal fit the arbitration model. Neither the Peace Agreement nor the Rules of Procedure established by the Commission indicate that the decisions of the Commission are subject to the supervision of the Dutch courts or otherwise enforceable in national courts under the New York Convention. The Commission is required to apply relevant rules of international law (not national law) and all decisions are final and binding, with the parties committed to honor all decisions and pay any monetary awards.

While the Claims Commission is still in its infancy and has not yet begun rendering awards, its decisions are the result of interstate arbitration arguably enforceable in national courts under a foreign judgment model. Unlike the Iran-United States Claims Tribunal, the rules of procedure of the Claims Commission are based, not on the UNCITRAL Rules, but on the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between States. The arbitration therefore is truly "anational." In addition, the arbitration is interstate in that all of the claims are either state-to-state claims or espousal claims brought by the respective governments on behalf of their nationals. Significantly, unlike the Iran-United States Claims Tribunal, there is no independent mechanism for the enforcement of decisions of the Claims Commission. Consequently, to the extent the awards of the Claims Commission are not satisfied by other means or in other fora, they may be subject to enforcement proceedings in national courts, including the United States. As suggested above, a federal court seized of an action for recognition and enforcement of a decision of the Claims Commission.

182. Id. at art. 5 (13), (17); Rules of Procedure, arts. 18(4), 19 (on file with author).
183. Supra note 181, Peace Agreement, at art. 5(7).
Commission should apply international comity principles enunciated in *Hilton v. Guyot*, and recognize any decision by the Claims Commission in the same manner as it would a foreign judgment.\(^\text{184}\)

Finally, the decisions of the International Court of Justice may also fall within the foreign judgment model. Assuming that a federal court were to conclude that the relevant provisions of the U.N. Charter and the Statute of the ICJ are not self-executing,\(^\text{185}\) then a prevailing country’s attempt to secure direct recognition and enforcement of an ICJ decision may fit this model more closely than the full faith and credit model. For example, assume Mexico prevails in the pending litigation before the ICJ regarding alleged violations by the United States of the Vienna Convention on Consular Relations,\(^\text{186}\) and then seeks to have that decision recognized and enforced in the United States. Absent a finding of self-execution the decision of the ICJ should be recognized as a matter of international comity. Relying on *Hilton* and the *La Abra* trilogy, Mexico could argue that “an award by a tribunal acting under the joint authority of two countries is conclusive between the two governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.”\(^\text{187}\) Thus, unless there is some ground to impeach the integrity of the decision, or there is some binding federal mandate requiring a contrary result,\(^\text{188}\) a federal court should treat the decision of the ICJ as conclusive as between the parties.

Assuming the decisions of an international tribunal fit the foreign judgment model, as a matter of comity a national court should grant significant deference to the international tribunal. The above analysis demonstrates that a foreign judgment model may be appropriate where parties to foreign or international litigation seek recognition of those

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184. It is noteworthy that at least one federal court has refused to dismiss a class action suit brought for events arising out of the Eritrean-Ethiopian war on *forum non conveniens* grounds, concluding that the Claims Commission provided an inadequate forum for resolution of the claims. In so doing, the court engaged in a *forum non conveniens* analysis to determine that that particular tribunal could not provide the necessary guarantees that Commission awards would be recognized by the Ethiopian government. Nemariam v. The Federal Democratic Republic of Ethiopia, 315 F.3d 390, 394-95 (D.C. Cir. 2003). The clear implication, however, was that an international tribunal may prove an adequate forum with sufficient safeguards that their awards will be given effect. Id. at 395 (“[W]e recognize that the decision is a close one, particularly in the light of...the district court’s observation, with which we agree, that there is nothing in the record to suggest the plaintiffs’ awards will be set off against debts owed by Eritrea to Ethiopia. Neither, however, is there any legal barrier to such a set off.”).

185. See supra text accompanying notes 58-79.


187. *La Abra Silver Mining Co.*, 175 U.S. at 463.

188. See *Breard*, 523 U.S. at 376; infra note 249.
decisions in federal courts. Having said this, the narrow scope of such a postulation should be underscored. This model suggests that federal courts should recognize decisions of international tribunals on the basis of Hilton-style international comity. It does not suggest a broader notion, espoused by some scholars, that "[c]omity...expresses an appreciation of different assignments and a global allocation of judicial responsibility, sharpened by the realization that the performance of one court's function increasingly requires cooperation with others." Comity in the Hilton sense is much narrower. It simply suggests that the judicial acts of another nation—or group of nations acting collectively—are worthy of respect when the actual litigants in those fora seek recognition of those decisions in our courts. That is to say, to conclude that comity should be a factor when litigants appear before a foreign court acting alone necessarily imports the larger notion that this is true when litigants appear before an international tribunal established by several nations acting in concert. The comity concerns that merit recognition of decisions of other national courts apply with equal if not greater force for recognition of decisions of supra-national courts.

As noted above, the foreign judgment model is less deferential than the previous two models because there is no congressional mandate to recognize and enforce judgments, and therefore recognition is conferred as a matter of international comity. Moreover, the scrutiny that a federal court will undertake in deciding whether to recognize a judgment is far more exacting and rigorous for foreign judgments than for arbitration awards recognized under the New York or ICSID Conventions. Nonetheless, federal courts traditionally recognize foreign judgments liberally, and one would expect that in most cases international tribunal decisions would satisfy the Hilton criteria. As one noted scholar has put it in discussing foreign judgments, although the command of the full faith and credit clause

\[\text{does not...apply to foreign-country judgments, ... the attitude toward enforcement of judgments rendered by other jurisdictions seems to carry over to foreign-nation judgments as well, thus making the United States—without benefit of any treaties or federal statute—among the most receptive nations with regard to recognition and enforcement of foreign-country judgments.} \]

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189. Anne-Marie Slaughter, Court to Court, 92 AM. J. INT'L L. 708, 711 (1998). For a detailed discussion distinguishing different types of international comity, see Ramsey, supra note 83. Ramsey defines Hilton international comity as "judicial comity." See id. at 897-902.

190. Andreas F. Lowenfeld & Linda J. Silberman, United States of America, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 123 (Charles Platto & William G. Horton,
Given the integrity with which most international tribunal proceedings are conducted, one would expect that such a receptive attitude to recognition of international tribunal decisions would also obtain in this country.

IV. THE CHARMING BETSY MODEL

A fourth model for domestic courts to confer discretion on decisions of international tribunals is through statutory construction. Under this approach, there are no binding instructions in a statute or treaty as to what effect to give to the international tribunal decision. Nor is the court even requested to directly recognize and enforce the decision. Rather, the decision is considered as part of the process of interpreting and construing a domestic statute.

A. Charming Betsy as a Rule of Statutory Construction

The interpretative approach of construing statutes to be consistent with international law had its genesis in 1804 with Chief Justice Marshall's decision in Murray v. The Schooner Charming Betsy. In Charming Betsy, a United States statute enacted in February 1800 prohibited any commercial intercourse between the United States and France, and authorized the seizure of and sale for forfeiture of any United States vessel destined for any port within the French Republic or sold for the purpose that they may proceed to such port. A United


191. 6 U.S. (2 Cranch) 64 (1804).


States vessel included "[a]ny vessel owned, hired or employed wholly or in part by any person residing within the United States, or by any citizen thereof residing elsewhere." On July 3, 1800, the American frigate Constellation seized the Charming Betsy destined for the French island of Guadeloupe and thereafter sold it in forfeiture pursuant to the statute. The Charming Betsy was originally an American vessel that had been sold in 1800 to one Jared Shattuck, a former United States citizen residing in St. Thomas. Shattuck became a naturalized Danish citizen in 1796 and, upon completion of the sale, documented the ship as a Danish vessel. On appeal of the forfeiture of the ship, the Court held that

[A]n act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.  

Applying that standard, the Court concluded that the "correct construction" of the statute is that the vessel must be owned by a United States citizen "not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed." Having further found that Shattuck, in swearing allegiance to the Danish crown, took himself "out of the description of the act" as a United States citizen, the Court concluded that "the Charming Betsy, with her cargo, being at the time of her recapture the bona fide property of a Danish Burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island."

Since that time federal courts have regularly applied the Charming Betsy doctrine. The Charming Betsy doctrine has been crystallized into a rule of statutory construction. The Restatement (Third) Foreign Relations summarized the rule as follows: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."
Significantly, the *Charming Betsy* canon of statutory construction was established to promote separation of powers.\(^{199}\) As the Supreme Court has observed, separation of powers is a prophylactic device that

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\(^{199}\) EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) [hereinafter *Aramco*]

It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. This canon of construction is a valid approach whereby unexpressed congressional intent may be ascertained. It serves to protect against unintended clashes between our laws and those of other nations, which could result in international discord.

*Id.* (citations omitted).

[T]he Court has until now recognized that *Benz* and *McCulloch* are reserved for settings in which the extraterritorial application of a statute would implicate sensitive issues of the authority of the Executive over relations with foreign nations. The strictness of the *McCulloch* and *Benz* presumption permits the Court to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a statute to displace the domestic law of another nation. Nothing nearly so dramatic is at stake when Congress merely seeks to regulate the conduct of United States nationals abroad.

*Id.* at 264-65 (Marshall, J., dissenting) (citations omitted); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in...*The Charming Betsy*..., by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available." (citations omitted)).

The presence of such highly charged international circumstances brings to mind the admonition of Mr. Chief Justice Marshall in *The Charming Betsy*..., that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains. We therefore conclude, as we did in *Benz*, that for us to sanction the exercise of local sovereignty under such conditions in this delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.... This is not to imply, however, any impairment of our own sovereignty, or limitation of the power of Congress in this field. In fact, just as we directed the parties in *Benz* to the Congress, which alone has the facilities necessary to make fairly such an important policy decision, we conclude here that the arguments should be directed to the Congress rather than to us.


[H]ere such a “sweeping provision” as to foreign applicability was not specified in the Act.... For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.

*Benz* v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 146-47 (1957). For a detailed discussion of *Charming Betsy* as a doctrine of constitutional avoidance, see Bradley, supra note 198, at 524-33. *But see* Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 686-87 (2000) (arguing that *Charming Betsy* is not a canon of constitutional avoidance, reasoning that when the Supreme Court originally described it as such in *Catholic Bishop* it was by accident).
promotes the concept that "good fences make good neighbors." In the international context, *Charming Betsy* plays an important role of gatekeeper, limiting the instances in which the legislative branch is construed to have encroached on executive authority in the foreign affairs arena. The *Charming Betsy* canon serves as a "braking mechanism" discouraging courts from over-enforcing federal enactments in a manner that has negative foreign relations consequences associated with violating international law. The Supreme Court, applying *Charming Betsy*, explained that a statute should not be read to "give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations." Before sanctioning such an interpretation with international implications, "there must be present the affirmative intention of the Congress clearly expressed." In short, the power of the Executive to conduct foreign affairs necessarily means that legislative encroachments in this arena are not only of international concern, they are also of constitutional import.

That *Charming Betsy* promotes separation of powers is noteworthy because, as discussed below, federal courts are often forced to prioritize among canons of statutory construction, and a canon that has constitutional underpinnings will trump other canons that do not. This is particularly relevant in understanding the nexus between *Charming Betsy* and the deference that federal courts are required to give to administrative agency determinations under *Chevron U.S.A. Inc. v. NRDC.* As the Supreme Court stated in *DeBartolo v. Florida Gulf Coast Bldg. & Trades Comm'n*, courts presume that Congress neither intends to usurp authority of a coordinate branch or infringe constitutionally protected liberties of its citizenry, and any administrative agency determination to the contrary is impermissible.

200. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995); see also Rosales-Garcia v. Hollan, Nos. 99-5683, 99-5698, 2003 WL 742589, at *23 (6th Cir. 2003) ("The *Charming Betsy* canon of constitutional avoidance is a majoritarian default rule. That is, the canon draws its legitimacy from the premise that Congress generally does not intend for its statutes to exceed constitutional limits.").
201. Bradley, supra note 198, at 532.
203. Id. (discussing and summarizing reasoning in *McCulloch*).
204. 467 U.S. 837 (1984). Under *Chevron*, a federal must undertake a two step process in which it first asks "whether Congress has directly spoken to the precise question at issue." If so, the court "must give effect to the unambiguously expressed intent of Congress." Second, if Congress expressed no intent on the matter, or Congress' purpose and intent is unclear, the court must defer to the agency's interpretation of the statute if it falls within the range of permissible construction. Id. at 842-43.
Therefore, where constitutional concerns may be implicated, the Court will decline to defer to an agency's interpretation and will construe a statute so as to "make[] unnecessary passing on the serious constitutional questions that would be raised by the [agency's] understanding of the statute." As discussed in detail below, one might view the Supreme Court as essentially conflating *Charming Betsy* and *Chevron* such that one must apply constitutional avoidance presumptions when undertaking a *Chevron* analysis. Any agency interpretation that requires a court to rule on a constitutional question when there are other interpretations is unreasonable.

B. *The Charming Betsy Model and the World Trade Organization*

The relevance of the *Charming Betsy* canon is presented in starkest relief in the context of U.S. federal court considerations of the relevance of WTO obligations and WTO decisions. Direct recognition of WTO decisions by private parties is precluded by the implementing legislation, leading parties to invoke *Charming Betsy*. As a consequence, federal courts increasingly have been forced to consider the relevance of adverse WTO decisions in the interpretation and application of federal statutes.

Because WTO obligations are almost always presented within the context of reviewing administrative decisions, the relationship between *Charming Betsy* and *Chevron* deference is particularly relevant. As

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U.S. 568, 574-75 (1988). An agency determination would:

normally be entitled to deference unless that construction were clearly contrary to the intent of Congress. *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*

Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in... *The Charming Betsy* and has for so long been applied by this Court that it is beyond debate. As was stated in *Hooper v. California*, the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.... The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

_id._ (internal citations and quotations omitted)

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206. _Id._ at 588.

207. See *Aramco*, 499 U.S. at 260 (Scalia, J., concurring) ("Given the presumption against extraterritoriality that the Court accurately describes, and the requirement that the intent to overcome it be 'clearly expressed,' it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done.").

208. 19 U.S.C. § 3512(c) (no person other than the United States shall have a cause of action under any of the WTO agreements by virtue of congressional approval of WTO agreements or may challenge any action or inaction by any agency of the United States on the that ground that such action or inaction is inconsistent with the WTO agreements).
noted above, in *DeBartolo* the Supreme Court opined that while an agency’s decision will “normally be entitled to deference” under *Chevron*, another rule of construction rooted in *Charming Betsy* requires that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems.” Following *DeBartolo*, the Court of International Trade has analyzed WTO decisions in light of the general requirement that “*Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter doctrine is implicated.”

These general principles have had specific application in a number of cases. In practice this has led to an approach that effectively collapses the *Charming Betsy* canon into the *Chevron* analysis. Under *Chevron*, the court asks first “whether Congress has directly spoken to the precise question at issue.” If so, the court “must give effect to the unambiguously expressed intent of Congress.” Second, if Congress expressed no intent on the matter, or Congress’ purpose and intent is unclear, the court must defer to the agency’s interpretation of the statute if it falls within the range of permissible construction.

Applying *Chevron* in light of *Charming Betsy* has led to a number of important conclusions. First, the *Charming Betsy* canon has no functional application where congressional intent is clear and courts are undertaking *Chevron* step-one analysis. If a statute admits of only one interpretation, courts must give effect to that interpretation, whether or not it violates a pre-existing international obligation. “When confronted with a conflict between an international obligation and U.S. law, it is of course true that an unambiguous statute will prevail over the international concern.”

The most concrete example of this arose in the interpretation and application of legislation to protect endangered sea turtles. In 1989 Congress passed legislation requiring, among other things, prohibiting the importation of shrimp harvested with commercial fishing technology that may adversely affect endangered sea turtles, subject to presidential

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209. 485 U.S. at 574-75.
210. Hyundai Elec. Co., Ltd. v. United States, 53 F. Supp. 2d 1334, 1344 (Ct. Int’l Trade 1999); *But cf.* Timken Co. v. United States, 240 F. Supp. 2d 1228, 1238-39, (Ct. Int’l Trade 2002), available at 2002 WL 31008981 at *7 (“While an unambiguous statute will prevail over a conflicting international obligation, an ambiguous statute should be interpreted so as to avoid conflict with international obligations. In the case of statutory interpretations by agencies, however, judicial review must take place within the confines of either *Chevron* or *Skidmore* deference.”) (citations omitted).
211. *Chevron*, 467 U.S. at 842-43.
212. Id. at 843.
certification that a foreign government has adopted a regulatory program governing the incidental taking of sea turtles that is comparable to the United States.\textsuperscript{214} Applying this statute, the Court of International Trade enjoined the United States from permitting the importation of shrimp from countries that were not certified as having a regulatory program that required all ships harvesting shrimp to use turtle-excluder devices (TEDs).\textsuperscript{215} Several countries brought action against the United States before the WTO alleging that this legislation as implemented violated the United States’ international obligations. A WTO panel and the WTO appellate body agreed, ruling that section 609 was a permissible conservation measure but was being enforced in a discriminatory manner.\textsuperscript{216} Following the WTO panel’s decision, the State Department modified the regulations in an attempt to bring U.S. law into compliance with its international obligations.\textsuperscript{217} A subsequent WTO decision affirmed these regulations as WTO permissible.\textsuperscript{218} On appeal to the Federal Circuit, the court ignored the relevance of the WTO decision and the State Department’s attempt to issue regulations in conformity therewith. Applying the first prong of \textit{Chevron}, the Federal Circuit ruled that the statute unambiguously permits importation of shrimp from noncertified countries.\textsuperscript{219} Consequently, the court stated that “because the meaning of section 609 is clear, we need not reach the question of how much deference we ought to accord the State Department’s interpretation of section 609, or whether the State Department’s interpretation would minimize potential conflicts with international trade agreements.”\textsuperscript{220}

Thus, if the only possible construction is one that is consistent (or inconsistent) with United States’ international obligations, \textit{Charming Betsy} and \textit{Chevron} both counsel that a court must give effect to the unambiguously-expressed congressional intent.\textsuperscript{221} As the Federal Circuit

\textsuperscript{215} Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1289 (Fed. Cir. 2002).
\textsuperscript{217} \textit{Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations}, 64 Fed. Reg. 36,946 (July 8, 1999) (the “1999 Guidelines”). Principally the regulations no longer required country certification, and would accept TED certification on a shipment-by-shipment basis even for vessels from uncertified nations. \textit{Turtle Island}, 284 F.3d at 1290.
\textsuperscript{218} 284 F.3d at 1291 citing United States – Import Prohibition of Certain Shrimp and Shrimp Products, 2001 WL 671012 at *101 (Jun. 15, 2001).
\textsuperscript{219} \textit{Turtle Island}, 284 F.3d at 1291-96.
\textsuperscript{220} \textit{Id.} at 1297.
\textsuperscript{221} \textit{Charming Betsy}, 6 U.S. (6 Cranch) 64,118 (1804) (“an act of Congress ought never to be construed to violate the law of nations, \textit{if any other possible construction remains}.”) (emphasis added); \textit{Chevron}, 467 U.S. at 842-43 (if “Congress has directly spoken to the precise question at
has emphasized, regardless of the fact that “the Uruguay Round Agreements have been incorporated into United States law by the Uruguay Round Agreements Act.... [I]t remains true ...that in the event of a conflict between a GATT obligation and a statute, the statute must prevail.” If this results in the United States violating its international obligations, it is Congress that must remedy the situation.

Given that the same conclusion will result under both canons of construction where congressional intent is clear, the synthesizing of Charming Betsy into the Chevron analysis is only relevant where the statute is ambiguous. When the statute is ambiguous, courts interpreting WTO decisions have reached a number of different conclusions. First, where the administrative interpretation of an ambiguous statute is consistent with the WTO obligation, courts reviewing the interpretation have upheld it under Chevron step two analysis. Second, where the administration interpretation (or lower court decision) is inconsistent with the international obligation, courts have applied Chevron and Charming Betsy and reversed the decision. Third, where the international obligation is ambiguous (and in particular where it grants discretion to the state as to the means of compliance with the international obligation), courts defer to the administrative agency. Fourth, where the statute is ambiguous and has been interpreted to be inconsistent with international obligations, the WTO has held that this interpretation is a violation of the WTO and should be corrected.

The first lesson arose in Warren v. EPA, where the administrative agency modified its regulations following an adverse decision by the WTO in Reformulated Gasoline. In 1990, Congress passed legislation amending the Clean Air Act to require the use of reformulated gasoline in certain urban regions. In implementing this legislation, the Environmental Protection Agency discriminated against foreign refiners in establishing rules regulating emissions from conventional gasoline. In 1995, the WTO ruled that such an approach violated the United States' national treatment of international obligations under the WTO. In response, the EPA modified its regulation to be nondiscriminatory, and

222. Federal-Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995); see also 19 U.S.C. § 3512(a)(1) (1994) (“No provision of [the WTO Agreements] nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”).


224. 159 F.3d 616 (D.C. Cir. 1998).

225. Id. at 619-20.
environmental groups challenged the agency action. The D.C. Circuit denied the challenge. Relying on *Chevron*, the court held that the statute was silent as to whether the EPA could rely on factors other than air quality, and that it was a permissible construction of the statute for the EPA to consider the WTO decision in revising its regulations.

Under step two of *Chevron*, we think that the agency’s interpretation is permissible.... In the particular circumstances of this case our usual reluctance to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute is bolstered by the decision of the WTO lurking in the background. Since the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States to violate the law of nations. ... *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, (1804).... [T]he EPA’s consideration of factors other than air quality is not precluded by anything in [the statute]; in this case, moreover, that consideration appears to be congruent with...the Supreme Court’s instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States.226

The second lesson is that where the administration interpretation is inconsistent with the international obligation, courts have applied *Chevron* and *Charming Betsy* and reversed the decision. In *Caterpillar v. United States*, an agency’s interpretation was rejected under a *Chevron* step two and *Charming Betsy* analysis because the agency’s interpretation of an ambiguous statute violated an international treaty obligation.227 In that case, the Court of International Trade relied on *Charming Betsy* to conclude that “in order to prevail in its proposed exegesis of the statute, the Government must convince the Court that Congress intended [the statute] to deviate from the prohibition in the 1947 GATT.”228 Significantly, the Court’s approach clearly indicated that departure from an international obligation must be found in “express Congressional language to the contrary,” and absent such

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226. *Id.* at 624. (citations omitted). In a similar vein, the Court of International Trade (CIT) recently held that a federal statute and regulations were consistent with the view expressed by the WTO Appellate Body. The CIT described WTO decisions as “non-binding decisions the reasoning of which may help inform this Court’s decision” in applying *Chevron* and *Charming Betsy*. Timken Co. v. United States, 240 F. Supp. 2d 1228, 1238-39, (Ct. Int’l Trade 2002), available at 2002 WL 31008981 at *7-8.


228. *Id.* at 1248.
language, "the venerable canon of construction [of Charming Betsy] to interpret Congressional acts consistently with international obligations overcomes the exercise of ventriloquism urged upon the Court by the Government." 229 Stated differently, the presumption that Congress does not intend to act in a manner inconsistent with international law leads to the corollary that a Chevron step two analysis leaves no room for a construction that is not consistent with an international obligation. 230

The third lesson of these cases is that where the international obligation is ambiguous, courts will defer to the agency’s determination. In Hyundai, a case involving the termination of an antidumping duty in the manner required by the WTO Antidumping Agreement, the court recognized that "Chevron must be applied in concert with the Charming Betsy doctrine when the latter doctrine is implicated,"231 but concluded that the international obligation gave states discretion in implementing the international obligation.232 Given this, the court concluded that as

229. Id. at 1249. Similarly, in Federal-Mogul, the Federal Circuit relied on Charming Betsy in observing that "GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations." It then interpreted the statute and concluded that the agency’s determination was GATT consistent while the CIT’s approach was not. See Federal-Mogul Corp. v. United States, 63 F.3d 1572, 1581-82 (Fed. Cir. 1995) ("The Act presented Commerce with a choice between methodologies...that are tax-neutral, on the one hand, and methodologies that are not tax-neutral, on the other. Tax-neutral methodologies clearly accord with international economic understandings, negotiated by this country, regarding fair trade policy."). Of course, this case did not squarely present the problem of an agency interpretation that violated international obligations. It only reversed a lower court’s conclusion that the agency’s decision was not entitled to Chevron deference.

More recently, in one case, Acciali Speciali Terni S.p.A. v. U.S., 206 F. Supp.2d 1344, 1356-57 (Ct. Int’l Trade 2002), the Court of International Trade declined to address an agency interpretation that was inconsistent with an earlier WTO decision involving the same issue but different parties. See id.; see also Acciali Speciali Terni S.p.A. v. U.S., No. 2002-10 slip op.,2002 WL 342659 at *15 (Feb. 1, 2002). In addition, in its subsequent post-remand decision in Acciali Speciali Terni S.p.A. v. U.S., 217 F. Supp.2d 1345 (Ct. Int’l Trade 2002) ("AST II") the court did not address the relevance of a more recent WTO panel decision involving exactly the same facts and same parties. See United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/R (July 31, 2002), available at http://www.wto.org (last visited February 18, 2003). The CIT’s decision, issued days after the WTO panel decision, was inconsistent with the WTO panel decision.


232. Specifically, the WTO Antidumping Agreement provided that “[i]f...the authorities determine that the antidumping duty is no longer warranted, it shall be terminated immediately.” Id. at 1344. (emphasis original).
"the Antidumping Agreement provides the administering authority discretion to determine whether revocation is appropriate...[i]t follows that the administering authority also has discretion to determine whether injurious dumping would be ‘likely’ to occur in the future” and whether the antidumping duty should not be revoked.\footnote{Id. More difficult is the situation where a treaty provision is potentially ambiguous but the WTO has clarified the interpretation to be given to the provision in an unrelated case. In Corus Staal BV, the Court of International Trade recently found that “[w]hen faced with an ambiguous statute and ambiguous international agreement, the court should defer to Commerce’s interpretation,” notwithstanding that the agency’s interpretation is inconsistent with the international obligation as interpreted by the WTO Appellate Body in an unrelated case. Corus Staal BV v. Dep’t of Commerce, No. 2003-25, slip. op., 2003 WL 919310 at *7-8 (Ct. Int’l Trade Mar. 7, 2003). The Court described WTO decisions as not binding and of “very limited precedential value.” Id. at*8.}

Fourth, Charming Betsy has now come full circle and is becoming relevant for World Trade Organization’s review of federal court’s statutory interpretation in the United States. In one case, the WTO, aware of the relevance of Charming Betsy doctrine in United States jurisprudence, has expressed the importance of its use in federal courts. In a recent countervailing duty case in which the use of one methodology would be consistent with WTO obligations and another would not, the WTO panel concluded that the United States statute in question grants the discretion to the executive branch to use either methodology.\footnote{Id. at 97-98, para. 8.1.} It then noted that a decision of the Federal Circuit interpreted the ambiguous statute to be inconsistent with WTO obligations and found that “[w]e fail to see how the U.S. Department of Commerce could exercise its alleged executive discretion...in a WTO-compatible manner when it is prohibited by its Courts” from doing so.\footnote{Id. at 98, para. 8.1.} It then held that “[t]o the extent that [the statute], as interpreted by the...Federal Circuit...requires the...Department of Commerce to apply a methodology...[it] is preventing the United States from exercising a WTO-compatible discretion.”\footnote{Id. at 97-98, para. 8.1.} It concluded by recommending that the United States bring its measures into conformity with its WTO obligation, i.e., interpret the statute to be consistent with the international obligation.\footnote{United States – Countervailing Measures Concerning Certain Products from the European Communities – Report of the Panel, WT/DS212/R (July 31, 2002), p. 95, para. 7.156, available at http://www.wto.org. (last visited February 18, 2003).}

The Appellate Body reversed the panel, finding that nothing in the appellate court’s interpretation of the statute would prevent the Department of Commerce from complying with its WTO obligations.\footnote{Id.} The Appellate Body did not, however, reach the
question of a possible WTO violation where legislation was enacted “granting discretion to its authorities to act in violation of its WTO obligations.” These decisions underscore the importance of federal courts and agencies applying Charming Betsy to interpret a statute consistent with WTO obligations to avoid a WTO finding that its interpretative decision is in violation of those obligations.

C. Normative Application

The Charming Betsy model arises in those contexts, such as WTO decisions, in which the parties are not seeking direct recognition and enforcement of the decision, the international tribunal has opined on the legality of United States legislation or practice, and the parties then use that decision to influence the subsequent interpretation of the statute or regulation by a federal court. It provides an extremely important mechanism for indirect recognition of international tribunal decisions.

In applying this model, federal courts should begin by confirming that the parties are not seeking direct recognition and enforcement of the decision. A request to treat the decision of the international tribunal as “binding” on the court or res judicata as between the parties may be an attempt at offensive or defensive recognition, respectively. If so, the court should confirm that none of the requirements for direct recognition are satisfied. If none of those models apply or it is otherwise clear that the parties are not seeking direct recognition, then the federal court must wrestle with the international tribunal decision in determining how best to interpret the statute in light of the international obligation.

In this regard, two points are particularly noteworthy. First, it is largely irrelevant whether or not the decision of the international tribunal is binding in the traditional sense. In fact, the Charming Betsy canon has been applied in conjunction with Chevron deference in the context of GATT panel decisions, which universally are recognized as non-binding decisions. This suggests that the Charming Betsy canon may be useful as a tool for human rights tribunals or other adjudicative


239. Id. at 68, para. 159, n. 334.

240. There is much debate in the international trade bar as to whether WTO decisions are binding. Compare John H. Jackson, supra note 65, at 61-64 with Judith Hippler Bello, The WTO Dispute Settlement Understanding: Less is More, 90 AMER. J. INT’L L. 416, 416-17 (1996).

bodies that render non-binding awards in articulating and crystallizing international norms that may be subsequently considered by domestic courts. A case in point is the non-binding decision of the Inter-American Juridical Committee of the Organization of American States finding that the Helms-Burton law violated a number of international obligations. To the extent that the statute could be construed not to conflict with international law, a federal court may apply *Charming Betsy* and interpret its ambiguous terms consistent with those norms, using such decision as one aid in its analysis of international law.

Second, the analysis of *Charming Betsy* noted above may explain federal courts’ seeming unwillingness to confer greater status on decisions of international tribunals. The Supreme Court’s celebrated case in *Breard v. Greene* is illustrative. In that case, the Court first noted that “we should give respectful consideration to the interpretation of an international treaty rendered by an international court.” It then rejected the claims on several grounds. First, consistent with but not in express reliance upon *Charming Betsy*, the Court attempted to reconcile the statute with the international obligation. If the international

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243. *Breard v. Greene*, 523 U.S. 371 (1998). The essential legal and factual issues are straightforward. Following a conviction and death sentence in 1993, Angel Breard exhausted his state court remedies and filed for habeas relief in 1996. For the first time, he argued in federal court that his rights under the Vienna Convention on Consular Relations (Vienna Convention) had been violated. Finding that Breard should have raised this argument in state court, the federal district court concluded that he had procedurally defaulted the claim. In January 1998, the Fourth Circuit affirmed. *Id.* at 373. Paraguay instituted proceedings before the ICJ on April 3, 1998 alleging that the United States violated its international obligations by arresting, detaining, trying, convicting and sentencing a Paraguayan national, Angel Francisco Breard, without affording him his consular rights under the Vienna Convention. With Breard scheduled for execution on April 14, 1998 by the Commonwealth of Virginia, on April 9, 1998 the ICJ rendered an interim order indicating that the United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed. Breard then filed a petition for an original writ of habeas corpus in the United States Supreme Court and a stay application to ‘enforce’ the ICJ’s order. In addition, Paraguay filed a motion for leave to file a bill of complaint before the Supreme Court, citing its original jurisdiction under Article III of the Constitution over cases “affecting Ambassadors...and Consuls.” *Id.* at 374-75.
244. *Id.* at 375.
245. *Id.*

[1] It has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.... This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention “shall be exercised in conformity with the laws and regulations of the receiving State,” provided that “said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”
obligation is so construed, the Court avoided a conflict between the statute and the treaty. Second, although recognizing that the Vienna Convention on Consular Relations is the supreme law of the land under the U.S. Constitution, the Court concluded that when inconsistent legislation is enacted subsequent to the treaty, “the statute to the extent of conflict renders the treaty null.” 246 The Court sub silentio engaged in a Charming Betsy analysis. If Charming Betsy stands for the proposition that “that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains” and that for a court to “sanction the exercise of...sovereignty under such conditions in this delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed,” 247 the Court simply ruled that the affirmative intent of Congress was clearly expressed, and this intent must be given effect. 248 Given what it perceived (rightly or wrongly) to be the clear intent of Congress, the Court was unable to go further with Charming Betsy and construe the statute to avoid a potential violation of international law. Finding it “unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier,” the Court concluded that “[n]onetheless, the Court must decide questions presented to it on the basis of law.” 249

246. Id. at 376. According to the Court, subsequent to the Vienna Convention, in 1996 Congress passed legislation which provides that “a habeas petitioner alleging that he is held in violation of ‘treaties of the United States’ will, as a general rule, not be afforded an evidentiary hearing if he ‘has failed to develop the factual basis of [the] claim in State court proceedings.” Breard, 523 U.S. at 376 quoting 28 U.S.C. § 2254(a), (e)(2).
248. As the Court put it, although the Vienna Convention “arguably confers on an individual the right to consular assistance following arrest... Breard’s ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted [legislative] rule.... This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him.” Breard, 523 U.S. at 376 (emphasis added).
249. Id. at 378. In Committee of U.S. Citizens Living in Nicaragua, the D.C. Circuit reached a similar conclusion in dicta. In response to the ICJ’s decision in Nicaragua v. United States, the Court noted that “unless Congress makes clear its intent to abrogate a treaty, a court will not lightly infer such intent but will strive to harmonize the conflicting enactments.” Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 936-37 (1988). The Court went on to find that appellants’ challenge that a congressional act violated an international obligation must fail because they lack standing and because under our constitutional framework, a prior treaty can never preempt a subsequent statute. Id. at 937.

The International Court of Justice has now in the subsequent case of LaGrand unequivocally concluded that the federal statute as applied is inconsistent with international obligations. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 128 (Nov. 13) available at http://www.icj-cij.org. (last visited February 10, 2003). But this will not change the analysis for a federal court. While the international obligation is now clear, federal courts simply have no authority to ignore the clear intent of Congress. Breard, 523 U.S. at 376. In Breard, the Supreme Court concluded
The *Charming Betsy* model falls fourth on the continuum of deference because unlike the first three models, there is no attempt to secure direct recognition and enforcement of the decision. The *Charming Betsy* model seeks only indirect recognition and even then only when the interpretation of an ambiguous statute is in question. Nonetheless, this model is more deferential than others because it is the last of the models that is mandatory in nature. As a matter of statutory construction, if the statute is ambiguous and is subject to an interpretation that is consistent with international law, the federal court shall interpret the statute consistent with that international obligation. The content of that international obligation should be greatly influenced by the decision of the international tribunal interpreting the statute in light of the international obligation. The WTO has even gone so far as to state that if a federal court does not interpret a particular statute in a certain manner, it will incur international responsibility for violating a WTO obligation.²⁵⁰ In this sense, the federal court defers to the decision of the international tribunal to circumscribe the parameters of permissible statutory construction.

²⁵⁰ See supra text accompanying notes 234-237.
V. THE PAQUETE HABANA MODEL

A fifth model for determining the degree of deference that should be accorded to decisions of international tribunals is based on the approach taken in Paquete Habana.\(^\text{251}\) This theory posits that international law is part of our law and that the contours of that law can be defined by reference to decisions of international tribunals. It is similar to the previous discussion regarding the Charming Betsy model, in that it looks to international tribunals as evidence of the content of international law. It is distinct, however, because Charming Betsy serves only as an international *law check on the interpretation of an ambiguous United States statute. This approach declares that international law is part of United States law, and then looks to decisions of international tribunals to ascertain the content of that law. This model thus has the potential for international tribunal decisions to serve as persuasive authority for incorporating international law norms into federal court decisions.

A. Paquete Habana and Discerning International Law

The details regarding Paquete Habana are well known and require little elaboration here. The question before the Court was whether the fishing vessels were subject to capture by the armed vessels of the United States during the Spanish-American War. The Court argued that, "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish,

\(^{251}\) The Paquete Habana, 175 U.S. 677 (1900).
have been recognized as exempt...from capture as prize of war.”252 The Court lamented the lack of a “complete collection of the instances illustrating” this rule of international law, and therefore found it salutary to “trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.”253 What is noteworthy in the Court’s historical analysis is the degree to which decisions of national prize tribunals were paramount in its survey. Of course, in 1900 there were no relevant international tribunals, only national courts. But at the time a recognized branch of the law of nations was prize jurisdiction under maritime law, which was subject to enforcement by national courts. Not surprisingly, the Court’s central focus was on the pronouncements of other courts, particularly the preeminent admiralty court in the world at that time, the English High Court of Admiralty. In justifying the seizure of the *Paquete Habana*, counsel for the United States relied heavily on the English court’s 1798 decision in *The Young Jacob and Johanna*, where Sir William Scott, then Lord Stowell, stated that

> in former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present [American Revolutionary] war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy’s trade.\(^{254}\)

The Court recognized the potential damage this case could have to its thesis that under international law fishing vessels were exempt from seizure as prize of war. It therefore sought to distinguish the case as the mere application of an express order from the English government in 1798 to seize French and Dutch fishermen with their boats. It further diminished the importance of this decision by noting that “the period of a hundred years which has since elapsed is amply sufficient to have

252. *Id.* at 686.
253. *Id.*
254. *Id.* at 693 (quoting *The Young Jacob and Johanna*, 1 C. Rob. 20, 165 Eng. Rep. 81 (Adm. 1798)).
enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law." 255 Thus, what could have been a troublesome case against the proposition that there was a rule of international law was used by the Court as the seed of custom that germinated over a century into a rule of law.

The Court then marshaled evidence of this process of germination by reference to other prize tribunals, to government proclamations, to state practice in the nineteenth century, and to the works of jurists and commentators citing national court prize jurisprudence as "trustworthy evidence of what the law really is." 256 For example, the Court cited the works of several commentators, including Carlos Calvo's 1896 work. Calvo's study analyzed prize tribunal jurisprudence of the courts of France, England and the United States in support of the proposition that coastal fishing vessels are exempt from seizure as prize. 257 Summarizing these sources, the Court held that:

The review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of law...that coastal fishing vessels...unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. 258

In essence the Court relied on judicial decisions and commentary thereon to reformulate an eighteenth century statement of custom into a nineteenth century established rule of international law.

One may well object to the selectiveness and reliability of all of the sources relied upon by the Court. The dissent dismissed the writings of commentators as mere "persuasive lucubrations" and instead relied upon The Young Jacob and Johanna in support of the view that the exemption is "a rule of comity only, and not of legal decision." 259 Recent commentators have described Paquete Habana as a "hollow shell." 260 They suggest that the evidence relied upon by the Court to establish customary international law is selective and that "the bulk of

255. Id. at 694.
256. Id. at 694-708.
257. Id. at 703.
258. Id. at 708.
259. Id. at 719-20.
evidence suggests that nations refrain from seize fishing vessels when there is no military or economic value in doing so."261 Regardless, the relevant point for present purposes is that Paquete Habana has clarified that in determining the content of international law, judicial decisions serve as a critical element in the process of ascertainment. As the Court put it,

where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.... Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.262

Paquete Habana is thus critical to understand the sources to be used by federal courts in ascertaining international law. It echoes earlier pronouncements by the Supreme Court in United States v. Smith, which sets forth the classic formulation that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."263 Although less celebrated than Paquete Habana,264 the Supreme Court in Smith took a similar approach in examining the sources of international law to define and recognize piracy as a violation of the law of nations. In Smith, the Court examined the works of jurists and judicial decisions, particularly the High Court of Admiralty in Britain, to conclude that piracy was a common law violation of the law of nations punishable in municipal courts even absent statutory authority.265

Modern jurisprudence also confirms the propriety of using judicial decisions to ascertain the content of international law. The classic formulation regarding sources of international law recognizes that judicial decisions are one means for determining its content.266 Moreover, the formulation articulated by the Court in Smith—that the law of nations "may be ascertained by consulting...judicial decisions

261. Id.
262. Paquete Habana, 175 U.S. at 700.
264. Ascertaining whether that the act of piracy is a violation of the law of nations is a less difficult judicial task than establishing that a fishing vessel exception for prize law has ripened into an international norm.
265. Smith, 18 U.S. at 163.
266. Statute of the International Court of Justice, Art. 38 ("The [International Court of Justice] shall apply...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.").
recognizing and enforcing that law—it has been cited repeatedly and relied upon by lower courts in recent decades. It is thus well established that reference to judicial decisions to establish the content of international law is a legitimate exercise by federal courts. As applied, it suggests that international tribunals will be critical to determine the content of international law, when such a determination is necessary to resolve cases or controversies before federal courts. As Justice Cardozo put it, "[i]nternational law...has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality.

B. The Paquete Habana Model and the International Court of Justice

There are few if any areas within United States Supreme Court jurisprudence that have utilized international law more than cases involving domestic boundary disputes. Boundary disputes are resolved based on a tapestry of statutory and federal common law, which in turn is pasted together from international law norms, property concepts, contract law, and sovereignty principles. As the Court observed in United States v. Maine, it "has consistently followed principles of international law in fixing the coastline of the United States." That the United States Supreme Court would rely on international law to resolve interstate boundary disputes is not surprising. Water and boundary disputes within the United States "were and continue to be analytically indistinguishable from international boundary disputes." For example,

in noting the absence of a definition for "inland waters" in the Submerged Lands Act, the Court stated,

Congress, in passing the Act, left the responsibility for defining inland waters to this Court.... It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone...provides such definitions.... Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines that, absent the Convention, would be more troublesome.273

In addition, the original jurisdiction of the Supreme Court for such disputes has precluded the development of any significant jurisprudence by our own lower courts, further underscoring the need for persuasive authority. And perhaps most fundamental, the delimitation of coastal boundaries inherently has an international aspect; "it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law."274 One might say that the Supreme Court has presumed that domestic boundary disputes should be resolved using the same rules applied in international boundary disputes. Dividing lines may have "less importance for...states united under a general government than for states wholly independent. Nonetheless, the same test will be applied in the absence of usage or convention pointing to another."275

Consequently, the rich body of international law concerning land and water boundaries has long been an authoritative source for the Supreme Court.276 While the Court has "relied in particular"277 on treaty law, it also has utilized decisions of the International Court of Justice. Reliance by the Supreme Court on one famous decision of the International Court


274. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, at 132 (Dec. 18). See also United States v. California, 381 U.S. at 168 ("California may not use such [straight] base lines to extend our international boundaries beyond their traditional international limits against the expressed opinion of the United States.").

275. New Jersey v. Delaware, 291 U.S. at 380 (citation omitted).


of Justice, *Fisheries Case, (United Kingdom v. Norway)*, is illustrative.

The *Fisheries Case* involved a dispute about the right of British fishermen to fish in and near Norwegian coastal waters. From the seventeenth to the nineteenth century, British fishermen refrained from fishing within Norwegian waters. However, beginning in 1906, they began fishing off the coast of Norway, leading to numerous incidents involving their seizure and arrest. The legal dispute between the United Kingdom and Norway centered on identifying the outer limits of Norwegian territorial and inland waters. Rugged and broken throughout, the Norwegian coast has a “very distinctive configuration” with numerous large and small islands, islets, rocks and reefs, making boundary delimitations extremely difficult. The United Kingdom preferred to draw lines based on arced circles closely mirroring the coast, while Norway preferred to draw straight lines from outer edges (trace parallele), or alternatively lines drawn based on “historic grounds” reflected by her longstanding assertion of jurisdiction. The ICJ ruled in Norway’s favor, concluding that it notoriously had applied a straight-line system of delimitation consistently and uninterruptedly and that foreign States tolerated the Norwegian practice. It further found that certain departures from this methodology that inured to the benefit of Norway were justified by the historic practice of granting exclusive fishing licenses, which showed that the area in question was regarded as “falling exclusively within Norwegian sovereignty.” The historic practice of granting exclusive fishing rights to Norwegians, the ICJ concluded, is “founded on the vital needs of the population and attested by very ancient and peaceful usage, [and] may legitimately be taken into account in drawing a line.”

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279. *Id.* at 128. Inland waters are subject to the complete sovereignty of the nation and the coastal nation has the privilege to exclude foreign vessels altogether. Territorial waters remain within the control of the coastal state, but innocent passage by foreign vessels cannot be denied. *The Louisiana Boundary Case*, 394 U.S. at 22.
281. *Id.* at 128-32.
282. *Id.* at 138.
283. *Id.* at 142.
284. *Id.*

Even if a certain “deviation was too pronounced...[Norway] has relied upon an historic title...namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century [to a Norwegian national]...under a number of licenses which show...[that] the fishing grounds pertaining thereto were regarded as falling exclusively within Norwegian sovereignty.

*Id.*
The Supreme Court has relied upon the *Fisheries Case* in four cases, and in three of these cases the decision featured prominently. In the *Louisiana Boundary Case*, the Supreme Court noted the *Fisheries Case* as evidence of perceived long-standing principles of international law pertaining to the use of low-tide elevations to delimit the territorial sea. The Court noted that the ICJ judgment had been relied upon by the drafters of Article 11 of the Convention on Territorial Sea and the Contiguous Zone. Essentially, the Court relied upon the case as evidence of the drafter’s intent in adopting Article 11 of the Convention, which in turn was used by the Court to resolve the case.

In the *Alabama and Mississippi Boundary Case*, the Court applied a four-part test to determine whether the Mississippi Sound was an “historic bay.” This test required (1) an exercise of authority over the area; (2) continuity of this exercise; (3) acquiescence of foreign nations; and (4) the vital interest of the coastal nation. The Court cited the *Fisheries Case* in support of three of these four factors. First, it cited the ICJ judgment as evidence of the existence of a “vital interest” requirement. Second, it cited the discussion of the United States’ policy in the ICJ judgment as evidence that the United States openly asserted its right. Third, it cited the ICJ judgment, with reference to inaction or toleration, as proof of acquiescence by foreign nations.

In *United States v. Maine*, the Supreme Court addressed Massachusetts’ contention that it had “ancient title” to the Nantucket

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286. 394 U.S. at 43 n.55.

287. *Id.* at 43-47.

288. 470 U.S. at 101-02.

289. See 470 U.S. at 102 (“there is substantial agreement that a fourth factor to be taken into consideration is the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self defense” (citations omitted). See also *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 142.).

290. *Alabama and Mississippi Boundary Case*, 470 U.S. at 107 (“There is no doubt that foreign nations were aware that the United States had adopted this [10-mile] policy. Indeed, the United States’ policy was cited and discussed at length by both the United Kingdom and Norway in the celebrated *Fisheries Case*.’’; see also *id.* at 107, n.10 (“It is noteworthy that in the *Fisheries Case*, the [ICJ]...ruled that the consistent and prolonged application of the Norwegian system of delimiting inland waters, combined with the general toleration of foreign states, gave rise to a historic right to apply the system.”).

291. *Id.* at 110 (“There is substantial agreement that when foreign governments do know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of the foreign governments is sufficient to permit a historic title to arise” (citations omitted) See also *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. at 138-139.”); see also *Alabama and Mississippi Boundary Case*, 470 U.S. at 107, n.10.
Sound. The Court assumed that "ancient title" resembled "historic title" and held that Massachusetts would have to establish that it "occupied" the Sound to obtain clear original title. It defined "occupation" as acts attributable to the sovereign manifesting an assertion of exclusive authority over the waters and cited the Fisheries Case as one of the "two most publicized cases convey[ing] the international understanding of occupation." In explaining the ICJ judgment, it noted that Norway's occupation was evidenced by Norwegian fishermen exploiting fishing grounds from time immemorial and that Norway had excluded fishermen from other states for three centuries until 1906. It then contrasted this with Massachusetts' practice to conclude that there was ineffective occupation. The Court thus imposed an occupation requirement, used the ICJ judgment (and one other foreign court judgment) to convey an understanding of the requirement, and finding it lacking in the case at hand, disposed of Massachusetts' claim.

This brief summary of Supreme Court references to one ICJ judgment in the context of boundary disputes underscores how important international tribunal decisions may be when the Court views international law as critical for resolution of cases before it. It is not inaccurate to state that the Supreme Court used the Fisheries Case in the Louisiana Boundary Case to confirm the meaning of a treaty provision which was dispositive, in the Alabama and Mississippi Boundary Case to identify the existence of one requirement and the satisfaction of two others, and in United States v. Maine to give meaning to a requirement that proved fatally lacking. More generally, the particular reliance by the Court on the Convention on the Territorial Sea and Contiguous Zone also indirectly reflects reliance on the Fisheries Case, for the drafters of the Convention were greatly influenced by the ICJ decision. To use the language of Paquete Habana, "questions of right

292. 475 U.S. at 93-96.
293. Id. at 98.
294. Id. at 99.
295. See, e.g., id. at 94.

The drafters of the Convention...were aware that international law permitted... island fringes in some circumstances to enclose inland waters. The principle was recognized and applied by the International Court of Justice in the Fisheries Case.... Thereafter, with the Fisheries Case as the model, attempts were made to draft concrete rules for the uniform treatment of such island fringes.... There was, however, too little technical information or consensus among nations on that and related subjects to allow the formulation of uniform rules. It was agreed, therefore, that the problem should be handled as it had been by the International Court of Justice in the Fisheries Case: each
depending upon [international law were] duly presented for...determination" and the Supreme Court relied upon the ICJ decision as "trustworthy evidence of what the law [of nations] really is."297

Federal courts also have referenced decisions of the International Court of Justice in numerous other contexts.298 ICJ decisions have been cited in support of a variety of principles, including corporate law,299 the doctrine of preemptory norms (jus cogens),300 and violations of international law.301 According to one scholar writing in 1998, "[s]ince the creation of the International Court [of Justice], forty-two cases in federal courts have applied fifteen I.C.J. decisions or advisory opinions as evidence of international normative content."302 This includes "six relevant uses in the Supreme Court, nineteen uses in the circuit courts, sixteen uses in the district courts, and one citation in the Court of Trade."303 Such frequency of use lends further support to the assertion that federal courts are integrating decisions of international tribunals such as the International Court of Justice to ascertain the law of nations.

C. Normative Application

This model marks a dramatic shift in emphasis with respect to federal court treatment of international tribunal decisions. The first three models required direct recognition and enforcement if the judgment satisfied, respectively, the requirements of the ICSID Convention, New York Convention, or international comity criteria set forth in Hilton v. Guyot. The Charming Betsy model required, as a matter of statutory construction, the interpretation of an ambiguous statute to be consistent

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297. 175 U.S. 677, 700 (1900).
301. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 837 n.1, 843 n.2 (D.C. Cir. 1984); McKeel v. Islamic Republic of Iran, 722 F.2d 582, 585 (9th Cir. 1983); Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979); Nat’l Airmotive v. Gov’t & State of Iran, 491 F. Supp. 555, 556 n.7 (D.D.C. 1980).
303. Id. at 792.
with international law. By contrast, this model anticipates discretionary deference. This model simply recognizes that in certain circumstances international law is part of our law and that the decisions of international tribunals often will be the best source for ascertaining the content of that law. If applying international law is required to resolve the case presented to the federal court, then courts have a responsibility to give content to that law. In exercising that responsibility, the court will scan the horizon of international law sources, and often an international tribunal decision will provide useful guidance for application and integration. But because the decision is only persuasive authority, the decision to defer to the ruling of the international tribunal is a matter wholly within the discretion of the domestic court.

The most common application of the *Paquete Habana* model is in those instances in which content of international law is required for resolving a federal common law question arising out of statutory interstices. The use of international law to resolve the boundary disputes in the above discussion represented the enunciation of federal common law in the absence of sufficient congressional guidance in the Submerged Lands Act. Likewise, Congress' failure to give further content to the elements of the Alien Tort Claims Act represents a similar use of international law to create federal common law based on statutory interstices. The Alien Tort Claims Act states only that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The vagaries of this statute require federal courts to fashion common law notions of international legal obligations. As illustrated below, decisions rendered in application of the Alien Tort Claims Act have relied upon international tribunals to ascertain the law of nations.

The most important human rights case to be decided by a federal court was the Second Circuit decision in *Filartiga v. Pena-Irala*, which paved the way for the modern application of the Alien Tort Claims Act

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305. See Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) ("the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 418-19 (S.D.N.Y. 2002) (federal case law has developed reflecting the emergence of a set of decisional rules federal courts have crafted to give scope and content to the cause of action the ATCA creates as it relates to international human rights law.... [T]hese precedents represent...the natural evolution of common law, and the organic branching of federal substantive rules through the ATCA.).

to redress human rights abuses.³⁰⁷ In *Filartiga*, a Paraguayan national brought suit alleging that his torture at the hands of another Paraguayan national constituted a violation of international law actionable under the Alien Tort Claims Statute. Significantly, the Second Circuit relied on Supreme Court precedent, including *Paquete Habana* and *Smith*, to determine the sources of international law. “The law of nations 'may be ascertained by consulting the works of jurists...; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'³⁰⁸ In this latter category, the Second Circuit referenced the jurisprudence of the European Court of Human Rights, and held that “[h]aving examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations.”³⁰⁹

A recent example of the use of international tribunals in discerning the content of human rights obligations is the Ninth Circuit’s decision in *Doe I v. Unocal*.³¹⁰ In *Doe I*, the Ninth Circuit was faced with a claim of corporate liability for aiding and abetting human rights abuses in Myanmar. The Ninth Circuit noted that

[d]istrict [c]ourts are increasingly turning to the decisions by international criminal tribunals for instructions regarding the standards of international human rights law under our civil ATCA. We agree with this approach. We find recent decisions by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the ATCA.³¹¹

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³⁰⁷. 630 F.2d 876 (2d Cir. 1980).
³⁰⁸. *Id.* at 880 (citations omitted).
³⁰⁹. *Id.* at 884 & n.16 citing *Ireland v. United Kingdom*, Judgment of Jan. 18, 1978 (European Court of Human Rights) (holding that Britain’s subjection of prisoners to sleep deprivation, hooding, exposure to hissing noise, reduced diet and standing against a wall for hours was “inhuman and degrading,” but not “torture” within the meaning of the European Convention on Human Rights).
³¹⁰. *John Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57107, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. Sept. 18, 2002) (emphases omitted), **vacated**, Doe v. Unocal Corp., Nos. 00-56603, 00-56628, 003 WL 359787 (9th Cir., Feb. 14, 2003).
³¹¹. *Doe 1*, 2002 WL 31063976 at *12 (citations and emphases omitted). Significantly, Judge Reinhardt refused to join the majority because he rejected the standard of third-party liability under which Unocal was held responsible for the human rights violations, arguing that the question of Unocal’s liability should not be resolved, as the majority holds, “by applying a recently-promulgated international criminal law aiding-and-abetting standard.” *Id.* at *24 (Reinhardt, J., concurring). Judge Reinhardt argued that reliance on international tribunals was inappropriate given the existence of well-established federal common law principles for aiding and abetting. *Id.* at *28-30. “Having declared that international law governs, and that the
The Court then examined international tribunal decisions and, applying the standard articulated therein, concluded that issues of material fact existed as to whether Unocal aided and abetted the government’s forced labor campaign. Doe I thus represents an important instance of an appellate court relying almost exclusively on a standard articulated by an international tribunal to deny summary judgment in an ATCA case. It remains to be seen whether the Ninth Circuit en banc will adopt a similar approach.

Other landmark decisions in the human rights arena likewise relied upon international tribunal decisions to determine the content of international law. In Kadic v. Karadzic, the Second Circuit relied upon the Nuremberg Trials as evidence of the liability for private individuals for committing war crimes. In Siderman de Blake v. Republic of Argentina, the Ninth Circuit relied on the Nuremberg Trials and the International Court of Justice in defining fundamental human rights which are binding under international law even absent state consent (jus cogens norms). Two significant district court cases likewise cited the Nuremberg trials as evidence that forced labor constitutes a violation of international law. Another recent case relied upon the decisions of the International Criminal Tribunal for Former Yugoslavia (ICTY) in establishing facts supporting a claim for human rights abuses arising out of the war in Yugoslavia. In determining whether a violation of the law of nations had occurred, the court noted that “the statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and recent opinions of these tribunals are particularly relevant.” Such cases amply illustrate the proclivity of

Yugoslav Tribunal’s standard constitutes the controlling international law, the majority cannot then escape the implications of being bound by the law it has selected.” Id. at *30, n. 9.; see also id. at *13, n. 28 (responding to Judge Reinhardt, the court clarified that nowhere did it declare that the Yugoslav Tribunal’s standard constitutes the controlling international law or that it is “bound” by every aspect of that standard. It only declared that decisions by these tribunals are one of the sources of international law, an approach the Court described as “not particularly noteworthy, let alone improper.”)

312. Id. at *12-15.
313. Filartiga v. Pena-Irala, 630 F.2d 876, 885, n. 16 (2d Cir. 1980).
national courts to resort to international tribunal decisions to illuminate the content of international law.

Litigation involving boundary disputes and human rights abuses are two of the more significant arenas in which decisions of international tribunals have been utilized to ascertain the content of international law. What is noteworthy is that when federal courts are required to understand and apply international law to resolve a case, they increasingly utilize decisions of international tribunals as one of the principal sources for determining its content. As Justice O'Connor wrote in discussing *Paquete Habana*,

> [t]he flow of ideas from our Court to other tribunals around the world is well-chronicled, but we have not seen fit to reciprocate in kind.... As our domestic courts are increasingly asked to resolve disputes that involve questions of...international law about which we have no special competence,...there is great potential for our Court to learn from the experience and logic of...international tribunals.\(^{318}\)

An understanding of the different models will assist courts in addressing the uses and abuses of persuasive authority as they seek to draw a line between the requirements of their own legal system to resolve cases presented, and the resources available to aid in that process, including international tribunal decisions.\(^{319}\) While the use of persuasive international decisional authority is appropriate in circumstances such as those outlined above, application of the *Paquete Habana* model is more problematic in those instances in which international law is not required to resolve a case. In its traditional usage, resort to international tribunal decisions is appropriate where international law “must be ascertained and administered” when “questions of right depending upon it are duly presented for their determination.”\(^{320}\) However, parties are increasingly citing international tribunal decisions as persuasive authority when other questions—such as the content of constitutional protections—are presented for resolution. As discussed in the “no deference” model, such an approach rarely succeeds in carrying the day.

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VI. THE SPECIAL MASTER MODEL

The sixth model for domestic courts to confer deference on decisions of international tribunals is perhaps the most novel and the least likely to be repeated with any regularity. Nonetheless, its success in at least one instance suggests that it could be a model for the future inter-play between federal courts and international tribunals. This approach would permit a national court to utilize the expertise of an international tribunal to assist in resolving certain questions with respect to liability or the distribution of assets under a settlement. In at least one instance, a pre-existing international tribunal has been utilized by a federal court as a special master to distribute funds to claimants in a class action settlement. Such an approach posits that an international tribunal might serve as a court-appointed expert to resolve difficult questions of international law. Under this model, the decision-making process that gives rise the international tribunal decision is subject to the direct control and supervision of the national court. The international tribunal is, as it were, always looking over its shoulder, anticipating whether the national court will defer to its decision.

A. Special Masters Under the Federal Rules of Civil Procedure

Special masters are an increasingly common tool in the hands of federal judges faced with complex litigation. Article 53 of the Federal Rules of Civil Procedure provides that:

The court in which any action is pending may appoint a special master therein. As used in these rules, the word “master” includes a referee, an auditor, an examiner, and an assessor. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when
the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.... The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report.... In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.... The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.21

The growth of special masters is one of the more remarkable developments in federal civil procedure. The traditional role of special masters is to address judicial limitations or shortcomings in the adjudicatory system, such as time constraints, lack of expertise, or lack of skill in certain roles. The historical function of special masters has been ministerial, such as accounting or the calculation of damages, but recent ministerial permutations have expanded to include the distribution of settlement assets in large class action civil litigation.22 Special masters have also been used for evidentiary purposes in complex or mass tort and commercial cases for the discovery of significant quantities of information. Masters have supervised pre-trial phases of litigation, facilitated settlement as a negotiator or conciliator between the parties, or assisted in shaping, monitoring, or enforcing compliance with post-judgment relief.23 In short, whatever may have been the historical limitations of special masters, today they have consistently been used to assist in all phases of litigation: pre-trial, trial, and post-trial.24

As for the appointment of the special master, courts traditionally have appointed one or more judges, lawyers, or academics to serve as masters. But there is nothing to prevent more novel forms of special masters, such as appointing a respected jurist in significant part because he has a large staff capable of assisting the special master with his mandate. Although rarely discussed, in mass claims litigation the

321. FED. R. CIV. P. 53.
324. Id.
officially-appointed special master often establishes a “quasi-agency” to fulfill his mandate, which often consists of a large machinery of personnel who actually perform many of the functions of the special master. The appointment of one or more judges of an international tribunal may simply be a manifestation of this form of special master.

To be sure, the use of an international tribunal as a special master will rarely be necessary or appropriate. But there are those unusual cases when a federal court may wish to entertain the option. International tribunals may be particularly appropriate as remedial masters when there are matters of public importance that include government involvement in a class action litigation where there is a twin desire to provide a global settlement to the class generally while also providing for individual, case-by-case relief to specific class members. The global settlement of the litigation will involve the court responding to the lawyers and various government officials addressing the public policy interests at large, while the court will rely on the special master to focus on the implementation for the individuals affected. If the court does appoint a special master as part of a global settlement, whether or not this involves an international tribunal, there will be little chance for appellate review of the appointment given the acquiescence or acceptance of the special master by the parties.

With respect to public disputes, in the domestic context it is well known that special masters have been actively involved in a number of high-profile public disputes with the government. Given that remedial


special masters have been frequently used for such "public law litigation" in the domestic context, it is not surprising that they may be utilized for very public disputes in the international context. The United States is the preferred choice for a number of different types of transnational disputes, including, for example, human rights litigation against corporate or government defendants under the Alien Tort Claims Act. As one commentator has put it, the "new trend of 'mass tort' transnational litigation is an inevitable development both in human rights litigation in the U.S. and in the realm of international human rights law in general." Given this fact, we can likewise anticipate that such litigation may involve special masters. As Linda Silberman has noted, modern United States litigation has developed an "almost Pavlovian response to the complicated case—delegation to a special master."

As for the latter concern for a global settlement with particularized relief, such concerns have been increasingly relevant in the domestic context. Alternative dispute resolution processes, including the use of one or more arbitrators or a special master, have been used to allocate portions of a settlement fund to claimants according to specified criteria established by the court. Under this approach, the alternative dispute resolution process is not simply the means for achieving a final resolution, it actually becomes the final resolution.

Masters in Complex Environmental Litigation: City of Quincy v. Metropolitan District Commission, 8 HARV. ENVTL. L. REV. 435, 473-75 (1984); see also Brazil, supra note 322, at 416-17; DeGraw, supra note 325, at 825-26.

327. "Public law litigation" as been described as litigation with the following characteristics: (1) the scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties; (2) The party structure is not rigidly bilateral but sprawling and amorphous; (3) The fact inquiry is not historical and adjudicative but predictive and legislative; (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees; (5) The remedy is not imposed but negotiated; (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court; (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome; (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy. See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1302-03 (1976). For a description of the use special masters in public litigation, see DeGraw, supra note 325 at 802-38; Silberman, supra note 332, at 2161-62.


329. Silberman, supra note 323, at 2158.

A commentator has put it:

[s]ettlements involving the establishment of a fund must address how the fund can be equitably divided among the claimants. Some fund settlements...involve appointing either a single arbitrator, special master, or panel of neutrals to divide a fund. Another option is to design a tiered ADR system to resolve individual claims. The tradeoffs are clear: the more elaborate the claim determination process..., the more expensive and time-consuming it will be to administer the proceeding. The smaller the fund and the more expedited the claims review process, the more likely the potential for settlement “opt-outs.”

The use of arbitration as a means to provide particularized relief in the domestic context is perhaps best illustrated by the class action litigation against New York Life Insurance Company. Pursuant to this litigation, the insurance company reached a settlement that provided class relief and individualized damages for those class members who wished to pursue a special alternative dispute resolution before an arbitration forum established pursuant to the settlement. Class members could opt for certain pre-determined class relief or pursue arbitration that provides for the award of monetary damages within specified ranges according to defined criteria. One of the special features of this insurance litigation was that it provided an innovative use of established ADR techniques in a new context. More specifically, it provided claimants with a centralized, expeditious, and fair procedure permitting claimants to tell their particularized story while also affording defendants an economically viable model that limited the marginal cost of claims resolution and capped defendant’s total exposure to liability.

If one recognizes that arbitrators as special masters are an appropriate tool for a federal court to use in dividing settlement funds in the domestic class action context, it is not a large leap to extrapolate that an international dispute before a federal court involving a matter of significant public importance may also benefit from such an approach. An international tribunal with specialized skills in resolving mass claims will be among the avenues that the parties or the court might pursue for resolution of fund settlement disputes.

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B. The Special Master Model and the Claims Resolution Tribunal

In the mid-1990s Swiss banks faced tremendous public pressure for an independent audit of Swiss bank account for evidence of closed or dormant accounts held by Holocaust victims. In May 1996, the Swiss Bankers Association and the World Jewish Congress established the Independent Committee of Eminent Persons (Volcker Commission) to appoint an independent auditing company and to establish an international tribunal to resolve claims to dormant Swiss bank accounts.\(^3\) Although established by a memorandum of understanding between private parties—the World Jewish Congress, the World Jewish Restitution Organization, and the Swiss Bankers Association—it clearly had the imprimatur of the Swiss and Israeli governments.\(^3\) The purpose of the Claims Resolution Tribunal was to “establish an expeditious judicial process, working under liberal rules of evidence, that would fairly and objectively determine the legitimate owners or heirs of the assets in dormant accounts identified by the auditors.”\(^3\) Reflecting the intended independence of the tribunal, following the filing of the class action litigation in federal court by Holocaust victims against the Swiss banks, Paul Volcker wrote in opposition of the litigation, stating that it would cripple the resolution process being conducted by the Volcker Commission.\(^3\) However, the independence between the tribunal and

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\(^3\) Letter from Prime Minister Yitzhak Rabin to Mr. Edgar M. Bronfman (Sept. 10, 1995), reprinted in VOLCKER REPORT, supra note 334, at Appendix B, A-3.

I was pleased to learn during our conversation that you will be meeting in Switzerland with the Bankers Association and the Government Banking Commission, in the matter of restitution of Jewish assets deposited in Switzerland, along with the issues of restitution of Jewish Property which you have been dealing with in countries of Central and Eastern Europe. I look forward to hearing of your success in this matter in which, as President of the World Jewish Restitution Organization, you represent the Jewish people and the State of Israel.

Id.; Declaration of the Swiss Federal Council on Dormant Accounts from World War II, dated May 8, 1996 reprinted in VOLCKER REPORT, supra note 334, at Appendix C, A-4. (“The Swiss Federal Council welcomes the conclusion of the Memorandum of Understanding of May 2, 1996 between Jewish organizations and the Swiss Bankers Association establishing a joint committee of eminent persons whose task it will be to review the investigations of Swiss banks into dormant accounts from World War II.”); VOLCKER REPORT, supra note 334, at Annex 8, 115 (describing the involvement of the Swiss Federal Banking Commission in the establishment of the Claims Resolution Tribunal).

\(^3\) VOLCKER REPORT, supra note 334, at Annex 8, 115.

the New York class action litigation changed in 1998, when, with the court’s approval, the parties agreed, that any awards rendered by the tribunal would be used to reduce the amount owed under the $1.25 billion settlement.338

This change in the mission of the Claims Resolution Tribunal is reflected in its procedures. The tribunal has had two distinct phases in its adjudicative process. During the first three years of its existence, under the CRT I procedures, the tribunal acted independently of the federal court, resolving claims to accounts published by the Swiss Bankers Association in 1997 under the originally established procedure. As noted above, the CRT I procedure likely falls within the arbitration model. However, pursuant to a settlement reached in In re Holocaust Victims,’ beginning in February 2001 a new procedure—the CRT II procedure—was established in which the international tribunal became a judicial adjunct of the federal court litigation. The sole purpose of the tribunal under CRT II was to distribute a portion of the funds provided under the settlement agreement.340

Under this procedure, the Claims Resolution Tribunal did not expressly become a special master, but rather it serves as the court-appointed administrator of a portion of the settlement amount. According to the court’s appointment memorandum, “[t]he Zurich-based Claims Resolution Tribunal (“CRT”) will administer the Deposited Assets Class claims process on behalf of the Court” with the court appointing two special masters, Paul Volcker and Mike Bradfield, as “CRT Special Masters to closely supervise the day-to-day


340. For a discussion of the claims resolution procedures, see generally, Alford, The Claims Resolution Tribunal, supra note 7, at 259-67.
supervision of the CRT and to regularly monitor its activities.”

The reasons cited by the court for the decision to use the tribunal was that it was an “already existing adjudicative body comprised of arbitrators, attorneys, and other staff, who now have several years of experience, and are serving under outstanding leadership” and could “best assure that the tens of thousands of claims expected to filed against Swiss bank accounts are resolved speedily, equitably, and accurately.”

Also relevant was the fact that the parties and the original special master, Judah Gribetz, appointed to develop a distribution plan, all “unanimously support[ed] the use of the Claims Resolution Tribunal to resolve...claims, under Court supervision.”

The original special master appointed to develop the distribution plan, Judah Gribetz, was even more explicit in the reasons for utilizing the international tribunal. He addressed the appropriate mechanism for distributing the deposited assets and concluded that the Claims Resolution Tribunal had unique strengths. First, the settling parties intended that the claims resolution process in Zurich continue after settlement was reached. Second, a federal court had previously determined that the international tribunal was already administering a fair and efficient claims process claims to dormant Swiss bank accounts. Third, the Volcker Commission had previously concluded that the tribunal functioned under outstanding leadership with speed and effectiveness and recommended that claims to the accounts be channeled through the tribunal. Finally, the Swiss Federal Banking Commission had made clear that under Swiss law, bank records and account database and audit work papers must be archived in Switzerland. Because of these and similar strengths, the special master concluded that “it is clear that bank account claimants must continue to benefit from the CRT [Claims Resolution Tribunal’s] expertise. The CRT should be charged with the resolution of the Deposited Assets Class claims, under Court supervision, and with the

343. Id.
express approval of the Swiss Confederation.\(^{345}\)

Under this new mandate, the Claims Resolution Tribunal began receiving claims to 21,000 accounts published in February 2001 and now is in the process of resolving approximately 25,000 claims to these accounts. The CRT II procedures established by the Claims Resolution Tribunal to administer the funds make it clear that they serve as the judicial adjunct of a federal court. The tribunal will not render arbitration awards per se, but will “make determinations regarding the rights of claimants to accounts in Swiss banks” which will then “be certified to the Court for payment by the Special Masters [Volcker and Bradley] subject to Court approval.”\(^{346}\) Article 37(3) provides that “[c]ertified awards shall be paid by the Special Masters after approval of such awards by the Court. Upon Court approval of awards certified by the Tribunal, the full amount of the awards shall be paid....”\(^{347}\) Pursuant to these rules, the Claims Resolution Tribunal has begun certifying awards to the Court for payment.\(^{348}\)

The case of *In re Holocaust Victims* thus establishes a new precedent for utilizing the resources of an international tribunal as a judicial adjunct of a United States federal court. Although not expressly a special master, the tribunal is under the supervision of two special masters and serves as the sole mechanism for administering the claims resolution process for Swiss bank claims involving the disbursement of up to $800 million of the $1.25 billion settlement amount.\(^{349}\) In the court’s view, an international tribunal established by private parties with governmental imprimatur had the recognized experience to resolve claims to Holocaust accounts and was viewed as an ideal mechanism for

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345. *Id.* at 101-02.


347. *Id.* at 37(3).


The Tribunal is of the opinion that the Claimant has presented a strong claim to the Account, thus substantially reducing the likelihood of competing claims. On this basis, and taking into account the instructions of the Special Masters, the Tribunal recommends approval of the present Award by the Court for payment by the Special Masters in accordance with Article 37(3) of the Rules.

resolving claims to these funds. More than merely integrating decisions of an international tribunal into a domestic court, if the court decides to defer to the tribunal, the awards of the international tribunal actually become the decision of the domestic court.

C. Normative Application

The special master model falls near the end of the continuum of deference because, for the first time, the international tribunal is under the supervision and control of the national court. As a consequence, not only is there no obligation to defer to the international tribunal decision, but the decision-making process of the international tribunal will be shaped out of concern to secure that deference. The international tribunal will remain independent and impartial as between the parties, but its decisions will be subject to the approval of the national court and not binding in the absence of such approval. One might say that with the first model—the full faith and credit model—the national court becomes the handmaiden of the international tribunal; with this model, the international tribunal has become the handmaiden of the national court.

As noted above, it will be relatively rare for an international tribunal to serve as a special master for a U. S. federal court. To date, no other international tribunal has served in such a capacity. While the special master model is relatively unique, the Claims Resolution Tribunal may serve as a model for other international tribunals to serve as a special master in appropriate circumstances. With class-action litigation before federal courts in which the parties reach a globalized settlement of international claims that requires particularized relief, the use of an existing international tribunal as a special master may be appropriate.

350. In the same order that appointed the Claims Resolution Tribunal to resolve claims to Swiss bank accounts, the U.S. court also appointed three international agencies – the Conference on Jewish Material Claims Against Germany, Inc., the American Jewish Joint Distribution Committee, and the International Organization for Migration – to serve process claims involving slave labor and refugee claims. These entities may be viewed as international tribunals in a broad sense, but they are more accurately described as governmental and non-governmental international agencies rather international tribunals. See Memorandum and Order, In re Holocaust Victims Assets Litig., (E.D.N.Y. Dec. 8, 2000) (No. CV 96-4849), available at http://www.swissbankclaims.com/PDFs_Eng/96cv4849mo12800.pdf (last visited February 10, 2003); see also Claims Conference: Conference on Jewish Material Claims Against Germany, at http://www.claimscon.org (last visited February 10, 2003); Holocaust Victims Assets Programme, at http://www.swissbankclaims.iom.int (last visited February 10, 2003). In addition to processing the distribution of funds under In re Holocaust Victims Assets Litigation, the International Organization for Migration ("IOM") also has been designated by the German Government to resolve claims arising out of the German slave labor claims. The German Forced Labour Compensation Programme is the division within IOM charged with processing these claims. See generally, German Forced Labour Compensation Programme at http://www.compensation-for-forced-labour.org/index.htm. (last visited February 10, 2003).
After all, an international tribunal is particularly well-suited to serve as a special master where a judicial discretion is required in distributing settlement funds.

[A] claims tribunal with a narrowly defined and well-circumscribed jurisdiction can advantageously be used where payments call for mass determinations on precise factual or legal issues which cannot be resolved by reference to objective criteria with minimal exercise of judgment. In such cases, independent and disinterested judgment applied with the requirements of the judicial functions by a claims tribunal may be much better suited to distribute the proceeds of a settlement agreement.\(^3\)

The central requirements for use of an international tribunal as a special master are that: (1) there are parallel proceedings before a United States court and an international tribunal over the same or similar factual issues; (2) there are common parties appearing in the United States litigation and before the international tribunal; (3) the international tribunal has recognized expertise in a particular aspect of the litigation; (4) the entities appearing before or establishing the international tribunal are willing to have the international tribunal serve the function of special master; and (5) the parties appearing before the United States litigation, as well as the judge presiding over the United States litigation, concur in the assessment that the international tribunal should serve as a special master.\(^3\)

Applying these principles, one can posit that other international tribunals may serve as special masters in the future. To illustrate how such an approach could be taken with another extant international tribunal, one may revisit the Eritrea-Ethiopia Claims Commission. As discussed above, the Eritrea-Ethiopia Claims Commission, as currently established, arguably fits the foreign judgment model. That is, decisions rendered by the Commission should be recognized and enforced in federal courts in the same manner as foreign judgments. But one could posit a scenario in which this tribunal could also be a candidate for the special master model. The Peace Agreement signed by Ethiopia and Eritrea on December 12, 2000 established the Claims Commission to address “the negative socio-economic impact of the crisis on the civilian population.”\(^3\)

According to the agreement establishing the commission,

\(^{351}\) Beauchamp, supra note 339, at 1030.

\(^{352}\) See supra text accompanying notes 344-345.

[t]he mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals...of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.\textsuperscript{354}

The agreement anticipates that this claims process shall be exclusive, with an important caveat. It stipulates that "[e]xcept for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this agreement, the Commission shall be the sole forum for adjudicating claims described [above]."\textsuperscript{355}

This provision is significant because six months prior to the signing of the agreement, a class action lawsuit was filed in federal district court in Washington, D.C. alleging that Eritrean nationals had property expropriated by Ethiopia in violation of international law.\textsuperscript{356} On August 2, 2001, the D.C. district court dismissed the complaint without prejudice on the grounds of \textit{forum non conveniens}. In so doing, it argued that the Claims Commission provided an adequate forum to resolve the claims presented against Ethiopia, applying the traditional \textit{forum non conveniens} test which examines whether an adequate alternative forum exists, balances various private and public interest factors, and considers whether plaintiffs could reinstate their suit in the alternative forum.\textsuperscript{357} On appeal, the D.C. Circuit reversed, finding that the Claims Commission provided an inadequate forum.\textsuperscript{358}

But if the facts are changed slightly, the Claims Commission could be structured in a manner not unlike the Claims Resolution Tribunal. With the D.C. Circuit finding that the Claims Commission is an inadequate forum, the government of Ethiopia may not wish to challenge the class action, and may wish to settle the case and structure an arrangement that

\textsuperscript{354} ld.
\textsuperscript{355} ld. at art. 5(8).
\textsuperscript{357} ld. at 393.
\textsuperscript{358} ld. At 394-395. The Court reasoned that "the Commission’s inability to make an award directly to Nemariam, and the possibility that Eritrea could set off...an award in her favor against...an award in favor of Ethiopia, render[ed] the Commission an inadequate forum.” \textit{ld.} at 394.
limits its total financial exposure under both proceedings. Under such a scenario, the federal court should consider settlement of the class action lawsuit in a manner that incorporates the special master model. If settlement of the class action were reached, the five commissioners of the Claims Commission could be appointed by the district court to serve as special masters with respect to those claims at issue in the United States litigation. Such an appointment would be in recognition of the fact that the settling parties wished the Claims Commission to continue notwithstanding the settlement, that the Commission was administering a fair and equitable procedure under outstanding leadership, and that the claimants could benefit from the expertise developed by the Claims Commission with respect to other claims under review. Any decisions rendered by the Claims Commission concerning such claims would be reported to the district court judge for review and approval. Upon court approval of awards by the Claims Commission, the full amount of the awards shall be paid under the settlement amount.

The frequency with which a federal court will have occasion to require a special master to resolve international disputes is rare. Nonetheless, in those instances in which parties to United States litigation are able to secure a global settlement and wish to provide a mechanism for particularized relief to affected individuals, the use of an international tribunal is a viable candidate for a federal court. The Claims Resolution Tribunal is an example of such a success story, and other instances may present themselves in which a similar avenue could be pursued.

VII. THE "NO DEFERENCE" MODEL

The final model represents the extreme on the continuum of
deference. This model differs from the *Paquete Habana* model because courts are not being asked to resort to international tribunal decisions when “questions of right depending upon [international law] are duly presented for their determination.”\(^{359}\) With this model courts are asked to ascertain and administer international law when constitutional questions of right are at issue. Courts respectfully decline. This model posits that for constitutional questions federal courts confer no deference on decisions of international tribunals, finding the decisions irrelevant or otherwise unnecessary to resolve the cases that are presented to them for adjudication.

### A. Constitutional and Human Rights: Same Direction, Different Tracks

The civil liberties embodied in the U.S. Constitution have corollaries in human rights instruments. Freedom of religion, freedom of speech, freedom of assembly, and the right of equal protection, are all constitutional\(^{360}\) and human rights.\(^{361}\) Likewise, the Constitution\(^{362}\) and human rights instruments\(^{363}\) protect against unlawful takings, cruel and unusual punishment, unreasonable searches and seizures, or deprivations of life, liberty, or property without due process of law.

Born out of the horror of the Second World War and influenced by the civil liberties inherent in democratic society, these core human rights instruments were intended to guarantee to the rest of the world the

\(^{359}\) *Paquete Habana*, 175 U.S. 677, 700.

\(^{360}\) U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”); *Id.* at amend. XIV, § 1 (“No State shall...deny to any person within its jurisdiction the equal protection of the laws.”)

\(^{361}\) Universal Declaration of Human Rights, art. 3 (U.N. 1948) (“Everyone has the right to life, liberty and security of person.”); *Id.* at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); *Id.* at art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); *Id.* at art. 18 (“Everyone has the right to freedom of thought, conscience and religion.”); *Id.* at art. 19 (“Everyone has the right to freedom of opinion and expression.”); *Id.* at art. 20 (“Everyone has the right to freedom of peaceful assembly and association.”)

\(^{362}\) U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”); *Id.* at amend. V (“No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); *Id.* at amend. VIII (“[N]or cruel and unusual punishments inflicted.”)

\(^{363}\) Universal Declaration of Human Rights art. 3 (U.N. 1948) (“Everyone has the right to life, liberty and security of person”); *Id.* at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); *Id.* at art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”); *Id.* at art. 17 (“No one shall be arbitrarily deprived of his property.”)
protections already cherished at home. But recent decades have seen a dramatic shift in emphasis. Human rights are no longer simply exported abroad for foreign consumption. Attempts began to import international norms and utilize domestic courts to enforce those norms. While the attempt largely has been aimed at giving binding domestic legal effect to these rights through a tapestry of federal statutes, self-executing treaties, and preemptory norms, more novel attempts have also been fashioned to internalize these norms as part of the process of constitutional interpretation.

Thus far, the experiment of judicial internalization of international ideals through constitutional interpretation has failed. Although constitutional liberties and human rights may be headed in the same direction, they are on decidedly different tracks. This is because for constitutional and human rights the same questions are asked, but domestic courts and international tribunals ascertain the answers from different source material. Constitutional liberties find their source in text, structure, history and national experience. Human rights find their source in international custom and canonical conventions. Although parties will frequently invite reliance upon international norms in an attempt to give meaning and shape to a constitutional requirement, the courts are not accepting the invitation. Constitutional guarantees embody universal concepts of humanity and decency; but universal concepts of humanity and decency do not shape those guarantees. Courts essentially remain convinced that the use of extra-constitutional material, including international human rights decisions, to give meaning to the content and scope of constitutional guarantees is illegitimate. As the Court succinctly put it, "[c]omparative analysis [is] inappropriate to the task of interpreting a constitution." Whether a


365. Printz v. United States, 521 U.S. 898, 921, n.11 (1997) (The "dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to
constitutional civil liberty is consistent or inconsistent, broader or narrower than an international norm is simply not germane. Consequently; the decisions of international tribunals interpreting those norms are likewise viewed as irrelevant. To conclude otherwise would dramatically “expand the canon of authoritative materials from which constitutional common law reasoning might go forward,” and in so doing, so broaden the Court’s constitutional vision that it would, as Anne-Marie Slaughter predicts, “change the course of American law.”

Of course, this is not to say that international law is not “part of our law” as reflected in federal common law, or that it is otherwise unimportant for federal courts. It is only to say that for certain answers to certain questions—such as the content of constitutional guarantees—federal courts have rejected invitations to view international law and international tribunal decisions as relevant.

B. The “No Deference” Model and Human Rights Tribunals

The most important example of recent unsuccessful attempts to use international law generally, and decisions of international tribunals in particular, to give content to the scope of constitutional guarantees has arisen in death penalty litigation. Scholars have noted the use of international law “to assist in interpreting the scope of constitutional norms” in other countries, and argued that “[d]eath penalty jurisprudence provides one of the most dramatic examples of the synergy between international and domestic human rights law.” Not in the United States. As Justice O’Connor has noted, the Supreme Court has “refused to consider international law and the law of other nations when interpreting our own Constitution.” Despite precedent by the task of writing one.”


367. Slaughter, supra note 319, at 203-04 (commenting on Charles Fried’s article and the import of constitutional cross-fertilization).

368. Paquete Habana, 175 U.S. 677, 700.


370. Indeed, the Alien Tort Claims Act and the Torture Victims Protection Act create rights of action based on violations of international law.


international human rights tribunals that the death penalty violates international human rights, and notwithstanding that such decisions have been cited in United States death penalty litigation in support of the argument that the death penalty is unconstitutional, the Supreme Court has never considered such information germane. Nor has it considered international law particularly relevant. At most it has considered the actual practice of other countries as potentially relevant to the constitutional inquiry.

The Eighth Amendment is succinct, simply prohibiting the infliction of "cruel and unusual punishment." The Supreme Court has repeatedly held that "the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment...must be decided on the basis of our own judgment in light of the precedents of this Court." The critical constitutional inquiry in recent decades has been what information should be brought to bear by the Court in making the determination as to whether the death penalty is cruel and unusual. In making this determination, fierce disagreements have ensued within the Court as to the relevance, if any, of contemporary standards of decency reflected in the practice in the United States, and more controversially, world opinion as expressed by the practice of states and evolving international norms.

That evolving standards of decency should be utilized in determining

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374. See infra text accompanying notes 396-400.

375. U.S. CONST. amend. VIII.

the scope of the Eighth Amendment was settled in 1958. In *Trop v. Dulles*, a plurality of the Court recognized that the words of the Eighth Amendment are not precise, nor their scope static. Therefore, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{377} Recognizing such evolving standards, the Court found that the punishment of denationalization—rendering a person stateless—is "a condition deplored in the international community of democracies."\textsuperscript{378} In support of this conclusion, it noted that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime" and that a "United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries...impose denationalization as a penalty for desertion."\textsuperscript{379}

In subsequent decades the Court took a similar approach to the death penalty and referenced the practice of other countries in determining whether its application in particular contexts was cruel and unusual.\textsuperscript{380} However, the relevance of the practice of other countries was largely rejected in the late 1980s. In *Thompson v. Oklahoma*, a plurality noted "the relevance of the views of the international community in determining whether a punishment is cruel and unusual,"\textsuperscript{381} but the concurring opinion of Justice O'Connor referenced only a "national consensus" in determining the "evolving standards of decency."\textsuperscript{382} Moreover, three dissenting justices concluded that in discerning any evolving societal consensus, all that is relevant is legislation in *this* society.\textsuperscript{383}

\textsuperscript{377} Trop v. Dulles, 356 U.S. 86, 101 (plurality opinion).
\textsuperscript{378} Id. at 102.
\textsuperscript{379} Id. at 102-03.
\textsuperscript{380} *Coker*, 433 U.S. at 596, n.10 (citing Trop, Court noted that it is "not irrelevant here that out of 60 major nations in the world...only 3 retained the death penalty for rape."); *Enmund*, 458 U.S. at 796, n.22 ("[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant.")
\textsuperscript{381} *Thompson*, 487 U.S. at 830, n.31.
\textsuperscript{382} Id. at 848-49 (O'Connor, J., concurring).
\textsuperscript{383} Id. at 868 (Scalia, J., dissenting) ("it is obviously impossible for the plurality to rely upon any evolved societal consensus discernible in legislation—or at least discernible in the legislation of this society, which is assuredly all that is relevant."). The dissent all but eschewed the need to inquire into world opinion or practice.

The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. [citations omitted] But where there is not first a settled consensus among our own people, the views of other nations...cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more
The following year, in Stanford v. Kentucky, the Court held that in determining evolving standards of decency, "we have looked...to those of modern American society as a whole." It emphasized that:

it is American conceptions of decency that are dispositive.... While the "practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well."

The Supreme Court has never departed from this standard in applying the Eighth Amendment to the death penalty. As Harold Koh has noted, "[a]fter Stanford, U.S death penalty jurisprudence has proceeded largely without reference to the opinions of mankind." Thus, evolving standards are critical in determining whether a particular punishment is cruel and unusual, but these standards are determined based on a national consensus. The practice of other nations is relevant only after uniformity has been established within the United States and even then only to show that this uniformity was not merely accidental, but rather so fundamental to an ordered society that it is deserving of constitutional prohibition. Under Stanford, reference to the practice of other nations actually inures to the benefit of death penalty proponents, rendering the global consensus relevant as an additional check on the national consensus, making the constitutional bar even higher to overcome.

Notwithstanding this precedent, litigants have continued to argue that the practice of other countries is relevant to the constitutional inquiry (and helpful to their cause). The most recent example was in the context

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384. Stanford v. Kentucky, 492 U.S. 361, 369 (1989). In her concurring opinion, Justice O'Connor again emphasized that evolving standards must be measured based on a national consensus. Id. at 381 (O'Connor, J., concurring). Four justices disagreed. The dissent observed that "[t]he views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society." Id. at 384 (Brennan, J., dissenting). In addition, the dissent argued that "objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis." Id. at 389.

385. Id. at 369, n.1 (quoting Thompson, 487 U.S. at 868-69, n.4 (Scalia, J., dissenting)) (emphasis in original).

of imposing the death penalty on the mentally retarded, a practice that one source has argued is unique to the United States.\(^{387}\) Marshalling evidence that executing the mentally retarded is abhorrent to international standards of decency, briefs filed with the Supreme Court in the recent case of *Atkins v. Virginia*\(^{388}\) argued that there is a growing international consensus against the practice.\(^{389}\) The Supreme Court agreed that the practice of executing the mentally retarded was unconstitutional, finding that a national consensus has developed against the practice.\(^{390}\) But it did not depart from the approach taken in *Stanford* regarding the relevance of the practice of other nations. It noted a national consensus and then concluded that this consensus was shared by a "broader social and professional consensus."\(^{391}\) To bolster this conclusion, it cited additional evidence, such as the practice within the world community, which is "by no means dispositive," but "lends further support to the conclusion that there is a consensus among those who have addressed the issue."\(^{392}\) The protestations of the dissenters notwithstanding,\(^{393}\) this analysis closely mirrors the *Stanford* approach. In *Stanford*, the Court found that evolving standards of decency must be

387. *Id.* at 1124.
390. 536 U.S. at 347.
391. *Id.* at 347, n.21.
392. *Id.* Surprisingly, the Court gave equal weight to opinions by the American Psychological Association and religious communities as to the practice of nations to support this broader consensus.
393. *Id.* at 353 (Rehnquist, J., dissenting, joined by Justices Scalia and Thomas)
   I fail to see...how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination.... For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.

*ld.*

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal...to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls.... [I]relevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people.

We must never forget that it is a Constitution for the United States of America that we are expounding.... Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.

*ld.* at 2264 (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justice Thomas) (quoting *Thompson*, 487 U.S. at 868-69 n.4 (Scalia, J. dissenting)).
determined by a national consensus, and assuming national uniformity has been established, the practice of states may be relevant to determine whether such uniformity is accidental or implicit in any ordered society. In Atkins, the Court did much the same, finding a national consensus and then, in a "tantalizingly vague and imprecise footnote," concluding that this national consensus is consistent with a much broader consensus shared by others who have considered the matter.\(^{394}\)


395. A simple reading of the majority opinion suggests that the dissent overstates the majority position when it reasons that the dissent relied on international opinion to "support its conclusion that a national consensus has developed." Atkins, 536 U.S. at 355 (Rehnquist, C.J., dissenting). The majority only cited international opinion as reflective of a "much broader social and professional consensus" after concluding that a "national consensus has developed against it." Id. at 347, n.21. As already suggested, this is not unlike the approach in Stanford. 492 U.S. at 369, n.1. No doubt however, a few members of the Court, joined by death penalty opponents, will seize upon the vague language in the Atkins footnote to present a capacious interpretation of its meaning. See, e.g., Patterson v. Texas, 123 S. Ct. 24, 24 (2002) (Stevens, J., dissenting) ("Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity."); id. at 24 (Ginsburg, J., dissenting) (same); Foster v. Florida, 123 S. Ct. 470, 471 (2002) (Breyer, J., dissenting) ("Just as 'attention to the judgment of other nations' can help Congress determine the justice and propriety of [America’s] measures, so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.") (internal citations omitted); see also Paolo G. Carozza, “My Friend is a Stranger”: The Death Penalty and the Global Ius Commune of Human Rights, 81 TEX. L. REV. 1031, 1032-33 (2003) (the dissenters response hardly seems proportionate to the majority’s bare mention, in very indirect fashion, of the existence of an international consensus; it only makes sense to the extent that the reference to global developments is a sign of a larger and more significant presence looming just beyond the current reach of U.S. law.... The dissenters succeeded in highlighting that in its death penalty jurisprudence, the U.S. Supreme Court is on the threshold of participating more fully in a substantial transnational normative community that could, in principle, have a significant impact on U.S. law.).

Yet such expansive interpretations would sub silentio overrule the interpretative approach taken in Stanford, something Justices O’Connor and Kennedy, who joined the majority in both Atkins and Stanford, are unlikely to have intended without comment or explanation, particularly given a more plausible reading of Atkins that renders the decisions consistent with one another. Cf. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n, 461 U.S. 375, 391 (1983) ("the same respect for the rule of law that requires us to seek consistency over time also requires us...to seek consistency in the interpretation of an area of law at any given time."). Indeed, in other contexts Justices O'Connor and Kennedy have extolled restraint in overruling prior Supreme Court holdings. Cf. Dickerson v. United States, 530 U.S. 428, 443 (2000) (Seven justices, including Justices Kennedy and O'Connor, finding that "'[w]hile stare decisis is not an inexorable command,' particularly when we are interpreting the Constitution, 'even in constitutional cases the doctrine caries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'"") (internal citations omitted); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854-55 (1992) (when this Court reexamines a prior holding, its judgment is customarily informed by
What is remarkable in these death penalty cases is the Supreme Court’s total disregard of international law or decisions of international human rights tribunals. One would think that international law and particularly decisions of human rights tribunals that have addressed the matter might be relevant to determining evolving standards of decency. Petitioner and their amici certainly thought so in Atkins. The petitioner argued that “numerous international and regional intergovernmental bodies have passed resolutions and other statements expressing strong opposition to the execution of any individuals who have mental retardation.”

One amicus brief by nine highly-respected retired American diplomats argued that

[i]nternational opinion has always informed this Court’s understandings of the social values of the United States and, in particular, what our society considers to be “cruel and unusual punishments.” In an increasingly globalized society, the opinions of other nations are more relevant today than at any time since the Founding. In this context, the Court’s evaluation of “evolving standards of decency” must continue to reflect not just the views of the American community, but the views of the international community as a whole.

In support of the proposition of an evolving global standard, they cited, inter alia, resolutions by the U.N. Commission on Human Rights urging states not to impose the death penalty on persons suffering from any form of mental disorder. Likewise, the European Union filed an amicus brief arguing that “[t]he United Nations and other bodies concerned with human rights have articulated a body of [international] norms and standards that prohibit the execution of the mentally

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a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

(internal citations omitted); Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (O’Connor, J.) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.”).

396. Brief for Petitioner, supra note 389, at 43, n.46.


398. Id. at 8.
In support, they cited decisions of the European Court of Human Rights and the Inter-American Commission on Human Rights.\footnote{399} Notwithstanding these attempts at judicial internalization of international norms,\footnote{400} the Supreme Court has all but ignored these and similar international law arguments and eschewed any reference to decisions of human rights tribunals.\footnote{401} Atkins presented the Supreme Court with an invitation to begin the process of internalizing global norms against the death penalty, and give "new energy to 'vertical' efforts to internalize international law norms into domestic constitutional law."\footnote{402} But the Supreme Court declined the invitation. The lone citation in Atkins offered by the Court for the proposition that the world community overwhelmingly disapproved of United States practice was a section in the European Union \textit{amicus} brief that outlined actual practices of countries.\footnote{403} Nor has the Supreme Court accepted the invitation in the past. Only in a plurality opinion in Thompson and in the dissent in Stanford did four justices footnote the existence of international human rights treaties regarding the death penalty, and even then they failed to explain the importance to be attached to these treaties.\footnote{404} In no instance involving a

\footnote{399} Brief of Amicus Curiae for the European Union, \textit{supra} note 389.
\footnote{400} \textit{Id.} at 12-13, 17 (Inter-American Commission on Human Rights called on member states of the Organization of American States (including the United States) to "guarantee respect for the fundamental freedoms and human rights of persons with mental disability…incorporating international standards and the provisions of human rights conventions that protect the mentally ill.")
\footnote{401} Koh, \textit{supra} note 386, at 1129, n.181.\footnote{402} \textit{Id.} at 1129.\footnote{403} Atkins v. Virginia, 536 U.S. 304, 347, n.21 (2002). This portion of the European Union’s brief deals exclusively with a summation of the practice of nations.
The United States stands virtually alone in its practice of sentencing to death those defendants who show any significant level of mental retardation.\footnote{404} Most countries in the world bar the execution of the mentally retarded, and since 1995, only three countries are reported to have carried out the execution of a mentally retarded defendant. Brief of Amicus Curiae for the European Union, \textit{supra} note 389, at 4.
\footnote{404} Thompson v. Oklahoma, 487 U.S. 815 831, n.34 (1988) (plurality opinion); Stanford v. Kentucky, 492 U.S. 361, 390, n.10 (1989) (Brennan, J., dissenting). In addition, Justice O’Connor in Thompson cited to United States signature of these same three treaties to show the absence of congressional reflection on the relationship between federal capital punishment statutes and juvenile offender statutes. 487 U.S. at 851-52 (Noting absence of legislative history suggesting
death penalty case has the Supreme Court relied upon an international tribunal decision to ascertain the evolving standard of decency.

The Supreme Court also has declined opportunities to consider the relevance of international human rights tribunal decisions arguing that a prolonged delay on death row is itself cruel and unusual punishment. In Knight v. Florida, the Supreme Court denied certiorari on such a petition, but Justice Breyer dissented to the denial, arguing that “a growing number of courts outside the United States...have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel.” In support, Justice Breyer cited the famous European Court of Human Rights case of Soering v. United Kingdom. Justice Thomas, concurring in the denial of certiorari, ridiculed such a reference to international tribunals, stating that “were there any...support in our jurisprudence [for this argument], it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights [and foreign courts].”

Lower courts have entertained similar Eighth Amendment arguments regarding this so-called death row phenomenon and likewise noted—but disregarded—human rights tribunal decisions. In McKenzie v. Day, for example, the Ninth Circuit rejected such a claim by the defendant, who relied upon Soering and similar foreign court decisions, concluding that

with all due respect to our colleagues abroad, we do not believe this view will prevail in the United States.... The delay has been caused by the fact that McKenzie has availed himself of procedures our law provides to ensure that executions are carried

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406. 528 U.S. at 995. In Soering, the European Court of Human Rights held that the United Kingdom was prohibited from extraditing a potential defendant to Virginia in large part because the 6- to 8- year delay that typically accompanied a death sentence amounted to cruel, inhuman, or degrading treatment or punishment forbidden by the European Convention on Human Rights. See id. citing Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A), at ¶ 111 (1989).
407. Id. at 990 (Thomas, J., concurring). A near identical post-Atkins debate between Justices Breyer and Thomas occurred in the more recent denial of certiorari in Foster v. Florida. 123 S.Ct. 470, 470 (2002) (Thomas, J., concurring) (“While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”) (emphasis in original); Id. at 471 (Breyer, J., dissenting)
(Courts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel. Just as “attention to the judgment of other nations” can help Congress determine the justice and propriety of [America's] measures, so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.) (internal citations omitted).
out only in appropriate circumstances.... We cannot conclude that delays caused by satisfying the Eighth Amendment themselves violate it.  

The Eighth Circuit took a similar approach to the unconstitutionality of extended delays on death row. In dicta, the court addressed the death row phenomenon in deference to the “respect that we owe to the foreign courts that have accepted this argument.” The court cited Soering and other foreign court decisions, but again noted that “the essential point for our purposes...is whether or not the Eighth Amendment is being violated” and concluded that “[d]elay has come about because Chambers...has contested the judgments against him.”

C. Normative Application

The attempts to utilize international norms to inform the scope of constitutional protections is, in reality, a simple extrapolation of the impulse for government to mirror majoritarian values. An international majoritarian paradigm would posit that if the overwhelming global consensus is that the death penalty is cruel and unusual, then this majoritarian value should be reflected by abolishing the practice in the United States. The problem arises when the international majoritarian impulse is at odds with the domestic majoritarian impulse. The majoritarian impulse in the United States, or at least in many states, is that the death penalty is a legitimate form of punishment and this is reflected in legislative enactments. Lacking the ability to satisfy the

408. McKenzie v. Day, 57 F.3d 1461, 1466-67 (9th Cir. 1995).
410. The failure to raise the constitutional claim in state court was held to preclude his claim. Id. at 568-69.
411. Id. at 569.
412. Id. at 570.
413. For a critique of this approach, see John R. Bolton, Should We Take Global Governance Seriously?, 1 CHI. J. INT’L L. 205, 213-15 (2000)

Americans in the last several decades have soberly examined the death penalty, and by and large reaffirmed it in a textbook demonstration of popular sovereignty at work. This result enrages the Globalists.... In response, they have launched a multifaceted campaign—entirely consistent with their larger effort to create binding worldwide human rights standards—to internationalize whether and to what extent the United States will be able to employ the death penalty.... In addition, international pressure is being applied through mechanisms such as the UN Human Rights Commission.... The real agenda...of course, is to leverage the stature and legal authority of the United Nations (such as they are), into our domestic debate, an effort most Americans would find fundamentally illegitimate. Yet this is precisely a case where the Globalist-Americanist debate is most vividly expressed.

Id.
impulse through the political branches, the international majoritarians resort to the courts. Although the Supreme Court is frequently criticized for thwarting the popular will, what is unusual about Eighth Amendment jurisprudence is the absence of a “counter-majoritarian difficulty.” The Supreme Court has adopted a majoritarian paradigm, which it dubs the “national consensus.” If the national consensus is of the view that a certain punishment is cruel and unusual, then this American conception of decency will be dispositive. The international majoritarians thus face a different “counter-majoritarian difficulty”: to the extent that constitutional protections are responsive to popular will, how can they be interpreted to give expression to the international majoritarian impulse to protect the individual from democratic governance? With the Supreme Court’s majoritarian paradigm articulated in Eighth Amendment jurisprudence, the answer is they cannot.

There is certainly logic to the international majoritarian strategy. If the Court has concluded that evolving standards of decency are relevant, then one would think that international standards of decency might have some relevance to Eighth Amendment jurisprudence. One would also think that international law and the decisions of international human rights tribunals might have some relevance to ascertain those international standards of decency. But the Supreme Court has declined to attach any importance to international law or the international judiciary in undertaking its constitutional analysis. This is because a majority of the Court considers that the issue of whether a punishment is unusual or cruel should depend not on international norms, but on a national consensus giving expression to the sovereign

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will of the American people as to what is fair and decent punishment. At most, it has looked to the actual practice of other nations to assist it in determining if there is an evolving standard abroad that is consistent with our national consensus.

The Eighth Amendment is the premier example of the "no deference" model because international norms are perceived by international majoritarians as relevant to the constitutional analysis, while the Supreme Court does not. This clash provides a useful heuristic for the "no deference" model. But for other constitutional guarantees, there is little debate as to the relevance of international tribunal decisions. The Fifth Amendment "Takings Clause" jurisprudence underscores the irrelevance of international tribunals in defining constitutional guarantees.

Although international law has an extremely robust body of law concerning unlawful takings without just compensation, the Supreme Court has never considered it relevant. For example, in defining when and whether government regulations may constitute a compensable taking, international tribunals are quite explicit. The Iran-United States Claims Tribunal has held that:

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.

This definition is consistent with other international tribunal decisions. Thus, under international law, regulatory takings that

418. See, e.g., id. at 370.
421. One celebrated NAFTA tribunal has expressed an even more liberal standard, holding that an expropriation includes "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the
deprive the owner of fundamental rights are compensable.

The Supreme Court jurisprudence on regulatory takings is remarkably less solicitous toward property owners.\textsuperscript{422} In early regulatory takings cases the Supreme Court held that "if regulation goes too far it will be recognized as a taking."\textsuperscript{423} In fact, regulations can go quite far before they constitute a taking.\textsuperscript{424} The Court has held that where a regulation does not deprive an owner of all economically beneficial use,\textsuperscript{425} the Court eschews a set formula and engages in "essentially ad hoc, factual inquiries."\textsuperscript{426} Among the factors it considers is "the economic impact of the regulation on the claimant" and the "extent to which the regulation has interfered with distinct...expectations."\textsuperscript{427} But the "ultimate constitutional question" is the "fairness and justice" of requiring individual property owners to bear the burdens that should be borne by the public as a whole.\textsuperscript{428}

One could argue that determining how "fair and just" it is to require private individuals to bear public burdens could benefit from inquiry into international norms or the practice of other countries. One could say that international opinion has always informed the Court's understandings of social values of the United States and that in an increasingly globalized society, the opinions of other nations are more relevant today that at any time since the founding.\textsuperscript{429} One could say that the Court's evaluation of "fairness and justice" or "just compensation" must reflect not just the views of the American community, but also the views of the international community as a whole. One could cite to international tribunal decisions as having articulated a body of international norms and standards that clearly prohibit regulatory


\textsuperscript{423} Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).


\textsuperscript{425} Id.

\textsuperscript{426} Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465, 1481 (2002).


\textsuperscript{428} Tahoe-Sierra, 122 S. Ct. at 1484-85.

\textsuperscript{429} See supra note 397.
expropriation of private property without compensation.

But the "no deference" model rules the day in Takings Clause jurisprudence. The Supreme Court has never considered international norms to be relevant in determining the content of the Fifth Amendment Takings Clause. Nor do petitioners even suggest its relevance. In the most important recent regulatory taking case of *Tahoe-Sierra*, none of the briefs cited international law as potentially relevant. Yet the disconnect between international and constitutional law is so pronounced that the same property owner who owns property at Lake Tahoe, California arguably has a compensable claim under NAFTA if he is Mexican or Canadian, but no claim under the Fifth Amendment if he is American.431

Despite the Court's clear reluctance to use international tribunal decisions to interpret the Constitution, petitioners in other contexts continue to reference such decisions as constitutionally relevant. Most recently, in the pending sodomy case of *Lawrence v. Texas*,432 prominent scholars filed an amicus brief arguing that "foreign and international courts have barred the criminalization of sodomy between consenting adults" and that the Supreme Court "has regularly and traditionally used international and foreign law rulings to aid its constitutional interpretation."433 But in support of the argument that the Supreme Court has "throughout history" looked to the opinions of the "world community,"434 the brief cites to no instance in which a majority of the Court has referenced an "international law ruling" as an aid in interpreting the Constitution. Almost every citation offered is to foreign country decisions or practices, and even those citations generally are from "members of this Court," i.e., concurring and dissenting opinions.435 Although the Court's opinion in *Lawrence v. Texas* is still

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431. Compare *Metalclad Corp.*, ICSID ¶ 103 with *Tahoe-Sierra*, 122 S Ct. at 1485-89.

([W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.... Although
[factors including world opinion] are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.)

pending, if its past practice is any indication it will decline once again
the invitation to reference international tribunal decisions in delineating
the contours of constitutional guarantees.\footnote{436}
A century ago, Justice Holmes famously observed that “the
Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social
Static.”\footnote{437} Today one might say the message from the Court is that the
Eighth Amendment does not prohibit all punishments reported by the
U.N. Human Rights Commission. Nor is the Fifth Amendment defined
by the pronouncements of the Iran-United States Claims Tribunal or
NAFTA panels. If the source of constitutional protections is embodied
in text, structure, history and national experience,\footnote{438} then the Eighth
Amendment jurisprudence suggests that international decisions,
declarations, and exhortations have no location in those sources.\footnote{439}

(1961) (Harlan, J., dissenting) (delimiting notion of privacy in the home by looking to “common
understanding throughout the English-speaking world”); Malinski v. New York, 324 U.S. 401,
413-14 (1945) (Frankfurter, J., concurring) (“[t]he safeguards of ‘due process of law’ and ‘the
equal protection of the laws’ summarize the history of freedom of English-speaking peoples”);
New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) (states in
this nation can “serve as...laboratori[es]” for “social and economic experiments”). Please note
that all parentheticals are as set forth in the text or footnotes of the amicus brief.

\footnote{436} Specifically in \textit{Lawrence} the \textit{amicus} brief argues that the equal protection and privacy
guarantees of the Constitution should be interpreted in light of, among other things, the European
Convention on Human Rights as interpreted by decisions of the European Court of Human
Rights. Brief of Mary Robinson, Amnesty International U.S.A. as Amicus Curiae, Lawrence v.

\footnote{437} \textit{Lochner v. New York}, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) Justice Holmes’
point is that the Constitution is not about upholding majoritarian views or personally-held
convictions.

If it were a question whether I agreed with that theory, I should desire to study it
further and long before making up my mind. But I do not conceive that to be my duty,
because I strongly believe that my agreement or disagreement has nothing to do with the
right of a majority to embody their opinions in law. It is settled by various decisions of
this court that state constitutions and state laws may regulate life in many ways which
we as legislators might think as injudicious or if you like as tyrannical as this, and
which, equally with this interfere with the liberty to contract.... But a constitution is not
intended to embody a particular economic theory, whether of paternalism and the
organic relation of the citizen to the State or of \textit{laissez faire}. It is made for people of
fundamentally differing views, and the accident of our finding certain opinions natural
and familiar or novel and even shocking ought not to conclude our judgment upon the
question whether statutes embodying them conflict with the Constitution of the United
States.

\textit{Id.} at 75-76.

\footnote{438} \textit{TRIBE, supra} note 364, §§ 1-15, at 75.

\footnote{439} This is in sharp contrast with other constitutions, such as the South African Constitution,
which embodies a textual commitment to comparative analysis. See \textit{S. AFR. CONST.} ch. 2 § 36(1)
(1996) (“The rights in the Bill of Rights may be limited only in terms of law of general
application to the extent that the limitation is reasonable and justifiable in an open and democratic
society based on human dignity, equality and freedom.”). For a discussion of the impact of this
conclude otherwise would be to “introduce a whole new range of materials to the texts, precedents, and doctrines from which the Herculean task of constructing [constitutional] judgments in particular cases proceeds.”  

The larger point of the “no deference” model is that in protecting constitutional guarantees, the constitutional inquiry is separate and independent from the larger human rights agenda to globalize civil liberties. The fact that the United States is perhaps more protective than most of the civilized world on rights such as free speech, freedom of religion, and the rights of women and minorities, but perhaps less protective on rights such as the juvenile death penalty and regulatory takings is certainly deserving of genuine attention. Aberrant practices at home and abroad may give rise to legislative action or meritorious litigation. But it does not, in and of itself, rise to the level of constitutional importance. To disregard international law or international tribunals in constitutional decision-making is not to suggest any disrespect for international law or its adjudicative bodies. Rather, the question presented simply renders unnecessary certain avenues of inquiry. Federal courts are requested to confer a degree of deference to international tribunal decisions in resolving constitutional questions—usually to use an international decision as persuasive authority of international norms, à la the Paquete Habana model—and they respectfully decline.

VIII. CONCLUSION

It is accepted wisdom among the uninitiated that international law is “soft law” in which nations offer a lukewarm porridge of hortatory or precatory exhortations, without the meaty commitments of enforceable clause on the South African Constitutional Court’s practice of comparative constitutionalism, see Fried, supra note 366 at 820-21.


441. It may, for example, give rise to “legislative norm-internalization” whereby international law norms are embedded into binding domestic legislation. It may also promote “judicial norm-internalization” with judicial incorporation of human rights norms either implicitly under Charming Betsy, or explicitly, through litigation pursuant to the Alien Tort Claims Act and similar statutes. Harold Hongju Koh, Why Do Nations Obey International Law, 106 YALE L.J. 2599, 2657 (1997). For an example of the latter applied to United States practices, see Alvarez-Machain v. United States, 266 F.3d 1045 (9th Cir. 2001).

442. Of course, evolving international standards of decency reflected in state practice and international law may indirectly be of constitutional relevance. For example, the fact that we are out of step with the rest of the world in engaging in a particular practice may shape a national consensus of our own standards of decency, which is of Eighth Amendment relevance. U.S. CONST. amend. VIII.
legal rights and obligations. But as the chattering class continues to debate just how “soft” is the body of international law, and precisely why nations “obey” or “disobey” international law, behind the scenes inventive chefs have found a recipe for success. They first have resorted to internal mechanisms for enforcement, as is evident in the enforcement proceedings available under the World Trade Organization and the United Nations Compensation Commission. If that ingredient is missing, they offer a substitute of external mechanisms for recognition and enforcement, with national courts as the secret ingredient. The shape and form of such external recognition is varied, reflecting the particular milieu of each international tribunal. But it is an ineluctable fact that decisions of international tribunals are increasingly being recognized and enforced by national courts, offensively and defensively, directly and indirectly. It is simply facile to categorically maintain that international law is soft law when one analyzes the internal and external enforcement mechanisms available to parties appearing before a whole host of international tribunals.

Of course, international tribunals are anything but uniform or homogenous in nature and function. The diversity of international tribunals also is reflected in the diversity of mechanisms for incorporating their decisions into national courts. Rather than debate whether international tribunal decisions are binding or not, a far more fruitful inquiry is to consider the continuum of deference accorded to international tribunals, with national courts granting varying degrees of respect depending on the circumstances presented. At one extreme are the full faith and credit and arbitration models. Under these models there are binding federal instructions to federal courts that guide them as to what effect to give to tribunal judgments. Under the foreign judgment model, in the absence of binding instructions, courts show significant deference to decisions of international tribunals, enforcing them in the same manner as foreign judgments as a matter of international comity. Courts show even less deference under the Charming Betsy model because direct recognition is not sought, and a tribunal decision is used only when interpretation of an ambiguous statute is at issue. The Paquete Habana model is among the weakest along the continuum, because decisions of international tribunals offer only persuasive authority as to international law, and national courts will selectively choose among the various decisions of international tribunals to inform

the content of international law. At the other extreme on the continuum of deference are the special master and "no deference" models, which confer little or no deference on decisions of international tribunals. With the special master model, although the parties seek direct enforcement, such an international tribunal actually becomes an adjunct of the national court as a special master rendering decisions subject to the approval of the presiding judge. With the "no deference" model, national courts confer no deference in resolving certain disputes, such as the scope of constitutional guarantees, finding them irrelevant to resolve the question.

What lessons can be learned from this continuum of deference? The thesis of this article is that federal courts must think far more deeply about the degree of "respectful consideration" they must accord to international tribunal decisions. The models that have been outlined in this article provide a starting point for a more thoughtful methodology of deference. International tribunals are not homogenous, and courts should not assume that the degree of deference they confer upon their decisions is uniform. Nor should they assume that a particular international tribunal fits only one model—particularly given that four models anticipate direct enforcement while three models seek indirect recognition.

Numerous factors will counsel greater or lesser deference. Is a party seeking to directly or indirectly enforce the international tribunal decision? Is the United States a signatory to the treaty establishing the tribunal, and if so, what are the requirements for the degree of recognition set forth in the treaty and implementing legislation? Is the tribunal resolving interstate disputes or are private parties involved? If the United States is a party to the dispute, what are its commitments as a party to respect the opinion? If the United States is not a signatory to the treaty creating the tribunal, what confidence does the federal court have in the integrity of the process giving rise to the decision? If the party is seeking indirect recognition, is a United States statute subject to interpretation by the international tribunal? Is that statute clear and unambiguous? How respected and authoritative are the decisions of the international tribunal as a source of international law? Have the parties settled their dispute in federal court but willing to utilize the expertise of an international tribunal to provide particularized relief? Are the parties relying on persuasive international decisional authority to resolve a question that requires reference to international law or are they using it to expand the canon of constitutional interpretative material? These and

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similar questions must be addressed when courts are asked to confer deference to decisions of an international tribunal. The methodology proposed offers federal courts the beginnings of a systematic that will assist them in a more thoughtful analysis of the degree of deference required.

Of course this article also raises numerous questions that it does not begin to answer. Numerous other avenues of inquiry arise from the continuum of deference. At least five questions not addressed here immediately spring to mind. First, in establishing a new tribunal one of the principal concerns always is the enforcement question. As has been suggested, the question of how international tribunal decisions are honored must often include thoughtful consideration of the vertical variation of the inquiry. If there is not an internal mechanism for enforcement, or the internal enforcement mechanism is only partial, how can the tribunal be established to enhance the likelihood of national court enforcement? Moreover, even if direct enforcement in national courts is not contemplated, indirect reliance upon the decisions of the international tribunal requires that international tribunal bureaucrats consider how best to communicate their decisions to a wider audience, recognizing that national courts will utilize them to discern the content of international law. Some international tribunals, such as the Claims Resolution Tribunal, render hundreds of awards and yet publish only a small percentage. How can international tribunals establish a more effective channel of information distribution to inform national courts of the content of international law that is being promulgated by these tribunals.

Second, the continuum of deference raises questions for those aggrieved parties who wish to intelligently forum shop in deciding where to initially file their complaint. For example, a foreign investor may have the option of pursuing a claim before an ICSID tribunal under a bilateral investment treaty, before the World Trade Organization for a WTO violation, or in private commercial arbitration pursuant to a government contract. How significant will the likelihood of enforcement under the various models be in forum shopping? Perhaps the certainty of full faith and credit under ICSID may be more appealing than the vagaries of enforcement under the New York Convention or the WTO’s internal enforcement mechanism.

Third, the question of national court deference to decisions of international tribunals is relevant not only for the United States.

National courts across the globe wrestle with the degree of deference that should be accorded to international tribunal decisions. The methodology presented in this article is focused on the United States, but many if not most of the models presented have the potential for application in other jurisdictions. An analysis of the deference accorded tribunal decisions in other contexts is of urgent concern, and scholarly comparative analysis is critical for a fuller understanding of the process of deference. Such comparative analysis is unusually difficult, because a variety of international tribunals should be examined across a variety of national jurisdictions. While the questions may be the same across jurisdictions, the answers will be fluid, and will depend on the particular country involved. The degree of deference that a European national court will confer upon the decision of an European Court of Human Rights will obviously differ from a U.S. federal court, but how similar or different will a European court and a federal court treat a decision of the World Trade Organization, the Iran-United States Claims Tribunal, or the International Court of Justice? How similar or different is the obligation of federal courts to grant full faith and credit to ICSID tribunal decisions from the obligation of European Member State courts to grant automatic recognition to decisions of the European Court of Justice? These and similar questions are ripe for further inquiry.

Fourth, the proliferation of international tribunals, in all their glorious varieties, is occurring so fast that the legal academy is breathless in its attempt to understand the collective import. An inquiry into comparative international adjudicative institutions should be in the offing, but the trans-substantive nature of these tribunals leads to selective analysis. Human rights scholars understand and dialogue with other human rights experts about the various human rights institutions, and trade and investment lawyers discourse with each other about investment tribunals and the World Trade Organization. But adjudication before international tribunals as a separate and independent sphere of inquiry has not yet developed. The commonalities of the various tribunals, as well as their distinctions, should be analyzed and explained to the international community. This article offers modest conjectures about one small piece of the international judicial puzzle that could be emulated for other trans-substantive procedural inquiries.

Finally, the degree of deference that national courts accord to decisions of international tribunals is a missing piece in the larger puzzle about the enforceability of international rights and obligations.

446. *See Schreuer, supra* note 50, at 1101-02 & n.5 (suggesting that the basis for full faith and credit to be given to ICSID awards was modeled on the Treaty of Rome obligation imposed on Member State courts to grant automatic recognition to the European Court of Justice).
The "hard law" and "soft law" debate could be contextualized to the international judicial system, with deeper reflections on why, for example, the architects of one convention fashioned a regime that grants full faith and credit to international tribunal decisions, while the architects of another established few if any binding enforcement mechanisms. Such contextualization will focus the debate about why nations obey international law. In this larger debate, the blind men describe the shape of the elephant, and "each [are] partly in the right, and all [are] in the wrong." A more pointed inquiry is why nations "obey" international tribunals. Those engaged in this more focused inquiry perhaps will do so with eyes wide open, describing only one facet of the elephant, and knowing that in so doing they may be in the right, but only partly so.

447. Koh, Why Do Nations Obey International Law, supra note 441, at 2602.
448. JOHN GODFREY S A X E, THE BLIND MEN AND THE ELEPHANT at http://www.noogenesis.com/pineapple/blind_men_elephant.html (last visited February 10, 2003). ("And so these men of Indostan, disputed loud and long, each in his own opinion, exceeding stiff and strong, though each was partly in the right, and all were in the wrong!").